

# LAW AND THE SENSES



Edited by Andreas Philippopoulos-Mihalopoulos,  
Danilo Mandic, Caterina Nirta, Andrea Pavoni

**SMELL**

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# SMELL

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## **Introduction: Law and Smell**

Andreas Philippopoulos-Mihalopoulos,  
Danilo Mandic, Caterina Nirta  
and Andrea Pavoni

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

—Heraclitus, *Fragment 37*

### 1. Law and the Senses

Philosophy tends to relegate senses to the realm of phenomenology, experience or subjectivity. By contrast, critical theory has gradually eroded the holy opposition between knowing and sensing, to the extent that new speculative trends are now seeking to rebuild it. While the social sciences endeavour to frame sensing within socio-historical genealogies, scientific research draws deterministic connections between our sensing of the world and neurophysics hardware. At the same time, planetary modifications gesturing towards the seemingly unavoidable extinction of humanity, suggest literally



‘post’ human ways of sensing, with novel technologies that enable us to understand things that escape human capacity to sense, thus widening up perception to inhuman scales and temporalities. Meanwhile, capitalism relentlessly crafts our sensorial immersion into hyperaesthetic atmospheres, mirrored by art’s ongoing fetishisation of site-specific sensoriality.

Law is present in all this, and with a complexity that is yet to be addressed in the current sensorial turn in legal thinking.<sup>1</sup> In fact, law and the senses have been mostly explored as the usual law vs. ‘what escapes law’ framework, one that characterises many of the ‘law and...’ approaches (e.g. law and space, law and materiality etc.). In other words, the tendency in most cases has been that of remaining trapped within a phenomenological understanding of senses, oscillating between two sides (law vs. the senses) of an unquestioned opposition, occupying each of the sides of the partition, without fully exploring its promising threshold.<sup>2</sup> This has generated a series of compelling but ultimately limited narratives. Namely, law is assumed to be the anaesthetic par excellence,

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<sup>1</sup> We are not the first to deal with this. See Lionel Bently and Leo Flynn, eds. *Law and the Senses: Sensational Jurisprudence* (London: Pluto Press, 1996); Bernard J. Hibbitts, ‘Coming to Our Senses: Communication and Legal Expression in Performance Cultures’, *Emory Law Journal* 41, no. 4 (1992): 873–955. See also the ongoing project ‘Law and the Regulation of the Senses: Explorations in Sensori-Legal Studies’, coordinated by David Howes at the Centre for Sensory Studies, <http://www.centreforsensorystudies.org/related-interest/law-and-the-regulation-of-the-senses-explorations-in-sensori-legal-studies>.

<sup>2</sup> For an attempt in this direction see Sheryl Hamilton et al., eds. *Sensing Law* (Abingdon: Routledge, 2017).

constantly numbing the polymorphous realm of the sensorial in order to assert the rational domain of normativity. According to this narrative, the legal project is a systematic attempt to depurate law from any compromise with the sensible and its contingent imprecision. The violence, coldness and alienation of legal abstraction, and its systematic denial of the polymorphous and sensual spontaneity of life, are the *de rigueur* accusations addressed to law, whose failure the critical thinker is quick to point out: senses are not amenable to legal machinations, they always escape its cumbersome and sad, to put it à la Spinoza, apparatus.

Hence the call to re-materialise, re-spatialise, re-sensitise law: to let law come to its senses, that is. Except that law has never been outside of senses. Its way of making-sense of the world is always premised on its sensorial immersion in the world itself. This appreciation requires not only thinking law differently, but also thinking senses differently. This could open a path, we argue, towards exploring the sensoriality of law, both in the epistemological way in which law engages with, and indeed senses the world, as well as the ontological emergence of law from the sensorial continuum of the world itself. Senses, no longer an anarchic escape from law, thus become a way to explore the functioning, limits and possibilities of law, questioning how law works and deals with senses, how law senses, how law makes sense. This series intends to pursue this path through four intersecting conceptual endeavours.

First, to disarticulate the sensorial from its reduction to the phenomenological, the subjective, the personal

and the human dimension. This reductionism, which law is simultaneously responsible for as well as in denial of, underlines the majority of approaches dealing with law and the senses, and constitutes the unspoken fissure around which the two realms are split. Disarticulating the senses from their direct subjective and phenomenological relevance may enable them to appear as a gateway to a posthuman and ecological understanding of the spatio-legal – thus repurposing them as a promising tool with which to investigate the materiality of law's relation to the world. At the same time, gesturing towards the inhuman dimensions of sensing that climatic catastrophes, technological innovations, and philosophical and artistic praxis hint at, may allow us to think of novel ways, subjects and objects of sensing, whose impact on questions of agency, responsibility and politics is paramount.

Second, to dismantle the law/senses separation by widening the fissure into a complex ontology, and thus revealing the necessary but ultimately insufficient critique to law's 'anaesthetising' enterprise. This entails challenging the taken-for-granted presupposition of the law as a systematic attempt to purify itself from any compromise with the sensible and its contingent frictions. This, in fact, is only a part of the story. Law is certainly an anaesthetising project aimed at manipulating, governing, and channelling the senses into precise categories, boundaries and definitions, protecting from and numbing the sensorial, the bodily, the libidinal. Yet, law is also an emerging process, that is, a diffuse normativity emerging out of the intermingling of bodies and senses that constitutes our being-together, and as such inseparable from it. The

relation between law and the senses is not one of straightforward oppression or control of the latter by the former, but rather a surface on which sensorial law (law folding into senses) and legal senses (senses folding into law) are reciprocally affected, and on which surface each fold pursues its own mythology of origin, meaning, direction, teleology. The law-senses assemblage should be thus addressed by fully tackling the consequences of the unavoidable discrepancy between the de-sensitising project of legal control and the multi-sensorial process of legal emergence.

Third, and expanding on the foregoing observation: to expose the role of law in keeping this very dichotomy in place. By suggesting that, beneath law itself, unruly sensorial freedom would lie, the law perpetuates a grand trick. An anarchic illusion apparently offering critique with an easy target (law's supposed denial of senses), which is only a decoy, however, in which critique all-too-easily ends up ensnared. Law's attempt to manipulate senses should not be underestimated or simplified. In a sense, law is constantly engaged in numbing the senses into commonsense by manipulating, channelling and controlling the sensible; inserting properties and forbidding contacts; dissimulating violence, regulating sounds, defining taste. More precisely, law constructs its meaning (its sense, its direction) by orchestrating the senses in three ways. First, the law 'names' the senses, puts them into categories, thereby adding the moral weight of its sensorial judgement. Second, the law controls when senses should be kept apart and when blended; thus encouraging synaesthesia (namely coalesced sensorial modalities that encourage the attribution of one sensorial stimulation to

another sense), or anaesthesia, depending on the way it adjusts its universal teleology to the particularity of the situation. In so doing, the law dissimulates the fact that these senses are blended or anaesthetised by something other than the individual herself. In other words, the law maintains an illusion of phenomenological perception and evaluation of senses, while on another level, the law works hard to build socio-political and cultural receptacles of sensorial taste construction that dissimulate the fact that the law is behind all this, deftly orchestrating both senses and its very own apparent absence of involvement. Finally, law elevates the phenomenology of senses to the corollary of the liberal individual's sense of personal freedom: what best exemplifies freedom than sensorial taste of food, colouring, odours, materials? The law manages to fool us by allowing us to think that we own our senses in full phenomenological immersion; while all along, the law inverts their 'sense', by constructing their origin and facilitating a fake causality from senses to atmosphere, rather than from the legally constructed, preconscious atmosphere in which senses come to be perceived as individually owned.<sup>3</sup> This complex interplay of intervention and disappearance obviously requires much more than simply assuming senses as a dynamic excess to law's static numbness. As much as overestimating it, underestimating law is a perilous strategy.

Fourth, to envisage an approach to law beyond these strictures, unfolding alternative strategies and

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<sup>3</sup> Andreas Philippopoulos-Mihalopoulos, 'Atmospheres of Law: Senses, Affects, Lawscapes', *Emotion, Space and Society* 7 (2013): 35–44.

methodologies to which law attuned to its senses may open up. We do not simply wish to push legal thinking beyond its comfortable socio-legal and critical methods. This series rather intends to pursue a constructive endeavour, namely ushering law into a different mode of dealing with the world: one which is tentative, tempting, reflexive and uncertain, a mode of sensing, that is, which sanctions the impossibility for law to avoid its own materiality. This requires emphasising at the same time the posthuman and the inhuman quality of law, and understanding its relations to senses accordingly. On one level, in fact, law emerges out of the coming together of human and nonhuman bodies, spaces and times. On another level, law pretends to address a purely rational and disembodied, inhuman subject, namely a fully institutionalised subject whose ‘humanity’ is constructed to the extent that is useful to the institution. Both dimensions are crucial. The first suggests that law is not a socio-cultural construct that is superimposed over an inert matter, but a normativity made of flesh and stones, thought and water streams, cosmic and everyday interaction, human and non-human sensing: a way in which the ‘world’ is organised. The second points to the fact that law is a force of abstraction and, insofar as abstract, plays a generative role in creating and giving consistency to identity, relations, spaces and worlds.<sup>4</sup> Thinking the posthuman and inhuman dimension of senses thus permits rethinking law’s sensorial

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<sup>4</sup> Derek McCormack, ‘Geography and Abstraction: Towards an Affirmative Critique’, *Progress in Human Geography* 3, no. 6 (2012): 717–18.

engagement and entanglement with the world, at the same time gesturing towards different ways to use legal abstraction, beyond their absolutisation or dismissal.

## 2. Smell

Smell, just like taste, manifests itself only when stimulated, making it hard to recall its effect outside that moment of direct exposure. Smells are ‘transitory, evanescent, ephemeral.’<sup>5</sup> Because they are activated only when experienced, they are often perceived as impressions or internal occurrences. Their connection to emotions feels more natural: they are intangible inscriptions of memory, often invoking intimate responses<sup>6</sup> in an instantaneous and momentary way. There is, however, a fundamental difference between smell and taste: while taste only arises when something from outside enters one’s body, the sense of 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

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<sup>5</sup> ‘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.’ Michel Serres, *The Five Senses: A Philosophy of Mingled Bodies (I)* trans. Margaret Sankey and Peter Cowley (London: Continuum, 2008), 156.

<sup>6</sup> Proust in *Swann’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.’ Marcel Proust, *Remembrance of Things Past, Volume I* (Ware: Wordsworth Editions, 2006), 63.

silent, invisible, non-haptic, incorporeal quality results in great variations in terms of its recognition, categorisation and appreciation across time, culture and history.

Although the ‘forgotten sense’,<sup>7</sup> the olfactory is the most potent way of anchoring ourselves to the world. We subconsciously find our place in it by sniffing our body, the body of the one next to us, the room in which we are, the culture with which we are familiar. There is an incessant olfactory flow consisting of bodies, human and nonhuman, that are agents of generation, consumption, diffusion, reproduction and dissolution of odours. As they move or pause, as they cluster with others or try to move away, these bodies constantly partake in this olfactory flow, this dense planetary swirl that leaves nothing outside.<sup>8</sup>

The fact that one cannot intentionally stop smelling becomes part of smell’s ontological import. To start with, to not want to smell is to stop breathing. It is tantamount to becoming asphyxiated in one’s own immunitas, intentionally to stop living,<sup>9</sup> to go against the Spinozan *conatus* that characterises every single body. But the will to carry on living (breathing, smelling) relies on the need

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<sup>7</sup> Richard Stevenson, ‘The Forgotten Sense,’ in *The Multisensory Museum: Cross-Disciplinary Perspectives on Touch, Sound, Smell, Memory, and Space*, eds. N. Levent and A. Pascual Leone (Plymouth: Rowman & Littlefield, 2014), 151. See also Serres, *The Five Senses*, 34.

<sup>8</sup> This olfactory flow we have called the *olflow* in Andreas Philippopoulos-Mihalopoulos, ‘Ontological Anosmia,’ *Rivista di Estetica*, Special Issue, *The Senses of Smell: Scents, Odors and Aromatic Spaces* 78 (2021): 50–167.

<sup>9</sup> Joanne Yoo, ‘Tracing the Immaterial Spaces of You,’ *Qualitative Inquiry* 1–6 (2020). <https://doi.org/10.1177/1077800419898485>; [journals.sagepub.com/home/qix](https://journals.sagepub.com/home/qix)



to let the outside world come in. Even when you cannot smell (something), you still smell (*of* something). Whatever one does or does not do, one always remains an olfactory flow agent, regardless of intention, consciousness or life. To smell, actively or passively, is to be flowing along that pulsating olfactory flow of life and death, rush and rot, and to co-produce it along with everything else.

To stop smelling (actively or passively), that is to stop being an agent of the olfactive swirl, is also to entertain that strangely theological dream of going beyond judgement.<sup>10</sup> To be beyond smell is to hover somewhere over materiality, in defiance not only of the laws of physics, biology and society, but of the very nature of laws. This latter dictates that laws emerge even when laws are defied. Perhaps different laws, perhaps unrecognisable laws, perhaps even not established laws. But laws nevertheless. Laws are judgement are smell. Nothing in the ontology of olfaction is there for passive, unaffected observing. Everything is contributing to the emergence of the very olfactive flow. Everything takes part in the judgement of the olfactive.

Yet, despite (or precisely because of) its ontological import, smell remains the most suppressed and downgraded.<sup>11</sup> This is because it is closely related to our

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<sup>10</sup> “Of the messiah it is written that he smells and judges. When they saw that he was unable to judge by scent, they killed him.” Deborah Green, *The Aroma of Righteousness: Scent and Seduction in Rabbinic Life and Literature* (University Park: Pennsylvania State University Press, 2011), 93, quoted in David Howes and Constance Classen, *Ways of Sensing: Understanding the Senses in Society* (New York: Routledge, 2014), 93.

<sup>11</sup> However, in Aristotle’s hierarchy of senses constructed on the basis of distance, smell follows seeing and hearing as the highest of the senses.

bodily functions – our animality – and consequently to what have been consistently considered morally questionable behaviours denoting one’s lower social origin. The world has regularly been categorised and separated according to its smells. African slaves were thought to be carriers of miasma, as Andrew Kettner shows in his study on slavery and olfactory racism.<sup>12</sup> ‘The East is just a smell!’ said a British voyager in the early 20<sup>th</sup> century; the developing world has always been thought of as an “open sewer”; and the line of demarcation between colony and metropole was soap.<sup>13</sup> The lessons from colonial olfactory divisions that enable atmospherics of intense seclusion and exclusion to become normalised on the basis of smells and such simple dispositifs as that of a soap bar, were eagerly adopted by the Nazis. Rindisbacher, quoting Gisella Perl, a Jewish doctor and prisoner at Auschwitz, writes: ‘the air reeked with the penetrating smell of dirty bodies, pus-filled wounds which covered rotten extremities’. Perl met the infamous Dr Mengele in person: ‘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], he began to wash his hands ...’<sup>14</sup>

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<sup>12</sup> Andrew Kettler, *The Smell of Slavery: Olfactory Racism and the Atlantic World* (Cambridge: Cambridge University Press, 2020).

<sup>13</sup> Jonathan Reinartz, *Past Scents: Historical Perspectives on Smell* (Chicago: University of Illinois, 2014), 88–90.

<sup>14</sup> Hans J. Rindisbacher, ‘When the Stink Begins to Rise: Nazi Smellscapes’, in *Non Liqueur: The Westminster Online Working Papers Series, Law and the Senses Series: The Smell Issue*, eds. Danilo Mandic et al. (London: The Westminster Law & Theory Lab, 2015), 10–31, 26.

These odoriferous objects are not merely symbolic. Just as odours were and still are believed to have material qualities that inform the symbolic (cleansing, purification, communication with the divine), in exactly the same way the olfactory lines of discrimination rendered the other less human and the particular slice of the world more vulnerable. Susan Ashbrook Harvey puts this crossing between the symbolic and material clearly: ‘These codes were not based on symbolism as a disembodied language, but on the concrete view that smells participated in effecting the processes they represented. Odours could cleanse, purify, ward off, or heal; they could contaminate, pollute, endanger. Medical science, mythology, social systems, and ritual practices converged to sustain this olfactory orientation across the world.’<sup>15</sup> These are not exotic moments of bygone olfactory eccentricity but enduring racial, geographical and ethnic constants, with whose atmospheric perpetuation we are all complicit.<sup>16</sup>

Smell’s elusiveness makes it hard to pinpoint its political effect. Linguistic structures add to this elusiveness (or perhaps simply reflect it). Most European languages suffer from a lack of olfactory terminology (another attempt at concealing animality and otherness). While olfactory perception plays a significant role in the production of

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<sup>15</sup> Susan Ashbrook Harvey, *Scenting Salvation: Ancient Christianity and the Olfactory Imagination* (Berkeley: University of California Press, 2006), 2.

<sup>16</sup> ‘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.’ Rindisbacher, 2015: 29.

meaning,<sup>17</sup> the sense of smell and its stimulus do not have a linguistically communicable quality of their own (blue, sweet, soft, loud). 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:<sup>18</sup> ‘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.’<sup>19</sup> 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.’<sup>20</sup> 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.<sup>21</sup> Yet, when socially integrated, a

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<sup>17</sup> See, for instance, Bronwen Martin and Felizitas Ringham, eds. *Sense and Scent: An Exploration of Olfactory Meaning* (Dublin: Philomel, 2003).

<sup>18</sup> Trygg Engen, *Odor Sensation and Memory* (New York: Praeger, 1991), 117.

<sup>19</sup> Plato, *Timeus*. <http://www.gutenberg.org/files/1572/1572-h/1572-h.htm>

<sup>20</sup> Ibid.

<sup>21</sup> Harvey, 103.

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.<sup>22</sup> 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.<sup>23</sup> 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

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<sup>22</sup> 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.’

<sup>23</sup> See, for instance, Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (Routledge: London, 2002 [1966]).

‘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.<sup>24</sup> Although order might present itself as odourless, it is intrinsically an odorous process.

### 3. Smell and the Law

During the onset of Covid-19, we all became familiar with the word anosmia, the inability to smell. This form of total deodorisation deprives the anosmic person of the olfactory exchange with the world. It cuts short the breathing interface between the inside and the outside.<sup>25</sup> It all becomes unilateral, and the world becomes indistinguishable. There is no room for judgement on behalf of the anomic. Anosmia equals *anomia* – we are no longer nomically positioned. It’s a short step then to realise how existence is intimately connected to judgement, to law and to our position in relation to them. Is this how nothing smells? When one’s nostrils are obstructed, when smells do not reach one’s brain, one is left in the middle of a plane, directionless and locationless, deprived of guiding judgement (which way to move?) and excluded from locational judgement (where am I judged to belong?). We are left adrift. We fumble for judgement, but we only find

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<sup>24</sup> For instance, scent (olfactory) trademarks and copyright. Controversially, the 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.

<sup>25</sup> Lorenzo Marinucci, ‘Structures of Breathing: East Asian Contributions to a Phenomenology of Embodiment’, *Studi di Estetica* 2/2017, 99–116, 107.

the one that our bodies invite ('I couldn't smell myself at all, I hope I didn't cause offence'<sup>26</sup>), unable to respond or react to it.

Anosmia is, therefore, an anathema for contemporary dispositifs of judgement. Consequently, with the rise of olfactory products such as deodorants, perfumes, aromatherapy and home scenting items, scents have gradually become a matter of production, a marketing tool.<sup>27</sup> Far from being harmed by technology and digitisation – its medium traditionally being the molecular, rather than the digital<sup>28</sup> – 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).<sup>29</sup> 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. As Victoria Henshaw shows in the context of the urban hygienisation process (but abounding in undertones of atmospheric engineering), particular smells are 'heavily associated with dirty, unhealthy and

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<sup>26</sup> Post on the Covid-19 Facebook group, <https://www.facebook.com/groups/anosmia.covid19>

<sup>27</sup> However, as Rindisbacher rightly reminds us that 'the goal of the odour producers may well lie in *concealing* the odours that emerge from their practices and places of production.'

<sup>28</sup> Alan Chalmers, 'Level of Realism: Feel, Smell, and Taste in Virtual Environments' in *The Oxford Handbook of Virtuality*, ed. Mark Grimshaw (New York: Oxford University Press, 2014), 60.

<sup>29</sup> Jim Drobnick. 'Introduction: Olfacocentrism', in *The Smell Culture Reader*, ed. J. Drobnick (Oxford: Berg, 2006), 2.

run-down areas, illustrative of places that are uncared for and out of control through their apparent lack of cleaning and maintenance activities.<sup>30</sup> The immediately available social aetiology of smells is part of the olfactory ontological prefabrication. Scents are never just scents. They are always an invitation to discover their origin, their emitter, their context. And at those points, in those inner folds of the olflow, stereotypical atmospheric constructions nestle. This is why, to avoid surprises, deodorisation is libidinal society's version of ceremonial purification, operating across the symbolic and the material and ushering everyone towards a predetermined direction of desire.<sup>31</sup> Henshaw again: 'more prosperous commercial areas are zealously controlled in olfactory terms. Such areas have potentially antisocial odour sources separated from them ... Commercial areas frequently undergo enhanced cleansing and maintenance regimes as public and private resources focus on keeping key public areas clean, with cleanliness occasionally being prioritised above the wider aesthetics of an area.'<sup>32</sup>

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,

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<sup>30</sup> Victoria Henshaw, *Urban Smellscapes: Understanding and Designing City Smell Environments* (New York: Routledge, 2014), 151.

<sup>31</sup> Jean-Francois Lyotard, *Libidinal Economy*, trans. Iain Hamilton Grant (London: Athlone Press, 1993).

<sup>32</sup> Henshaw, *Urban Smellscapes*, 165.



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 into 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',<sup>33</sup> olfactory volatility allows smells to

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<sup>33</sup> Constance Classen et al. *Aroma: The Cultural History of Smell* (New York: Routledge, 1994), 5.

cross boundaries, disrupt the apparent anosmic order, and transgress the socially and legally constructed ‘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.’<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup>

In addition to the regulation of the *propriety* of odours, smell permeates and attacks one of the most fundamental

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<sup>34</sup> Ibid.

<sup>35</sup> 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.’ Alan Hyde, ‘Offensive Bodies’ in *The Smell Culture Reader*, ed. Jim Drobnick, 53.

<sup>36</sup> For instance, a library excludes a homeless person from its premises because of his malodour. *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. N.J. 1992).

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.’<sup>37</sup> 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.’<sup>38</sup> 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

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<sup>37</sup> Howes and Classen, *Ways of Sensing*, 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 Constance Classen, ‘The Deodorized City: Battling Urban Stench in the Nineteenth Century’, in *Sense of the City: An Alternate Approach to Urbanism*, ed. Mirko Zardini (Montreal: Canadian Centre for Architecture, 2005), 296.

<sup>38</sup> Hyde, ‘Offensive Bodies’, 55.

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 token, as simultaneously social and historical phenomena.<sup>39</sup> 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'.<sup>40</sup> 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.<sup>41</sup> At the same time, smell is also 'a hedonic agent for the enjoyment of fragrances',<sup>42</sup> another function it shares with law. By indulging smell, refraining from resisting to its allure of instability, we overcome its immunological function,

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<sup>39</sup> Classen et al. *Aroma*, 3.

<sup>40</sup> Engen, *Odor Sensation and Memory*, 2.

<sup>41</sup> See Dominique Laporte, *History of Shit* (Cambridge: MIT Press, 2000).

<sup>42</sup> Engen, *Odor Sensation and Memory*, 2.

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 Leopold Sacher-Masoch does, abandoning oneself to its formal harmony, transforming its punitive mechanism into a device for hedonistic enjoyment.<sup>43</sup>

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.’<sup>44</sup> 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.’<sup>45</sup> 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.<sup>46</sup>

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<sup>43</sup> Gilles Deleuze, *Masochism: Coldness and Cruelty & Venus in Furs* (New York: Zone Books, 1991).

<sup>44</sup> Howes and Classen, *Ways of Sensing*, 96.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid., 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, 96, quoting Green, *The Aroma of Righteousness*, 246, n106.

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 truth of the matter is that for Heraclitus the world is *both*.<sup>47</sup> 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.

In Patrícia Branco and Richard Mohr’s chapter, *Odore di Napoli: Normativity from Objects and Smells*, cities are smellscapes 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 experience brims with different olfactory markers and symbols.<sup>48</sup> They question the rules and regularities of the olfactory legal environment of Naples by looking into the encounters experienced within the city, and by examining the rules and (ir)regularities in the environment.

In *Skunk: Olfactory Violence and Morbid Speculation*, Jean-Thomas Tremblay, Hsuan L. Hsu, and Aleesa Cohene move to a differently violent urban context, where the malodorant Skunk water used by Israeli police to quell urban riots is a symbol of that perversely sophisticated international law category of the non-lethal. The discussion ranges from speculative pre-emptive violence to questions of airborne biological weapons, in a fully

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<sup>47</sup> Heraclitus, ‘Fragments’. *A Text and Translation with a Commentary*, ed. and trans. T. M. Robinson (Toronto: University of Toronto Press, 2003 [1983]), 80.

<sup>48</sup> Henshaw, *Urban Smellscapes*.

embodied context of marketing material that shows the banality of the visceral olfaction.

Plastic flowers, that strange affliction, have no scent. Yet, that has not always been the case. Kerstin Kraft and Susanne Schmitt trace the olfactory dimension of plastic flowers from the early 20<sup>th</sup> century to now, and especially the way that they were endowed with scent in order to reproduce this most primordial sensation of smelling a flower. They have chosen, however, to do this via a visual essay, whose photographs have that old-fashioned scratch-and-smell quality that some of us might still remember from the magazines some decades ago.

In *Different Smellscapes: Olfactory Patterns Through the Japanese Worldview*, Lorenzo Marinucci performs an analysis of the Japanese smellscape both in its specificity as one of the cultural spaces where ocularcentrism has not completely conquered; and its generalisability as a smellscape of impermanence and evanescent presences, and the potential narratives that one could usefully draw from this tightly coded society. Carefully avoiding exceptionalism, the text is replete with spaces, books and rituals, expertly bridged as much by Plato as by Bashō.

Digging deeper in the hierarchical distinction between natural and artificial scents in the context of the practice of rewilding natural landscapes, Jonathan Prior focuses on the scents that at least partly determine this controversial practice. Pleasant smells are obviously preferred but at what cost? The superimposition of ordered, normatively determined, sensorially predictable landscapes, on

those that must, by definition, be messy, discordant, and sensorially complex, is rewilding's central issue.

Working with a highly coded theory like autopoietic systems theory, and bringing the olfactory in, is the complex challenge that Mateus de Oliveira Fornasier has set for *The Sense of Smell in Brazilian Justice*. After an excursus in scent and its relation to memory and culture, the text displays an ontological understanding of olfaction, not as a human quality but as a systemic characteristic whose social predilections still determine the administration of justice.

The text of Cinnamon Ducasse takes the discussion to the incense and sacrificial smoke of the late Roman Empire. An era of extreme codification which became even more intense with the legalisation of Christianity and the Theodosian Code in particular. Ducasse's text works within the tradition of atmospheric theory, extracting from historical accounts the olfactory mechanisms that guaranteed the political and legal atmosphere needed at the time for the sensuous participation of the early Christian.

In the playful *What Is Nikolai Gogol's 'The Nose' About? (Or the Smell of Law)*, Elena Loizidou takes ontological detachment of the olfactory a few steps further when looking at the severed nose in Gogol's famous story *The Nose* and how, far from smelling, becomes an instrument of pure rebellion against given normativities of the whole body. In a metaphorical vein, the nose becomes that of the law, and the sniffing becomes part of law's mechanism of passing judgement towards the world. With not a single actual scent in view.



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 the active role of the law in the production of 'reasonable' smells. She 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.

Zachary Low Reyna explicitly delves into the materiality of law in *Law's Stench: Antigone's Materialist Approach to Law*. Using a posthumanist materialist framework, Reyna analyses the olfactory qualities of Sophocle's *Antigone* and the various analyses it has been submitted to by legal theorists. His strategy is to focus on minor characters, such as the corpse and the bacteria that perform the corpse's self-annihilation (the main issue of the tragedy and the law), in his quest for an *other* law and a sketch for an earthbound and materialist natural justice.

For the endword we have reserved a different corpse, as famous perhaps as the one in *Antigone* but with a more postmodern history: the fake remains of Jeanne d'Arc which were revealed to be fake because of the scent of vanilla and burnt plaster they were emitting. Nicole Zilberszac stages a dialogue between these remains and a rather imperious law, where the joy of norms mingles with the inevitability of putrefaction to a most disorienting effect. Or, as the law says, 'ontology as humility is an idea that smells like sea salt and vinegar.'

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# ***Odore di Napoli: Normativity from Objects and Smells***

Patrícia Branco and Richard Mohr

## 1. Introduction

Odore di vita e di morte, Smell of life and of death,  
odore di Napoli. smell of roots.  
Odore di radici. 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.<sup>1</sup> 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

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<sup>1</sup> This is a revised version of an article that the authors previously published in *Non Liqueur: The Westminster Law and Theory Working Papers Series* (London: The Westminster Law and Theory Lab, 2015) under the title ‘Odore di Napoli: What If Jurisprudence Came to Us Through Smell?’

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 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. 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 remain, engaging with the smellscape(s) to orientate their days and years, and to nourish their senses, bodies and souls.

The interplay of locals and tourists is of course a set of relations between people, between insiders and outsiders. Yet it is mediated by material objects, from cameras or phones to garbage and cruise ships, from Mount Vesuvius to the Tyrrhenian Sea. The groups relate differently to the urban fabric of the city, including the tangible walls and streets, and the intangible smells and the ephemeral meals. All of these fixed or shifting markers exist in a semiotic stew, whose odours and flavours are discerned according to cultural learning. This learning, these cultural competences, arise inside and outside the city itself, then to be applied to the material culture which abounds in Naples. This leaves us with a palette of stimuli through which law is perceived. As we will show, the scents and the stinks, *profumo* and *puzza*, form a framework for understanding the law.

The vocabulary we use to explore the relations between smell and socio-legal orders revolves around two 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 chapter 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 about 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 and material objects of daily life.

## 2. Smell and Judgment: From Rules to *Rillette*s

To approach the challenge of a jurisprudence of smell we must first introduce some of the requisite methods and terms before turning to apply 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 has 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 through the works of Cervantes, Gracián and Descartes.

At the dawn of that century in Spain we find, in Miguel de 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.'<sup>2</sup> 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

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<sup>2</sup> Miguel de Cervantes, *Don Quixote*, trans. Edith Grossman (New York: Harper Collins, 2003), 537; Miguel de Cervantes Saavedra, *Don Quijote de la Mancha* (Barcelona: Editorial Juventud, 2003), 629.

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 judgement and cultural capital.<sup>3</sup> For Gracián, taste mediates between the animal and the spritual: ‘there is cultivation not only of the mind (*ingenio*) but also of taste (*gusto*)’.<sup>4</sup> 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 olfactory<sup>5</sup> sense.<sup>6</sup>

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<sup>3</sup> ‘Cultural capital’ is, of course, a much later expression. Pierre Bourdieu, *Distinction: A Social Critique of the Judgement of Taste*, trans. Richard Nice (Abingdon: Routledge, 2010), 188.

<sup>4</sup> Hans-Georg Gadamer, *Truth and Method*, trans. J. Weinsheimer and D. G. Marshall (New York: Continuum, 1989), 35.

<sup>5</sup> 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 (Ithaca: Cornell University Press, 1988), 93–4; Maurice Merleau-Ponty, *The Phenomenology of Perception* (Abingdon: Routledge, 2012) has dealt with the intellectualist vs empiricist controversy more adequately by reaching a third, phenomenological, position. Pérez Herranz points out that Gracián’s position also transcends the positivist vs intellectualist debate by introducing ingenuity (*ingeniosa*) and good taste into an appreciation of the material. Fernando Pérez Herranz, ‘La ontología de *El Comulgatorio*’ in *Baltasar Gracián: Ética, política y filosofía*, ed. Alberto Hidalgo Tuñón (Oviedo: Fundación Gustavo Bueno, 2002), 73–4. (All translations by the authors unless otherwise credited).

<sup>6</sup> Pérez Herranz, ‘La ontología de *El Comulgatorio*’, 69.

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.’<sup>7</sup> 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 René 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 Herranz, 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.<sup>8</sup>

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.’<sup>9</sup> In the wake of the Cartesian division of *esprit* and *res extensa*, mind and body, the Enlightenment

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<sup>7</sup> Baltasar Gracián, ‘El Criticón’ in Lorenzo Gracián (pseudonym), *Obras de Lorenzo Gracián* (Madrid: Pedro Marin, 1773), 148.

<sup>8</sup> Pérez Herranz, ‘La ontología de *El Comulgatorio*’, 69.

<sup>9</sup> Giorgio Agamben, *Infanzia e storia: Distruzione dell’esperienza e origine della storia* (Turin: Einaudi, 2001), 17.

denigrated bodily functions and senses, particularly that of smell, and relegated the body to the 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 Paris<sup>10</sup> and of the colonial urge for the commanding view.<sup>11</sup> 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'.<sup>12</sup> 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'.<sup>13</sup> 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 same time that the mind was privileged over the body.<sup>14</sup>

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<sup>10</sup> Walter Benjamin, *The Arcades Project* (Cambridge: Harvard University Press, 2002), 121.

<sup>11</sup> David Spurr, *The Rhetoric of Empire: Colonial Discourse in Journalism, Travel Writing, and Imperial Administration* (Durham: Duke University Press, 1993), 16.

<sup>12</sup> Peter Jukes, *A Shout in the Street: The Modern City* (London: Faber & Faber, 1990), 104–5.

<sup>13</sup> Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism* (Bloomington: Indiana University Press, 1994), 3.

<sup>14</sup> Martin Jay, *Downcast Eyes: The Denigration of Vision in Twentieth Century French Thought* (Berkeley: University of California Press, 1994).

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.<sup>15</sup>

In post-Enlightenment thought, smell is anchored in the corporeal; compost, soil, animals and sex.<sup>16</sup> 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 Elizabeth Grosz sees the mind/body distinction mirrored in gender stereotypes of male/female,<sup>17</sup> colonialism makes a similar identification of

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<sup>15</sup> Theodor W. Adorno and Max Horkheimer, *Dialectic of Enlightenment*, trans. John Cumming (London: Verso, 1979), 233.

<sup>16</sup> Michel Serres, *The Five Senses: A Philosophy of Mingled Bodies*, trans. Margaret Sankey and Peter Cowley (London: Continuum, 2008), 163.

<sup>17</sup> Grosz, *Volatile Bodies*.

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 idolators and fetishists.<sup>18</sup> 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.<sup>19</sup> The second myth is one of the pervasive tropes of racism: the dominant peoples do not smell. Let us follow Dr Johnson<sup>20</sup> 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 jurisprudence. If sight is the sense of

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<sup>18</sup> Bruno Latour, *Petite Réflexion Sur Le Culte Moderne Des Dieux Faitiches* (Paris: Synthélabo, 1996); W. J. T. Mitchell, *Iconology: Image, Text, Ideology* (Chicago: University of Chicago Press, 1986).

<sup>19</sup> Bruno Latour, *Petite Réflexion*; Peter Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992).

<sup>20</sup> 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/970928.28stoddat.html>, accessed 17 April 2014.

the Enlightenment, then rules are its scaffolding. The *règles* that Descartes promulgated to guide reasoning formed a model for modernity. Charles Taylor draws on Bourdieu to conjugate *règlement*, *régularité*, *régulation* (*inconsciente*).<sup>21</sup>

*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'.<sup>22</sup> 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'.<sup>23</sup> 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.<sup>24</sup> We can have more detailed, local maps that tell us about the rules of communities, or we can zoom

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<sup>21</sup> Charles Taylor, 'To Follow a Rule...' in *Bourdieu: Critical Perspectives*, eds. Craig Calhoun, Edward LiPuma and Moishe Postone (Cambridge: Polity Press, 1993).

<sup>22</sup> Herbert L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 87.

<sup>23</sup> *Ibid.*

<sup>24</sup> Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York: Routledge, 1995), 458.



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*<sup>25</sup> (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'.

Michel Serres has pointed out a fourth derivation from *regulae: rilette* (to which he adds the wry comment, 'Descartes, where are you?').<sup>26</sup> 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'.<sup>27</sup>

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<sup>25</sup> Bourdieu, *Distinction*, 166.

<sup>26</sup> Serres, *The Five Senses*, 154.

<sup>27</sup> *Ibid.*, 167.

When the corporeal, saved from Cartesian subordination, is elevated to the level of the sublime, the artifice of cooking becomes, literally, supernatural.<sup>28</sup> 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.’<sup>29</sup> 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.<sup>30</sup> 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. By reviving an appreciation of the senses, and particularly the sense of smell, we hope to follow Serres by reinstating an empire of the senses, a corporeal epistemology attuned to the material, both human and non-human. Going further in his enthusiastic embrace of the sensual, Serres goes on to ask, ‘what if philosophy came to us through the senses?’<sup>31</sup> Drawing on this proposed sensual epistemology, we now turn to a study of the smells-capes of Naples to explore further the relations between law and the olfactory: what if jurisprudence came to us through smell?

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<sup>28</sup> *Ibid.*, 167.

<sup>29</sup> *Ibid.*, 156.

<sup>30</sup> C. Bushdid et al. ‘Humans Can Discriminate More than 1 Trillion Olfactory Stimuli’, *Science* 343 (2014).

<sup>31</sup> Serres, *The Five Senses*, 19.

### 3. 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; and familiar places can suddenly lose identity under disturbing scents.<sup>32</sup>

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. He is somewhat familiar with Italian culture, but with limited experience of Naples: he has memories from the 1970s, updated with a brief field trip in the course of writing this piece. 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

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<sup>32</sup> Marco Armiero and Salvatore Paolo De Rosa, 'Political Effluvia: Smells, Revelations, and the Politicization of Daily Experience in Naples', in *Methodological Challenges in Nature-Culture and Environmental History Research*, ed. Jocelyn Thorpe, Stephanie Rutherford and L. Anders Sandberg (Abingdon: Routledge, 2017), 181.

interviewed, three male and two female, of varying ages.<sup>33</sup> 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 Pane<sup>34</sup> and Bud Spencer<sup>35</sup>). Finally, a poem by Armando Francesco Serrano, *Odori*,<sup>36</sup> was considered of interest to our analysis. Sources for 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*<sup>37</sup> (2013), Rachel Donadio’s chronicle in *The New York Times*<sup>38</sup> (2013) and Luca Porcella’s writings (2012). Naples is a unique, and uniquely sensuous, city, as described by the

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<sup>33</sup> The interviews were conducted in Italian. The excerpts used were translated into English by the authors, with help from Silvia D’Aviero.

<sup>34</sup> [http://www.nuovomonitorenapoletano.it/index.php?option=com\\_content&view=article&id=958:napoli-colori-odori-e-suoni&catid=72:libere-riflessioni](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.

<sup>35</sup> <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 was 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).

<sup>36</sup> The poem was listed for an Italian High Schools poetry prize in October 2009. The author appears to have been a student at a Neapolitan high school at the time. Formerly available at <http://www.liceozingarelli.it/progetti/0910/certame0910/poesie/serrano.pdf>, accessed 23 March 2014.

<sup>37</sup> <http://travelloafers.wordpress.com/2013/09/08/i-love-the-smell-of-naples-in-the-afternoon>, accessed 23 March 2014.

<sup>38</sup> Rachel Donadio, ‘Seduced By Naples’. *The New York Times*, 13 December 2013. <https://www.nytimes.com/2013/12/15/travel/seduced-by-naples.html>.

Brazilian author Alice Otero: ‘If Italy is the country of the senses, it is in Naples that they will meet at their 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’).<sup>39</sup> Here we will focus on its multiplicity of smells. Some are more fragrant than others, others more disgusting than some. *Profumi e puzze*, that stick to the city, to its different places, its buildings, and to the people, engaging with the different smellscapes and their ways of regulating behaviour, in time and space.

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’,<sup>40</sup> 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

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<sup>39</sup> 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.’

<sup>40</sup> Mark Twain, *The Innocents Abroad*, first published 1869. Available at <http://classclit.about.com/library/bl-etexts/mtwain/bl-mtwain-innocents-30.htm>, accessed 24 February 2014.

people are filthy in their habits, and this makes filthy streets and breeds disagreeable sights and smells.<sup>41</sup>

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.<sup>42</sup> David Spurr has identified several tropes which apply to Twain's observations (and to other observers, as will be seen below<sup>43</sup>):

- 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';<sup>44</sup>
- idealization,<sup>45</sup> access to the sublime: 'see Naples and die.'

Twain's impressions on 'disagreeable smells' can take us back to the recent 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,

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<sup>41</sup> Ibid.

<sup>42</sup> 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.

<sup>43</sup> The Canadian Travel Loafers, in another blog entry, 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.

<sup>44</sup> Spurr, *The Rhetoric of Empire*, 16.

<sup>45</sup> Ibid., 138.

which made her change the famous epithet ‘See Naples and Die’ into ‘Smell Naples and Die.’<sup>46</sup> 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 visiting during 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 smellscape. 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. There was, hence, a rearticulation of the city’s lawscape,<sup>47</sup> affecting not only the generation and control of bad smells, but also the ways people started behaving in and within the city, and their struggles to resist the odours and their toxicity.

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<sup>46</sup> Jenny McCartney, ‘Smell Naples and Die.’ *The Telegraph*, 20 January 2008. Within <https://www.telegraph.co.uk/comment/columnists/jennymccartney/3553931/Our-criminal-system-is-a-persistent-re-offender.html>, accessed 23 March 2014.

<sup>47</sup> Andreas Philippopoulos-Mihalopoulos, ‘Atmospheres of Law: Senses, Affects, Lawscapes’, *Emotion, Space and Society* 7 (2013): 35–44.

