

Law and the Odour-ing of Order: Smell, Air and the Public Forum

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In everyday sites of social governance, such as those discussed by Sloterdijk,¹ Philippopoulos-Mihalopoulos,² and Delaney,³ law's presence is amorphous, diffuse, and affected by non-legal phenomena.⁴ Air is one such place/atmosphere/environment/nomosphere, as smell found in air becomes a legal phenomenon in which the public asserts nasally normative frameworks of community. As air that stinks or as air that is pleasingly aromatic, air

¹ Peter Sloterdijk, 'Airquakes', in *Environment and Planning D: Society and Space* 27, no. 1 (2009): 41–57.

² Andreas Philippopoulos-Mihalopoulos, 'Atmospheres of Law: Senses, Affects, Lawscapes', in *Emotion, Space and Society* 7 (2012): 35–44.

³ David Delaney, *Nomospheric Investigations: The Spatial, The Legal and the Pragmatics of World-Making* (New York: Routledge/Glass House Books, 2010).

⁴ I would like to express my great appreciation to Andreas Philippopoulos-Mihalopoulos for his infectious enthusiasm in my project, his encouragement of my ideas, and his warm and generous spirit of collegiality.

is the public forum and legal environment shaped by a smell's positive or negative associations. Often the source of smell may be distanced from the smell itself and as such, that smell becomes a legal entity all of its own. In this way, smell becomes independent from the smeller as bodies that would normally do the smelling, or are the subject of being smelled, may be distanced from the smell itself. In this way, smell acquires a non-human quality found in its production, existence, and acceptance. In these atmospheres and environments of law, smell exists in the nomosphere as an autonomous phenomenon interpreted by law as a source of regulability, normativity, and positivist social order. Thus, the smelling capacity of law marginalises those who digress from dominant social expectations as law's olfactory abilities determine if a smell is condoned, appreciated, or offensive. Hence, smell becomes a manufactured legal materiality as it serves as the basis for either the acceptance of social norms or deviance from them.

Yet, smell does not always happen in accordance with the human nose. After all, not all humans are either able to smell or be smelled. Additionally, smell often wafts from non-human sources. The ways in which smell legally characterises spaces and places as the sensory is limited in its interpretive positionality as the authority over smell is itself subject to further interpretation. In this way, smell emerges as a concept unto its own. Whether as bouquet or offense, smell is subjective in its production as well as its reception. So, while olfactory-based jurisprudence can often just simply stink (as this chapter will assert), the relationship of smell to material governance in legal spaces constitutively perpetuates notions of the

social order in settings of public forum through regulatory frameworks of normativity and deviance.

This chapter considers the legal materiality of smell as a technology of law that operates beyond the nose. Smell is either the fragrance of everyday life (think: the wafting of perfume or cologne that is pleasing to the nose) or a stench that pollutes (think: carcinogenic car exhaust fumes clouding an otherwise sunny day). Often an anonymous phenomenon, smell exists in the space between the smeller and the source of that smell. The air we breathe that is host to an array of smells, may originate from human bodies, but also perhaps from chemicals, cars, or even gases from an active volcano. Smell is one of those complex phenomena that is conceptual as well as tangible, active as well as passive. As a noun, smell is odour, namely as air that generates meaning through the presence or absence of aromatic particles. As a verb, smell (or smelling) is the nasally interpretive act of normatively engaging with the social order and the public forum. As an adjective, smelly (fragrant/stinky/neutral) sustains a legal technology by inviting judgment and often consequence.

Andreas Philippopoulos-Mihalopoulos⁵ describes the lawscape as an environment or atmosphere as ‘the fusion of space and normativity’. Normativity becomes the uniformity of expectation in which smell conveys lawful or unlawful activity. In his depiction of urban environments, Philippopoulos-Mihalopoulos describes ‘sites of sensory extremes’ in which ‘the normativity of the lawscape becomes obvious once one scratches the surface

⁵ Philippopoulos-Mihalopoulos, ‘Atmospheres of Law’, 35.

and sniffs'.⁶ By scratching and sniffing the surface of the landscape, the normativity of scents that are positively received, smelled, and/or produced construct the notion of reasonable in places with a public understanding of air. 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-1989.⁷ 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 legitimised by various smells.'⁸ 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 localised knowledge create norms and standards. In the American contexts examined in this chapter, 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.⁹

⁶ Ibid.

