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Series

SMELL

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Introduction: Law and Smell

The Editors

"If everything were turned to smoke, the nose would be the seat of judgment."

Heraclitus, *Fragment 37*

The *Law and the Senses* series continues with taste's neighbouring sense — smell. The two senses share the quality of manifesting themselves only when stimulated, making it hard to recall their effect outside that moment of direct exposure. Smells and tastes are 'transitory, evanescent, ephemeral.'¹ Because they are activated only when experienced, they are often perceived as impressions or internal occurrences. There is no doubt that smells and tastes are directly linked to emotions: they are intangible inscriptions of memory, often invoking intimate responses,² but nearly always in an instantaneous and momentary way. There is, however, a great difference between the two: while taste only arises when something from outside enters one's body, smell is ceaselessly and uncontrollably exposed to the outside. By having air as its medium, smell crosses boundaries, walls, edifices. This is the spatiality of smell. Smell's silent, invisible, non-haptic, incorporeal quality results in great variations in terms of its recognition, categorisation and appreciation across time, culture and history.

Smell is the most primordial of senses, and for this reason also the most suppressed and downgraded.³ This is partly because it is closely related to our bodily functions – our animality – and consequently to what have been consistently considered morally questionable behaviours denoting one's lower social origin; and partly because of its (im)permanence and ability to take over spaces, to (dis)integrate into common air. This degradation of smell, at least in the West, can also be traced in the lack of olfactory terminology in European languages. While olfactory perception plays a significant role in the production of meaning,⁴ the sense of smell and its stimulus do not have a linguistically communicable quality of their own (blue, sweet, soft, loud).

¹ 'So our sense of smell, champion among our sensations, and our taste, excellence in culture and refinement, bestow their rare treasure together, within a shared cycle.' Serres, M. (2008) *The Five Senses: A Philosophy of Mingled Bodies (I)* London and New York: Continuum, p.156.

² Proust in *Swan's Way* writes: 'But when from a long-distant past nothing subsists, after the people are dead, after the things are broken and scattered, still, alone, more fragile, but with more vitality, more unsubstantial, more persistent, more faithful, the smell and taste of things remain poised a long time, like souls, ready to remind us, waiting and hoping for their moment, amid the ruins of all the rest; and bear unfaltering, in the tiny and almost impalpable drop of their essence, the vast structure of recollection.' Proust, M. (2006) *Remembrance of Things Past, Volume I* Wordsworth Editions, p.63.

³ However, in Aristotle's hierarchy of senses constructed on the basis of distance, the smell follows seeing and hearing regarded as the highest of the senses.

⁴ See, for instance, Martin, B. and Ringham, F. (eds.) (2003) *Sense and Scent: An Exploration of Olfactory Meaning* Dublin: Philomel.

Verbal transcoding is needed, therefore, for odours to be classified and contextualised. The usual way is by association to a source, an event, an object, a material:⁵ 'it smells *like/as/of...*' One constantly resorts to similes, metaphors, obliqueness. In other words, smells are always something that are not; as Plato observed, they 'are of a half-formed nature', without names and only 'distinguished as pleasant and unpleasant.'⁶ The elusiveness of smells manifests itself in their impossibility to be categorised.

Due to their 'half-formed nature', Plato tells us that smells 'always proceed from bodies that are damp, or putrefying, or liquefying, or evaporating, and are perceptible only in the intermediate state, when water is changing into air and air into water; and all of them are either vapour or mist.'⁷ The intermediate state is confirmed by *prepositions* ('like''as''of'), always *preceding* the final *position*, condition or state. If the intermediate state is a place of change, crisis and convergence (of private and public space, of the body and its environment, of various bodies in an assemblage), smell always carries in it the instability of its source.⁸ Yet, when socially integrated, a smell immediately calls for some sort of order that will respond to that 'instability', that is to say, that will approve (and therefore normalise) or cancel out the uncertain effect.⁹ As such, smells expose themselves as powerful 'ordering' agents that affect bodies and their surroundings, while at the same time operating via a strict classificatory *order* of appropriateness, acceptability, pleasantness, and so on. This is the double normativity of smell: ordering itself in an olfactory order of categorisation, while at the same time ordering its bodies of emergence according to the very order.

Indeed, once categorised, the 'lower' end of the olfactory spectrum is submitted to the necessity of social purification. Unpleasant, inappropriate odours must be cleared out, and the malodorous, associated with bodies, communities and physical spaces must be sanitised, or better deodorised to allow for an ordered space to emerge.¹⁰ As the word suggests, deodorisation is the act of removing (de-) the odour, thus becoming a form of normative organisation. Purification and cleanliness are technologies of social marginalisation through their olfactory classification and normativity. This does not only take place on the level of direct normativisation but, significantly, on the level of desire. Not only does smell 'inscribe' rules of what is considered socially acceptable or proper, but consolidates the atmospherics of commodification of the order of smells that are considered proper and therefore desirable.¹¹ Although order might present itself as odourless, it is intrinsically an

⁵ Engen, T. (1991) *Odor Sensation and Memory* New York: Praeger, p.117.

⁶ Plato, *Timeus* <http://www.gutenberg.org/files/1572/1572-h/1572-h.htm>

⁷ Ibid.

⁸ Harvey, S.A. (2006) *Scenting Salvation: Ancient Christianity and the Olfactory Imagination* Berkeley and Los Angeles: University of California Press, p.103.

⁹ Plato continues: 'Wherefore the varieties of smell have no name, and they have not many, or definite and simple kinds; but they are distinguished only as painful and pleasant, the one sort irritating and disturbing the whole cavity which is situated between the head and the navel, the other having a soothing influence, and restoring this same region to an agreeable and natural condition.'

¹⁰ See, for instance, Douglas, M. (2002[1966]) *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* London: Routledge.

¹¹ For instance, scent (olfactory) trademarks and copyright. Controversially, Dutch Supreme Court has held that the fragrance of a perfume qualifies as a copyright work. *Kecofa v. Lancôme*, Case C04/327HR, [2006] ECDR 26.

odorous process. With the rise of olfactory entertainments and products such as deodorants, perfumes, aromatherapy and home scenting products, scents have gradually become a matter of production, a marketing tool.¹² Far from being harmed by technology and digitisation – its medium traditionally being the molecular, rather than the digital¹³ – the olfactory has gone through a technological development, and smell has become instrumentalised into electronic noses, odour biometrics, artificial fragrances and flavours, as well as militarised smell (stink bombs).¹⁴ In such a growing olfactory actualisation and demand, the sense of smell is ordering and organising society by becoming both regulatory target (towards subjects, objects and processes) and regulatory tool, performing the deodorising role needed for the space of order to emerge. The sensory markers and practices become instrumental means for the construction of the paradigm according to which we make sense. Even so, and despite the earnest efforts to an olfactory ordering, the instability of the olfactory source remains and haunts the order itself from within.

The olfactory ordering operates on the same level as the legal ordering, yet the former's role in the latter is marginalised and elusive to pinpoint. In view of the fact that the law habitually aims at presenting itself as rational and objective, smell is one of the least integrated senses in the legal edifice, in comparison to, say, seeing and hearing. This can be attributed to various factors, one of which, however, is that the sense-making of smell and law is different, even antithetical. Smell operates undercurrent, tickling the olfactory antennas of individual and collective bodies while habitually hiding behind other sensory volumes. Law, on the other hand, has an interest in appearing present, universal, constant. Olfactory sense-making relies on its elusiveness; legal sense-making invests in its obviousness. Yet, the two can interact in most unexpected ways, as this volume amply shows. If anything, smell exposes to view, or better, it *airs* the way in which law conceptualises and contextualises its own actuality. Smell brings law forth by allowing it to show its underbelly, its elusive sense-making that is invariably sacrificed in preference to the necessity of legal impressions of constancy. However, smell's fragmentary, discontinuous and unstable nature, despite all the ordering that goes to it, poses a peculiar challenge to the law. This volume sets out to investigate this juncture.

Smells do not remain on the surfaces. Being 'inscribed' on to the air, they penetrate. The power of smell emanates from its possibility to affect the physical, psychological and the social. We are conscious of smells, whether pleasant or unpleasant, only when they intrude our spaces. While the sense of smell operates within its reductive signification in language, its spatiality extends beyond language. In contrast to the modern and linear view which focuses on 'privacy, discrete divisions and superficial interactions',¹⁵ olfactory volatility allows smells to cross boundaries, disrupt the apparent anomic order, and transgress the socially and legally constructed

¹² However, as Rindisbacher rightly reminds us that 'the goal of the odor producers may well lie in *concealing* the odors that emerge from their practices and places of production.'

¹³ Chalmers, A. 'Level of Realism: Feel, Smell, and Taste in virtual Environments' in Grimshaw, M. (ed.) (2014) *The Oxford Handbook of Virtuality* New York: Oxford University Press, p.60.

¹⁴ Drobnick, J. 'Intorduction: Olfacocentrism' in Drobnick, J. (2006) (ed.) *The Smell Culture Reader* Oxford and New York: Berg, p.2.

¹⁵ Classen, C. et al (1994) *Aroma: The Cultural History of Smell* New York: Routledge, p.5.

'olfactory' limits. They challenge and evade the spaces in which law operates, thus simultaneously obliterating and reinstating the boundaries between the private and the public: smell is a powerful agent not only in connecting and creating social bonds, but also in dividing spaces, groups, tribes, packs, herds. Always delivered and actualised by air, smell embodies the air's paradoxical attribute to 'unite and divide, empower and disempower.'¹⁶ Smell challenges law's tendency to contain and disqualify. Law excludes and incriminates the transgressive nature of smell, stench, malodour, the improper redolence disturbing the public (domain), the city, and the body.¹⁷ Such divisions are not just conceptual narratives, but are materialised in the different sensorial responses that construct them. Once again, the double ordering of the olfactory is at work: law performs its role of continuously making divisions, while at the same time different cultural, habitual and spatial practices, whether individual or collective, sustain and reinforce such normative demarcations.¹⁸

In addition to the regulation of the *propriety* of odours, smell permeates and attacks one of the most fundamental Western jurisprudential and social principles: property. Free circulation of smells in the city are still 'often blocked by objections that this would infringe on property rights.'¹⁹ Hyde notes that in the nineteenth century, public baths excluded the poor, not on the premise of their status, but by using the delineation afforded by the institution of private property 'and conceptualizing of bathing as a private privilege.'²⁰ At the basis of it all, however, remained the olfactory judgement of the undesirable, in conformity to a strict olfactory ordering. Control of perceptibility is a focal point of law's performance. In so doing, the law serves its own conative, namely self-perpetuating and self-establishing, purposes. The law's position is understood not only as a regulatory authority, but also as an enabler of new sensory meanings. It is along these lines that this series engages with the olfactory: not as law's object of regulation, but as a means and medium through which the law performs, actualises, perpetuates and materialises itself.

Smell and law, therefore, share similar qualities: they both have the potential to perform the same acts of unification and division when constructing normative spaces. Of course, while smell is often caused by subjective reactions, the law appears to be objective. However, by acknowledging the cultural normativity that sustains them, and by drawing on Classen *et al.*'s discussion on odours, both law and smells can be said to be 'invested with cultural values and employed by societies as a means of and model for defining and interacting with the world', and by that

¹⁶ Classen, C. *et al.* (1994) *Aroma: The Cultural History of Smell* New York: Routledge.

¹⁷ As Hyde nicely puts it: 'Law facilitates the construction and abjection of hated others whenever it permits classification and exclusion around issues of sameness or propriety.' Hyde, A. 'Offensive Bodies' in Drobnick, J. (2006) (Ed.) *The Smell Culture Reader* Oxford and New York: Berg, p.53.

¹⁸ For instance, a library excludes a homeless person from its premises because of its malodour. [*Kreimer v. Bureau of Police*](#), 958 F.2d 1242 (3d Cir. N.J. 1992)

¹⁹ Howes, D. and Classen, C. (2014) *Way of Sensing: Understanding the Senses in Society* New York: Routledge, p.112. Classen notes that one London sanitary reformer in 1854 has put: 'When your orders are addressed to some owner of objectionable property which is a constant source of nuisance, or disease, or death...you will be reminded of the 'rights of property' and of 'an Englishman's inviolable claim to do as he will with his own.' quoted from Classen, C. (2005) 'The Deodorized city: Battling Urban Stench in the Nineteenth Century', in Zardini, M. (ed.) *Sense of the City: An Alternate Approach to Urbanism* Montreal: Canadian Centre for Architecture, p.296.

²⁰ Hyde, A. 'Offensive Bodies' in Drobnick, J. (2006) (ed.) *The Smell Culture Reader* Oxford and New York: Berg, p.55.

token, as simultaneously social and historical phenomena.²¹ The sense of smell is an attribute that is learned and assimilated through memory, informing one's identity/culture. The normative becomes actualised, or recognised in the moment it is inhaled.

In fact, the process of inhaling is a protective device: smell is 'a sensor for self-preservation against potentially harmful substances in the atmosphere'.²² It alarms against an intrusive and potentially noxious environment, and calls for an intervention by the censor to block and clear the air of pollution. Law expands this function to the social, translating what once was one's own private and intimate space (of waste and body odours) into a matter of public moral and public policy.²³ At the same time, smell is also 'a hedonic agent for the enjoyment of fragrances',²⁴ another function it shares with law. By indulging smell, refraining from resisting to its allure of instability, we overcome its immunological function, becoming fully exposed and permeable to its penetration. There is a masochistic pleasure in letting oneself being penetrated by smell, in becoming-smell, vulnerable to its unpredictable whiffs, just as there is a masochistic pleasure in letting oneself being penetrated by law, as Sacher-Masoch does, abandoning oneself to its formal harmony, transforming its punitive mechanism into a device for hedonistic enjoyment.²⁵

Finally, Howes and Classen observe that 'the least amenable to informing perceptions of justice is smell. This is because in the modern West we tend to associate smell with intuition, ephemerality and idiosyncratic personal memories.'²⁶ However, for pre-modern societies the sense of smell was often considered the sense to 'perceive essential truths': the real judgement moment in which one could 'ascertain the true state of affairs.'²⁷ As Isaiah utters, the Messiah will judge people by his sense of smell:

'And by smelling in awe of the Lord.
and not with his eyes see will judge.
and not by what his ears hear will he decide.'²⁸

Continuing from the opening fragment by Heraclitus, while the smoke appears imperceptible to the eyes because of its uniformity, it is the sense of smell that is capable to differentiate. Hence its inherent paradox: 'Were one to accept uncritically the 'evidence' of the one, the world is a unity; of the other, a diversity; when the

²¹ Classen, C. et al (1994) *Aroma: The Cultural History of Smell* New York: Routledge, p.3

²² Engen. T. (1991) *Odor Sensation and Memory* New York: Praeger, p.2.

²³ See Laporte, D. (2000) *History of Shit*, MIT press

²⁴ Engen. T. (1991) *Odor Sensation and Memory* New York: Praeger, p.2.

²⁵ Deleuze, G. (1991) *Masochism: Coldness and Cruelty & Venus in Furs*, Zone Books

²⁶ Howes, D. and Classen, C. (2014) *Way of Sensing: Understanding the Senses in Society* New York: Routledge, p.96

²⁷ Ibid.

²⁸ Howes, D. and Classen, C. (2014) *Way of Sensing: Understanding the Senses in Society* New York: Routledge, p.93, Isaiah 11.3. A similar reference is found in the Babylonian Talmud, concerning the Bar Koziba, leader of the Jewish revolt against the Romans in the second century claiming to be the messiah. "Bar Koziba ruled for two and one-half years and said to the rabbis, 'I am the messiah.' they said to him, 'Of the messiah it is written that he smells and judges. Let us see if he can do so.'" When they saw that he was unable to judge by scent, they killed him.' Ibid, p.96, quoting Green, D.A. (2011) *The Aroma of Righteousness: Scent and Seduction in Rabbinic Life and Literature* University Park, PA: Pennsylvania State University Press, p.246, n106.

truth of the matter is that for Heraclitus the world is *both*.²⁹ Smell as intrusive ordering, pre-conscious differentiator, insidious commodicator, undercurrent streamer of desire; yet, at the same time, smell as pure desire, promise of oneness, dream of final justice.

The omnipresence and ambiguity of smell inform the cross-disciplinary investigation of this issue. It opens with an engaging contribution by Hans Rindisbacher who explores the relation between political systems and their odours. Hans concentrates on the Nazi regime and its incongruous relationship with olfactory production, by revealing women's position, role and representation within that regime. The notion of *smellscape*, a space of control, allows him to recount Nazi's political action and trace the olfactory of its concentration camps. By traversing literary, historical and (auto)biographical accounts of the irreducible and dramatic material dimension of the stench of burnt human flesh, Rindisbacher fervently weaves in fragmentary facts, narratives and reflections about the power of smell, and the potential of the olfactory being inscribed in the text (books) as a sensory experience.

For Sarah Marusek, smell is an instance of transformation from one state to another. Her contribution explores the spatial overlap of law and smells, and questions the possibility of olfactory jurisprudence in terms of jurisdiction and public right as 'the everyday (trans)formation of law through smell.' She proposes an olfactory jurisprudence that is able to reveal the relationship between culture and law, jurisprudence and public right. She explores the active role of the law in the production of 'reasonable' smells and suggests that culturally determined norms stimulate inequality by constructing narratives of acceptance and refusal (nuisance and reasonableness). This reveals that law is not neutral but contingent on cultural normativity, using smell as a sensory marker to manifest its power and authority. Marusek's notion of olfactory jurisprudence is then an alternative approach to a traditional understanding of jurisprudence understood as the foundation of rules and regularities.

Amber Marks' investigation examines the notion of privacy in relation to the law's olfactory conceptualisation and deployment. She focuses on the body and law's surveillance methods and demonstrates that law has generally inherited the 'arguably fictitious' sensory hierarchy, which in turn informs a superficial understanding of smell as different from a tactile search, thus questioning the intrusiveness of law (and its sniffing dogs) in one's personal odour 'headspace'. Through a meticulous legal argumentation, Marks embarks on a detailed investigation of sensorial jurisprudence, its constructions of olfaction, the legal concept of intrusiveness, and its techniques and interpretations, in order to argue that 'the law should better inform itself about the nature of olfaction and in particular, the nature of sniffer dog operations.'

²⁹ Heraclitus (2003 [1983]) "Fragments". A text and translation with the commentary of T.M. Robinson. Toronto, Buffalo, London: University of Toronto Press; p.80.

In Patrícia Branco and Richard Mohr's analysis, cities are smellscape par excellence where the spatiality of odours is never casual. Branco and Mohr focus on the city of Naples as a smellscape in which the materiality of everyday's experience brims with different olfactory markers and symbols.³⁰ They question the rules and regularities of the olfactory and legal environment of Naples by looking into the distinct encounters experienced within the city, and by examining the rules and (ir)regularities embedded in the environment.

We conclude the *Smell Issue* with scent researcher Sissel Tolaas and barrister Andreas Pretzell in dialogue on the impossibility of the law to account for the volatile materiality of smells. Their contribution offers an opportunity to reflect on and juxtapose the intangible yet imposing essence of olfactory memory and the cultural associations it provokes. These inform the way in which our perception filters smells and reacts to olfactory stimulations. Tolaas and Pretzell's disquisition highlight issues of discrimination, suppression and equality which, at present, the law struggles to define and regulate.

³⁰ Henshaw, V. (2014) *Urban Smellscapes: Understanding and Designing City Smell Environments* New York: Routledge

When the Stink Begins to Rise: Nazi Smellscapes

Hans J. Rindisbacher

Abstract: Totalitarian regimes smell bad, literally and symbolically. The Nazi regime attempted to regulate the fashion and beauty industries via a prescribed natural, cosmetics-free ideal for women. At the other end of the olfactory spectrum, the stench of death from the camps was a central concern. In between, as economic conditions worsened, the Nazi leadership seriously discussed abolition of beauty products as unnecessary luxuries – but determined such policy risky and likely to antagonize women. This article outlines the regime’s dealing with cosmetics from ideological prescription to economic elimination and glances into the private world of the Führer and his entourage. While based mostly on personal accounts it notes that bad odors linger as literary phenomena in recent German family histories about the Nazi time.

"As we said: the Nazi smells of much more than blood; he smells of the urine from the giant chamberpot, the stinkpot of his habits, his atrocities, his crimes and his ideology, he is a hellish pimp. ... He adds to hell something that so far was absent: ... to the bloody smell of known bestialities, he adds the spiteful pong, the typical Nazi odor of unaired beds, the addition of the stench of piss."¹

The law has many doors, as Kafka knew, and what happens behind each of them is not always clear. And neither is it clear what odors waft from it, inside, outside or through these doors. What is clear, however, is that in its execution – an ominous word – the law, even today, albeit in most cases subtly, eventually bears down on the body of its subjects. A fine, let’s say, for a minor infraction, forces the offender to produce money – the fruit, in the last analysis, of work, the sweat equity of the brow. Isolating a wrongdoer in prison for a more serious offense takes the body for the whole person and lets time and the mind do their slow, reflective work of punishment or correction. *In extremis*, however, the law will grab the body materially in capture, torture, and execution. Pain is always the messenger when the law is brought to bear and imprinted on the body. Kafka has the metaphor for this, too. And there are many forms of pain, some mere irritations, others the signal of impending death. And there are many channels of delivering pain to the person-as-mind-and-body. What all such applications of the law on the human body have in common is their working through the sense of touch, broadly construed. Yes, there

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¹ Ernst Bloch, *Politische Messungen, Pestzeit, Vormärz*. Works, vol. 11 (Frankfurt/M: Suhrkamp, 1970), 189. This and all subsequent translations from German are my own.

are modern and less obvious methods too: psychological terror, drugs, deprivations, stress positions, waterboarding that aim at breaking the mind and spirit before breaking the body. And they barely leave traces. Nevertheless, the body is the *sine qua non* in each case; even the mildest panopticon makes it its object.

How does the sense of smell function in this context? Its realm is invisible, ephemeral, near immaterial – and hard to delimit. *Eyewitnesses* are central to the legal process – but *nosewitnesses*? Olfactory evidence is rare in courts, its very admissibility a work in progress.² Moreover, given that the olfactory spectrum is strongly polarized into pleasant and unpleasant, a large part of it is of no use in punishment at all. On the contrary: vast arrays of cosmetics and perfumery belong entirely to the world of pleasure, while for the bad side we know that mere stinks do not kill. But one must be careful! Borderlines are fluid and can be deceptive. The ingestion of an odor, indeed, the inhalation of pure air, is a chemical process that may involve substances, perceptible or not, that will have bodily effects, even lethal ones. And above all, using air as their medium and breathing as their mechanism, smells are potent threats as their experience is unavoidable.

The olfactory world is divided along other axes: the different perspectives on odors that their producers may have from their consumers. If both parties deal with the good side of the spectrum and intentional, aesthetic production, they may align beautifully: the world of scented consumer products is a realm of pleasure indeed – and is understood that way. But it's possible that the goal of the odor producers may well lie in *concealing* the odors that emerge from their practices and places of production. The verb "to smell" has two distinct, if complementing aspects: the emanation of odor from an object and the perceptual-cognitive process by a subject. To stimulate the latter is the goal of the perfumer – the former, as we shall see, the fear of the perpetrator. Odors arise from many processes not as their goal but as their undesirable byproduct. In Ch. S. Peirce's terminology, odors are indexical signs; they direct attention to their source. And they are always evocative, hence *contextualizing* – that too, a quality either desired or loathed.

The idea of a direct link between a political system and its odors is at the center of this article. After a brief introduction into the atmospherics of totalitarian systems and the concept of *smellscapes*, we will home in on the Nazi regime. The Nazis were fully aware both of the pleasing cosmetic-aesthetic and the lethal-putrid dimensions of their politics and attempted to rule on both – and failed in both. Neither did they gain full control over the consumer world of cosmetics and its primary users, women; nor did they keep control, in the end, over the stink that began to rise from

² See, for instance, the "Scientific Working Group on Dog and Orthogonal Detector Guidelines," <<http://swgdog.fiu.edu>>; <http://swgdog.fiu.edu/appendices/appendix_6-1.pdf> is a document with recent (United States) state court stipulations (accessed 2-12-2014). The state security service of former East Germany, Stasi, did include smell among their surveillance tools. The Stasi collected from suspects olfactory body prints, as it were, the seat covers from the chairs on which they had sat during interrogations, and stored those cloths in pickle jars, to be given to tracking dogs to facilitate pursuit, should the need arise. A wide-ranging study of the senses as information channels in the contemporary surveillance industry is Amber Marks's *Head Space: On the Trail of Sniffer Dogs, Wasp Warders and Other Dumb Friends in the Surveillance Industry* (London: Virgin, 2008).

the complete breakdown of the law, any law, and all moral values. They knew this and were olfactorily anxious.

This essay provides a reasoned collection of olfactory events and begins its exploration of the olfactory strands in public discourse from the *good* end, their embedment in fashion, health care, hygiene, cosmetics, luxury and consumer culture, and other traditionally feminine-coded fields. The findings can serve as a critical commentary on women's issues. Without losing sight of the strangely decentered centrality of women to the topic at hand, the study will pursue olfaction to its extremes in a world of extremes, the death camps, where at least a few women – Ilse Koch, Irma Grese – appear as what one might call “idols of olfactory perversity.” On the way there, the narrative will stop over at the personal realm of Hitler's Berghof, engage with Goebbels's Berlin Sportpalast address, and end on smell in memory.

Methodologically, the essay draws on comments by contemporary observers and visitors to Germany, accounts by the perpetrators, analyses by historians, cultural critics, and researchers in retrospect; and there will be the voices of the victims too. It makes its central argument based on the strong bi-polarity of the olfactory spectrum, the common associations with both the good and pleasing as well as the bad and disgusting odors; it correlates these associations thematically: by linking the good side with femininity, fashion, cosmetics, and perfumery, however contested and changing within the time frame considered here; and the bad side with the depravity of the concentration camp system that grows over time and whose conditions, if anything, worsen. My arguments are thus loosely chronological, not overlooking, however, the inevitable *ungleichzeitigkeit* that inheres in most large-scale historical descriptions, nor the internal contradictions that adhere to every ideological system.

The idea of a smellscape, though not the term itself, which has become established in cultural studies, has existed for quite a while even if the word itself can still not be found in most dictionaries. The term was coined in 1985 by the Canadian geographer J. Douglas Porteous in an article for the journal *Progress in Physical Geography*.³ He modeled it on the term and the implied concepts of *landscape* and also used the term *soundscape*. The *idea* and the *concept* of something akin to “olfactory landscape” signaled that smells were slowly ascending as a scholarly topic in cultural and historical research. The 1980s and 1990s with the rise of *historicism* in humanities research provided a welcoming context for the growing interest in olfactory perception. A good short introduction and overview of a related term, “sensuous geographies,” can be found in Paul Rodaway's 1994 book by that title.⁴ We can define the term *smellscape* as an epistemological framework with a hermeneutic and aesthetic orientation that organizes and structures rural and urban landscapes and public and private spaces from the angle of smells and their perception and contributes to their analysis and interpretation. There is inevitably

³ J. Douglas Porteous “Smellscape.” *Progress in Physical Geography* 1985, 9 (3): 356-378.

⁴ Paul Rodaway, *Sensuous Geographies: Body, Sense and Place* (New York and London: Routledge, 1994).

also a temporal dimension to smellscape and their perception, due to varying intensities, lingering, fading, reemergence, etc., of odors. And there are two modes of perception involved: “a kind of passive encounter with odours in the environment.... If these odours are innocuous or familiar, we soon forget or ignore them.” But there is also a more active perception that involves “exploratory behaviour which is excited by certain odours, intensities, associations or memories. This exploratory olfaction [sniffing, really; HJR] tends to home in on specific smells, rather than attempting to compose an overall smellscape” (Rodaway, 69). The type of smellscape sketched out in the present essay can be understood as a specific space (among other possible frameworks) for political action to unfold in, as well as being shaped by it.

What makes any smellscape revealing is the fact that odor references operate as *signs*, that is, as a link “between the tangible and the intelligible” in Lévi-Strauss’s formulation, by virtue of the linguistic fact that we are commonly forced, when talking about smells, to refer to their source.⁵ Smell serves as a *trace* that leads to the objects, situations and constellations that give rise to it in the first place.⁶ It is these objects and their connections rather than the odors themselves that form the center of social, historical, and potentially legal interest in, and use of, olfaction. While set within a broader discourse on fashion, hygiene, cosmetics, and hair care, the following section on women in Nazi Germany reveals the regime’s much broader ambivalence about women’s social roles as well as their physical appearance. Even if not always explicitly mentioned, perfumery, the good smells, are always at least implied.

Embedded in the concept of the smellscape we also consider what Andreas Philippopoulos-Mihalopoulos calls “lawscape.”⁷ The term is both concrete-spatial as well as conceptual, fusing space with (legal) normativity that, barely noticeable, permeates it. For Philippopoulos-Mihalopoulos a lawspace is characterized by an “atmosphere,” again a material as well as a conceptual term, that he defines as “the varying measure of normativity and space that appear simultaneously in the lawscape” (5), the fluctuation “between dissimulation and appearance” of legal norms, between hiding and revealing the force of the law that inhabits any social space. Accounting for the varying degrees of legal *and* olfactory penetration of specific areas of public, private and memory spaces is central to the arguments of this essay.