In normal times, Naples provides the nostrils with unique smells of food, in keeping with the city's gastro-nomic 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 pizza<sup>48</sup> itself (the odour of tomatoes, basil, oregano, yeast, bread and mozzarella); of frittata and fried pizza (dough and hot oil). It also smells of coffee (strong and burnt). 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 (more specifically, of the Tyrrhenian Sea which is a different smell to that of fish<sup>49</sup>) along with the smell of the cruise ships (motor oil burning) leaving the port in the morning. All these odours contribute to create the identity<sup>50</sup> of the city, in its various places, from the historical centre to the outskirts of the town.

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<sup>48</sup> 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: the type of dough, consistency, and products used to bake it.

<sup>49</sup> And it also differs from that of the Atlantic Ocean, which has a stronger smell of iodine.

<sup>50</sup> D. Quercia et al. 'Smelly Maps: The Digital Life of Urban Smellscapes', *Proceedings of 9th International AAAI Conference on Web and Social Media* (2015): 327–336. In <https://www.aaai.org/ocs/index.php/ICWSM/ICWSM15/paper/view/10572/10516>, accessed 27 December 2017.



If travellers, from Mark Twain to Canadian bloggers, can condescend to the locals, mass tourism puts the shoe on the other foot. Even as tourists (who are supposed to occupy a lower status than ‘travellers’) seek authenticity – the real pizza, the gritty side of the city – they are always outclassed by the locals who are seen to *live* ‘authenticity’. The ultimate travel experience is to live as a local (a selling point of Airbnb, where you book ‘homes and experiences’),<sup>51</sup> inverting the classical ‘hierarchy of scorn’<sup>52</sup> with which the metropolitan traveller views the peripheral local. As can be seen in the case of the cruise ships polluting the air of Naples with their black fumes, now that the locals can scorn the tourists, it is the latter who stink.

Some outsiders seem to have more privileged familiarity with Naples, and demonstrate their superior olfactory capital in discerning a greater range of smells, a talent more commonly found among the locals. This is particularly notable in regard to food. In Rachel Donadio’s 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 who was accompanied by 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

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<sup>51</sup> Our emphasis; <https://www.airbnb.com/>, accessed 13 January 2018.

<sup>52</sup> ‘gerarchia del disprezzo’, Marco d’Eramo, *Il Selfie Del Mondo: Indagine Sull’età Del Turismo* (Milan: Feltrinelli, 2017), 147. In d’Eramo’s formulation each tourist wants to be seen as a ‘traveller’, and to get away from ‘the tourists’ (a nomenclature that does not include *them*).

food, with smells that run through the narrow streets announcing dinner time. Via dei Tribunali, then, is the highlight of these sensations: 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.<sup>53</sup>

Now tourists, and even sophisticated and culturally attuned travellers, will perceive the city and its smells-capes, as well as its landscapes, differently from the locals. Most of our insiders particularly mention the smells of food. Those mentioned more than once include pizza, fried pizza, pastries, or fried calamari; and also the smells of roasted nuts and cotton candy, as well as those of coffee,<sup>54</sup> 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.)

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<sup>53</sup> [http://www.golosoecurioso.it/luca-porcella/viaggi-del-gusto/napoli--odori-e-sapori/info\\_inserzione.html](http://www.golosoecurioso.it/luca-porcella/viaggi-del-gusto/napoli--odori-e-sapori/info_inserzione.html), accessed 28 March 2014.

<sup>54</sup> 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 roasted 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.'

(...) 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 homes at street level, the so-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 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 odor of pizza at Portalba (...) of the freshly baked pastry out of Pintauro!<sup>55</sup> (F. N. I.)

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<sup>55</sup> A famous bakery in Via Roma.

Pizza at Via Colletta, from *Michele* or, also in Decumano Superiore, from *Sorbillo*. Or from *Il Presidente*.<sup>56</sup> (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)

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.<sup>57</sup>

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.<sup>58</sup> The plurality of the smells of Naples can, then, in their coexistence, be seen as part of the ontology of the city itself, an emanation of the urban fabric, from the domestic houses to the city centre's buildings, towards the sea and beyond the city, and then making a feedback loop back to the city, flowing from the walls, travelling in the wind, sticking to the

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<sup>56</sup> These are all famous Neapolitan pizzerias in the Decumano Superiore area.

<sup>57</sup> A friend commented that one needs to get out of Naples in order to be able to smell the sea, since the smell of smog overwhelms it. Using Anna Maria Ortese's book title, one could almost say that 'the sea doesn't bathe Naples' [*Il mare non bagna Napoli*].

<sup>58</sup> John Urry, 'City Life and the Senses', in *The New Blackwell Companion to the City*, ed. Gary Bridge and Sophie Watson (Ithaca: Blackwell Publishing, 2011), 352–53.

bodies and walking with the people from place to place. It is a perpetual movement – from emanation to transformation to re-emanation, recreating the daily smells-capes of the urban landscape. Smells can also help us to organise and characterise places: ‘Smells, scents, whiffs and stinks are incredibly important in our experience and understanding of the surrounding world.’<sup>59</sup>

Henri 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.’<sup>60</sup> 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.’<sup>61</sup> 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’.<sup>62</sup>

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 organising time, including life and death. They calibrate the day, the week, or a particular season, such as Christmas, Easter or summertime.

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<sup>59</sup> Victoria Henshaw, ‘Welcome to the Smellscape’, *New Scientist* 222 (2014): 28–29.

<sup>60</sup> Lefebvre, 1991, in Urry, ‘City Life and the Senses’, 352–53.

<sup>61</sup> Formerly available at: <http://www.liceozingarelli.it/progetti/0910/certame0910/poesie/serrano.pdf>, accessed 23 March 2014.

<sup>62</sup> «Lodore della tua città?». ‘Lodore 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.

... 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*<sup>63</sup> ... 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*.<sup>64</sup> (Wanda Pane)

The smell of the sea varies depending on the season ... in the summer it has one odor, in winter another. (F. S.)

Odour of moss, tourists and tuff.<sup>65</sup> (Serrano)

Scents function as symbolic representations and particular smells act as triggers for memory and recollection.<sup>66</sup> Smells hold memories: they unlock childhood, take you back to familiar objects or bring forth past events or lost periods in one's life,<sup>67</sup> 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)

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<sup>63</sup> Model nativity scenes which use moss to represent grass.

<sup>64</sup> A characteristic Neapolitan pastry, with fresh and candied citrus fruits.

<sup>65</sup> The volcanic stone, *tuffo*, used extensively in Naples for building.

<sup>66</sup> Kelvin Low, *Scents and Scent-sibilities: Smell and Everyday Life Experiences* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2009).

<sup>67</sup> Ibid.

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:

[F]rom 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 p.m. with a bad smell, the smell of  
poverty in the hillside subway to Piscinola. (Wanda  
Pane)

According to John Urry,<sup>68</sup> 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 themselves 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.

#### 4. 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

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<sup>68</sup> Urry, 'City Life and the Senses'.



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 recognise, 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, 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 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 lunchtime friggitorie 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. Shapiro<sup>69</sup> claims that Hart's most fundamental distinction

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<sup>69</sup> Scott J. Shapiro, 'What is the Internal Point of View?', *Fordham Law Review* 75 (2006): 1157–1170.

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'.<sup>70</sup> For Twain and our more recent travellers, the smells of Naples are, on the other hand, 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.<sup>71</sup> 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. The absence of law can be shocking, as can the absence of smell.

If this description of jurisprudence highlights the position of law in its transgression or suspension, how is it experienced by insiders? Smell has this in common with

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<sup>70</sup> Walter Benjamin and Asja Lacin, 'Naples', in Walter Benjamin, *Reflections, Essays, Aphorisms, Autobiographical Writings*, trans. Edmund Jephcott (New York: Schocken, 1986), 164.

<sup>71</sup> José Baptista Machado, *Introdução ao direito e ao discurso legitimador* (Almedina: Coimbra, 1990). To recall the analogy of law and map, habitus and territory: we only consult the map when we are lost.

the law: neither is remarked on 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 their favourite pizzeria orientate in situ, 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 (the old stones) and present (lunchtime). Through smell they invoke memory, but change is apparent to them when they notice the new ethnic cuisines of recent immigrants. Thus the law, as smell, is inscribed in the material: in the walls, the buildings, the urban fabric, in the movements of the bodies, coming and going, leaving and living in the city. The overlapping of the different smells translates into an immanent normativity<sup>72</sup> of Naples’ everyday life.

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

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<sup>72</sup> Andrea Pavoni, ‘Sharing Conflict: Law, Justice and the Street’, in *Street-Level Sovereignty. The Intersection of Space and Law*, ed. Sarah Marusek and John Brigham (Lanham: Lexington Books, 2017), 37.

redemption through the power of reason: of Descartes' *regulae* and Hart's rules.

### 5. *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'<sup>73</sup> that are 'always found in ... primitive societies' which may, with some help from a 'self-binding' legal establishment, progress into fully functioning legal systems.<sup>74</sup> 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.'<sup>75</sup> 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' smellscapes. 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 hybridisations, a condition present not only at the structural level of the

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<sup>73</sup> Fitzpatrick, *The Mythology of Modern Law*, 193.

<sup>74</sup> Hart, *The Concept of Law*, 42, 89, 91.

<sup>75</sup> Fitzpatrick, *The Mythology of Modern Law*, 194.

relationship between the different legal orders, but also at the level of legal behaviour, experiences and representations of citizens and social groups.<sup>76</sup> 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.<sup>77</sup> 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,<sup>78</sup> the relationship between these different legal orders, values, and self-interest is neither fixed nor unnegotiable. The same can be said of the different smells and stench that characterise 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

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<sup>76</sup> Maria Paula Meneses, 'Toward Interlegality? Traditional Healers and the Law in Postcolonial Mozambique', *Oficina do CES* 202 (2004): 3.

<sup>77</sup> Santos, *Toward a New Common Sense*, 473.

<sup>78</sup> Italo Pardo, 'Morals of Legitimacy in Naples: Streetwise about Legality, Semi-legality and Crime', *European Journal of Sociology* 36(1) (1995): 44–71.

heels, immigrants selling knockoff bags, helmetless teenagers on mopeds racing the wrong way down slippery one-way streets, and everywhere 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.<sup>79</sup>

According to Pardo,<sup>80</sup> 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 referring 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 judgements 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.

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<sup>79</sup> Rachel Donadio, 'Seduced By Naples'. *The New York Times*, 13 December 2013. <https://naplespolitics.wordpress.com/2009/11/20/garbage-crisis-and-organized-crime>

<sup>80</sup> Pardo, 'Morals of Legitimacy in Naples', 47.

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 recognised order of social life.<sup>81</sup> 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 characterising 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 criminals, as described by Pardo,<sup>82</sup> 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 organised crime has been officially recognised by the Italian state in

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<sup>81</sup> *Ibid.*, 50.

<sup>82</sup> *Ibid.*, 55.



recent years.<sup>83</sup> The title of an article by Alexander Smoltczyk, ‘The Stink of Greed: In Naples, Waste Is Pure Gold’,<sup>84</sup> makes clear the association between stench and avarice. Again, *puzza*: the stench of filth and garbage. The smell of ‘dirty-money’<sup>85</sup> 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. Sales<sup>86</sup> 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 a 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. This is where one can find most of the 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.<sup>87</sup>

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<sup>83</sup> See also <http://naplespolitics.com/2009/11/20/garbage-crisis-and-organized-crime>

<sup>84</sup> Alexander Smoltczyk, ‘The Stink Of Greed: In Naples, Waste Is Pure Gold.’ *Der Spiegel*, 13 January 2008. <https://www.spiegel.de/international/europe/the-stink-of-greed-in-naples-waste-is-pure-gold-a-528501.html>

<sup>85</sup> Pardo, ‘Morals of Legitimacy in Naples’, 50.

<sup>86</sup> Isaia Sales, ‘Chiesa e Mafie’, *Annuario Kainos 2* (2014): 115–144.

<sup>87</sup> *Ibid.*

Using the religious concepts evoked by Low,<sup>88</sup> 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*.

## 6. 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.<sup>89</sup> 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 gadget<sup>90</sup> 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.

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<sup>88</sup> Low, *Scents and Scent-sibilities*, 9.

<sup>89</sup> First there were postcards (created by professional photographers and printers); then with mass diffusion of cameras, we all took our own pictures.

<sup>90</sup> We could talk of sound too. Sound, much like smell, has been marginalised. Simmel stated that hearing is a passive sense, without autonomy, contrary to what happens with sight. Georg Simmel, 1981, *apud* Carlos Fortuna, 'Paisagens Sonoras. Sonoridades e ambientes sociais urbanos', in *Identidades, Percursos, Paisagens Culturais. Estudos sociológicos de cultura urbana*, ed. Carlos Fortuna (Oeiras: Celta Editora, 1999).

When Walter Benjamin and Asja Laciš 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.<sup>91</sup> Curiously, for a text called ‘Imagining Naples: The Senses of the City’, Lesley Caldwell also ignores smell in analysing two movies<sup>92</sup> 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.’<sup>93</sup> 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

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<sup>91</sup> Benjamin and Laciš, ‘Naples’, 164–166.

<sup>92</sup> *Morte di un matematico napoletano* and *L’amore molesto*. Smell is, of course, even harder to portray in cinematic language.

<sup>93</sup> Lesley Caldwell, ‘Imagining Naples: The Senses of the City’, in *The New Blackwell Companion to the City*, ed. Gary Bridge and Sophie Watson (Oxford: Blackwell Publishing, 2011), 345.

*régulation inconsciente* can be understood in Taylor's dialogical terms, or in relation to Bourdieu's *habitus*.<sup>94</sup>

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 *ambiente*, an environment as removed from quotidian survival as is the distant edifice of rules making up state law.<sup>95</sup>

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. Immanent and corporeal normativity is constituted by the material of social and human life. That includes bodies and foods, scents and stinks, and the objects which exude them. Some of those are the product of human activity in the moment (cooking lunch); others are given

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<sup>94</sup> Taylor, 'To Follow a Rule...', 171; Bourdieu, *Distinction*, 166.

<sup>95</sup> Pardo, 'Morals of Legitimacy in Naples', 51.

by nature (Vesuvius). All of them mediate that most social and human of activities: regulation, not in rules and statutes, but in *regularité, régulation inconsciente*: rillettes to ragù.

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,<sup>96</sup> where *prudencia* and an *ingenio inventivo* are the aims of education and self-formation. Naples is, to this day, a laboratory of the Baroque:<sup>97</sup> a living challenge to Enlightenment absolutism, colonialism and monolithic jurisprudence.

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<sup>96</sup> Pérez Herranz, 'La ontología de *El Comulgatorio*', 69.

<sup>97</sup> Henshaw claims in 'Welcome to the Smellscape', a *New Scientist* opinion piece, that in modern western cities 'the smellscape of city streets are turning into sterilized clones of one another'.

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# Skunk: Olfactory Violence and Morbid Speculation

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During the 2020 protests responding to the police murders of George Floyd, Breonna Taylor, Ahmaud Arbery, Tony McDade, Dion Johnson, Elijah McClain, and other African American individuals, Twitter and other social media saw frequent calls for the deployment of Skunk water – a weaponised malodorous regularly used by Israeli police forces – against US protesters. Unsatisfied with the tear gas, rubber bullets, metal batons, tasers, pepper spray, and flash bang grenades already being deployed against civilian protesters, commentators fantasised about a weapon that had primarily been used to target Palestinian people: ‘Time to break out the Skunk Water Cannon. F these rioters.’<sup>1</sup> Such comments frame counterinsurgent

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<sup>1</sup> @Blackler\_C. ‘@Sassafras\_Knob @KenWebsterII @selvestekjetil I wish we would try this... <https://t.co/6phwQC7Ybf>’. Twitter. 1 June 2020. [https://twitter.com/Blackler\\_C/status/1267489601859604481](https://twitter.com/Blackler_C/status/1267489601859604481); @flatbush711. ‘Where’s The Skunk Water ??????’ <https://t.co/6phwQC7Ybf>.

violence inflicted by police and self-appointed vigilantes as a spectator sport. In a historical moment when both the coronavirus and police violence have made glaringly evident the racially uneven distribution of the conditions for breathing, conservative commentators advocate the use of a crowd-control weapon that would make the air unbreathable for protesters worldwide who have interpreted the last words of George Floyd, Eric Garner, and countless other targets of antiblack violence – ‘I can’t breathe’ – as a call to action. Although Skunk’s developers present it as a humanitarian, ‘less-lethal’ weapon, these online fantasies evoke the ways in which the malodorous is also *more-than-lethal* in its unbearable, dehumanising effects on civilians’ bodies and minds.

While there has been no record to date of Skunk water being deployed on US soil, fantasies about its use are grounded in fact. In November 2014, during a series of protests and popular uprisings in the wake of the police murder of Michael Brown in Ferguson, Missouri, the St. Louis Metropolitan Police Department purchased fourteen 1.4-litre canisters of Skunk from Mistral Security, Inc., a company that provides security technologies to the Department of Homeland Security, law enforcement

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Co/5seitfNQWI.’ Twitter. 1 June 2020. [@realMarryFanning](https://twitter.com/flatbush711/status/1267789688653447168). ‘@realDonaldTrump Where are the SKUNK BOMBS that disperse violent rioters – Israel uses them!!!’ Twitter. 29 May 2020. [@P3ENG](https://twitter.com/realMaryFanning/status/1266544748807979011). ‘@NYPDnews Time to break out the Skunk Water Cannon. F these rioters.’ Twitter. 15 July 2020.

agencies, and private security firms.<sup>2</sup> The purchase of Skunk by several US police departments is just one facet of the ongoing exchanges between the US and Israel that have fuelled the militarisation of the police in both settler states. Since 2002, thousands of US police have been trained by Israeli officials in both Israel and the US in programs funded by the Department of Justice, the Anti-Defamation League, the American Jewish Committee, and the Jewish Institute for National Security Affairs.<sup>3</sup> The US Campaign for Palestinian Rights states that ‘the Israeli military trains US police in racist and repressive policing tactics, which systematically targets Black and Brown bodies.’<sup>4</sup> Skunk’s movement from Israel to the US also exemplifies the significance of capitalist commodification to this transnational circuit of police militarisation. From its inception, Skunk was intended to

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<sup>2</sup> Patrick Tucker, ‘After Ferguson Unrest, St. Louis Police Bought Stink Weapons to Launch at Protesters’, *Defense One*, 11 August 2015, <https://www.defenseone.com/technology/2015/08/after-ferguson-unrest-st-louis-police-bought-stink-weapons-launch-protesters/119044>

<sup>3</sup> Edith Garwood, ‘With Whom are Many U. S. Police Departments Training? With a Chronic Human Rights Violator’, *Amnesty International USA*, 25 August 2016, <https://www.amnestyusa.org/with-whom-are-many-u-s-police-departments-training-with-a-chronic-human-rights-violator-israel>

<sup>4</sup> @USCPR\_. ‘The Israeli military trains US police in racist and repressive policing tactics, which systematically targets Black and Brown bodies. The recent murders of George Floyd, Breonna Taylor, and Ahmaud Arbery are examples of racialised, systematized violence.’ Twitter. 28 May 2020. [https://twitter.com/USCPR\\_/status/1266113526545944576?s=20](https://twitter.com/USCPR_/status/1266113526545944576?s=20); see also ‘The Knee-on-Neck, Long a Staple of Israel’s Occupation of Palestine’, *TRTWorld*, 30 May 2020, <https://www.trtworld.com/magazine/the-knee-on-neck-long-a-staple-of-israel-s-occupation-of-palestine-36787>

be field-tested on unconsenting and uncompensated Palestinians – a process that has demonstrated both its effectiveness and its supposed non-toxicity as a ‘less-lethal’ anti-crowd technology. How does a necessarily imprecise chemical weapon with unknown health effects that was developed in support of a settler colonial nation with a bleak record of human rights abuses get used, praised, and marketed as a humanitarian technology?

This essay interrogates how Skunk water’s developers and advocates have leveraged the legal distinction between morbidity and lethality. We argue that Skunk capitalises on the construction of the ‘non-lethal’ in international law, which opens up a space for pre-emptive violence that is speculative in both its legitimisation and its ongoing commodification. We begin by discussing the broader history of airborne biological weapons – particularly tear gas – in international law. We argue that the legal construction of ‘less-lethal’ weapons not only obscures the violence and health risks associated with morbidity, but also valorises these as modes of humanitarian intervention.<sup>5</sup> We then analyse marketing materials for Skunk alongside accounts of its embodied effects, focusing on how this ‘less-lethal’ weapon simultaneously trivialises and weaponises the visceral, trans-corporeal qualities of olfaction.

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<sup>5</sup> For example, Sari Bashi of Human Rights Watch recommended in 2018 that, instead of using bullets, Israel ‘can and should exhaust’ ‘nonlethal means, such as tear gas, skunk water, and rubber-coated steel pellets’ to secure its border. Sari Bashi, ‘Don’t Blame Hamas for the Gaza Bloodshed’, *Human Rights Watch*, 22 May 2018 (repr. from *Foreign Policy*), <https://www.hrw.org/news/2018/05/22/dont-blame-hamas-gaza-bloodshed>

## Less-Lethal Loopholes

Skunk's Israeli manufacturer Odortec, the Israel National Police, and the Israel Defense Forces (IDF) present malodorants as the apotheosis of more than a century of 'less-lethal' weapons development. 'A non-lethal, non-toxic liquid spray, Skunk is the most innovative and effective riot control method available. And there simply are no countermeasures,' reads Israel's 2018–2019 *Homeland and Cyber Defense Directory*.<sup>6</sup> Skunk is promoted as a cost-efficient and 'ecofriendly' means of dispersing 'the most determined of violent demonstrators.'<sup>7</sup> According to a *BBC News* story published in 2008, the year of the IDF's first reported use of Skunk, 'the beauty of Skunk – if beauty is the right word – is that it is said to be completely organic.'<sup>8</sup> Interviewed for the story, Superintendent Ben Harosh maintains that 'it's totally harmless, you can even drink it.'<sup>9</sup>

To understand the transnational career of this euphemistically labelled 'organic' 'spray', a joint venture between police and military agencies, we must situate Skunk in relation to the legal history of chemical agents. Although simple chemical weapons have been used occasionally since antiquity, the rise of chemical warfare is

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<sup>6</sup> The Israel Ministry of Defense, SIBAT—International Defense Cooperation, *Israeli Directory 2018–19: Homeland and Cyber Defense* (Tel Aviv: Hoffen, 2018), 112. <http://www.sibat.mod.gov.il/Industries/directory/Documents/Sibatdir-HLS-en2018-19.pdf>

<sup>7</sup> The Israel Ministry of Defense, *Israel Directory 2018–19: Homeland & Cyber Defense*.

<sup>8</sup> Wyre Davies, 'New Israeli Weapon Kicks Up Stink', *BBC News*, 2 October 2008. [http://news.bbc.co.uk/2/hi/middle\\_east/7646894.stm](http://news.bbc.co.uk/2/hi/middle_east/7646894.stm)

<sup>9</sup> *Ibid.*

commonly attributed to World War I, when poison gases such as chlorine and mustard gases were diffused to break the stalemate of trench warfare.<sup>10</sup> From its inception, poison gas was prohibited by international law under article 23(a) of the Hague Convention of 1899 ('it is prohibited to employ poison or poisoned arms').<sup>11</sup> The Geneva Protocol of 1925 explicitly outlawed asphyxiating and poisonous *gases*.<sup>12</sup> The most recent arms control agreement with the force of international law is the Chemical Weapons Convention (CWC), which the United States signed in 1993 and ratified in 1997, and which Israel signed in 1993 but has yet to ratify.<sup>13</sup>

While the CWC prohibits the development, production, stockpiling, and use of chemical weapons toward warfare, it allows them in 'types and quantities' consistent with the purpose of domestic law enforcement. The use of less-lethal weapons by US police has been a pivotal component in a counterinsurgency project that preemptively suppresses challenges to the state's legitimacy and its monopolisation of means of violence.<sup>14</sup> Whereas

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<sup>10</sup> Anna Feigenbaum, *Tear Gas: From the Battlefields of World War I to the Streets of Today* (New York: Verso, 2017), 15–24; Peter Sloterdijk, *Terror from the Air*, trans. Amy Patton and Steve Corcoran (Los Angeles: Semiotext(e), 2009), 9–14.

<sup>11</sup> Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, 1899.

<sup>12</sup> Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, 1925.

<sup>13</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993.

<sup>14</sup> Stuart Schrader, *Badges Without Borders: How Global Counterinsurgency Transformed American Politics* (Oakland: University of California Press, 2019), 13.

international uses of chemical weapons were deemed ‘repugnant to the conscience of mankind’, domestically, such weapons, restyled as riot control agents (RCAs), were part of an effort to redeem US policing after the violent responses of police and soldiers to Black freedom protests in the 1960s.<sup>15</sup> ‘Stamped with the politically significant though inaccurate name “tear gas”,’ Stuart Schrader explains, chemical weapons ‘conferred the appearance of sensitivity to political criticism, while also enhancing the ability of police to conduct their business of fabricating social order unfettered.’<sup>16</sup> Skunk, an allegedly ecofriendly, organic, and potable liquid, keeps alive what Anna Feigenbaum describes as ‘the continued fiction that riot control agents are safe – that these are law enforcement equipment and not chemical weapons.’<sup>17</sup>

As an exception to the CWC, the use of chemical weapons by police constitutes an ever-expanding zone of unaccountability or severely limited accountability. As the rubric of *law enforcement* balloons to accommodate the illegal actions of police, so, too, does the rubric of the *domestic* begin to expand. In Vietnam, the US deployed tear gas, supposedly a ‘less-lethal’ means of preventing ‘crowd-based violence’, in situations where no crowds were present, and with lethal consequences.<sup>18</sup> More

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<sup>15</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993; Schrader, *Badges Without Borders*, 192.

<sup>16</sup> Schrader, *Badges Without Borders*, 194. See also Amory Starr, Luis Fernandez, and Christian Scholl, *Shutting Down the Streets: Political Violence and Social Control in the Global Era* (New York: New York University Press, 2011), 44.

<sup>17</sup> Anna Feigenbaum, ‘Riot Control Agents: The Case for Regulation,’ *SUR* 12, no. 2 (2015), 109.

<sup>18</sup> Schrader, *Badges Without Borders*, 192, 209–210.



recently, US border patrol agents fired tear gas across the country's border with Mexico, and the IDF has deployed various chemical weapons, including Skunk, in East Jerusalem.<sup>19</sup> There exist some regulations around the trade of the chemical compound most commonly referred to as 'tear gas' (2-Chlorobenzalmalonitrile, or CS) at the national and international levels, but the extent of their implementation varies from country to country. Likewise, the policing guidelines of the United Nations 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF) are unevenly observed. As Feigenbaum notes, 'Because less-lethal weapons are not well regulated under international law or trade policies, it remains relatively easy for security forces to acquire large quantities of them without public scrutiny or human rights oversight.'<sup>20</sup> As a result, Israel has been able to export arms tested on Palestinian civilians to around 130 countries.<sup>21</sup> Although the foreign-domestic divide regulates how policymakers render military and police action toward civilians acceptable in legal and moral terms, Schrader observes, 'these weapons' travel [undermines] this divide's very regulatory power.'<sup>22</sup> It is through this contradiction – the foreign-domestic divide

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<sup>19</sup> 'How Tear Gas Became a Favorite Weapon of US Border Patrol, Despite Being Banned in Warfare', *Democracy Now*, 28 November 2018. [https://www.democracynow.org/2018/11/28/how\\_tear\\_gas\\_became\\_a\\_favorite](https://www.democracynow.org/2018/11/28/how_tear_gas_became_a_favorite)

<sup>20</sup> Feigenbaum, 'Riot Control Agents', 109.

<sup>21</sup> Yaya Hawari, 'Another Israeli Weapon for Collective Punishment', *Al Jazeera*, 12 August 2021, <https://www.aljazeera.com/opinions/2021/5/12/the-skunk-another-israeli-weapon-for-collective-punishment>

<sup>22</sup> Schrader, *Badges Without Borders*, 195.

holds when it comes to authorising chemical weapons, but not when it comes to regulating them – that Skunk becomes an object of speculation.

### Morbid Speculations

The legal construction of ‘less-lethal’ as a permissible degree of harm has opened a limitless space for speculative investment. As Aimee Bahng observes, both financial speculation and speculative fiction are ‘forms of extrapolative figuration that participate in the cultural production of futurity.’<sup>23</sup> Increasingly dependent on simulations and ‘premediation,’ the security industry is also oriented by speculative processes that imagine possible futures in order to prevent them.<sup>24</sup> The development, testing, and marketing of Skunk exemplify how the legal framing of ‘less-lethal’ violence makes space for entangled narrative and financial speculations that simultaneously target and extract value from colonised and racialised populations.

Even a brief overview of the history of Skunk illustrates how its deployment, putatively in the name of maintaining security, has been entangled with the marketing pressures to test delivery technologies, gather data (for example, about lethality, strategic effectiveness, and public opinion concerning its use), and demonstrate potential applications in the field. Skunk’s first documented deployments in the Palestinian villages of Bil’in and Na’alin in 2008 were described by the head of the Israeli police department for

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<sup>23</sup> Aimee Bahng, *Migrant Futures: Decolonizing Speculation in Financial Times* (Durham: Duke University Press, 2018), 2.

<sup>24</sup> Richard Grusin, *Premediation: Affect and Mediality after 9/11* (London: Palgrave, 2010).

technological development as ‘monitored exercises’.<sup>25</sup> The ‘experiment’ used Palestinians as test subjects. According to Wyre Davies, even then the Israeli police force had ‘high hopes of turning Skunk into a commercial venture and selling it to law-enforcement agencies overseas.’<sup>26</sup> Each documented deployment of Skunk since – including, in the spring of 2021, against Palestinians protesting forced evictions from their homes in the Sheikh Jarrah neighbourhood<sup>27</sup> and Palestinians protesting a Jewish ultranationalist rally at Damascus Gate,<sup>28</sup> both in East Jerusalem – should be viewed as an experiment that draws information and value from its subjects’ suffering. The IDF has experimented with a range of delivery mechanisms, from the ‘backpack spray devices’ that were initially used in 2008 to a ‘truck-mounted water cannon’ and a drone that can drop Skunk directly onto crowds.<sup>29</sup> These delivery devices progressively increase both the physical and the ontological distance between the security official and the target population. Meanwhile, security forces have also experimented with dilution: ‘at times, security forces have used the trucks to spray plain water, or water containing

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<sup>25</sup> Quoted in Rania Khalek, ‘Will Israel’s ‘Whiff from Hell’ Weapon be Used to Crush US Protests?’ *Rania Khalek: Dispatches from the Underclass*, 7 June 2015, <https://raniakhalek.com/will-israels-whiff-from-hell-weapon-be-used-to-crush-us-protests>

<sup>26</sup> Davies, ‘New Israeli Weapon.’

<sup>27</sup> Hawari, ‘Another Israeli Weapon for Collective Punishment.’

<sup>28</sup> ‘Skunk Water Used Against Palestinian Protesters’, *Euronews*, 18 June 2021, <https://www.euronews.com/2021/06/18/skunk-water-used-against-palestinian-protesters>

<sup>29</sup> Michael Crowley, *Chemical Control: Regulation of Incapacitating Chemical Agent Weapons, Riot Control Agents and Their Means of Delivery* (London: Palgrave, 2016), 42.

a very small amount of the Skunk liquid.<sup>30</sup> In 2017, India tested Skunk water on a group of volunteers – including Central Reserve Police Force personnel – in Delhi with the hopes that the weapon would be effective in suppressing protests in Kashmir and Jammu;<sup>31</sup> although the volunteers tolerated the stench reasonably well, this incident represents another speculative application of the malodorant designed to ascertain the scope of its effectiveness. In both 2017 and 2020, Israeli police deployed Skunk against Haredi (ultra-Orthodox) protesters in Jerusalem – a move that broadened the demographic base of unconsenting test subjects beyond primarily Palestinian targets.<sup>32</sup>

The development of Skunk has been driven by speculative security narratives. Ruth Pinney, a retired Naval biochemist who registered a patent for a malodorant similar to Skunk in 2001, recalls that her invention was ‘inspired by an anecdote of an enemy militia attacking a US embassy (in an unnamed country) by using pregnant women as a defense mechanism; the US troops could not

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<sup>30</sup> Sarit Michaelo, *Crowd Control: Israel's Use of Crowd Control Weapons in the West Bank*, trans. Shuli Schneiderman (Jerusalem: B'Tselem, 2013), 22.

<sup>31</sup> This was widely reported in finance news outlets. See, e.g., ‘Amazingly, Stinky Bomb Skunk Fails to Deter Protesters in India’, *Financial Express*, 27 July 2017. <https://www.financialexpress.com/india-news/amazingly-stinky-bomb-skunk-fails-to-deter-protesters-in-india-reason-will-leave-you-stunned/781897>

<sup>32</sup> See ‘Israeli Police Knock Over Innocent Woman with Skunk Cannon’, *Daily Sabah*, 27 November 2017. <https://www.dailysabah.com/mideast/2017/11/27/israeli-police-knock-over-innocent-woman-with-skunk-cannon> and ‘Dozens Arrested as Israel Police Break up Haredi Anti-Draft Protest in Jerusalem’, *Middle East Monitor*, 27 January 2020. <https://www.middleeastmonitor.com/20200127-dozens-arrested-as-israel-police-break-up-haredi-anti-draft-protest-in-jerusalem>

retaliate without hurting the women.<sup>33</sup> Whether or not this narrative about human shields was based on a historical occurrence – the authors have found no record of such an incident – it leverages the vulnerability of pregnant women to frame a weaponised malodorous as a paradoxical form of humane violence. Although it invokes both the precarity of the womb and the futurity associated with unborn children, the anecdote actually serves to normalise a modality of sensory violence that has frequently been inflicted upon pregnant women and children in Palestine.<sup>34</sup> Singling out the pregnant body as an icon of vulnerability also de-emphasises the complex, temporally dispersed modes of ‘slow violence’ through which an environmental and sensory weapon like Skunk – whose stench lingers for weeks on bodies and in spaces including schools, hospitals, playgrounds, and homes – could affect both reproductive health (for example, through the intergenerational transmission of

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<sup>33</sup> Aleesa Cohene, Phone Interview with Ruth Pinney (23 October 2019). While Pinney’s malodorous differs from the yeast-based formula used in Skunk, her work likely influenced the development of the weapon deployed by the IDF. The US Department of Defense has also been exploring military applications of stench; see Elmar Schmeisser, Kimberly Pollard, and Tomasz Letwoski, ‘Olfaction Warfare: Odor as Sword and Shield’ (Aberdeen: Army Research Laboratory, 2013) and David Hambling, ‘US Military Malodorous Missiles Kick up a Stink’, *New Scientist*, 30 May 2012. <https://www.newscientist.com/article/mg21428676-800-us-military-malodorous-missiles-kick-up-a-stink>

<sup>34</sup> A 2017 study of 455 Palestinian Bedouin children found that 30% of them had been exposed to Skunk Water during confrontations with Israeli forces (Salwa Massad, Umayyeh Khammash and Rosalyn Shute, ‘Political Violence and Mental Health of Bedouin Children in the West Bank, Palestine: A Cross-Sectional Study’, *Medicine, Conflict, and Survival* 33, no. 3 (2017): 196).

trauma) and capacities for social reproduction (for example, through the closure of schools affected by Skunk).<sup>35</sup> Drawing on field interviews with pregnant Palestinian women in Occupied East Jerusalem, Nadera Shalhoub-Kevorkian has noted how, through everyday exposures to tear gas and other forms of violence, the ‘occupation of the senses invades space, time, the womb, and the sensory experiences of birthing mothers.’<sup>36</sup> Directly contradicting Pinney’s opportunistic invocation of pregnant women, the Association for Civil Rights in Israel (ACRI) attorney Anne Suciú wrote in a 2014 letter to the Chief Commission of the Israeli Police that, ‘the use of Skunk liquid in densely constructed residential areas is likely to harm small children, sick people, elderly people, and pregnant women.’<sup>37</sup>

Marketing materials for Skunk rely on the proliferation of vague, speculative security scenarios reminiscent of Pinney’s anecdote. As Shimrit Lee explains in her analysis of corporate mediations of less-lethal weapons, marketing images blur the line between reality and simulation, detaching insurgency from local histories and contexts: ‘for example, a video produced by [TAR Ideal Concepts] to spotlight Skunk technology begins with a mash-up of footage from protests and riots around the world, though the video’s producers provide no indication of

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<sup>35</sup> Rob Nixon, *Slow Violence and the Environmentalism of the Poor* (Cambridge: Harvard University Press, 2011).

<sup>36</sup> Nadera Shalhoub-Kevorkian, ‘The Occupation of the Senses: The Prosthetic and Aesthetic of State Terror’, *British Journal of Criminology* 57, no. 6 (2017): 1292.

<sup>37</sup> Quoted in H. S. Salem, ‘Sources of Indoor Air Pollutants in the Occupied Palestinian Territories, Including Skunk Liquid, Household Cleaning Products, and Others’, *Journal of Environmental Pollution and Control* 2, no. 1 (2019): 9.

when, where, or why they took place. The intended sensation that is manufactured is a global and pervasive instability.<sup>38</sup> Mistral enacts a similar strategy, speculating that the weapon's 'applications include, but are not limited to, border crossings, correctional facilities, demonstrations, and sit-ins.'<sup>39</sup> By presenting these scenarios as commensurable sites of potential instability, Mistral deracinates them from locally and institutionally specific histories of racial and colonial violence. In an effort to downplay the racist implications of these recommended 'applications,' Mistral illustrates them with an image of a Black police officer spraying an unseen target. Nevertheless, the racist and settler colonial conditions of Skunk's development, testing, and marketing are made explicit in popular calls for its deployment in the US. As Nick Estes (Sioux) reports, in 2016 a helicopter contractor named Toby Schweitzer sent an email recommending the use of Skunk to North Dakota probation officers employed at the #NoDAPL protests: 'forget the wall[.] Just put sprayers all along the southern border with sensors. Might have saved lots of store fronts in Baltimore and Ferguson. The US needs to get some of this for the looters in any out of control demonstrations. Israelis [sic] crowd control method. NOW WE ARE TALKING. BRILLIANT.

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<sup>38</sup> Shimrit Lee, 'Simulating the Contact Zone: Corporate Mediations of (Less-Lethal) Violence in Israel, Palestine, and Beyond,' *Jerusalem Quarterly* 75 (Autumn 2018): 27.

<sup>39</sup> Crowd Control—Skunk, Mistral Security, n.d. <http://www.mistralsecurityinc.com/Our-Products/Skunk/Crowd-Control>, last accessed 21 July 2020.

Skunk spray!’<sup>40</sup> Schweitzer’s thinking moves seamlessly between sites of racial and colonial violence: from Israel’s indiscriminate and punitive deployment of Skunk in Palestinian communities to the US-Mexico border (where Schweitzer’s speculative technology of Skunk diffusion anticipates the deployment of tear gas by US border agents in 2018–2019); from the uprisings against police brutality in Ferguson (where Black protesters were often depicted as ‘looters’) to the Oceti Sakowin camp where protesters opposed the environmental effects of the Dakota Access Pipeline on the Standing Rock Indian Reservation.

Such real and imagined scenarios of counterinsurgency have been a key component in Skunk’s marketing strategy. The product’s publicity materials perpetuate a human rights framework wherein deaths are the only significant statistic, and other, less quantifiable modes of trauma and debilitation become simultaneously obscured and *revalued* as techniques of ‘psychological deterrence.’<sup>41</sup> As Neve Gordon has explained, Israel’s use of Palestinian bodies and spaces as unconsenting test subjects for ‘less-lethal’ weapons including tear gas, Skunk, and a sound cannon called the Scream enables weapons developers to ‘establish or demonstrate some “truth” about their products and services, which both “certifies” them and provides

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<sup>40</sup> Quoted in Nick Estes, *Our History is the Future: Standing Rock Versus the Dakota Access Pipeline, and the Long Tradition of Indigenous Resistance* (New York: Verso, 2019), 250.

<sup>41</sup> ‘Skunk: Non-Lethal Malodorant’, *Mistral Security*, n.d. <http://www.mistralsecurityinc.com/Portals/MistralSecurity/FINAL%20-%20MSI%20Skunk%20Product%20Brochure%205.16.13.pdf>, last accessed 21 July 2020.



them with credit.<sup>42</sup> Meanwhile, the construction of Black, Latinx, and Indigenous populations – as well as people protesting in solidarity with them – as violent security threats creates potential scenarios that enhance Skunk's perceived value *whether or not it is ever actually deployed in the US*.

### More-than-Lethal Consequences

Skunk stresses the status of the 'less-lethal' designation as a misnomer. This designation not only ignores the pre-existing conditions and different degrees of exposure that could in fact make weapons like tear gas or Skunk lethal, but also fails to account for social consequences that are *in excess of* what lethal weapons achieve. In rehearsing the contention that Skunk has not caused any fatalities across its many deployments, the weapon's marketers obscure diverse, everyday forms of morbidity. Although it is marketed as a 'less-lethal', humane, and environmentally sustainable product, Skunk is in fact used as an indiscriminate 'collective punitive measure' on political dissidents and their communities and surrounding environments.<sup>43</sup> Since 2008, Israeli forces have used both canisters and high-pressure water cannons to deliver Skunk water to 'Palestinian crowds, homes, hospitals, hotels, schools, mosques, shops, restaurants, yards, trees, entire neighbourhoods, and even [a] funeral

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<sup>42</sup> Neve Gordon, 'Israel's Emergence as a Homeland Security Capital', in *Surveillance and Control in Israel/Palestine: Population, Territory, and Power*, eds. Elia Zureik, David Lyon, and Yasmeen Abu-Laban (New York: Routledge, 2010), 158.