⁷ Martyna Sliwa and Kathleen Riach, 'Making Scents of Transition: Smellscapes and the Everyday in "Old" and "New" Urban Poland', *Urban Studies* 49, no. 1 (2012): 23–41.

⁸ Sliwa and Riach, 'Smellscapes', 28.

⁹ Thomas L. Dumm, *A Politics of the Ordinary* (New York: New York University Press, 1999).

Smellscape: Jurisdiction of the Nose

The public interpretation of smell evolves according to emerging stimuli, yet remains constant in its patrolling of disorder. This interpretation positions smell within the sensory lawscape in such a way as to both premise the nose but move beyond the limitations of individual olfaction. In a methodological approach to sensory history, Mark M. Smith distinguishes between 'the production and the consumption of the senses' with sensory production stemming from the contemporary reproduction of an originating context. Smith further articulates sensory history as to involve the 'role of the senses'¹⁰ in sculpting our experience and habits of thinking. He 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 characterisation was used to justify actions.'¹¹ Following Smith's approach, we can conceive of the role of smell in law as olfactory jurisprudence in which air becomes a normative legal medium for sensory management of that which is nasally sanctioned as reasonable in localised 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 rather *should* smell like, constitutes the

¹⁰ Mark M. Smith, 'Producing Sense, Consuming Sense, Making Sense: Perils and Prospects for Sensory History', *Journal of Social History* 40, no. 4 (2007): 841–858.

¹¹ *Ibid.*, 843.

nasal embodiment of power and authority. Additionally, the framework of community in such a sensory jurisdiction determines the availability of membership as well as foundations for exclusion along the smell lines of public right. Therefore, that which is deemed reasonable is premised upon communal understandings of who belongs and who is shunned, as described by Robert Jütte in his historical examination of smell.¹² Jütte notes that in the eighteenth and nineteenth centuries, the social comprehension of smell was advanced for purposes of anti-Semitism and the ‘smelling-out’ of prostitutes and witches as such olfactory education was used for purposes of civilising. Other scents, such as urine or flowers, were taught as either positive or negative. Rural agricultural smells were distinguished from urban industrial smells, and wealthy smells were noticeably separate from the ‘stench of the poor.’¹³ Interestingly, the pungent smells of the body, such as the ‘anchovy-butter smell of the stinking whore’ were often reframed to have an aphrodisiac quality in ways that Corbin (as quoted by Jütte) discussed as a ‘discourse of social hygiene.’¹⁴ Therefore, the deoderisation of society was taught as originating in the nasal cavities of law, thus compelling the legal ‘olfactory imagination’ to construe of public space through normative associations with smell.¹⁵

However, such normative expectations associated with smell are paradoxical, as smell is individualistically and

¹² Robert Jütte, ‘The Sense of Smell in Historical Perspective’, *Sensory Perception: Mind and Matter*, ed. Friedrich G. Barth et al. (New York: Springer, 2012): 313–332.

¹³ *Ibid.*, 322.

¹⁴ *Ibid.*, 321–322.

¹⁵ *Ibid.*, 327.

subjectively interpretive. In this way, the public cannot be uniform in its abilities to smell (or not to smell) as many members of the public simply can't smell. Even when noses can smell, smell itself cannot be objectively determined. According to the Warwick Olfactory Research Group in the Department of Psychology at the University of Warwick,¹⁶ 'the inability to detect odours, anosmia, can cause profound psychological effects resulting in feelings of physical and social vulnerability and victimization' insofar as 'smell is a sense whose value seems to be only reappreciated after it is lost.'¹⁷ This olfactory disability limits an individuals' sense of belonging as 'odours are semiotic messages'¹⁸ 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 when framed by a non-anosmic public are premised upon smell.

Yet, determinations of smell seem to prevail in the sensory management of cultural and legal contexts. Meaning correlates with setting, as the notion of smellscape,¹⁹ or sensory geographies involving populated environments, asserts. Air serves as a legal medium involving public rights, private property assertions, and the nasally-driven contextualisation of community and nuisance. Through assertions of right, normativity of air and odour/order are effluent sources of socio-legal regulation of life more broadly (more specifically pertaining to an American

¹⁶ Steve Van Toller, 'Assessing the Impact of Anosmia: Review of a Questionnaire's Findings', *Chemical Senses* 24, no. 6 (1999): 705–712.