Philippopoulos-Mihalopoulos develops his terms in the framework of contemporary consumer society with the law deeply embedded (hidden) both in the atmosphere and the subjects, making itself (mostly) imperceptible. But in its inescapable

⁵ Lévi-Strauss, Claude, *The Raw and the Cooked: Introduction to a Science of Mythology I*. Trans. from French by John and Doreen Wightman (French, *Le cru et le cuit*, 1964; New York and Evanston: Harper and Row, 1969), 14.

⁶ See also Dan Sperber, *Rethinking Symbolism* (Cambridge, London, New York: Cambridge UP, 1975), 115ff. Ch. S. Peirce’s “indexical sign,” mentioned above, allows for the foregrounding of additional hermeneutic aspects characteristic of olfactory perception.

⁷ Andreas Philippopoulos-Mihalopoulos, “Atmospheres of Law: Senses, Affects, Lawscapes, Emotion, Space and Society” (2012). Online at <https://www.academia.edu/3092470/Atmospheres_of_Law_Senses_Affects_Lawscapes>, (accessed 4-10-2014).

comprehensiveness the law is a key element of the postmodern condition, a soft-totalitarian approach, where any space is permeated – through the subjects inhabiting it, the objects it contains, and the interactions between them – by a host of (usually backgrounded) legal stipulations. This is not yet the case in “the Nazi space” (both temporal and geographical and unstable in both dimensions) and certainly not in the camps. Neither the Nazi Reich nor the camps are what Philippopoulos-Mihalopoulos, calls “the city,” the necessarily civilized space within and for which he develops his concepts, a space where the law is so “thick” that, “just like air, [it] is not perceived” (2). The Reich as well as the camps might be called a lawspace and certainly have an atmosphere (both in Philippopoulos-Mihalopoulos’s sense and in the everyday meaning of the term) but the “law” is precisely not what we normally understand it to be, namely “standard law and regulation, as well as the generalized diffused normativity that characterizes life” (2). The “atmosphere,” therefore, is no place of subtle balancing, of revealing and hiding the law. Instead, “just like air that smells foul when something has gone wrong, the law can easily re-emerge.” In the Nazi Reich the law *does* emerge; it is prominent and the atmosphere hides nothing. In fact in the camps the “law” that the atmosphere enshrouds is the law of annihilation of its subjects. It is not a law-as-normativity, but an absurdity, a mockery of the very idea of law.

As a brief survey reveals, not only the Nazi regime, but all totalitarian regimes smell bad, both real ones and those in fiction. Winston Smith’s canteen in George Orwell’s *Nineteen Eighty-Four*, is a

low-ceilinged, crowded room, its walls grimy from the contact of innumerable bodies; battered metal tables and chairs, placed so close together that you sat with elbows touching; bent spoons, dented trays, coarse white mugs; all surfaces greasy, grime in every crack, and a sourish, composite smell of bad gin and bad coffee and metallic stew and dirty clothes.⁸

Winston’s olfactory memory also pinpoints two specific elements beyond the general grime and ugliness that are explicitly political and sexual when he seemed

to breathe again the warm stuffy odour of the basement kitchen, an odour compounded of bugs and dirty clothes and villainous cheap scent, but nevertheless alluring, because no woman of the Party ever used scent, or could be imagined as doing so. Only the proles used scent. In his mind the smell of it was inextricably mixed up with fornication (55).

While Aldous Huxley’s *Brave New World*⁹ is fully deodorized and its inhabitants are clean and olfactorily standardized, this new world is sharply separated from the “bad old world” of the reservation where Lenina spends much of her time with “her

⁸ George Orwell, *Nineteen Eighty-four* (1949; Harmondsworth, UK: Penguin Modern Classics, 1973), 51.

⁹ Aldous Huxley’s *Brave New World* (1932; New York: Harper Collins Perennial Classics, 1998), 37.

handkerchief to her nose" (109, 112) because, among many other olfactory unpleasantnesses, their Indian guide "smells" (108).

The real existing totalitarian world of the Soviet Union was no better, according to Fitzroy Mclean, a British diplomat, adventurer, and soldier, who comments on his olfactory impressions when crossing the border to the Soviet Union on his way to Moscow in 1937 and finds himself in "the overpowering warmth of the Customs' building":

It was then that I first noticed the smell, the smell which, for the next two and a half years, was to form an inescapable background to my life. It was not quite like anything I had ever smelt before, a composite aroma compounded of various ingredient odours inextricably mingled one with another. There was always, so travelers in Imperial Russia tell me, an old Russian smell made up from the scent of black bread and sheepskin and vodka and unwashed humanity. Now to these were added the more modern smells of petrol and disinfectant and the clinging, cloying odour of Soviet soap. The resulting, slightly musty flavour pervades the whole country, penetrating every nook and cranny, from the Kremlin to the remotest hovel in Siberia. Since leaving Russia, I have only smelt it once or twice again, for Russians in sufficiently large numbers seem to carry it with them abroad, and each time with that special power of evocation which smells possess, it has brought back with startling vividness the memories of those years.¹⁰

This passage unites key aspects of olfactory perception as discussed here: the material complexity of the smellscape, its ethnic/national determination, its temporal variability, and its power of evocation as memory. In his 2003 book, *Russia's Carnival*, with its central theme of the rapidly changing sensory landscape in the wake of the collapse of the Soviet Union in 1990, the Swiss journalist and travel writer Christoph Neidhart raises an important question: is there indeed something like national smellscapes?

Speaking of a country's smell might be problematic – all the more so if the country in question spans eleven time zones and includes climates as diverse as Russia's, from arctic to semitropical, from maritime to extremely continental. Nevertheless, few people who have traveled the Soviet Union would deny a scent of 'socialism' common to the whole of Soviet Russia and even to the republics, despite their historic and ethnic otherness. The Soviet Union's smell was hard to describe but easy to recognize, as was socialism's color: gray. Socialism had its particular stench and characteristic dust. The houses smelled of cabbage, of wet socks and sweat; the backyards reeked of diesel and trash, and sometimes of coal. Even the vastness of Siberia's far north, the tundra, smelled of oil. And no one seemed to care.¹¹

¹⁰ Fitzroy MacLean, *Eastern Approaches* (1949; New York: Time-Life, 1964), 11.

¹¹ Christoph Neidhart, *Russia's Carnival. The Smells, Sights and Sounds of Transition* (Lanham, MD: Rowman and Littlefield, 2003), 1.

As all dictatorships, the Nazi regime operated with double standards. Their vision of women's roles in society was traditional at best, but more often reactionary, repressive, and fundamentally anti-feminist, especially in rolling back the recent emergence of an urban consumer culture that had characterized the Weimar Republic and brought significant changes in gender roles and their expression via dress, cosmetics, and behavior in the public realm.¹²

The representatives of desired Nazi standards were ideological *apparatchiks* like Gertrud Scholtz-Klink, the Reich's Women's Leader; the leader of the German Order of Women, Elsbeth Zander; or Lydia Gottschewsky, the leader of the BDM, the organization of German girls, and various others over time.¹³ These women represented the ideal image of femininity in person as well as supporting it in their political activities – an image that was cosmetics and perfume free and *sans* many other feminine appurtenances of fashion or toiletry. Jill Stephenson, in discussing the BDM, stresses the demand placed on young women for “being fit and healthy for both childbearing and physical work, adapting habits and instincts to the demands of the ruling elites, and forgoing cosmetics and popular entertainment.”¹⁴ Clifford Kirkpatrick, an American sociologist, makes the same point, based on his own experience of living in Germany in the late 1930's: “Compared with American women, German women are still strikingly restrained in their use of cosmetics,” he notes and relates a comment made by the head of the *Frauenwerk*, Gottfried Krummacker, to the effect that “women who shave their eyebrows, use rouge, dye their hair and seek to attract attention in public by smoking, powdering, etc. belong to an older generation whose age is past,” implying that they have not yet caught up with the younger, more ideologically indoctrinated generation of women for whom “[t]o be young means to be natural and to understand the warning and the demands of great times.”¹⁵ Katherine Thomas, a British journalist reporting from Germany during the 1930s and, like Kirkpatrick, drawing on personal impressions, notes that “[i]n 1933 any sort of ‘sex appeal’ was banned as an invention of ‘Jewish pseudo scientists’. Thus the shiny nose, the uncorseted figure, the low heel became the surest passport for a true Nazi woman.”¹⁶ But this unadorned style was not welcomed everywhere, as Stephenson points out: “The Nazi prohibition on cosmetics, for example, did not appeal to city girls, many of whom were employed and sought an adult social life” (77) and a degree of economic independence and

¹² An account of the transition from the liberal-modernist Weimar years to the more restrictive Nazi period in cosmetics advertising can be found in Uta Poiger's “Fantasies of Universality? Neue Frauen, Race, and Nation in Weimar and Nazi Germany.” In Alys Eve Weinbaum et al., *The Modern Girl Around the World: Consumption, Modernity, and Globalization* (Durham: Duke University Press, 2008), 317-344. The broader cultural background is given in Peter Gay, *Weimar Culture: The Outsider as Insider* (New York: Harper & Row, 1968); Richard Grunberger, *The 12-Year Reich* (New York: Ballantine Books, 1972), provides extensive quantitative discussion of economic and consumption figures.

¹³ On the structure of Nazi women's organizations see the site of the Deutsches Historisches Museum <<http://www.dhm.de/lemo/html/nazi/innenpolitik/frauen/>>. Also Jill Stephenson, *Women in Nazi Germany* (Harlow, England; New York: Longman, 2001), 82-93.

¹⁴ Jill Stephenson, *Women in Nazi Germany* (Harlow, England; New York: Longman, 2001), 78.

¹⁵ Clifford Kirkpatrick *Nazi Germany: Its Women and Family Life* (Indianapolis, New York: The Bobbs-Merrill Company, 1938), here 108 and 106. The Nazi idea of the “natural” is itself an ideologically charged notion ut cannot be pursued here.

¹⁶ Katherine Thomas, *Women in Nazi Germany* (London: V. Gollancz, 1943), 73.

personal self-expression they had only recently gained.¹⁷ Even Joseph Goebbels felt the need to assert, in 1934, “that even good women might have bobbed hair” (Kirkpatrick, 106), indirectly acknowledging the growing importance of hair cutting, color treatment, and perming as indispensable fashion needs. Sabine Hake points to women’s ambivalence with regards to fashion and cosmetics as means of self-expression in the instable and fluctuating value system of Weimar culture:

The relationship between fashion and role-playing came to the fore in the changed attitude toward makeup. Until the war, only prostitutes and demi-mondaines wore makeup during the day. Respectable middle-class women may have used face powder but typically found rouge and mascara too unnatural, too closely linked to the specter of sexuality. [Erich] Fromm’s survey indicates that the resistance to the New Woman was most pronounced in matters of makeup, with the image of red painted lips uniting different social groups against the threat of a liberated femininity. Younger women nonetheless welcomed the new products introduced by cosmetics firms like Helena Rubinstein and Max Factor. Two basic styles predominated, the sporty, tanned look that limited the use of makeup to foundation and rouge and the pale look for the evening, with plucked and penciled eyebrows, dark eye shadow, bright red lips, and heavy perfumes.¹⁸

In his 1937 essay, “Die Frau im Dritten Reich,” that satirically outlines the sham cultural trades the regime offered women on the way into the glorious Nazi future, Ernst Bloch points out the Nazi presumption of the time that in women “[i]ntellect is altogether undesirable and at any rate unfeminine – the German woman does not use makeup, the German woman does not think.”¹⁹

Yet the Nazi period is not lacking in glamorous women, such as Emmy Göring or Magda Goebbels, for instance, among the party wives – besides the female movie idols of the time. Hans-Otto Meissner writes of Goebbels: “She disliked the slightest personal negligence, never failing to change for lunch and dinner or to renew her make-up completely before going out”;²⁰ and George Mosse culled the following excerpt from *Vossische Zeitung* from 6 July 1933 attributed to her: “I am trying to make the German woman more beautiful.”²¹ Antje Ascheid succinctly sums up the Nazi struggle with womanhood: “femininity was a problem in the Nationalist Socialist ideological domain.”²² Ascheid is particularly intrigued by women in cinema, “their glamour and beauty [that] seemed to contrast starkly with the stereotypical images of wholesome Nazi women” (ix). Such official images, distributed for instance via the

¹⁷ For a broad picture of the emerging global beauty industry, see Geoffrey Jones, *Beauty Imagined: A History of the Global Beauty Industry* (Oxford: OUP, 2010). Chapter four, “Beauty Amid War and Depression,” makes reference to the situation in (Nazi) Germany.

¹⁸ Sabine Hake, “In the Mirror of Fashion.” *Women in the Metropolis: Gender and Modernity in Weimar Culture*, ed. Katharina von Ankum (Berkeley, Los Angeles: UC Press, 1997), 185-201; here 189.

¹⁹ Bloch, *Gesamtausgabe*, vol. 11, 110.

²⁰ Hans-Otto Meissner, *Magda Goebbels: the First Lady of the Third Reich* (New York: Dial Press, 1980), 139.

²¹ George L. Mosse, ed. *Nazi Culture: Intellectual, Cultural, and Social Life in the Third Reich* (New York: Grosset & Dunlap, 1966), 43. This much-quoted line also appears in Otto Meissner, and in Anna Maria Sigmund, *Women of the Third Reich* (Richmond Hill, Can: NDE Publishing, 2000). For the context of Magda Goebbels direct involvement in fashion, see Johannes Christoph Moderegger, *Modefotografie in Deutschland*, 52.

²² Ascheid, Antje. *Hitler’s Heroines: Stardom and Womanhood in Nazi Cinema* (Philadelphia: Temple U Press, 2003), 214.

SS newspaper *Das Schwarze Korps*, strongly condemn “symbols of luxury (like jewelry and fur), get-up (lipstick, powder, perfume, high-heeled shoes), and male attributes (such as smoking or very short hair)” ... as ... “indecent, or rather, degenerate” (25).²³ In the volume referred to above, Mosse also includes the following remark, excerpted from Joseph Goebbels’s own paper, *Der Angriff*: “We want women and not tough-eggs as our comrades along life’s path. There is no woman who renounces ‘all beauty aids and treatments,’ which we must not confuse with the fabrication of masks in the style of the Kurfürstendamm.”²⁴ While obviously responding to earlier comments, the statement both tones down calls for an all-out rejection of feminine beauty care and emphasizes a social and cultural rift between groups of women: the cosmetically minimalist Nazi paragons pitted against a Kurfürstendamm set of excessive cosmetics users. In other words, the generational and class differences, overlaid by a rural-urban divide in fashion and style are facts of life in Nazi Germany and reveal the absence of a unified standard, pointing to a need for regulation. Thomas, the British journalist, sums up the confusion that the Nazi-imposed body and beauty standards could lead to, confirming Mosse’s anonymous quote from *Der Angriff*:

The Nazis sometimes seem really distressed by the sight of their womenfolk: ‘Today we meet a great number of younger and elder women who were formerly always nicely made up and now suddenly bear all the signs of neglect,’ they complain; ‘even times of war do not justify laziness and the neglect of beauty culture, care of the skin, care of the nails and hair’ (73).

Thomas shows herself to be a sharp but sympathetic observer of women’s cosmetic and vestimentary quandaries in Nazi Germany when she contextualizes the above remark in a chapter titled, “Compulsion for Beauty” and laments “the Nazi conception of women as sentimental household ornaments,” highlighting the resulting pressure for body care and cosmetic upkeep.

‘How deeply will a woman disappoint the expectations of her husband if she does not daily bear in mind that she must keep herself young, beautiful and fresh for him. A woman must frequently consult her mirror and remember that at any moment her husband may return on leave’ – is the kind of ‘noble thought for the day’ being spread about the country at present (73).

Clearly, women face conflicting demands as to their physical appearance. As time goes by – but still before the beginning of the war that in fact temporarily improves the supply of many consumer goods thanks to German access to the industrial and commercial production of occupied countries – the very procurement of toiletry and beauty care, certainly of good quality becomes increasingly difficult.²⁵ Thomas touches on this in a telling observation about barter and exchange that had become already quite common in the toughening consumer economics of the time:

²³ Ascheid’s footnote reference is to: *Das schwarze Korps*, 10 December 1936.

²⁴ Mosse, *Nazi Culture*, 44; the reference is to *Der Angriff*, 16 January 1936.

²⁵ See Richard Grunberger, *The 12-Year Reich*, chapter 14, “Consumption,” esp. 213.

A photographer in the Rhineland advertised a camera for sale. He got 800 replies, among them more than 100 telegrams. To most people it did not occur even to suggest offering him money. French soap, French perfume and French champagne (unlikely themselves to have been acquired through barter) headed the list of proposals... (79).

The French and German perfume and fashion industries have a long history of competition that became particularly acute in the early Nazi years of (re-) Germanizing Weimar culture, which often also meant the Aryanization of Jewish businesses.²⁶

Despite the best German efforts to rival French style, Berlin never managed to dislodge Paris as the global center of everything fashionable and glamorous in dress, perfumery, and luxury consumption.²⁷ As Thomas's incident shows, perfumery could serve as a valuable barter object but "French perfume," real and as a symbol, remained the pinnacle of prestige and desirability; it was and remained the target of feminine stylistic and cosmetic longings and desire. Thomas' example also resonates with Richard Grunberger's economics account, referenced earlier. He notes, after commenting on the always abundant supply of entertainment in the Nazi years, that efforts were made early in the war for "forms of non-essential consumption, such as holiday-making, winter sports or beauty care for women" to be "maintained at the same levels as in peacetime" (213). This fact, together with the sensitivity toward female beauty care as expressed in *Der Angriff*, above, contextualizes a discussion among the Nazi party leadership in the wake of Goebbels's "Sportpalastrede" on 18 February 1943, where he launched his call for total war. This remarkable exchange connects the discourse on women during the Nazi time and its scholarly assessment in retrospect, as outlined above, to the strictly male space of the economy, war, and ultimately the politics of genocide. As we will see, at that final point women's voices resurface as the voices of survivors. Along this trajectory, it seems, there is only one woman able to raise her voice in the inner circle of power, although feebly and egotistically: Eva Braun.

²⁶ See Irene Guenther, *Nazi Chic?* Part two, esp. chapter 5, deals with this competition as well as the Aryanization of the German textile industry that was to a significant extent in Jewish hands. The city of Frankfurt/M., on its website "Frankfurt am Main 1933-1945," presents the history of its "Modeamt," corroborating Guenther's depiction of the 1930s textile and fashion business in Germany. See <http://www.ffmhist.de/ffm33-45/portal01/portal01.php?ziel=t_hm_modeamt> (accessed 1-31-2014). A quick orientation about clothing and fashion in the Nazi period that touches on many important points can be found online at "Clothing and Fashion Encyclopedia," <<http://angelasancartier.net/fascist-and-nazi-dress>> (accessed 1-31-2014). Aryanization is an important part of the historical narrative of German fashion, cosmetics, and perfumery as Jewish-owned businesses constituted a significant share of these fields. But it far exceeds the scope of this essay. For an example, see <<http://www.jmberlin.de/main/EN/01-Exhibitions/02-Special-Exhibitions/2010/perfumers.php>> (accessed 1-17-2014). See also the informative website of the *Frankfurter Rundschau*, 15 December 2011, pointing to an exhibit on Scherk, Albersheim and Kortheus <<http://www.fr-online.de/freizeitipps/kulturgeschichte-der-kosmetik-innovative-duefte,1474298,11307858.html>> (accessed 1-31-2014). Jones, *Beauty Imagined*, touches on the difficulties of Jewish firms briefly, p. 122-125.

²⁷ Mila Ganeva points out a crucial distinction that emerged in those years: "If France was best known for its *haute couture*, Germany became famous worldwide for its thriving *Konfektion*, the ready-to-wear clothing industry that was centered in Berlin." Mila Ganeva, *Women in Weimar Fashion: Discourses and Displays in German Culture, 1918-1933* (Rochester: Camden House, 2008), 4.

In Goebbels's speech on total war matters of cosmetics reached the highest levels of national attention, and the link between fashion, beauty care, and war, requiring from German women a renunciation of the former in support of the latter, preoccupied the party leadership for some time.²⁸ By presenting beauty care vs. war effort as a zero-sum game, Goebbels assigns the former strategic value. Simultaneously, the communication among the party leadership on the issue reveals a deep unease about the power of women that evidently has not been entirely subjugated despite years of propaganda and demands for alignment and conformity. The issue of beauty care reveals the existence of a feminine space that even the Nazis dreaded to challenge.

In support of total war Goebbels announces:

We are [...] compelled to adopt a series of measures that are not essential for the war efforts in themselves, but seem necessary to maintain morale at home and at the front. ... We would rather wear mended clothing for a few years than get into a situation where our people would have to wear rags for a few centuries. What good are fashion salons today? They only use light, heat and labor. They will reappear after the war when we'll have time and need for them. What good are hair salons that serve a cult of beauty and take vast amounts of time and labor? In peace this cult is wonderful and pleasant, but unnecessary during war. Our women and girls, even without their peacetime finery, will be a pleasure to meet for our victoriously returning soldiers."²⁹

Goebbels's diaries from January through March 1943 provide additional commentary on the topic of women's beauty care that seems to obsess him.³⁰ As the defeat at Stalingrad sinks in, he is convinced that the German population at large is all for, in fact enthusiastic about, the idea of "total war" and greater austerity and the tightening of the screws on anything remotely resembling luxury and consumerism. Goebbels plans to instrumentalize this presumed willingness as a tool to get at the shirkers and decadents, especially those in the party leadership (he has above all Goering in mind) and bring them in line with his ideas of true Germanness. This theme runs through his diary in the first weeks of 1943, leading up to the "Sportpalastrede." On 20 February, as well as on subsequent days, Goebbels stresses the lasting effect of his speech both domestically and internationally. On 12 March he reports that "total war is still the big topic in public debate" but admits that some details will have to be discussed further, "especially the question of beauty care for women. It plays a remarkably large role, above all in the big cities. Perhaps one ought to dial down the severity a bit" (*Tagebücher*, vol. 7, 535.) Women's issues

²⁸ Admittedly, government interest in cosmetics seems not to have been an exclusively German phenomenon. See Jones, *Beauty Imagined*, 136: "Following the American entry into the war in 1941, the US government declared the production of lipstick a wartime necessity."

²⁹ The full text of the speech in its German original is available online at http://www.1000dokumente.de/?c=dokument_de&dokument=0200_goe&object=translation&l=de, a site maintained by the history department of the University of Erlangen-Nürnberg (accessed, 2-12-2014).

³⁰ The Goebbels quotes are from vol. 7 of *Die Tagebücher von Joseph Goebbels* (Goebbels's Diaries). Im Auftrag des Instituts für Zeitgeschichte und mit Unterstützung des Staatlichen Archivdienstes Rußlands, ed. Elke Fröhlich. Teil II Diktate 1941-1945, vol. 7, January-March 1943 (Munich: K. G. Saur, 1993).

resurface, with a focus on dress, the very next day: "There have been incidents where well-dressed ladies were accosted in the street or in public transport, with reference to total war. This, of course, is nonsense. ... Total war has nothing to do with a deliberate or desired cult of primitivism." (*Tagebücher*, vol. 7, 541). A couple of paragraphs later he takes up beauty and hair care again.

There is still confusion in the question of what is legal or not in beauty salons. I will contact Funk and order him to clarify [Walther Funk, Minister for economics, among other positions, HJR]. It is not acceptable that in one Gau total war is implemented laxly and strictly in another. We have already seen that in a certain Gau coloring and perming is illegal while it is permitted in others, with the result that the better-off ladies travel from one Gau to the other in order to get their makeup. Naturally, this is not the purpose of total war" (*Tagebücher*, vol. 7, 541).

The exchange on women's beauty care in the context of fine-tuning the notion of total war is rather grotesque, especially as it builds up to a male-chauvinist pitch when Goebbels summarizes, on 22 March 1943, a conversation between himself and Hitler:

We discussed aspects of total war in some detail. The Führer too is of the opinion that, to take just an example, women's hair coloring should not be forbidden. In matters of total war, one must not act niggardly but make sure not to turn women into one's enemies. It is far from reprehensible that women make themselves beautiful for the men and neither makeup nor hair coloring is forbidden in the national socialist program. There is a strong possibility, that if we were to misuse total war for such trifles, it could arouse the rabble. ... The Führer opines that women are to be resolutely excluded from politics but that in exchange, they should at least be handed over the realm of their own beauty without restrictions. And besides, it is the men who get to enjoy the benefits" (*Tagebücher*, vol. 7, 616).

This conversation is joined in late April 1943 by Albert Speer, then Minister of armament. In his memoirs he recalls discussions that addressed the need for deepened austerity measures in support of the war effort, under way even before Goebbels's speech and notes that while the Führer "was strictly against unnecessarily alarming the population by interdictions," he

agrees that goods that are no longer desirable in total war will automatically disappear in the course of time if their production is discontinued. He finds, for example, that the gradual disappearance from the market of hair coloring products and various other things associated with beauty care would be better than a law against their use. ... This principle is to be applied across the board as it leads to success more easily and with less apprehension than a ban, which could not be controlled in the first place.³¹

³¹ *Die Rückseite des Hakenkreuzes: Absonderliches aus den Akten des Dritten Reiches*, ed. Beatrice and Helmut Heiber (München: dtv, 1984), 260, dated 25 April 1943.

But a few weeks earlier Speer had noted in his diary that Hitler had been

reluctant about our proposal for a large-scale administrative restructuring, reduction of consumption, and limitation of cultural offerings ... These meetings were heated. ... Even when Goebbels demanded that leading party members forego their so-far nearly unrestricted lifestyle, he was unable to change Hitler's mind; and the generally reserved Eva Braun mobilized Hitler as she heard about the planned ban of perms and the termination of cosmetics production. Hitler immediately vacillated: he suggested to me to bring about 'a tacit disappearance of hair color and other beauty-care products' and the 'end of repair service for appliances used in perming'.³²

These extensive quotes show just how seriously beauty care, and with it the power of women, was taken by the Nazi leadership: cosmetics, fashion, dress appear as central concerns to the regime. The heated debate reveals male indecisiveness, a desire to mask responsibility behind market mechanisms, and a surprisingly conciliatory stance toward women. The realm of cosmetics faces off against the implementation of the total war program as a key element in domestic policy; fashion is juxtaposed with primitivism and social disorder; beauty care is the ersatz for the exclusion of women from politics altogether; and it counts as a benefit for men. This node of politically-cosmetically irreconcilable desiderata creates a harsh, even painful atmosphere – and Goebbels feels it: "One is in permanent crisis mode. But imperceptibly, crises become the air in which one lives and breathes. One can get used to this air, even if it is harsh and at times stings the respiratory organs. Everything in life is a matter of getting used to, even war" (*Tagebücher*, vol. 7, 631).

While Goebbels thus breathed, even if only metaphorically, with difficulty, at least one member of the German public was hoping to improve materially Hitler's personal airspace, as it were. The following adulating letter to the Führer is from one Erna Boltze from Thuringia, daughter of a small-business owner who manufactures pine needle-based bath and healthcare products. It is truly among the "Absurdities from the Third Reich" (the subtitle of the book where this quote is excerpted) and seems to have been accompanied by some product:

I permit myself to provide our only Führer with a little relaxation if he were to use our Thuringia-Coniferol pine needle extract bath. We would be immeasurably grateful if this wish were to be fulfilled! A pine sapling nerve-fortifying skin application following the bath has been proven wholesome for decades. We ask that noble fir scent be sprayed in our only Führer's study and the branches from the Thuringian forest be put into vases there.³³

It is not known whether Hitler ever enjoyed the atmospheric or balneological benefits of the Coniferol, but he did face, at home in Obersalzberg, female

³² Albert Speer, *Erinnerungen* (Berlin: Propyläen, 1969), 268-69.

³³ *Die Rückseite des Hakenkreuzes*, 145. The letter is dated 28 February 1935.

resistance to his regime's policies on women and cosmetics, as we already saw, from the woman closest to him, Eva Braun. There is general agreement that Eva Braun had virtually no role in Nazi inner-circle decision-making, but Nerin Gun's biography of her provides intriguing commentary on her personal space and her stance on fashion and cosmetics.³⁴ Gun's account of Eva Braun's life is a rather chatty book with only casual attribution of quotes and sources. Thus the following selections from it relating to fashion, cosmetics, and perfumery in Eva Braun's context are included here for atmospheric purposes only. But even without Gun's details, there are enough reliable historical sources with regard to Eva Braun's style, fashion, and certain personal inclinations to suggest that she *was* attractive, sporty, fashion-conscious and partial to personal luxuries. At dinner at the Berghof in Obersalzberg, Gun writes,

the conversation was just as innocuous as at lunchtime. 'Your napkin is stained with lipstick,' Hitler would say to Eva. 'What are you painting yourself with?' 'But my lipstick comes from Paris,' Eva protested. 'Ah, if you ladies only knew that French lipstick is made with the grease of kitchen slops....' But the ladies merely laughed and continued to come to table with painted lips (137).