<sup>43</sup> Michaelo, *Crowd Control*, 36.

procession....<sup>44</sup> Both the weapon's name and many of its proponents trivialise the sense of smell, bringing the long history of Western discourses of (racialised) deodorisation to bear on the task of minimising olfaction's capacities for violence. Yet, according to Marijn Nieuwenhuis, Palestinians associate Skunk's long-lasting effects with 'experiences of humiliation and both personal and social exclusion.'<sup>45</sup> That is to say that the victim's respiratory system isn't the only one to register the effects of Skunk, and that some of Skunk's more lasting effects are revealed once other people find themselves in proximity to the victim.

To dismiss olfactory damage is not only to minimise uncertainties concerning exposure and trauma in vulnerable populations for whom pre-existing conditions are endemic, but also to neglect smell's profound ties with limbic system, hippocampus, memory, emotion, identity, sense of place, chemically mediated affective attunement (or 'entrainment'<sup>46</sup>) among groups, and material ecological relations. If smell is how we come to know our past – or how we come to feel attuned with a place or community<sup>47</sup> – then what are the psychological impacts of the intense and prolonged olfactory discomfort inflicted by Skunk? Racial hierarchies in the West have often been

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<sup>44</sup> Salem, 'Sources of Indoor Air Pollutants', 13.

<sup>45</sup> Marijn Nieuwenhuis, 'Skunk Water: Stench as a Weapon of War', *Open Democracy*, 17 December 2017. <https://www.opendemocracy.net/en/skunk-water-stench-as-weapon-of-war>

<sup>46</sup> Teresa Brennan, *The Transmission of Affect* (Ithaca: Cornell University Press, 2004), 9.

<sup>47</sup> See, e.g., Louisa Dahmani et al. 'An Intrinsic Association Between Olfactory Identification and Spatial Memory in Humans', *Nature Communications* 9 (2018): 1–12.

sustained by olfactory hierarchies (where both those who emit odours and those who value them are perceived as atavistic), and Skunk's 'less-lethal' status masks the deliberateness with which it inscribes olfactory difference onto racialised groups already stereotyped as olfactory deviants. Palestinians, Black people, and Latinx migrants have all been subjected to discourses of olfactory difference that mobilise (socially constructed) embodied knowledge to reproduce racial hierarchies.<sup>48</sup>

Skunk perpetuates what Jasbir K. Puar, in the context of Palestine, calls 'debilitation', or the 'slow wearing down of populations'.<sup>49</sup> Puar's primary example of debilitation is 'the right to maim', a right expressive of sovereign power that extracts value 'from populations that would otherwise be disposable'.<sup>50</sup> Promoted as a humanitarian practice, shooting to maim rather than to kill leaves 'many civilians "permanently disabled" in an occupied territory of destroyed hospitals, rationed medical supplies, and scarce resources'.<sup>51</sup> Much like maiming, Skunk spraying is promoted as a more humane alternative to other uses of force. Though mostly invisible, Skunk's effect is nonetheless dramatic. The scented violence of Skunk contributes to what Puar calls 'the slowing down of Palestinian life'.<sup>52</sup> 'While the West Bank is controlled largely through

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<sup>48</sup> On olfactory racism, see Mark Smith, *How Race is Made: Slavery, Segregation, and the Senses* (Chapel Hill: University of North Carolina Press, 2008).

<sup>49</sup> Jasbir K. Puar, *The Right to Maim: Debility, Capacity, Disability* (Durham: Duke University Press, 2017), xiv.

<sup>50</sup> *Ibid.*, xviii.

<sup>51</sup> *Ibid.*, x.

<sup>52</sup> *Ibid.*, 136.

checkpoints', Puar writes, the Gaza Strip is suffocated through choke points: 'the intensification of policing and control thus happens through, and not despite, "disengagement" and disinvestment, not through checkpoints but through choke points.'<sup>53</sup> The use of Skunk, a weapon that seizes the respiratory tract and olfactory system, extends choke points deep into the bodies of East Jerusalem's inhabitants. Puar describes choke points as the product of a 'control society', and we may likewise understand Skunk as a technology through which the population control and surveillance achieved by the checkpoint come to saturate atmospheres and bodily cells.<sup>54</sup>

Skunk simultaneously reproduces and extracts profit from a debilitating and humiliating atmosphere designed to perpetuate racial and settler colonial power relations. In doing so, it exemplifies the simultaneously material and cultural modes of atmospheric racism articulated by recent work in critical race and Indigenous studies including Renisa Mawani's analysis of 'racial atmosphere', Christina Sharpe's theorisation of the 'weather' of antiblackness, and Kristen Simmons' (Southern Paiute) provocative commentary on 'settler atmospheric'.<sup>55</sup> Simultaneously targeting human sensoria and environments, Skunk materially inscribes racial difference; it

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<sup>53</sup> Ibid., 135.

<sup>54</sup> Ibid., 135; Gilles Deleuze, 'Postscript on the Societies of Control', *October* 59 (1992): 3–7.

<sup>55</sup> Renisa Mawani, 'Atmospheric Pressures: On Race and Affect', unpublished manuscript cited with author's permission; Christina Sharpe, *In the Wake: On Blackness and Being* (Durham: Duke University Press, 2016), 102–134; Kristen Simmons, 'Settler Atmospheric', *Cultural Anthropology*, 20 November 2017. <https://culanth.org/fieldsights/1221-settler-atmospherics>

differentiates groups by seeing to it that they literally don't breathe the same air. Skunk's international marketing capitalises on the legal grey area opened by the concept of 'less-lethal' violence, which leaves already vulnerable communities open to debilitating practices of narrative and financial speculation.

### Conclusion

In the early 2020s, the escalation of Israeli attacks on Palestinians and the frequency of counterinsurgent violence against BIPOC (Black, Indigenous, and People of Color) people in the US have confirmed what has for decades been an open secret: chemical weapons were never really banned. Their confinement to domestic use might have in fact aided their proliferation. For one, as we have recounted, the domestication of chemical weapons has coincided with their rebranding as humanitarian; a state's decision to debilitate rather than kill has come to signal benevolence and soberness, ratifying sovereign power through its deferral. What is more, 'domestic use' continues to connote measured and contained action even as what counts as domestic gets inflated through colonial occupation and border policing. While attacking the senses through chemical weapons is nothing new, the social life of smell – from its role in aesthetic judgments like disgust or abjection to its role in the management of racial difference through norms of hygiene – is such that we must understand Skunk as extending the reach, both temporally and semiotically, of crowd-control measures. Noxious smells that linger entail isolation and stigmatisation – not merely the short-term dispersal of crowds but

the medium-to-long-term obstruction of encounters and gatherings of all kinds. Skunk's promise of isolation and stigmatisation, we have contended, incites narrative and market speculation, with each deployment serving as a test for future deployments and thus driving up the weapon's (perceived) value.

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# **Almost Fragrant Pseudobotany: A Bouquet of Encounters With Faux Flora Across Time – A Visual Essay**

Kerstin Kraft and Susanne Schmitt

Artificial flowers – also known as ‘faux flora, forever flowers and permanent botanicals’<sup>1</sup> are everyday objects. They dwell under the artificial lights of open-plan offices, root into windowsills, eternally unwatered, and adorn graves across the seasons. Once you start paying attention, they seem to be sprawling everywhere. But what smell would guide you there, helping you find them? Imitation flowers often gesture towards smell by mirroring its source visually and even haptically. And yet smell, a central property of flowers, is strangely neglected.

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<sup>1</sup> Kirsten Hardie, ‘But They’re Only Imitation...? Plastic Flowers That Can Disgust and Delight.’ In *Provocative Plastics: Their Value in Design and Material Culture*, ed. Susan Lambert (Cham: Palgrave Macmillan, 2020), 179.

In this essay, we look at the cultural history of a less domesticated and stationary and more mobile variety of imitation floral life that was very popular until the early second half of the twentieth century: artificial flowers that were worn on the body as accessories: as pins or as millinery elements. They grew on hats, hairdos and buttonholes.

When city dwellers left their homes, often adorned with artificial flowers on their hats and lapels, they cut through the fresh air, that ‘turbulent medium,’<sup>2</sup> by adding whiffs of seasonal and not-so-seasonal flowers emanating from carefully crafted textile and synthetic buds to the urban smellscape. The organic surfaces of their flower adornments were often meant to carry perfume through mechanical contraptions, to soak them up, to diffuse them. People moved through the city as ‘channels, containers, and filters for airs and the things they hold.’<sup>3</sup> And so did their companion imitation flowers.

In the bouquet of vignettes that follows, we will travel to the almost forgotten production sites of artificial flowers, to sites of consumption where fabricated flowers and perfume were sold side by side, and to the virtual vaults of Intellectual Property Law.

We became interested in smell when doing object-based artistic research on historical fashion in a museum depot – a space where olfaction is always suspicious and important because it may carry hints of decay. The depot

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<sup>2</sup> Timothy Choy and Jerry Zee, ‘Condition—Suspension’. *Cultural Anthropology* 30, no. 2 (2015): 210–23. <https://doi.org/10.14506/ca30.2.04>

<sup>3</sup> Ibid.



**Figure 1:** Building front and entry of the former artificial flowers factory, Kunstblumenfabrik Lumpe.

is also a site where whiffs and traces create an opening into the everyday life of bygone times and people. At the depot, artificial flowers can be found on hats and headpieces, but also as decorative elements for other accessories and even full outfits. The leaves often give way easily to the touch, and the stems, often wrapped in a greenish material, smell like old books. The flowers themselves are different. Their origin is often the animal kingdom. Silk and paper, wax and paper, felt and paper – the mixes are dry and acidic, powdery and sweet. Dusty and sometimes even rusty.

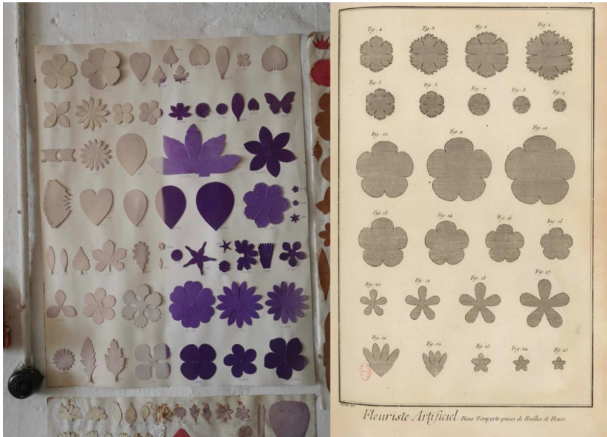
Curious where rust, paper, and fabric would lead us, we decided to go on a scavenger hunt that led us across

the cultural history and fashion(ing)s of artificial flowers in the German-speaking world. What started with flowers and leaves so delicate and brittle to the touch led us through an abandoned factory, a perfume and flower store closed due to the pandemic, and, finally digital property law vaults – the smells had always just disappeared as we approached them.

The images you see here captured some multisensorial ghosts, and many more storylines – or should we say bouquets?

### The Smell of Abandonment in the Factory and the Absence of Smell in the Archive

If one is to look for production facilities of artificial flowers, only very few of these are still operational in Germany. The ‘Kunstblumenfabrik Lumpe’, an artificial flower factory in Trutzhain (about 100 km north of Frankfurt), was forced to close due to economic reasons in 2003. Since then, this *sleeping beauty* awaits her prince. In the original German title ‘Dornröschen’ one would find even more florets and thorns. However, instead of a fairytale castle, a lost visitor will only find dust and cobwebs at this once busy production site. Despite the signs of decay many of the working processes are still visible, the traces of molding, forming, steaming still echo through materials and special tools left behind in the low ceilinged and cold rooms of the factory. The process of punching, dyeing and mounting the artificial flower leaves has remained virtually the same for 250 years. When one compares the left behind tools at ‘Kunstblumenfabrik Lumpe’ to the tools of the ‘fleuriste artificiel’ described by Denis Diderot



**Figure 2:** Samples photographed at the factory in 2021 (left) and Fleuriste artificiel from the *Encyclopédie* (right).

in his *Encyclopédie* (pictured on the right)<sup>4</sup> one recognises that very little has changed in this profession since the eighteenth century.

In the factory, flowers are not grown, they are produced. Artificiality concerns not only materiality but also breaking the plants down into their constituent parts and reconstructing them in a rationalised manner. For example, a natural daisy is composed of many single petals around a pistil. In the imitation, the leaves are fabricated by a punching form and the pistil is replaced by a cotton ball that could be soaked with fragrance. This artificial odour remained on the mimetic version for about three months.

<sup>4</sup> Denis Diderot and Jean d'Alembert, eds. *Encyclopédie ou dictionnaire raisonné des sciences, des arts et des métiers*. (Chicago: University of Chicago, n.d. [1751–1772]). <https://artflsrv04.uchicago.edu/philologic4.7/encyclopedia0922>



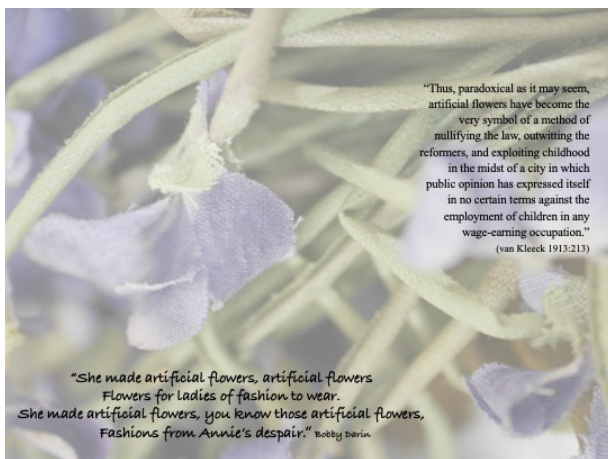


Figure 3: Bobby Darin and Mary van Kleeck.

Today the smell of mould and humidity dominates the former factory – a smell of tristesse, decadence and decay.

Neither the smell, nor the thought that, in fact, one stands on the grounds of a former barracks camp – one that was a Nazi prisoner of war camp during World War II, a US Civil Internment Camp for Nazis post-1945, a camp for Jewish displaced persons after 1946, and, after 1948, a camp for German displaced persons from Eastern Europe (one of them the founder of the factory) – vanish.

The fragility and tenderness of artificial flowers does not convey the reality of the harsh manufacturing conditions as described in Bobby Darin's 1961 swing song, 'Artificial Flowers', about an orphan forced to work in sweatshop conditions.<sup>5</sup> The production was traditionally organised

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<sup>5</sup> Bobby Darin, 'Artificial Flowers' (song) from *The Bobby Darin Story* (1961).



**Figure 4:** Wire, paper and linen flowers (c. 1910) for hat trimmings or dress accessories.

through home-work systems, also known as cottage industries, and workers were only paid for each piece they produced. Male factory owners mostly employed women without professional training, housewives and their children, labouring in a chemical smellscape smelling of dye and other potential toxins. Mary van Kleeck who investigated women's working conditions in the early 20th century wrote: 'frequently the dyeing is done in a corner of the same room in which the girls work and the odor of the wood alcohol is unpleasant and even, as many believe, positively injurious.'<sup>6</sup>

### Parfum Lehmann, Berlin

Kantstraße, Berlin West End, off the famous Kurfürstendamm: this is a site of more pleasurable smells that are preserved on purpose. Lehmann's 'Parfum und Künstliche Blumen' ('Perfume and Artificial Flowers'), is a well-established shop selling perfume according to weight (once per gram and now per millimetre) and

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<sup>6</sup> Mary van Kleeck, *Artificial Flower Makers* (New York: Survey Associates, 1913), 131.

artificial flowers since 1926. Unfortunately, it could not be entered at the time of writing. Covid-19 had placed the city in shutdown, its silence echoing that of the museum depot.

The shop leaves the passerby with a choice of several vistas, all framed by late 1950s curved shopfront features and brass trims: on the right side of the door, the shop windows are overgrown with orchids, arrowroot, roses, cacti. The orchids are *phalaenopsis*, and on closer inspection it becomes clear that these plants are not photosynthesising, but fabric based. And so are the *strelizia*, the poppies, the lilies, all arranged in vases dating from the 1950s onwards. This is why this flower shop looks so much more alive than the others on Kantstrasse, where the lockdown's slow to nonexistent business has taken its toll.

To the left, golden fabric is draped over a stair-like structure exhibiting large bottles of perfume. To this day, customers bring their own containers and carry home creations like 'Lambada' or 'Bahia', pure fragrances like linden blossom or velvet, or individual mixes.

The newspaper TAZ relates that the business, now owned by the third generation of the Lehmann family, keeps records of the olfactory preferences of all their customers including those who have passed on: an archive of fashionable smells, individual preferences and the olfactory history of Berlin, its citizens and visitors.<sup>7</sup> Artificial flowers, still occupying half of the shop floor were a later

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<sup>7</sup> Jana Janika Bach, 'Düfte Mit Persönlicher Note'. *TAZ Verlags*, 27 November 2015. <https://taz.de/Duefte-mit-persoelicher-Note/!5254748>



**Figure 5:** Shop front, Lehmann's, Parfum und Künstliche Blumen, Berlin. The business has been selling (fragranced) artificial flowers since 1926.



**Figure 6:** Details from Lehmann's window display.



**Figure 7:** Bricolage made from a 1920s velvet flower head piece detail (photograph) and patent specification for a vase holding a synthetic flower and motorised butterfly dispensing perfume.

addition to the shop's stock, sold as an alternative means of wearing the perfume that would otherwise have travelled home in bottles. And as plants do, they took root even after the trend faded.

And while both travelling and airborne substances have become concepts charged with mixed affects during a pandemic spreading a potentially deadly lung infection, a third window, displaying old black and white photographs, suggests that it does not need to be that way: the 'Tropfer' (a dripper), installed during an earlier iteration of the shop's life near Bahnhof Zoo, would disperse the parfum du jour – a new one each day, using the skin and fabric of passersby and potential customers to travel and float with the wind. Some, however, preferred artificial flowers rather than necks and revers to be the carriers of these perfumes.

But how to make the scents stay alive on the felted or silky leaves?

## Botanising Patents

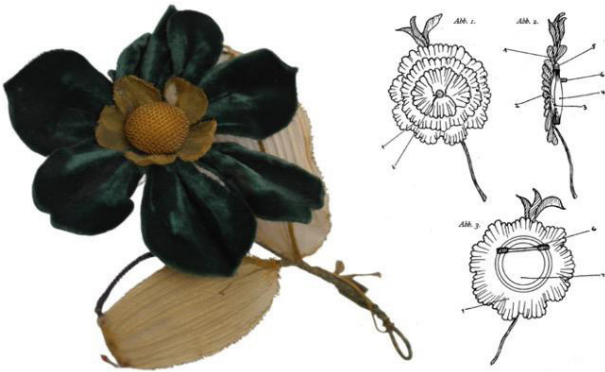
There is a surprising undergrowth of artificial flowers that have taken root in patent databases – many from the United States, the UK, and Germany and stemming from the first to early second half of the last century.

Intellectual property law is a ‘form of commodification rooted in Western liberal philosophy that creates regimes of scarcity by recognising some types of material expression as the property of individual, collective, and corporate actors. Using rationales such as the valorisation of original individuated expression (copyright), novel innovation (patent), investments in creating fields of commercial meaning (trademark), and the making and merchandising of distinctive personas (celebrity), the law legitimates various entitlements.’<sup>8</sup> Anthropological studies of intellectual property law often cross into ethnobotany, the privatisation of plant genetic materials in an era of tremendous biodiversity loss, question what exactly the ‘public sphere’ constitutes in any given cultural context and across economic asymmetries.

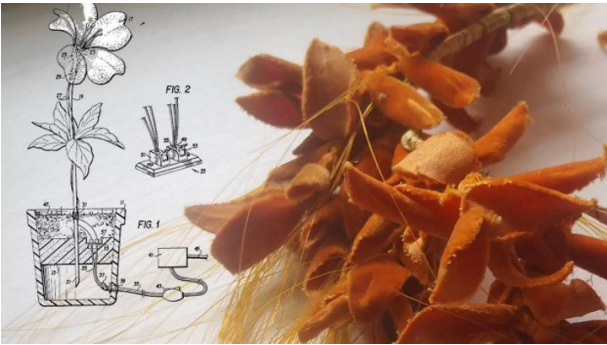
Not unlike other taxonomies of the plant kingdom, blueprints of artificial flowers sitting in the vaults of patent databases have been organised into different taxons, following a tree model of organising patent specifications. One such taxon is that of artificial flowers equipped with mechanisms used to disperse fragrances.

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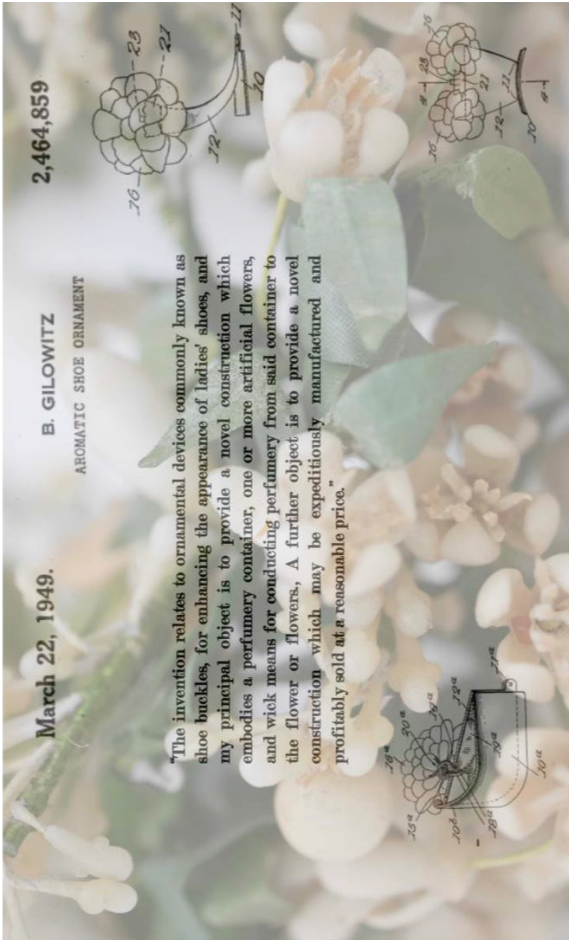
<sup>8</sup> Rosemary J. Coombe and Susannah Chapman, ‘Ethnographic Explorations of Intellectual Property’. In *Oxford Research Encyclopedia of Anthropology* (Oxford: Oxford University Press, 2020), 1–45.



**Figure 8:** Velvet and linen flower pin (1930s) and a technical drawing used for patent application detailing an artificial flower pin with perfume-carrying cushion in the centre.



**Figure 9:** Wreath made of velvet leaves and grain from the 1920s meeting a patent specification for a vase with perfume reservoir.



**Figure 10:** Aromatic shoe ornament patent (1949) against a background of artificial myrtle from a bridal ornament.



The drawings that accompany the patent specifications depict mechanisms that add an olfactory dimension to faux flora are accurate and detailed, showing cross-sections and multiperspectivity that renders them botanical as much as technical. The actual sources of odours – oils, creams, alcoholic carrier substances – that can be used remain often underdetermined. From the perspective of intellectual property law, this makes sense: the less defined and fixed those sources are, the more is covered by the patent. As a resource for historical textile research, patent specifications occupy an unusual and often overlooked position. They draw together technological and legal worlds and put forward imaginaries about moving bodies in dressed up worlds, trying to stabilise the volatility of fragrances.

Please have a closer look at the legal-botanical drawings in this essay. On closer inspection their botanico-technical specificity becomes apparent; suggesting close kinship between the two epistemological worlds, making them available to the world of legal reasoning.

The cross sections reveal hollow stems and a variety of contraptions used to disperse fragrances (about which we mostly learn little): illuminated silk flowers are being patented here, the light fixture being a source of warmth, diffusing the fragrance.

Another patent offers a vase with a semiporous stopper and wire so fragrances can travel up to the floral leaves.

None of the contraptions, mostly intended to be worn close to the body, hold the fragrance forever. Here, the imitation flowers, vibrant as they may be, undergo the same changes as their photosynthesising siblings. The labour of patenting, all about stabilising, regulating, owning, merely extends time a little. The smell of complex

perfumes becomes faint, mingles with paper. Becomes a note within the bouquet of a different archive.

### Authors' Note

All images and collages were made by the authors, using our own photography from our private collections and the research project 'Dresses in motion' (<https://kw.uni-paderborn.de/fach-textil/kleidung-in-bewegung>; <http://www.susanneschmitt.org/#/kleidung-in-bewegung>) and patent documents freely available through the German Patent and Trade Mark Office as well as the European Patent Office: [Depatisnet.dpma.de](http://depatisnet.dpma.de) and [worldwide.espacenet.com](http://worldwide.espacenet.com).

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# Different Smellscapes: Olfactory Patterns Through the Japanese Worldview

Lorenzo Marinucci

## Smellscapes and Japan

Most philosophical accounts of smell could begin with the acknowledgement of how little it has been discussed within European philosophy. The limited attention dedicated to the olfactory elements of our experience throughout the history of European thought would, therefore, be the shadow cast by privilege accorded to sight by Greek philosophy. This is a broad generalisation, sure, and yet it is true that a certain visual primacy is intimately connected with the metaphor of *ideas*, and that the broad features of European ontology have been predicated on the visive quality of objects: stability, defined outlines, a discrete and thematic mode of presence, able to be traced and expressed by *logos*. A history of smell

through Western thought is thus also a challenge to its core categories.<sup>1</sup>

For instance, is smell consciousness, in its structure, intentional? Is the smell of a rose part of the rose itself, or something else, a partially or totally different reality? While the two other distal senses, sight and hearing, are (through very different schemes) senses of presence, through which the distant is given as a positive reality, scents are able to evoke spatial and temporal distance within proximity. The presence of scents is not simply *there*, but *yonder* – even in the case of something overwhelming like stench. Even when the source can be identified visually, smell has a weird topology, being at the same time inside us and a stranger assailing us from all sides. In this respect, smell constitutes a medial, atmospheric sense. Smells lend themselves to no *Ideation*, since they have no sides, and therefore do not present themselves through partial, progressively constitutive profiles (*Abschattungen*), lending themselves to no free variation and no formalisation. There is no stable *idea* of a rose's smell, nor in a Platonic or Husserlian sense. Smell, rather, hangs unstably in the air, suddenly appearing and

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<sup>1</sup> This text was my first attempt to tackle philosophically the relationship between olfaction and thought in a Japanese context, asking myself whether thinking (with) scent outside a European perspective could grant this idea some novelty and flair in several directions. This hunch became the beginning of my first postdoc (Canon Europe Fellow 2020, University of Kyoto) and of a second one (Japan Foundation Fellow 2021, University of Kyoto). My research has progressed a good deal since this first draft, and a book project is currently underway. I have decided to keep this text as close as possible to its original to avoid overlap with several other articles on these themes currently under review. I wish to thank Professor Philippopoulos-Mihalopoulos for his precious prompt.

disappearing as the *quasi-things* described by Hermann Schmitz (wind, voices, feelings), which unlike common things can appear and disappear without notice, very often below the fringe of conscious perception, not present thematically, but arising as part of a 'smellscape', a topology of sensibility in which our consciousness and things of the world are brought together in a certain qualified accord, or *Stimmung*. A smellscape is at the same time something we meet and the phenomenological horizon in which we discover ourselves: our own home, city, country. We are, one might say, grounded in the air.

If this layer of experience has been downplayed in European traditions of thought, a parallel question ought, however, to be asked too, if only for methodological good sense: what about the rest of the world? If the ostensible universality of ideas is predicated on the stability and discreteness of visual experience, but this stress on the visible and abstract is ultimately a defining trait of (post-Homeric Greek) thought, the particularity of this tradition is hidden and assumed unproblematically, rather than transcended. In this essay I will therefore try to address the problem of smellscapes through another intellectual tradition, the Japanese one. Not only has Japanese culture thought *about* the olfactory in rich and detailed ways throughout its history, it has, on occasion, thought *with* the olfactory, developing a 'philosophy of scent' no less rich than the Greek philosophy of vision.

Approaching Japanese scents, I would like to adopt the concept of 'smellscape':

The concept of smellscape suggests that, like visual impressions, smells may be spatially ordered or place

related. It is clear, however, that any conceptualization of smellscape must recognize that the perceived smellscape will be non-continuous, fragmentary in space and episodic in time, and limited by the height of our noses from the ground, where smells tend to linger. Smellscape, moreover, cannot be considered apart from the other senses [...] In combination with vision and tactility, smell and the other apparently 'non-spatial' senses provide considerable enrichment of our sense of space and the character of place.<sup>2</sup>

It must be stressed, however, how the spatial turn implied by the notion of smellscape does not necessarily point towards an objective ambiance: a smellscape can be defined as a localised, interpersonal mode of the 'surfaceless space' experienced as atmosphere by the living body, as described by Schmitz. What the notion of smellscape grasps well, however, is the vastness of its ontology: smellscape are cities and countries, houses and workplaces, our togetherness (pleasant and unpleasant) with other beings. As an open, cohabited horizon of sensation, desire and memory, a smellscape is also always already a lawscape,<sup>3</sup> a folding together of being and knowing, self and otherness, whose binding character also derives its strength from its invisibility. A last advantage of the term smellscape is that by shifting the discourse from single 'scents' and 'smells' to smellscapes we are able to describe not the singular, exasperating 'objects' named smells, which stubbornly deceive thought with their non-objective

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<sup>2</sup> J. Douglas Porteous, 'Smellscape'. *Progress in Human Geography* 9, no. 3 (1985): 360.

<sup>3</sup> Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Abingdon: Routledge, 2015).

behaviour, but atmospheric events and *quasi-things* that characterise interpersonal relationships, lawscapes, even a different metaphysics. To quote Diaconu:

Atmosphere has breathing as its sensory model, and its 'object' is more likely to be a surrounding milieu, in the midst of which the subject is moving and living, than a *Gegen-stand* in the meaning of a static being-as-opposed.<sup>4</sup>

Any exploration of smellscapes has to be located and specific. Are there specific reasons, however, to begin with premodern and modern Japanese intellectual history? While Asian culture at large seems to pay good attention to *plena* (if nothing else, in comparison with their effacement in European thought), it is fair to say that Japanese culture has an interesting and particularly developed passion for smellscapes, and they have often been developed as places of sensory thought.

First, it is not an exaggeration to say that the primacy of visual experience in Japan has never become overwhelming as in Europe. While a heavy reliance of sight is most likely an integral part of human and animal ecology, it does not necessarily translate in the partiality towards *form* typical of Greek culture. If we look at premodern Japanese culture, we can see that it has historically insisted on *plena* such as colour and the qualitative aspects of vision, rather than abstract, objective forms. In early Japanese literature and poetry we find a keen attention to the different elements of subjective experience,

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<sup>4</sup> Madalina Diaconu, 'Reflections on an Aesthetics of Touch, Smell and Taste'. *Contemporary Aesthetics* 4, no. 4 (2006): 136.



distributed across the senses and often integrated into complex synaesthetic spaces and atmospheres. Among these, olfactory stimuluses, their description, and the associations arising from them, are an integral part of such aesthetic lawscapes. Secondly, without the development of a thing-based ontology and a metaphysics of the idea, both Chinese and Japanese culture have been open to a religious and aesthetic exploration of the liminal spaces of impermanence and disappearance, of what manifests itself between things without becoming one.

From these two connected conditions – a strong pull towards multiple sensual and embodied experiences, and an onto-aesthetics open to both positive and negative forms of manifestation – Japanese culture has produced not a unique, unitary olfactory logic, but a series of discourses and practices unfolding the intellectual potentials of smellscapes. These smellscapes have to be understood in this plural voice: through their mediality and atmospheric qualities, not by all-encompassing, unavoidably abstract definitions. A theory of smell is never detached from particular smellscapes.

### Three Smellscapes

In this text we will discuss three different Japanese smellscapes, all of which exist as an intersection of the immediate, ecstatic experience of atmospheres and the double ‘folding’ of lawscapes. First, we will try to observe one of the most peculiar and less known Japanese traditions of refinement: *kōdō* 香道, literally ‘the way of incense’, a societal game of perfume guessing and appreciation that probably constitutes the only traditional smell-based game-cum-artform.

The case of *kōdō*, both in its antecedents, the courtly incense gatherings described in *The Story of Genji* and in the rule-bound gatherings of the Edo period, shows how, far from being a simple datum, the smellscape can be the result of training, linguistic definition, visualised cues and rules, and an intersubjective formation of meaning.

The second case is the formation of the metaphoric category of *nioi* におい (‘scent’) and *nioizuke* におい付け (‘link by scent’) in the poetic aesthetics of Bashō’s school *haikai*. *Haikai* (literally ‘humorous verse’) differed from the modern, world-renowned poetry form of *haiku* (a single 17 morae verse, composed by an individual author) in being a form of art at once individual and collective, a chain of shifting scenes composed by different authors gathered in a poetic setting. Among the formalised modes of connection between poems Matsuo Bashō (1644–1694) and his school developed a theory of connection based not on syntactical wording, ideas or form, but on a harmonising of heterogeneous elements, named in fact ‘scent link’. This metaphorisation of smell as a sense of attunement and realisation of a paradoxical non-dual duality (reception and composition, other and self, etc.) highlights with a unique depth the comprehension of the auratic elements of experience active in Bashō’s aesthetic thought.

The third smellscape is a modern one, and while being very Japanese, also bears the traces (all smells are traces after all) of several European odours: French oysters and perfumes, Western flowers like the rose, the dust of a German library. This unique bouquet characterises the thought of one Japan’s most original and cosmopolitan 20th century thinkers, Kuki Shūzō (1888–1940). Kuki’s philosophical work reveals, at several points, a unique attention to

smellscapes. His most well-known work, *The Structure of Iki* (1930), explores from a phenomenological perspective the notion of *iki*, a specific style of elegance and seduction that defined itself in the floating world (*ukiyo*) of 18th century Edo. Based on the interplay of sexual attraction, tension of the will and the eventual realisation of desire's impermanence, *iki* is considered by Kuki a cultural *unicum*, specific to Japan. But rather than perceiving this cultural specificity as earthbound 'roots', Kuki is employing an atmospheric paradigm, and defining *iki* as perfume, breathing, and atmosphere. Desire and culture are realms of the specific, residing not within an insular subject, but literally becoming the air of a place, its perfume. More than an 'essentialist' in ontological terms, Kuki is interested in the scent-like 'essence' carried by specific conformations of desire, locality and memory: this is why *iki* resists abstraction and generalisation, but not a philosophical discourse *per se*. In his works on literature and contingency, Kuki rediscovers smell as a sense of temporality and even metaphysics, able to grasp absence as such and open the immanent plane of experience towards a perpendicular mode of transcendence.

There is no unique, ahistorical ground to these experiences and theorisations of smell: no general and unifying ideas, no hidden 'essence' of Japanese uniqueness. Or rather, following the olfactory trails of Kuki, we can turn the term 'essence' over, and realise that it refers originally not to a stable identity, but to *the scent of something*, something that goes beyond the positively given thing, becoming a *non*-thing, and yet bringing within itself what is most intimate, *essential* to it.

To avoid both Western and Japanese exceptionalism, we can in fact rely on this idea of *essences* as particular auras

of different smellscapes, defined through their interactions and contingent progress. The three Japanese smellscapes presented in this text are thus 'other' not only in respect of a European point of view, but other from each other – with shared family resemblances, but no common identity – and through the particular phenomenology of scents, being other even to themselves.

### On the Path of Incense

Incense is one of the quintessential exotic smells: beginning a discussion on Japanese smellscapes with it might even be a little dangerous. Nothing seems to compliment better the mix of spirituality and sensuality associated with the other in orientalist discourse, the fascination for the distant land constantly reassembled in lists and purple patches. In his long, erudite essay on incense in *Ghostly Japan*, an equal mixture of traveller's reminiscence, orientalist projection and a piece of scholarship, Lafcadio Hearn imagines a (still unwritten) *Book of Incense*, which ought to be composed of no less than thirteen different sections:

- a) A brief account of the earliest knowledge and use of aromatics in Japan;
- b) Records and legend of the first introduction of Buddhist incense from Korea (551 A.D.);
- c) Something would have to be said about those classifications of incense made during the 10th century;
- d) Then mention should be made of the ancient incenses still preserved in various Japanese temples;
- e) Then an outline of the history of mixed incenses made in Japan, with the one hundred and thirty varieties collected by the shogun Ashikaga Yoshimasa (1435–1490);

- f) We could list the traditions attached to historical incenses preserved in princely families, and recipes should be given for those strange incenses made ‘*to imitate the perfume of the lotos, the smell of the summer breeze, and the odor of the autumn wind*’;
- g) Some legends of the great period of incense-luxury should be cited (such as the story of Sue Owari no Kami [Sue Harukata, 1521–1555], who built a palace of incense woods and set fire to it on the night of his revolt, perfuming the land over a distance of twelve miles;
- h) A study of documents, treatises and books, such as the *Kunshūruishō* [薰集類抄] and the teaching of the Ten Schools of the Art of Mixing Incense;
- i) A special chapter should certainly be given to the incense bags (*kusadama*) hung up in houses to drive away goblins, and similar perfumed talismans to be carried on the person;
- j) Then a very large part of the work would have to be devoted to the religious uses and legends of incense – a huge subject in itself;
- k) There would also have to be consideration of the curious history of the old ‘incense assemblies’ whose elaborate ceremonials could be explained only by help of numerous diagrams;
- l) One chapter at least would be required for the subject of the ancient importation of incense-materials from India, China, Annam, Siam;
- m) A final chapter should treat the romantic literature of incense [...] and especially those love-songs comparing the body to incense, and passion to the eating flame.<sup>5</sup>

Of these thirteen voices I would like to focus on just one, the ‘curious history’ of incense gatherings, first in the imperial court during the Heian period (794–1185)

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<sup>5</sup> Lafcadio Hearn, *In Ghostly Japan* (London: Sampson Low, Marston and Co. 1889), 22–24.

and further formalised during the Tokugawa regime (Edo period: 1603–1868). I justify this choice not only for the relatively unknown status of *kōdō* (the name of the practice from the 17th century onwards) in comparison with other traditional ways of refinement such as the tea ceremony or ikebana, but also because of the lack of scholarship and experience of it outside, and even within, Japan.<sup>6</sup> *Kōdō* offers a unique aesthetic puzzle, being probably the oldest and possibly the only formalised smell-based art form of the world. There is probably no other pre-avant-garde example of such an endeavor and quite surely not in Europe, where smell has been deemed an ‘anti-aesthetic sense’, too close to animality to reach the degree of detachment necessary for aesthetic appreciation. Kant, for instance, was particularly critical of the invasiveness of smell in his *Anthropology from a Pragmatic Point of View*, declaring it ‘contrary to freedom and less sociable than taste.’<sup>7</sup> *Kōdō* turns this supposed aesthetic disadvantage on its head, managing to be not only a smell-based artform, but also a convivial one, at the same time a serious aesthetic cultivation and a society game. Smelling is a highly subjective experience, and yet in being atmospheric it surrounds and attunes the whole gathering. To understand how some ritualised manifestation of smellscapes became the basis of a specific artform, we need to go back to the – obviously alien – social norms of the Japanese imperial court in the

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<sup>6</sup> An important, recent exception is the French volume by Chantal Jaquet, *Philosophie du kōdō: l'esthétique japonaise des fragrances* (Paris: Vrin, 2018).

<sup>7</sup> Immanuel Kant, *Anthropology from a Pragmatic Point of View* (Cambridge: Cambridge University Press, 2006 [1798]), 50.

Heian period. It would be hard to find a place in which smellscapes and lawscapes are more intimately connected.

The Heian court of Kyoto was a highly formalised society, in which rank was not only arranged by means of politics, but also through numerous displays of sophistication: poetry, taste in clothing, calligraphy, personal smells. A poetic competition was roughly the equivalent of jousting among European nobility – no less fierce in competition, no less important in order to raise one's status, no less disgraceful in the case of failure. Mostly disengaged from actual politics, Heian aristocracy lived in a social space of extreme formality and refinement, of strong feelings mixed with ennui and melancholia, but also love play. Men and women were kept physically separate by strict etiquette and a host of protocol and rank distinctions. The forced separations of this lawscape were not simply a hindrance to seduction, however, they were rather integrated into a different sort of erotic interaction, also highly formalised. Accounts of courtly love in Europe focus on the appearance and the *gaze* of the beloved, such as in Dante or Petrarch, following the much older visual character of the erotic, first defined by Plato. The Japanese 'lovescape' revelled instead in mediations: not the body, but clothing and hair; not touch, but calligraphy; not voice, but poetry and letters; not sight, but smells:

One reason why incense was held in such high esteem arose from the customs of upper-class Heian society. People rarely saw each other. Even members of the same sex, if not on close terms, met with a curtain between them. To make matters worse, in the case of romantic conversations, the man might not

hear the voice of the woman whom he was courting until the romance reached its later stages. Until then he had to be content with the voice of a lady's maid repeating her mistress' message.<sup>8</sup>

An appreciation of absence is the basic structure of longing. What is given visually, however, often loses such pathetic sense of distance: separation becomes the *condition* of sight, not its theme. Smell, on the contrary, means being surrounded and infused by the other, without necessarily constituting them as a definite object or a presence. Rather than by transitive expressions like 'loving someone', a phenomenology of olfactive desire might rather be expressed as, literally, 'being into' them.

Smell did not just 'express' a lady's character, it was part of it. Conceiving this olfactory datum (again, never simply bodily odours, but clothing, perfumes, wood, food) as something only *associated* with a person means missing a crucial point: the being-given-together, one within the other, of the material-visible and the etheric-auratic poles of the same atmospheric space.