¹⁷ *Ibid.*, 705.

¹⁸ *Ibid.*, 711.

¹⁹ Sliwa and Raich, 'Smellscapes'.

context as examined by this author). The nose is used to distinguish legality from illegality, reasonableness from nuisance, and norm from deviance. In this way, the nose works to embody and instil 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 odour) as legal methods through which social governance and cultural normativity relate to local ordinances and other forms of olfactory-based regulations.

Beyond the Nose: Smell as Posthuman

However, the nose, whether anosmic or non-anosmic, has limited reach, particularly as posthumanist scholar Jannice Käll notes, 'the boundaries between human and non-human are always in flux.'²⁰ Jurisdiction of foul-smelling air has at one point been communicated by a smelling nose as offensive. Communication between multiple smelling noses interpreted this air as stinky. Consequently, stink in air takes on an almost objective quality, as smelling noses that communicate with one another normatively frame this otherwise subjective concept. If law, as an extension of community desires, sustains reasonable expectations of public airspace, then stinky air is culturally framed as unreasonable. Within law's purview according to the perception of corporate responsibility and law's duty to

²⁰ Jannice Käll, 'A Posthuman Data Subject? The Right to Be Forgotten and Beyond', *German Law Journal* 18, no. 5 (2017): 1145–1162.

protect public health (via the smell of air), foul smell, or stink, is aligned with malodorous activity.

As early as 1925, the *Yale Law Journal* discusses the ability to smell as within the allowable purview of legal decision-making by juries.²¹ 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’,²² 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.’²³ 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 like signalled a cultural norm that legal instruction of the jury ironically depended upon. In this way, through smell (and stink), law recognised, and even celebrated, its relevant foundations in cultural life.

However, even as the relationship between law and culture was recognised through jury instruction, the law itself did not celebrate smell for the cultural sake of smelling. In 1939, the *Virginia Law Review*²⁴ discussed the legal

²¹ ‘Criminal Law. Intoxication Liquors. Permitting Jury to Smell or Taste Liquor in Evidence’, *The Yale Law Journal* 35 (1925): 232–233.

²² *Ibid.*, 233.

²³ *Ibid.*, 232.

²⁴ C.J.S., ‘Injunctive Relief Against Sound, Smell, and Sight Nuisances, and the Doctrine of ‘Balance of Interests’’, *Virginia Law Review* 25 (1939): 465–473.

notion of smell as nuisance with relief through injunction that ‘becomes necessary to determine whether an obnoxious odor transgresses the bounds of reasonableness and becomes a nuisance.’²⁵ This justification for an injunction is related to public health and whether an odour is ‘injurious to health’ or if the odour 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.²⁶

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 are contextually predicated upon fluid notions of normativity. The characterisation of what is reasonable is of particular relevance to cultural normativity, for law, through the utterance of the judge in this case, recognised the degree of acceptability and cultural limitation as legal justification for sanctioning air that didn’t smell

²⁵ *Ibid.*, 470.

²⁶ *Ibid.*, 470.

good (read: legal). Through the framework of malodorous activity, smell is implicated as stink, and is no longer potentially neutral, but instead offensive to a legal framework of reasonableness.

If norms produce normativity,²⁷ then what is considered reasonable depends upon paradigms of epistemological influence over usage and application. Using Mariana Valverde's framework of administrative versus common knowledge,²⁸ we can consider the plight of recognising the drunk 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 behaviour when consuming alcohol. In this way, determining drunkenness becomes a legal, yet culturally subjective, even fluid task, which differs between individuals according to behaviour, speech patterns, movement, cultural stereotyping of ethnic appearance, as well as smell. However, as Valverde asserts, smell (in addition to the other qualifiers) is not a foolproof way to determine drunkenness, particularly as more formal indicators such as blood alcohol level and levels of alcohol in the breath legally exist. However, in cultural settings, the drunken stench may influence expectations of one who is within these reasonable parameters of normative alcohol consumption. Nonetheless, the odour

²⁷ Matthias Baier, 'Towards a Socio-legal Understanding of Normativity', in *Social and Legal Norms: Towards a Socio-legal Understanding of Normativity*, ed. Matthias Baier (London: Ashgate, 2013), 333–341.