Braun is described as "the most elegant; she changed outfits six or seven times a day and frequently summoned her hairdresser for a setting. She always wore matching jewelry – a necklace, brooch and bracelet, and a diamond watch. She ordered her shoes from Ferragamo, of Florence. Hitler did not like these metamorphoses" (136). Wiedemann, Hitler's adjutant from 1934-1939, is quoted as describing, "how he personally procured perfumes in Paris that he then offered to Eva" (158). While proud of Braun's elegance, Gun reports Hitler as being critical, too: "We have no funds for such follies. Women insist upon buying foreign clothes, and refuse to believe that German products can be just as good. You always want French perfumes? But who invented eau de cologne? We did" (176). According to Gun, Braun's "favorite perfume was Worth's *Air Bleu* (206)."³⁵

Gun also draws on Traudl Junge, who confirms both the Nazi party line on women's appearance and use of cosmetics – and the frequent and commonly accepted deviations from it, even at the center of power:

She [Braun] was not a model from the pages of a fashion magazine and still less the personification of Nazi womanhood exalted in the Nuremberg parades. Her elegance was not a reflection of opulence but rather of good

³⁴ There are three book-length accounts of Braun's life to date: Nerin E. Gun. *Eva Braun, Hitler's Mistress* (New York: Meredith Press, 1968); Heike B. Görtemaker, *Eva Braun. Life with Hitler*, trans. from German by Damion Searls (New York: Knopf, 2011); and Angela Lambert, *The Lost Life of Eva Braun* (New York: St. Martin's Press, 2007). The two later studies reference Gun extensively, if critically.

³⁵ Gun is mistaken here, as there is no Worth perfume by that name; there is, of course, *L'Heure Bleue* by Guerlain, released in 1912. Worth, a respected couture house, *was*, however, important as a trendsetter in the modern fashion business. It "was one of the first fashion brands to venture into the perfumery market. The company's first luxury fragrance, *Dans La Nuit*, was launched in 1924. The fragrance came in a bottle that was designed by the world-famous glass-maker René Lalique." <<http://www.fragrantica.com/designers/Worth.html>>, (accessed 1-17-2014).

See also, <http://en.wikipedia.org/wiki/Charles_Frederick_Worth> on the history of the fashion house Worth (accessed 1-17-2014); and Jones, *Beauty Imagined*, 26.

taste and discretion. She tinted her naturally fair hair to make it more golden, and she made herself up heavily, especially in our eyes, for we didn't even use lipstick then – it was considered unwomanly, un-Germanic. Her makeup was cleverly applied, though, and heightened her beauty (205).

Overall, Gun voices the general scholarly consensus when writing that Braun was not a political person and did not generally participate in conversations when the topic was politics. However, on occasion, as corroborated by Speer, “she was prepared to argue with Hitler when specifically feminine questions were involved. For instance ... [o]nce when Himmler had ordered the closing of ladies' hairdressers, Eva persuaded Hitler to reopen them: German women had to have the possibility of making themselves beautiful” (211-212).

Besides being loath of cosmetics and fashion excess, Hitler was also opposed to smoking and Gun reports an incident, linking perfume and smoke, that sounds plausible, even if not entirely logical.³⁶ It allegedly happened when Eva's sister Ilse visited her in the Führerbunker in Berlin: “The two sisters took advantage of [Hitler's] absence to smoke, but Eva, as a precaution, sprayed the room with a French perfume that irritated her sister” (238).³⁷

Even without putting too much store in Gun's anecdotes, the existence of a “cosmetic space” in both a public and a private version at the center of the Nazi regime is sufficiently documented in the Goebbels-Speer-Hitler exchanges for the public and the various accounts of the Berghof society around Braun for the private realm. And as cosmetics and war appear linked, let us pursue this thread as Germany's military situation worsens and the war comes to its horrible end. Gun paints the following picture of the moment when the door to the room in the Führerbunker was opened where Hitler and Braun took their own lives, drawing together once more the air of luxury, beauty, and smell – but now the smell of death.

[Eva] was wearing her dress with the rose at the corsage. Her hair was freshly washed and carefully dressed. Her face was expressionless but beautiful. ... The broken phial, which looked so like lipstick, had fallen to the ground. The air reeked of acid fumes, and there was a smell of almonds. There was also a stench of powder, for Hitler, who was sitting at the right end of the sofa, had shot himself (278).

The stench of death is what the third Reich ends with. But even inside the concentration camps, the Reich's most horrific legacy, the stench is tinged with perfumes and sweetness. And it has a strong female accent. The following example connects style, nationality, femininity, and the camps in interesting ways, and

³⁶ For a history of smoking among women, very much a fashion in the 1920's see Rosemary Elliot, *Women and Smoking Since 1890*, Routledge Studies in the Social History of Medicine, No. 29 (London: Routledge, 2007).

³⁷ Görtemaker, 66.

although there is no direct mention of perfume one can almost smell it. Margaret-Anne Hutton, a scholar of French literature, analyzes autobiographical accounts of French women in German concentration camps and organizes their personal narratives around the central idea of identity.³⁸ One of her questions addresses what we might broadly label “femininity” and the answers reveal that identity construction brings to the fore not just “feminine concerns,” but *Frenchness*, the strong emphasis on being a *French* woman. Thus, one of the narrators “is concerned above all by her bedraggled state: ‘I was ashamed to appear dressed like that, me a French woman.’” Hutton also notices that descriptions of “the arrival of the French women in the camps frequently stress the manner in which they stand out from other deportees.” For instance, one of the women Hutton quotes writes about the arrival of her convoy at Ravensbrück: “Through miraculous care for their appearance, the women are still well-dressed, their hair neat and tidy; the German women, huge and lumbering, cast envious glances at us: Parisians, French women!” (130). Thus even on the edge of the abyss, style and fashion – aesthetics – constitute an argument against the ugliness that humiliation and violence necessarily are. And the French win, as always in these matters, over the Germans.

This nationalization of style, with the beautiful equating with the good, is further illustrated in a vignette in Gisella Perl’s story. Perl was a Jewish medical doctor and a prisoner in Auschwitz before being sent to Bergen-Belsen, where she participated, thanks to her medical skills, in winding down the camp after its liberation on 15 April 1945 by providing help to ex-prisoners. In this work she receives at least symbolic support from a French *Abbé*. One day he brings Perl and the other medical staff a little present.

‘I brought this for you from the Galeries LaFayettes.’ He said, ‘I hope you’ll like it. I don’t understand about these things, I am a priest, but I wanted you to be women again, not only workers, and I want you to enjoy your youth ...’. There was some face powder in that parcel, a piece of soap and a little perfume. A message from Paris, a message from the big, free world.... He wanted us to forget Bergen-Belsen for a moment, to forget the blood, the filth, the endless agony and our own helplessness in the face of death.’³⁹

This inestimable value of good smells and cosmetics for the restoration of femininity thus persists even inside the camps. As extreme places of bare survival and annihilation, they are cesspools of stench; hardly any survivor’s account leaves out the olfactory horror that was life in the camps. It is useful for this last analysis to adduce the affect of disgust, the visceral physical-emotional-moral reaction, triggered along all sensory channels to various degrees, certainly also through bad odors. Disgust has been fairly extensively theorized in recent years, notably by William Ian Miller, Susan B. Miller, and Daniel Kelly.⁴⁰ There is broad agreement on

³⁸ Margaret-Anne Hutton, *Testimony from the Nazi Camps: French Women's Voices* (London and New York: Routledge, 2005).

³⁹ Gisella Perl. *I Was a Doctor in Auschwitz* (New York: International Universities Press, 1948), 181-82.

⁴⁰ William Ian Miller, *The Anatomy of Disgust* (Cambridge, MA: Harvard UP, 1997); Susan B. Miller, *Disgust: the Gatekeeper Emotion* (Hillsdale, NJ, & London: Analytic Press, 2004); Daniel Kelly. *Yuck! The Nature and Moral Significance of Disgust* (Cambridge, MA, and London: The MIT Press, 2011).

the roots of the human disgust system in biological-evolutionary developments; its function as a “gatekeeper emotion,” as a guardian on the borders of the self and along the civilization–nature transition. Humans, another broadly accepted point, are the only animals that possess the ability for disgust. The most insidious and psychologically destructive aspect of disgust in the camps lies in the fact that it turns its force against the inmates: they themselves become objects of their own disgust; disgust’s force of rejection is directed at the observer, resulting in self-loathing and the crushing insight of having fallen outside of civilization. The bestial stench, noted by inmates, was merely another deliberate means toward their dehumanizing.

Before this tiny cosmetic relief, above, Perl describes her impression of the last days of Bergen-Belsen thus:

The air was so thick and humid that one could hardly breathe, the horrible smell of human excrement, blood, pus, and sweat invaded our nostrils in nauseating waves, until the desire for fresh air became just as torturing, just as unbearable as the desire for a mouthful of water, a bite of food (171-172).

The following examples are from Perl’s recollections from Auschwitz. Note how she emphasizes the almost alarming contrast between the general stink and the rare whiff of perfume.

We stood in line to get into this tiny building [the ‘washrooms’, HJR], knee-deep in human excrement. As we all suffered from dysentery, we could rarely wait until our turn came, and soiled our ragged clothes, which never came off our bodies, thus adding to the horror of our existence by the terrible smell which surrounded us like a cloud (33).

In summer 1944 she “worked in the ‘ambulance’, a small wooden shed. Jostling each other, my shadow-like fellow-camp inmates waited for ‘treatment’. The air reeked with the penetrating smell of dirty bodies, pus-filled wounds which covered rotten extremities” (98). Perl met Dr. Mengele in person and writes: “Half an hour later Dr. Mengerle (her spelling throughout, HJR) returned to the hospital. He took a piece of perfumed soap out of his bag and whistling gaily, with a smile of deep satisfaction on his face [after beating a woman prisoner into a bloody pulp, HJR], he began to wash his hands ...” (elisions original, HJR; 111).

The stark contrast between the life of the guards and staff and the “half-life” of the prisoners is not lost on the latter. Perl observes and puts in explicit sensory terms a fact that Arthur Smith, author of *Die Hexe von Buchenwald*, an account of the notorious guard Ilse Koch, also points to: “The NS personnel in the concentration camps led lives radically different from the lives of ordinary Germans. The general population fell victim to increasing deprivations in all areas while the staff of Buchenwald and other camps enjoyed a better life than ever before.”⁴¹ Perl notes

⁴¹ Arthur L. Smith jr., *Die ‘Hexe von Buchenwald’: Der Fall Ilse Koch* (Köln: Böhlau, 1983), 36. A short version of the multiple trials against Ilse Koch, the wife of the camp commander Karl Koch, can be found here: <http://www.mdr.de/geschichte-mitteldeutschlands/filme/rueckblick/2012/koch/buchenwald-prozess102_page-0_zc-6615e895.html> (accessed 2-12-2014).

that “all the time the warehouses of Auschwitz were full of the best, most expensive clothes, and the S.S. women walked among us in brilliant silk dresses, warm coats, their hair newly waved, fragrant with good soap and perfume, laughing at us, torturing us, and deciding which of us should die, which of us should live...” (47; elisions original, HJR).

A striking example for this stark contrast between good and bad in the realm of air and smells, amounting almost to a kind of “perfumistic torture” in the degraded context of Auschwitz is found in Olga Lengyel’s account, *Five Chimneys*.⁴² Like Perl, she was a medical doctor in civilian life. Here she writes of the appearances of the feared Irma Grese, a female guard who was hanged by the British in 1945 for her crimes.

Her beauty was so effective that even though her daily visits meant roll call and selections for the gas chambers, the internees were completely entranced, gazing at her and murmuring, ‘How beautiful she is’. ... Wherever she went she brought the scent of rare perfume. Her hair was sprayed with a complete range of tantalizing odors: sometimes she blended her own concoctions. Her immoderate use of perfume was perhaps the supreme refinement of her cruelty. The internees, who had fallen to a state of physical degradation, inhaled these fragrances joyfully. By contrast, when she left us and the stale, sickening odor of burnt human flesh, which covered the camp like a blanket, crept over us again, the atmosphere became even more unbearable (160).

The juxtaposition of the “refinement” of perfume versus the “sickening odor of burnt human flesh,” the luxury product of a sophisticated society versus the olfactory trace of its complete breakdown signals the full conceptual bandwidth of the Nazi smellscape. Grese probably had her choice among international perfumes because the camp personnel had access to property confiscated from female camp inmates – as both Perl’s account and Smith’s narrative imply – besides domestic perfumes still available in stores.⁴³

However, as much as the inmates are tortured by both the stench *and* the occasional good smell, the stench of Auschwitz is also a perpetrator obsession. It is the unmistakable sign of their abuse of power that has degenerated into pure violence aimed at the bodily annihilation of its subjects. The obsession with the stench is, in a way, the last vestige of bad conscience that the Nazi death machine still exhibits. The book *KL Auschwitz Seen by the SS* unites three autobiographical

Accusations of sadism and sexual perversion that swirled around her also include perfumery, as when Kurt Titz, a prisoner in the camp, detailed to work as a household aide in the commandant’s villa, allegedly smashed up the place in a drunken rage during her absence, pulled her clothes and underwear out of her bedroom closets, tore them up, and poured alcohol and perfume over them. *Die 'Hexe von Buchenwald'*, 57.

⁴² Lengyel, O. *Five Chimneys: The Story of Auschwitz* (1947; Chicago: Academy Chicago Publishers, 1995). Lengyel misspells Irma Grese’s name as “Griese.”

⁴³ Naturally, the question, what scents Grese was wearing has crossed my mind. Answering it, however, would require an inquiry that cannot be pursued here, a historical account of perfume manufacturers, cosmetics firms, and brands and their fates. It is an involved story as Aryanization and, after the foundation of the two German states, nationalization and consolidation in the east German economy, complicate the picture.

accounts by camp leaders, Commandant Rudolf Höss, Dr. Johann Paul Kremer, and overseer Perry Broad, used in connection with the trials against them.⁴⁴

Broad, a German-Brazilian, who became an guard at Auschwitz, describes in some detail the first crematorium and talks about problems with its exhaust system:

The smoke did not always rise above the chimney in transparent, bluish clouds. It was sometimes pressed down to the ground by the wind. And then one could notice the unmistakable, penetrating stench of burnt hair and burnt flesh, a stench that spread over many kilometers. When the ovens, in which four of [sic] six bodies were burnt at the same time, were just heated, a dense, pitch-black smoke coiled upwards from the chimney then there was no doubt as to the purpose of that mound (Bezwinska 159).

The underlying fear of the spreading of the stench becomes more nagging in the following passage, describing the olfactory emissions after the mass graves of Russian prisoners begin to leak in the summer of 1942.

The sun shone hotly that summer upon Birkenau, the only partially decomposed bodies began to fester and a dark red mass poured out from gaps in the ground. The resulting stench was indescribable. Something had to be done about it and quickly (Bezwinska 170-71).

Höß, Commandant of Auschwitz from 1940-1943, was the ultimate technocrat of that killing machine and a diligent administrator. In 1942, as ever larger contingents of Jews began to arrive at Auschwitz, it became clear that their bodies could no longer simply be burned in the open air. Höß writes:

During bad weather or when a strong wind was blowing, the stench of burning flesh was carried for many miles and caused the whole neighborhood to talk about the burning of Jews, despite official counter-propaganda Moreover the air defense services protested against the fires which could be seen from great distances at night. Nevertheless, the burnings had to go on, even at night, unless further transports were to be refused (Bezwinska 122).

The stench of burning flesh sears memory indelibly. Lisl Jäger, a former inmate at Ravensbrück, always remembers it: "There are two smells that I will never forget: that's chlorine and what it smells like when flesh burns."⁴⁵

While the smellscape of a place and time can only be an indicator, rarely an instigator, of the events that it envelops, its written traces serve as a historical record of perhaps unexpected but remarkable revelatory and memorial power. Odors reveal, connect, highlight and in their variability pick up the broader changes in people's everyday lives. Having set out from commentary on fashion and femininity

⁴⁴ Jadwiga Bezwinska, ed., *KL Auschwitz Seen by the SS: Höss, Broad, Kremer* (New York: Howard Fertig, 1984).

⁴⁵ *Dossier. Ravensbrück – Überlebende erzählen*. Website of the Bundeszentrale für politische Bildung <<http://www.bpb.de/geschichte/nationalsozialismus/ravensbrueck/60642/lisl-jaeger>> (accessed 2-12-2014).

– the context in which we placed olfactory perception at the outset in the roaring twenties, the daringly liberal, innovative, and fashionable Weimar years – we have been able to mark the transition to the repressive new era of drab Nazi womanhood. Here, with the realm of women’s beauty, fashion, cosmetics and perfumery under attack, the good smells, hiding in the cracks of the reigning double standards, never quite vanished. And a trace of perfume lingered even in the camps, where our account ends and the Nazi smellscape is overwhelmed by the stench of death that emanates from a lawless space far beyond what should be the realm of humans. But dissolved into stories, converted into texts, this very stench, the trace so deeply feared by the perpetrators of the murderous application of power on the human body, gains its historical significance as it becomes the memory trace that will always speak of how mass murder ends.

Our present smellscape, long after the perversions in the camps, has normalized into the generally innocuous atmosphere dominating western countries. It is the civilized lawscape that balances via a carefully managed sensory regime the visibility and disappearance of legal norms. In fact, it has only now, in postmodern consumer culture, developed its full force through all-around pleasant atmospherics within which, to take smell as our example, the odors and stench of the past linger only as texts. Yet their force is remarkable. Jean-François Lyotard’s libidinal economy provides a model for the transition from life to text and hence the virulent quality of sensory experience, olfactory in particular, as text. Lyotard suggests this transition is less an encoding of one in the terms and concepts of the other than a *mingling* of both, where the experience as cognition co-emerges with its linguistic formulation. As there is no “notable difference between a libidinal formation and a discursive formation, insofar as they are both formations, *Gestaltungen*,” Lyotard offers a model for the interpenetration of smell and text, where senses and sense are the same thing, the two sides of a Möbius strip that are actually *one*.⁴⁶ The sense experience carries over into the text, the text backs into (real, remembered or imagined) experience and emotions. In realist literary usage of the sense of smell, biographical or autobiographical, the triangulation between experience, memory and context, all as *language* events, forms the central mechanism.

Let us then ease out of the Nazi smellscape and conclude with three literary examples that dilute the odors associated with the Nazi regime into texts and into our own time, with Primo Levi making the transition. Regardless from which point the triangulation sets out (experience, memory, or present context) the Möbius loop takes them through language, the indispensable medium of conceptualization and representation.

When Levi, a chemist by training, and prisoner at Auschwitz, enters for the first time the Buna laboratory (operated partly with Auschwitz prisoners) in late 1944, where the Germans are trying to set up production of synthetic rubber, the cleanliness of the space and its odor give him both a memory jolt and a context shock:

⁴⁶ Jean-François Lyotard, *Libidinal Economy*; transl. by Iain Hamilton Grant (French 1974; Bloomington and Indianapolis: IUP, 1993), 25.

We entered the Laboratory timid, suspicious and bewildered like tree wild beasts slinking into a large city. How clean and polished the floor is! It is a laboratory surprisingly like any other laboratory. There are long workbenches covered with hundreds of familiar objects The smell makes me start back as if from a blow of a whip: the weak aromatic smell of organic chemistry laboratories. For a moment the large semi dark room at the university, my fourth year, and the mild air of May in Italy comes back to me with brutal violence and immediately vanishes.⁴⁷

Writing in 1958, Levi's olfactory memory trace thus links that moment with an event in 1944 and a memory of prewar life. Fact, post- and pre-memory emerge jointly as narrative.

In recent German literature a spate of novels emerged that deal with wartime family memory, often written by women (Julia Frank, Monika Maron, Tanja Dückers, besides Uwe Timm or Eugen Ruge, to name a few). They provide olfactory examples harking back two or even three generations. While the stench of the camps has faded as personal experience it survives as collective memory in texts as a universally recognized topos. A memorable example is the "cattle-car scene" toward the end of Julia Frank's *Die Mittagsfrau*. As World War II draws to its close, Frank's main character, Helene, is searching for mushrooms with her son Peter, when they find themselves suddenly enveloped by a horrible stench emanating from a train that has been stopped on the tracks: "They crossed the railroad track. A breathtaking stench surged toward them, of carrion, urine, and excrements.... They had to go around the train, in a wide circle, in order to escape its stench.... She retched, breathed through her mouth, tried not to breathe at all."⁴⁸ After Helene discovers a fugitive hiding in a hollow under a tree, her mind, racing, fuses the stench, the swirling rumors about internment and prisoners, the railroad police whistles she heard, the search dogs, and later the sound of gunshots into a dawning image of a truth that for her, at the time, only hints at the full historical weight it has for us now. While contemporary with the events, the incident is mediated via a fictional character and is not the experience of a survivor. Yet the "olfactory aura" of Auschwitz as a text, has become a fact and will linger down the generations.

Uwe Timm's entertaining but thoughtful narrative of "the discovery of the curry sausage," a hotly contested topic in German popular culture, is at its core a (fictional) war memory. In it (as well as in the Russian story, below), we move away from the camps to the odors of army personnel and the subtle differences in rank. In *Currywurst*, a young deserter has been hidden by a woman in Hamburg. As the British move into the city, Lena Brückner, the woman in question and accidental inventor of the famous curry sauce that goes with the wurst to this day, comments

⁴⁷ Primo Levi, *Survival in Auschwitz. If This Is a Man*, transl. by Stuart Woolf (New York: Orion Press, 1959), 150.

⁴⁸ "Sie kreuzten die Bahnlinie. Ein sinnenbetäubender Gestank wehte ihnen entgegen. Nach Aas stank es, nach Urin und Exkrementen. ... Sie mussten den Zug umgehen, in großem Bogen umrunden, um seinem Gestank zu entrinnen. ... [S]ie musste würgen, durch den Mund atmen, am besten gar nicht atmen." Julia Frank, *Die Mittagsfrau* (Frankfurt/M.: Fischer, 2009), 404; my translation.

on the British officers' appearance and odor and compares it with those of the Germans: "They looked elegant in their khaki uniforms with their oversized side pockets. They wore much less leather on their bodies than the German soldiers, who always smelled like sweating horses."⁴⁹ Officers smell better than soldiers. And their smells linger, as the last example shows. On the occasion of a radio interview on olfactory issues I gave in Moscow in 2010 a woman called in and related how her family still remembers the fragrance of the German officers who were quartered in their house in the Donbas region of eastern Ukraine that the Wehrmacht occupied in late 1941.

From reality to memory, shaped into stories, smell carries historical meaning. That Russian family's recollection is a testimony to the tenacity of smellscape. To this day the lavender scent of the eau de cologne for them is the aroma of German officers. It has not entirely faded more than seven decades after the actual events. While we have begun to understand ever more intimately what smell does to memory, what memory does to smell is still an open story.

⁴⁹ Uwe Timm, *Die Entdeckung der Currywurst. Novelle* (1993; München: dtv, 2006). "Elegant sahen die beiden aus in ihren Khaki-Uniformen mit den übergroßen Seitentaschen. Hatten viel weniger Leder am Körper als die deutsche Soldaten, die immer wie schwitzende Pferde rochen, sagte Lena Brücker." 116; my translation.

Reasonable or Offensive? Smell, Jurisdiction, and Public Right

Sarah Marusek

Abstract: Air is a legal medium that captures the smellscape of legality and conceptualizes reasonableness through discourses of rights, community, power, and equality. Through smell, law normalizes bodies, place, and expectations through the exclusion of the deviant, the noncompliant, and the disempowered. This paper will examine the role of law in creating the fragrance of American life.

Recently, the United States Supreme Court ruled that drug-sniffing dogs brought to the front porches of suspects' homes by law enforcement violated reasonable expectation frameworks of property and privacy under the Fourth Amendment of the U.S. Constitution.¹ According to the majority opinion, the trained sniff of the dog outside the home and on the front porch without a search warrant unconstitutionally represented the 'state's gaze'. Additionally, according to the concurring opinion, such a sniff was likened to a 'pair of high-powered binoculars.' This case characterizes the role of smell as paramount to legal discussions of privacy and unconstitutional intrusion by the state. As demonstrated in this context and others similar, law's sense of smell constitutively constructs the jurisprudential contextualization of place, authority, and belonging within the socio-legal milieu of rights, community, and the cultural normativity of order. This paper will examine the relationship between olfaction and law in order to introduce the notion of olfactory jurisprudence in terms of jurisdiction and public right as the everyday (trans)formation of law through smell.

In a methodological approach to sensory history, Mark M. Smith distinguishes between "the production and the consumption of the senses" with sensory production that can be reproduced in the contemporary and sensory production of originating context. Smith further articulates sensory history to involve the "role of the senses"² in sculpting our experience and habits of thinking and asserts that from a historical perspective concerning objectivity, "what we really need to know is whose nose was doing the smelling, how the definition of 'smell' changed over time and according to constituency, and how the characterization was used to justify actions."³ Following Smith's approach, we can conceive of the role of smell in law as olfactory jurisprudence in which air becomes a legal medium for sensory

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¹ Florida v. Jardines (2013)

² Smith, Mark M., 'Producing Sense, Consuming Sense, Making Sense: Perils and Prospects for Sensory History', in *Journal of Social History* 40(4), pp. 841-858, 2007.

³ Ibid: 843.

management of the reasonable in localized settings involving the public. Through the consideration of what is locally considered to be reasonable, the immediacy of place creates sensory jurisdictions in which control of what that place smells like, or should smell like, constitutes the nasal embodiment of power, authority, and normative constructions of law. Additionally, the framework of community according to smell shapes availability of membership and foundations for exclusion along the perceptive construction of public rights.

From a constitutively legal approach, the social interaction regarding smell is premised upon the cultural understanding of how smell is a source of regulation. In this sense, the relationship between law and smell draws upon social and cultural resources for its scope of normativity, further explaining the aspect of reasonableness as is it locally determined. However, this framework of reasonable smell is also culturally determined in settings that respond to a greater cultural impetus for scent and odor. In turn, law responds to these cultural frameworks in such a way as to create, or constitute, meanings about what law is and how it responds to cultural stimuli. Through a variety of olfactory-based regulations and regulatory frameworks, law reeks of power (corporate vs. individual interests in scent), normativity (reasonableness vs. nuisance), and the cultural fragrance of American life as the public and determinations of community are implicated. Sniffing out legality may be the process through which we smell law. Conversely, law smells us as members of a particular community, through regulations, frameworks of governance, and cultural expectations associated with smell. Dennis D. Waskul and Phillip Vannini assert "because odor conveys meaning, it is part of the ritualized facework of everyday life."⁴ When we smell, we receive meaning and associate context to that meaning. Through these meanings and contexts, we frame our everyday experiences. The smell of law contributes to our associations of power, normativity, and deviance and considers "how olfaction intersects with social, cultural, and moral order, thus compelling reflexive forms of somatic work by which people manage smell (as an act) and odor (as signs)."⁵

In this way, sensory management is the notion that smell contributes to meaning with meaning contributing to cultural and legal context. Meaning is then dependent upon setting, as the interpretation of the relationship between the smell and the smelling represents the signified and the signifying according to a Peircean semiotic framework through which we comprehend the signs and symbols of everyday life. Sensory management can also be attributed to the notion of smellscape⁶, or sensory geographies involving populated environments. Air is a legal medium involving public rights, private property assertions, and the nasally-driven contextualization of community and nuisance. Through the assertion of right and effluent normativity, air and odor are sources of socio-legal regulation in American life, as the nose is used to distinguish legality from illegality, reasonableness from nuisance, and norm from

⁴ Waskul, Dennis D. and Phillip Vannini, 'Smell, Odor, and Somatic Work: Sense-Making and Sensory Management', *Social Psychology Quarterly* 71(1), pp. 53-71, 2008.

⁵ Ibid: 53.

⁶ Sliwa, Martyna and Kathleen Riach, 'Making Scents of Transition: Smellscapes and the Everyday in 'Old' and 'New' Urban Poland', *Urban Studies* 49(1), pp. 23-41, 2012.

deviance. In this way, the nose works to embody and instill a social and cultural response to normativity within a positivist framework of smell and polity. The smells of legality and illegality (such as those relating to alcohol, drunkenness, and marijuana smoke) heighten the sensory management of public space (through breathing, bodies, and odor) as legal methods through which social governance and cultural normativity relate to local ordinances and other forms of olfactory-based regulations.

In their work on the transition from communism to capitalism in Poland, Martyna Sliwa and Kathleen Riach chronicle the smells of urban Polish life pre- and post-1989. In their findings on olfaction, the two authors discuss the process of 'Europeanisation' by using smell "in the development of social stratification and the interplay between discourses surrounding smell and how these discourses are created, supported and legitimized by various smells."⁷ The discourse of smell and its meaning develops a jurisprudential sense of olfactory understanding within a context of right and might in which environments and localized knowledge create norms and standards. In the American contexts examined in this paper, it becomes clear that social stratification is linked to culturally discursive standards of how air and bodies should smell as tethered to law-based frameworks. Such frameworks are enlivened through everyday interactions, daily routines, and banal activities and accordingly inform dynamics of power that occur because of the banality of cultural settings and the quotidian nature of daily life (Dumm, 1999).