This mutual belonging of scent and person is true in general: it was however even truer for Heian aristocrats, among whom incense making and appreciation was a form of self-cultivation as common and as important as poetry. Crafting incense (*takimono*) was a sign of one's good taste and sophistication, but was also a display of status, and many recipes were jealously guarded knowledge, transmitted along noble lineages. All incenses were composed of six staple ingredients (aloeswood, clove,

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<sup>8</sup> Aileen Gatten, 'A Wisp of Smoke, Scent and Character in the *Tale of Genji*'. *Monumenta Nipponica* 32, no. 1 (1977): 36.



seashells, amber, sandalwood and musk) in varying proportions, plus a seventh, different ingredient for each of the six basic types of *takimono*.<sup>9</sup> A formalisation of six basic scents dates to the reign of Emperor Nimmyō (833–850) by Prince Kaya and the Minister, Fujiwara Fuyutsugu, and each of them was furthermore connected to seasonal and literary references.

As is quite clear from the descriptions of Go-Fushimi, describing a smell is always, if not difficult, a dip into non-literal language. In the *takimono* list we see descriptions of flowers, that are *not* an ingredient of a perfume, but its *metaphor*, a visual cue of its character; or otherwise, a synaesthetic ‘colour’; a seasonal scene like falling leaves and *susuki* billowing in the wind; a direct feeling of impermanence (*mono no aware*) or lost love. As a place of belonging and meeting, smellscape held together personal sensitivities and interpersonal literary references that were central to the self-expression of Heian-era aristocrats.

We have a prime example of this multidimensionality of incense in a major literary document of the Heian period, *The Tale of Genji* (*Genji Monogatari*). The whole novel is awash with perfumes: we see scenes of courtship take place through incense burning, or courtship failing when too sweet a perfume reveals the vulgar character of a lady (XXV, *Fireflies*). Further, two male characters are identified in their roles and relationship by their fragrances (Prince Kaoru, whose body emits naturally a wonderful scent, and Prince Niou, who out of jealousy becomes obsessed with the alchemy of incenses).<sup>10</sup> There is a whole chapter

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<sup>9</sup> Ibid., 37.

<sup>10</sup> Ibid., 41.

INCENSE (TAKIMONO)	SEASON	DESCRIPTION ACCORDING TO THE METHODS OF BURNING INCENSE RECORDED BY FORMER EMPEROR GO-FUSHIMI, 14TH CENTURY
梅花 <i>Baika</i> Plum Blossom	Spring	'Similar to the smell of plum blossom.'
荷葉 <i>Kayō</i> Lotus leaf	Summer	'Approaching the smell of lotus flowers.'
侍従 <i>Jijū</i> Chamberlain	Autumn	'A smell that brings forth old memories, like the melancholic pathos ( <i>mono no aware</i> ) of the heart in the autumn wind.'
菊花 <i>Kikka</i> Chrysanthemum	Autumn Winter	'Like the colour of chrysanthemum flower, not unlike the perfume of dew.'
落葉 <i>Rakuyō</i> Fallen leaves	autumn Winter	'Imitating the falling leaves of <i>momiji</i> , reminiscent of the gentle shape of <i>susuki</i> .'
黒方 <i>Kurohō</i> Black	Winter (special celebrations)	'Like the cold air of deep winter, a smell that gets deep in the body, and reminds of a lost love across the four seasons.'

of the *Genji Monogatari* dedicated to incense gathering (XXXII, *A Branch of Plum*), describing an incense competition a by Prince Genji for several ladies (many of which are present or former lovers):

Genji planned something exceptional for his daughter's donning of the train. The Heir Apparent was to come of age in the same second month, and her presentation to him would presumably follow. [...] He had his incense woods old and new arranged before him and then passed out to his ladies with the request that they make two blends each. Everyone at Rokujō and elsewhere was caught up in preparing superb gifts for the guests, rewards for the senior nobles, and so on; but now each had choices to make as well, and iron mortars rang loudly everywhere. [...] Genji sequestered himself in the main house and blended away according to the two methods (how had he ever learned them?) covered in the Sōwa Instructions. His lady had had herself specially installed in the deepest recess of her eastern extension to master the method taught by the Hachijō Lord of Ceremonial. So the two vied with each other, and her strict secrecy moved Genji to remark, 'After all, a fragrance wins or loses according to whether it is shallow or deep!'<sup>11</sup>

The role of perfumes here is both aesthetic and political: Genji hopes that his daughter can become a lady-in-waiting for the Empress and meet the Crown Prince, who is of the same age.

But, just as with smells, the scene also has different overtones: each of the women present perfumes that express something private and personal – her status, her

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<sup>11</sup> Murasaki Shikibu, *The Tale of Genji*, trans. Royall Tyler (London: Penguin 2016). Chapter 32, 'The Plum Tree Branch'.

residence, the season that best represents her personality, and her relationship to Genji.<sup>12</sup>

Such all-encompassing aestheticism is a hallmark of Heian court life. In later eras, with the rise of the military class, incense gatherings retained their role as a demonstration of status and wealth but moved towards a sensitivity distinctly different from that of the Heian aristocracy. Sasaki Takauji (1306–1373), a military governor for the Ashikaga Shogunate, famous for his accomplishments in poetry and the luxurious extravagance typical of this period (*basara*), once famously lit a block of incense, weighing almost a kilogram, at once. During the same period, two other military lords with a passion for poetry and the newly formalised tea ceremony, Shino Sōshin (?–1480) and Sanjōnishi Sanetaka (1455–1537), started codifying a new way of incense burning. The aesthetics of the military class in the 15th century, which also developed through its relationship with Zen and the tea ceremony, ultimately developed a penchant for essentiality and impermanence. Rather than personalised blends, the smelling gatherings of this period were thus increasingly based on pure aloeswood, an expensive imported material that was classified by six main proveniences and five particular flavours. This further formalisation developed into incense meetings (*kōkai* or *kumikō*) in which art and refinement met in a game of guessing.

The number of varieties to guess varied from setting to setting; in many cases the host provided most of the incense, and guests might contribute with one variety. A sample of the host's incense was burnt as a reference

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<sup>12</sup> Gatten, 'A Wisp of Smoke', 45–46.

before the start of the game, but the guest's incense was kept as a surprise. Very often, incenses were named after poetic images according to the season or literary references. Gatten describes one of the easiest forms of *kōkai*, the Pine-Bamboo-Plum:

The three scents, *Shō* (Pine), *Chiku* (Bamboo), and *Bai* (Plum) are first presented in a *tameshi*, or trial run. Each scent is identified by the master of ceremonies before it is passed on to the participants. When everyone has had an opportunity to sample the three scents, the packets containing the incense are shuffled to mix up the order. The three scents are then passed around again, and one must identify them by their characteristic odor. This is more difficult than it may seem. One cannot rely on the memory of familiar fragrances: the scent named Pine, for instance, does not smell especially like a pine forest, nor does the Plum resemble the fragrance of a plum blossom. The scents are entrancing but abstract; they are distinct when one samples them, and have passed from memory by the second round. [...] Approximately twenty people took part: all but one failed to identify the scents correctly.<sup>13</sup>

Hearn describes a more complex game, in which the number of possible scents is four, with ten smell-rounds (十炷香 *jicchūkō*). But the variants are numerous. A particularly interesting version, which developed during the Edo period, is *Genji-kō*, in which the game references the perfumed world of *Genji Monogatari*. I personally tried it in 2018 at Yamadamatsu, a traditional incense manufacturer not far from the grounds of the Imperial Palace in Kyoto. In *Genji-kō* twenty-five fragments of aloeswood, of

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<sup>13</sup> Ibid., 48.

five different kinds, are mixed. Five pieces are picked up and arranged in order, noted down by the master of the gathering, and then put on braziers and passed among the participants. While it is possible to have the same scent repeated five times or five different scents, most combinations will contain some repetition. There are 52 possible combinations. To note the sequence down, another highly aesthetic system of graphic cues has been developed, the *Genjikō no zu* (源氏香). For each of the five incenses passed among the participants, each traces a vertical line on a piece of paper, from right to left. Then, if the current fragrance is the same as a previous one, a horizontal line is drawn across the vertical ones, connecting them to form a sort of bridge shape (see Figure 1). By doing so, the participants of *Genji-kō* can trace 52 possible patterns, which are named after *Genji Monogatari*'s 54 chapters (with only the first and last, 'The Paulonia Court' and 'The Bridge of Dreams', excluded). The logic of smells as a means of poetic expression, a cultural development that characterized the *Genji Monogatari* itself, is employed recursively, as a reference for aesthetic patterns and to evoke a perfumed world that existed in centuries long gone.

*Genjikō* glyphs make visible a temporal, invisible sequence; translate it into a literary realm, connecting it to the events, characters and emotive tones of the corresponding chapters; and can also be reproduced on the tools used in the ceremony, becoming patterns on a kimono or obi, or appear in graphic arts, hinting at the world of *Genji* and that of *kōdō* simultaneously. For instance, we see them in many of the *ukiyo-e* illustrations by Utagawa Kunisada (1786–1865) for





















































						
帶木 Hōki	空蟬 Utsusemi	夕顔 Yūgao	若紫 Wakamurasaki	末摘花 Suetsumuhana	紅葉賀 Momijinoga	花宴 Hana no en
						
葵 Aoi	賢木 Sakaki	花散里 Hana chiru sato	須磨 Suma	明 Akashi	滯櫻 Miotsukushi	蓬生 Yomogiu
						
関屋 Sekiya	絵合 Eawase	松風 Matsukaze	薄雲 Usugumo	朝顔 Asagao	乙女 Otome	玉鬘 Tamakazura
						
初音 Hatsune	胡蝶 Kochō	螢 Hotaru	常夏 Tokonatsu	篝火 Kagaribi	野分 Nowaki	行幸 Miyuki
						
藤袴 Fujibakama	横柱 Makibashira	梅枝 Umegae	藤裏葉 Fuji no uraba	若菜上 Wakana jō	若菜下 Wakana ge	柏木 Kashiwagi
						
横笛 Yokobue	鈴虫 Suzumushi	夕霧 Yūgiri	御法 Minori	幻 Maboroshi	匂宮 Nioumiya	紅梅 Kōbai
						
竹河 Takekawa	橋姬 Hashihime	椎本 Shiigamoto	総角 Agemaki	早蕨 Sawarabi	宿木 Yadorigi	東屋 Azumaya
						
浮舟 Ukifune	蜻蛉 Kagerō	手習 Tenarai				

Figure 1: *The 52 Genjikō no zu* 源氏香図.

the *Nise Murasaki inaka Genji* (*Fake Murasaki and a Country Genji*), a parodic work by Ryūtei Tanehiko published between 1829 and 1842. Switching from the refinement of Heian court to the humorous fictional adventures of the second Ashikaga shōgun's son, Mitsuuji, and swapping the classic poetry of nobility,

*waka*, with the popular and ironic form of *haikai* (the antecedent of modern *haiku*), the *Nise Murasaki* is an example of the Edo taste for parody, graphic puns, and comic intertextuality.

This interplay of scents and intertextuality is itself significant. There is in fact a certain isomorphic relationship between the two texts, original and parody, on one side, and the way in which scent can connect two moments in time on the other. Literary reference is a particular mode of unity in duality: the original is not present, but it lingers in the derivative text exactly as a 'scent' would do in the lifeworld. It is active in absence: remembered, but in a partial, non-representational way that does not obstruct what is present, but gives it a surreal depth. This is the inherent quality of scent-memory, the difficulty of which the games of *kumikō*, *Genjikō* included, rely. The paradox is that while smell is certainly *the* sense of memory, we cannot recall smells. This is confirmed by Gatten, who, in recalling a *kōdō* meeting, notes that, 'the scents are entrancing but abstract; they are distinct when one samples them, and have passed from memory by the second round.'<sup>14</sup> I have experienced myself this unexpected difficulty during my experiences of *kōdō*, and overheard a Japanese woman attending the ceremony perfectly express the reason for their surprising self-erasure from memory: *Katachi ga nai no de...* 'It is because they have no shape...' Thus, *kōdō* is a form of art rather than a simple game not only because of its multi-layered refinement, and for the skills required to participate, but because it reveals through its rules, through the particular

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<sup>14</sup> Ibid.



lawscape of the gathering, something essential and yet often unrecognised about the phenomenology of smell: its non-linear temporality. Smell is for us the sense of connections – among people, environments, and especially across time. And yet it is not at our disposal as a voluntary remembrance or a stable object. Its representation must be a *re-presentation* in the literal sense of a *happening again*. We do not hold smells under our control, we are not able to evoke them at will; rather, the opposite is true, since a smell from the past can hold sway over us and bring back a forgotten memory, which seems for a moment to be in the air. This dynamic of disappearance and re-presentation, which is then centrifugally expressed in literary forms and images, is nothing less than the central experience of *kōdō*.

Discussion of ‘connection’ also forces upon us another question. The atmospheric value of smell is not only a spatial connector (the smellscape), but also acts temporally, as we have seen. Both personal memories and past identities surface again in smellscapes. Of the traditional five senses, hearing has perhaps the strongest temporal connotations. But while the temporality of hearing is linear, and once exteriorised and made visible in language or music notation belongs to a spatialised, objective temporality, the temporality of smell is sudden and discontinuous, a gap or absence followed by a magical return of the selfsame. The Japanese philosopher, Kuki Shūzō, reflecting on the nexus of smells and time, speaks of its ‘metaphysics’, as we will see. But the art form that seems best suited to explore this pattern of discontinuous temporality through which such ‘connection’ can arise, is literature.

The use of odor in literature emphasizes that while one may stand outside a visual landscape and judge it artistically, as one does a painting, one is immersed in smellscape; it is immediately evocative, emotional and meaningful. Literature, largely British and twentieth century, provides ample data for the discussion of smells of persons and landscapes in space and through time.<sup>15</sup>

Porteous' claim is correct, even if his belief that smell-literature is 'largely British and twentieth century' is at best dubious. It is true, however, that one of the best-known reflections on smell and taste in Europe is not the work of a philosopher but the *madeleine*-triggered reminiscence at the beginning of Marcel Proust's *In Search of Lost Time*, and that in *kōdō* the indescribable quality of smellscape sequences becomes image and poetry through its transfiguration into literary references.

Is there a structural affinity between scent-time and literary time? There is one uniquely Japanese literary form in which this temporal quality of smell has been grasped and rendered into an essential tool of aesthetic understanding, creating what Haruo Shirane has called, very appropriately, 'the poetics of scent': the chained poetry of *haikai*.

### The Poetics of Scent

The notion of 'scent' (*nioi* 匂い) has a central role in the lawscape of *haikai* – Japanese comic chained poetry – and especially in the school led by Matsuo Bashō

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<sup>15</sup> Douglas Porteous, 'Smellscape', 360.

(松尾芭蕉 1644–1694), beginning from the late 1680s. Today, Bashō is known as a *haiku* poet, the first premodern master of the Japanese 17-morae poetic form. But the modern form of *haiku* was actually first named and defined by Masaoka Shiki (1867–1902), during the Meiji period (1868–1912), in a dialogue with an idea of literature already influenced by Western standards. One of Shiki's peeves against *haikai* was it being a multi-authorial and impromptu composition, a poetry of sudden connection between friends or even strangers, too far removed from authoriality in its modern, Western sense.

The use of poetic dialogue in Japanese poetry had already begun with the tradition of courtly poetry, *waka*. Following a 5-7-5/7-7 morae pattern, *waka* lent itself to being composed by two different authors, with the first 17 morae (*kami*) creating a scene and the second fourteen (*shimo*) completing it through a series of formalised associations. During the 11th and 13th centuries, courtly games meant that the form evolved into longer chained sequences: after the 14-morae *shimo* a third poet would attach another 17-syllable fragment, meant to be read just with the 14-morae immediately before it (the first sequence was to be 'pushed away', *uchikoshi*). This effectively created a shift in the scene, which gained a cinematic quality and could move (always according to a specific set of often very complex rules) through seasons, characters, places and themes. While an extreme example of refinement, the stiff conventionality of this kind of poetry meant that by the 14th century an informal and less serious form, not limited to the aristocracy and the samurai class but also increasingly enjoyed by bourgeoisie

and commoners, gained ground. It was called *haikai no renga*, ‘comic linked verse’. Mixing common spoken language and Chinese words with the classical Japanese of *renga* and employing a playful language that often relied on puns or crude humour, *haikai* was considered a minor divertissement until the 17th century, when masters like Teitoku, Sōin and Onitsura more earnestly explored its aesthetic potential, respectively stressing its continuity with *waka*, its freedom and irony, and its ability to re-stitute experience with sincerity (*makoto*). Bashō synthesised all these elements in a unique, powerful formula that mixed high and low, and oscillated masterfully between the courtly tradition, Buddhist themes, and the everyday lives of ordinary Japanese citizens, blending Chinese classics and Japanese sensitivity. Before his death he became the undiscussed master of *haikai* throughout Japan, also thanks to his constant travels in the last ten years of his short life.

*Haikai* is unique in being a composition that is at the same time individual and collective. While each author could be better or worse at producing single verses (*ku*), often excelling in one or two types of scenes, the artistic quality of the sequence arose not only from the beauty of the single verses, but from the ‘negative’ element of their linking, the gap between them. Bashō once declared himself *better* at linking verses, rather than as the author of single poems. This stress on linking means that *haikai* poets were both passive and active, composers and audience at the same time. The assembly of the poetic session (*za* 座 ‘sitting’) was an attuned lawscape in which human beings explored both their individual and their collective

existence; *haikai* poets had therefore to show, through their contribution, how finely they understood the preceding verse and the lingering atmosphere of the whole session in order to produce something new by letting it affect their own feelings and imagination. Too much distance meant that the aesthetic unity between two linked verses was broken; too little was a sign of little talent and self-confidence. Each poet had to 'create and interpret each strophe in light of the poem's totality while at the same time attempting to understand each individual strophe within the contextual atmosphere of the particular *renga* as a whole.'<sup>16</sup>

Before Bashō, these links between poems were mostly based on formal associations or diction (*monozuke*, 'lexicon link') and on the overt elements of its scene (*kokorozuke*, 'content link'). Bashō however became interested in new kinds of indirect, atmospheric links that were gathered under the term *nioizuke*, 'scent link'. Haruo Shirane, in his seminal essay 'Matsuo Bashō and the Poetics of Scent' notes that by recognising the aesthetic potential of linking two different worlds by an overtone or an atmosphere, rather than explicit content or wording, the *nioizuke* produces a dynamic metaphorical effect, close to that of montage in cinema:

A succession of seemingly unrelated shots are closely linked by connotation or overtone. Sergei Eisenstein, a pioneer in film production and theory, once define

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<sup>16</sup> Tadashi Ogawa, 'A Short Study of Japanese Renga: The Trans-Subjective Creation of Poetic Atmosphere', in *Destiny, the Inward Quest, Temporality and Life*, ed. Anna-Teresa Tymieniecka (New York: Springer, 2011), 259.

montage as ‘an idea that arises from the collision of independent shots’ and that may result in ‘emotional dynamization.’<sup>17</sup>

We can think of this ‘emotional dynamization’ not simply as a visual phenomenon: in fact, the smellscape, too, works by interactions, letting objects extend beyond themselves and turning them into a new dynamic whole. In the case of *haikai* two distinct images in temporal sequence, from two different subjectivities, come together in what is in effect a negative space: the temporal pause between them. As in cinema, or, an even better comparison, comics, the space between two frames is the implicit device allowing this discontinuous temporality to create an emotive or narrative effect. This empty space is what lets the atmospheric be: scent and atmosphere are connecting two things *without making them one*, since the later verse should only carry ‘the atmosphere of its predecessor much as the fragrance of a flower is carried by the wind.’<sup>18</sup>

This elevation of scent to a general principle of poetics was later stressed by another *haikai* theoretician and disciple of Bashō, Kagami Shikō (各務支考 1665–1731) who, in his *Jūron’i benshō* (*In Defense of My ‘Ten Treaties’, 1725*), equates the notion of *nioi* to another central concept of classic Japanese aesthetics, the ‘emotive overtone’ (*yosei* 余情): ‘what is called an overtone (*yosei*) in classical poetry is called scent (*nioi*) in *haikai*.’<sup>19</sup> *Yosei*,

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<sup>17</sup> Haruo Shirane, ‘Matsuo Bashō and the Poetics of Scent’. *Harvard Journal of Asiatic Studies* 52, no. 1 (1992): 86.

<sup>18</sup> *Ibid.*, 79.

<sup>19</sup> *Ibid.*, 81.

overtone, was the term originally used for poetry capable of an emotive effect going beyond words, leaving an element unsaid and invisible, as the ‘atmosphere that is not revealed through the form of the poem.’<sup>20</sup> If the atmospheric element of *yosei* is what goes beyond the given words in a single poem, the effect of *nioi* relied too on this aesthetic potential of gaps or atmospheres between different moments in poetry. Shirane also argues that the principles of *nioi* poetics are active in Japanese aesthetics at large:

The aesthetics of *nioi* is by no means limited to Bashō. It can be found in a variety of traditional Japanese arts, from landscape gardens to architecture to flower arrangement, and forms a part of the larger medieval aesthetics of resonances.<sup>21</sup>

But however general a principle, it is in the *haikai* use of *nioi* that this metaphoric scent becomes paradigmatic. Given that *haikai* chains are little known by Western and even Japanese readers, let us observe one. The poetics of scent is prominent for the first time in the Bashō School collection, *Sarumino* (*The Monkey’s Straw Raincoat*), published by Nozawa Bonchō and Mukai Kyorai in 1691. It includes four *kasen* (36 verse chains) considered the peak of Bashō School style, and it is closed by another of Bashō’s masterpieces, the short poetic prose (*haibun*), *An Account from the Illusory Dwelling*.

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<sup>20</sup> Michael Marra, *Modern Japanese Aesthetics: A Reader* (Honolulu: University of Hawai‘i Press, 1999), 149.

<sup>21</sup> Shirane, ‘Matsuo Bashō and the Poetics of Scent’, 109.

One of the four *kasen* series, ‘Summer Moon’, begins with a poem that has a smellscape as the theme of its scene, and then goes on to explore this scented world through the gaps in *nioi* connections. The three poets participating were Bashō and two of his most accomplished disciples, Bonchō and Kyorai. Here are the first four linked verses:

市中は 物のにほひや 夏の月 (凡兆)	<i>Ichinaka wa Mono no nioi ya Natsu no tsuki</i>	Out in the city The smell of things – Summer moon
	(Bonchō)	
あつし／＼と 門／＼の声 (芭蕉)	<i>Atsushi atsushi to Kado kado no koe</i>	It’s hot, oh so hot! Voices say gate by gate
	(Bashō)	
二番草 取りも果さず 穂に出て (去来)	<i>Nibankusa Tori mo hatsazu Ho ni dete</i>	The second weeding Not yet done, and already Ears of rice
	(Kyorai)	
灰うちたゝく うるめ一枚 (兆)	<i>Hai uchitataku Urume ichimai</i>	Tapping off the ashes a thin dried sardine
	(Bonchō)	

The city of Kyoto, surrounded by hills, is unbearably hot and damp in summer. Moreover, the poem does not describe the refined northern side of the city, but downtown, the more popular and commercial part (*ichinaka*). In the hot evening, the city’s smellscape, with its nature, food, people and animals, melts into a big, powerful note:



in the night, as vision is reduced and the paper doors have to stay open to allow fresh air into the home, the smell of the world is everywhere. The expression *mono no nioi*, ‘the smell of things’, might even hint at a much older, noble ideal of sensitivity from the Heian period, the *mono no aware* (pathos of things), the ability to be moved by the presence and impermanence of things. If the reference is there, it is half serious and half parodic, in *haikai* style. The damp sweat of summer and the smell of roasted fish is surely far from classical images of beauty: but things of the world are present and fused together in their smell, seeping into our sensitivity and at the same time ready to scatter and disappear, just like the cherry blossoms of classical poetry. Scents, like emotions, are first and foremost *of things*: not a private, internal sensation, but a pathic affection that reveals our subjectivity as part of a whole, emplaced in an impersonal ‘it smells ... it feels’ in which it can first become conscious of itself.

Bonchō’s *hokku* juxtaposes this horizontal expansion of the smellscape with a sudden vertical jolt. The moon, waxing and waning, is something aloof, beyond the passions of the world. Typically a seasonal word (*kigo*), indicating autumn, in this case is overtly stated to be the moon of summer: this not only implies that the city smells are those caused by the heat of the season, but introduces another specific poetic essence (*hon’i*, the ‘true idea’ of a thing as revealed in poetry), in this case freshness, the topical meaning of a summer moon. The moon is seen, not smelled: this vision however, rather than suggesting one of simple contemplation, is fused with an olfactory scene of the city. What the two elements of this *hokku*

have in common is a sense of distance. But rather than subtracting from their aesthetic effect, their heterogeneity becomes the unique smellscape of a summer evening. Even the moon has a certain scent.

Bashō's *waki*, answering to Bonchō, adds aurality to this scene, integrating people and movement to the development of the poem. This verse's structure is all acoustic, not just in terms of content, but with its repetition, rhythm and alliteration (*kado kado no koe*). Not a single sound or a unified music, but a sense of shared connection via a climate – isn't discussion of the weather the smallest of small talk, and yet the also surest sign of our belonging together, in the same atmosphere?<sup>22</sup>

Just as this first image is complete, the addition of a third verse by Kyorai moves on from the night city smells (as with all smells, they are impermanent) and shifts the scene from the city to the countryside. The heat wave is making rice mature faster than normal, before the second weeding. The explosive plant growth of the hot, damp Japanese summer gives the sequence a different kind of depth, invoking the seasonal life of farming families. The 'emotional dynamization' of montage realises a new setting with a *nioi* link that is atmospheric: the hot air of summer.

The fourth verse, again by Bonchō, is another scent link. The transference here is from the vast to the small, the 'thin' (*hosomi*, another ideal of Bashō School *haikai*). With the haste of the field work, a single dried

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<sup>22</sup> Watsuji, Tetsurō. *A Climate; A Philosophical Study* (Tokyo: Printing Bureau, Japanese Government, 1962), 15.

sardine covered in ashes becomes a very frugal lunch before returning to the rice fields. Smell is back, the mix of charcoal and fish that speaks of the worn poverty praised and spiritualised as *wabi* by Bashō's poetics. From the general overview of farming life we move to a concrete image, another technique that anticipates cinematic montage. But the *nioi*, connecting the rural environment and the meagre dried sardine, is not simply a synecdoche. As Shirane notes, *nioi* counts as a metaphor not simply by describing as 'scent' the linguistic formalisation of distant links: the metaphoric axis of poetry is recognised by *haikai* poetics as a smell-quality, with its capacity of blending and relating different sides of being:

Roman Jakobson has argued that literary discourse develops along two fundamental lines of verbal behavior, selection and combination, that is to say, a metaphorical axis, in which words are linked by substitution, similarity, or dissimilarity, and a metonymic axis, in which words are joined by contiguity, particularly as a combination of elements in a grammatical or narrative sequence [...] An ideal *nioi* link also did not depend on metonymy in its more general forms of cause and effect, narrative continuity, character portrayal, or dilation on an existing scene. Instead, *nioi* poetics favored a more metaphorical juxtaposition in which the *maeku* and the *tsukeku* intersected on a shared connotation, often in montage fashion. [...] *Nioi*, in short, was a rhetorical trope in which the two linked verses often had the function of mutual metaphors. These were not metaphors in the traditional sense of the word, in which a direct transference was made between one image and another. Instead, the *nioi* link relied

on selective juxtaposition, in which the connections were only suggested.<sup>23</sup>

The unexpected blending of two different things is not limited to metaphor. It can be considered for instance typical of irony, and the laughter of *haikai* often works through such juxtapositions. In the poetics of scent, *nioi* is not simply an intra-textual metaphor, but works also as a second-degree one, employed to describe and visualise the invisible *poiesis* of the metaphorical activity at the core of language. Scent moves through a vertical axis that transcends what is visible and present, both temporally and physically. If the essence of scent-as-metaphor, in this more radical sense, is in its *beyondness*, there is always some *metaphysics* in the *metaphoric*, and vice versa.

This discovery of smell as a metaphoric axis does not apply only to the chained poetry of *haikai no renga*. On the contrary, as the reliance on scent links meant that single *hokku* were increasingly perceived as independent units, the structure of *nioi* connections eventually started to be employed within the single poem also. A fine example of this internal scent in the Bashō School already appears in the *hokku* about the city smells and the moon by Bonchō: as we saw, the horizontal plane of smellscape is intersected with a sense of freshness of the moon, and the two are blended without fusing, with the verticality of this association making the *hokku* a crossroad of immanence and transcendence. Another *hokku* by Bashō,

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<sup>23</sup> Shirane, 'Matsuo Bashō and the Poetics of Scent', 82.

which uses scent both as an image *within* the poem and as instantiation of the associative-metaphysical structure of poetry, is this composition, dated autumn 1694, a few months before his death:

菊の香や	<i>Kiku no ka ya</i>	Chrysanthemums' scent
奈良には古き	<i>Nara ni wa furuki</i>	In Nara many ancient
仏たち	<i>Hotoketachi</i>	figures of Buddhas

Chrysanthemums and their scent have been associated with autumn since antiquity. Nara, the most ancient capital of Japan (from 710 to 784), was greatly shaped by Buddhism, which arrived in Japan bringing with it the incenses essential to its rites. According to Shirane, 'the dignified, elegant statues of buddhas that fill the temples of the old capital of Nara have no metonymic connection to the scent of chrysanthemums – the statues are not surrounded by flowers – and yet the overtones of the two parts fuse: both possess antique and elegant atmospheres.'<sup>24</sup> What is separated physically and temporally – *many* statues, a faraway past, living flowers and ancient human art – exist together in a state of non-obstruction as atmosphere. Scent hence reveals a particular metaphysical overtone, both in a sense of temporality and as pure, metaphysical transcendence. Even if we don't assume that Bashō's failing health – he died aged just 50 – would mean his thoughts would turn to Buddhist salvation, and even bracketing his own nuanced understanding of Buddhist philosophy, the overlapping of Buddhism

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<sup>24</sup> Ibid., 103.

and scent – if not a classic theme in poetry – is far from uncommon in Buddhist history and practice:

Buddhism always honored scents. Its statues are of fragrant woods, sandalwood is used to evoke the mysteries of the cult [...] like many other religions, incense and Buddhism weaved together this symbolic relationship, that is that of transcendence. Incense and its fumes become the evanescent ways that elevate man towards divinity.<sup>25</sup>

By being a symbolic or metaphoric connector, scent here links two elements – Buddha statues, with their own aura of dignity, and the smell of chrysanthemums. But both elements of this smellscape have a distinct *temporal* connotation. Just as the smell of *nioizuke* worked in the temporal gap between poems, letting the absent linger, here the temporal disclosure of smell is even stronger. Bashō is separated from the ancient Buddhism of Nara and the old incense rituals of the Imperial Court by 1,000 years. But this temporal distance is not perceived as the spatialised, objective time criticised by Henri Bergson: it is a gap or distance within the present scene, making both moments exist differentially within the smellscape. While the connection of memory and smell is commonplace, in the context of a phenomenology of smellscapes we can turn this idea on itself, and rather affirm that *it is temporality that exists like scent*. We do not remember a scent: we exist within it in a cross-temporal way, *feeling* the past

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<sup>25</sup> Louise Boudonnat and Harumi Kushizaki, *La voie de l'encens* (Arles: Picquier 2000), 41–43.

within the present. Smell is at the same time a sense of proximity, intimacy, and of metaphysical distance:

Fragrance has no rhythm, to be sure: one does not have fragrance *within* time. [...] The oral sensorium does not merely create in us a state of attunement, but also a sense of *repetition*. We cannot of course repeat the fragrance, as we would repeat a line or a melody; but the fragrance repeats *us*, as it were [...] *in fragrance and flavor the enduring element of the past, its atmosphere, is preserved.*<sup>26</sup>

This temporal ecstasy is even clearer in another *hokku* by Bashō, which reveals a perfect understanding of this dynamic, and effectively anticipates the grammar of the Proustian *madeleine* of a couple of centuries later:

橘や いつの野中の ほととぎす	Tachibana ya Itsu no nonaka no Hototogisu	Wild mandarins- And a cuckoo, yes, But in which past field?
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Bashō was a highly spatial poet: his own sensitivity is breathing through things themselves, and even time here manifests itself as an atmospheric ‘place’. The scent of wild mandarins and the call of a cuckoo, two symbols of summer, compose a quick and brilliant synaesthesia. But the middle verse, with its ruminating nasal repetitions (*itsu no nonaka no*), suggests even in sound the process of recalling – the oral sensorium of mouth and nose is the

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<sup>26</sup> Hubertus Tellenbach, ‘Tasting and Smelling – Taste and Atmosphere – Atmosphere and Trust’. *Journal of Phenomenological Psychology* 12 (2), 1981: 223–4.

place where scent becomes *us*, after all. There is a vertical *durée* discovered in the smellscape, that does not become a specific memory, but is a place in itself. Unlike Proust, Bashō is not discovering his own lost time, but rather finding eternity in a half-remembered instant of smell.

Bashō never wrote about the philosophical elements of his poetics, which included Buddhist, Daoist and Neo-Confucian views and an unmatched phenomenological attention towards his own experiences as a traveller. But we know from the records of his disciples that he spoke often of art's paradoxical temporality through a notion of his making, *fueki ryūkō* 不易流行 'eternal-changing'. *Fueki ryūkō* refers to the constant elements and ever-changing modishness of artistic style, but also has an ontological meaning, grounding human creativity in the mix of ever-changing phenomena and non-phenomenal a-temporality (or meta-temporality) of nature. According to Toshihiko Izutsu, 'in the linguistic 'field' of *haiku*, the phenomenal transiency (*ryūkō*) is made to assume a positive form while metaphysical constancy (*fueki*) is given a position of hidden, negative subsistence as its background.'<sup>27</sup> This interrelation is quite clear in the scent of mandarins: it is both a quickly fading whiff and a trans-temporal, metaphysical field.

Does scent really have this metaphysical relevance, as something intimate and transcendent at once, flesh becoming spirit and vice versa? Here, I would like to

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<sup>27</sup> Toshihiko Izutsu and Toyo Izutsu, *The Theory of Beauty in the Classical Aesthetics of Japan* (Dordrecht: Springer Netherlands, 1981), 71.



conclude by focusing on the keen interest in the philosophical conundrum of smellscape and atmospheres shown by modern Japanese philosopher, Kuki Shūzō.

### Intimacy as Metaphysics: Kuki Shūzō and the Smellscape of *Iki*

With the turbulent opening to the ‘West’ coinciding with the beginning of Meiji period (1868–1912), Japanese philosophy faced several unique problems. Philosophy described itself as one of the practices defining the ideological reality of the ‘West’, grounding it in the myth of its Greek origin beyond any effective historical continuity. All the while attempting to translate this corpus and adapt to it, aspiring to a participation to Western philosophical discourse, Japanese philosophers, especially after the turn of the century, also began to critique its ethnocentric assumptions, drawing from key insights of Japanese culture. In doing so, however, they were also – often unwittingly – reshaping and transforming that very tradition into a discourse that reflected their cross-cultural formation.

One of the most compelling figures of this intellectual milieu was Kuki Shūzō 九鬼周造(1888–1940). The intersection of globalism, tradition and the fractured self of Japanese modernity is evident in Kuki’s biography even before his birth. Kuki was the son of the baron and diplomat Kuki Ryūichi (1852–1931), himself a disciple of Japan’s first political moderniser, Fukuzawa Yukichi, and of a former geisha from Kyoto, Hatsuko, who had accompanied her husband in his role as cultural ambassador to the United States in the 1880s. Due to difficulties during

her pregnancy, Hatsuko was sent back to Japan, in the company of the younger Okakura Tenshin (1862–1913), an influential intellectual and one of the first advocates of traditional culture's worth in Japan and in the West.

During the boat trip back to Japan, Okakura and Hatsuko began a love affair that eventually resulted in her divorce from Baron Kuki and ended with her descent into mental illness. Shūzō's early years thus bore the mark of familial fracture and the dangers of desire. Further, Baron Kuki and Okakura were themselves two opposing models of Japanese intellectual modernity. Shūzō's thought was also a lifelong quest to reconcile such contradictions, or to find meaning within contradiction itself.

After formative years that reflected his elite background, schooling at the First High School and then at the Imperial University in Tokyo, Kuki left for Europe in 1921. His financial means (and the European post-war economic crisis) allowed him to remain for eight years – much longer than contemporaries who typically stayed only one or two years, relying on scholarships for funding. Moreover, his evenly split interest in both rigorous academic philosophy and the aesthetic nuances of a dandy's life meant that he regularly spent time not just in Germany, but also in France. The list of his meetings and friendships made during his European stay – Rickert, Husserl, Becker, Heidegger, Bergson, Sartre – reflects his eclectic approach to philosophy, and an impressive flair for intellectual brilliance. But despite his privilege and recognition, his works also bear a distinct mark of melancholia and rootlessness.

Kuki's most famous work, *The Structure of Iki*, was published in 1930, shortly after his return to Japan. *Iki*

is an ‘uniquely Japanese’ notion of taste, a mix of sensuality (*bitai*), willpower (*ikiji*) and detachment (*akirame*). Developed in the pleasure quarters of Edo (nowadays Tokyo) in the late 18th century, *iki* is, for Kuki, a particular mode of being that does not only characterise the relation between sexes, but overflows into architecture, clothing, and a common life ideal, ultimately becoming a symbol of national character, and a particular take on human existence. However, this analysis of a ‘Japanese atmosphere’ also relies on German and French philosophical discourses, and his text has been heavily discussed in the 30 years since its first Western translations. The stress on *iki* sometimes overshadows Kuki’s other works – he later developed a theory of contingency (*The Problem of Contingency*, 1936), and a complex philosophical reflection on poetic and literary language (*On Literature*, 1940). Kuki’s early death in 1941 left these three threads of his thought superficially distinct, but it is evident that his reflections on contingency, beauty and cultural particularity were, if not parts of a system, grounded in the same intellectual and existential problems. Some of these problems can be approached if we recognise that Kuki was doing philosophy with his nose, too. It might even be that starting with the complex integration of smellscapes in his thought could be the most appropriate way to assess Kuki’s reflection on the lawscape of national character.

In fact, Kuki started reflecting about *iki* not in Japan, but in Paris: his very first mentions of this term are not an organised philosophical reflection, but a list of ‘Japanese things’ and a 1926 poem full of sensual perfumes, in which a Parisian seafood restaurant and a French *demimondaine* are superimposed to the Japanese smellscape and to a geisha.

<p>魚料理屋</p> <p>ああ、海、海  遠い東の島国に生まれた僕は  青い海が恋しい  貝殻の落ちている浜辺、  朝日を浴びた白い砂、  藻のほひ、浪の音、  巴里そだちのお前には  僕の気持ちが解るかしら。  今夜はヴィクトル・ユウゴ街の  プリュネエへ行こうか。</p> <p>柱の様子は帆立貝、  電燈の形は海蟹。  壁には水泡、  なげしには魚、  天井はうすい水色、  敷ものは紅い藻の色。  仄かに漂う光、  夢より淡いかをり、  海の底で呼吸（いき）する  ような  あの僕の好きな魚料理屋。</p> <p>(...)</p> <p>着物は黒地の絹のにしますわ、  銀の壁から姿が浮き出ていい  でしょ、  胸に真白な薔薇の花を一つ、  頸飾は真珠、  腕には白銀の時計、  指環は白いダイヤ、  帽子は石蓴のようなみどり  色のを  まぶかに、いきに被るわ。  口紅を濃くささして頂戴、  乙姫だなんてまたおつしやるの。</p>	<p><i>A Seafood Restaurant</i></p> <p>Ah, the sea, the sea!  Born in an island in the Far East  How I long for the blue sea  Beaches covered in seashells  White sand bathing in the morning light  Seaweed scent, the sound of the waves  I wonder if you, grown up in Paris  Understand how I feel.  How about going to Prunier tonight,  In Victor Hugo Avenue?</p> <p>Scallop pattern on its columns,  Lights shaped like sea crabs.  Walls covered by sea foam,  Fish on its moldings,  Ceiling blue like water  Carpets red like seaweed.  A faint light floating,  A perfume lighter than a dream  Like breathing at the bottom of  the sea  My favorite seafood restaurant</p> <p>(...)</p> <p>I will wear black silk for you,  Floating over the silver wall</p> <p>With a pure white rose on my breast,  And pearls around my neck,  A silver watch at my wrist,  A white diamond ring,  A seaweed green hat</p> <p>Covering my eyes in an <i>iki</i> way.  Let me wear heavy lipstick tonight,  Will you tell me again I am the princess  of the sea?<sup>28</sup></p>
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<sup>28</sup> Author's translation from the original. See also *Kuki Shūzō Zenshū*, vol. 1 (Tokyo: Iwanami Shoten, 1980), 117–120; also trans. in Michael F. Marra, *Kuki Shūzō: A Philosopher's Poetry and Poetics* (Honolulu: University of Hawaii Press, 2004), 46–7.