²⁸ Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003).

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 encourages the sniffer to try and determine those who have had too much as beyond the realm of reasonableness. In the American context of smell-based regulation, the 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*,²⁹ the drug testing of high school athletes in public high school during school hours was found to be 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. While the smell of drunkenness might be somewhat unclear, the smell of marijuana is perhaps more distinct and recognisable. 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

²⁹ 515 U.S. 646 (1995).

detected.³⁰ 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, as 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 odours become 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 marijuana³¹ as well as varying definitions of drunkenness and alcohol consumption. Interestingly, as legal standards for marijuana become more expansive to include medical marijuana usage and even recreational use, the smell of illegality for law enforcement also shifts.³²

³⁰ Richard L. Doty, Thomas Wudarski, David A. Marshall, and Lloyd Hastings, 'Marijuana Odor Perception: Studies Modeled from Probable Cause Cases', *Law and Human Behavior* 28, no. 2 (2004): 223–233.

³¹ In the United States, the illegality of marijuana is challenged by evolving medical marijuana laws as well as by laws (in such states as Massachusetts) that fine rather than criminalise the possession of small amounts of the drug.

³² Katherine A. Carmon, 'Don't Act Like You Smell Pot (At Least, Not in the Fourth Circuit): Police-Created Exigent Circumstances in Fourth Amendment Jurisprudence', *North Carolina Law Review* 87, no. 2 (2009): 621–643.

However, in contrast to this case of ‘smells like teen spirit’,³³ 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 protections under the Fourth Amendment.³⁴ 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.’³⁵ This case characterises 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 contextualisation of place, authority, and belonging within the socio-legal milieu of rights, community, and the cultural normativity of order. The relationship between olfaction and law reveals the everyday (trans)formation of law through smell as a technology of law. 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.

³³ Nirvana, ‘Smells Like Teen Spirit’, *Nevermind*, 1991.

³⁴ *Florida v. Jardines* (569 U.S. __ (2013)).

³⁵ *Ibid.*

Air as Public Forum

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.’³⁶ 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.’³⁷ Here, the rights of the public were expressed through the presence of odour and the desire not to smell that odour. While the presence of noxious odours is indeed a public hazard, the idea that the public has the right not to smell offensive odours presents a cultural foundation on which to normatize what the air should smell like. In this case and others previous, law often favourably responds to cultural norms of sensory management.

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 community draws upon social and cultural resources for its scope of

³⁶ Sarah Favot, ‘Sriracha Hot Sauce Factory in Irwindale Raises Banner: “No Tear Gas Made Here”’ in *Pasadena Star-News*, 29 November 2013. <http://www.sgvtribune.com/business/20131129/sriracha-hot-sauce-factory-in-irwindale-raises-banner-no-tear-gas-made-here>

³⁷ Ibid.

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 with greater cultural impetus for odour as order. 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 ritualised facework of everyday life.'³⁸ 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).'³⁹

³⁸ Dennis D. Waskul and Phillip Vannini, 'Smell, Odor, and Somatic Work: Sense-Making and Sensory Management', *Social Psychology Quarterly* 71 (2008): 53–71.

³⁹ *Ibid.*, 53.

Jurisdiction through smell can be exercised through legal and cultural frameworks of regulatory knowledge that are tempered according to normative understandings 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 marginalises 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 rights extends beyond the body to that which the body can smell and receive those smells that bodies emit. Just as we don't experience smell equally, neither do we experience law or community equally.

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 characterisation 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 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 laws⁴⁰ 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 rights via the characterisation 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, the olfactory articulation of the public forum serves as the jurisprudential framework of stink by asserting notions of belonging, exclusion, and perceived deviance. These jurisdictional notions of power become real when smell is the cultural basis for law's determination of what is reasonable/unreasonable, legal/illegal,

⁴⁰ Constantine I. Vardavas et al. 'The Role of the Non-Smoker in Enforcing Smoke-Free Laws', *Journal of Public Health Policy* 32, no. 1 (2011): 46–59.

and appropriate/offensive. If visual jurisprudence⁴¹ is the process of seeing law, then olfactory jurisprudence is the idea of smelling law. Smelling law is therefore the ability of smell to generate constructions of community.