In the paragraphs that follow, this paper's examination of olfactory jurisprudence will focus upon two primary legal concepts, or domains of law, that reveal the constitutive relationship between law and culture: jurisdiction and public right. In each, the meaning of law will be analyzed and contextualized through cultural examples and legal cases. In the first, the legal domain of jurisdiction contributes to the meaning of place through smell as smell is culturally associated with legal authority and/or legal remedy regarding illegal acts. In the second, the cultural framework of public-based right will analyze the meaning of smell in terms of community and exclusion via public space and cultural expectations of air and scent. The paper will conclude with a discussion of air in which the presence of smell moves beyond olfactory stimulus to examine socio-legal stimulus regarding culturally normative discussions about regulation and order that concern odor, bodies, and power as they transform banal spheres of everyday life.

Jurisdiction

Kelvin E. Y. Low⁸ describes smell as a "sociocultural phenomenon" and asks "what is the role of smell in everyday life experiences?"⁹ Drawing upon Anthony Synnott's suggestion that "odour defines the individual and the group...and smell (like sight and sound] mediates social interaction," Low uses 'olfactory enquiries beyond physiological and biopsychological concerns, to further understand the role of smell

⁷ Ibid: 28.

⁸ Low, Kelvin E. Y., 'Ruminations on Smell as a Sociocultural Phenomenon' in *Current Sociology* 53(3), pp. 397-417, 2005.

⁹ Ibid: 397.

in our day-to-day realities.”¹⁰ Just as law is present in our daily comings and goings, smell and its presence or absence generates cultural understanding, expectations, and associations. Through a constitutive approach to law¹¹, the relationship between law and society characterizes everyday phenomenon. Place-based approaches to law¹² examine this relationship as it happens spatially while semiotic approaches to law¹³ consider the symbolic notions of the relationship. Law, as it works in the everyday, works in ways we can understand, contribute to, as well as contest in our routines and expectations.

As early as 1925, the *Yale Law Journal* discusses the ability to smell as within the allowable purview of legal decision-making by juries.¹⁴ In cases involving intoxicating liquors, the jury was allowed to smell and even taste liquor in open court as part of evidence deliberations. Although the act of a jury smelling evidence was frowned upon by some jurisdictions as “incompatible with the court’s dignity”¹⁵, the ability to smell, particularly in 1925, revealed the importance of all senses to the fair outcome of law. “Since they are allowed to use other senses, they should also be allowed to use that of smell.”¹⁶ Smell, in this example, is part of the administration of justice; however, this sense of justice is based upon social norms, as alcohol during this time of Prohibition, was illegal. Therefore, the knowledge of what alcohol even smelled was a cultural norm that legal instruction to the jury depended upon. In this way, through smell, law recognized, and even celebrated, its foundations in cultural life.

However, as the relationship between law and culture was recognized through such jury instructions, the law itself did not celebrate smell for the cultural sake of smelling. In 1939, the *Virginia Law Review*¹⁷ discussed the legal notion that smell was nuisance with relief through injunction [that] “becomes necessary to determine whether an obnoxious odor transgresses the bounds of reasonableness and becomes a nuisance.”¹⁸ The two forms of justification for an injunction related to health, and whether an odor is “injurious to health” or if the odor impairs the “enjoyment of property.” In 1939, as might be argued to continue to the present day,

*The nature of the malodorous activity is of the utmost importance in determining the plaintiff’s rights to an injunction. Generally speaking, the courts have been very liberal in granting relief against privies, slaughterhouses, and the like. But where the activity takes the form of a large and prosperous manufacturing plant, allowances are most likely to be made in the interest of progress.*¹⁹

¹⁰ Ibid: 398.

¹¹ Please see further the work of John Brigham, Patricia Ewick and Susan Silbey, and Sarah Marusek.

¹² Please see further the work of Andreas Philippopoulos-Mihalopoulos, David Delaney, and Richard T Ford.

¹³ Please see further the work of Anne Wagner, Desmond Manderson, and Richard Mohr.

¹⁴ ‘Criminal Law. Intoxication Liquors. Permitting Jury to Smell or Taste Liquor in Evidence’ *The Yale Law Journal* 35(2), pp. 232-233, 1925.

¹⁵ Ibid: 233.

¹⁶ Ibid: 232.

¹⁷ C.J.S., ‘Injunctive Relief Against Sound, Smell, and Sight Nuisances, and the Doctrine of ‘Balance of Interests’’, *Virginia Law Review* 25(4), pp. 465-473, 1939.

¹⁸ Ibid: 470.

¹⁹ Ibid: 470.

The characterization of what is reasonable is of particular relevance to cultural normativity, for law, through the utterance of the judge in this case, recognized the degree of acceptability and cultural limitation under legal justification for smelling air that was less than pleasant. Through the framework of malodorous activity, smell is implicated as odor, and no longer potentially neutral, but instead offensive and responsive only to legal refrain.

Jurisdiction of air as far as it is foul-smelling communicates law's authority at the behest of cultural framing via reasonableness to justify what is socially expected as good or bad smells. Additionally, as the above case suggests, foul smell, or malodorous activity, is construed as within law's purview according to the perception of corporate responsibility and law's duty to protect public health (via the smell of air). However, the legal sanctioning of pollution, as the last sentence of this 1939 injunction consideration purports, is also a function of progress. In this context, progress can be attributed to economic growth, and against this backdrop, that which is considered reasonable may be tempered according to economic gain or loss. In this way, legal and cultural definitions of reasonableness in terms of smell and jurisdiction are contextually predicated upon fluid notions of normativity.

If norms produce normativity,²⁰ then what is considered reasonable depends upon paradigms of epistemological influence into the term's usage and application. Using Mariana Valverde's framework of administrative versus common knowledge²¹, we can consider the plight of recognizing the drunken individual as one example. For purposes of drinking establishment licensure in Canada, servers are responsible for determining the drunkenness of clients served, or in other words, figuring out what is normatively accepted as reasonable behavior when consuming alcohol. In this way, determining drunkenness becomes a legal, yet culturally subjective task, which differs between individuals according to behavior, speech patterns, movement, cultural stereotyping of ethnic appearance, as well as smell. However, as Valverde discusses, smell (in addition to the other qualifiers) is not a foolproof way to determine drunkenness and more formal indicators such as blood alcohol level and levels of alcohol in the breath are used in legal settings. However, in cultural settings, the drunken stench may influence expectations of one who is within these legal parameters of normative alcohol consumption. Nonetheless, the odor associated with drinking too much influences cultural frameworks of regulation, which are also legal frameworks in this Canadian example (both of which result in curbing the ability to buy more alcohol in public establishments). The nose knows. Or does it? The question however remains: what does being legally drunk actually smell like?

In the Canadian regulatory context, cultural involvement with drinking knowledge enables the sniffer to recognize those who have had too much and are beyond the realm of reasonableness. In the American context of smell-based regulation, the

²⁰ Baier, Matthias, 'Towards a Socio-legal Understanding of Normativity' in *Social and Legal Norms: Towards a Socio-legal Understanding of Normativity* (Matthias Baier, Editor), Ashgate: London, pp. 333-341, 2013.

²¹ Valverde, Mariana, *Law's Dream of a Common Knowledge*, Princeton University Press: Princeton, 2003.

jurisdictional authority of law relies upon the cultural expectation of reasonable (i.e. legal, in this context of the word) smells that connote legal, as well as illegal activity. The governmental interest in smelling is acute, yet concurrently limited with regard to how smell is interpreted. In *Vernonia School District v. Acton*,²² the drug testing of high school athletes in public high school during school hours was constitutional. In this case, a high school student's Fourth Amendment's rights against unreasonable searches and seizures were trumped by the government's interest in promoting legitimate governmental interests of curbing illegal drug activity, particularly by youth.

However, in contrast to this case of 'smells like teen spirit'²³, the United States Supreme Court recently ruled that drug-sniffing dogs brought to the front porches of suspect's homes by law enforcement violated reasonable expectation frameworks of property and privacy under the Fourth Amendment of the US Constitution.²⁴ According to the majority opinion, the trained sniff of the dog outside the home (and on the front porch) without a search warrant unconstitutionally amounted to the 'state's gaze' and according to the concurring opinion, a 'pair of high-powered binoculars.'²⁵ Through an olfactory jurisprudential framework, rights associated with smell ascribe to the embodiment of place as a way to convey the smells of jurisdiction in socio-legal frameworks. In this way, the reasonableness of marijuana usage implies age expectations of usage within the private confines of the home versus the public environment of schools.

While the smell of drunkenness might be somewhat unclear, the smell of marijuana is perhaps more distinct and recognizable. Despite this scent, Doty, Wudarski, Marshall, and Hastings argue that research is not sufficient to support the court's acceptance, *prima facie*, that "marijuana's odor can always be detected."²⁶ In their study of law enforcement's ability to smell marijuana smoke that leads to an arrest, these scholars argue "the contention that law enforcement officers may be more accurate than laypersons in detecting marijuana by odor, however, requires substantiation" with the assertion that through such smell-driven searches, Fourth Amendment rights may be violated and the courts' preference given to law enforcement as expert smellers may be misplaced. Expertise in inebriation and forms of intoxication as well as cannabis-related odors are fungible frameworks of legal regulation and cultural normativity that continue to adjust the notion of reasonableness in order to account for the degrees of allowable usage related to evolving legal standards concerning marijuana²⁷ as well as varying definitions of drunkenness and alcohol consumption.

²² (515 U.S. 646 (1995))

²³ Nirvana, 1991.

²⁴ *Florida v. Jaynes* (569 U.S. ____ (2013))

²⁵ Ibid.

²⁶ Doty, Richard L., Thomas Wudarski, David A. Marshall, and Lloyd Hastings, 'Marijuana Odor Perception: Studies Modeled from Probable Cause Cases' *Law and Human Behavior* 28(2), pp. 223-233, 2004.

²⁷ In the United States, the illegality of marijuana is challenged by medical marijuana laws as well as by laws (in such states as Massachusetts) that fine rather than criminalize the possession of small amounts of the drug.

Public right

Jurisdictions of smell can be exercised through legal and cultural frameworks of regulatory knowledge that are tempered according to normative notions of reasonableness. In this way, the normativity of reasonableness reflects cultural expectations that may be communicated through law. Law may regulate, control, and govern, but also constitutively reflect the culture of smell in which certain smellers are more powerful than others. Additionally, certain smells are less acceptable than other smells when present in public spaces. In public settings, smell marginalizes through associations with lack of personal hygiene, disregard for community standards, or simply not belonging. In these spaces, smell, or better yet, the right not to smell, is the extension of personal space to which rights frameworks are attached. In this way, the somatic notion of right extends beyond the body to that which the body can smell and receive those smells that bodies emit. We don't experience smell equally, and through smell, neither do we experience law or inclusion in community equally as well.

In Irwindale, California, a suburb of Los Angeles, Huy Fong Foods, producer of Sriracha Hot Chili sauce, was sued by the City of Irwindale for offensive emissions. Local residents complained that the smell generated by the plant caused burning eyes, coughing fits, gagging sensations heartburn, and even nosebleeds. According to the Los Angeles County Superior Court, the hot sauce factory was deemed a "public nuisance."²⁸ Judge Robert O'Brien ordered the company to shut down "the part of its operation that causes the odor and [to] immediately make changes to mitigate the smell."²⁹ Here, the rights of the public are expressed through the presence of odor and the desire not to smell [that odor]. While the presence of noxious odors is indeed a public hazard, the idea that the public has the right not to smell offensive odors presents a cultural foundation on which to normatize what the air should smell like. Likewise, through the articulation of right, law often favorably responds to cultural norms of sensory management.

Offensive emissions are those smells considered to violate the public's right to breathe clean air. In this way, air is communally determined. However, the premise of community is inherently exclusive as the nature of community is to define who belongs and who does not. This characterization of belonging is culturally determined through social discipline and legal framing. One example of this would be recent laws that ban second-hand cigarette smoke in public places. These laws have origins in cultural backlash against cigarette smoking as well as legal steps taken to protect the public's right not to be exposed to cancerous air. According to the idea of sensory management, smelling is the Foucauldian premise of governmentality in which citizens do the work of the state by policing one another. In the case of smelling cigarette smoke in designated smoke-free zones, the critique

²⁸ Favot, Sarah, 'Sriracha Hot Sauce Factory in Irwindale Raises Banner: 'No Tear Gas Made Here'' in *Pasadena Star-News* [<http://www.sgvtribune.com/business/20131129/sriracha-hot-sauce-factory-in-irwindale-raises-banner-no-tear-gas-made-here>; accessed 2/14/14].

²⁹ Ibid.

launched by those who smell against those who create smells is one way to consider how law works, namely through the legalistic practice associated with social discipline. The role of the non-smoker in enforcing smoke-free laws³⁰ is based upon the dependency that law has on smell, and the culturally determined smells of deviance. Through assertions of breathing rights in places involving second-hand smoke, the public right to smell is a recent phenomenon and speaks to the somatic framework of rights and personal space. Furthermore, the idea of cultural normativity responds to pronouncements of public right via the characterization of offensively emissions.

If air can be legally framed as harming the public, then the smell of air can be interpreted in a comparable manner. As a legal medium, the smell of air invokes the personification of rights and the spatial frameworks of place that generate notions of cultural normativity and state power. Through smell, jurisprudence, or the articulation of public right is olfactory, as the legal framework of odor and scent reveals notions of belonging, exclusion, and deviance. Jurisdictional notions of power through inclusion become real when smell is the cultural basis for law's determination of what is reasonable/unreasonable, legal/illegal, and appropriate/offensive. If visual jurisprudence³¹ is the process of seeing law, then olfactory jurisprudence is the idea of smelling law. Smelling law is therefore the right to smell what is culturally perceived as acceptable within a community.

In his work on the history of garbage laws in the U.S., Gregory J. Howard views law as a "symbolic exercise" in his critique of governmental policies regarding waste.³² While waste and body odor should not be equated, we can consider the symbolism in laws that condemn odorous bodies as indicative of the reasonable, normative expectation of a clean social spectrum. Elaborating upon the idea of a sanitized social spectrum, Weinberg and Williams's description of 'fecal habitus' brings attention to the absence of public facilities for homeless populations.³³ We know through personal experience about fecal habitus in which bodily odors are not always voluntarily emitted or conveniently able to be discharged. We also can recognize that cultural standards of personal hygiene also exist. However, the legal translation of cultural practices regarding personal hygiene tethers the idea of public right to sensory management in such a way as to exclude members of a community.

In 2009, Honolulu City Councilman Rod Tam co-sponsored a bill that would make it illegal to "bring onto transit property odors that unreasonably disturb others or interfere with their use of the transit system, whether such odors arise from one's person, clothes, articles, accompanying animal or any other source."³⁴ Tam

³⁰ Vardavas, Constantine I., Christine Dimitrakaki, Sotiria Schoretsaniti, Evridiki Patelarou, Filippou T. Filippidis, Gregory N. Connolly, and Yiannis Tountas, 'The Role of the Non-Smoker in Enforcing Smoke-Free Laws' *Journal of Public Health Policy* 32(1), pp. 46-59, 2011.

³¹ For more on visual jurisprudence, please see the work of Richard K. Sherwin.

³² Howard, Gregory J., 'Garbage Laws and Symbolic Policy: Governmental Responses to the Problem of Waste in the United States' *Criminal Justice Policy Review* 10(2/99), pp. 257-290, 1999.

³³ Weinberg, Martin S. and Colin J. Williams, 'Fecal Matters: Habitus, Embodiments, and Deviance' *Social Problems* 52(3), pp. 315-336, 2005.

³⁴ Pang, Gordon Y.K., 'Honolulu Targets B.O. on Buses' *The Honolulu Advertiser* updated 9/2/2009 [http://usatoday30.usatoday.com/news/offbeat/2009-09-02-honolulu-bus-odor_N.htm?csp=usat.me (accessed 2/14/14)].

explained that such a bill was needed because "As we become more inundated with people from all over the world, their way of taking care of their health is different. Some people, quite frankly, do not take a bath every day and therefore they may be offensive in terms of their odor."³⁵ In the end, the 'odor ban' bill was criticized for its vagueness, its difficulty of enforcement, and the fundamental question, raised by Council Transportation Chairman Gary Okino, "How smelly does a person have to be (to be illegal)?"³⁶ However, what this bill represents is cultural normativity not only through smell but through fundamental belonging through attempts at exclusion ironically articulated as cultural difference, but in practice, presented as targeting homeless persons in the city. Odorous bodies, homeless or not, were considered in this bill to be responsible for offensive emissions in violation of the public's right not to smell them.

In Honolulu and other cities with comparable attempted or realized odor bans, the dominant ideology of sanitized smell, or smelling 'good' or 'pleasant' (and not offensive), becomes the norm of what bodies and the air around them should smell like. Qian Hui Tan³⁷ discusses the idea of olfactory politics that contributes to the effluent knowledge of the contemporary sensory generation and the "socio-spatial stratification of odorous bodies."³⁸ In Hui Tan's work, the sensory regime, or 'sensescape', happens when "sensory disruptions take place: to "rid (largely Anglo-American) cities of the 'stench' of poverty and incivility."³⁹ The resulting 'scent-orship' of olfactory dispute arising in public spaces challenges the 'sensory diversity' in these places. However, in public places that purposely perfume the air (such as malls or hotels), cultural norms of smelling good, or not smelling offensively, become the dominant ideology that masks scents not only of deviance, but also of poverty, much less general nonconformity to cultural norms. Olfactory jurisprudence therefore characterizes the relationship between law and culture as the right of the public to inhabit places that are sanitized from undesirable smells or members of the community.⁴⁰ The public rights framework protecting against offensive emissions is a statement about power and exclusion.

However, the normative expectations associated with smell are ironic, given that the idea of smell is so individualistic anyways and arguably subjective. In this way, the public is not uniform in its ability to smell; however, many member of the public simply can't smell. According to the Warwick Olfactory Research Group in the Department of Psychology at the University of Warwick,⁴¹ "the inability to detect odours, anosmia, can cause profound psychological effects resulting in feelings of physical and social vulnerability and victimization" and that "smell is a sense whose value seems to be only reappreciated after it is lost."⁴² This olfactory disability limits

³⁵ Ibid.

³⁶ Ibid.

³⁷ Hui Tan, Qian, 'Smell in the City: Smoking and Olfactory Politics' *Urban Studies* 50(1), pp. 55-71, 2013.

³⁸ Ibid: 55.

³⁹ Ibid: 56.

⁴⁰ Kohn, Margaret, *Brave New Neighborhoods: The Privatization of Public Space*, New York: Routledge, 2004.

⁴¹ Van Toller, Steve, 'Assessing the Impact of Anosmia: Review of a Questionnaire's Findings' *Chemical Senses* 24, pp. 705-712, 1999.

⁴² Ibid: 705.

an individuals' sense of belonging as "odours are semiotic messages"⁴³ which when absent remove the non-smeller from the norms of a smelling-society. The semiotics of smell therefore further limit who can participate in a community of cultural norms in which definitions of the public are premised upon smell.

Concluding remarks

Normativity then fosters inequality. Inequality expressed as law in terms of what is considered to be both culturally and/or legally reasonable or a nuisance. Since we are not told explicitly how to interpret our sensory stimuli, cultural normativity frames the legal discourse of smell and those included as participants within that discourse in places where smell, smells, and smelling matter. Olfactory jurisprudence as the jurisdictional basis for regulatory knowledge and the pronouncement of public right in response to offensive emissions, enables us to witness law working in our everyday lives through our noses and the accompanying perceptions of right and belonging that are normatively conveyed through cultural expectations. Through smell, law normalizes bodies, place, and expectations through the exclusion of the deviant, the noncompliant, and the disempowered. Air is a legal medium that captures the smellscape of legality and conceptualizes reasonableness through discourses of rights, community, power, and equality. Smell as odor or stink compliments smell as fragrance or aroma insofar as our noses interpret who belongs, why, where, and in what form. Smell characterizes law's participation in the sensory culture present in everyday places.

⁴³ Ibid: 711.

In Search of Headspace: Sniffing out the Boundaries of Privacy

Amber Marks

Abstract: Courts in Australia, Canada and the United States struggle in coming to terms with sensory mutations in policing methods. This paper will explore the privacy implications of olfactory surveillance, in particular the sniffing of a person by a police dog trained to detect the odours of contraband. It argues that the sensorial categorization adopted in the legal decisions on searches is not only irrelevant to the philosophical foundations of privacy law, but that inviting superficial comparisons between the senses has enabled decisions to be based on unsubstantiated and frequently erroneous assumptions about the nature of olfaction.

Introduction

The purpose of sniffer dog deployment is to enable police officers to determine the likely presence of contraband items (on a person, in their belongings or on their property) without touching the person, physically examining their property, or entering a dwelling; all such alternatives are unlawful in the absence of a warrant, reasonable and probable grounds, or reasonable suspicion (which is a pre-requisite depends on the jurisdiction and the circumstances and intrusiveness of the search). The extent to which sniffing a person, their home or their belongings can be described as a search has been litigated in the Supreme Court of Canada, the United States of America South Australia and New South Wales.¹ The sniff of a person by a police dog amounts to a 'search' in Canada (meaning reasonable and probable grounds are a pre-requisite) but not in New South Wales, South Australia or in the United States.

In *Kyllo v. United States* the Supreme Court in the United States ruled that the police could not aim a thermal-imaging device at the appellant's residence to detect heat emanations associated with high-powered marijuana- growing lamps without a warrant. The Court held that when the police obtain by sense-enhancing technology any information regarding the interior of the home that *could not otherwise have been obtained without physical intrusion into a constitutionally protected area*, that constitutes a search, at least where the technology in question is not in general public use. The Court observed that this would assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.² Instead of applying this reasoning to olfactory surveillance of the person, much of the common law discourse has become enmeshed in an inherently unstable sensory

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¹ R v AM (Attorney General of Quebec and others intervening) 2008 SCC 19; Florida v Jardines 569 U.S (2013), Illinois v Caballes 543 U.S.405 (2005), United States v Place 462 US 696 (1982); Questions of Law Reserved (No 3 of 1998) (1998) SAS 7163; (1998) 71 SASR 223; DPP v Darby [2002] NSWSC 1157

² *Kyllo v U.S.*, 533 U.S. 27, 121 S.Ct 2038

hierarchy in which the courts insist upon measuring the intrusiveness of olfactory surveillance by distinguishing it from 'physical' (as in tactile) searches. Despite noting in *R v AM* that '[s]tripped of the relevant context, musing on the differences between a dog's nose and an infrared camera, or generalising about 'emanations', does not greatly advance the resolution of the issues...' the Canadian Supreme Court proceeded to measure the intrusiveness of a sniff by distinguishing it from a 'physical' search.³ This inhibits a purposive interpretation of privacy which would better safeguard the right to privacy.

On account of the existence of an arguably fictitious hierarchy of the senses, assumptions about the relative attributes of the senses come to the fore in judicial reasoning. The sense of olfaction – at least when employed by an animal – is assumed to be, not only less intrusive, but also more accurate in its perceptual focus than the combined human senses of touch and vision (both of which would be employed in a 'bodily search'). "In the present case, of course, we are not dealing with a body search, which is far more intrusive than a dog sniff and whose results are not limited to the disclosure of contraband."⁴ This paper seeks to demonstrate that sensorial categorization is not only irrelevant to the philosophical foundations of privacy law, but that inviting superficial comparisons between the senses has enabled decisions to be based on unsubstantiated and frequently erroneous assumptions about the distinctions between them. If the courts continue to insist upon a sensorial jurisprudence, the law should better inform itself about the nature of olfaction and in particular, the nature of sniffer dog operations. The Supreme Court of Canada recently acknowledged that:

"[i]n determining where the proper balance lies between the protection of privacy and effective law enforcement, the courts will be hampered by the fact that little is known about investigative techniques using sniffer dogs. Indeed the record remains singularly bereft of useful information about sniffer-dogs."

What the courts have tended to do is treat sniffer dogs as no more than a form of sensory perception and thereby conclude that their deployment in policing is not intrusive because "mere sensory perception, whether by eye, ear or nose, cannot of itself constitute a search".⁵ This begs the question of the basis upon which the law is distinguishing between 'physical' and olfactory searches. To address the question of whether a sniff intrudes on privacy it is necessary to explore the social, cultural and scientific aspects of olfaction to establish whether the characteristics of the legal concept of intrusiveness are present in its application to policing. Only then can we begin to delineate the possible boundaries of a legally protected headspace⁶. The legal literature has not explored the relevant social, cultural or scientific aspects of

³ *R v AM* (Attorney General of Quebec and others intervening) 2008 SCC 19 per Binnie J at 6

⁴ *R v AM* (Attorney General of Quebec and others intervening) 2008 SCC 19, per Binnie J at 45

⁵ Questions of Law Reserved (No.3 of 1998) (1998) 71 SASR 223, per Prior J at 224

⁶ Headspace' is the scientific term for the area surrounding an object, in a sealed container, in which its odour can be analysed and is a vernacular term for privacy. I use the term here to connote the shell, which might protect the personal odour space from intrusion.

olfaction in sufficient detail to enable the courts to appropriately incorporate it within the common law's framework.

Dismantling the sensory hierarchy

That comparisons are drawn with physical searches in cases on new investigative methods is not surprising given that police searches have traditionally been conducted by what is commonly termed the 'physical means' of touch. The touching of a person, entry upon or interference with (by touching, moving, or carrying away) their property, without consent, amounts to the tort of trespass unless authorised by law. Any unauthorised touching of a person, however slight, also amounts to the criminal offence of battery. The limiting factor on such comparisons is that the concepts of physicality and the sense of touch have not been explored in any depth in the case-law on searches and so there is no principled basis for drawing sensory comparisons.

Despite the absence of any suggestion in the jurisprudence on searches that there is anything in particular about the sensory modality of touch that affords it special legal protection, comparisons with the sense of touch abound in the case-law on sniffer dogs. Law enforcement seeks to ensure olfactory investigation remains free from regulation by distancing olfaction from the physically concrete and distinguishing it from the tactile. The Association of Chief Police Officers (ACPO) in the United Kingdom maintains that a sniff is not a search because 'The dog is deployed to scent the air surrounding an individual person and indicate the presence of the smell of ...[contraband]...in the close vicinity of an individual...'⁷ ACPO is asserting that because the dog does not physically touch the subject, the action does not constitute a search. The absence of touch in a police dog sniff appears to have been the key factor in the refusal of the New South Wales Supreme Court to classify a sniff as a search (and thereby an intrusion):

"the generally accepted connotation of search is that it involves looking carefully in order to find something that is hidden. When it relates to a person, it carries the implication of some physical intrusion onto the person (for example by patting down the clothing of such person) or into the clothing or body of the person the subject of the search.."⁸

The lack of 'physical contact' involved in a sniff was pivotal in Lebel J's evaluation of the minimum intrusiveness of a sniff in *R v Kang-Brown*: "the search, properly conducted, does not require any physical contact with the person or object being sniffed."⁹

⁷ ACPO Police Dog Working Group (2002) Police Dog Training and Care Manual. <http://www.acpo.police.uk/asp/policies/policieslist.asp>

⁸ Per O'Keefe J in *Question of Law Reserved* (No 3 of 1998) (1998) 71 SASR 223 [26] and approved by IPP JA in *Darby v Director of Public Prosecutions* [2004] NSWCA 431 (26 November 2004) [120-121]

⁹ *R v Kang-Brown* [2008] 1 SCR 456 [81]

The law's focus on the absence of any tactile intervention in a sniff is misguided. That which the law against unwanted touching seeks to protect us from "isn't epidermal but a profound penetration into the core of someone's being".¹⁰ The absence of any epidermal requirement in the law is clear from the case of *Thomas* (1985) 81 Cr App R 331 in which it was held that touching a person's clothing will suffice for the crime of battery.¹¹ Blackstone described the rationale for the broad scope of the protection from unwanted touching being 'every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.'¹² The rationale is firmly rooted in what we would in modern parlance refer to as the right to privacy:

"[T]he privacy of a human being denotes at the same time the personal 'space' in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate."¹³

The intimate connection between the regulation of searches by law enforcement and the right to privacy is clear. In Canada, "the right to be secure against unreasonable search or seizure" is enshrined in s.8 of the Charter of Rights and Freedoms and has been interpreted broadly, "so as to secure the citizen's right to a reasonable expectation of privacy against governmental encroachment"¹⁴. In the United States the protection of a person's reasonable expectations of privacy have been acknowledged as a central value underlying the right to be secure against unreasonable search or seizure.¹⁵ The *raison d'être* of laws on police searches is to protect a citizen's personal space from arbitrary interference. The issue raised by olfactory methods of interrogation should not therefore be whether a sniff involves a tactile intrusion but whether the sniff threatens to intrude on an individual's personal space.

The legal concept of intrusiveness

In criminal law the rationale for the offence of battery is the protection of privacy. The law draws on 'background social norms' to delineate the boundaries of personal space and determine the extent of any intrusion.¹⁶ The offence of battery does not include 'everyday touching' or 'generally acceptable standards of conduct', for example bumping into someone on a crowded tube train or tapping someone on the shoulder to inform them that they have dropped something.¹⁷ In a similar vein,

¹⁰ Diane Ackerman on D.H.Lawrence's use of the word 'touch' in D.Ackerman *A Natural History of the Senses* (Chapmans, 1992) at 71

¹¹ *R v AM* (Attorney General of Quebec and others intervening) 2008 SCC 19, per Binnie J [33]

¹² Commentaries, iii, 120, cited by Goff LJ in *Collins v Wilcock* (1984) 3 All ER 374 [378]

¹³ [R v Broadcasting Standards Commission, Ex p BBC \[2001\] QB 885](#) per Mustill LJ [48]

¹⁴ *R v Dyment* [1988] S.C.R. 417

¹⁵ *Katz v. United States*, 389 U.S.347, 353 (1967)

¹⁶ *Florida v Jardines* 569 U.S. (2013) [7]

¹⁷ *Collins v Wilcock* [1984] 1 WLR 1172

approaching a person's front door in the hope of speaking with the occupant, will not amount to a trespass.