The first thing that we notice is that Kuki's lifestyle in Paris must have been pleasant, if not outright decadent. He enjoyed a certain *insouciance*, openly dealing with themes of sexual desire, food and extravagant consumption that were very far from the image of a professional philosopher. And yet, several themes of his philosophical reflection are active in the 'scent links' of this poem. As Porteous notices, travel is an activity that lets smellscape emerge with an increased force: 'almost all literary descriptions of smells ... are the work of non-residents. Thus in the humanistic study of smellscape, as elsewhere, the insider:outsider antinomy is a crucial one.'<sup>29</sup>

Indeed, the whole scene of the poem is about smell (or the 'oral sensorium', smell-taste) working as a mediation between very distant things. Such distance is not simply physical – the thousands of kilometres separating Paris and the Japanese sea are no less intensely felt than the tablecloth full of perfumed seafood separating him from this sensual (or *iki*) French woman. The scent of nostalgia is already a crossing of the spatial and temporal: Japan is not simply far, but also *past* – a metaphysical heritage, that lets Kuki wonder about the chance of a mutual understanding. The contingency of one's birth and memories are a constant connection to this elsewhere, which is lost and rediscovered on an axis of memory and desire, but never simply present on a phenomenal level. Here, Kuki uses a significant image to suggest the existential *depth* of this sensual dimension: 'A perfume lighter than a dream/Like breathing at the bottom of

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<sup>29</sup> Douglas Porteous, 'Smellscape', 358.

the sea'. As human beings we are surface-dwellers, and most of our senses work on the horizontal-phenomenal axis of presence. The 'verticalization' of poetry, dreams, desire, memory and imagination is thus often perceived and expressed as a *vertical* shift in reality, that we perceive airily, as a flight or breathing,<sup>30</sup> or as watery depths (Freud's main metaphor for the unconscious). 'Breathing a scent at the bottom of the sea' is an impossibility, but this unbridgeable distance holds together both the temporal desire for the absent land, Japan, and the erotic drive towards a woman that seduces and yet keeps herself distant as a siren, shrouded in perfume. Sex and food find this common meaning in the oral sensorium, the first and strongest locus of intimacy:

This type of communication from the environment manifests itself most directly and resolutely in our oral sense, human relations under its aegis show special characteristics of intimacy, such as we primarily find in the culinary and erotic sphere.<sup>31</sup>

And yet this proximity hides an infinite distance, both in the discontinuous temporality of memory and dream, and as desire, since the smell is not the positive presence of the other as a reality, but already their phantasm, their *possibility*. According to Kuki, one of the first conditions of *iki* as erotic attraction was not to objectify the other as a stable reality, but to preserve them as *just a possibility*

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<sup>30</sup> Gaston Bachelard, *Air and Dreams: An Essay on the Imagination of Movement* (Dallas: The Dallas Institute of Humanities and Culture, 1988).

<sup>31</sup> Tellenbach, 'Tasting and Smelling', 223.

(*kanōsei no mama*).<sup>32</sup> This very expression is used again by Kuki in a later essay about smellscapes and memory ('Sound and Smell – The Sounds of Contingency and the Scent of Possibility'):

Scent, too, is one of the things I yearn for. I have to confess, that in the age of my youth I felt an irresistible attraction for the perfume of powder. When I was in Paris, women for their perfume loved the smell of Guerlain's *L'heure bleue* and Lanvin's *Quelques Fleurs*. Sometimes I would sprinkle too some drops of Guerlain's *Bouquet de Faunes* inside my vest. All of this is now sunk in the past. Therefore, in some quiet days of autumn I like to smell the scent of the tea olive tree in my garden from the window of my study. I am there, alone, and I just smell deeply. And as I do so I am transported to a place far, far away. A place even further away of my birth. A place where possibility was just as a possibility (*kanōsei no mama*).<sup>33</sup>

Perfume works both ways, reminding Kuki of Japan when he is in Paris, and of Paris when he is back in Japan. But the otherwise very sensual piece of prose ends with a metaphysical twist: in the verticality of scent and desire, presence and reality become relativised, and Kuki is brought into a place before birth, before the real fact of being born or located in Japan or France – that is, before individuation, in a different degree of possible temporality.

In 1928, shortly before coming back to Japan, Kuki presented at two conferences in French at the *Décades*

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<sup>32</sup> Kuki Shūzō and Nara Hiroshi, eds. *The Structure of Detachment: The Aesthetic Vision of Kuki Shūzō* (Honolulu: University of Hawaii Press, 2004), 16.

<sup>33</sup> Kuki Shūzō, *Kuki Shūzō Zenshū* v. 5 (Tokyo: Iwanami shoten, 1982), 167.

of Pontigny, later collected in the little book *Propos sur le temps*. Both in the first paper Kuki presented, *The Notion of Time and Repetition in Oriental Time* and in the second, *The Expression of Infinite in Japanese Art*, he was already shaping philosophically his interest for the ‘verticality’ of smells and desire, and their relationship with temporality. For Kuki, the essence of oriental time is a repetition of the equal. He calls this form of temporality ‘metaphysical’ or ‘imaginary’, but does not mean it in a disparaging way. Kuki wants rather to say that the time of transmigration, a discontinuous return of an eternal past in the moment, happens within consciousness, intimately connected with will and desire, as already recognised by Vedas and Buddhism. Heidegger qualified the onto-phenomenological structure of time as ‘ecstatic unity’, but only conceived it in a horizontal plane. Kuki speaks here instead of a vertical ecstasy in the idea of transmigration and eternal return, creating a ‘thickness of infinite depth’ in every instant. While the ‘horizontal plane represents the ontologico-phenomenological’, and is continuous and heterogeneous, the repeated, vertical time of the ‘metaphysical-mystical ecstasy’ is *homogeneous and discontinuous* of ‘elements connected only by a kind of attraction at a distance’ – like the incenses of *kōdō*, the scent link in *haikai* poetics or the extra-temporal smellscape of mandarins and cuckoos. In fact, Kuki quotes enthusiastically the aforementioned *hokku* by Bashō about wild mandarins in the second Pontigny conference, and in several later points in his work.

Bashō smells the scent of mandarins. He remembers then that he smelled once the same smell of the same



flowers, listening to a cuckoo in the fields. Allow me to present a commentary on this: '[...] let a sound already heard or an odor caught in bygone years be sensed anew, simultaneously in the present and in the past, real without being of the present moment, ideal but not abstract, and immediately the permanent essence of things, usually concealed, is set free [...] A single minute freed from the order of time recreated in us through our sense a man freed from that order too' (Marcel Proust, *Le temps retrouvé*, vol II, 16).<sup>34</sup>

Kuki might have been the first to note the deep affinity between Japanese scent poetics and Proustian temporality. But how is this reflection on smell, desire and metaphysical time in his French period transformed into his exploration of ethnic particularity in *The Structure of Iki*? Concluding the conference on time repetition, Kuki posited two possible ways of escaping, or rather finding freedom in this time of desire: first the transcendent, intellectual liberation of Buddhism, and secondly the immanent, voluntarist liberation of Bushidō, the way of the samurai.<sup>35</sup>

*The Structure of Iki* brings such will and detachment together, as different moments of the breath-like dialectic of seduction: as a style of behaviour and taste, *iki* is a lawscape, a desiring space of negotiation between closeness, distance, identity and otherness. But being the place where this metaphysical contingency is revealed, the lawscape of encounter and atmospheric belonging is binding, enviroing, and yet without positive laws. As Kuki writes

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<sup>34</sup> Kuki Shūzō, *Kuki Shūzō Zenshū* v. 1 (Tokyo: Iwanami shoten 1980), 77.

<sup>35</sup> *Ibid.*, 285.

in another poem: ‘You and I, I and you/the secret of a chance encounter I saw/of love the anti-law.’<sup>36</sup> Here contingency – the contingency of ethnic being, our arising in determined configurations of meaning, and the contingency of the encounter with the other, in the unbridgeable closeness of erotic allure – is ultimately thinkable only in terms of atmosphere.

In fact, Kuki begins his account of *iki* with another statement about memory and perfumes, noticing how their resistance to abstraction and their extra-temporal quality is something common to both smellscapes and the equally particular being of cultural ‘essences’:

Even if we were to engage in what is referred to as *Ideation* in a domain of the possible by freely making changes to a phenomenon, the being of which is ethnically and historically determined, we would only gain in the end abstract general concepts containing that phenomenon as a part. The important thing to bear in mind in the understanding of a cultural state of being is that one must grasp the living form of it, as it is, without altering its actual concreteness. Bergson states that when we recall the past as we smell a rose, it is not that the fragrance triggers the memory. Rather, we smell in the fragrance the memory of the past. Immutable objects, such as the fragrance of roses, or, equivalently, general concepts that are universal for all men, do not exist in reality.<sup>37</sup>

Thus, an explanation of *iki* begins for Kuki with the Japanese taste for duality – that is, the possibility of the other, preserved as such – in the art of seduction. This material

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<sup>36</sup> Michael Marra, *Kuki Shūzō: a Philosopher's Poetry and Poetics* (Honolulu: University of Hawaii Press, 2004), 17.

<sup>37</sup> Kuki Shūzō, *The Structure of Detachment*, 17.

base is refined by will (*ikiji*) that allows this duality to be appreciated as such, without losing oneself into it – a pivot between individuality and collective being that was also sought by the collective-individual atmosphere of *haikai* poetic communities. The third moment of resignation (*akirame*) is, according to Kuki, an existential realisation of Buddhist impermanence in this field of desire. The word used to name the pleasure quarters during the Edo period, ‘floating world’ (*ukiyo*), was originally employed in a Buddhist context, with the homophonous sense of ‘suffering world’ – and no-one experiences the impermanence of beauty and desire as acutely as the ageing lover or courtesan. The two modes of transcendent time are grafted on the desiring body that is the origin of this temporality, without denying it, but distilling it into its ‘essence’:

*Iki* is the ‘very essence’ (*sui*) of coquetry. *Iki* ignores an unproblematic positing of reality, and boldly brackets the actuality of everyday life, playing autonomously, without purpose and without preoccupations, transcending all life and breathing the empty air between things.<sup>38</sup>

As we can see, the ‘essence’ here is something breathed, going beyond formal abstractions. *Iki* resides, like smell-scapes and atmospheres, in the gap between real and unreal, I and other, self and the world. As stated previously, the stubborn resistance opposed by atmospheric, olfactive experiences to formal, abstract theorisation is something that we can appreciate in any culture. Smell reveals something about the ‘inherent nature of the thing’

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<sup>38</sup> Ibid., 23, translation modified.

within the structure of our perception, and yet hints at a surplus ‘which lies beyond the actual fact of the experience, but which we sense as belonging to it [...] what we call atmosphere.’<sup>39</sup>

This logic of atmospheric surplus leads Kuki’s efforts in the second part of his essay, in which he looks for expressions of *iki* in natural and artistic spaces. While a series of body types, gestures and embodied attitudes is also listed as *iki*, it is telling how, for Kuki, the best expressions of *iki* are artistic ones, able to express it non-representationally, in an atmospheric way. The first example made by Kuki is that of *vertical stripes*. It ceases to seem a curious example if we acknowledge, with Kuki, that parallel lines are a *Gestalt* of erotic duality (so close, and yet never touching), and their verticality accompanies the eye towards the same vertical gesture that, for him, is distinctive of metaphysics. The decorative patterns derived from *Genjikō*, in which the temporal and qualitative discontinuity between smellscapes and narrative worlds is given in vertical lines, can be, according to Kuki, another of the visual manifestations of the ‘breath-like’ essence of *iki*. This spatialisation of the non-spatial, or the expression of the atmospheric, ‘surfaceless’ space of *iki* is also a possibility of architecture, through contrasts of colours, materials, partitions and lines, and a sparing use of light. In architecture the Japanese ideal of *iki* is achieved through the atmospheric ambiance of penumbra:

The lighting of *iki* is subdued; the color of its radiance is that of a paper lantern. *Iki* lighting must allow one

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<sup>39</sup> Tellenbach, ‘Tasting and Smelling’, 227.

to sink into the depths of the soul, its subtlety inspiring one to inhale the scent of perfumed sleeves.<sup>40</sup>

Architecture here is another art of atmosphere and scent, whose task is not creating objective forms, but an enveloping space for life and desire. Kuki's mention of 'perfumed sleeves' is a reference to an old, anonymous poem from the imperial *tanka* anthology *Kokinshū* (*Poems Ancient and New*, 920 A.D.), and another classic instance of desiring smellscape:

色よりも	<i>Iro yori mo</i>	More than the sight
かこそあはれと	<i>ka koso aware to</i>	is the scent that moves me
おもほゆれ	<i>omō yure</i>	On whose sleeves seeped
たが袖ふれし	<i>ta gas ode fureshi</i>	the plum blossoming
宿の梅ぞも	<i>yado no ume zo mo</i>	close to my home?

According to Kuki, the non-visual eroticism of the Heian Court, in which one's lover was more a space of perfume than an object of vision,<sup>41</sup> is not completely dead, even in contemporary Japan. Or rather, it is conserved in the vertiginous discontinuity of smell-time, as an *essence of the past*, an absent element which can, however, be constantly retrieved in the chance of an encounter, as an atmosphere.

Some readers criticised Kuki observing that, after the irreversible process of Japan's modernisation, the world of *iki* was already then something past, and talking about its existence and essence, or its belonging within an ethnic character, was a form of cultural exceptionalism, and even more questionable because this antiquary fixation

<sup>40</sup> Kuki Shūzō, *The Structure of Detachment*, 51.

<sup>41</sup> Philippopoulos-Mihalopoulos, *Spatial Justice*, 45.

had a specific political meaning after the rise of Japanese 'fascism' in the early 1930s.<sup>42</sup> Such criticism, I believe, misses the original point of *The Structure of Iki*, and fails to understand it textually and in the context of Kuki's philosophy. *Iki* is not an immutable possession of Japanese people. It is an atmosphere and a taste, and as such existing in a 'place further away of their birth', a place of possibility manifesting in the vertical time of scent, desire and memory. In other words, the air-like characterisation of *iki* corresponds to its being an *essence in an atmospheric sense*. Thus, its intersubjectivity and communality is the atmospheric quality of an environment, coming before any political fetishisation:

Atmospheres [...] cause people to form groups that bear witness to this atmosphere in such inexplicable radiations as emanate from human relations, attitudes and value judgments. Through atmosphere people recognize those that belong to their particular world.<sup>43</sup>

By being an opening to contingency and desire, the smell-scape of *iki* invites us instead to be guests of this otherness, or rather to discover the essence of otherness (essence as otherness) within our own globalised worldviews. Unlike abstract vision, *taste* has to be trained with a concrete, infinite engagement with the world of lived experience – this is Kuki's own invitation:

We literally 'learn the taste' of something. We make value judgments based on that experience. We rarely

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<sup>42</sup> See for instance Leslie Pincus, *Authenticating Culture in Imperial Japan* (Berkeley: University of California Press, 1996).

<sup>43</sup> Tellenbach, 'Tasting and Smelling', 229.

experience taste as pure taste. The expression *aji na mono*, ‘scrumptious thing’, suggests not just taste, but a certain scent in which the sense of smell itself takes part. It hints of fragrance faint and elusive. Moreover, it sometimes involves the sense of touch as well. The tongue itself is part of taste, with tactile sensations of its own. [...] In a very fundamental sense, the senses of taste, smell and touch comprise ‘lived experience’. [...] The significance of scholarly investigation resides in *eternally* pursuing the *task* of actualizing logical expression. At the same time the scholar must be clearly mindful of an incommensurable discontinuity between meaningful experience and its conceptual recognition. I believe that an understanding of the structure of *iki*, too, will have significance in this sense.<sup>44</sup>

### Sniffing Conclusions

The refinement of Heian incenses and *kōdō*, the aesthetics of scent of the Bashō School, the sensual metaphysics of Kuki’s philosophy and *iki*: all of them are examples of Japanese smellscapes, places where theory has to meet ‘lived experience’. Are they available to the non-Japanese, or even to the Japanese themselves, as the increasing globalised world keeps erasing, perhaps before everything else, the *scent* of particular places? Yes and no. Since they are not objects, they are *not* available to theory alone, to an attempt of understanding sheltered within the safety of visive and ideal discrimination, cultural exceptionalism, and Eurocentric universalism. But scent, as I have hopefully argued, is a sense of connection, or even transgression, in which intimacy and incredible distance curiously

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<sup>44</sup> Kuki Shūzō, *The Structure of Detachment*, 54–56.

coexist. Scents and smellscapes, flowing through bodies and spaces, arising again and again in a discontinuous temporality transcending chronological time, might even be privileged tools for intercultural understanding – an infinite task only fuelled by desire, since the other, in the logic of *iki*, can be other only as the *possibility* of an encounter. What do we have to gain from this delving into foreign smellscapes (but is there a smellscape which is not foreign)? In one word: transcendence. Transcendence within immanence. A never guaranteed, yet always rediscovered involvement with a dimension of subjectivity and intersubjectivity whose loss comes at the harsh cost of neurosis, and whose elusive retrieval hints at a state of intellectual and emotive wholeness.

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# Rewilding and Olfactory Landscapes

Jonathan Prior

## Introduction

‘Rewilding’ has emerged as a novel but provocative form of environmental conservation, leading to far more polarised viewpoints across both the academic and popular literature than the affiliated – and oftentimes overlapping – actions of ecological restoration and species reintroduction programmes. Much of this polarisation has stemmed from concerns about the implications of rewilding for productive land uses, particularly agriculture and forestry, the broader landscape politics of rewilding, and, at a conceptual level, because of disagreements over the meaning of rewilding. Nonetheless, a commonality across most formulations of the concept is that rewilding in some way normatively asserts the primacy of non-human agency over future ecosystem development.

Put another way, rewilders seek to implement landscape management strategies that do not depend on continuous

human interventions. Rather than weeding and removing dead matter, suppressing fires, providing supplementary feed for wild animals, protecting land to prevent fluvial and coastal erosion, and other such common conservation practices, rewilding aims to significantly reduce or completely withdraw such interventions, so that species and ecosystems become 'self-sustaining' and land 'self-willing'. In rewilding projects, much work is initially put into place; often, there is community engagement work to be done, as well as fundraising, ecological and social monitoring, and physical work on the ground. Dams, fences, and other barriers are removed, and certain organisms are introduced to 'kick start' ecological revival; top carnivores including wolves and lynx, and animals that remodel landscapes, such as beavers, loom large in the rewilding imagination. However, the intention is that once this work has taken place, landscape interventions are relinquished over the medium to long term.

There is now a vast policy-orientated framework, promulgated by a range of actors and institutions, including environmental NGOs and health and well-being policymakers, that situates experiences of nature as always being health-giving, healing, or therapeutic.<sup>1</sup> Through this framework, the natural world is characterised as inherently beautiful or possessing similar aesthetic value. While not explicitly tied to human well-being, this

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<sup>1</sup> Samantha Walton's *Everybody Needs Beauty: In Search of the Nature Cure* (London: Bloomsbury Circus, 2021) charts the rise of this way of thinking within popular (Western) cultural, industrial, environmental, and healthcare settings.

position has become established within the field of environmental philosophy as, simply, 'positive aesthetics', most notably by Allen Carlson, who states that 'the natural environment, insofar as it is untouched by humans, has mainly positive aesthetic qualities; it is, for example, graceful, delicate, intense, unified, and orderly, rather than bland, dull, insipid, incoherent, and chaotic.'<sup>2</sup>

In what follows, I want to think through rewilding experiences from an olfactory aesthetic perspective in a European context. Such a way of approaching conservation can have significant ramifications for humans and non-humans alike, including the ways in which human communities experience, interpret, and relate to the natural world, their desire to protect certain species or ecological functions, as well as legislation that shapes these complex relations. I argue that rewilding presents us with a conservation practice that can propagate negative olfactory aesthetic qualities and experiences within landscapes, and that these qualities challenge prevailing tendencies in policy, administrative, and academic circles to position sensory experiences of nature as innately positive, and, relatedly, that negative olfactory aesthetic qualities and experiences need to be taken seriously if rewilding is to receive popular and legislative support.

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<sup>2</sup> Allen Carlson, *Aesthetics and the Environment: The Appreciation of Nature, Art and Architecture*. (London: Routledge, 2011). See Emily Brady, 'The Ugly Truth: Negative Aesthetics and Environment', *Royal Institute of Philosophy Supplement* 69 (2011): 83–99, for a rejoinder to the positive aesthetics position.

## The Olfactory Appreciation of Nature

The minimal literature that broaches the topic of what we may conceive of as being peoples' smellscape preferences – their olfactory likes and dislikes of a given space – tends to focus on urbanised areas, only ever imagining what the 'countryside' beyond urban edgelands may smell like. Victoria Henshaw's 2014 monograph *Urban Smellscapes*, provides a sense of what can be smelt, and where, across various towns and cities, and the preferences and meanings attached to different odours. In much of what Henshaw details, preferred odours are often those construed as 'natural'. Take the following excerpt, in which Henshaw reflects upon the olfactory preferences of her research participants located in Doncaster, a town in Yorkshire, England:

When they were asked about their favourite odour many participants highlighted fresh natural smells from woodland, countryside, fresh air, cut grass, trees, flowers or the rain. Despite expectations that experiences of these smells would be limited in Doncaster town centre, they were named across all the studied towns and cities as odours that people wanted to experience more, which they believed would enhance the quality of urban life.<sup>3</sup>

A more recent analysis of preferences in Sheffield, England, similarly indicates that the smells of trees, fresh water in the summer, and plants (such as lavender) contribute to smellscape 'pleasantness',<sup>4</sup> while Porteous goes

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<sup>3</sup> Victoria Henshaw, *Urban Smellscapes: Understanding and Designing City Smell Environments* (New York: Routledge, 2014), 175.

<sup>4</sup> Jieling Xiao, Malcolm Tait and Jian Kang, 'A Perceptual Model of Smellscape Pleasantness'. *Cities* 76 (2018): 105–115.

further when he states that ‘generalised preferences, at least amongst westerners, appear to favour natural scents from flowers, fruits and vegetables.’<sup>5</sup>

We are, then, presented with a scenario in which (Western) urbanites appear to demonstrate a preference for those smells we may, at least, stereotypically associate with ‘nature’, and that natural smells are coded as being ‘clean’, and beneficial to human well-being. An olfactory map also emerges here of highly domesticated and managed experiences of the natural world. What happens, though, when nature doesn’t provide ‘fresh’ or ‘clean’ smells? What happens when the grass is no longer cut, or water goes stagnant? What if in essence we are confronted with negative – or, at the very least, challenging – natural smells? We cannot fully know *a priori* what rewilding smellscape will be as these scapes will in a sense become ‘rewilded’ themselves, meaning they will be unpredictable, changeable, unmanaged, and ungovernable. Nonetheless, given its focus on non-intervention, rewilding presents us with a case of conservation practice that conflicts with overtly positive cultural smellscape preferences, and one that poses a significant challenge to environmental governance codified in legal frameworks, which seek to nurture and protect natural beauty.<sup>6</sup>

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<sup>5</sup> J. Douglas Porteous, ‘Smellscape’. *Progress in Human Geography* 9, no. 3 (1985): 360.

<sup>6</sup> See Benjamin J. Richardson, Emily Barritt and Megan Bowman, ‘Beauty: A *Lingua Franca* for Environmental Law?’ *Transnational Environmental Law* 8, no. 1 (2019): 59–87, for a discussion on natural beauty and international legal frameworks.

## Into the Swamp: Rewilding, Olfaction, and Negative Aesthetics

Recently, the Eurasian beaver (*Castor fiber*) has come to be something of an icon for rewilding within the United Kingdom and indeed across much of Europe. Having been extirpated some 400–500 years ago in the UK, beavers were legally reintroduced into Scotland in 2009 for a monitored trial period of five years, which culminated in the Scottish Government formally recognising the Eurasian beaver as a native species.<sup>7</sup> Following on from the initiation of the trial, other beaver reintroduction efforts have begun in England and Wales.<sup>8</sup> Aside from the animals' charismatic aesthetic values, the Eurasian beaver is valued by rewilders because of the functional role that beavers play within the wider landscape; they create new watery channels (used by the animals to move in a manner that affords relative protection from potential predators), thin trees and other vegetation adjacent to river systems, and build lodges and dams. These activities have been demonstrated to improve water quality, reduce flash flooding events, and

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<sup>7</sup> See Kim J. Ward and Jonathan Prior, 'The Reintroduction of Beavers to Scotland: Rewilding, Biopolitics, and the Affordance of Non-human Autonomy', *Conservation & Society* 18, no. 2 (2020): 103–113.

<sup>8</sup> For the first licensed trial reintroduction in England, see: Devon Wildlife Trust. 'River Otter Beaver Trial.' Accessed 16 February 2023. <https://www.devonwildlifetrust.org/what-we-do/our-projects/river-otter-beaver-trial>; for Wales see North Wales Wildlife Trust, 'All About Beavers.' Accessed 16 February 2023. <https://www.northwaleswildlifetrust.org.uk/welshbeaverproject>



**Figure 1:** Flooded woodland due to the actions of beavers, Scottish Beaver Trial site (photograph by author).

enhance fish and insect habitats, amongst other ecological benefits.<sup>9</sup>

The reintroduction of beavers has, however, been met with scepticism – if not outright resistance – particularly from land managers, farmers, and agriculturalists, due to the perceived effects of beavers conflicting with other land uses. Beaver dams, for instance, may lead to the flooding of prime agricultural land, particularly in low-lying regions. From a non-instrumental perspective, the return of beavers into what were, at least nominally, managed landscapes, may be perceived as aesthetically challenging, not because of the beavers themselves, but for the ways in which they modify ecosystems at the land/water interface. Of principal interest here is the transformation of

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<sup>9</sup> See Róisín Campbell-Palmer et al. *The Eurasian Beaver Handbook: Ecology and Management of Castor fiber*. (Exeter: Pelagic Publishing, 2016).



orderly, maintained, multi-sensorially *legible* landscapes, to those that are messy, discordant, and sensorially complex; in short, the return of beavers is likely to produce aesthetically challenging landscapes that stand in opposition to Carlson's positive aesthetics.<sup>10</sup>

Through the actions of reintroduced beavers, areas of the woodland used for recreational purposes at the Scottish Beaver Trial site were flooded, creating deep stagnant pools of water that killed trees, primarily birch and oak (see Figure 1). The smell of rotting logs (a 'peaty, moist smell'<sup>11</sup> then, as well as other submerged plant matter, combines with the smells of still water – musty, or even 'rotten egg' odours, as hydrogen sulphide is released as a waste product of anaerobic bacteria – which is generally negatively valued: '... many cultures are perplexed or have a deep suspicion of still water, in part because of its smell.'<sup>12</sup> Indeed, wetlands, including bogs, marshes, and swamps, are sites of pronounced negative aesthetic valuations, with their mix of stagnant smells, and dark, swampy waters. In his book *Postmodern Wetlands*, Rod Giblett sets out the many ways in which these watery landscapes '... have been seen by many in "the west" as places of darkness,

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<sup>10</sup> Jonathan Prior and Emily Brady, 'Environmental Aesthetics and Rewilding.' *Environmental Values* 26, no. 1 (2017): 31–51.

<sup>11</sup> Emily Brady, *Aesthetics of the Natural Environment* (Edinburgh: Edinburgh University Press, 2003), 126.

<sup>12</sup> Joël Candau, 'The Olfactory Experience: Constants and Cultural Variables.' *Water Science and Technology* 49, no. 9 (2004): 11–17, 11. See also Hannah Pitt, 'Muddying the Waters: What Urban Waterways Reveal about Bluespaces and Wellbeing.' *Geoforum* 92 (2018): 161–170, 167 for an interesting discussion on the malodorous qualities of water.

disease and death, horror and the uncanny, melancholy and the monstrous' that required drainage and development to 'improve' them.<sup>13</sup> Giblett charts a long cultural and political history of wetlands, wherein negative aesthetic proclamations about 'black waters' are highly gendered and racialised, and describes how such aesthetic-political judgements laid the ground for the need to 'conquer' and 'civilise' them. The value of wetlands has certainly increased in contemporary conservation discourses, but there remains an abiding aesthetic '...dislike [of] land-water, the muddy, mucky places where the land and the water mingle'.<sup>14</sup>

### Morticulture, Decomposition and Excretion

The scent of rot and decay are likely to become the 'pungent loci'<sup>15</sup> of many rewilded landscapes, particularly those set on a course for woodland regeneration, especially as dead wood – standing snags, rot holes, tree stumps and the like – starts to accumulate, and rivers and streams are left uncleared of vegetal detritus, leading to blocked channels and localised flooding. As woodland matures and dead wood accrues at ever-greater rates, there will be an associated change in the smellscape, as Peterken and Mountford note in relation to ongoing efforts to rewild a

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<sup>13</sup> Rod J. Giblett, *Postmodern Wetlands: Culture, History, Ecology* (Edinburgh: Edinburgh University Press, 1996), xi.

<sup>14</sup> Holmes Rolston III, 'Aesthetics in the Swamps', *Perspectives in Biology and Medicine* 43, no. 4 (2000): 584–597.

<sup>15</sup> Jim Drobnick, 'Toposmia: Art, Scent, and Interrogations of Spatiality', *Angelaki: Journal of Theoretical Humanities* 7, no. 1 (2002): 31–47, 37.

glen in the Scottish Highlands: ‘in a few decades, birches will be toppling over paths, dead wood will accumulate and there will be an air of decay and decrepitude.’<sup>16</sup>

As part of its emphasis on non- (or minimal) intervention, death and decomposition are not unintended consequences of rewilding strategies, rather, they are highly valued processes within a predominantly self-regulating system. Indeed, decomposition of organic matter, which is widely interpreted as bringing about negative aesthetic qualities to natural environments<sup>17</sup> is essential for the restoration of ecological processes (primarily nutrient cycling), so much so that there is a growing realisation by woodland managers that interfering with decomposition cycles is ecologically deleterious:

Historically, managers removed deadwood as a hygiene measure to protect the timber resource from what were perceived to be dangerous threats from insect and fungal attack. This has resulted in levels of deadwood in British woodland which are too low for sustaining populations of many woodland species of key conservation importance.<sup>18</sup>

There are now examples of non-intervention on behalf of ‘morticulture’ – ‘the culturing of woody detritus in

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<sup>16</sup> George F. Peterken and Edward P. Mountford, *Woodland Development: A Long Term Study of Lady Park Wood* (Wallingford: CABI, 2017), 259.

<sup>17</sup> Paul H. Gobster, ‘An Ecological Aesthetic for Forest Landscape Management.’ *Landscape Journal* 18, no. 1 (1999): 54–64.

<sup>18</sup> Forest Enterprise, *Life in the Deadwood: A Guide to Managing Deadwood in Forestry Commission Forests* (Edinburgh: Forest Enterprise, 2002), 2.

forests<sup>19</sup> – in parts of Europe, North America and Asia, but this is proving controversial from an aesthetic perspective, particularly in European woodlands previously managed under strict interventionist regimes.<sup>20</sup>

Smells of rot and decay as an outcome of rewilding policy are not limited to those emanating from plant matter or stagnant waters; we can also expect to encounter the smells of animal carcasses within rewilded landscapes. Once again, the availability of animal carcasses is valuable from an ecological perspective, though this goes against the logic of modern agricultural methods and, in some cases, legislative demands placed upon land managers. Cortés-Avizanda et al. provide a good example of this through their analysis of avian scavengers within European rewilding efforts.<sup>21</sup> The authors give an account of top avian scavengers – ‘true’ vultures and other raptor species – that depend upon carcasses of large animals for their survival. They detail how the recuperation of these species in Western Europe will require, amongst other

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<sup>19</sup> Carol A. Johnston, *Beavers: Boreal Ecosystem Engineers* (Cham: Springer International Publishing AG, 2007).

<sup>20</sup> Annick Schnitzler, ‘Towards a New European Wilderness: Embracing Unmanaged Forest Growth and the Decolonisation of Nature.’ *Landscape and Urban Planning* 126 (2014): 74–80.

<sup>21</sup> Ainara Cortés-Avizanda, José A. Donázar and Henrique M. Pereira, ‘Top Scavengers in a Wilder Europe’, in *Rewilding European Landscapes*, eds. Henrique M. Pereira and Laetitia M. Navarro. (Cham: Springer International Publishing AG, 2015). Dead animals may also be publicly controversial from an animal ethics perspective; for an example of this in a rewilding context see Patrick Barkham, ‘Dutch Rewilding Experiment Sparks Backlash as Thousands of Animals Starve.’ *The Guardian*, 27 April 2018. <https://www.theguardian.com/environment/2018/apr/27/dutch-rewilding-experiment-backfires-as-thousands-of-animals-starve>

things, the modification of current EU 'sanitary' laws, imposed in the aftermath of the BSE crisis, that significantly limits the availability of livestock carcasses, as they are required to be destroyed rather than left in agricultural fields. These legal requirements have led to '...a halt in population growth, a decrease in breeding success, and an apparent increase in mortality of young age classes.'<sup>22</sup> Ecological data also points to EU sanitary legislation affecting other species' feeding habits, such as wolves in Spain.<sup>23</sup>

An increase in carrion, then, is a necessary requirement for the return of sustainable populations of a range of scavenger and opportunistic predatory species, and therefore carrion is important for a range of rewilding projects, especially given the rewilding ethos of avoiding the supplementary feeding of wild animals. As well as the putrid smells of decomposing animal bodies, other highly localised animal scents – scat, urine, and other waste excretions; scent markings; bodily scents – are likely to emerge in rewilding landscapes, again disrupting the stereotypically valued smells of 'clean' and 'fresh' nature that are associated with closely managed rurality.

At this juncture, it is important to note that, unlike wilderness creation and preservation, rewilding is not just about remote landscapes distant from human habitation, and nor does it necessitate the elimination of

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<sup>22</sup> José A. Donazar et al. 'Too Sanitary for Vultures.' *Science* 326, no. 5953 (2009): 664. [https://doi.org/10.1126/science.326\\_664a](https://doi.org/10.1126/science.326_664a)

<sup>23</sup> Laura Lagos and Felipe Bárcena, 'EU Sanitary Regulation on Livestock Dispersal: Implications for the Diet of Wolves', *Environmental Management* 56, no. 4 (2005): 890–902.

imprints of human culture from landscapes.<sup>24</sup> Indeed, rewilding has been proposed, and is being carried out, in peri-urban and urban areas alike.<sup>25</sup> In my discussions with policy makers and conservationists, they are keen to stress that they see rewilding as a continuum of different activities applicable across a range of spatial scales – wildflower meadows replacing ornamental green spaces and manicured lawns; the creation of new urban wetlands; wild boar populations establishing themselves in urban woodlands – which will lead to subtle smellscape changes in and amongst large populations of people.

Such changes may be relatively short-lived, not only when they are highly localised (meaning we can move past them), but also when they are not, as ‘the perceived intensity of a smell declines rapidly after one has been exposed to it for some time. Not that the smell disappears, but the perceiver becomes habituated to it.’<sup>26</sup> Nonetheless, given the particular role that odours play

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<sup>24</sup> Prior and Brady, ‘Environmental Aesthetics and Rewilding’, 31–51.

<sup>25</sup> See for example Architecture For London. ‘Rewilding London’. 2 November 2017. <https://architectureforlondon.com/news/rewilding-london>; and the following roundtable discussion on urban rewilding: Kevin Sloan, ‘Let Go Of Some Urban Domestication: How Would You Convince The Mayor To The City?’ *The Nature Of Cities*. 13 November 2017. <https://www.thenatureofcities.com/2017/11/13/re-wilding-make-cities-better-just-wilder>. In March 2022, beavers were re-introduced to the London Borough of Enfield, and there are examples of beavers living in urban centres across Europe, including Stockholm and Munich.

<sup>26</sup> J. Douglas Porteous, ‘Smellscape’. *Progress in Human Geography* 9, no. 3 (1985): 358.

in the formation of place-based memories<sup>27</sup> and sense of place<sup>28</sup> we should caution against assuming such experiences will not have repercussions for relations between self and landscape.

## Conclusion

Rewilding has the capacity to bring about diverse, complex, and potentially more challenging, if not outrightly negative, smellscape to both rural and urban areas. While not all rewilding odours will necessarily be adjudicated to be negative – some, such as the smells of wildflowers in rewilded greenspaces, may be positively adjudicated, at least until the point of their eventual decay – they will likely defy cultural expectations of olfactory experiences, particularly given that nature is overwhelmingly positioned as ‘therapeutic’, ‘fresh’, or ‘clean’ smelling. Challenging or negative olfactory qualities also conflict with existing legal frameworks that tend to work toward sanitising and deodorising landscape experiences, including the removal of dead and decaying flora or fauna, due to sanitary concerns related to human and non-human health. It has been argued that the implementation of these ‘aseptic’ strategies in natural resource management, is a manifestation of social

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<sup>27</sup> Kara C. Hoover, ‘The Geography of Smell.’ *Cartographica: The International Journal for Geographic Information and Geovisualization* 44, no. 4 (2009): 237–239.

<sup>28</sup> See for example, Richard Gorman, ‘Smelling Therapeutic Landscapes: Embodied Encounters with Spaces of Care Farming.’ *Health & Place* 47 (2017): 22–28.

disconnection from nature.<sup>29</sup> Another legal angle that pertains to rewilding, is the inculcation of ‘beauty’ as a standard for environmental protection. If ‘beauty’ were to be enshrined as a *lingua franca* for environmental law, what olfactory space is there for negative smells within such a legal framework?<sup>30</sup>

As a developing form of conservation practice, then, rewilders need to take negative aesthetics seriously from both a legal and broader cultural perspective, particularly given that ‘... people’s aesthetic preferences often lead them to disregard the preservation of animals, plants, and landscapes that are deemed either “ugly” or “smelly”’.<sup>31</sup> So how might we confront the challenge of negative olfactory aesthetics as a likely outcome of rewilding practices? As previously outlined, ‘positive aesthetics’ stipulates that nature unmodified by humans demonstrates positive aesthetic qualities. Within this theory, there is a propensity to fold negative aesthetic experiences into wider relational chains that ultimately amount to positive aesthetic value. The smell of a rotting animal carcass might be unpleasant, but the carcass, understood as a source of nutrients for other organisms, enables ecosystem-level beauty. Emily Brady has argued against such a position, in part because ‘this sort of reply

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<sup>29</sup> M-Martina Quaggiotto et al. ‘Past, Present and Future of the Ecosystem Services Provided by Cetacean Carcasses.’ *Ecosystem Services* 54 (2022).

<sup>30</sup> Benjamin J. Richardson, Emily Barritt and Megan Bowman. ‘Beauty: A *Lingua Franca* for Environmental Law?’ *Transnational Environmental Law* 8, 1 (2019): 59–87.

<sup>31</sup> Larry Shiner, *Art Scents: Exploring the Aesthetics of Smell and the Olfactory Arts* (Oxford: Oxford University Press, 2020), 309.



denies the existence of ugliness by reframing the aesthetic object into a whole and avoids the point in question, which is particular perceptual qualities rather than broader, holistic knowledge of some natural event or system.<sup>32</sup> Indeed, the smell of a rotting carcass and our visceral response to it cannot be easily explained away by knowledge that the carcass is of ecological value to a healthy, beautiful ecosystem. Negative smells demand our aesthetic attention, even when we don't want them to, and so are a distinct category of smells set apart from the merely mundane or the boring, which are relatively easy to shield from our perception.<sup>33</sup> At any rate, reframing the carcass as a component of an ecological whole will not miraculously transform a negative aesthetic experience into a positive one. As we have seen, some ecological wholes, such as wetlands, are not characterised as either beautiful or fragrant. It might well be that, as Brady alludes to, the promotion of other forms of value, such as biodiversity and existence values,<sup>34</sup> may enable us to protect and care for ugly ecologies; the same can be said for malodours, without denying the very real existence of negative olfactory experiences.

I want to end by suggesting that addressing contemporary cultural connotations of negative rewilding scents may also be a plausible response. Take, for instance,

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<sup>32</sup> Brady, 'The Ugly Truth', 83–99, 86.

<sup>33</sup> Pertinent to the present discussion, Karl Rosenkranz in *Aesthetics of Ugliness: A Critical Edition* (London: Bloomsbury, 2017) argues that decomposition and decay should be categorised as a form of 'the disgusting' within aesthetic theory.

<sup>34</sup> Brady, 'The Ugly Truth', 83–99, 98–99.

our aesthetic experiences of agricultural land. Visually ‘untidy’ and ‘messy’ agricultural aesthetics are often interpreted as an outcome of negligence or a lack of a work ethic.<sup>35</sup> Indeed, there is a cross-cultural aesthetic appreciation of ‘tidy’ farms across Europe; maintaining a ‘tidy’ farm is an important component of what constitutes a ‘good farmer’, which is as much social and cultural as it is economical.<sup>36</sup> Challenging or negative smells of on-farm rewilding are an outcome of the relinquishment of tidiness, from a lack of adequate drainage to the non-removal of dead matter; a lack of tidiness results in a loss of social status within farming communities, regardless of any conservation benefits stemming from these actions.<sup>37</sup> How to move away from ‘tidiness’, is of course, a major challenge. Within a market economy, the role of education and changes to agricultural subsidies would be useful places to start.<sup>38</sup> From a more radical political economy perspective, it might mean an embrace of anti-capitalist, anti-work movements, such as degrowth. The

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<sup>35</sup> Shelley Egoz, Jacky Bowring and Harvey C Perkins, ‘Making a “Mess” in the Countryside: Organic Farming and the Threats to Sense of Place.’ *Landscape Journal* 25, no. 1 (2006): 54–66; Marc Treib, ‘Ethics ≠ Aesthetics.’ *Journal of Landscape Architecture* 13, no. 2 (2018): 30–41.

<sup>36</sup> Rob J. F. Burton, ‘Understanding Farmers’ Aesthetic Preference for Tidy Agricultural Landscapes: A Bourdieusian Perspective.’ *Landscape Research* 37, no. 1 (2012): 51–71.

<sup>37</sup> *Ibid.*, 65.

<sup>38</sup> The post-Brexit agricultural subsidy system being developed across the UK, which has not been fully fleshed out at the time of writing, points to a future scenario in which subsidies are tied to environmental improvements on agricultural land. A component of this is the implementation of large-scale ‘nature recovery’ efforts, including rewilding.

smells of rewilding, after all, are those of ecology over economic productivity, disrupting the through-flow of materials (resources in, 'waste' material out) characteristic of carefully managed landscapes, instead allowing them to accumulate, settle, stagnate, and stew in situ.