In 2009, Honolulu City Councilman Rod Tam co-sponsored a bill that would make it illegal to 'bring onto transit property odours that unreasonably disturb others or interfere with their use of the transit system, whether such odours arise from one's person, clothes, articles, accompanying animal or any other source.'⁴² Tam 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 odour.'⁴³ In the end, the 'odour ban' bill was criticised 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)?'⁴⁴ 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. Odourous bodies, homeless or not, were considered in this bill to be responsible for

⁴¹ For more on visual jurisprudence, please see the work of Richard K. Sherwin and Anne Wagner.

⁴² Gordon Y. K. Pang, 'Honolulu Targets B.O. on Buses', *The Honolulu Advertiser*, 9 February 2009. http://usatoday30.usatoday.com/news/offbeat/2009-09-02-honolulu-bus-odor_N.htm?csp=usat.me

⁴³ *Ibid.*

⁴⁴ *Ibid.*

offensive emissions in violation of the public's right not to smell them.

In his work on the history of garbage laws in the US, Gregory J. Howard views law as a 'symbolic exercise' in his critique of governmental policies regarding waste.⁴⁵ While waste and body odour 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 sanitised social spectrum, Weinberg and Williams's description of 'fecal habitus' brings attention to the absence of public facilities for homeless populations.⁴⁶ We know from personal experience which bodily odours are not always voluntarily emitted or held until a bathroom becomes available. We also can recognise 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 Honolulu and other cities with comparable attempted or realised odour bans, the dominant ideology of sanitised 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 Tan⁴⁷ discusses

⁴⁵ Gregory J. Howard, 'Garbage Laws and Symbolic Policy: Governmental Responses to the Problem of Waste in the United States,' *Criminal Justice Policy Review* 10, no. 2 (1999): 257–290.

⁴⁶ Martin S. Weinberg and Colin J. Williams, 'Fecal Matters: Habitus, Embodiments, and Deviance,' *Social Problems* 52, no. 3 (2005): 315–336.

⁴⁷ Qian Hui Tan, 'Smell in the City: Smoking and Olfactory Politics,' *Urban Studies* 50, no. 1 (2013): 55–71.

the idea of olfactory politics that contributes to the effluent knowledge of the contemporary sensory generation and the 'socio-spatial stratification of odorous bodies.'⁴⁸ 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.'⁴⁹ 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 characterises the relationship between law and culture as the right of the public to inhabit places that are sanitised from undesirable smells or members of the community.⁵⁰ The public rights framework protecting against offensive emissions is a statement about power and exclusion.

Conclusion: The Odour-ing of Order

Kelvin E. Y. Low⁵¹ describes smell as a 'sociocultural phenomenon' and asks 'what is the role of smell in everyday life experiences?'⁵² Drawing upon Anthony

⁴⁸ Ibid., 55.

⁴⁹ Ibid., 56.

⁵⁰ Margaret Kohn, *Brave New Neighborhoods: The Privatization of Public Space* (New York: Routledge, 2004).

⁵¹ Kelvin E. Y. Low, 'Ruminations on Smell as a Sociocultural Phenomenon', *Current Sociology* 53 (2005): 397–417.

⁵² Ibid., 397.

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 in our day-to-day realities.'⁵³ 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 law,⁵⁴ the relationship between law and society characterises everyday phenomenon. Place-based approaches to law⁵⁵ examine this relationship as it happens spatially while semiotic approaches to law⁵⁶ 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.

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

⁵³ *Ibid.*, 398.

⁵⁴ Please see further the work of John Brigham, Patricia Ewick and Susan Silbey, and Sarah Marusek.

⁵⁵ Please see further the work of Andreas Philippopoulos-Mihalopoulos, David Delaney, and Richard T. Ford.

⁵⁶ Please see further the work of Anne Wagner, Desmond Manderson, and Richard Mohr.

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 normalises 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 conceptualises reasonableness through discourses of rights, community, power, and equality. Smell as odour or stink compliments smell as fragrance or aroma insofar as our noses interpret who belongs, why, where, and in what form. Smell characterises law's participation in the sensory culture present in everyday places.

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