The intrusiveness of an investigative method is additionally gauged by both (i) the manner in which it is conducted and (ii) the extent and nature of information obtained from it. Reasonable expectations of privacy play a key role in colouring each and are widely discussed in the literature on privacy. A person may, for example, be deemed to have less of a reasonable expectation of privacy on public transport than in their home, and cannot have any reasonable expectation of privacy in a matter they have knowingly and voluntarily exposed. Additional indicators of intrusiveness can be identified in the case-law, and merit further examination. The degree of intrusiveness will determine whether there is a breach of privacy.

The case-law posits the following as indicators of intrusiveness in the *manner* in which the investigation is conducted: (i) stigmatisation of the target with the suggestion of wrong-doing (ii) humiliation, degradation and embarrassment¹⁸ (iii) interference with 'bodily integrity' (iv) 'physical intrusion' or contact¹⁹ (v) atmospheric impact²⁰; (vi) a positive act of investigation by a third person²¹ (vii) the nature of the investigation's target (whether a person, item of property, or a dwelling); (viii) the location in which the investigation takes place (for example, a public through-fare, a school, or a dwelling).

Whether the *extent and nature of information obtained* is intrusive will depend on whether any intimate details of the accused's lifestyle or information of a biographical nature are included.²² The accuracy and reliability of the investigatory method is relevant to this heading because one with a high false positive rate is likely to lead to further investigation.²³

The legal, social and scientific constructions of olfaction

"...the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure."
(*US v Place*)

¹⁸ R v Kang Brown [2008] 1 SCR 456 per Bastarache J [241]

¹⁹ Darby v DPP, 120; Kang Brown [2008] 1 SCR 456 [81]

²⁰ Doe v Renfrow (1980) 632 F2d 91 per Swygert J dissenting [93]

²¹ This is quite similar to the plan view doctrine as is clear from Prior J's addition to Olsson J's observation that "the word [search] is not apt to describe the mere detection of an odour ...which is released into the atmosphere surrounding it without any positive acts of a third person to effect that release" (with which he agreed) : 'I agree in particular with the submission put by the Director of Public Prosecutions that mere sensory perception, whether by eye, ear or nose, cannot of itself constitute a search. It follows that that odours which emit from a person's bag are exposed to the plain perception of the public at large.' See Questions of Law Reserved (No.3 of 1998) (1998) 71 SASR 223. It also encapsulates the concept of voluntary exposure, whereby a person cannot have a reasonable expectation of privacy in what they knowingly expose to the public. An alternative means of expressing a similar point is the "general proposition...that when a law enforcement officer is able to detect something by utilization of one of more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a "search" within the meaning of the Fourth Amendment", see dissenting judgment of Major J in R v Evans (1996) 1 S.C.R. 8 [51]

²² R v Tessling [2005] 3 LRC 528 [32]

²³ R v Evans (1996) 1 S.C.R. 8 [3]

The consensus of the common law is that a canine sniff is 'minimally intrusive' in comparison to 'physical' searches.

In law, the canine olfactory apparatus is more sensitive than the human's; it can detect odours imperceptible to the human. In the Canadian Supreme Court the sensitivity of the canine olfactory apparatus (compared to that of the human) provided the court's basis for finding that a sniff amounts to a search (albeit a minimally intrusive search); "It is significant that the odours... were imperceptible to humans hence the need for a dog to detect narcotics."²⁴ This construction of canine olfaction accords with what was until recently a scientific consensus. A study recently reported in the *New Scientist* revealed that humans can follow scent trails across a field in the same way that dogs can - and they improve with practice.²⁵ Biologists have noted an apparent absence of correlation between olfactory receptor gene numbers with smell acuity, sounding a note of caution for the new era of "systems biology" and against any belief that behaviour can be related directly to genomes. Recent behavioural studies suggest humans have a relatively good sense of smell.²⁶

One explanation for the legal portrayal of dogs' olfactory abilities outstripping our own, is the perception of olfaction as primitive. In humans, many of olfaction's operations are said to operate in the subconscious realm and even when they are consciously perceived, they are difficult to define. Le Gu  rer suggests it is the paucity of olfactory vocabulary, the 'perpetual problem of abstraction', that facilitates the portrayal of olfactory sense as 'primitive'.²⁷ Social norms may also play a role.

The law seems unwilling to acknowledge human olfaction. It is as if it does not exist. A search of Lexis Nexis reveals only one case of olfactory identification evidence by a human witness, and the identification was entirely glossed over in the legal proceedings.²⁸ In *R v Holder* the complainant was asleep in her bedroom with her two-year old daughter when she was awakened by the presence of a person lying on top of her. This person had covered her face and head with a towel and was trying to spread her legs apart and undress her. Because the young child was becoming restless, the person forced the complainant, still blindfolded, to walk in front of him from her bedroom to another. There, he proceeded to rape her. The person spoke to the complainant during the ordeal. At the defendant's trial the complainant gave evidence that her assailant had a distinctly unpleasant and offensive odour and a heavy voice. The morning after the assault the complainant was in the supermarket near to her apartment. She said that a man came and stood up next to her in the queue. Immediately she smelt the same offensive odour that

²⁴ *R v Kang-Brown* [2008] 1 SCR 456 [174]

²⁵ L. Geddes 'Unleash your Inner Bloodhound' <http://www.newscientist.com/article/dn10810-unleash-your-inner-bloodhound--start-sniffing.html>

²⁶ G. M. Shepherd 'The human sense of smell: are we better than we think?' *PLoS biology*, 2 (5):E146, May 2004.

²⁷ Annick Le Gu  rer 'Olfaction and Cognition: A Philosophical and Psychoanalytic View' in C.Rouby, B.Schaal, D.Dubois, R.Gervais, A.Holley (eds.) *Olfaction, Taste and Cognition*, Cambridge University Press 2002

²⁸ *R v Holder* (2005) 67 WIR 60 (2006) 1 LRC 458, Court of Appeal in Barbados

she had experienced during the sexual assaults. He spoke to her and she recognised his voice distinctly. She reported him to the police. The ground of appeal was that the voice identification evidence should not have been admitted. No mention was made of the olfactory identification in the grounds. Although mentioned in the court's judgment, it was not discussed or remarked upon. The complainant's olfactory evidence appears to have been denied the status of identification evidence and to have gone unchallenged.

Although the human sense of smell has been historically denigrated in scientific and philosophical writings, smells themselves are, on account of their 'direct and intimate nature' frequently treated as 'active realities, as the surest messengers from the real world'.²⁹ The complainant's olfactory identification in *Holder* is therefore likely to have had an impact on the jury. According to Bloch "this belief that the olfactory sensations lead us to the heart of things...is based...on the fact that these sensations evoke strong, sudden emotions and only nebulous ideas." (Bloch) Indeed several science writers have speculated as to the ability of olfaction to account for the knowledge otherwise attributed to a 'sixth sense'.³⁰ Sander Ferenczi suggested that 'a large part of what has hitherto been regarded as an outré, occult or metaphysical performance may have some psycho-physiological explanation'³¹ The biological necessity of the chemical sense contributes to the sense of wonder associated with it "The threshold levels here are so low that we are entering the world in which eel larvae smell their way across entire oceans, male moths respond to single molecules.... Above and beyond its primary function, smell thus serves as a 'sixth sense', the sense of intuitive knowledge."³²

Whereas the importance and reliability of human olfaction is denigrated, the olfactory perception of non-human agents is lauded. Dogs are renowned for the acuteness of the olfactory perception and are for this reason, portrayed as the ideal investigator in detective stories. In Arthur Conan Doyle's *Sign of The Four* Sherlock Holmes tells Watson he "would rather have Toby's [a dog] help than that of the whole detective force of London." In Doyle's *Hound of the Baskervilles* the hound does not err in its ability to track down its target. The slamhounds in William Gibson's *Count Zero* and the mechanical hounds in Ray Bradbury's *Fahrenheit 451* are portrayed as infallible on account of their reliance on the chemical sense.

Accounts of the canine's prowess abound in the popular press, frequently with reference to the relatively large number of olfactory receptors that can be found in the dog's nose. An extract from a media broadcast in *Fahrenheit 451*, although written in 1953 and about a mechanical hound bears an uncanny resemblance to present-day portrayals in the courts and the media of police dogs' unerring accuracy and olfactory range.

²⁹ Le Guérer 'Olfaction and Cognition: A Philosophical and Psychoanalytic View' in C.Rouby, B.Schaal, D.Dubois, R.Gervais, A.Holley (eds.) *Olfaction, Taste and Cognition*, Cambridge University Press 2002, p.5

³⁰ D. Mckenzie, MD, fellow of the royal college of surgeon, *Aromatics and The Soul: A study of smell*, Edinburgh, William Heinemann, 1923, chapter VI

³¹ Ferenczi (1985) as referenced in Le Guérer 'Olfaction and Cognition: A Philosophical and Psychoanalytic View' in C.Rouby, B.Schaal, D.Dubois, R.Gervais, A.Holley (eds.) *Olfaction, Taste and Cognition*, Cambridge University Press 2002.

³² Lyall Watson, *Jacobson's Organ: And the Remarkable Sense of Smell* (Penguin Books, 2002) at 147

"Montag," The TV set said, and lit up. "M-O-N-T-A-G." The name was spelled out by the voice. "Guy Montag. Still running. Police helicopters are up. A new Mechanical Hound has been brought from another district...."

Montag and Faber looked at each other.

"...Mechanical Hound never fails. Never since its first use in tracking quarry has this incredible invention made a mistake. Tonight, this network is proud to have the opportunity to follow the Hound by camera helicopter as it starts on its way to the target..."

Faber poured two glasses of whisky. "We'll need these."

They drank.

"...nose so sensitive the Mechanical Hound can remember and identify ten thousand odour-indexes on ten thousand men without re-setting!"³³

The content of the information revealed by the procedure

In law, canine olfaction is highly specific. Courts make frequent reference to the "pin-point accuracy of a sniff executed by a trained and well-handled dog".³⁴ As well as being used employed to search for illegal contraband, the canine olfactory apparatus is used to make identifications. It is referred to as "bloodhound testimony" when used in this way. In order to fully understand how olfaction is constructed in law, we will need to explore the case-law of olfactory identification.

Decisions on the admissibility of bloodhound testimony have been criticized for ascribing 'too great a degree of mechanical inerrancy' to the dog and "passing too lightly" over the difficulties inherent in the science of olfaction.³⁵ The principle established by common law cases on the admissibility of bloodhound evidence is that it is "the same as where evidence is offered of the observation of some fact by a machine. Animals lack the uniformity of and are less predictable than machines, so the court insists on 'scrupulous care' in laying a foundation for the evidence of the dog's behaviour by an account of the nature of its training, its reliability and of any tests showing a reliable response."³⁶ The knowledge that people emanate different scents and that dogs are able to discriminate between one person's scent and another's is "common knowledge".³⁷ As illustrated in the English authority on the admissibility of and judicial guidance in relation to the adduction of tracker dog evidence, the reliability or weight of the evidence is treated as an issue of calibration: "...it is important to emphasise two safeguards. First, the proper foundation must be laid by detailed evidence establishing the reliability of the dog in question. Secondly, the learned judge must, in giving his directions to the jury, alert them to the care that they need to take and to look with circumspection at the evidence of tracker dogs, having regard to the fact that the dog may not always be reliable and cannot be cross-examined."³⁸

³³ Lyall Watson, *Jacobson's Organ: And the Remarkable Sense of Smell* (Penguin Books, 2002) at 169

³⁴ *R v Kang-Brown* [2008] 1 SCR 456 at 58

³⁵ A.H.Hudson 'Bloodhound Testimony Again' *Criminal Law Review* (1967) 110 at 113

³⁶ J.C.Smith 'Tracker dog evidence- whether evidence of dog's actions and reactions admissible' *Criminal Law Review* (1995) 402

³⁷ *Patterson v. Nixon* (1960) S.C.(J.) 42

³⁸ *R v Pieterse* CLR (1995) 402

In stark contrast to the *Turnbull* warning on visual identifications, no reasons for exercising such caution (such as the lack of scientific consensus on the individuality of odours, on the uncertainty regarding whether the dog is picking up on the scent of freshly traipsed ground or the scent of an individual, or on psychological factors peculiar to the dog such as its interpretation of cues from its handler) are provided in common law warnings to juries about the need for caution in placing reliance on canine scent identifications.³⁹ The only explanation provided for the need for caution is the comical reminder that a dog “cannot be cross-examined”.

Andrew Taslitz attributes the judicial faith in the unerring accuracy of scent identifications to the domination of the judicial psyche by the mythical ability of dogs⁴⁰ and Iwan Bloch’s sociocultural observations suggest we might equally attribute it to the “metaphysical conception of the olfactory sense.”⁴¹ John Henry Wigmore may have been referring to both when he attributed the prejudicial nature of tracker dog evidence to a “superstitious faith in the dogs’ inerrant inspiration”⁴² I suggest a third fiction may also be at play here, and that is the mechanistic conception of the olfactory sense of non-human agents, part of a Cartesian heritage which denies animals cognition and treats them like automatons. Binnie J (McLachlin CJ Concurring) of the Canadian Supreme Court disagreed with the Attorney General’s statement in *R v AM* that ‘dogs do what people do, they just do it better’ by stating:

“I do not think this attempt to anthropomorphise sniffer-dogs is convincing. Dogs have a capacity not available to human beings. The better analogy is to a machine or device for detecting odours (such as a smoke alarm), although dogs, being living creatures, are more variable than machines in their performance.” (para 76)

The law’s perception of canine olfaction is reminiscent of Ray Bradbury’s description of a mechanical hound in *Fahrenheit 451*:

*“It doesn’t like me,” said Montag.
“What, the Hound?” The Captain studied his cards.
“Come off it. It doesn’t like or dislike. It just ‘functions’. It’s like a lesson in ballistics. It has a trajectory we decide for it. It follows through. It targets itself, homes itself, and cuts off.”*

In the United States the specificity and discriminatory qualities of the canine olfactory apparatus provided the court’s basis for ruling that a sniff is not a search: ‘because the [dog’s] sniff can only reveal the presence of items devoid of any legal use [illegal contraband], the sniff “does not implicate legitimate privacy interests” and is not to be treated as a search.’

³⁹ R v Benecke (1999) NSWCCA 163, R v Pieterse CLR (1995) 402

⁴⁰ A. Taslitz, ‘Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup’ (1990-1991) 42 Hastings L. J. 15-134 at 28

⁴¹ Iwan Bloch *Odoratus Sexualis: A Scientific and Literary Study of Sexual Scents and Erotic Perfumes*, American Anthropological Society, 1933.

⁴² J. Wigmore, *Evidence*, 177 at 1853 (1983) as referenced at page 28 Taslitz

The law fails to acknowledge the cognitive and perceptual complexities of canine olfaction. As Souter J pointed out in his dissenting judgment in *Illinois v Caballes*:

'The infallible dog... is a creature of legal fiction. Although the Supreme Court of Illinois did not get into the sniffing averages of drug dogs, their supposed infallibility is belied by judicial opinions describing well-trained animals sniffing and alerting with less than perfect accuracy, whether owing to errors by their handlers, the limitations of the dogs themselves, or even the pervasive contamination of currency by cocaine.'⁴³

That the infallible dog is fictional concept is beyond doubt. Empirical research suggests olfactory detection by dogs frequently produces both false positives and false negatives. Police dogs often take their lead from the behavioural cues of their handlers (the Clever Hans effect) and their indications are less reliant on olfactory perception than we are led to believe.⁴⁴ The ambiguity surrounding possible sources of 'error' in false positives and false negatives from police dog teams is clear from examples provided in the case-law. In *Doe v Renfrow* it is noted that the dog had supposedly alerted to the plaintiff because she had been playing with one of her own dogs on the morning of the search and her dog was in heat.⁴⁵ In *Commonwealth v. Fens* the handler (apparently wrongly) interpreted the dog's behaviour as a response to menstruation.⁴⁶ The law treats the question of error in dog indications as a question of calibration, thereby side-stepping the scientific and cognitive issues of mammalian olfaction. Perhaps the closest the law comes to the problematization of olfaction is Binnie J's observation that: "the sniff does not disclose the presence of drugs. It discloses the presence of an odour that indicates *either* the drugs are present *or* may have been present but are no longer present, or that the dog is simply wrong. Odour attaches to circulating currency and coins. In the sniffer-dog business, there are many variables."⁴⁷ The law's general approach is to treat the dog as machine and assume drugs have a characteristic odour the dog-detection device detects. The Pavlovian training methods for police dogs are treated as instilling an irresistible conditioned reflex in the animals. The law describes the presence of drugs as 'the sniffer-dog's equivalent of a smoking gun'.⁴⁸ In other words, a dog's indication is treated as incontrovertibly incriminating, an instinctive (albeit by Pavlovian conditioning) reaction to the odour of drugs.

The manner in which the information is obtained

The second key factor in gauging the intrusiveness of an investigative method is the manner in which it is conducted. The trial judge in the NSW case of *Darby v DPP*

⁴³ *Illinois v Caballes* 543 U.S.405 (2005) at [411-412]

⁴⁴ L.Lit , J.B.Schewitzer, A.M. Oberbauer 'Handler beliefs affect scent detection dog outcomes' *Anim Cogn* (2011) 14:387-394.

⁴⁵ *Doe v Renfrow* (1980) 632 F2d 91

⁴⁶ *Commonwealth v. Fens* *Commonwealth v. Fens* No CR03F01831-01 (Chesterfield Cir.Ct. Jan 06, 2004) as referenced in K.Lammers 'Canine Sniffs: The Search that Isn't' *NYU Journal of Law & Liberty* Vol 1 No 2

⁴⁷ *R v AM* (Attorney General of Quebec and others intervening) 2008 SCC 19 [87]

⁴⁸ *R v AM*, (Attorney General of Quebec and others intervening) 2008 SCC 19 [38]

provides a prosaic description of the manner in which a 'sniff' by a police dog will generally be conducted:

"...the dog flared its nostrils, sniffed the air and then sniffed about until he headed straight towards the defendant, at which point the dog then sniffed around the defendant's genital area, his trousers and his pockets and put his nose directly onto the outside of the defendant's pocket and sat down."⁴⁹

In his evidence to the court the police dog handler explained that on detecting a scent, the dog's "nostrils would flair and he would start to sniff rapidly".⁵⁰

Although graphically described in the facts of *Darby v DPP*, the physical act of sniffing is generally overlooked by the courts and was ignored in the reasoning of the appeal of the trial judge's finding that a sniff is a search at first instance in *Darby v DPP*. Odours enter our systems continuously and we are usually passive in our detection of odours. It is only when we are particularly interested in an odour, that we will actively force the air into our noses and sniff. The difference becomes relevant when the law seeks to compare detection of an odour by a detection dog with that by a human police officer, as the Court of Appeal did when reversing the decision of the local court in *Darby v DPP*:

"A police officer would have been entitled to walk in the vicinity of the appellant and, if he were able to smell cannabis leaf in the appellant's possession, form a reasonable suspicion sufficient to entitle him to search the appellant. He would not thereby commit trespass to the person. Treating a drug detection dog as an extension of the police officer, an aid to his olfactory senses, the position is unchanged. It matters not that the dog acts differently from the police officer in the way he detects and indicates, short of bunting and ferreting and putting his nose on a pocket..."⁵¹

The Court of Appeal in *Darby v DPP* was of the opinion that the behavior of the dog would only amount to a search if the dog touched the appellant in the course of its olfactory investigation. The law portrays olfaction as a passive sense, in which odours travel to the olfactory apparatus uninvited. Although many odours do catch us unawares, if we, or a dog, is particularly interested in an odour, or is searching for a particular odour, we will sniff in order to increase the airflow inside the nasal cavity. Indeed, one of the principal impediments to the creation of viable electronic noses is the challenge of directing the airflow to capture the volatiles of interest. By ignoring the physical mechanics of an olfactory investigation, the law conjures up the characteristic of passivity in its operation. The passive nature of the olfactory sense is the fictional basis upon which detector dog sniffs are said not to amount searches:

⁴⁹ *Darby v DPP* [2002] NSWSC 1157

⁵⁰ *Darby v DPP* (2004) NSWCA [51]

⁵¹ *Darby v DPP* (2004) NSWCA [62]

"...That word [search] is not apt to describe the mere act of detection of an odour generated by the content of the item searched, which is released into the atmosphere surrounding it without any positive acts of a third person to effect that release. ...In this regard it seems to me that the Crown is on sound ground when it argues that a sensory perception of any type simply cannot constitute an act of searching, because it is a passive act which cannot possibly constitute a trespass."⁵²

It is worth pausing to consider social norms at this point. If an officer were to audibly and visibly sniff in the vicinity of a person, I expect it would be deemed both unusual and intrusive behaviour. When the law draws analogies between dogs and human officers, it does not suggest an officer could legitimately engage in the pro-active behaviour of sniffing a person. In order to test the strength of the line of reasoning that a dog sniff is not a search given that an officer would be entitled to form reasonable suspicion on the basis of what odours the officer detected, O'Keefe J provided the hypothetical examples of an officer with "a particularly sensitive sense of smell" and a situation in which "the odour of cannabis is so strong...that even a person without special sensitivities...would become aware of the presence."⁵³ Such hypothetical examples deny the reality of pro-active sniffing.

Sniffing and uninvited intrusion could be said to walk hand in hand in everyday English language. Those who pry into the business of others, or ask too many questions, are pejoratively referred to as 'nosy'. Neither Watson⁵⁴ nor Classen et al's⁵⁵ extensive anthropological surveys were able to identify more than a handful of communities where sniffing people outside of intimate relationships is a normal cultural practice. According to Avery Gilbert, a U.S. based psychologist specializing in olfaction "sniffing is considered rude, and audible sniffing downright vulgar".⁵⁶ The rudeness of a 'sniff' is not confined to western culture. In the Quechua language there is a word for letting oneself be smelled and another for being forced to smell someone else⁵⁷. Watson ascribes this olfactory "sensitivity" to "a widespread belief that a link exists between odour and personal identity". Stoddart identifies a similar theme in his account of cultural observations across the world: "the breath, the soul and odour are in some way interconnected."⁵⁸ Stoddart explains that the chilling quality of Patrick Süskind's best-selling novel *Perfume* is not the cold-blooded murders, which are not described in any detail "but from an unconscious awareness of the heinous nature of the act of psychological vandalism which is inflicted on each of the victims as each is drained of her fragrance."⁵⁹

It is useful to look at how sniffing outside of intimate relationships is portrayed in western culture in order to get a sense of western social norms regarding sniffing.

⁵² Questions of Law Reserved (No 3 of 1998) (1998) 71 SASR 223 at 226, per Olsson J

⁵³ DPP v Darby (2002) at [47- 48]

⁵⁴ Lyall Watson Jacobson's Organ

⁵⁵ Constance Classen, David Howes and Anthony Synott The Cultural History of Smell (Routledge, 1994)

⁵⁶ Avery Gilbert What the Nose Knows: The Science of Scent in Everyday Life (Crown Publishers, 2008, p. 74).

⁵⁷ Lyall Watson, Jacobson's Organ and the Remarkable Nature of Smell (Penguin, 2001) p. 3

⁵⁸ Michael Stoddart The Scented Ape: The biology and culture of human odour, The Biology and Culture of Human Odour (Cambridge University Press, 1990) p. 123.

⁵⁹ Ibid, p. 120.

Perfume (1985) has been credited with putting "olfactory perception on the popular cultural map of our time".⁶⁰ *Perfume* is a fictional biography of a freak of nature with extraordinarily acute powers of olfactory perception, and no personal odour of his own. Abandoned at birth, he is taken into the care of an ecclesiastical order. When Father Terrier is cradling the baby Grenouille in his arms, and beginning to feel affection for his charge, the baby wrinkles his nose. The priest is horrified by the apparent intensity of the child's olfactory investigation.

"While the child's dull eyes squinted into the void, the nose seemed to fix on a particular target, and Terrier had the very odd feeling that he himself, his person, Father Terrier, was that target. The tiny wings of flesh around the two tiny holes in the child's face swelled like a bud opening to bloom. Or rather, like the cups of that small meat-eating plant that was kept in the royal botanical gardens. And like the plant, they seemed to create an eerie suction. It seemed to Terrier as if the child saw him with its nostrils, as if it were staring intently at him, scrutinizing him, more piercingly than eyes could ever do, as if it were using its nose to devour something whole, something that came from him, from Terrier, and that could not hold that something back or hide it."

Perhaps being sniffed feels intrusive because of the breadth of hidden knowledge that may be revealed by the inquiry. Perhaps the experience is perturbing because the target is not only unable to control the release of personal information, but also unable to fathom the nature of the information being released. The scope of the olfactory inquiry is mysterious and thereby potentially infinite. The idea that the olfactory sense is strangely omniscient, permeates literature, history, movies and many other forms of popular culture, including news stories. The omniscient, primal and primitive nature of olfactory perception is evident throughout the cultural heritage of the west. It is notable that the smelling is done by animals or freaks of nature; 'others' beyond the boundaries of civilised society.

In the English fairy tale *Jack and the Beanstalk*, the giant smells Jack's presence in his home, as well as Jack's race and gender. In Homer's *Odyssey* Odysseus's dog Argos recognises his visually disguised owner after years of absence, apparently by his scent. In Margaret Atwood's *Oryx and Crake* the protagonist wonders if the caterpillar is smelling him and thereby "picking up on his chemical aura". In Thomas Harris's *Silence of the Lambs* Dr. Lecter can smell the beauty products Clarice has used in the past. In JM Barrie's *Peter Pan*, the family dog "smells danger". In Ken Kesey's *One Flew Over the Cuckoo's Nest* those around can smell the protagonist's fear. The smell of children is readily perceived by the child-catcher in the film *Chitty Chitty Bang-Bang* and the witches in Roald Dahl's *Witches*. The scent of beautiful virgins wafts up the nostrils of the protagonist in Patrick Süskind's novel *Perfume*.

The all-encompassing nature of an olfactory inquiry may go some way towards explaining why the experience of being sniffed can feel invasive.

⁶⁰ Hans Rindisbacher, *The Smell of Books*, (University of Michigan Press, 1992)

“In the quest for truth, the sense of smell — which is also the sense of veracity, drawing as it does upon the sure sources of animal instinct that give the body its great wisdom, providing the tool for a psychologist in search of the fake and illusory — dethrones the chilly logic that emerges when man struggles against the intellectual. Above and beyond its primary function, smell thus serves as a ‘sixth sense’, the sense of intuitive knowledge.”⁶¹

Returning to *Perfume* and the scene in which the priest is cradling baby Grenouille, “The child seemed to be smelling right through his skin, into his innards. His most tender emotions, his filthiest thoughts lay exposed to that greedy little nose.” Olfaction is portrayed as the most probing of the senses “inasmuch as it enables us to judge of the innermost substance of many bodies and living things; whereas the visual and tactual senses permit us to become acquainted with the outside of these objects only”.⁶² The suggestion of embarrassment, humiliation and stigma is important because of the role such effects play in the legal conception of intrusiveness.

Legal pronouncements on whether any stigma is attached to being sniffed by a police dog, and whether the experience is humiliating or embarrassing are contradictory.⁶³ In *R v Kang-Brown Bastarache* J said the dog sniff itself cannot be described as an “embarrassing process”.⁶⁴ Only in dissenting judgments do we find any acknowledgment of the atmospheric impact of being sniffed. In his dissent in *Doe v Renfrom (1980) 632 F2d 91* Swygert J (93) remarked upon the “extraordinary atmosphere” generated by the subjection of a school’s students to a sniff.

Ken Kesey’s uses the potential of olfaction to illustrate the invasive atmosphere of the mental health ward in *One Flew over the Cuckoo’s Nest*:

‘I can feel that least black boy out there coming up the hall, smelling out for my fear. He opens out his nostrils like black funnels, his outsized head bobbing this way and that as he sniffs, and he sucks in fear from all over the ward.’

Father Terrier’s experience of being sniffed in *Perfume* is immediately degrading, “It was establishing his scent! And all at once he felt as if he stank”. It is humiliating both on account of its invasiveness and its one-sidedness: “He felt naked and ugly, as if someone were gaping at him while revealing nothing of himself.” Odours are historically associated with contagion.⁶⁵ Attributing bad odours to persons who engage in particular activities is an effective means of moral condemnation as evidenced in the recent campaign against so-called “third-hand smoke”. “Ever take a whiff of a smoker’s hair and feel faint from the pungent scent of cigarette smoke?”