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# The Sense of Smell in Brazilian Justice

Mateus de Oliveira Fornasier

## Introduction

Studying the sense of smell means exploring an extremely complex form of communication characterised by highly differentiated nuances and pragmatic, semantic and syntactic attributions of senses.<sup>1</sup> The olfactory sense is triggered by molecules possessing special attributes in the outside world; these interact with sensory receptors in the nose, sending specific nerve impulse patterns to the brain, which then compares the incoming signal with other memorised signal patterns and, based on whether or not it finds a matching pattern, assigns a meaning to the signal and decides on the most appropriate response.<sup>2</sup>

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<sup>1</sup> An earlier version of this chapter has been published in the journal *Revista de Direito Brasileira* 23 (2020) as ‘The Smell of Law Decisions: Olfaction in Brazilian Superior Justice Court’. It is reproduced here in accordance with the Creative Commons licence CC BY-NC-SA 4.0.

<sup>2</sup> Robert H. Wright, *The Sense of Smell* (Boca Raton: CRC Press, 1982).

Almost every productive human activity involving even a minimal chemical reaction or physical phenomenon will produce some aroma – industrial and agricultural production, mining, trading, crafting, etc. Several living species communicate intentions and behaviours through smell, emitting pheromones to produce certain hormonal or behavioural reactions in others (such as marking territory or signalling a readiness to mate).<sup>3</sup> Humans also produce certain smells as a way of communicating with others. Further, memories evoked by smell are more linked to emotions than consciousness, although the two are not mutually exclusive.

There are relatively few works on smell in legal social theory<sup>4</sup> – perhaps because Western scholars have, from the eighteenth century onwards, sought to minimise the importance of smell, for example constructing it as animalistic.<sup>5</sup> However, extensive work has examined the senses in the humanities and social sciences. Howes,<sup>6</sup> for example has traced the evolution of sensory studies in history and anthropology since the 1980s, proving that

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<sup>3</sup> Mimi Halpern and Alino Martínez-Marcos, 'Structure and Function of the Vomeronasal System: An Update', *Progress in Neurobiology* 70, no. 3 (2003): 245–318. <https://www.ncbi.nlm.nih.gov/pubmed/12951145>

<sup>4</sup> Anthony Synnott, 'A Sociology of Smell', *Canadian Review of Sociology and Anthropology* 28, no. 4 (1991): 437–459, 438. <https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1755-618X.1991.tb00164.x>

<sup>5</sup> Alain Corbin, *The Foul and the Fragrant* (Cambridge: Harvard University Press, 1986).

<sup>6</sup> David Howes and Constance Classen, *Ways of Sensing: Understanding the Senses in Society* (London: Routledge, 2014), 10–26.

connecting smell and its legal implications more broadly is not only possible but also provides a promising route for the understanding of law in society. Although law has conventionally been associated with reason and considered separate from the realm of the senses, it is undeniably entwined in the regulation and comprehension of sensory experience: ‘law, through its conventional association with reason, has been seen as opposed to, or at least situated outside, the realm of senses – although very much involved in its regulation.’<sup>7</sup>

The main objective of this chapter is to explore the significance of the sense of smell in society, particularly in the context of legal interpretations, and to illustrate the tensions between different social systems. To achieve this goal, the chapter is structured in three sections. Firstly, it examines the role of olfaction in the human brain. Secondly, it discusses how olfaction carries historical and cultural significance, and shows that modernity has distorted its meaning in a non-scientific manner. Finally, the chapter examines the jurisprudence of the Brazilian Superior Justice Court (known as the ‘Superior Tribunal de Justiça’ (STJ) in Portuguese) to demonstrate that modern preconceptions still influence the decision-making process.

The research question that generated this work can be summed up as follows: how do modernity’s deleterious conceptions of olfaction manifest within the legal system? The hypothesis guiding this inquiry is that certain

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<sup>7</sup> *Ibid.*, 93.



modern conceptions, despite their outwardly scientific and methodological appearance over the centuries, are biased by social interests. These understandings underlie several knowledge paradigms that have existed through different periods, suggesting that legal reasoning about smell has absorbed these socially constructed conceptions, which have been largely discredited by most research.

The research methodology employed here involved conducting a survey of the STJ website, using the terms 'cheiro' (which translates as 'scent' in English), 'odor' (a synonym for 'scent' in Portuguese), 'olfato' and 'faro' (Portuguese terms that refer to 'olfaction' or 'the sense of smell'; the latter is commonly associated with a dog's sense of smell).<sup>8</sup> The study focuses solely on a specific type of decision known as 'acórdão', which represents a judgment issued by a collegiate body within the Court, serving as the final ruling on an appeal, and which is typically the last important decision made by the STJ on matters that do not concern the Brazilian Constitution directly.

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<sup>8</sup> Seven decisions of the STJ were found where the word 'smell', although it appears in the text of the decision, is not fundamental to the question. These were the described decisions: Recurso Especial 693.172/MG, Rel. Min. *Luiz Fux*; Recurso Especial 840.011/PR, Rel. Min. *Luiz Fux*; Agravo Interno no Agravo em Recurso Especial 389.062/DF, Rel. Min. *Herman Benjamin*; Agravo Regimental no Agravo em Recurso Especial 622.639/SP, Rel. Min. *Herman Benjamin*; Habeas Corpus 379.479/SP, Rel. Min. *Reynaldo Soares da Fonseca*; Agravo Interno no Agravo em Recurso Especial 992.525/SP, Rel. Min. *Paulo de Tarso Sanseverino*; e Habeas Corpus 442.556/RJ, Rel. Min. *Reynaldo Soares Da Fonseca*.

## 1. The Impact of Smell on the Human Brain and Body

The olfactory bulb is situated in close proximity to brain structures responsible for emotions and long-term memory. This positioning results in the olfactory sense triggering emotions and recalling older memories more rapidly than other senses. Unlike other senses, which must first pass through the thalamus, the olfactory bulb is part of the limbic system. This comprises of a collection of structures that play a role in various aspects of brain functioning, including emotions, behaviour, motivation and long-term memory.<sup>9</sup> This might explain why smell possesses a unique, unusual evocative quality, and why it induces immediate attraction or repulsion.

There is evidence that smell holds significant meaning. For instance, infants separated from their mothers will cease crying when exposed to clothing worn by their parent.<sup>10</sup> This underscores the idea that the impact of smell extends beyond biological functions, encompassing crucial, formative social interactions, and evident in the profound bond shared between a mother and child, where a sense of safety is transmitted primarily through scent. Further, research dating back to 1983 shows that mothers who have had only brief contact with their newborn babies after undergoing caesarean surgery can identify

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<sup>9</sup> Barney Shaw, *The Smell of Fresh Rain: The Unexpected Pleasures of Our Most Elusive Sense* (London: Icon Books, 2017).

<sup>10</sup> Regina M. Sullivan and Paul Toubas, 'Clinical Usefulness of Maternal Odor in Newborns: Soothing and Feeding Preparatory Responses', *Biology of the Neonate* 74, no. 6 (1998): 402–408. <https://www.karger.com/Article/Abstract/14061>

their scent through a single item of clothing worn by the infant.<sup>11</sup>

The function of smell extends beyond facilitating recognition and communication from the earliest stages of life. It also serves as a mechanism for establishing cultural boundaries and delineating the concept of the 'other'. Certain smells, which indicate affiliation with a particular group, foster a sense of unity within that community. However, these same scents can also create a sense of separation and alienation of those who do not belong or who are viewed as 'outsiders'. Odour becomes an instrument and a justification for social, racial and moral rejection and exclusion.<sup>12</sup>

In various species, scent – via pheromones – plays a vital role in communicating reproductive availability. Burton<sup>13</sup> noted that human females exhibit sensitivity to substances with a musky odour, which are also present in pheromones of male mammals of various species, and related to the male hormone, testosterone; moreover, that sensitivity seems to increase during ovulation. Further, research has suggested that women's bodies are perceived as more attractive when their oestradiol levels are at their

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<sup>11</sup> Richard H. Porter, Jennifer M. Cernoch and F. Joseph McLaughlin, 'Maternal Recognition of Neonates Through Olfactory Cues', *Physiology and Behavior* 30, no. 1 (1983): 151–154. <https://www.sciencedirect.com/science/article/abs/pii/0031938483900513>

<sup>12</sup> Annick Le Geéer, *Scent: The Mysterious and Essential Powers of Smell*, trans. Richard Miller (London: Chatto & Windus, 1993).

<sup>13</sup> Robert Burton, *The Language of Smell* (London: Routledge & Kegan Paul, 1976), 111–112.

highest and progesterone levels are low.<sup>14</sup> This implies that producing a smell does not solely depend on the intention of its originator; even when a specific meaning is intended, the receiver may experience it in very diverse ways.

Engen<sup>15</sup> has extensively examined the connections between odour and cognitive memory. He suggests that the expression of an odour poses a considerable challenge due to the absence of a ‘universal’ link or connection between a specific scent and a name. It is difficult to ‘name’ a scent in a way that it is not with, for example, colour, proving that the naming of smells involves a different semantic system. Engen’s research showed that, while we initially prescribe functional meanings to sight and other senses, these evolve as we develop – but smell operates differently. He notes:

[C]hildren define an orange as something to eat. It is not until they are about seven or eight years old that more abstract ways of describing category membership, such as ‘an orange is a fruit’, become evident in their language. But we continue to name odours according to their functions as adults, when our descriptions of sights and sounds have changed.<sup>16</sup>

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<sup>14</sup> Janek S. Lobmaier et al. ‘The Scent of Attractiveness: Levels of Reproductive Hormones Explain Individual Differences in Women’s Body Odour’, *Proceedings of the Royal Society B* 285, no. 1886 (2018): 15–20. <https://royalsocietypublishing.org/doi/abs/10.1098/rspb.2018.1520>

<sup>15</sup> Trygg Engen, *Odor Sensation and Memory* (New York: Praeger, 1989), 85.

<sup>16</sup> *Ibid.*, 85.

This is complemented by Degel, who analysed the relationship between odour and implicit memory.<sup>17</sup> In contrast to other senses such as hearing and sight, smell remains primarily ‘nominative’. However, this unique aspect does not necessarily diminish the significance of olfactory perception: the immediacy of smell seems to indicate that one of its main functions is to operate as a warning system for detecting potential, dangerous hazards in the environment or in food.

This nominative quality of smell appears to be linked to language. English native speakers, for example, struggle when attempting to abstractly describe a smell, and almost uniquely need to refer to the scent’s source. In contrast, native Jahai and Asilan speakers possess a vast lexicon of abstract terms with which to describe smell.<sup>18</sup> Unsurprisingly, the extent of vocabulary used to abstractly define scents appears to be more pronounced in hunter-gatherer societies in comparison with agricultural and industrial communities.<sup>19</sup>

Besides this consideration of the purely nominative character of smell, there are several other noteworthy considerations regarding the relationship between olfac-

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<sup>17</sup> Joachim Degel, *Implicit Odor Memory* (Utrecht: Universiteit Utrecht, 2000).

<sup>18</sup> Asifa Majid and Niclas Burenholt, ‘Odors Are Expressible in Language, As Long As You Speak the Right Language’, *Cognition* 130, no. 2 (2014): 266–270. <https://www.sciencedirect.com/science/article/pii/S001002771300214X?via%3Dihub>

<sup>19</sup> Asifa Majid and Nicole Kruspe, ‘Hunter-Gatherer Olfaction is Special’, *Current Biology* 28, no. 3 (2018): 409–413e2. <https://www.sciencedirect.com/science/article/pii/S0960982217316160>

tion and memory. For example, it has been proven that, unlike hearing and vision, smell does not evoke false memories, only veridical ones.<sup>20</sup> This could suggest that olfactory input has direct access to the hippocampus (which is key to the laying down of accurate memories).<sup>21</sup> False memories tend to originate in the temporal pole, an area associated with the storage of abstract semantic knowledge.<sup>22</sup> Further, it has also been proven that olfactory cues are better than visual ones in evoking autobiographical memories.<sup>23</sup>

‘The more familiar a person thinks an odour is, the more likable it is judged.’<sup>24</sup> This is reinforced by Vroon et al.,<sup>25</sup> who argue that there is something obvious about the appreciation of smell: it is used to differentiate

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<sup>20</sup> Jakke Tammines and Mariam Mebude, ‘Reinstatement of Odour Context Cues Veridical Memories But Not False Memories’, *Memory* 27, no. 4 (2018): 575–579. <https://www.tandfonline.com/doi/full/10.1080/09658211.2018.1513041>

<sup>21</sup> Anne-Lise Saive, Jean-Pierre Royet and Jane Plailly, ‘A Review on the Neural Bases of Episodic Odor Memory: From Laboratory-based to Autobiographical Approaches’, *Frontiers in Behavioral Neuroscience* 8, 240 (2014): 1–13. <https://www.frontiersin.org/articles/10.3389/fnbeh.2014.00240/full>

<sup>22</sup> Martin J. Chadwick et al. ‘Semantic Representations in the Temporal Pole Predict False Memories’, *Proceedings of the National Academy of Sciences* 113, no. 36 (2016): 10180–10185.

<sup>23</sup> Maaïke J. De Bruijn and Michael Bender, ‘Olfactory Cues Are More Effective than Visual Cues in Experimentally Triggering Autobiographical Memories’, *Memory* 26, no. 4 (2018): 547–558.

<sup>24</sup> Neil G. Martin, *The Neuropsychology of Smell and Taste* (London: Psychology Press, 2013), 38.

<sup>25</sup> Piet Vroon, Anton von Amerongen and Hans de Vries, *Smell: The Secret Seducer*, trans. Paul Vincent (New York: Farrar, Straus and Giroux, 1994), 86–87.

certain kinds of plants or foods from others, and to signal aversion to putrid or faeces-like odours that might pose a risk to health, as well as to identify familiar smells in the environment to aid understanding of one's surroundings.

## 2. Smell and its Cultural Meanings

The significance of the sense of smell has evolved over time. Classen, Howes and Synott<sup>26</sup> in their cultural history of smell describe, for example, the importance of smell to the ancient Egyptians; the pleasure ancient Greeks and Romans took from intense sweet smells that would be overpowering today; the initial repulsion that early leaders of the Christian Church felt towards the burning of incense, due to its association with pagan rituals – a repulsion which was eventually replaced with belief in the sanctity of such aromas; the relationship between the miasma of illness and pleasant smells in the Middle Ages; and the transformation in sanitation and smell that accompanied the industrial and urban revolutions, and new understandings of human and industrial waste as a cause of disease within cities.<sup>27</sup> They also discuss how the nineteenth century emphasis on sanitation led to sight surpassing smell as the

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<sup>26</sup> Constance Classen, David Howes and Anthony Synnott, *Aroma: The Cultural History of Smell* (London: Routledge, 1994), 31.

<sup>27</sup> *Ibid.*, 13–92.

foremost sense,<sup>28</sup> not least via the development of visual elements and tools such as maps, microscopes and money to the detriment of the olfactory, and the identification of smell with ‘savages’ and animals – both of which have a history of being disregarded and exploited by Western culture.

While the importance of smell in the West has waned since the 1800s, other cultures consider the meanings of smell very differently and have an alternate appreciation of its significance. The Andaman Islanders in Burma (now Myanmar) constructed their calendar around the cyclic patterns of plant fragrances, and distinguish regions via smells – i.e., the fragrant flowers of inland areas versus the salty scents of the coastline. The Dassanetch (Ethiopia) similarly employ a scent-based calendar that is structured via the scent of burning fields (the dry season) and of blossoming plants (the wet season). In New Guinea, the Umeda calculate distance not by sight but by the distance of a smell, as great emphasis is placed on the olfactive sense, making it extremely accurate. For the Desana people of the Colombian Amazon, tribes are characterised according to their dietary habits, with foods emitting particular smells. This means that the territorial boundaries of a tribe can be delineated by the location of particular odours. They also have moral, botanical and zoological systems based on smell. The Suya and the Borono (from Brazil) and the Serer Ndut (of Senegal) structure

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<sup>28</sup> Ibid., 84.



classification systems (of human, plants and animals) on different types of smell.<sup>29</sup>

The language of the Maniq, a nomadic hunter-gatherer community residing in southern Thailand, is strongly based on smell, and it is an important reference point for various aspects of life, including medicinal practices and rituals, hunting, and risk prevention. They have a broad lexicon in relation to smell and would not, as in English, simply refer to smell by its source.<sup>30</sup> This capacity for abstract expression in relation to smell is also evident within the Jahai, hunter-gatherers based in the Malay Peninsula.<sup>31</sup>

Many cultures use odour as symbolic markers for classifying human beings. The interplay of attractiveness/repulsiveness in the olfactory experience turns smell into a useful symbolic vehicle for categorising according to cultural values, as well as investing classificatory systems with emotive power. The repugnance of a kind of odour, for example, can produce the immediate physical repulsion a society/community demands for a specific class or group of people. Thus, designating a particular group as one that 'smells bad' is to make it repulsive on multiple levels, classifying them at a very basic physical and

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<sup>29</sup> Constance Classen, *Worlds of Sense: Exploring the Senses in History and Across Cultures* (London: Routledge, 1993), 91–105.

<sup>30</sup> Ewelina Wnuk and Asifa Majid, 'Revisiting the Limits of Language: The Odor Lexicon of Maniq,' *Cognition* 131, no. 1 (2014): 125–138, 134. <https://www.sciencedirect.com/science/article/pii/S0010027713002527>

<sup>31</sup> Asifa Majid et al. 'Olfactory Language and Abstraction Across Cultures.' *Philosophical Transactions of Royal Society B* 373, 20170139 (2018): 1–8. <https://royalsocietypublishing.org/doi/pdf/10.1098/rstb.2017.0139>

emotional level.<sup>32</sup> Such culturally constructed parameters of inclusion or exclusion serve as the basis, not only for creating political, but also legal, narratives and norms.

The exercise of olfactory jurisdiction occurs through legal and cultural frameworks of regulatory knowledge, which are based on normative notions of reasonableness. In this way, the normativity of reasonableness reflects cultural expectations that may be communicated through the legal system and the law. While law serves as a mechanism for regulation, control and governance, it also reflects a culture of smell in which certain 'smellers' are more powerful than others, and certain smells are less acceptable than others in public spaces. Smell marginalises through its association with lack of personal hygiene, disregard for community standards, or simply not belonging. In these spaces, smell, or '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 smells that other bodies emit. The experience of smell differs from person to person and is not experienced in a uniform or equal way, and similarly through smell, our encounter with law and inclusion in society is likewise uneven and unequal.<sup>33</sup>

Establishing hierarchies based on physical, moral and economic criteria, as well as devising measurements of

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<sup>32</sup> Constance Classen, *Worlds of Sense: Exploring the Senses in History and Across Cultures* (London: Routledge, 1993), 95–105.

<sup>33</sup> See Sarah Marusek's chapter in this volume entitled 'Law and the Odour-ing of Order: Smell, Air and the Public Forum'.

time and space, form an important basis for legal culture. In Western societies, although moral judgements and prejudices concerning smell are linked with certain groups – the working class, the poor, migrants, those of different ethnic groups (or as George Orwell<sup>34</sup> phrased it, ‘four frightful words ... the lower classes smell’) – this may appear to arise from a lack of attention to smell within legal cultures. In Britain, during the eighteenth and nineteenth centuries, smell was used to assign certain attributes to particular cultures and races, including Native Americans, Africans, Chinese and, in particular, Jewish communities:<sup>35</sup> ‘there was a shift in the way that smell, beginning in the late nineteenth century, was used to not simply demarcate groups but, in addition to supposedly detect “race” and “ethnicity”’.<sup>36</sup>

Sovereignty is based on territory and on the ownership of property. The measurement of life expectancy is quantified in years, months, hours, seconds: clockwise. Payment for labour is structured by time or by the completion of specific tasks: ‘formerly power was personal, and therefore imbued with the smell of those who wielded it; now it has become impersonal and abstract, and therefore odourless’.<sup>37</sup>

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<sup>34</sup> George Orwell, *The Road to Wigan Pier* (London: Victor Gollancz, 1937), 159.

<sup>35</sup> William Tullett, ‘Grease and Sweat: Race and Smell in Eighteenth-Century English Culture.’ *Cultural and Social History* 13, no. 3 (2016): 307–322. <https://tandfonline.com/doi/full/10.1080/14780038.2016.1202008>

<sup>36</sup> Mark M. Smith, ‘Transcending, Othering, Detecting: Smell, Pre-modernity, Modernity.’ *Postmedieval: A Journal of Medieval Cultural Studies* 3 (2012): 380–390, 381.

<sup>37</sup> Classen, Howes and Synnott, *Aroma*.

The decline of the importance of smell (and the other non-visual senses) in modern Western culture reveals more than just a shift in sensory preferences. It signifies a transformation in cultural and conceptual paradigms brought about by the Enlightenment.<sup>38</sup> John Locke's *Essay on Human Understanding* emphasises the visual basis of mental activity;<sup>39</sup> Descartes also endorsed sight as the most important sense for science and technology.<sup>40</sup> Condillac noted of smell: 'of all the senses it is the one which appears to contribute least to the cognitions of the human mind.'<sup>41</sup> Darwin considered it to be 'of extremely slight service',<sup>42</sup> and for Kant, it was 'the most dispensable' of the senses.<sup>43</sup>

Even the scientific belief that posits human olfaction as inferior to that of other mammals is, in fact, a misconception. It stems from a non-empirical hypothesis advanced by the French anatomist and anthropologist, Paul Broca, whose work was influential during the nineteenth

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<sup>38</sup> Classen, *Worlds of Sense*, 27.

<sup>39</sup> Walter Ong, *The Presence of the Word: Some Prolegomena for Cultural and Religious Story* (New Haven: Yale University Press, 1967), 66–68.

<sup>40</sup> Anthony Synnott, 'Puzzling Over the Senses: From Plato to Marx', in *The Varieties of Sensory Experience: A Sourcebook in Anthropology of the Senses*, ed. David Howes (Toronto: University of Toronto Press, 1991), 70.

<sup>41</sup> Etienne. B. de Condillac, *Condillac's Treatise on the Sensations*, trans. Geraldine Carr. (London: The Faval Press, 1930 [1754]), xxxi.

<sup>42</sup> Charles Darwin, *The Descent of Man, and Selection in Relation to Sex* (London: John Murray, 1874), 17.

<sup>43</sup> Immanuel Kant, *Anthropology from a Pragmatic Point of View*, trans. Robert B. Louden. (Cambridge: Cambridge University Press, 2006 [1798]), 50.

century.<sup>44</sup> His misunderstandings and errors regarding the size of the human olfactory bulb, especially in relation to other mammals, led Broca to conclude that human olfaction was antithetical to free will. Freud subsequently based much of his own work regarding human olfaction and psychoanalysis on these misconceptions.

In contrast, recent studies have shown that human capabilities regarding olfaction should not only be evaluated in relation to the capabilities of other mammals, but according to a broader range of parameters. The primate olfactory system is highly sensitive to many odours and can be highly influential on emotions, physiology, and behaviour when properly tested.<sup>45</sup> Different species have varying degrees of sensitivity to different odours. In the case of human primates, olfaction exerts a potent impact on our behaviour. Environments can trigger specific memories and emotions, induce activation of the autonomic nervous system, shape perceptions of stress, and prompt both approach and avoidance responses.<sup>46</sup>

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<sup>44</sup> John P. McGann, 'Poor Human Olfaction is a 19th Century Myth', *Science* 356, no. 6338 (2017): eaam7263. <https://science.sciencemag.org/content/356/6338/eaam7263>

<sup>45</sup> Benoist Schaal and Richard Porter, "'Microsmatic Humans' Revisited: The Generation and Perception of Chemical Signals', *Advances in the Study of Behavior* 20 (1991): 135–199. <https://www.science-direct.com/science/article/abs/pii/S0065345408603216>; Mathias Laska, Alexandara Seibt and Andreas Weber, 'Microsmatic Primates Revisited: Olfactory Sensitivity in the Squirrel Monkey', *Chemical Senses*, 25, no. 1 (2000): 47–53. <https://academic.oup.com/chemse/article/25/1/47/345710>; Gordon M. Shepherd, 'The Human Sense of Smell: Are We Better Than We Think?', *PLOS Biology* 2 no. 5, e.46 (2004): 572–575. <https://journals.plos.org/plosbiology/article?id=10.1371/journal.pbio.0020146>

<sup>46</sup> McGann, 'Poor Human Olfaction is a 19th Century Myth'.

Yet, in modern architecture, the olfactory dimension of built structures has often been neglected, even though ‘the effects created by odoriferous materials, ventilated scents and other wafting perceptions can significantly influence one’s experience of a structure.’<sup>47</sup>

The impact of the Enlightenment on legal culture in the West is undeniable. Concepts such as constitutionalism, fundamental rights, the separation of powers, and the central importance of rationality stand as foundational examples. Further, the shift from synthesis to analysis represented in the shift from the importance of smell to sight<sup>48</sup> may also be seen in the rise of the importance of the written (and published) text of the law, and in the shift in authority, from the individual to the text. Legal decisions can also trigger various sensory experiences, so what metaphorically could be considered the ‘smell’ of the legal system? It could be said, of course, that law has no physical smell – but there are ways in which it does utilise the olfactory in its propositions and decisions.

### 3. Smell in Brazilian Justice

In spite of the diminishing significance of smell in Western culture, and including its relevance in law, the legal system can still attribute meaning to smell within its practices. It can serve as an external reference to make a judicial decision possible. An analysis of what can be signified by a law order may clarify – and help critique – the

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<sup>47</sup> Jim Drobnick, ‘Volatile Effects: Olfactory Dimensions of Art and Architecture’, in *Empire of the Senses: The Sensual Culture Reader*, ed. David Howes. (Oxford: Berg, 2005), 265–280, 265.

<sup>48</sup> Ong, *The Presence of the Word*, 74.

specific meanings senses have within a social system. As Masurek elsewhere in this volume notes:

[T]he 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.<sup>49</sup>

When analysing the jurisprudence of the STJ, it becomes evident that unpleasant smells, along with other unhealthy factors such as overcrowding in prisons, are deemed an affront to the dignity of the human person.<sup>50</sup> However, expert proof is demanded in Brazilian decisions in order to confirm ‘bad smells’ arising from malpractice within institutions, whether they relate to incarcerated adults, or concern children and adolescents. The state may be considered liable for indemnification of these torts because, in Brazil, their welfare is the responsibility of the state.<sup>51</sup>

Expert evidence is also the basis for not only determining areas affected by bad odours as a result of sewage problems, but also for identifying who can legitimately pursue legal action for material and moral damages in

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<sup>49</sup> Marusek, ‘Law and the Odour-ing of Order’.

<sup>50</sup> Recurso em Mandado de Segurança 46.701/MG.

<sup>51</sup> Recurso Especial 1653359/MG.

such scenarios.<sup>52</sup> The state can be held civilly accountable for harm caused by the inadequate provision of public sewage treatment services where foul odours and other unsanitary conditions detrimentally impact the wellbeing of individuals. In these cases the role of expert evidence is pivotal in establishing the extent of such unhygienic conditions.<sup>53</sup> It is interesting to note that the court does not consider the discovery of a human corpse in a public reservoir to be the basis for civil action if an investigating expert does not detect any changes in odour, colour or microbiology at the site.<sup>54</sup>

It has also been established in law that if expert evidence indicates that a bad smell resulting from the installation of a sewage plant does not devalue a property or cause any other inconvenience, no legal offence is recognised.<sup>55</sup> Further, this liability is categorised as non-contractual. It is understood that the compensation for such offences must include accumulated interest rates dating back to the inception of the offence or the commencement of the odour-related nuisance.<sup>56</sup> Specialist evidence is also vital in making judgements in relation to criminal activity and civil liability due to air pollution caused by the emission of noxious fumes from factories.<sup>57</sup>

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<sup>52</sup> Recurso Especial 1693951/RS.

<sup>53</sup> Agravo Interno no Agravo em Recurso Especial 1207215/PR; Agravo Regimental no Agravo em Recurso Especial 401.510/RJ; Agravo Regimental no Agravo em Recurso Especial 462.242/RJ; and Agravo Regimental no Recurso Especial 1346198/RJ.

<sup>54</sup> Agravo Regimental no Recurso Especial 1560641/MG.

<sup>55</sup> Agravo Regimental no Agravo em Recurso Especial 113.877/MS.

<sup>56</sup> Recurso Especial 1718176/RS.

<sup>57</sup> Recurso Especial 32.103/SP; Recurso Ordinário em Habeas Corpus 63.357/PA; Habeas Corpus 409.361/AM.



In relation to drug trafficking investigations in Brazil, it has been established that if a strong odour of narcotic substances, as substantiated by expert evidence and/or police testimony, is discovered in the investigation of a suspect's possessions, then this warrants their temporary detention<sup>58</sup> or criminal prosecution.<sup>59</sup> The use of sniffer dogs is also accepted by the STJ in providing valid proof of the presence of illicit substances – this is evident in numerous decisions wherein habeas corpus petitions were rejected.<sup>60</sup> However, the reliance on expert evidence is mitigated in drink driving cases, wherein a physical on-site evaluation by the police, without the need for a blood test or breathalyser, is deemed sufficient to establish the basis for criminal prosecution.<sup>61</sup>

It is interesting to note that the STJ considered accidents that result in the loss of smell to the victim (which is provided, of course, by specialist evidence) a case for

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<sup>58</sup> Habeas Corpus 415.574/MG.

<sup>59</sup> Recurso Ordinário em Habeas Corpus 34.981/PR; Habeas Corpus 305.308/SP; Habeas Corpus 337.247/SP; Habeas Corpus 364.024/SC; Habeas Corpus 378.323/SC; Recurso Ordinário em Habeas Corpus 87.935/MG; Agravo Regimental no Habeas Corpus 423.838/SP; Habeas Corpus 438.147/SP; Habeas Corpus 461.194/TO; Habeas Corpus 448.036/RS; Habeas Corpus 470.307/SC.

<sup>60</sup> Recurso Ordinário em Habeas Corpus 29.483/MG; Habeas Corpus 296.256/SP; Recurso Ordinário em Habeas Corpus 52.561/MG; Recurso Ordinário em Habeas Corpus 98.951/PR; Recurso Ordinário em Habeas Corpus 98.397/MG.

<sup>61</sup> Recurso Ordinário em Habeas Corpus 69.856/SP; Recurso Ordinário em Habeas Corpus 73.589/DF; Agravo Regimental no Recurso Especial 1638451/RJ; Agravo Interno nos Embargos de Declaração no Agravo em Recurso Especial 769.140/DF; Recurso Especial 1684544/CE; Agravo Regimental no Habeas Corpus 340.161/PR; Agravo Regimental dos Embargos de Declaração no Habeas Corpus 354.810/PB; Agravo Regimental no Agravo em Recurso Especial 1226785/ES.

civil liability action, particularly in cases of incidents between individuals.<sup>62</sup> Compensation awarded in such cases varies between 30-80,000 Brazilian reais (USD\$6-16,000).<sup>63</sup> Where the loss of a sense of smell is related to compensation claims covered by Brazil's mandatory vehicle insurance (DPVAT), which is managed by a company called Seguradora Líder, which has national capital participation, it is not only the loss of smell that needs to be established, it must also be linked to the victims' permanent incapacity to work.<sup>64</sup> This is the same in accident aid cases, a benefit provided by Brazilian Social Security. Specialist evidence must not only affirm the loss of smell but demonstrate that it is significant enough to render the plaintiff permanently unable to work.<sup>65</sup>

A Decree (Decreto 8.468/76) enforced by São Paulo State, one of the most significant in the Brazilian Federation, was deemed unlawful by the Superior Court because it had adopted olfaction from authorised personnel as a standard for the measurement of environmental pollution. The court's rationale was rooted in the understanding that an administrative act, such as a decree, cannot impose penalties (in this case financial) based on a norm lacking in objectivity, thus implying that smell is an entirely subjective sense.<sup>66</sup>

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<sup>62</sup> Recurso Especial 404.706/SP.

<sup>63</sup> Agravo Regimental no Agravo de Instrumento 1392878/PR; Recurso Especial 1531096/PR.

<sup>64</sup> Agravo Regimental no Recurso Especial 1308294/MG.

<sup>65</sup> Agravo Interno no Agravo em Recurso Especial 875.457/SP.

<sup>66</sup> Recurso Especial 399.355/SP, Recurso Especial 35.887/SP.

## Conclusion

Contemporary science has brought about significant changes in our understanding of human olfactory capabilities. This sense, which has been used to draw distinctions between humans and other animal species is, in fact, far more potent and integral to the human body, brain and communication than conventional scientific wisdom has suggested, especially as defined by modernity.

This chapter has demonstrated that scientific and societal perspectives on olfaction have evolved over time, influenced by historical and cultural factors. Perhaps the most profound shift in our understanding of smell occurred with the advent of modernity, an era subject to contextual fluctuations. During this period, smell, as a cultural and social phenomenon, gradually lost its importance and its significance diminished. The Western world sought to rationalise it away, despite scientific evidence of its value, and the Enlightenment established sight as the foremost sense for a modern, rational and reasoned sensibility.

In light of this, several key observations emerge from an analysis of the STJ. Firstly, it classifies olfaction as a vital means of interacting with the world and a significant determinant of human dignity. The STJ consistently interprets tort, environmental and constitutional law in ways that enforces various penalties in relation to olfactory matters, and often views the disregard of smell as a significant form of illegality.

Olfaction is important as a means of providing evidence and used to detect unlawful activity. However, the way it is used within the justice system can vary. For instance, in

the case of illegal drugs, trained dogs and other specialist methods are used for evidentiary purposes; in contrast, regarding illicit alcohol use, the subjective testimony of an authority figure who has inhaled the scent is deemed sufficient evidence.

Smell finds itself relegated to second place by the pre-conceptions of modernity, which elevates sight, written language and reason as the foremost sense, mode of communication and form of knowledge respectively – and all are put to use to assert the authority and validity of a juridical decision. This is not to imply that a return to previous modes of reasoning and expression is inherently superior or more acceptable. The realm of social affairs has attained such a level of complexity that the subjectivity of authority and the search for an innate spiritual essence of things can no longer be regarded as fundamental categories.

The prevailing notion that human olfaction is a lesser sense is now widely discredited by scientific inquiry. The very tenets upon which modern rationality was constructed must be re-evaluated, not only within the realm of hard science, but also within the social and human sciences. Law must be part of this re-evaluation too, and a dynamic, provocative and provoking dialogue between Law and Science should supplant the instrumental authority that characterises contemporary legal systems worldwide.

Obviously, there are limitations to this research. A thorough examination of how other Brazilian courts address smell and olfaction is essential to support the findings presented here. Additionally, these results should be

compared with jurisprudence from other nations in order to verify their consistency. However, these preliminary findings have the potential to inspire future studies in a largely uncharted and unexplored transdisciplinary field – the intersection of law and the senses in court decisions.

### Note

AI technology was used to assist in the translation of this chapter from Portuguese to English.

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# Smell and the Engineering of Christian Atmospheres in the Theodosian Code: An Olfactory Approach to the Legislation on Public Festival

Cinnamon Ducasse

## I. Burning Flesh and Incense: The Atmospheric Politics of Sacrifice

Just as We have already abolished profane rites by a salutary law, so We do not allow the festal assemblies of citizens and the common pleasure of all to be abolished. Hence We decree that, according to ancient custom, amusements shall be furnished to the people, but without any sacrifice or any accursed superstition, and they shall be allowed to attend festal banquets, whenever public desires so demand.

—*Theodosian Code*, 438 CE<sup>1</sup>

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<sup>1</sup> *C. Th.*, XVI.10.17.

... [I]n a department store, the law is in the service of the atmosphere of excessive desire to consume, since what becomes dissimulated is law as *logos*, namely the oppressive nature of the law.

—*Andreas Philippopoulos-Mihalopoulos*,  
2015 CE<sup>2</sup>

Enacted in 399CE and represented in the 438 *Theodosian Code* the above legislation is extracted from a now lost imperial rescript addressed to the Proconsul of Africa. That same year, violence broke out in the provincial African colony of Suffectum, resulting in the death of fifty Christians and a vandalised statue of Hercules. We know this through Augustine, who quickly wrote to the ‘magistrates and town-leaders’, accusing them of having ‘buried the laws of Rome in a dishonoured grave’ and for ‘rewarding the most active in the massacre ... with ... a high place in your Council.’<sup>3</sup> While a clear link between the 399 legislation and the Sufes riot would be difficult to prove, it is evident that the stakes of public expressions of faith ran high in this period, pervading multiple levels of society and regional space. This they continued to do well beyond the publication of the *Theodosian Code*.

Statues and bodies, however, frozen in the vulnerability of their raw materials, are and were easy targets in religious warfare. Other materials are harder to pin down, becoming instead embroiled in more complex antagonisms and ambivalences. Among these are the airborne scents of burning flesh and incense which accompanied

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<sup>2</sup> Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Landscape, Atmosphere* (Abingdon: Routledge, 2015), 108–9.

<sup>3</sup> Augustine, *Ep.* 50.

the spectacular civic festivals that saturated the late Roman calendar. For centuries, these acrid-sweet smokes connected earthly with divine bodies, keeping order among things by physically transforming them: “altered” or “purified” by burning, incense travelled heavenward in a physical image of ascent that mirrored both polytheistic and Jewish cosmologies.<sup>4</sup> The multiple possible cosmic connections enacted by ritual fumes, however, made smelling a site of visceral conflict and anxious confusion at both the level of the Empire and the individual. In early persecutions, suspected *Christiani* were forced to offer incense to the image of the emperor according to the customs which were felt to protect the Empire. Apostates earned the name of ‘incense-burners.’<sup>5</sup> As Susan Ashbrook Harvey has shown in her illuminating study of Christian olfaction, both intentionally producing and accidentally sensing these scents was a major theme in early Christian literature.

Incense and sacrificial smoke, however, followed parting trajectories in the fourth century, an era characterised by a ‘legalisation’ of Christian practice. For the followers of Christ, as Ashbrook Harvey shows, traditional sacrificial practices were ‘superseded by the actions of Christ’ and could not be ritually recuperated.<sup>6</sup> Christ’s actions had irreversibly reoriented sacrificial discourse toward martyrdom.<sup>7</sup> The invasive fumes generated at public

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<sup>4</sup> Susan Ashbrook Harvey, *Scenting Salvation: Ancient Christianity and the Olfactory Imagination* (Berkeley: University of California Press, 2006), 14.

<sup>5</sup> *Ibid.*, 19.

<sup>6</sup> *Ibid.*, 20.

<sup>7</sup> *Ibid.*, 21–27.

festivals had, for Christians, come to embody the abject sin of prohibited customs, clouding the path to salvation. But 'legalisation' and the associated rise of Christian actors to political prominence, according to Ashbrook Harvey, entailed also a kind of *romanisation* of Christian rite, radically transforming the liturgy into a 'feast for the senses' and, in a reappropriation of imperial ceremony, came to be 'drenched in the scent of incense'.<sup>8</sup> Ashbrook Harvey centres on Christian authors' mystagogical debates over new meanings for smell and the strategies they found for normatively redeeming the senses for Roman Christians, but a closer look at the legal sources from this period reveals a further, more distinctly legal and governmental dimension to public ritual.

Within the *longue durée* of Christianity's permeation of the Roman imperial bureaucracy, the *Theodosian Code* offers us a legislative narrative of cultural change from the reign of Constantine up until that of the second Theodosius. But this is overlooked in the secondary literature. While scholars of ancient festival have mined the code for circumstantial evidence, none have questioned the means by which that evidence is structured and transmitted: by the compilers and copyists of the *Theodosian Code*. Each constitution has been carefully selected, manipulated and woven into a chronological timeline prepared for fifth century readers. Before being able to consider a singular constitution, therefore, we must firstly ask, how did the compilers of the code itself

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<sup>8</sup> *Ibid.*, 58.

choose to represent changes in the public festival within the period it attempts to cover, and to what effect? And what place do the sacred aerosols of incense and sacrificial smoke take in the atmospheric changes they purport to describe? As Honoré has amply demonstrated, law to the late antique Romans was the ‘*ars aequi et boni*, the just and the good in their technical aspect’,<sup>9</sup> and so did they artistically, technically and highly creatively respond to the challenges brought up by religious conflicts taking place at all levels of society.<sup>10</sup>

In what follows, I propose to answer these questions within a ‘Sensory Studies’ framework. In defense of the academic transgression of comparing ancient festivals to modern department stores, I will argue that the law on public festival also serves atmospheres of pleasure. My thesis is that when we approach the legislation on festival as it appears in Books II and XVI of the *Code* from the perspective of the senses and from olfaction in particular, we can see a clear narrative emerge in which the lawgiver and the law itself engineer a sensual atmosphere imbued with religious meaning. As the protagonists of this atmosphere, however, the law and the lawgiver are represented as non-oppressive agents, guardians of pleasure and keepers of correct divine relations. This is clear in the 399 legislation as it calls upon the ‘ancient custom’ of civic euergetism, while subverting its established sacral significance. Indeed, by ‘not allowing the common

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<sup>9</sup> Tony Honoré, *Law in the Crisis of Empire 379–455 AD: The Theodosian Dynasty and Its Quaestors* (Oxford: Clarendon Press, 1998), viii.