⁶¹ Le Guerer paraphrasing the views of Friederich Nietzsche on smell in Le Guérer ‘Olfaction and Cognition: A Philosophical and Psychoanalytic View’ in C.Rouby, B.Schaal, D.Dubois, R.Gervais, A.Holley (eds.) *Olfaction, Taste and Cognition*, Cambridge University Press 2002,

⁶² Iwan Bloch *Odoratus Sexualis: A Scientific and Literary Study of Sexual Scents and Erotic Perfumes*, American Anthropological Society, 1933.

⁶³ *R v Kang-Brown* per Deschamps J [238] and [241]; Binne J at 36 in *R v AM* (2008) SCC 19 [36]

⁶⁴ *R v Kang-Brown Bastarache* J [241]

⁶⁵ See for example D. Mckenzie *ibid* Guérer *ibid* and M.Stoddart *ibid*.

asked *The Scientific American* in its account of a highly publicised report on the perceived dangers of third-hand smoke in *Paediatrics*. "Your nose isn't lying" explained Jonathan Winickoff, one of the authors of the report in *Paediatrics*. "The stuff is so toxic that your brain is telling you: 'Get away.'"

The high visibility and media reporting of drug sniffer dogs associates drug users with pungent odours. Drug-users "smell". The association between illegal drugs and pungent odours was recently highlighted in a campaign by Crimestoppers in UK. The charity distributed "scratch and sniff" cards to the public to educate and inform them about the signs to spot and detect cannabis farms by recognising the supposed smell of growing cannabis.

Smell's association with sin dates back to at least the Middle Ages, when witches were identified by their characteristic odour.⁶⁶ Various saints were credited with the ability to sniff out the sins of wrongdoers.⁶⁷ Smell's historical association with sin finds expression in common English idioms. Wrongdoing is "sniffed out". When we have grounds for suspicion, we 'smell a rat'. The illegitimate or underhand smells 'fishy'.

Drawing headspace: asking the ridiculous?

"The word [search] is not apt to describe the mere detection of an odour generated by the content of the item searched, which is released into the atmosphere surrounding it without any positive acts of a third person to effect that release. If it were otherwise, ridiculous questions would arise to as how close one would need to get to an item generating an odour before one could be said to be searching it."⁶⁸

Legal reasoning about the extent to which the sniff of a detection dog is intrusive has centred upon the sensitivity and accuracy of canine olfaction. Whilst there is nothing wrong in this per se, the court's assumptions about the sensitivity and accuracy of canine olfaction are based on fictions. The law does not engage with the cognitive and physical complexity of mammalian olfaction, choosing instead to treat the dog as a basic device or machine. This explains how the law enhances the reliability of canine olfaction. It fails to engage with the mechanics of olfaction, which explains why the social norms, so pertinent in drawing the boundaries of assault and battery and of intrusiveness, have been ignored when it comes to sniffing. The law treats olfaction as passive, as not requiring 'any positive acts'. By leaning on the distinctiveness of olfactory searches from 'physical' searches, the law ensures that our skin is the only 'curtilage' sufficiently real to protecting us from intrusion.

It is only when the law recognises "sniffing", or olfaction in its own right that it will be able to deal with the legal implications of olfactory surveillance. Only then will it realise that the determination of the "carapace, or shell, or umbrella, or whatever

⁶⁶ D.Doty (ed) *Handbook of Olfaction and Gustation*, 2nd edition, New York: Marcel Dekker (2003)

⁶⁷ Mckenzie 1923 *ibid*

⁶⁸ *Questions of Law Reserved* (No.3 of 1998) (1998) 71 SASR 223 per Olsson J [226].

other metaphor is preferred, which protects that space from intrusion” in the olfactory realm is not dictated by “ridiculous” questions about how close one needs to be to an odour to search it, but by the same questions we ask in relation to any potential intrusion; what information is being revealed and how socially acceptable is the manner in which it is being obtained?

Recent case-law suggests that the law is on the verge of recognising a sniff as “positive act” of a potentially intrusive character, at least in relation to the home. In both the United States⁶⁹ and Canada⁷⁰ the Supreme Courts have ruled that where a police dog is taken on to the approach to the door of a person’s house, the police officers will have conducted a search. Although the basis of the rulings is very much grounded in the law of trespass (and therefore the tangible, or physical realm) the dicta suggest that the act of sniffing has the potential to be intrusive in itself and independently of any physical intrusion. The area immediately surrounding and associated with a person’s home – the “curtilage” (*Florida v Jardines*) is protected from unreasonable searches because it is intimately linked to the home both physically *and psychologically*. The court’s basis for ruling that a dog sniffing at the front door of a person’s property is intrusive and therefore a search is that such conduct goes beyond the implied public license to approach a person’s property⁷¹ and because “[O]ur society simply cannot accept police wandering about or “sniffing” around our homes.....”⁷²

Drawing the parameters of a legally protected headspace is the challenge the law presently faces. How close, how prolonged, how loud, how deep might a sniff have to be for it to be described as intrusive? Does its intrusiveness depend on the purpose and extent of the inquiry? As well as betraying our possessions and recent whereabouts, odours are capable of betraying our racial, sexual and individual identities, as well as our emotional and physical states – does this information cease to be intimate in the olfactory realm? Or is it more so?

⁶⁹ *Florida v Jardines* 569 U.S. (2013)

⁷⁰ *R v Evans* (1996) 1 S.C.R.8

⁷¹ *R v Evans*(1996) 1 S.C.R.8 [50]

⁷² *R v Evans* (1996) 1 S.C.R.8 per La Forest J [3].

Odore di Napoli: What if Jurisprudence Came to us through Smell?

Patrícia Branco* and Richard Mohr†

Abstract: Observing the differences between insiders' and outsiders' perceptions of the smells of Naples, we draw parallels with different views of law. Insiders relate to the smells of the city as a complex olfactory web that defines places and regulates time. Outsiders generally privilege the sense of sight over smell, admiring the views while admonishing the inhabitants for the stench that arise from piles of garbage or filthy habits. Legal outsiders observe regularities in behaviour that indicate the presence of laws. On the other hand, law is also seen as a set of rules to which one must conform (which Hart regards as the insiders' view). Rules and regularities seem inadequate to understand the complex ways Neapolitans negotiate their olfactory and legal environment. They can smell the rotting garbage and the stench of the Camorra, but these are only a background to everyday life and the regular round of meals and seasons, feasts and festivals, that make up their own smellscapes. This takes us beyond the Enlightenment's lines of sight and monolithic view of law to appreciate a Baroque interlegality, inhabited by bodies and experienced in smells. If sight is linked to rules (from the laws of perspective to the rule of recognition), then smell promotes judgment of the sort that Gracián considered necessary to negotiate an ingenious and prudent passage through life.

Introduction

Odore di vita e di morte,
odore di radici.
Odore di Napoli.

Smell of life and of death,
smell of roots.
Smell of Naples.

– Armando Francesco Serrano, 'Odori'

The sense of smell is passive, unlike sight or touch, which are active senses, exploring, seeking and feeling their way around an environment. Smelling is activated by the involuntary act of breathing. Smell is not displayed (passive voice); it escapes (active voice). From the body, from the houses, from the bakeries and from the sewers. The nose is enveloped, invaded or assaulted by stinks and perfumes. Smells escape from the architecture, from the interior, into the public realm, where we can—or must—share them. Thus, smell orientates us to a social environment more intimately than sight, with less regard for intention.

Despite the sensitivity of our olfactory sense, with its extraordinary capacity to differentiate between smells, we often make a primal distinction between a very fragrant odour and a disgusting smell. This could be based on the physical fact that

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some smells can actually be sickening. However, the sense of smell is also calibrated by culture. The mind responds to the nose, as is the case when we smell something that can make us happy or sad or nostalgic, because we tend to associate that particular aroma with someone or some event in our lives, such as a particular trip we have embarked on.

While smells are unruly, having no respect for space or boundaries, they nonetheless attach to places: nostalgia, roots. Smell orders the social environment with memories, repetitions, temptations and alarms. What can we learn from smell about the regulation of the social order? We explore this question through different people's perceptions of the various smells of a city, Naples.

Analysing a range of impressions of the smells of Naples, we find that insiders and outsiders have very different impressions of the smellscape of the city. They have various ways of engaging with olfactory orders, as they do with legal orders. The tourists come with the intention of exploring, intentionally, by sight and with cameras: 'See Naples and die'. The sights are interrupted by the smells, which are often seen as unwelcome distractions, like dirt, poverty or theft. Indeed, they may be interpreted as emanating from 'filthy habits' and lawlessness. The tourists, having explored, leave: life goes on, goes back to the normal, the quotidian, back home. The locals stay on, engaging with the smellscape(s) to orientate their days and years, and to nourish their senses, bodies and souls.

The vocabulary we use to explore the relations between smell and socio-legal orders revolves around these axes: time and space, and unity–plurality. We ask how attachments to places influence perceptions of smells and of regulatory regimes. We consider the connections between smell and time to understand how Naples and its ethnic and social order are layered, and changing. And through an appreciation of the diverse smellscapes of Naples, we hope to reach a better understanding of its different legal orders and how Neapolitans engage with them to survive, materially, socially and spiritually.

This article begins with a brief cultural history of smell: as a guide to judgment and good taste in the Baroque, to its repression and denigration in the age of reason, to its rehabilitation in more recent times. The conceits of modernity distorted our view of law as much as our appreciation of smell. In the next section we try to sketch some of these relationships among the senses, knowledge and jurisprudence as a broad epistemological framework for what follows. Then we lay out the information we have gained on reactions to the smells of Naples, through interviews, literature, poems, blogs and journalism, which reveal certain patterns in the perception of smells, by insiders and outsiders, and in relation to space and time. Then follow two sections considering, first, the distinctions between insiders and outsiders in matters of smell and regulatory orders, and then the plurality of approaches to smell and to moral and legal regimes. A conclusion sums up the lessons we draw from Naples for an olfactory jurisprudence, which is corporeal, attuned to judgment and embedded in the lived experience of daily life.

Smell and judgment: from rules to *rillettes*

To approach the challenge of a jurisprudence of smell we must first introduce some of the requisite methods and terms before turning applying these to our study of Naples. Jurisprudence is a foundation for decision-making based on laws, facts and reasoning. It therefore combines obligation (or some form of ethical imperative), epistemology and action. Smell's position among the senses has been influenced by long historical and cultural traditions. In this section we trace those traditions back to a point in the intellectual history of the west where smell diverged from other senses and other ways of knowing. We then consider some social consequences of that cultural path, before clarifying jurisprudence in the terms of ethics, epistemology and action on which our study is based.

The sense of smell had mixed fortunes in western culture, from its key position in the Baroque, to its nadir in the Enlightenment, and then a revival in recent years. The point at which smell was set on a separate course from other ways of knowing can be traced to the seventeenth century. The story of this divergence can be told in brief though the works of Cervantes, Gracián and Descartes.

At the dawn of that century in Spain we find in Cervantes a subtle discussion of the sense of smell as it relates to taste and judgment. This was soon elaborated by Gracián into an ontology of the senses and of taste. Cervantes' Sancho Panza has a natural capacity to differentiate wines: 'if I just smell (*oler*) one I know where it comes from, its lineage, its taste, its age, and how it will change, and everything else that has anything to do with it'.¹ Given the identification of Sancho with the primitive and unrefined peasantry (in contrast to Don Quixote's befuddled over-refinement), this might be seen as a back-handed dignification of the sense of smell. It seems likely that Sancho is a connoisseur by virtue of his lack of refinement: he can trust his nose in a way that Don Quixote never could.

In the middle of the seventeenth century, Baltasar Gracián outlined the role of the senses in the development of 'good taste': possibly the earliest use of the term in the sense of refined judgment and cultural capital.² For Gracián, taste mediates between the animal and the spiritual: 'there is cultivation not only of the mind (*ingenio*) but also of taste (*gusto*)'.³ Knowledge was to be gained by a combination of ingenuity (*ingenio*), judgment and taste. Each of these was associated with one of the senses, respectively: sight, smell (*oler*) and taste. While Gracián associates smell with the nose, he identifies taste not with the tongue, but with '*olfato*', the olfactory⁴

¹ Miguel de Cervantes, *Don Quixote*, Trans. Edith Grossman, Harper Collins, 2003; p. 537; Miguel de Cervantes Saavedra, *Don Quijote de la Mancha*, Editorial Juventud, 2003; p. 629

² 'Cultural capital' is, of course, a much later expression. Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, Trans. Richard Nice, Routledge Classics, 2010; p. 188.

³ Hans-Georg Gadamer, *Truth and Method*, Trans. J. Weinsheimer and D. G. Marshall, Continuum, 1989; p. 35

⁴ Olfactory, *olfato* is derived from *oler* (smell) + *facere* (do, make). This combination of a sense with an active faculty was cited by Vico in support of his view that sense perceptions are constituted by the subject who perceives them, rather than being inherent in the object. (Giambattista Vico, *On the Most Ancient Wisdom of the Italians*, Trans. Lucia M. Palmer, Cornell University Press, 1988; p. 93-4). Merleau-Ponty, M. (*The Phenomenology of Perception*, Routledge, Abingdon, 2012) has dealt with the intellectualist vs. empiricist controversy more adequately by reaching a third, phenomenological, position. Fernando Pérez Herranz ('La ontología de *El Comulgatorio*' in Alberto Hidalgo Tuñón (ed) *Baltasar Gracián: Ética, política y filosofía*, Fundación Gustavo Bueno, 2002; pp 73-4) points out that Gracián's position also transcends the positivist vs. intellectualist

sense.⁵ Furthermore, there are persons of good and bad taste; there are those who 'only have noses for the black fumes of self-love [*el negro humo de la honrilla*], not for the fragrance of virtue'. We should cultivate a sixth sense which mediates the other senses, like a *sensus communis*, leading to an inventive mind (*ingenio inventivo*) that is 'cautious, active and perceptive'.⁶ The senses could be educated and refined to the point that they could contribute to the desirable virtues, foremost of which is prudence (*prudencia*).

Also in the mid seventeenth century Descartes published such key works as the *Discourse on Method* (1637) and *Meditations on the First Philosophy* (1641). While Descartes died eight years before Gracián, his influence would dominate for several centuries. Pérez highlights an important distinction between these two contemporaries: For Gracián the parts of the body are not already given [*ya dadas*], constituted (like the Cartesian *res cogitans*), but they are to be educated, cultivated, in order to achieve *prudencia*, throughout [one's] existence.⁷

In Gracián we find a sensuous ontology that accounts for judgments of taste and prudence that can develop and be refined within the human body. In contrast, Descartes' *ego cogito*, 'cannot mature, but only grow his own consciousness'.⁸ In the wake of the Cartesian division of *esprit* and *res extensa*, mind and body, the Enlightenment denigrated bodily functions and senses, particularly that of smell, and relegated the body to domain of the other.

For Descartes the mind was to dominate the body and the physical world of things (*res*): in the same way, sight facilitates domination of the other. This is true of Haussmann's strategic 'perspectival articulation' of Paris⁹ and of the colonial urge for the commanding view.¹⁰ David Hockney observed that 'the development of closed perspective in painting accompanies the development of artillery', to which Jukes adds, 'a line of sight can also be a line of fire'.¹¹ The Cartesian grid opens up vistas for art, artillery and counter-insurgency. The Cartesian mind is the inside, the command centre, to the outside of things, *res extensa*. The post-Cartesian subjugation of the body defines it as 'unruly, disruptive, in need of direction and judgment, merely incidental to the defining characteristics of mind [and] reason'.¹² Vision is the panoptical projection of Cartesian reason, enabling the controlling view from inside to outside, from ego to other.

An epistemology based in sight and a linear rationalism dominated throughout the Enlightenment. The very term suggests sight, privileged among the senses at the

debate by introducing ingenuity (*ingeniosa*) and good taste into an appreciation of the material. (All translations by the authors unless otherwise credited.)

⁵ Fernando Pérez Herranz, op. cit.; p. 69.

⁶ Baltasar Gracián, 'El Criticón' in Lorenzo Gracián (pseudonym), *Obras de Lorenzo Gracián*, Pedro Marin, 1773; p. 148.

⁷ Fernando Pérez Herranz, op. cit.; p. 69.

⁸ Giorgio Agamben, *Infancia e storia: Distruzione dell'esperienza e origine della storia*, Einaudi, 2001; p. 17.

⁹ Walter Benjamin, *The Arcades Project*, Harvard University Press, 2002; p. 121.

¹⁰ David Spurr, *The Rhetoric of Empire: Colonial Discourse in Journalism, Travel Writing, and Imperial Administration*, Duke University Press, 1993; p. 16.

¹¹ Peter Jukes, *A Shout in the Street: The Modern City*, Faber & Faber, 1990; pp. 104-5.

¹² Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism*, Indiana University Press, 1994; p. 3.

same time that the mind was privileged over the body.¹³ Perhaps vision was saved by the scientific and geometrical laws of perspective, but smell has been irredeemably anchored in the body and the animal.

The compulsive urge to cruelty and destruction springs from the organic displacement of the relationship between the mind and body; Freud expressed the facts of the matter with genius when he said that loathing first arose when men began to walk upright and were at a distance from the ground, so that the sense of smell which drew the male animal to the female in heat was relegated to a secondary position among the senses.¹⁴

In post-Enlightenment thought, smell is anchored in the corporeal; compost, soil, animals and sex.¹⁵ To redeem smell is to challenge the logic of domination on two fronts. First, smell and its corporeal links are a counterpoint to the supremacy of vision, reason and mind, split off from action and the body. We can repatriate the body and the physical from Cartesian exile through Gracián's delicate appreciation of smell and taste as the senses of judgment, not given with our animal nature, but cultivated.

Second, we propose that to redeem smell as a sense and, hence, as a way of knowing, allows a reappraisal of two myths that promote the subjugation of peoples and genders. Just as Grosz sees the mind/body distinction mirrored in gender stereotypes of male/female,¹⁶ colonialism makes a similar identification of mind with the hegemonic role of the coloniser. The body is the preserve of the other. The West defined its superiority over colonised peoples in terms of its clear-sighted rationality, relegating the subaltern to the realm of primitive idolaters and fetishists.¹⁷ Two great myths have sustained colonisation and racism. The first myth has been highlighted by Latour and Fitzpatrick: the dominant peoples have no myths, only reason.¹⁸ The second myth is one of the pervasive tropes of racism: the dominant peoples do not smell. Let us follow Dr. Johnson¹⁹ in being more specific: they do not stink, but they smell others, more specifically, the other. The myth is sustained by the Enlightenment edifice that maintains it is only the moderns who have transcended the animal, the body and nature.

In one of its guises, jurisprudence is the justification of domination, even as it draws on epistemology and leads to action. To clarify these aspects of jurisprudence, we now turn to a philological consideration of terms derived from the Latin *regulae*. Through an analysis, and then synthesis, of these terms, we hope to illustrate alternative approaches to jurisprudence, which may open the way to an olfactory

¹³ Martin Jay, *Downcast Eyes: The Denigration of Vision in Twentieth Century French Thought*, University of California Press, 1994.

¹⁴ Theodor W. Adorno and Max Horkheimer, *Dialectic of Enlightenment*, Trans. John Cumming, Verso, 1979; p. 233.

¹⁵ Michel Serres, *The Five Senses: A Philosophy of Mingled Bodies*, Trans. Margaret Sankey and Peter Cowley, Continuum, 2008; p. 163.

¹⁶ Elizabeth Grosz, op. cit.

¹⁷ Bruno Latour, *Petite réflexion sur le culte moderne des dieux faitiches*, Synthélabo, 1996; W. J. T. Mitchell, *Iconology: Image, Text, Ideology*, University of Chicago Press, 1986.

¹⁸ Bruno Latour, op. cit.; Peter Fitzpatrick, *The Mythology of Modern Law*, Routledge, 1992.

¹⁹ The attribution of the comment 'No, Madam, you smell. I stink' to Dr Johnson is so widespread that it is accepted apocryphally, but without any certain citation. See for example D. Michael Stoddart, 'Follow Your Nose', *New York Times*, 28 September 1997 <http://www.nytimes.com/books/97/09/28/reviews/970928.28stoddart.html> accessed 17 April 2014.

jurisprudence. If sight is the sense of the Enlightenment, then rules are its scaffolding. The *règles* that Descartes promulgated to guide reasoning formed a model for modernity. Taylor draws on Bourdieu to conjugate *règlement*, *régularité*, *régulation* (*inconsciente*).²⁰

Régularité occurs with observable frequency. To do something regularly becomes a habit: we can act without particularly thinking (in a disengaged Cartesian way) *about* what we are doing. The outside observer sees the regularity of other people's actions: this is Hart's 'external point of view'.²¹ Facts are observed; the relevant verb is 'is'.

Hart famously sought to move from 'is' to 'ought' by entering the 'internal view', where we find 'rule-dependent notions of obligation or duty'.²² These rules form a system which must be obeyed: *règlement*. This delivers the legal or ethical force of obligation. However, according to Taylor, to represent ways of acting as explicit rules that can be spelt out is to distort the way we really experience them: it is to confuse the territory with the map. A map has neither the passage of time nor the bodily movements required to get from one place to another. Law is such a map of rules, which, like a map, has distortions of scale and projection.²³ We can have more detailed, local maps that tell us about the rules of communities, or we can zoom out to the map of the whole country, of national laws. Law, like the map, is also detached from the actions, movements and learning of the body. It is general, not time specific, and it is abstract, not referring to or dealing with any specific bodily experience. In this, of course, it diverges from day to day unconscious self-regulation. Like a map, law distorts or negates time, motion and action. In day to day experience of *régulation inconsciente* we act on rules as they are understood from within our bodies, as much as our communities. Unconscious rule-following inheres in community relations and in bodily *habitus*²⁴ (which should be distinguished from the mere observable regularity of Hart's 'habits'). The relevant verb is neither the 'is' of Hart's external view, nor the obligatory 'ought' of the internal view. This synthesis resolves the dialectic with the verb to 'do', or we may recall the Latin *facere*, which includes the English concept of 'make'.

Serres has pointed out a fourth derivation from *regulae*: *rilette* (to which he adds the wry comment, 'Descartes, where are you?').²⁵ If *régulation* (*inconsciente*) is the cold, raw, Hegelian synthesis, of *is* and *ought* into *do*, we can now *cook* with Serres by applying heat to *facere* in order to bring out the smells and flavour: 'analysis slices and dices raw; synthesis requires flame'. The *rilette* is the cooked synthesis, which 'invents coalescences'.²⁶

²⁰ Charles Taylor, 'To Follow a Rule...' in Craig Calhoun, Edward LiPuma and Moishe Postone (eds) *Bourdieu: Critical Perspectives*, Polity Press, 1993.

²¹ H. L. A. Hart, *The Concept of Law*, First edn, Clarendon Press, 1961; p. 87.

²² *ibid.*

²³ Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, Routledge, 1995; p. 458.

²⁴ Pierre Bourdieu, *op. cit.*; p. 166.

²⁵ Michel Serres, *op. cit.*; p. 154.

²⁶ *ibid.*, p. 167.

When the corporeal, saved from Cartesian subordination, is elevated to the level of the sublime, the artifice of cooking becomes, literally, supernatural.²⁷ Drawing on scientific discoveries regarding the small number of tastes we can differentiate: 'it can barely make out four or five qualities', Serres concludes that taste 'depends on smell to achieve its festive richness'.²⁸ Recent scientific research into smell has discovered that humans can discriminate more than one trillion distinct odours, making smell our most finely tuned perceptual sense.²⁹ Serres concurs in placing smell among the most refined of senses, identified with the corporeal and animal as well as the sublime and the supernatural. Going further in his enthusiastic embrace of the sensual, Serres goes on to ask, 'what if philosophy came to us through the senses?'.³⁰ Drawing on this proposed sensual epistemology, we now turn to a study of the smellscapes of Naples to explore further the relations between law and the olfactory: what if jurisprudence came to us through smell?

Neapolitan smellscapes: time and place

Smell calibrates time, not in days, like the sun, or minutes, like the clock, but according to our experiences and culture. As will be seen in the data that follows, smells mark the time of day, the days of the week, the seasons, and the year's festivals. Smells take us back to our past by invoking memories. Old things and old places smell 'old'. Unknown places can smell familiar.

As mentioned in the introduction, this section is devoted to analysing a range of impressions of the smells of Naples. They tend to fall into two broad categories, insiders and outsiders, as will be seen. The authors occupy an ambiguous position in regard to Naples. Neither is Neapolitan, but the first author, Patrícia, has lived in Naples since October 2013, while the second, Richard, is a true outsider: somewhat familiar with Italian culture, but with faded memories of Naples in the 1970s. We have collected data about responses to the smells of Naples from two main sources: travel writing and other online and media reports; and interviews with residents of Naples. The residents were interviewed by the first author, who has also, as a resident of Naples, contributed her own impressions in the text. Five persons, identified in the text by their initials, were interviewed, three male and two female, of varying ages.³¹ The sample does not purport to be systematic or representative, since all were friends or family of the first author, but provides a rich source of material. Two other 'insider' impressions were collected on the internet, from blogs and newspapers (Wanda Pane³² and Bud Spencer³³). Finally, a poem by Armando Francesco Serrano, *Odori*,³⁴ was considered of interest to our analysis. Sources for

²⁷ *ibid.*, p. 167.

²⁸ *ibid.*, p. 156.

²⁹ C. Bushdid et al, 'Humans Can Discriminate More than 1 Trillion Olfactory Stimuli', *Science*, 343/ 6177, 2014

³⁰ Serres, op. cit., p. 195.

³¹ The interviews were conducted in Italian. The excerpts used were translated into English by the authors, with help from Silvia D'Aviero.

³² http://www.nuovomonitorenapoletano.it/index.php?option=com_content&view=article&id=958:napoli-colori-odori-e-suoni&catid=72:libere-riflessioni accessed 23 March 2014.

³³ <http://www.paralleloquarantuno.it/articoli/bud-spencer-voglio-lodore-di-acqua-salata-della-mia-napoli.html> accessed 23 March 2014. Bud Spencer (born Carlo Pedersoli), who is famous as an actor, starring in a lot of *Spaghetti Western* movies with Terrence Hill, was born in Naples (1929) and continued to live in Italy (if not always in Naples).

³⁴ The poem was listed for an Italian High Schools poetry prize in 2009-10. The author appears to have been a student at a Neapolitan high school at the time.

the outsiders' impressions were Mark Twain's *The Innocents Abroad* (1869, chapter 30), followed by journalistic and travel writing of recent years: Jenny McCartney's chronicle in *The Telegraph* (2008), the Canadian bloggers *Travel Loafers* (2013),³⁵ Rachel Donadio's chronicle in *The New York Times* (2013)³⁶ and Luca Porcella's writings (2012).

Naples is a unique, and uniquely sensuous, city, as described by the Brazilian author Alice Otero. 'If Italy is the country of the senses, it is in Naples that they will meet at its most heightened state. Naples provokes the senses'. Otero goes on to describe the ways Naples stimulates all the senses, starting by mentioning that of smell (particularly 'the smell of the Tyrrhenian Sea [that] invites you to a boat ride').³⁷ Here we will focus on its multiplicity of smells. Some are more fragrant than others, others more disgusting than some. *Profumi e puzze*. Scents and stinks.

Mark Twain's description of Naples in the late nineteenth century privileges sight, in line with that Enlightenment tradition discussed earlier. It marks the city as best seen from a distance, 'in the early dawn from far up on the side of Vesuvius',³⁸ where one should 'see Naples and die': it is a 'picture of wonderful beauty'. At that distance, 'its dingy buildings look white', but closer acquaintance reveals another reality, and brings another sense into play. But do not go within the walls and look at it in detail. That takes away some of the romance of the thing. The people are filthy in their habits, and this makes filthy streets and breeds disagreeable sights and smells.³⁹

Twain reeled at the sensory impression of Naples close-up, where the streets are filled with unpleasant odours. His observations fit well into the tradition of Western writing on colonial subjects, a metropolitan view of the periphery.⁴⁰ Spurr has identified several tropes which apply to Twain's observations (and to other observers, as will be seen below):⁴¹

- surveillance: the 'commanding view' 'from far up on the side of Vesuvius' (Twain) gives the outsider a sense of control, 'from a position of spatial advantage';⁴²
- idealization,⁴³ access to the sublime: 'see Naples and die'.

<http://www.liceozingarelli.it/progetti/0910/certame0910/poesie/serrano.pdf> accessed 23 March 2014.

³⁵ <https://travelloafers.wordpress.com/2013/09/08/i-love-the-smell-of-naples-in-the-afternoon/> accessed 23 March 2014.

³⁶ http://www.nytimes.com/2013/12/15/travel/seduced-by-naples.html?_r=2&#h accessed 23 March 2014.

³⁷ Alice Otero. <http://www.correrpelomundo.com.br/2011/01/napoles/> accessed 23 March 2014. Our translation from the original text: 'Se a Itália é o país dos sentidos, é em Nápoles que eles se encontrarão em seu estado mais aguçado. Nápoles provoca os sentidos: o cheiro do mar Tirreno convida a um passeio de barco, a vista do gigante adormecido Vesúvio em contraste com o mar azul emociona, o sabor do vinho provoca uma doce embriaguez, a canzone napolitana enche sua alma de sonoridade e beleza'.

³⁸ Mark Twain, *The Innocents Abroad*, first published 1869, <http://classicit.about.com/library/bl-etexts/mtwain/bl-mtwain-innocents-30.htm> accessed 24 February 2014.

³⁹ loc. cit.

⁴⁰ The more beautiful the place or the more sublime the ancient arts, the more disappointed is the traveller that the local, contemporary savages are not worthy of it. As Twain remarked, Naples was a great metropolis at the time of the European 'grand tours', and it still is. To apply colonial discourse to this great European city is to draw attention to its perceived otherness within the family of European cities, and not to denigrate it as a metropolis and great city.

⁴¹ The Canadian *Travel Loafers*, in another blog post wrote: 'The views of Pompeii below, with Naples and the Mediterranean sea in the hazy distance are wonderful (Caesar, I can see your house from here!)'. <http://travelloafers.wordpress.com/2013/08/11/smokin-on-mount-vesuvius/> accessed 23 March 2014.

⁴² David Spurr, op. cit.; p. 16.

⁴³ *ibid.*; p. 138.

Now, Twain's impressions on 'disagreeable smells' can take us back to a near past: that of Naples' garbage crisis. Jenny McCartney wrote in the British *Telegraph* that in 2008 more than 200,000 tons of waste were lying in the streets, which made her change the famous epithet 'See Naples and Die' into 'Smell Naples and Die'.⁴⁴ During that crisis all sorts of garbage accumulated in the streets of the city, in every neighbourhood, creating landscapes that will endure in people's minds, giving rise to descriptions of the city by travellers coming in that period that are reminiscent of Twain's a century and a half earlier. As observed by the Canadian bloggers, *Travel Loafers*: When we stepped out of the air conditioned Napoli station ... the smell hit us like a mixture of sweaty socks, sour milk and sewer fumes. I wish this blog was scratch'n'sniff. Hard to describe the smell. Garbage was decomposing absolutely everywhere. A huge pile of it right in front of the station in the middle of a bus terminus. Welcome to Naples. The original home of pizza. The smell however wasn't conducive to having a slice.

Consequently, the piles of garbage not only created memorable landscapes, but also disgusting smells. During the hot weather the decomposing garbage, as well as the burning of trash, produced a variety of stinks that overwhelmed the city's usual odours and scents.

In normal times, Naples provides the nostrils with unique smells of food, in keeping with the city's gastronomic pride in its characteristic cuisine. When walking along the streets that compose the *centro storico*, one is enveloped by the sweet smells of *babà*, *sfogliatella* or *pastiera* (the typical Neapolitan pastries); by the woody scent of the pizzerias (the wood burning in the ovens), along with the smell of pizza⁴⁵ itself (the odour of tomatoes, basil, oregano, and mozzarella); of frittata and fried pizza (dough and hot oil). It also smells of coffee (strong and burned). Around the fisheries it smells of fresh fish arriving from the near coast. And sometimes the wind (especially the *scirocco*, the hot wind blowing from the north of Africa that arrives here coming from Sicily) brings the smell of the Mediterranean, and more specifically, of the Tyrrhenian, sea, which is different from that of fish.⁴⁶

Some of these smells are also reported by two of the outsiders, Donadio and Porcella, who have both lived for long periods in Rome and seem to have more than an outsider's familiarity with Naples. In Rachel Donadio's recent travel chronicle we read, 'everywhere the smells of strong coffee, fried dough, fresh clams and the breeze blowing in from the sea'. Luca Porcella, a Roman with a good local guide, is more specific, stating that such gastronomic odours, marking the city's own history, especially around the narrow streets of the historical centre, tell us of dinner time. Naples and its ancient history [is above all] made up of its cuisine, in particular, pizza, fish and fried food, with smells that run through the narrow streets announcing dinner time. Via dei Tribunali, then, is the highlight of these sensations:

⁴⁴<http://www.telegraph.co.uk/comment/columnists/jennymccartney/3553931/Our-criminal-system-is-a-persistent-re-offender.html> accessed 23 March 2014.

⁴⁵ Neapolitans claim that pizza was invented in Naples and there are, in fact, differences between Neapolitan pizza and the pizza baked in the rest of the country (type of dough, consistency, and products used to bake it).

⁴⁶ And it also differs from that of the Atlantic Ocean, which has a stronger smell of iodine.

a succession of pizzerias and *friggitorie* [selling traditional fried food], one after the other, with huge lines of people waiting to get in and sit down.⁴⁷

Now, the tourists' eye view will be very different from the locals' one. And the same can be said of the nose. Most of our insiders particularly mention the smells of food, more than once those of pizza, pastries, fried pizza or fried calamari; and also the smells of roasted nuts and cotton candy, as well as those of coffee,⁴⁸ fruit and vegetables.

Naples smells of many things: (...) of fruits and vegetables, the stink of frying from the *friggitoria*. (V. R.) [Smells] Of pizza (...) (F. S.) (...) or, even more frequently, the smell of fried pizza or other fried foods, among which one can also recognize fried calamari served in small paper cones, convenient to eat on the street while walking ... Oh I almost forgot! Coffee is another characteristic odour ... you really can smell it a lot! (T. G.) (...) suddenly you feel you are being grabbed by the smell of cotton candy, or rather of almonds 'landing' in it; following such smell you end up in a hidden homemade pastry shop. (Wanda Pane)

There is also an association of different smells (food, freshly washed clothes, humidity) with domestic spaces (especially regarding the structure of the buildings and the street level homes called *bassi*), although such smells escape the domestic frontiers and invade the streets.

Imagining a stroll through the narrow streets of Naples what is immediately evident in observing the houses is that for the most part these are represented by houses at the ground floor, the so-called '*bassi*' (or '*vasci*' in Neapolitan dialect). This is particularly important for a research on odours since the majority of these smells, as we sense them on the street, come from such homes. Being so close to the street means that even the slightest scent (or stench) is immediately perceived by the passers-by! (T. G.) The smells I associate with Naples are primarily domestic, even if they are perceived in the street: the synthetic lavender from softeners, the overwhelming slow frying, the pungent and unhealthy deep frying with shoddy oils, the oppressive humidity of the '*bassi*'. (G. V.)

There is also the spatial distribution of smells, particularly relating those of food to the historical centre. (...) [the smell of] roasted nuts and chestnuts at Via Toledo. (...) Of fried food at Piazzetta Miraglia, the odour of pizza at Portalba (...), of the freshly baked pastry out of Pintauro!⁴⁹ (F. N. I.) Pizza at Via Colletta, from *Michele* or, also in Decumano Superiore, from *Sorbillo*. Or from *Il Presidente*.⁵⁰ (F. S.) The first smell that comes to my mind is that of a bakery at Via Egiziana in Pizzofalcone at 7 a.m. spreading into the street (...) (Wanda Pane)

⁴⁷ http://www.golosoecurioso.it/luca-porcella/viaggi-del-gusto/napoli--odori-e-sapori/info_inserzione.html accessed 28 March 2014.

⁴⁸ A small note on the smell of coffee: Wanda Pane offers subtle distinctions regarding such smell. As she claims, coffee smells different made in either a *moka* or a *napoletana* coffee maker; and it can also smell of *torrefazione* or roasting coffee: '[The smell] of coffee, whether poured from the moka or from the classic napoletana, with a more subtle scent. (...) Sometimes the wind brings into my house the smell of roasting coffee'.

⁴⁹ A famous bakery at Via Roma.

⁵⁰ These are all famous Neapolitan pizzerias in the Decumano Superiore area.

Insiders' descriptions of the odour of the sea differ from the outsiders' (Otero or Donadio) by the specificity of the places they are attributed to.⁵¹ The smell of the sea [is] certainly all over the sea front, Castel dell'Ovo... (F. S.) If the wind is good you're still able to smell the sea, especially in the summer, between Corso Umberto and Via Marina. (V. R.)

This idea of place, be it domestic or entangled with a particular zone of the city, draws on smellscapes, which contribute to a sense of that particular place.⁵² Smells help us to organise and characterise places: 'Smells, scents, whiffs and stinks are incredibly important in our experience and understanding of the surrounding world'.⁵³

Lefebvre argues that 'where an intimacy occurs between "subject" and "object", it must surely be the world of smell and the places where they reside'.⁵⁴ Serrano describes it well in his poem, by linking different smells to the idea of roots, as anchored to a particular place, and the idea of self as belonging to it, one's past intertwined with the place's own history and past: 'Smell of roots. Smell of Naples'.⁵⁵ The same idea is also present in the Neapolitan Bud Spencer's reply when asked about 'the smell of your city': 'The smell of salt water splashing on the rocks'.⁵⁶

Hence, smell is not only connected with place, it is also a way of dealing with memory, with the past. Smells also serve as a way of organizing time, including life and death. They calibrate the day, the week or the year. Or a particular season, such as Christmas, Easter or summertime.

... the smell of meat sauce [*ragù*] or bean soup is an almost daily occurrence. (T. G.) Often you can follow the menu for the week: Sunday *ragù*, roast and roasted artichokes! (G. V.) The moss from the *presepi* ...,⁵⁷ the smell of fireworks at New Year, just about everywhere. (F. N. I.) At Easter, in the narrow streets of the centre, the smell of *millefiori* and orange blossom gives you the feeling of being immersed in a large *pastiera*.⁵⁸ (Wanda Pane) The smell of the sea varies depending on the season ... in the summer it has one odour, in winter another. (F. S.) Odour of moss, tourists and tuff.⁵⁹ (Serrano)

Scents function as symbolic representations and particular smells act as triggers for memory and recollection.⁶⁰ Smells hold memories: they unlock childhood, take you

⁵¹ A friend commented that one needs to get out of Naples in order to feel the smell of the sea, since in the city the smell of smog overwhelms it. Using Anna Maria Ortese's book title, one could almost say that 'the sea doesn't bath Naples' [*Il mare non bagna Napoli*].

⁵² John Urry, 'City Life and the senses', in G. Bridge and S. Watson (eds.) *The New Blackwell Companion to the City*, Blackwell Publishing, 2011; p. 352-53.

⁵³ Victoria Henshaw, 'Welcome to the Smellscape', *New Scientist*, 222, 2014; pp. 28-9.

⁵⁴ Lefebvre, 1991, in John Urry, op. cit.; p. 352.

⁵⁵ <http://www.liceozingarelli.it/progetti/0910/certame0910/poesie/serrano.pdf> accessed 23 March 2014.

⁵⁶ 'L'odore della tua città?'. 'L'odore dell'acqua salata che si infrange sugli scogli'.

<http://www.paralleloquarantuno.it/articoli/bud-spencer-voglio-lodore-di-acqua-salata-della-mia-napoli.html> accessed 23 March 2014.

⁵⁷ Model nativity scenes which use moss to represent grass.

⁵⁸ A characteristic Neapolitan pastry, with fresh and candied citrus fruits.

⁵⁹ The volcanic stone, *tuffo*, used extensively in Naples for building.

⁶⁰ Kelvin Low, *Scents and Scent-sibilities: Smell and Everyday Life Experiences*, Cambridge Scholars Publishing, 2009.

back to familiar objects or bring forth past events or lost periods in one's life,⁶¹ as in Wanda Pane's example: And here I am again at Villa Comunale where the horses no longer walk, there aren't carriages at Riviera, but the stink left by the horses takes me back to those days, and I can even feel the smell of ozone left by the legendary 140 trolleybus. (Wanda Pane)

Time, memory and place are also present in relation to the smell of the old. Of course, trying to describe such a smell is delicate, since 'old' may smell different from place to place, and it may mean different things to different people. Neapolitans connect this description to the scent of incense coming from the numerous churches situated in the historical centre, or they relate it to a particular place, e.g. the old courthouse, at the end of Via dei Tribunali.

The scent of old, I think of San Gregorio Armeno, the street of the *presepi*, and all the narrow streets at the Decumani (San Biagio dei Librai), up to the old courthouse in Castel Capuano. (F. S.) The incense from the churches (...) (F. N. I.)

Smell, however, can also be seen as a vehicle that expresses new realities and changes in a city's life. Driven by smell, and especially that of food, we now turn from recollection of the past to the Naples of the present, characterised by the new cuisine of the recent immigrants. As T. G. points out: (...) from these homes [*bassi*] emanate the smells of cooking, which in fact depend a bit on the nationality of the inhabitants. In fact, if the house is inhabited by Indians or Sri Lankans the smell of spices like curry or cooked coriander will be almost mandatory.

Pane's essay and Serrano's poem also back up this reality, naming the 'exotic' odours of curry, kebab and sushi, side by side with that of pizza. The exotic smells of curry, kebab, and sushi in the Quartieri Spagnoli and in Duchesca inhabited by immigrants. (Wanda Pane) Smell of pizza, kebab (...) (Serrano)

Smells, however, don't relate only to objects or events. They are also concerned with feelings, desires, and sensations. Life and death, says Serrano. Smell... of defiance:/ two eyes/ on the street/ meet/ two others, /the last to look down /wins. / Smell ... of sacrifice and despair,/ old age and youth rebellion .../ Smell of blood, ... / and resignation .../ Smell of life and death ... (Serrano) My day ends at 7 pm with a bad smell, the smell of poverty in the hillside subway to Piscinola. (Wanda Pane)

According to Urry,⁶² smellscapes organise and mobilise people's feelings about particular places. In fact, Serrano is telling us that in Naples you can sense smells that remind you this is a city that deals with criminality (the smell of blood and defiance), a city where people must sometimes resign to the surrounding harsh reality, made of sacrifice, despair, old age and poverty (as observed by Pane). Or, instead, they may choose to rebel against it.

⁶¹ *ibid.*

⁶² John Urry, *op. cit.*

Insiders and outsiders

We have already noted that insiders and outsiders have very different impressions of the smellscapes of the city. If the insiders usually point out that Naples smells primarily of different kinds of food, many of the outsiders claim that Naples smells of garbage and filth. Twain's words on Naples provide an interesting backdrop on the outsiders' view which privileges the sense of sight, while the insiders are more attuned to the smellscapes of the city, calibrated in time and space. These obvious differences lead us to ask why insiders' and outsiders' relationship to smell and the senses varies so much.

A first hypothesis was suggested by the question: are one's own smells so familiar that they cannot be perceived? Evidently, the insiders recognize, as well, the stinks of Naples. Nevertheless, they relate these to garbage only occasionally, and specifically during summertime, also focussing on the smells of exhaust fumes or smog. Unfortunately, it's not only the scents that characterize Naples, but often there are also stinks. Among these the most annoying are the ones from the harmful cloud of smog and garbage, especially in the summer. (T. G.) ... the stink of exhaust fumes (F. N. I.). Naples smells of many things: of smog... (V. R.)

And, going back again to food, the insiders also mention the stench of unhealthy frying with shoddy oils (as G. V. and V. R. have mentioned). So it is not that the insiders cannot smell the stinks as well as the scents: they have a more nuanced appreciation of smells.

This in part derives from a greater involvement with smell, compared with the outsiders' primacy of sight which, as we have already noted, is connected to the detached reason of Descartes. We recall Twain's preference for distance (over proximity) and the commanding view, typical of the colonialist view, or surveillance, of the other. The insiders, on the other hand, have impressions of smell that engage with it. They are so much immersed in the smell of the sea that its smell is associated with certain zones of the city. Other smells also orientate the resident to familiar places: the smell of pizza (F.S.) or roasting nuts (F.N.I.) have their own associations with quite specific streets or neighbourhoods. The smells of bread, pastries or coffee, in their turn, remind them it is morning: they are tempted to breakfast and stimulated to get moving for the day. The smells of bean soup or the lunch-time *friggitorie* and pizzerias are quotidian and regulate daily meals. The smells of *ragù* and roasts, on the other hand, have a weekly rhythm, promoting a relaxed and family-oriented mood for Sunday. The smells of the *presepi* announce Christmas. And, although the smell of the sea seems to be inside their noses, the subtle changes in this odour speak to the insiders of the different seasons.

So the insiders inhabit the smells of their city, which in turn regulate their lives. The outsiders, for their part, notice the transgressive smells of garbage, the pathological threat of the foreign unclean. In our effort to derive a jurisprudence from smell, we now consider how these inside and outside views relate to our earlier discussion of Hart, and the philology of words derived from *regulae*.

For Hart, the outsiders find regularities, but not rules. The external point of view is that of an observer who does not necessarily have to accept the rules of a legal system, while the internal point of view is that of the members of a group who are governed by the rules of the legal system and who accept these rules as standards of conduct. Shapiro⁶³ claims that Hart's most fundamental distinction is between the practical and the theoretical points of view, the practical point of view being that of the insider who must decide how to respond to the law, and the theoretical perspective that of the observer, who is often but not necessarily an outsider, who studies the social behaviour of a group living under law.

In this study we have found that the outsiders rely on observation, and are not bound to negotiate the internal rules of Naples. Yet this does not isolate them from having to deal with the olfactory and legal order. The garbage and the dirt assail them, just like their 'foolish fear of being cheated'.⁶⁴ For Twain and our more recent travellers, the smells of Naples are mainly reported when they are offensive. In smell as in law, it is only when something pathological happens that attention is directed towards the law, the legal system, or the breaking of it.⁶⁵ It is only when a strong odour, most often a disgusting one, violates our nostrils that the observer's attention turns to smell, our olfactory sense. Absence can also be remarkable, as when we momentarily lose our olfactory faculties, or when there is a state of exception that freezes the legal system.

If this description highlights the position of law, like smell, in its transgression or suspension, how is it lived by the insiders? Smell has this in common with the law: neither is remarked nor remarkable in normal interactions. People living 'inside' a particular legal regime tend not to think about the law, as an abstraction: it is part of everyday life. So, to our insiders, the smell of the sea and the favourite pizzeria orientate in place, while all the daily, weekly or seasonal smells, that have been accepted, or incorporated, inform the insiders' lives and way of living. Smell also marks their awareness of the city's past and present. Through smell they invoke memory, but change is apparent to them when they notice the new ethnic cuisines of the recent immigrants.

For Hart, the insider takes a practical point of view, knowing the rules and which are to be applied. Likewise, our Neapolitan insiders express a practical point of view, being part of the system and engaging with it. This contrasts with Twain, McCartney and *Travel Loafers*, whose external point of view—or, rather, of smell—only observes a one-dimensional and transgressive reality, the smell of garbage. Aided by their commanding view, they adopt the haughty stance of the modern positivist, as if they were looking at a rudimentary society in need of redemption through the power of reason: of Descartes' *regulae* and Hart's rules.

⁶³ Scott J. Shapiro, 'What is the Internal Point of View?', *Fordham L. Rev.*, 75, 2006; p. 1157-70.

⁶⁴ Walter Benjamin and Asja Lacin, 'Naples', in Walter Benjamin, *Reflections, Essays, Aphorisms, Autobiographical Writings*, Trans. Edmund Jephcott, Schocken, 1986; p. 164.

⁶⁵ José Baptista Machado, *Introdução ao direito e ao discurso legitimador*, Almedina, 1990. To recall the analogy of law and map, habitus and territory: we only consult the map when we are lost.

Profumo e puzza

Hart's own origin myth of modern law is rooted in its emergence out of the primal swamp of primary rules, 'very similar to custom'⁶⁶ that are 'always found in ... primitive societies' which may, with some help from a 'self-binding' legal establishment, progress into fully functioning legal systems.⁶⁷ Here is the myth of progressive rationality—that modern law is myth-free—by which Hart distinguishes his elaborate system of rules from the 'primitive'. It is a jurisprudence based in 'Hart's arbitrary and essentialist confining of law to rules'.⁶⁸ If there has been little reference to rules in our insiders' understandings of the smells of their city, we may still find elements of another jurisprudence there.

Naples, as we have seen, is composed of a plurality of smells: scents and stinks. T. G. pointed out that 'it's not only the scents [profumi] that characterize Naples, but often there are also stinks [puzze]'. These form the two faces of Naples' smellscape. Both are intertwined, as occurs with different legal orders within society. Or with legality and illegality.

Our legal life is constituted by an intersection of different legal orders, a world of legal hybridizations, a condition present not only at the structural level of the relationship between the different legal orders, but also at the level of legal behaviour, experiences and representations of citizens and social groups.⁶⁹ This legal phenomenon has been described as interlegality. Far from characterising 'primitive' societies, Santos argues that interlegality is a dominant characteristic of our times, made of porous legality or legal porosity, multiple networks of legal orders forcing us to constant transition and trespassing.⁷⁰ These orders can be made of formal (mainly composed of state law), informal (social norms and, in the Neapolitan case, also the Camorra as a parallel legal framework) and/or religious rules. As claimed by Pardo,⁷¹ the relationship between these different legal orders, values, and self-interest is neither fixed nor nonnegotiable. The same can be said of the different smells and stench that characterize Naples. However, as seen before, outsiders and insiders reveal different perceptions of this relationship, be it in terms of smell or of what can be considered as legal and illegal.

Once you make your way through the unruly traffic, honking horns, locals shouting in thick dialect across alleys lined with wet laundry, past racy black lace garters on display in shop windows, shrines to the Madonna with blue neon and plastic flowers set into palazzo walls, churches decorated with carved skulls, women squeezed into their shirts and spike heels, immigrants selling knockoff bags, helmetless teenagers on mopeds racing the wrong way down slippery one-way streets, and everywhere

⁶⁶ Peter Fitzpatrick, *op. cit.*; p 193.

⁶⁷ H. L. A. Hart, *op. cit.*; pp. 42, 89, 91.

⁶⁸ Peter Fitzpatrick, *op. cit.*; p 194.

⁶⁹ Maria Paula Meneses, 'Toward Interlegality? Traditional Healers and the Law in Postcolonial Mozambique', *Oficina do CES*, 202, 2004; p. 3.

⁷⁰ Boaventura de Sousa Santos, *op. cit.*; p. 473.

⁷¹ Italo Pardo, 'Morals of legitimacy in Naples: streetwise about legality, semi-legality and crime', *European Journal of Sociology*, 36, 1995; pp. 44-71.

the smells of strong coffee, fried dough, fresh clams and the breeze blowing in from the sea — it is immediately clear that two primal forces drive this magnificent chaos of a city: life and death.⁷²

According to Pardo,⁷³ many ordinary Neapolitans conduct their lives without always strictly abiding by the law: small transgressions such as the violation of traffic laws are common, and so are various activities that, according to formal definition, fall in the grey area between legality and illegality or are unequivocally illegal. However, as Pardo points out, classifying these activities as criminal would miss the point that their moral legitimacy is the result of a redefinition of moral and spiritual values, entrepreneurialism and understanding of formal law. If we compare this vision of the law with smell, and going back to the previous section, where we argued that law and smell are recognised mainly in their transgression, it can be said that this comparison can point us toward smell that does not assault the senses, but is simply in the air we breathe. The same can be said of law, and especially informal law: it does not require binary judgments that distinguish legal from transgressive, nor does it need a rational legal establishment. There is also law in the air we breathe, in our bodily actions, our *régulation inconsciente*, and in our sense perceptions.

The category of 'real crime', linked to the Camorra, is clearly distinguished by Pardo's respondents from everyday misdemeanours. The *Camorristi* are seen as the holders of a monopoly of ruthlessness and rootlessness which challenge the recognized order of social life.⁷⁴ The same happens with stink (*puzza*): it violates the nostrils and disrupts the ordinary smellscapes. But, just like the scents (*profumi*), the stink of the Camorra has become part of the city's life. Curiously, a comparison can be made with an odour mentioned by Serrano: the smell of roots as one of the smells of Naples, thus characterizing it as an anchoring place (or home). This smell is in sharp contrast to the observed rootlessness that defines the *Camorristi*: as a *puzza*, they are part of the city; however, their belonging to it is of a problematic nature, as of having no roots.

The attitude of ordinary Neapolitans toward organised crime, as described by Pardo,⁷⁵ is a combination of pragmatism, defiance, fearful acquiescence and moral condemnation. Again, these feelings are well-known and described in Serrano's poem: the odours of defiance and youth rebellion, the smells of sacrifice, despair and resignation. Ultimately, the smell of blood. Thus, Naples is a city marked by two primal forces, as Donadio wrote. Articulating Donadio's words with Serrano's poem, and with our analysis, Naples smells of life and death. *Profumo* and *puzza*.

Now, the garbage disposal crisis' link to organized crime has been officially recognized by the Italian state for a number of years.⁷⁶ Smolczyk's title (2008), 'The Stink of Greed: In Naples, Waste Is Pure Gold',⁷⁷ makes a clear association between

⁷² Rachel Donadio, http://www.nytimes.com/2013/12/15/travel/seduced-by-naples.html?_r=2&#h

⁷³ Italo Pardo, op. cit.; p. 47.

⁷⁴ *Ibid.*; p. 50.

⁷⁵ Italo Pardo, op. cit.; p. 55.

⁷⁶ Cf. <http://naplespolitics.com/2009/11/20/garbage-crisis-and-organized-crime/>.

⁷⁷ <http://www.spiegel.de/international/europe/the-stink-of-greed-in-naples-waste-is-pure-gold-a-528501.html>.

stench and avarice. Again, *puzza*: the stench of filth and garbage. The smell of 'dirty-money'⁷⁸ related to greed, which stinks.

Another clear and well-known association is that between the Camorra and the Catholic Church, especially in the Campania region which includes Naples. Sales⁷⁹ notes that a society profoundly shaped by Catholic culture has given birth to Cosa Nostra, the Camorra, the 'Ndrangheta and the Sacra Corona Unita, not in opposition to the Church and its institutions, but in a formal and public adherence to its rites, its beliefs, respect for its hierarchy and its role in society. As visitors coming to Naples discover, this is profoundly religious city, where cathedrals, churches and chapels abound. Our insiders' perceptions led us to the smell of the old, relating it to the smell of incense coming from churches, and also placing it at the heart of the city's historical centre: where one can find most churches in Naples, sometimes one side by side with another. The relation between the Catholic Church and the Camorra is another old smell, since the mafias have been around for more than 200 years.⁸⁰

Using the religious concepts evoked by Low,⁸¹ it is possible to say that in Naples the odour of sanctity and the stench of sin go hand in hand. Yet again: *profumo* and *puzza*, with an old fragrance to it. This too is something that Neapolitans have become accustomed to, since it is all part of the *odore di Napoli*.

Conclusion

While smell has been neglected since the Enlightenment, sight is privileged in many areas of culture, including travel and tourism. Particularly since the invention of the camera we are able to capture what our eyes see.⁸² As in everyday life, we do not usually think about the smells of a place when we visit, unless we are making a different kind of trip, like gastronomic or wine tourism. Besides, as far as we know, there is no gadget⁸³ for private use capable of capturing what our nostrils smell, be it the scent of food, of the sea, of the trees, plants or flowers, or of the monuments that constitute a particular city. Language itself seems ill-equipped to describe the one trillion smells our noses can distinguish.

When Walter Benjamin and Asja Lacin wrote about Naples in 1924, not once did they mention its smells. The city is always described using sight: 'For anyone who is blind to forms sees little here'. Poverty, misery, 'dirty courtyards', 'dirty stairs' and the 'foolish fear of being cheated' complete the picture.⁸⁴ Curiously, for a text called

⁷⁸ Italo Pardo, *op. cit.*; p. 50.

⁷⁹ Isaia Sales, 'Chiesa e Mafie', *Annuario Kainos*, 2, 2014; pp. 115-144.

⁸⁰ *ibid.*

⁸¹ Kevin Low, *op. cit.*; p. 9

⁸² First there were postcards (created by professional photographers and printers); then with mass diffusion of cameras, we all took our own pictures.

⁸³ We could talk of sound too. Sound, much like smell, has been marginalized. Simmel stated that hearing is a passive sense, without autonomy, contrary to what happens with sight (Georg Simmel, 1981, in Carlos Fortuna, 'Paisagens Sonoras. Sonoridades e ambientes sociais urbanos', in *idem, Identidades, Percursos, Paisagens Culturais. Estudos sociológicos de cultura urbana*, Celta Editora, 1999). However, it is possible to record the sounds of a place. For a proposal on the soundscapes of two Portuguese cities, Coimbra and Oporto, cf. Casaleiro and Quintela (2008), *As paisagens sonoras dos Centros Históricos de Coimbra e do Porto: um exercício de escuta*. In <http://www.aps.pt/vicongresso/pdfs/127.pdf>.

⁸⁴ Walter Benjamin and Asja Lacin, *op. cit.*; pp 164-6.

Imagining Naples: The Senses of the City, Lesley Caldwell also ignores smell in analysing two movies⁸⁵ by the Italian director Mario Martone, both set in Naples. The author writes, in fact, that 'Language, cityscapes, noise, bodies, the presence of death ... reveal, at the same time, a regional city of the South, and an Italian city like no other'.⁸⁶ Each of these texts reveals the primacy of vision, sight, as *the* sense. They continue the tradition of genteel travellers, from Mark Twain to Canadian bloggers, who see Naples in all its beauty, from a privileged vantage point, but who are repulsed by the smell of garbage, illegality and *memento mori: Vedi Napoli e poi mori*.