<sup>10</sup> J. D. Harries, ‘How To Make A Law-Code’, *Bulletin of the Institute of Classical Studies* 42, Issue Supplement 71 (1998), 67.

pleasure of all to be abolished', the law blocks the abolisher within, dissimulating its oppressive character.<sup>11</sup> As Andreas Philippopoulos-Mihalopoulos (hereafter A.P.M.) shows, atmospheric engineering responds to problems of public order by 'rendering inert any willful resistance', depending of course on how sincere this pleasure-giving is judged to be.<sup>12</sup> Atmospheric engineering in the *Theodosian Code*, therefore, is the effect of an artistic legislative narrative of public order through sensory discipline, constructed from constitutions promulgated spontaneously throughout the fourth century and into the fifth. It is no coincidence, therefore, that the permeating materials of sacrificial smoke and incense are frequently targeted in this legislation. This smoke gave material presence to the spiritual pollution of non-Christian rites, and according to the narrative portrayed in the *Theodosian Code*, the Christian emperors purified the very air with laws and codes.

In my first section, 'The Power of Sensation', I set my framework within wider intellectual efforts to affirm sensation as a genuine historical force and explicate the concept of atmospheric engineering. Secondly, in 'The Order of Law' I will discuss how the specific literary architecture of the *Theodosian Code* gives rise to narrative form, before unpacking the narrative of sensory engineering told by the legislation on festivals in my final section, 'Engineering Christian Atmosphere'.

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<sup>11</sup> *C. Th.*, XVI.10.17.

<sup>12</sup> Philippopoulos-Mihalopoulos, *Spatial Justice*, 109.

## II. The Power of Sensation

If there should be any temples in the country districts, they shall be torn down without disturbance or tumult. For when they are torn down and removed, the material basis for all superstition will be destroyed.<sup>13</sup>

The premise of any exercise in Sensory Studies is that there is an inherent power to sensation. As such, it is also an exercise in materialism, in that it emphasises the vitality and importance of matter. This involves a certain complicity with the idea of a ‘material basis for superstition,’ even if it may also involve a critical analysis of the rhetorical mechanics at work in such a statement. Indeed, what Rosi Braidotti has called ‘new materialism’ is a late twentieth century intellectual trend which both comes out of, and reacts against, textual approaches:

Neo-materialism emerges as a method, a conceptual frame and a political stand, which refuses the linguistic paradigm, stressing instead the concrete yet complex materiality of bodies immersed in social relations of power.<sup>14</sup>

In fact, Sensory Studies explicitly situated itself within this trend early on, calling the ‘sensual revolution’ a ‘revolution in thought’ against textual obsessions.<sup>15</sup> Pioneering theorists such as David Howes cautioned against ‘playing

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<sup>13</sup> *Th.C.*, XVI.10.16.

<sup>14</sup> Rosi Braidotti cited in Rick Dolphijn and Iris van der Tuin, *New Materialism: Interviews & Cartographies, New Metaphysics* (Ann Arbor: Open Humanities Press, 2012), 19.

<sup>15</sup> David Howes, ed. *Empire of the Senses: The Sensual Culture Reader* (Oxford: Bloomsbury Academic, 2005), 4.



up the body and the senses through evocative accounts of corporeal life', in favour of extrapolating 'social ideologies conveyed through sensory values and practices'.<sup>16</sup> Unfortunately, forays of Sensory Studies into late antiquity have stopped short of moving beyond 'playing up the body', finding little more than a novel prism through which to refract the laboured topic of Christian asceticism.<sup>17</sup>

There is, however, an important difference between Braidotti and Howes' materialisms, which perhaps reflects the 'new' in 'new materialism' and, I think, the value of Sensory Studies. While Howes is interested in revealing *ideologies* which may be latent in sensory forms,<sup>18</sup> Braidotti, and A.P.M.'s radical materialism rejects ideology altogether on the basis of a 'common surface between material and the discursive'.<sup>19</sup> Braidotti and A.P.M. move away from the more orthodox Marxist concept of transcendent *ideology* towards a functionalist conception of the material world in which both ideas and sensory stimulus have immanent force.

A.P.M.'s engineered atmospheres, therefore, are entirely material sensori-legal entities; they are vital networks of sensory connections, made possible by the way that bodies (in the widest possible sense) affect each other. A focus on the connections made between bodies through

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<sup>16</sup> Howes, 6.

<sup>17</sup> A case in point is Susan Ashbrook Harvey, 'The Senses in Religion: Piety, Critique, Competition', in *A Cultural History of the Senses: In Antiquity*, ed. J. P. Toner (Bloomsbury Academic, 2014), 91–115.

<sup>18</sup> For another more orthodox Marxist approach to sensory history, see Robert Jütte, *A History of the Senses: From Antiquity to Cyberspace* (Cambridge: Polity, 2005).

<sup>19</sup> Philippopoulos-Mihalopoulos, *Spatial Justice*, 115.

sensation, therefore, moves from regarding the body to regarding the *intracorporeal*, giving both Christian asceticism and ideas concerning civic festival a social dimension. Atmosphere, then, attempts to detail Braidotti's 'bodies immersed in social relations of power' by looking closely at the way that bodies *move* each other. This could be the way that a body of law destroys the body of a temple, or the way that a cloud of airborne stimuli conceived as 'pagan' could repulse Christian bodies at a public festival, as Ambrose describes:

Can it be endured for a pagan to sacrifice in the presence of a Christian? Let them ... inhale the smoke through their eyes, even against their will, hear the sound of the music in their ears, feel the ash in their throats, the incense in their nostrils and let the ashes from our hearths scatter over their faces even though they turn their heads away.<sup>20</sup>

In an appeal to the Emperor against public sacrifice, Ambrose the Bishop describes a corporeal revulsion to the legal recognition of 'pagan' festivals in atmospheric, synaesthetic terms. As Sara Ahmed states, 'to be disgusted after all is to be affected by what one has rejected',<sup>21</sup> and Ambrose is protesting to the lawgiver about having to be continually affected by what he has already rejected. Here, then, Ambrose is entreating what A.P.M. sees as law's distinct capacity to engineer atmospheres by suppressing certain 'corridors of sensory direction' and allowing

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<sup>20</sup> Ambrose, 'Ep.18' in *Religious Conflict in Fourth Century Rome: A Documentary Study*, ed. Brian Croke and Jill Harries (Sydney: Sydney University Press, 1982), 48.

<sup>21</sup> Sarah Ahmed, quoted in Philipopoulos-Mihalopoulos, *Spatial Justice*, 113.

others to come forth.<sup>22</sup> This illuminates the connection between ideas, sensation, and stimulus: ‘the emergence of atmospheres is based on the connection between senses, emotions and symbolic meaning’.<sup>23</sup>

By placing law, emotion, sensory stimulus and signification on a common surface, this radically materialist sensory approach can account for the concern that clerics, legislators and emperors have with public festival. It can also account for the entanglement of certain smells and their possible meanings in the debate over sacrifice. The creation of atmosphere is both an expression and an effect of power, hence why Ambrose is physically disgusted by expressions of ‘pagan’ power through festal celebration. As we will see in my final section, spontaneous legislation managed stimulation in response to specific circumstances, but this is represented narratively in the *Theodosian Code* because of the specific way the code is constructed. As we move on to a discussion of its structure, we will bear in mind how this too has a vital function in this conception of atmosphere.

### III. The Order of Law

A book itself is a little machine ... the only question is which other machine the literary machine can be plugged into, must be plugged into in order to work ...<sup>24</sup>

In her article, ‘Ordering Divine Knowledge in Late Roman Legal Discourse’, Caroline Humfress persuasively

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<sup>22</sup> Ibid., 109.

<sup>23</sup> Ibid., 117.

<sup>24</sup> Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (London: Athlone Press, 1988), 4.

argues that the *Theodosian Code* can be classified as ‘a specialist form of Imperial prose literature.’<sup>25</sup> Setting Book XVI within a Foucauldian framework, Humfress shows that the final, ‘ecclesiastical’, Book of the Code ‘was intended to showcase a new, imperial and Theodosian, ordering of knowledge concerning matters human and divine.’<sup>26</sup> Drawing our attention to the relationship between the architectonics of the Code and the ‘broader, socio-cultural, logic’, Humfress shows that the text ‘provides its elite, specialist readers with the tools – epistemological and material – to produce their own ‘valid’ legal knowledge *as defined by and through the Codex itself*’.<sup>27</sup> The Code as literary machine, then, is ‘plugged in’ to an orthodox machine responsible for the production of theological meaning. It is also plugged into an imperial machine responsible for public order, as well as ancient machines still reproducing ancient religious ideas:

If we survey the range and ordering of title-headings within Book XVI we can see how the time-honoured imperial duty of ensuring the *pax Romana* is now framed as a concern to maintain ‘correct’ relations exclusively with the Supreme God of the Christians.<sup>28</sup>

Roman legal practice, thus, like Roman religious thinking, was deeply tied into a textuality which was ‘not

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<sup>25</sup> Caroline Humfress, ‘Ordering Divine Knowledge in Late Roman Legal Discourse’, *Collegium* 20 (2016): 161.

<sup>26</sup> *Ibid.*, 162.

<sup>27</sup> *Ibid.*, 164.

<sup>28</sup> Caroline Humfress, *Orthodoxy and the Courts in Late Antiquity* (Oxford: Oxford University Press, 2007), 171–72.

Scriptural or merely literate – but ... an object of writing and reading' which actively brought the divine and mundane together.<sup>29</sup> Roman law then, similarly to the transmission of scents to divine entities in ritual burnings, had a vital, material function in the workings of the ancient world, and this is reflected in the very ordering of material in the code.

The principles of this order are stated eloquently in the first Book of the Code. Firstly, the lawgiving power of the emperor is 'granted' to the compilers as lawmakers, whose subsequent role is to manipulate imperial enunciations into 'illuminated' constitutions:

In order that the law may be constrained by brevity and may be lucid with clarity, We grant to those men who are about to undertake this work the power to remove superfluous words, to add necessary words, to change ambiguities, and to emend incongruities. By these methods, of course, each constitution shall stand forth illuminated.<sup>30</sup>

Honoré points out that 'the formal language which attributes these documents to the emperors in whose name they were issued is sometimes taken too seriously'.<sup>31</sup> And yet, framing the body of the emperor as the source of law makes the emperor(s) the ultimate protagonist(s) of legal change and agents of the *Pax Romana*. So, whereas the compilers are given extensive creative control over the text of the *Code*, they never appear as political agents in their own right.

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<sup>29</sup> Duncan MacRae, *Legible Religion* (Cambridge: Harvard University Press, 2016), 146.

<sup>30</sup> *C. Th.*, I.1.6ii.

<sup>31</sup> Tony Honoré, *Emperors and Lawyers* (London: Duckworth, 1981), viii.

The second crucial aspect of the structure of the *Theodosian Code* is its chronological ordering, including even presenting earlier laws which are later overwritten, explicitly for their readership:

Although it would be simpler and more in accordance with law to omit those constitutions which were invalidated by later constitutions ... let us recognize that this code and the previous ones were composed for more diligent men, to whose scholarly efforts it is granted to know those laws also which have been consigned to silence and have passed into desuetude, since they were destined to be valid for the cases of their own time only.<sup>32</sup>

As Humfress argues, what this structure actually gives rise to is an effective ‘re-archiving of the religious past.’<sup>33</sup> We therefore ‘cannot depend on the text for a “natural” or “accurate” reflection of realities on the ground’, because it offers ‘an imperial – and imperialist – ordering of late Roman law and religion.’<sup>34</sup> This is precisely the purpose, function and condition of existence of the narrative of atmospheric engineering in the legislation on the festival to which we now turn. In the following narrative, the form of the Code frames the emperor as the protagonist of a transformation in the atmospheric sensory matrix, and the past is ‘re-archived’ according to the Christian cosmic order, based on a manipulation of legal material by Theodosius II’s artful compilers.

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<sup>32</sup> *C. Th.*, I.1.5.

<sup>33</sup> Humfress, 175.

<sup>34</sup> Humfress, 174.

#### IV. Engineering Christian Atmosphere

Legislation concerning festivals is organised across two separate *tituli* (title-headings) in the *Theodosian Code*. The narrative of atmospheric engineering through sensory manipulation emerges across both, though they appear to be fulfilling very different legal duties. The first, 'Book II, Title 8: Holidays', is set among matters of court administration because the Roman legal calendar distinguishes court days from festival days, when court proceedings are suspended. Obviously, this court/festival binary already suggest self-dissimulation: these are legally-given days for the absence of law. The majority of the legislation, however, is organised into 'Book XVI, Title 10: Pagans, Sacrifices and Temples' which deals in detail with the reorientation of sanctified bodies, objects and space along Christianising lines. I will consider both simultaneously, demonstrating how they work together to commemorate the reign of each Christian lawgiving emperor, as well as attempt to forget that of Julian 'the apostate'. Moving through the legal evidence as it appears to close sensory channels while preserving the pleasure of public festival, we will bear in mind the *distinctly* olfactory significance of animal sacrifice and incense burning in earthly-divine relations.

As is customary in the *Theodosian Code*, both *tituli* begin with a law of Constantine that signals an exaggerated orientation towards the Christian God. A Constantinian constitution from 321 reaffirms the distaste of sanctity towards court:

... it appears to Us most unseemly that the Day of the Sun (*Dies Solis*), which is celebrated on account

of its own veneration, should be occupied with legal altercations and with noxious controversies of the litigation of contending parties.<sup>35</sup>

Before going on to permit emancipation and manumission on these days, exempting them from the contaminated category of law. While this may well have been a step towards the liberationist discourse of Christian literature, *dies solis* is kept ambiguous, and no mention of the Christian God is made. The accompanying medieval commentary translates the *dies solis* as ‘the holy day of the Lord’, however, and this Christianising translation is repeated throughout the Code, despite the carefully worded admission that the day is ‘celebrated on account of its own veneration.’<sup>36</sup>

The memory of Constantine is even less convincingly Christianised in the opening constitution of ‘XVI. 10’. An excerpt from an imperial rescript states that in the event of a lightning-strike, ‘the observance of the ancient custom [*haruspexy*] shall be retained, and inquiry shall be made of the soothsayers as to the portent thereof’ and, further, that anyone may ‘appropriate this custom to themselves’ provided it be public. As we shall see, all sacrifice, including the ancestral tradition of consulting the entrails of a sacrificial animal on the fortune of the Empire, will later be firmly outlawed by numerous constitutions under the same title. While Pharr points out that the prohibition on domestic sacrifice was on account of their being ‘secret and antisocial; they might be used

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<sup>35</sup> C. Th., II.8.1.

<sup>36</sup> C. Th., II.8.1.



against the Emperor,<sup>37</sup> it is clear from the second constitution in the title from Constantine's more zealous son, Constantius, that some Constantinian hostility towards sacrifice had to be shown. Constantius refers to 'the law of the sainted Emperor, Our father' as it abolishes 'the madness of sacrifices', hence the latter could hardly be codified without the former.<sup>38</sup> That Constantius' legislation refers to a Constantinian law which Pharr points out to be 'not extant' is of little consequence when the compilers have clearly tried to present it as the preceding law – evidently Pharr did not fall for their trick.<sup>39</sup> Indeed, it does not follow that there ever was a genuine Constantinian sacrifice abolition. That the compilers felt the need to retain the permission of *haruspexy* is certainly suspect, since they quote the rescript at length. Perhaps they wanted to set a low bar from which later emperors could be shown to progress. So much for the laws of Constantine, and 'II.8: Holidays' stays quiet until the reign of the first Theodosius in 386.

As we might expect, there is quite a jump from Constantine to Constantius, who holds the next four constitutions in XVI.10 in his name, and a claim to a new severity towards traditional ritual. His constitutions also include the first genuine use of explicit Christian thematics and terminology such as the notion that certain stimuli create 'opportunities for sin.' The law discussed above begins with the fervent promise that 'the madness of superstition

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<sup>37</sup> *C. Th.*, II.8.1.

<sup>38</sup> *C. Th.*, XVI.10.20.

<sup>39</sup> *C. Th.*, XVI.10.2.

shall cease',<sup>40</sup> deploying the Christian discourse of insanity usually reserved for heretics.<sup>41</sup> But bold first steps are followed by awkward footing: the next year a qualification is added that temples *beyond* the city walls 'shall remain untouched and uninjured'.<sup>42</sup> This apparent protection of 'long established amusements of the Roman people' is then quickly revoked in the following constitution when Constantius announces with 'pleasure' the closure of temples 'in all places and in all cities', 'so as to deny to all abandoned men the opportunity to commit sin'.<sup>43</sup> Capital punishment is also decreed both to sacrificers and to governors neglecting to enforce such laws. The next constitution repeats the sacrifice abolition, and the sixth adds that the worshipper of images will also be 'struck by the avenging sword'.<sup>44</sup> The legislation in Constantius' name remembers his reign as having begun the earnest destruction of both 'pagan' bodies and buildings, though not without hesitation.

Though the chronology of the *tituli* glosses over the short and controversial reign of Julian (361–3), the constitutions of Theodosius I are clearly aggravated by tensions refreshed in its wake. It is quite possible that this legislation revolves around events known as the 'Altar of Victory controversy', though scholarly debate is still vigorous on

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<sup>40</sup> *C. Th.*, XVI.10.2.

<sup>41</sup> For a detailed study of this discourse, see Ferdinando Zuccotti, *Furor haereticorum: studi sul trattamento giuridico della follia e sulla persecuzione della eterodossia religiosa nella legislazione del tardo impero romano* (Milan: Giuffrè, 1992).

<sup>42</sup> *C. Th.*, XVI.10.2.

<sup>43</sup> *C. Th.*, XVI.10.5.

<sup>44</sup> *C. Th.*, XVI.10.6.

the political significance of this matter. Tensions, known to us through Ambrose, concern the removal by Gratian in 382 of a prominent sacrificial altar in the Roman Senate House which had already been removed once by Constantius I and then restored, probably by Julian. Chenault writes that the historiographical ‘custom’ has been to treat the events ‘as a defining moment in a longer conflict between paganism and Christianity, symbolised by the “debate” in 384CE between the pagan prefect, Symmachus and Ambrose, Bishop of Milan.’<sup>45</sup> This custom, however, reproduces Ambrose’s presentation of events, which Chenault suggests deliberately frames him in a position of power against Christian competitors, under a pretended interest in the altar.<sup>46</sup> In the same vein, Alan Cameron has problematised the assumption that powerful ‘pagans’ at the time were producing reams of ‘covert anti-Christian polemic,’<sup>47</sup> emphasising that though ecclesiastics ‘might thunder against paganism in all its forms’, ‘the real world government turned to those with influence, whatever their religious beliefs.’<sup>48</sup> The influence of Ambrose aside, however, the need for ‘real world

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<sup>45</sup> Robert R. Chenault, ‘Beyond Pagans and Christians: Politics and Intra-Christian Conflict in the Controversy over the Altar of Victory’, in *Pagans and Christians in Late Antique Rome: Conflict, Competition, and Coexistence in the Fourth Century*, ed. Michele Renee Salzman (New York: Cambridge University Press, 2016), 46.

<sup>46</sup> *Ibid.*, 61.

<sup>47</sup> Alan Cameron, ‘Were Pagans Afraid to Speak Their Minds in a Christian World? The Correspondance of Symmachus’, in *Pagans and Christians in Late Antique Rome: Conflict, Competition, and Coexistence in the Fourth Century*, ed. Michele Renee Salzman, Marianne Sághy, and Rita Lizzi Testa (New York: Cambridge University Press, 2015), 64.

<sup>48</sup> *Ibid.*, 108.

government' to negotiate complicated power struggles between elite traditionalism towards sacred architecture and rites on the one hand, and new Christian understandings of them on the other, certainly characterises the legislation of this period. This is made clear through frequent statements of universal application, qualifying subjects 'of any class or order whatsoever', and against 'favoritism'.<sup>49</sup> The resulting constitutions are eventually remembered in the *Theodosian Code* for their thoroughness towards influential traditionalists on the one hand, and on the other, for not having gone far enough.

Their thoroughness is manifested in the attention they give to bodily practices, intra-corporeal rituals, and the use of artifacts and edifices. Among many other corporeal-material behaviours listed and repeated, punishment is promised to those who 'devote their attention to sacrifices'; the 'worship of images'; 'immerse themselves in sacrifices'; pronounce 'dire incantations'; 'approach' or 'revere shrines'; 'wander through' or 'go around' temples; 'venerate his lar with fire, his genius with wine, his penates with fragrant odors ... burn lights to them, place incense before them, or suspend wreaths for them' or even 'bind a tree with fillets; or erect an altar of turf that he himself has dug up'.<sup>50</sup> Not only are these behaviours outlawed, so too are the emotional relations to ritual artifacts and the meanings given:

[I]f any person should venerate, by placing incense before them, images made by the work of mortals and destined to suffer the ravages of time, and if, in

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<sup>49</sup> *C. Th.*, XVI.10.12.

<sup>50</sup> *C. Th.*, XVI.10.12.

a ridiculous manner, he should suddenly fear the effigies which he himself has formed, or ... should attempt to honor vain images with the offering of a gift, which even though it is humble, still is a complete outrage against religion.<sup>51</sup>

This precocious mocking gives the lie to the ironic legislative subversion of the persecutory practice of forcing Christians to offer incense to the emperor's image which we saw in my introduction. Language here is dominated by Christian normative ideas over which divinities should be revered and exactly how. But the specificity also points towards the perceived power of sensation. Again, atmospheric impurity is perceived as a real threat to the *Pax Romana* – right relations with the divine. This impurity is even posed as a lingering one: 'all places shall be annexed to our fisc, if it is proved that they have reeked with the vapor of incense.'<sup>52</sup> Clearly some forms of stimulation are insurmountably impure and cannot have their meanings subverted along Christian lines. Imperial air had to be cleansed of 'pagan' incense.

It is worth noting that while a building can be marred by the smell of incense, attitudes towards architecture framed as the 'work of mortals' – buildings and devotional art – are treated with ambivalence. Caught between hope in recalibration of use and meaning and all out ban on entering temples, the compilers fail to restore coherence to this part of the story. A 382 rescript to the Duke of Osrhoene refers to a specific temple and perhaps surprisingly decrees that it should remain open. In fact, 'all

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<sup>51</sup> *C. Th.*, XVI.10.12.

<sup>52</sup> *C. Th.*, XVI.10.12.

celebrations of festivities' should be preserved so that the temple may 'be seen by the assemblages of the city and by frequent crowds, and so should the images 'reported to have been placed' therein remain but be 'measured by the value of their art rather than by their divinity'.<sup>53</sup> Nevertheless the proceeding 391 constitution from the same *Augustus* states that no person shall enter temples, enacting a special fine upon any judge exploiting 'the privilege of his power' in entering 'polluted places'.<sup>54</sup> The polluting power of incense ultimately trumps the possibility of secularising sanctified space.

Renee-Salzman has illuminated the ambivalence towards the social, political and divine function of temples by comparing it to the relative ease with which the calendar was drastically reorganised under Theodosius I in 'Book II, Title 8: Holidays'. In a single law of 389, Theodosius clears the calendar of all non-Christian holidays, excepting the 'respite from toil' in summer, the harvest, the new year's celebrations redefined as a 'rest day', and the 'natal days of the greatest cities, Rome and Constantinople, to which the law ought to defer, since it also was born of them'.<sup>55</sup> To this is added a ban on circuses during Sundays, on the familiar grounds 'that no concourse of people to the spectacles may divert men from the reverend mysteries of the Christian law'.<sup>56</sup> The apparent Christianisation of the legal calendar has attracted much of

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<sup>53</sup> *C. Th.*, XVI.10.8.

<sup>54</sup> *C. Th.*, XVI.10.9.

<sup>55</sup> Fritz Graf, *Roman Festivals in the Greek East: From the Early Empire to the Middle Byzantine Era* (Cambridge: Cambridge University Press, 2015).

<sup>56</sup> *C. Th.*, II.8.20.

the work on festivals in this era, though its significance is debated. Pointing to a backlog in court business, Graf frames this as a strategic action by an emperor eager to show his diligent maintenance of smooth-running courts, downplaying the religious intent.<sup>57</sup> Conversely, Renee-Salzman insists on the social importance of the construction of rhythmic time in this period:

To redefine the basic way a society and a people mark time is to alter profoundly the rules and rhythms of life. It is not surprising, then, that changing the organization of time and space in Rome was of particular interest to popes and emperors alike.<sup>58</sup>

Referring to their implanting of Christian celebrations on the same dates as ‘pagan’ holidays, Renee-Salzman argues that ‘by the mid C4th, bishops and emperors were aggressive in their appropriation of sacred time’, whereas public space had to be handled carefully as it was invested with much greater elite interest.<sup>59</sup> Temples and temple artworks, though imperial property, also belonged to an ancient euergetic culture whereby the elite sponsored its production, to whom it symbolised a material connection to their historic ‘role as civic leaders’.<sup>60</sup> At the same time, changing the calendar was theologically more permissible than destroying temples, because the temples literally

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<sup>57</sup> Fritz Graf, ‘Laying Down the Law in Ferragosto: The Roman Visit of Theodosius in Summer 389’, *Journal of Early Christian Studies* 22, no. 2 (2014): 219–42.

<sup>58</sup> Michele Renee Salzman, ‘The Christianization of Sacred Time and Sacred Space in Late Antique Rome’, ed. W. V. Harris, *Journal of Roman Archaeology*, Supplementary Series, 33 (1999): 123.

<sup>59</sup> *Ibid.*, 123.

<sup>60</sup> *Ibid.*, 123.

housed deities, who resided in their statues, and who in contemporary Christian discourses had become powerful demons.<sup>61</sup> At the level of sensation, 'from a pagan perspective, to ignore the Christian celebration of the birth of Jesus was easier than to ignore a Christian church built on a pagan temple.'<sup>62</sup> Compared with the lightness of incense and sacrificial smoke, and the ethereality of time, sacred buildings proved heavier on multiple levels. Nevertheless, according to 'Book XVI: Title 10', the Christianisation of public ritual is practically complete by the time of Theodosius II.

The constitutions within the reign of the second Theodosius (commissioner of the *Code* in his name) present the final scene in the narrative, an image of an atmosphere engineered. The legislation is victorious: 'the regulations of constitutions formerly promulgated shall suppress any pagans who survive, although We now believe that there are none.'<sup>63</sup> Punishments are to be 'executed more vigorously',<sup>64</sup> civic religious professions are outlawed entirely,<sup>65</sup> and after an abortive revival of traditionalism in the letter which opened this essay, the emperors withdraw all funding from temples and grant bishops 'the right to use *ecclesiastica manus*' in intervening in pagan ceremonial.<sup>66</sup> In 415 it is affirmed that all sacred spaces will be handed to the Orthodox Church, and any object which 'has ever been consecrated to sacrifices and

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<sup>61</sup> *Ibid.*, 130.

<sup>62</sup> *Ibid.*, 132.

<sup>63</sup> *C. Th.*, XVI.10.13.

<sup>64</sup> *C. Th.*, XVI.10.13.

<sup>65</sup> *C. Th.*, XVI.10.14.

<sup>66</sup> *C. Th.*, XVI.10.19.3.



thus served as a means of deception for men' should be removed from the 'favorite haunts of the public'.<sup>67</sup> Again, to hinder their very material, sensory pull: 'that it may not furnish allurements to the erring'.<sup>68</sup> Another intensifying constitution prohibits from imperial service 'those persons who are polluted by the profane false doctrine of crime of pagan rites, that is, the pagans'.<sup>69</sup>

The final constitutions, therefore, appear already immersed in a pacified, purified, Christian atmosphere. Here incense, which had now been recuperated into lavish Christian liturgies, no longer needs mentioning. The effort turns towards maintaining that atmosphere and tidying up unwanted 'pagan' remnants. This entails compelling 'those persons who are truly Christians or who are said to be' not to 'dare lay violent hands on Jews and pagans who are living quietly and attempting nothing disorderly or contrary to law'.<sup>70</sup> While implicitly recognising and authorising a public conflict between the constructed categories of 'Christian', 'pagan' and 'Jew', the ritual material, behaviour and space is tucked away into a quiet corner of this atmosphere. The final resounding image of 'XVI:10', however, is a 453 law concluding the complicated struggle with sacred space by calling for the destruction of all 'fanés, temples, and shrines' belonging to those of 'criminal pagan mind ... if even now any remain entire'.<sup>71</sup> This space was then to be 'purified by the erection of the sign of the venerable Christian

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<sup>67</sup> *C. Th.*, XVI.10.20.3.

<sup>68</sup> *C. Th.*, XVI.10.20.3.

<sup>69</sup> *C. Th.*, XVI.10.21.

<sup>70</sup> *C. Th.*, XVI.10.24.

<sup>71</sup> *C. Th.*, XVI.10.25.

religion' – so that while the material basis of superstition is destroyed, a material world of Christian law and solemn order is constructed in its stead.<sup>72</sup>

## V. Conclusion

Sensory Studies is always a materialist exercise, but getting the most out of new forms of materialism means moving on from ideology and into a conception of matter as vital and functional in itself. From this perspective, sensation has its own inherent power, and the materialities of complex religious systems are given a new dimension: an atmospheric dimension. Atmospheres connect bodies through organising ideas, emotions and objects of all kinds, all working together to create a specific kind of *mood*. As we have seen in the case of Roman sacrificial ceremonies, moods may become particularly pervasive and intrusive when directed along airborne sensory channels such as the olfactory. As with incense and burning flesh, material traversing these routes appears to be almost inherently transgressive in its disregard for spatio-socio-political boundaries, forcing Christians to smell the lingering injustice of the world from which they emerged. Although atmospheres emerge spontaneously and frequently antagonistically, it is characteristic of law, which is also immersed in them, to try to engineer them from within. This engineering is both an expression and an effect of power, and as is the case with Roman public festivals, is an effort to maintain public order.

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<sup>72</sup> C. Th., XVI.10.25.

The *Theodosian Code*, which has its own unique materiality as a constructed text, is a specific kind of technical literature, a kind of 'literary machine' that has to be plugged into other social machines in order to work. In the text of the *Code*, the Roman emperors themselves are framed as the protagonists of law, the drivers of the legal machine. The text is formed according to this narrative principle, which is then reinforced by a chronological ordering that allows it literally to tell the story of atmospheric changes made by the legislative actions of Christian emperors.

Changes in this period of Christian emperors are thus presented to the reader as a disciplining narrative. A story of atmospheric engineering through sensory management is told by chronological legislation looking back from the reign of Theodosius II on the laws of previous emperors. This story remembers Constantine's reign as having begun an orientation towards Jove, and the reign of Constantius as having intensified this orientation through a series of dramatic ritual prohibitions. The reign of Theodosius I is remembered as having been more thorough still, transforming the sacred calendar though failing to overcome the temples which still housed the old gods. But these temples, reeking with the lingering effect of incense burning and animal sacrifice, could not be defended. Theodosius II would clear up this problem by issuing a law that would have all temples replaced by a 'purifying' crucifix. With this, the atmosphere surrounding the *Theodosian Code* is engineered into a Christian one, where the 'material basis for superstition' has been replaced by a new matrix of divine-terrestrial relations.

As I discussed at the very beginning of this chapter, it is hard to imagine that the legal machine alone could have managed the emerging atmospheric shifts in this fraught period. We have seen, however, that the team of compilers of the fourth century lawbook, the *Theodosian Code* may have wished to present the Christian emperors as givers of both pleasure and order, overseers of air and atmosphere who replace the stench of sacrifice with an offering of sweet incense to the new Christian and Roman body.

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## What is Nikolai Gogol's *The Nose* About? (Or the Smell of Law)

Elena Loizidou

One morning, Ivan Yakovlevich, resident of St. Petersburg and a popular barber, wakes up to the smell of fresh loaves of bread popping out of his wife's oven. He chooses to have a loaf of bread with some onions. He cuts it in half and sees something unusual in the loaf. Curious to find out what this shiny object is, the barber puts his finger in the bread. He extracts a nose. This is not any nose. It is the nose of one of his customers, the Collegiate Assessor, Kovalyov. Fearful of the consequences of being found with the nose, Yakovlevich rushes to the river where he proceeds to throw the nose in its moving waters.

From the very start Nikolai Gogol's short story 'The Nose' makes us feel perplexed – how could a nose be baked into a fresh loaf of bread without anyone seeing it? Why did it not burn? – curious – oh, and what happens now that the nose has been thrown in the river? Will its lawful owner ever be reunited with it and have



they even realised that their nose has gone AWOL? – and how uncomfortable would it be, feel, if I lost *my* nose? Gogol's matter of fact writing style, however, manages to transform the discomfort of losing one's nose into comedy and intrigue.

The story continues from a different point of view: we meet the owner of the nose who wakes up one morning to find that his nose is missing. Collegiate Assessor Kovalyov, upon the realisation that in place of his nose 'there was nothing but an absolute flat surface!'<sup>1</sup> takes to the streets of St. Petersburg to find the runaway nose. Indeed, as luck has it, he encounters the nose dressed up in the coat of a Civil Councillor, an indication of it being elevated in status. As it turns out, Kovalyov's nose had outranked him. Kovalyov finds the courage to point out to the nose that 'it' belonged to him, but alas the nose briskly brushes aside his words: 'My dear fellow, you are mistaken. I am a person in my own right. Furthermore, I don't see that we can have anything in common. Judging from your uniform buttons, I should say you're from another government department.'<sup>2</sup> As the story unfolds, we find out that the nose is found by the police and returned to Kovalyov and that it takes two weeks after its return to be attached again to his face.

The story has been analysed by law and literature scholars. We find for example the renowned scholar, Richard Weisberg, referring to it in his book *Poethics: And Other*

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<sup>1</sup> Nikolay Gogol, 'The Nose' in *Nikolay Gogol: The Diary of a Madman, The Government Inspector and Selected Stories*, trans, Ronald Wilks (London: Penguin Books, 2005 [1836]), 113–139, 117.

<sup>2</sup> Gogol, *The Nose*, 120.

*Strategies of Law and Literature*<sup>3</sup> and Daniel Lowenstein writing about it in *Cardozo Law Review*.<sup>4</sup> For Weisberg the comic effect of the story conceals the terror that we as readers experience whilst reading *The Nose*.<sup>5</sup> As Lowenstein elaborates, for Weisberg the reader may experience such terror because the characters in the story react to the loss of the nose in non-normative ways.<sup>6</sup> For example, Yakovlevich's wife is concerned more with the detached nose messing up her kitchen than the horror of losing one's nose.<sup>7</sup>

Weisberg's interpretation – the comic effect of the story disguising the terror in readers in encountering characters that care more about kitchen order than the loss of smell – is of course a possible one. Here instead, I would like to invite you to think of the story of the detached nose as both an act of *rebellion* and a *celebration* of the non-normative (as presented by the reactions of the characters to the news of the disappearing nose). *The Nose*, I would like to suggest exposes us to the futility of status and at the same time the entrapments that ideas of status produce. Kovalyov was a man about town, trying to ensure that his good looks and relatively good social status as Collegiate Assessor (Major) would secure him the best wife. Once he loses his nose, the bodily organ that enables him to

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<sup>3</sup> Richard Weisberg, *Poethics: And Other Strategies of Law and Literature* (New York: Columbia University Press, 1992).

<sup>4</sup> Daniel H. Lowenstein, 'The Failure of the Act: Conceptions of Law in the *Merchant of Venice*, *Bleak House*, *Les Misérables*, and Richard Weisberg's *Poethics*', *Cardozo Law Review*, 15 (1993): 1139–1244.

<sup>5</sup> Weisberg, *Poethics*, 13–4.

<sup>6</sup> Lowenstein, 'The Failure of the Act', 1151.

<sup>7</sup> Gogol, *The Nose*, 114.

smell – where is the money and status? – his access to a better world appears to be threatened. To make things worse, his nose has managed to rise to a rank higher than his own. The nose's rebellion – detachment – provokes status anxiety in its owner, but more significantly it teaches us, and Kovalyov, an important lesson: status is simultaneously contingent and futile. A man/woman's worth may – and it is a man's worth in this case – be less associated with their status and more with their being. A part (nose) can at any moment become detached from the whole, declare independence, as in the story, and destroy in this sense the wholeness of the character. Similarly, normative values that we designate as having universal validity, that we may be hold onto are exposed by this story as being contingent reminding us that the universal is made of parts.

In his book *Nikolai Gogol*, Vladimir Nabokov focuses on Gogol's life and writings and describes the peculiar relationship that Russians have to noses: they are perceived as an anomaly on one's body, not quite fitting their bearer, as well as representing masculinity.<sup>8</sup> Moreover, he adds that Gogol's fascination with noses stems from having a 'long and sensitive nose that he used to discover new smells in literature'.<sup>9</sup> Nabokov's analogy draws our attention to Gogol's innovative storytelling, one that uses folkloric motifs or ideas to create stories that are both humorous and critical of social norms. We can extend Nabokov's analogy to law and its institutions. Like Gogol, who used his elongated nose to sniff out a new genre in

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<sup>8</sup> Vladimir Nabokov, *Nikolai Gogol* (London: Penguin Books, 2011), 4.

<sup>9</sup> *Ibid.*, 4.

literary writing, law and its institutions (i.e., the police) pride themselves in being able to 'sniff out' criminals and 'smell something fishy' about a particular situation. We can even argue that law and its institutions gain their *authority* by being able to smell out dangerous individuals and crime.

Nevertheless, noses do not just act as *executive* parts of the law. They do not only detect those that breach the law. Noses also act prejudicially. Think of the myriad times when the police harass and arrest young black men because their noses tell them that they are suspicious when in reality they are just innocently walking along a street (Reiner, 2019; Hall et al. 2002).<sup>10</sup> Such incidents are too many to mention. Noses cause trouble as their evaluation of smell is not necessarily free from preconceived ideas and judgements. But losing them or getting rid of them, as we find out in Gogol's story, will not necessarily alleviate us from the possible prejudices that noses can create.

In the last paragraph of *The Nose* Gogol playfully writes, '... the strangest, most incredible thing of all is that authors should write about such things. That, I confess, is beyond my comprehension.'<sup>11</sup> Of course, his question is rhetorical. Gogol knows very well why noses are interesting subjects for literature. Having a nose, or rather a detached nose as the protagonist of a story, diverts our attention from the psychic struggles of other characters and focuses us on the unfolding of the story and on how characters react to

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<sup>10</sup> Robert Reiner, *The Politics of the Police* (Oxford: Oxford University Press, 2019). See also Stuart Hall et al. *Policing the Crisis: Mugging, the State, and Law and Order* (London: Palgrave Macmillan, 2002)

<sup>11</sup> Gogol, *The Nose*, 139.

such loss, teaching us that there is no one way of being in the world or reacting to misfortune. Each reaction to the news of the detached nose reveals that there are incongruities in life. And these incongruities of life reveal what we otherwise are unable to see: our entrenched normative behaviours, attachment to status and universal values. We hold them so close that we cannot see them, just like we cannot see our own noses, too close to be able to sense anything. We can see for example that universal values are only partially such. Moreover, the story instructs us to be proud of our noses, their sense of smell and how this smell assists us in navigating the world (after all they may help us discover a new genre of writing or detect that criminal) but simultaneously to persistently question the very prejudices that our noses carry around with them. We learn not to be so hung up on status and what status can provide for us but rather to embrace the flow of life, with its ups and downs, as at any moment our world can turn topsy-turvy and we can lose the very smell of the world, as our noses may go missing.

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

Sarah Marusek

In everyday sites of social governance, such as those discussed by Sloterdijk,<sup>1</sup> Philippopoulos-Mihalopoulos,<sup>2</sup> and Delaney,<sup>3</sup> law's presence is amorphous, diffuse, and affected by non-legal phenomena.<sup>4</sup> 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

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

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

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

<sup>4</sup> 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-Mihalopoulos<sup>5</sup> 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

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<sup>5</sup> Philippopoulos-Mihalopoulos, ‘Atmospheres of Law’, 35.

and sniffs'.<sup>6</sup> 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.<sup>7</sup> 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.'<sup>8</sup> 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.<sup>9</sup>

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<sup>6</sup> Ibid.

<sup>7</sup> 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.

<sup>8</sup> Sliwa and Riach, 'Smellscapes', 28.

<sup>9</sup> 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’<sup>10</sup> 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.’<sup>11</sup> 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

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<sup>10</sup> 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.

<sup>11</sup> *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.<sup>12</sup> 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.’<sup>13</sup> 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.’<sup>14</sup> 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.<sup>15</sup>

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

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<sup>12</sup> 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.

<sup>13</sup> *Ibid.*, 322.

<sup>14</sup> *Ibid.*, 321–322.

<sup>15</sup> *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,<sup>16</sup> '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.'<sup>17</sup> This olfactory disability limits an individuals' sense of belonging as 'odours are semiotic messages'<sup>18</sup> 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,<sup>19</sup> 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

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

<sup>17</sup> *Ibid.*, 705.

<sup>18</sup> *Ibid.*, 711.

<sup>19</sup> 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.’<sup>20</sup> 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

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<sup>20</sup> 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.<sup>21</sup> 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’,<sup>22</sup> 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.’<sup>23</sup> 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*<sup>24</sup> discussed the legal

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

<sup>22</sup> *Ibid.*, 233.

<sup>23</sup> *Ibid.*, 232.

<sup>24</sup> 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.'<sup>25</sup> 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.<sup>26</sup>

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

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<sup>25</sup> *Ibid.*, 470.

<sup>26</sup> *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,<sup>27</sup> 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,<sup>28</sup> 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

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<sup>27</sup> 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.

<sup>28</sup> 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*,<sup>29</sup> 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

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<sup>29</sup> 515 U.S. 646 (1995).

detected.<sup>30</sup> 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 marijuana<sup>31</sup> 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.<sup>32</sup>

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<sup>30</sup> 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.

<sup>31</sup> 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.

<sup>32</sup> 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’,<sup>33</sup> 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.<sup>34</sup> 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.’<sup>35</sup> 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.

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<sup>33</sup> Nirvana, ‘Smells Like Teen Spirit’, *Nevermind*, 1991.

<sup>34</sup> *Florida v. Jardines* (569 U.S. \_\_ (2013)).