In contrast to the outsiders' visual viewpoint and olfactory repulsion, the Neapolitans navigate their city—its places, seasons and quotidian rhythms—by smell as much as by sight. Smells that escape from kitchens and homes illustrate that smell is unbounded, while it nonetheless defines places. Smell, though unruly, organises time. Here is a form of regulation that transcends any formal rules or hierarchical jurisdiction. This corporeal and sensuous *régulation inconsciente* can be understood in Taylor's dialogical terms, or in relation to Bourdieu's *habitus*.⁸⁷

Legal outsiders, relying on sight like good reasoning positivists, observe regularities in behaviour which they can take to indicate the presence of laws. Insiders, however, act on rules as they are understood from within their own bodies. The insiders of our study, anchoring their (unconscious) rule-following in bodily *habitus*, negotiate daily life at the edges of formal and informal law. Their judgements are more finely tuned to an interlegality in between the clean order of absolute legality and the stench of garbage which enriches the Camorra. Neapolitans can smell the rotting garbage and the metaphorical stench of organised crime and death. Yet these realities constitute a background to everyday life: exhaust fumes and shoddy oil; the daily, weekly and annual round of meals and seasons, feasts and festivals, that make up their own smellscapes. The Camorra occupies a distinct *abbient*, an environment as removed from quotidian survival as is the distant edifice of rules making up state law.⁸⁸

We have moved beyond the Enlightenment's lines of sight and monolithic view of law to appreciate that interlegality is inhabited by bodies and experienced in smells. If sight is linked to rules (the Cartesian grids that inform laws of perspective, maps or legal systems), then smell promotes judgement of the sort needed to negotiate an ingenious and prudent passage through life. We have come back to Gracián's Baroque ontology where the nose is the organ of judgement, and taste is based in the olfactory,⁸⁹ where *prudencia* and an *ingenio inventivo* are the aims of education and self-formation. Naples is, to this day, a laboratory of the Baroque:⁹⁰ a living challenge to Enlightenment absolutism, colonialism and monolithic jurisprudence.

⁸⁵ *Morte di un matematico napoletano* and *L'amore molesto*. Smell is, of course, even harder to portray in cinematic language.

⁸⁶ Lesley Caldwell, 'Imagining Naples: The Senses of the City', in G. Bridge and S. Watson (eds) *The New Blackwell Companion to the City*, Blackwell Publishing, 2011; p. 345.

⁸⁷ Charles Taylor, *op. cit.*; p. 171; Pierre Bourdieu, *op. cit.*; p. 166.

⁸⁸ Italo Pardo, *op. cit.*; p. 51.

⁸⁹ Fernando Pérez Herranz, *op. cit.*; p. 69.

⁹⁰ Victoria Henshaw claims in a *New Scientist* opinion (*op. cit.* p. 28) that in modern western cities 'the smellscapes of city streets are turning into sterilized clones of one another'.

A conversation about law and smell between Sissel Tolaas and Andreas Pretzell

4 June 2014, London

The materiality of smell: air, law and language

Danilo:¹ Hello and welcome. Let us start by trying to define law and smell in a general sense. First, how does Sissel view or sense law? And what do senses mean for law? How is the law constructed through the senses, and does it affect the senses?

Sissel: As a chemist, I can only say that smell is the first and the most prime sense of finding out about your surrounding. The processing of information around the other, or the city or whatever spatial context you should be in, starts with the nose. The nose knows long before both eyes and ears start the process. Smell goes to the subconscious in two synopsises, triggers emotion and constructs consciousness. This is essential because in this part of the world we don't consider these facts. We primarily operate after the look of things, but subconsciously we make decisions that can have bigger consequences. I think it's very tricky, but nevertheless, we live in a world that is sanitised, deodorised, homogenised, for your kind of protection. And by doing all that hard work, you improve a lot of important information about situations. We live in a world where that type of information could be very important for understanding these specific situations.

So, my work is primarily to show that type of reality. Replicate smells from reality, de-contextualise it and ask questions: Why not we tolerate it? Why should we tolerate it? Why should it be there, as kind of, you know, as a very important element? We have hardware called the body and we have software called the senses, and we primarily use a couple of them. All these tools are for free. What could happen if we start to use them more efficiently for the issue of being tolerant towards each other? What consequences could it have for, let us say, law and law making? If only we would integrate the nose and the smell as part of the way of understanding, and communicating, and navigating through society. That is not the case, at least not in this part of the world. There are cultures where it is very important. I have been working on a project at Max Planck Institute of Psycholinguistics about some cultures in South East Asia. And it is fantastic to see the tolerance that these people have towards each other... It's unbelievable. And it comes out through language. We operate with two terms: good or bad. What does it

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** Andreas Pretzell is a German national who following completion of his law degree (LL.B and LL.M) was called to the Bar in October 1997. He has been practicing immigration, nationality and asylum law since 1999, and is an accredited mediator and advocacy skills trainer at Middle Temple.

¹ Danilo Mandić's role is to facilitate the dialogue between Sissel Tolaas and Andreas Pretzell.

mean? Is too abstract. What are the terms here? What are the micro units you define after? Two words. So 'good' means you are on the right side, 'bad' on the wrong side. So in those cultures there is a wide vocabulary that leads to language where smell is possible, and you have much more possibilities to go beyond the kind of hedonic, we call it in the science of smell, which is immediate judging like black and white.² I don't know, there are many issues. Andreas, what do you think?

Andreas: I have had many opportunities to think about this topic after Sissel first introduced me to it. I have tried to think how best to approach it. I think from an abstract perspective, law obviously is not as a concept linked to smell, but because of the way law operates and because of how law is shaped by human beings and because as a lawyer I practice law, which means I go to a library and research it. I look at books that emanate smells, I interact with individuals who are other lawyers, clients and judges, and I go to buildings in London, very old buildings like the Royal Courts of Justice, or the Inns of Court, in my case Middle Temple, and the Hall of Middle Temple.

There are clear signs of smells all around us, and I cannot say that those smells in any way shape or form, define the law, but they are inextricably linked to the law, because, we are all human beings, and those human beings interact. And that is where from my perspective, both in the sense of the attire that we wear, the wigs, the gowns, and from the perspective of the people we meet, from all over the world, different cultural backgrounds, different languages, different religions, where smells definitely come in and play what I think is a major role. And that is because as human beings we engage with each other and within less than a second, we form an opinion about the person we are sitting opposite and we are engaging with. And it is a biological trigger that is built in us. And we make that judgment by looking at people, by gauging their body language, eye contact is very important, we listen to what they say, how they say it, but we also take in their smell and their body odour.

Sissel: But that process happens mostly subconsciously.

Andreas: Yes, absolutely. But I think it plays a significant role in determining the outcome of people's hearings, appeals, it does. And judges are meant to not have regard to that, we are meant to disassociate ourselves and be impartial, fair, regardless of the particular circumstances.

Danilo: Almost senseless.

Andreas: Yes, almost senseless, you are absolutely right. We are always encouraged to say I do not treat you any differently from anyone else that I meet. But that is not the reality.

Sissel: Yes, especially when you deal with people, I guess.

² A hedonic scale test is used by sensory professionals to test and measure the acceptability of food, smell, and products in question. The scale provides 9-point scale with nuanced verbal anchors ranging from Like Extremely to Dislike Extremely. <http://www.sensorysociety.org/knowledge/sspwiki/Pages/The%209-point%20Hedonic%20Scale.aspx>

Andreas: Yes, I think from my own perspective I am involved in international human rights, I specialise in victims of torture and both male and female rape victims from a number of countries. And in that context it is quite striking how quick a judgment call you can make, just by taking in how somebody presents himself or herself to you.

Sissel: Interesting.

Andreas: And the smell of fear or anguish, or anxiety, or suffering is something that I have subconsciously and then consciously experienced on many, many occasions. And it is one of the ways in which the truth in the context of what has happened to somebody in the past, always comes out, because it cannot be suppressed and cannot be faked.

Sissel: Interesting. If you come up with issues like post-traumatic stress, or let's say, you take a situation like in the case of what Andreas is doing, when things start to go wrong. What was the moment of torture, what was the physical condition of a torture, there must have been a smell. And if you replicate that very moment when things started to go wrong, and when that specific thing had happened, the reaction of the people is amazing. I did a case study with soldiers that had been in Iraq. We developed several smells that helped narrate the stories told by those soldiers and tested with psychiatrists and psychologists the reaction they had when confronting those smells. After 25 different attempts, we decided to focus on one of the smells, and try to train the person's awareness to turn it in something positive. This kind of methods of finding out the truth about the situation of what happened I think is very interesting to also discuss.

Danilo: In the end, you have managed to find the smell that would help them, or you were capable to find the smell of the actual fear?

Sissel: Yes. The moment when you were tortured, when the trauma started to happen. This has nothing to do with this topic, but I think that the smell per se as a topical conversation is what I would like to maybe focus on...

Danilo: Andreas gave an aspect that is material in a sense of law – the institution of law, the gowns, the actual practice – there is this kind of materiality that is related with law apart of what law represents abstractly in a sense. Shall we maybe address this kind of aspect where law or, to put it better, how law defines boundaries in a context of smell. How it affects, whether law is capable to control and erect walls around in order to kind of distance unwelcoming smell or there is no such possibility? Whether law is capable or is allowed to perform this kind of activity outside the frame of its confinement in a way? Of course, we can always discuss that there is nothing outside the law, in a way, everything is included even that aspect that is negative is still part of the law, because the law...

Sissel: I don't know if you operate the negative or positive, do you? What kind of terms you are using when you speak, let us say, if it should be, when the smell should be the issue?

Andreas: Mostly by way preventing the spread of smells that are unwanted. But in order to do that, you need to go back to when smells started to become relevant in these terms.

Sissel: Yes, exactly.

Andreas: And I am not a legal historian and should add I am not a specialist in this field, but I would imagine that with the industrial revolution and the large-scale manufacturer of products, smells were necessarily something that infringed on people's lives more than they had done before. If you look at London historically, people lived in crowded conditions, there were butchers, tanners, all kinds of professions, that lived in close proximity, on a small economic scale to others, whether is residential or other businesses, markets. And in fact, because of the absence of cars, horses would be running around, chickens, pigs, and there were excrement everywhere and the tolerance that people had for smells was much much higher than it is in a modern society, which is what Sissel talked about earlier – she said the sanitisation of people's lives and therefore their tolerance for smell is much reduced. So when you had industrial revolution and the control of large business and the smells that emanate from them you started to get legislation. And the current version of legislation is environmental protection legislation, which tells you that you, if you as a business cause a nuisance, a public nuisance, then if enough people are disturbed by it, and these are private individuals who live around businesses, for example, they can raise a complaint. And the court has the power to intervene when the smells that emanate from businesses, so water, sewage, treatment plants, things like that, I can think of agricultural businesses, large scale agricultural farming where the smell from animals depending on the wind direction will impact on residential properties, where those smells can be controlled if they are or amount to a public nuisance. And that is where law directly affects the amount of smell that comes out of certain premises. For example, just one example, we can also talk about the 2007 legislation that prevented cigarettes from being smoked in public places or in bars or restaurants. This is another example of the law reaching into the individual lives and affecting how smells are allowed. In private homes cigarettes can be smoked, there is no issue there, but in public places it's not allowed anymore. There are many examples that I could mention.

Sissel: Yes, exactly. But then again, as we said earlier, there is a cultural influence on smell. How we define smell and the tolerance of smell are essential too. Primarily in this part of the world, Europe and America, the Anglo-Saxon law system operates in terms of bad smell and good smell. Having said that, how can you measure these things, because it is not like measuring sound in decibels with limits. With smell it is a matter of personal judgment. This is too smelly. This is too bad, too good...or whatever. This issue never gets any attention. I think what is necessary is a re-definition of good or bad [Sissel's [NASALO](#) project]. Primarily these expressions are made by the commercial world, they make smell, they come on the market and their purpose is to smell good. They have evaluation groups, white Caucasian middle class Europeans, and that becomes a rule for the entire world. Intolerance towards real smell has gone to such excess. It is absurd. What justifies cleaning your floor with a smell of Granny Smith (apple) for god's sake. Really, it's extreme.

I did a project in Detroit where there was a sewage plant in the middle of the city. A lot of people loved that smell, not loved, but they loved to have the sewage as a smell of the sewage, rather than having it covered up with a smell of cupcakes. But they were so confused: people who didn't care believed there was a cupcake factory, but nobody really cared to find out. I went, I investigated into this, the city nearly forbade me to do the project, because I found out there is no cupcake factory. That shows again how the issue of smell is just floating around and whoever wants to care about it can make whatever rule they want, at least that is a reality, and what law does with it, that is another issue. But I think there is not much difference there, it is good or bad, it depends on the terms that you are using. But then, we are again touching issues of racism, discrimination, which I think are very important.

Smell as memory, evidence and division

Sissel: I have been asked by FBI, by German police, by Danish police, to train the policemen for acquiring more sophisticated noses, to be more tolerant with their noses and not just quickly decide good or bad. Interesting, I think it is going to change, and I am sure this could have an influence on the entire law system.

Andreas: In terms of criminal law, let us take the example of the police using their stop and search powers, to show why should somebody be stopped and searched. I am not a criminal practitioner but I know that from having colleagues that you need to have a reason to stop people. So imagine us walking into in the Middle Temple, as we did towards the hall, because I wanted to show Sissel the hall before coming here, and we smelled pot, cannabis. Now to some people that smells delicious, to other people is offensive. But regardless of that, if you have been following the papers here in England, for years now there has been outcry over certain minorities. They might not even be described anymore as minorities, but they are being stopped and searched disproportionately by the police, so if you are black and not Caucasian, you are more likely to be stopped than if you are white. If you are Muslim, you are more likely to be stopped because of the perception that you present a threat, simply by virtue of the colour of your skin. And this is why police dogs are so interesting because you cannot accuse a police dog of racism. You cannot accuse a police dog for discrimination, because all dog wants to do with its very fine nose is to do its job and find the offensive substance. Or we can focus on money laundering: there are dogs that are trained to detect the smell of cash.

Sissel: And medicine...

Andreas: Yes, where you see them on the airport and they are so cute they sit in front of you look up, oh I really want to pat you on the head. The sign that they are giving is that you have got something on you that you should not have, and the dogs can smell that. Speaking of which, I read an article from the United States, from Colorado, which shows how people react differently to cannabis. Well Colorado, interestingly does not have a prohibition for cannabis, but shop owners who have families frequenting their shops, have put up signs in a certain town in Colorado, saying if you are cannabis smoker and you smell of cannabis you may not come in to

this store because you are setting a bad example for the children in this store. And we have many customers who are children, families with children, therefore please don't come in here. That is not discrimination, it is not based on your gender, it is not based on your race, and it is simply based on the shop owner saying: 'because of the smell you permeate I do not want you in my shop'. It is very interesting.

Sissel: In Asia they have the durian. Have you heard of it? Durian is this fruit that emanates a smell like rotten shoes, cheese, whatever. All over Thailand you have big signs: if you have durian, please do not enter this hotel. But it is a food, people love it, so it is very interesting.

Andreas: We can also speak about body odour. And I think that is another interesting aspect because in the context of discrimination you can imagine many workplaces in London, which is multicultural society, where there is bad ventilation, what people eat, and what people secrete through their pores, is very individual but it is also determined by your ethnic origin and by your cultural beliefs. So what disturbs or offends the nose of a white Caucasian, in the context if somebody is from Pakistan, is very different to what would offend somebody, if at all, from Pakistan the other way round. And I can imagine many scenarios where if the owner of the business decided to take action because someone smelled the wrong way and they would be guilty of blatant discrimination and they will be taken to court. And that is where the Law interferes on behalf of individuals who cannot help the way they smell. Equally, if you are religiously observant and you have a particular faith, where washing is religious act and it is only done occasionally, the fact that you have a stronger body odour should not be held against you. That would be a discrimination against your religious beliefs. Again the Law would intervene to protect such an individual.

Sissel: I think that smells open up new issues related to language, the lack of language, and lack of precise terminology to describe and speak about smell.³ As soon as you ask people to describe any smell, people get perplexed and insecure. So I think in the end that if we have a society where the first year of school curriculum and chemistry of smell and nose would be as important as to look and to read – the world would look different. We have kids, and we would have grown up that smell fear, like you can, if you train your nose you can become able to smell anxiety. Just like in chemistry you can see that the structure of the tear related to happiness looks completely different from the structure of the tear related to unhappiness.

The same is with the smell of anxiety and happiness. If we had a little bit more of a sensual kind of education a lot of issues could be much more easily approached and solved. When it comes to smells, it is tricky because, as we said, there is a lack of terminology in language. In our commercial world, we communicate smell through perfume ads. It would be a dream to have a smell education. The more I look into cultures where smell is important for a shared notion of well-being, the more I find a terminology that is more developed and tolerant.

³ Tolaas, Sissel 'An alphabet for the nose' <http://www.researchcatalogue.net/view/?weave=1036>

Andreas: Do you ever have requests for creating environments, which are smell neutral? I would love to know because I find it fascinating that wherever I go, in shops, we are inundated with smells that are supposed to entice us to buy, I believe I have very relatively sensitive nose, and I just hate that kind of environment.

Sissel: Listen, there is no place with smell neutrality, not even the moon. Every day you breathe 24,000 times (23 750 something like that), you move 12,7 cubic meters of air every day with your system. Every nanosecond, every whatever unit of that you inhale millions of molecules. And some of them are not even identified by your 300 to 400 receptors. But there is nowhere with no smell...

Andreas: Because the reason I am asking to...

Sissel: What does neutral mean? Again, it is another word, bad/good, neutral, nice, fine, huh, you know what I mean, clichés. Neutral, accept it, there is a smell, there is a colour, there is temperature, there is touch, it is part of it, it is part of the body, for the body is there for a purpose, to make you understand the situation. But the aspect of smell had been manipulated because it is so efficient for psychology and manipulation concern, you immediately hope to make people buy and get feel better and etc., for commercial reasons.

Andreas: I believe that there were deodorants, this is just from advertising, which suppressed smell.

Sissel: There are, odour.

Andreas: So odour suppressants, that is why and where I was coming from, I was asking whether that is...

Sissel: But that is it...depression. It covers up and gives something new across, which is even worse. Everything you put on the body, first starting point is your own body smell, which is actually as your fingerprint and then you just add on the top, you think you make it neutral, maybe for yourself you make it neutral, but for the rest of your surrounding is maybe even worse. You highlight molecules on your skin, which you did not even know, so the kind of issue of chemistry here is quite essential. Chemical substance of your own body...

Danilo: I would like to return now to something what Sissel was referring to. It seems we are unable to really express, identify, not even define, or interpret smells. Law being a discipline, but also a practice or entity that is based on language, has the text as an initial prerequisite in order for it to be capable to operate, function and order. Do you think law can be able to really change the terminology or to find a way to explicate different smells, or it will always remain faithful to its presupposition of 'being neutral', and thus unwilling to get engaged in this kind of language games?

Andreas: I think you are right about that. The function of the law is to regulate the way society operates and it has to find a common denominator in order to do that. The scales of justice show you that the purposes to balance competing interests and

if that is the heart of what law is trying to achieve, to regulate, to mediate between parties that are not in agreement, whether one of the parties is the state and the other individual, or whether it is private individuals, it doesn't really matter in that context. Then you have an understanding of what the function, the basic function of law in most societies is.

In the context of nuisance, the tort of nuisance and smells, what for example the Supreme Court now, the highest court in this country has said about how it would go about regulating or adjudicating a problem that arises in that context. And the way the law it does it in common law, which is to be distinguished from the primary legislation, the statutory law, is: they say we put ourselves in the position of the objective reasonable man and this is not an abstract concept, this is something that we look at and we say, for example in the context of smell nuisance, somebody who lives in Belgravia may be a different objective reasonable man to someone who is living in Bermondsey. If you are going to say that you have grown up close to a fish or meat market then you are going to be a different objective reasonable individual than if you have grown up in an area where there are no such markets.

And your sense of smell and your tolerances and your experiences of smell are different. So the way the law does it goes outside of its shell, the judge says I am not myself now I am going to pretend to be an objective third party from this particular part of the country, or London, and I will then try to think outside of myself as to what I would consider to be reasonable in determining the dispute over smell at its basic level. And what we discussed earlier Sissel and I, it is very difficult to achieve that because of course every single person has a different sense of smell, different preferences as to what smells they like or dislike, and then also different levels of tolerance. Depending on their personal experience and the way they were born with this instrument, this great instrument.

Sissel: Yes, it is very tricky.

Danilo: Is there any initiative to preview this kind of sensory education?

Sissel: What I was trying to say earlier was, the de-contextualisation of a situation. If I bring you the battlefield here in the bottle, that is my proof that it happened, that specific smell, that specific context, someone got killed, someone got raped, etc. – as a judge, how would you relate to that proof?

Andreas: As a judge?

Sissel: Yes [Laughing].

Andreas: Again, in my field, and I am going limit to my field, what I said earlier was about making a connection with another human being. That is the first aspect, on a human level, using all the senses we gauge whether somebody is who they say they are, we all do it subconsciously. The next thing that happens is through people's actions, their body language, what they say, how they say it and also how they smell, subconsciously we determine as lawyers and as judges, and it is not our

opinion, is the law that matters, it is the opinion of the judges that matters – what the truth is. For instance I have a current client, an Iranian girl with her mother who ran away from her father, had tried to commit suicide on several occasions whilst in southern Iran and described in Court to a judge, who initially was not interested in her story, over ten minutes how she saw as a four year old her father beating first her mother, and then when he saw she was watching, her. No judge, in my experience, could have seen this woman, heard her and sensed what she was going through and not believe that that was the ultimate truth. And the consequence of that, hopefully, cause the case is not concluded, will be that she will be granted refugee status. So, on a very simple level that is the power...

Sissel: But do you think that in a situation like that, a concrete case, if there would have been a smell, could have brought a message across in a more 3D way? Could it be a proof taken seriously by a judge?

Andreas: We are living something as an experience. You touched upon when you were talking about post-traumatic stress disorder. We are living something and then gauging whether what has been what we lived is genuine. It is something that I can conceive as being a valid tool, though expert evidence. I have been involved in cases similar to yours, where there is a physical manifestation of an event that was relived. I had a client from Turkey who was reliving watching family members being thrown out of a helicopter over southeastern Turkey, by the army, by the Turkish army, because he was Kurdish. And every time he relived it, he got epileptic style fits. And the medical foundation caring for the victims of torture, they looked after him for three years. I took him to court and he was asked to relive this experience, to recount what he was going through, what he saw, and he immediately suffered a fit.

Sissel: Just by the wording...

Andreas: It is the physical manifestation of what he was reliving, and the question for the medical expert was, was he reliving that because it happened or did he have an independent medical problem like epilepsy, brought about by something else? And their conclusion was that he was reliving what he had seen. Eventually that got him refugee status. Not through smell, but through a physical manifestation of what his experiences had been. And I can see an application for that...

Sissel: I think so too, absolutely.

Andreas: I think is a very good idea.

Sissel: Absolutely, it's incredible, you see an immediate reaction, immediately generates a lot of emotion, because smell is so emotional, and if you do not get the language at least you get the psychological reaction.

Andreas: You did raise the question of the use and abuse of smell and we were just talking about victims of torture, and smell as torture or torture through smell. Once again from a perspective of what I do, there are many cultures in which certain

forms of torture are accepted, practiced and I have one example of one country, Sri Lanka, in which there was a long conflict between the Tamils and Sinhalese, the majority population. And there the form of torture always used was to suspend somebody from above and have them hanging over a fire in which that would burn chillies. So the obvious implication is not only the heat impact, but also the smoke inhalation and the smell of the chilly, not only going into your eyes, but also seriously impacting your airways, including the nose. And that was a very very common and well-known form of deliberate torture. And one that is obviously invisible to the eye, which is often one of the motives why such tortures are employed.

Sissel: Gas...

Andreas: Exactly. Which takes me back to you recreating this battlefield with First World War of mustard gas⁴...

Sissel: Dead horses, bodies...

Andreas: Dead horses, bodies...it is very difficult to determine the truth when somebody says to you that you have to inhale this. When people ask whether you have been treated this way, they want to see a physical manifestation. It's like saying, because I cannot see falaka,⁵ which is a beating of the soles of the feet, because it causes a nerve damage, but does not leave a physical residue, I don't believe that this has happened to you.

Sissel: A smell memory.

Andreas: It is very difficult, we are very sceptical as human beings, if there is no physical manifestation or trace of what we say has happened.

Sissel: Smell memory is very efficient, 100% after one year, but vision is 30% after three months. I did a project in South Korea, [MIT 'Fear Sweat' project](http://en.wikipedia.org/wiki/MIT_'Fear_Sweat'_project) with fear in men. In context of exhibiting the [project](#), an old man came over, he was 90-95 and he started to cry in front of the wall, in front of one of the guys (a soldier, as part of the installation). The application I used to display the project is that the sweat is micro-encapsulated, it is in nano-units, and you touch the surface of the wall, so the wall becomes masses of people, but invisible. You touch the wall and the wall starts to breathe body sweat from an anxious man. So this guy was standing in front of this wall and he started to cry. And he told me: 'yes, this reminds me of the Korean War', and since then he had not really smelled bodies, as he lived in a skyscraper in a sterilised clean part of Seoul. He burst into tears in front of this guy, and that was quite random as that was not even a soldier he knew, it was just body sweat and it was quite amazing. This is how smell can be used to trigger negative memories. And with the knowledge I have at my disposal, there are possibilities to really correctly

⁴ http://en.wikipedia.org/wiki/Mustard_gas

⁵ http://en.wikipedia.org/wiki/Foot_whipping

create a smell, reproduce it, de-contextualise it, and listen – to recreate as situation so as to elicit comments for the protagonists. I think that are sort of issues that should be...

Danilo: In the context of what Sissel is saying, I wonder if there is a possibility for law to learn through smell. Not only in the context of being a material proof for evidence, but in a sense that law is considered ocularcentric, based on the visual. Justice is blinded in order to do justice, but law is still dependent on the visual. Whether in a context of opening the sensory possibilities of Law, now on a complete abstract level, there is a possibility for law to learn through these sensory capacities?

Andreas: I think law is already doing so. Talking about criminal law, we discussed earlier about dogs that can sniff out drugs or money. Police dogs follow criminals who committed a criminal act, because they can smell adrenaline, correct me if I am wrong Sissel.

And if you engage the law at its primary level, the prevention of crime or detection of crime, which gets passed on from police work to crown prosecution to then, to the courts. Then at that basic level smell plays a massive role, because in order to detect that a crime has been committed, the dog will chase the adrenalin from the crime scene and therefore find the person who doesn't even have to speak, they don't even have to admit, they don't have to say anything. They are the ones who've been running away from a crime scene, there are maybe a number of explanation as to why they would do that, but the principal inference that you will draw is because it is likely that they have committed a crime. So, smell already plays an important part at that very primary level, before we even get to the law in the sense we get to the court, but you get to the law because the law defines what a criminal offense is. In certain countries law defines running away from a crime scene, abandoning a crime scene as a crime. In that sense, smell already has played or does play an important part. Can devices be invented – like Sissel I am sure is able to conceive – that would be able to detect whether one is guilty or not, according to the smell that emanates from them? I don't know, it is very interesting concept.

Sissel: I wanted to ask something Andreas, did you ever have a blind client?

Andreas: Yes [Hesitatingly].

Sissel: And how did that person explain the case?

Andreas: Very very interesting. They obviously use other senses and if you make allowance for that, then it is quite amazing what they can say and what they can come up with. I am hesitating because I have not just been with the blind client, but with family members who have been with the blind client, and who have supplemented what they were able to say. And we also have in my jurisdiction, we have a blind judge.

Sissel: Oh really! [With fascination]

Andreas: Which I find absolutely fascinating, and he is a very interesting person. His memory is absolutely incredible. His wife reads all the files to him the night before he comes to court. And then when you engage with him about the case, he will say – No, that is not true because the question 156 of the interviews says this, and he is right, you have just told him something that is not correct, and he is able to correct you, because his memory from having heard the evidence, not read it, is perfect, it is quite incredible, he is a real character. But there is obviously a danger that that judge is unable to use the other sense that is very important to gauge whether somebody is telling the truth, because they cannot gauge body language and they cannot look them in the eye...

Sissel: But he should be the specialist of the smell issues.

Andreas: But that is all what his hears and smell compensate for it, I don't know, I would have to ask him, I would be fascinated to...

Danilo: There must be, the pitch, the way in which people are saying, the trembling of the voice, probably tells a lot.

Sissel: In the future we will have devices that you carry with you as you have your iPhone even but there will be extra device that you carry with you to catch a moment that you want to be remembered.

Danilo: In the context of smell? Because we already have that with sound and the visual...

Sissel: I am doing a start up now with Global Institute of Micro Electronics, at MIT. The first device we will have is to detect that there is a smell at all for people who cannot smell – anosmia. The second is to collect a smell and build up a database consisting of 20,000 molecules so that you can send a message and immediately reproduce the smell. So here is the evidence, a proof – I was there, it is a proof that I touched that guy, or he touched me... What I mean there is so much in the air that we will also have an influence for...

Andreas: And there must be a therapeutic application of that, because of course, childhood memories, smells that we cannot even identify anymore. When we walk pass them it takes us back, it is a comfort zone. Which is why we always talk about comfort food, because we have the smells. I love the idea of giving comfort to people in environments simply by generating a smell that would make them feel happy.

Sissel: I do that all the time, Andreas. I have a client that ordered grass from me, a smell of grass. He is like walking around and smelling of grass, especially in winter in Germany and its like wow. And I bump into him on several occasions, and how does it feel to be a grass in the winter, [laughing] it is quite something.

Danilo: Thank you very much for engaging in this project.

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