<sup>35</sup> *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.’<sup>36</sup> 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.’<sup>37</sup> 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

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<sup>36</sup> 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>

<sup>37</sup> 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.'<sup>38</sup> 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).'<sup>39</sup>

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

<sup>39</sup> *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 laws<sup>40</sup> 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,

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<sup>40</sup> 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 jurisprudence<sup>41</sup> 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.'<sup>42</sup> 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.'<sup>43</sup> 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)?'<sup>44</sup> 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

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

<sup>42</sup> 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](http://usatoday30.usatoday.com/news/offbeat/2009-09-02-honolulu-bus-odor_N.htm?csp=usat.me)

<sup>43</sup> *Ibid.*

<sup>44</sup> *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.<sup>45</sup> 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.<sup>46</sup> 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 Tan<sup>47</sup> discusses

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<sup>45</sup> 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.

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

<sup>47</sup> 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.'<sup>48</sup> 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.'<sup>49</sup> 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.<sup>50</sup> The public rights framework protecting against offensive emissions is a statement about power and exclusion.

### Conclusion: The Odour-ing of Order

Kelvin E. Y. Low<sup>51</sup> describes smell as a 'sociocultural phenomenon' and asks 'what is the role of smell in everyday life experiences?'<sup>52</sup> Drawing upon Anthony

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<sup>48</sup> Ibid., 55.

<sup>49</sup> Ibid., 56.

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

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

<sup>52</sup> 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.'<sup>53</sup> 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,<sup>54</sup> the relationship between law and society characterises everyday phenomenon. Place-based approaches to law<sup>55</sup> examine this relationship as it happens spatially while semiotic approaches to law<sup>56</sup> 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

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<sup>53</sup> *Ibid.*, 398.

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

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

<sup>56</sup> 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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# Law's Stench: Antigone's Materialist Approach to Law

Zachary Low Reyna

## The Legal Ecology of Antigone

A stench pervades Sophocles' *Antigone* and has lingered over its numerous interpretations for centuries. It is the smell of rotting human flesh, of Polynices' corpse over-baked and oozing in the merciless Cadmean sun, the 'material accomplishment'<sup>1</sup> – to use Paolo Virno's term – of an entire chain of actors and sites of knowledge: human and posthuman bodies, bacteria, fungi, hot sun, wild animals, dust storms, repeatedly sightless guards, grieving sisters, a dogmatic king, competing legal systems, and ancient Greek customs around death and burial. But it is also the smell of a millennial stalemate and its attendant

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<sup>1</sup> Paolo Virno, 'The Two Masks of Materialism', trans. Alberto Toscano, *Pli* 12 (2001): 173. Virno criticises materialist accounts that just assume a vital starting point in matter, arguing instead that materialist accounts must reconstruct chains of 'material accomplishments'. This chapter draws on this argument.

rot: the conflict between Creon and Antigone, between legal positivism and natural law.<sup>2</sup> And inasmuch as it is the smell of rot and decomposition, it is also the smell of rich compost, of emerging imaginaries of law – of an *other* law – spawned in the earth-fallen detritus of the play's two dominant visions of law.

This chapter offers an experimental, olfactory reading of Sophocles' *Antigone* that foregrounds the scent of Polynices' decomposing corpse to reimagine law and its possibilities. The goal is to highlight a third account of law circulating in the play – irreducible to either Creon's legal positivist edict or Antigone's natural law appeal to the gods – and to inquire into its materiality and how legal materialist scholarship might attend to it.<sup>3</sup> Since Aristotle's time, *Antigone* has been interpreted as staging the conflict between two legal paradigms: legal positivism and natural law.<sup>4</sup> The first, represented by King Creon's edict that Polynices' body remain unburied, and the second, by Antigone's appeal to a higher law – the 'laws of the gods' – to justify her burial of Polynices. For most readings of the tragedy, this 'irresolvable conflict' motors the

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<sup>2</sup> Tony Burns, 'Sophocles' *Antigone* and the History of the Concept of Natural Law', *Political Studies* 50, no. 3 (2002): 545–557.

<sup>3</sup> For an insightful introduction to legal materialism scholarship, see Hyo Yoon Kang, 'Legal Materiality', in *The Oxford Handbook of Law and Humanities*, eds. Simon Stern et al. (Oxford: Oxford University Press, 2020). The final section of this chapter also discusses this literature.

<sup>4</sup> Aristotle, *Rhetoric*, trans. C.D.C. Reeve (Indianapolis: Hackett Publishing Company, 2008), 1373b1–10. Also see Burns, 'Sophocles' *Antigone* and the History of the Concept of Natural Law', and Gabriela Remow, 'Aristotle, *Antigone*, and Natural Justice', *History of Political Thought* 29, no. 4 (2008): 585–600.

play: a conflict between human-made law and a higher law beyond or outside the state.<sup>5</sup>

Yet other accounts of law pop up in the legal ecology of the play too. There is at least a third account of law bubbling under in the play that Aristotle and his heirs overlook or perhaps cannot see and which this chapter focuses on. Many others, from Goethe to Judith Butler, have noted it too, but have rarely known what to do with it. Goethe apparently believed it to be spurious and pleaded with the philologists of his day to prove it so.<sup>6</sup> Butler accepts its authenticity, but does not give it the status of law – a point I consider further below.<sup>7</sup> But what is this perhaps spurious, perhaps not-really-law-at-all that masquerades as law in the play? Like Antigone's canonical appeal to the laws of the gods, this other account of law is also offered by Antigone, but it comes later in the play (904–920). And while

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<sup>5</sup> Jennifer L. Culbert, 'Shattering Law: Encounters with Love in Billy Budd' in *QLR* 28 (2010): 766. In addition to Aristotle and ancient interpretations, Hegel also offers a conflict-driven interpretation in the *Phenomenology of Spirit*, trans. A.V. Miller (Oxford: Oxford University Press, 1977) as well as many contemporary thinkers such as Luce Irigaray, 'Antigone: Between Myth and History', in *Interrogating Antigone in Postmodern Philosophy and Criticism*, eds. S. E. Wilmer and Audrone Zukauskaitė (Oxford: Oxford University Press, 2010). Nevertheless, some recent interpretations have been turning away from this 'irresolvable conflict' of the main character to the more 'prudent perspectives' of the minor characters, see, Jennet Kirkpatrick, 'The Prudent Dissident: Unheroic Resistance in Sophocles' *Antigone*', *The Review of Politics* 73, no. 3 (2011). I draw on this literature below.

<sup>6</sup> Johann Wolfgang Goethe, *Conversations of Goethe with Johann Peter Eckermann*, trans. John Oxenford. (Boston: Da Capo Press, 1998).

<sup>7</sup> See Judith Butler, *Antigone's Claim* (New York: Columbia University Press, 2002): 10. Also see Julen Extabe, 'Antigone's Nomos', *Animus* 13:1 (2009): 60–73.

Antigone's first appeal to the laws of the gods is framed by Creon's interrogation of her (441ff), this other account of law is offered freely (900ff). Here in fact, it is Antigone who sets the frame of the discussion on her death march – claiming that she 'was born to love, not hate' (499).

This is how Antigone puts it:

for a husband who had died there would be another  
for me/And a child from another man, if I had been  
deprived of this one/But with mother and father cov-  
ered over, in Hades/There is no brother who could  
ever grow up/By such a law [Greek: *nomos*] indeed  
have I given you [Polynices' corpse addressed in the  
present] preeminence in honor. (904–920)

Here Antigone seems to claim that her actions were lawful because of her particular relationships with Polynices as well as the current state of things. In other words, the relations are both social and material as well as historical, or changing over time. They require receptivity and active listening. They are read out of the more-than-human material of the world rather than applied to it. For example, Polynices' wife could not have done it lawfully (using this law) nor could Antigone have if her parents were still alive. At the same time that the legal claim offers a logic, it also invokes a corpse. The logic is rooted in ancient Greek social family relations as well as more-than-human cycles of life and death and material contingency.<sup>8</sup> It is complex and a bit convoluted. Its application requires receptivity, listening and reading the situation. The invocation is less complex but perhaps more problematic. It brings

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<sup>8</sup> Philippe Nonet, 'Antigone's Law', *Law, Culture, and the Humanities* 2, no. 3 (2006): 314–335.

the materiality of Polynices' no-longer-human corpse, for which Antigone acted, back to centre stage, but almost too forcefully, too brutally.

Judith Butler raises a similar critique. According to Butler, 'this is a law of the instant and, hence, a law with no generality and no transposability, one mired in the very circumstances to which it is applied, a law formulated precisely through the singular instance of its application.'<sup>9</sup> On Butler's reading, Antigone's law is too trapped in its own immediacy and sensuality to be granted the name law. For law, Butler reminds us, must have something of the qualities of generality and transposability, it must have a life and wider application beyond its particular instantiations. In other words, Antigone's invocation of a corpse and her relationship to it simply cannot count as a legal claim because it is too particular. And in many ways Butler seems to be correct. Antigone's formulation fits poorly with the image of law presented by the first two accounts. In the first two accounts of law, law does take on an air of generality, as a ready-made rule that can be applied to particular situations to judge the legality of certain actions, just as a metrestick or ruler might be applied to a particular object to judge its length. It is hard to see how this third legal claim can take on the same generality and ready-made-ness.

My wager in this chapter is that the difficulty of appreciating this third account as law comes more from how we are looking at it. Rather than read Antigone's invocation of Polynices' corpse as a brute material fact, or

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<sup>9</sup> Ibid.

‘a law of the instance,’ this chapter suggests we read Antigone’s interactions with the corpse as a complex material accomplishment with multiple layers and various actors both human and nonhuman.<sup>10</sup> What generalisations and patterns might be discerned in Antigone’s claim on such a reading? Might it look more like law? What legal imaginaries might be waiting to be explored? Answering these questions requires returning to the stench I opened this chapter with and attending to it as a complex material composition.

### An Olfactory Reading of *Antigone*: Following the Scent of Antigone’s Other Law

In recent years, a diverse range of scholars have begun to criticise oppositional readings of *Antigone* that focus on the legal conflict between Creon and Antigone. These scholars have pointed out that a focus on the oppositional conflict in the play leads to a millennial stalemate we still have not moved passed.<sup>11</sup> Rather than focus on the conflict between legal positivism and natural law, their approach has been to look to the ‘minor characters’ of the play in order to unearth alternatives to the ‘oppositional

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<sup>10</sup> Here I follow Paolo Virno, ‘The Two Masks of Materialism’, 171: “Sensualism”, if taken seriously, is anything but immediate *incipit*, a presupposition, or a tranquil foundation ... Rather, it should be conceived as a happy point of arrival for the “labor of concepts”, as the result or the apex of theory; as a complex goal, toward which converge quite sophisticated intellectual performances.’

<sup>11</sup> Bonnie Honig, *Antigone, Interrupted* (Cambridge: Cambridge University Press, 2013); Carol Jacobs, ‘Dusting Antigone’ in *MLN* 11, no. 5 (1996): 889–917; Samuel Weber, *Theatricality as Medium* (New York: Fordham University Press, 2004).

struggle' of the two main characters. My olfactory reading of the play finds motivation in this approach, but seeks to stay closer to the legal ecology of the play that many of the readings that focus on minor characters overlook.

The minor characters turned to in this recent scholarship are various. William E. Connolly turns to Tiresias in his invocation of a seer's relevance for contemporary politics.<sup>12</sup> Derek Barker and James Tully both turn to Haemon whose impassioned plea to his father to heed the plurality of reasonable positions is particularly suited, they argue, to our contemporary plural society.<sup>13</sup> Jill Frank, Jenet Kirkpatrick, and Bonnie Honig all turn to Ismene whose 'unmanly' nonviolent resistance and desire for solidarity offer a nice counterweight to her sister's individualistic and rash actions.<sup>14</sup> Margaret Kitzinger, Rebecca McCarthy, and Larissa Atkison turn to the Chorus whose plural composition mirrors well, they suggest, our contemporary political condition of pluralism.<sup>15</sup>

However, all these turns to minor characters move away not only from the oppositional struggle of Creon and Antigone, but also from the legal ecology of the play.

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<sup>12</sup> William E. Connolly, 'The Theorist and the Seer' in *A World of Becoming* (Durham: Duke University Press, 2011), 148–175.

<sup>13</sup> Derek W.M. Barker, *Tragedy and Citizenship* (Albany: SUNY Press, 2009); James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

<sup>14</sup> Jill Frank, 'The Antigone's Law' in *Law, Culture, and the Humanities* 2, no. 3 (2006); Jenet Kirkpatrick, 'The Prudent Dissident'.

<sup>15</sup> Margaret Rachel Kitzinger, *The Choruses of Sophokles' Antigone and Philoktetes: A Dance of Words* (Leiden: Brill, 2008); Larissa Atkison 'Antigone's Reminders: Choral Ruminations and Common Sense', *Political Theory* 44, no. 2 (2016).



My olfactory reading also focuses on a minor character, Polynices' rotting corpse, but coupled with a discussion of law – a law that emerges out of Antigone's material-semiotic interactions with Polynices' very active corpse.<sup>16</sup> I focus on the smell of Polynices' corpse as a way to animate it as a minor character, one that makes things happen during the play and is not simply a bloated, rotting, lifeless prop.<sup>17</sup>

Polynices is already dead when the play begins. Throughout the whole play we never *see* the corpse, but we do witness its effects, particularly the effect of its smell. Antigone refers to the corpse in the opening scene in her exchange with her sister, Ismene, and the corpse is referenced by the Chorus in their first ode when they recount both Polynices' and Eteocles' deaths. Yet, it is around line 250 that we get a description of the corpse – and this description is more of a non-description as it paradoxically details what was *not seen*. Here, one of the guards tasked with preventing the burial of the corpse comes to report to Creon that something has happened: the corpse has been buried or at

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<sup>16</sup> Ingrid Fernandez, *Necrolife* (Saarbrücken: Lap Lambert Academic Publishing, 2014); Reza Negarestani, 'The Corpse Bride: Thinking with Nigredo' in *Collapse 4* (2008): 121–161; and Margaret Schwartz, *Dead Matter: The Meaning of Iconic Corpses* (Minneapolis: University of Minnesota Press, 2015).

<sup>17</sup> Here I follow Michel Serres's work on smell as a 'transformative' and 'metabolic' sense that offers us a different economy for sensing than that of vision, see *The Five Senses*, trans. Margaret Sankey and Peter Cowley (London: Continuum, 2009). I also draw on, Alain Corbin, *The Foul and the Fragrant* (Cambridge: Harvard University Press, 1986); Bruce Curtis, "I Can Tell by the Way You Smell": Dietetics, Smell, Social Theory', *The Senses and Society* 3, no. 1 (2008): 5–22; and 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.

least covered in dust. Yet, as none of the guards saw anyone approach the corpse and there is no evidence of digging, the conclusion that Creon's edict has been violated is not by any means self-evident – although Creon thinks it is. This is what the guard says when Creon asks 'who violated his edict:

I do not know. For there was there no mark/of axe's stroke nor casting up of earth of any mattock; the ground was hard and dry/unbroken; there were no signs of wagon wheels./The doer of the deed had left no trace./But when the first sentry of the day pointed it out/there was for all of us a disagreeable/ wonder. For the body had disappeared/not in a grave, of course; but there lay upon him/a little dust as of a hand avoiding/the curse of violating the dead body's sanctity. There were no signs of any beast nor dog/ that came there; he had clearly not been torn./There was a tide of bad words at one another/guard taunting guard, and it might well have ended/in blows, for there was no one there to stop it./Each one of us was the criminal but no one/manifestly so; all denied knowledge of it. (248–63)

The guard's report is so focused on the failure of vision – of what was not seen – that it fails to account for the fact that it is *literally unclear* whether Polynices' body has been buried at all, rather in the words of the guard: 'there lay upon him a little dust' (256).

In her article 'Dusting Antigone', Carol Jacobs suggests that the dusting 'tells the story of another economy', one that does not conform to Creon's and the guard's economy of buried or unburied and clear, analytical boundaries.<sup>18</sup> In her reading of the play, Jacobs highlights the contrast

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<sup>18</sup> Jacobs, 'Dusting Antigone', 891.

between the ‘traceless’ dusting the guard reports with the Chorus’s famous ‘Ode to Man’. In this – which follows on the heels of the guard’s report – the Chorus praises man’s capacity to chart courses across the sea and make marks on the earth:

Wonders are many, and none more wonderful than man. This being goes with the storm-wind across the foamy sea, moving deep amid cavernous waves. And the oldest of the gods, Earth the immortal, the untiring, he wears away, turning the soil with the brood of horses, as year after year the ploughs move to and fro. (332ff)

For Jacobs, the Chorus’s ‘Ode to Man’ is a sharp foil for the traceless non-marks the guard reports. ‘When Antigone works the earth, or fails to’, Jacobs points out, attributing the dusting to Antigone, ‘she does so differently from this universal man turned male [of the choral Ode to Man], plowing neither for possession of the earth nor of the other. She leaves the ground unmarked, unbroken.’<sup>19</sup> In dusting rather than plowing or burying, Antigone’s interaction with the materiality of Polynices’ corpse ‘tell[s] the story of another economy’ that disrupts the black and white contrast between buried and not buried, illegal and legal, seen and unseen that govern Creon’s legal positivist imaginary. Might it also point to another legal economy, one not oriented around the metaphor of sight and visibility?

After a berating by Creon, the guard returns to his post and, along with the other guards, brushes the dust off the

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<sup>19</sup> *Ibid.*, 900.

corpse and resumes watchful guard. This time the corpse is physically described using various senses: it is 'moist' and 'tacky' and the guards leave it 'naked' (410). Furthermore, the guards are described as taking up their watch 'on the brow of the hill, to windward' in order to 'shun the smell of the corpse' (411–12). Evidently, the corpse is not only damp, but also stinky. These are important tactile and olfactory observations that cannot be taken for granted, particularly when sight has already failed us previously. They betoken interactions and ways of knowing that dip below the sights and sounds of the play. But can an account of law emerge here? Can following these scents, can tracing their 'material accomplishments' as complex chains help us better account for Antigone's *other* law? Or ought we conclude with Butler that these scents are too singular, too much of the particular instance, too immediate in their context to broker any development and transposability?

The pungent smell of the corpse suggests that it is in what forensic scientists today define as the third stage of decomposition, or the 'purge'.<sup>20</sup> Depending on factors like temperature, cause of death, and exposure to the elements, this stage usually begins a couple days after death. At this point, the corpse typically becomes 'moist' as the body's internal tissues are liquified by microbes 'native' to the body but no longer kept in check by the body's now defunct immune system. Furthermore, forensic scientists now tell us decomposition is a process that corpses both actively undergo *and* participate in. In fact, the first

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<sup>20</sup> A. Marias-Werner et al. 'Decomposition Patterns of Buried Remains', *Medicine, Science, and the Law* 57, no. 3 (2017).

stage of decomposition is known as ‘autolysis’ literally ‘self-digestion.’<sup>21</sup> Only minutes after death, enzymes in cells build up to toxic levels. In normal cellular functioning, these enzymes are a routine product of cell metabolism. However, when cells are deprived of oxygen, they lose the ability to remove these enzymes, and at a certain point – usually just minutes after the cessation of respiration – the enzymes begin to devour the cell membranes, leaking out into the flesh in a process of self-cannibalism.<sup>22</sup>

This breakdown of cell walls allows vast numbers of bacteria that inhabit our bodies – something both internal to us and yet paradoxically foreign to our genome – to begin spreading through the body. Our bodies are replete with bacteria and microbes from our eyelashes and tongues to skin, gut, and genitals.<sup>23</sup> When the body is ‘living,’ these bacteria are held in check and even perform essential tasks for healthy human functioning. However, after death, these bacteria spread like wildfire, consuming everything in their path. For example, human anaerobic gut bacteria – crucial for human digestion and largely responsible for the stench of decomposition – begin eating their way out of the intestines and then systematically through the rest of the internal organs. This process is only exacerbated once the white blood cells of the immune system become defunct. These gut bacteria are so voracious and systematic in their consumption habits that today forensic criminal investigators use their

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<sup>21</sup> Mo Costandi, ‘Life after Death: The Science of Human Decomposition.’ *The Guardian*, 5 May 2015. <https://www.theguardian.com/science/neurophilosophy/2015/may/05/life-after-death>

<sup>22</sup> *Ibid.*

<sup>23</sup> Peter Turnbaugh et al. ‘The Human Microbiome Project,’ *Nature* 449 (2008): 804–810.

presence or absence on certain organs to determine time of death.<sup>24</sup>

When thinking about the 'disappearance' of Polynices' corpse – the crux of the legal issue in *Antigone* – the question of who or what is acting is clearly important. Indeed, the whole tragedy is premised on the allocation of blame for this deed. Nevertheless, nearly all interpretations fail to consider the active role Polynices' corpse plays in its own disappearance. The enzymes that initiate this process carry the same DNA as the cells they destroy; they are of the same stuff at the most fundamental genomic level. Gut bacteria, in contrast, are different. Collectively these critters are made up of thousands of different species that inhabit the human gut in varying and diverse compositions throughout an individual's life. Still, it is hard to say that these bacteria are 'outsiders' without literally turning the stomach inside out. Without them, digestion and life as we know it would be impossible. The self depends on these nonhuman critters for its vital functioning just as much as it depends on its human cells.<sup>25</sup>

But if we are not quite willing to see these bacteria as wholly 'other' in life, why should we in death? If we say, 'I digest my food' or 'I eat an apple', as Annemarie Mol has pointed out, and mean something by it – all the while recognising it is never a hermetically-sealed subject who digests food but a complicated network of human organs, multispecies bacteria, and conscious as well as unconscious drives – should we not also say '*I decompose?*', '*I partake in the process of turning internal organs*

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

into liquid that then seeps out into the soil making *my* flesh moist?’<sup>26</sup> And if we say *I* am active in this process of decomposition, must we not also say that ‘*I* help make the stench that draws the flies and maggots and that sends the guards windward’? Might *I* even help produce the tacky fluid that dust might stick to?

The argument here is *not* that Sophocles had a modern theory of organic decomposition and forensic science, but that we would be amiss to deodorise from our reading the very bodily, stinky, immanent, and literally posthuman material happenings that abound in the play. Polynices’ corpse is presented by Sophocles in all its vibrant material messiness – stinky, sticky, sweet – a ‘material accomplishment’ composed of diverse interactions that also include other characters of the play too.<sup>27</sup> In the play, Polynices’ corpse is repeatedly presented as active, morphing, changing, enmeshed in a complicated web of interaction: attracting vultures and dogs, driving upwind the guards stationed to watch over Polynices’ corpse, turning neighbouring cities against Thebes, inciting the ire of the gods, and beckoning a grieving sister. Might these diverse chains of interactions provide some of the patterns and generality Butler requires of law?

Not long after the guards retake their watch over Polynices’ corpse, a second dusting or burial scene occurs. This time Polynices’ corpse is described as embedded in series of interactions with varying outcomes. Baking in the noonday sun, the corpse emits

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<sup>26</sup> Annemarie Mol, ‘I Eat an Apple: On Theorizing Subjectivities’, *Subjectivity* 22, no. 1 (2008).

<sup>27</sup> Virno, ‘The Two Masks of Materialism’, 173.

a stench that the guards find so unbearable they must physically move. And then – broadening the cast of non-human minor characters:

a squall lifted out of the earth a storm of dust/a trouble in the sky. It filled the plain/ruining all the foliage of the wood/that was around it. The great empty air/was filled with it. We closed our eyes, enduring/this plague sent by the gods. When at long last/we were quit of it, why, then we saw the girl. (lines 417–423)

Crucially, this second dusting scene is no less problematic from the guards' visual perspective than the first. Even though they were keenly paying attention this time, and the corpse was not shrouded in the darkness of night, their eyes still failed them. This time though it is not fatigue that caused them to close their eyes, but a more external actor: a dust storm.

According to the guard who recounts this second dusting scene to Creon, the dust filled the entire sky, and when the dust settled, Antigone was espied standing over the corpse. On returning to Creon, the pitiable guard continues his account:

She was crying out with the shrill cry/of an embittered bird/that sees its nest robbed of its nestlings/and the bed empty. So, too, when she saw/the body stripped of its cover, she burst out in groans/calling terrible curses on those that had done the deed/and with her hands immediately/brought thirsty dust to the body; from a shapely brazen/urn, held high over it. (lines 424–431)

As the dust settles, Antigone wails unintelligibly like a brooding bird bereft of its chicks. It is tempting to read



this as the response of a grieving sister upon the sight of her brother's stinking, oozing, desecrated corpse. The guards, of course, have already responded to the corpse in their own way, 'moving windward' to escape the stench. Antigone, however, seems to be drawn toward the corpse. Polynices is her brother, and although dead and stinky, Antigone moves toward the corpse as Greek custom would seem to demand.<sup>28</sup> Yet this is not how the guards describe the interaction they witness. Rather than a grieving Greek sister, they describe something more animalistic, something nonhuman: a wild bird 'shrieking'.

Yet Antigone is not the only one 'shrieking' in her interactions with Polynices' corpse. Nor are her interactions with Polynices' corpse entirely 'singular' or 'of the instant' as Butler suggests, but patterned and shared, though perhaps not with humans.<sup>29</sup> The blind seer Tiresias' birds of augury also fall into 'shrieking and unintelligible frenzy' when they encounter the corpse of Polynices (999). Tiresias gives this ominous report to Creon just after Antigone's account of her other law:

our altars and hearths have been defiled, every one, by birds and dogs, with carrion from the son of Oedipus who lies in miserable death [Polynices]. And hence the gods no longer accept sacrificial prayers from us, nor blazing thigh-bones, nor does any bird scream out intelligible cries, for they have consumed a stream of dead man's blood. (lines 997ff)

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<sup>28</sup> Danielle Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens* (Princeton: Princeton University Press, 2000).

<sup>29</sup> Butler, 'Antigone's Claim', 10.

In Tiresias' telling, the birds of Thebes, like Antigone, find themselves drawn to Polynices' corpse and their response is akin to Antigone's. In other words, Antigone's invocation and interaction with Polynices' corpse is not a singular or idiosyncratic occurrence in the play. It follows, to some extent at least, a pattern that can be seen in the carrion birds. Attuning ourselves to this seemingly minor detail can help us appreciate how the corpse's draw on Antigone is not simply her idiosyncratic 'subjective' response: it draws birds too. This helps us see that Antigone's actions – which she claims as lawful – do follow a certain 'transposable' or 'generalizable' pattern to return to Butler's critique.<sup>30</sup>

But this only tells us that we might be operating in an alternative legal imaginary here. What can we say about it despite vision's repeated failures to apprehend it? I turn now to articulate three features that I believe are particular to this *other* law and distinguish it from the two dominant accounts of law in the play. I then conclude by suggesting how this alternative legal imaginary opens new avenues for legal materialist research.

### A Materialist, Earthbound Natural Law

The olfactory reading I have just presented begins to scent out the contours of a legal imaginary that is admittedly hard to see. Yet there are three features that I would like to foreground. First, law here is presented to us as *an ongoing process of composition*. Unlike the other two accounts which offer the image of law as a readymade

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<sup>30</sup> Ibid.

rule to be applied, the third account only begins to take shape as we trace the series of ‘material accomplishments’ that compose its unfolding in the present time of the play.<sup>31</sup> This does not mean the first two accounts do not have rich materialist stories to tell about their creation or coming into being, as much recent legal materialist scholarship has shown.<sup>32</sup> But for these first two accounts, this materialist story is located in an unwritten preface when it comes to the characters’ engagement with law. For the two dominant accounts, law is imposed, applied, and appealed to ready-made rather than composed through the characters’ interactions. In short, both Creon’s edict and Antigone’s appeal to the law of the gods enters the stage fully made, an object rather than a process.

In contrast, we meet Antigone’s other law at the time of its composition, not because the text has been spuriously added as Goethe wanted to believe, but because here law is not a rule, but a ‘form of life’, something lived, engaged, composed, and even resisted.<sup>33</sup> In interacting with Polynices’ corpse, in the corpse’s draw on her, in its own actions and ‘self-digestion’, in the bird-like wails it invokes out of her, Antigone co-creates a law, weaving into it form and pattern through her engagement with it and the world around her. Her co-creators include a decomposing and self-digesting corpse, dust, a storm, birds, guards, and a host of other critters and actors. Together they form

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<sup>31</sup> Virno, ‘The Two Masks of Materialism’, 173.

<sup>32</sup> In particular see Bruno Latour, *The Making of Law*, trans. Marina Brillman and Alain Pottage (Cambridge: Polity, 2003).

<sup>33</sup> For a development of this theme that nonetheless does not develop the materialist angle pursued here, see James Boyd White, ‘Justice in Tension’, *No Foundations* 9 (2012): 1–19.

what I venture to call a posthuman 'nomic community' drawing on Robert Cover's notion that law is also generated from below, in communities of interaction and not just official state institutions.<sup>34</sup>

This leads to a second feature: *an orientation toward law and justice beyond the state*. Here Antigone's other law may seem to approximate her initial appeal to the laws of the gods, albeit in a much more earthbound and immanent way. Both legal claims seem to hold out hope that regardless of what the state and its institutions say, there is a realm of natural justice, a lawfulness existing beyond or at least not fully reducible to state power.<sup>35</sup> This of course can be a difficult thing to accept, especially for legal positivists and their heirs.<sup>36</sup> But there is an important difference here too. While Antigone's appeal to the laws of the gods grounds its orientation toward justice precisely in its immateriality – its 'unwrittleness' and 'timelessness' (454–458) – or metaphysical qualities, her *other* account of law grounds it in the fecund compost of Polynices' active, morphing, becoming all-too-material corpse.

Here, law's orientation to justice is found not in the realm of transcendence, but in the unfinished, compostable, and emergent properties of law as a material

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<sup>34</sup> Robert Cover, 'Nomos and Narrative' in *Narrative, Violence, and the Law* (Ann Arbor: University of Michigan Press, 1995), 95–172.

<sup>35</sup> Linda Ross Meyer, *The Justice of Mercy* (Ann Arbor: University of Michigan Press, 2010), 11.

<sup>36</sup> Marianne Constable, 'Genealogy and Jurisprudence', *Law and Social Inquiry* 19, no. 3 (1994); Phillippe Nonet, 'What is Positive Law?', *Yale Law Journal* 100, no. 3 (1990).

composition.<sup>37</sup> Here the assertion is *not* that law is law only when it corresponds with some transcendent, universal rule, but the materialist's old adage: 'only in the connection of thought with pleasure (or with pain) do ethics and politics find a non-negligible foundation.'<sup>38</sup> This is 'corporeal justice' which rather than locate justice outside space and time – a vision of what the world ought to be – locates it within the plurality and indeterminacy of a material world that is in the process of becoming, a series of 'material accomplishments.'<sup>39</sup> In this legal imaginary, justice is never absolute or pure, it is composed in the here and now and the sites of its composition are not restricted to the state and its institutions. Indeed, in Antigone's case, it happened outside the city walls and in confrontation with state law.

This segues into the final feature I would like to highlight here: this law's *proximity*. Law here is a bit blurry, its edges are not quite clear, they decompose and emerge. In short, as the play repeatedly shows us, this law is hard to see. It is not black and white, but more blurred and composite and constantly missed by the eyes. Unlike Creon's law which is clearly placed in time and space and unlike Antigone's first account which anchors itself in the metaphysical, this other account is

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<sup>37</sup> A similar orientation to law, but one wedded to legal positivism, can be found in Bruno Latour, *The Making of Law*.

<sup>38</sup> Virno, 'The Two Masks of Materialism', 169.

<sup>39</sup> Elizabeth Grosz and Pheng Cheah, 'The Body of Law: Notes Toward a Corporeal Justice' in *Thinking Through the Body of Law*, eds. Pheng Cheah et al. (New York: New York University Press, 1996).

proximal. It is here, but not clearly in the way the first two accounts of law are present. It can be sensed – more with the nose as we've seen than with the eyes – but it cannot be defined, it cannot be analytically boxed. It requires receptivity and listening. And it goes deeper, the blurriness or proximality seems to even be essential to processes of human-more-than-human patterning – a way of weaving the interactions into a material world that well exceeds the human estate.

Arguably, this is what makes Antigone's other account of law so hard to appreciate as law as well as such a threat to legal positivism's emphasis on analytical clarity.<sup>40</sup> In this legal imaginary, law cannot be defined as such, it emerges and decomposes, it patterns and connects, it is the more-than-human in-between stuff that holds us and separates and must be cared for. One must be continually receptive to scent it out. It requires something more akin to what Donna Haraway has called 'situated knowledges' and this can be problematic for models of law that look to define law as rule rather than a mode of engagement or form of life.<sup>41</sup> But what does this desire to define law – so central to legal positivism – obscure? I turn now to briefly

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<sup>40</sup> For the legal positivist position see, Herbert L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012). This antithesis between the analytic clarity of legal positivism and the blurriness of natural law goes back to Jeremy Bentham's *An Introduction to the Principles of Morals and Legislation* (London: T. Payne & Son, (1789) [1780]), which develops one of the first legal positivist critiques of natural law thought.

<sup>41</sup> Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective', *Feminist Studies* 14, no. 3 (1988): 575–599.

consider how this *other* materialist account of Antigone's natural law might open new paths for contemporary legal materialist research.

## Conclusion

Developing alongside resurgent materialist currents across the humanities and theoretical social sciences in recent years, multiple law and humanities scholars have begun to examine what it would mean to study law as a material phenomenon, while simultaneously decentering the human as maker and subject of law.<sup>42</sup> Like their fellow travellers in other fields, the strategies employed by legal materialists appear to be animated by a complex of recent developments demanding circumspection around anthropocentric modern visions and spurred by discomfort with poststructuralism's singular emphasis on language and culture at the expense of matter and nature.<sup>43</sup>

The resulting findings have been diverse and insightful. From Bruno Latour's<sup>44</sup> focus on the physical mediation of law's creation by following lawyers' paper trails<sup>45</sup> and law's physical mediators<sup>46</sup> from products like handcuffs,

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<sup>42</sup> See Diana Coole and Samantha Frost, eds. *New Materialisms: Ontology, Agency, and Politics* (Durham: Duke University Press, 2010) for an overview of new materialist trends. See Kang, 'Legal Materiality', for an overview of legal materialism.

<sup>43</sup> *Ibid.*, 44–45.

<sup>44</sup> Latour, *The Making of Law*.

<sup>45</sup> Also see Cornelia Vismann, *Files*, trans. Geoffrey Winthrop-Young (Stanford: Stanford University Press, 2008).

<sup>46</sup> Kyle McGee, *Bruno Latour: The Normativity of Networks* (Abingdon: Routledge, 2014).

turnstiles, border walls<sup>47</sup> to patented Coke cans<sup>48</sup> and Peter Goodrich's<sup>49</sup> – as well as this series' – emphasis on the aesthetic, sensuous materiality of law. Alongside these investigations, there has been nuanced work that has sought to explore law's relationship to language and language's relationship to materiality too. Hyo Yoon Kang's important critique of a vitalist materialism especially for law – reminding us that things don't just call out, but that their calls must be constructed – and differentiation between law's physical matters and a non-physical legal materiality has been timely here as has Marianne Constable's exploration of law as linguistic bond.<sup>50</sup>

This chapter has sought to contribute to this scholarship by exploring a legal materialist imaginary found in a play written nearly 2,500 years ago. The play offers this legal materialist imaginary in contrast to the dominant imaginaries of legal positivism and natural law that conventionally frame the play. And while many have denied this *other* legal claim the status of legal, this chapter has argued that there is enough scent evidence to at least experimentally grant this status. How might one study the materiality of law in this alternative legal imaginary? What would giving up legal positivism's presuppositions

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<sup>47</sup> See the various research articles in the special edition 'Material Worlds: Intersections of Law, Science, Technology, and Society' of *The Journal of Law and Society* 39, no. 1 (2012).

<sup>48</sup> Andreas Philippopoulos-Mihalopoulos, 'Atmospheres of Law: Senses, Affects, Lawscapes', *Emotion, Space and Society* 7 (2013): 35–44.

<sup>49</sup> Peter Goodrich, 'Sepculla Law: Image, Aesthetic and Common Law', *Law and Critique* 2, no. 2 (1991): 233–254.

<sup>50</sup> Kang, 'Legal Materiality'; Marianne Constable, *Our Word is Our Bond: How Legal Speech Acts* (Stanford: Stanford University Press, 2014).



about law – including the demand that it be analytically definable – mean for the study of legal materialism?

The olfactory reading presented here explored the possibility of an immanent and materialist, yet more-than-human law: an earthbound natural law. It suggested that the play dramatises the emergence of an *other* law from the rich compost left in wake of Creon and Antigone's millennial stalemate. This other law might also be called natural law, but with important differences from Antigone's first appeal. This other law is composed through material interactions rather than applied readymade as a gift (or prohibition) from the heavens. It is oriented to justice, but a justice that emerges in the indeterminacy and plurality of an immanent world in the process of becoming.<sup>51</sup> It seems to make its home with a materialist or corporeal justice that emerges or is possible in posthuman 'nomic communities' on the edges of the state.<sup>52</sup>

How might law's materiality be thought here on the fringes of the state in posthuman, earthbound nomic communities? How might law operate more or differently as part of our material interactions with a world in becoming? This is a question for contemporary legal research and not *Antigone*. One place a legal materialist

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<sup>51</sup> Elizabeth Grosz and Pheng Cheah, 'The Body of Law'.

<sup>52</sup> Donna Haraway and Bruno Latour have both begun to theorise this type of posthuman, 'earthbound' community, See Donna Haraway, *Staying with the Trouble: Making Kin in the Chthulucene* (Durham: Duke University Press, 2016); Bruno Latour, *Facing Gaia: Eight Lectures on the New Climatic Regime*, trans. Catherine Porter (London: Polity, 2017). On 'nomic communities', in addition to Cover, 'Nomos and Narrative', see F.G. Snyder, 'Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law', *William & Mary Law Review* 40, no. 5 (1998–1999).

might look would be at the composition of law in communities that are not states, but still produce *law*, especially against the background of state law like Antigone. Recent ethnographic research on the politics of ecovillages and intentional communities is interesting here because they provide us both with sites in which non-state nomic activity can be observed and posthumanist practices are frequently explored both conceptually and practically.<sup>53</sup> More research is needed here by legal materialists, but that is outside the scope of this exploratory chapter.

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<sup>53</sup> Joshua Lockyer, *Seeing Like a Commons: Eighty Years of Intentional Community Building and Commons Stewardship in Celo, North Carolina* (New York: Lexington Books, 2021); Zach Rubin, 'A Not-so-silent Form of Activism: Intentional Community as Collective Action Reservoir' *Humanity and Society* 45, no. 4 (2021): 509–532; Ferdinand Stenglein, 'Exiting Private Property: On the Interstitial Terrain of Becoming Communards', in *Rule and Resistance Beyond the Nation State: Contestation, Escalation, Exit*, eds. Felix Anderl et al. (London: Rowman & Littlefield, 2019), 221–241; Philip Wallmeier, 'Exit as Critique: Communes and Intentional Communities in the 1960s and Today', *Historical Social Research* 42, no. 3 (2017): 147–171.

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# Olfactory Drama: A Fictional Conversation Between the Corpse of Jeanne d'Arc and the Law

Nicole Zilberszac

## Preface

*This fictional dialogue is based on a true story. For 140 years the supposed remains of Jeanne d'Arc had been stored in the French town Chinon. They had been found in 1867 in Paris. Through closer inspections by French scientists led by Philippe Charlier, the remains turned out to be fake. The smell of the remains played a crucial role in detecting their true nature. The smell of vanilla and burnt plaster coming from the remains finally convinced the scientists that the remains actually belonged to an Egyptian mummy. The fake relics of Jeanne d'Arc served the purpose of speeding up the process of her sanctification.<sup>1</sup>*

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<sup>1</sup> Declan Butler, 'Joan of Arc's Relics Exposed as Forgery'. *Nature* 446, 593 (2007). <https://doi.org/10.1038/446593a>



## Act One

Law: As a legal artefact I ridicule your sense of trust in my tangible emanations but at the same time I allow you access to your self-composed normativities through mediating ontologies into words, words like evidence, existence, error, entity, excuse.

*Exit.*

I indulge in these words, eat them till they are empty and dry and leave traces of their materiality in your closet. I am quite clingy and I put a layer of sobriety onto the mysteriousness of matter and overshadow it with the need to secure your basic needs for space, air, atmosphere and bodily safety.

I do this by tracing you and asserting what is due. What is due, here and now, are the ways your bodies can manifest, transform, transgress, fade and decompose.

Jeanne d'Arc: So if I understand you correctly the story of my corpse may be of interest to you. I want to talk about olfactory memory and its spatiotemporal ontology.

Law: That is fascinating but it might overcomplicate my overall appearance. A lack of trust in my existence can, in turn extinguish me, people used to say.

Jeanne d'Arc: I have been fighting for your annihilation as well as your rebirth. Of course, this is a story that can't be told in a sober way, like you supposedly want me to. So I let my corpse speak for you, as it is perfectly dead and alive at the same time.

To be more specific I never smelled like vanilla and burnt plaster. I decomposed and traces of my ontology were fading away without notice or worse being falsely noticed. Never would my materiality have become evident if people had not used their sense of smell. The smell of death turns out to be multifaceted. Traces of time and traces of space, all being perfectly noticeable through subtle olfactory hints. To be honest this was quite funny to me. Nevertheless, you should care about these things, namely about your odorous onto-epistemology, shouldn't you? How important is it for you to take notice of yourself?

Law: It's quite compelling to me how I can be so odorous. Noticing me is supposedly the way I exist in the first place, otherwise I would be quite natural, quite godly so to say. This however is already an outdated claim. In the case of your corpse, someone would have to be able to access the process of my decomposition through their sense of smell, for example, in order to tell whether this is actually my body or whether it has been buried too early. Otherwise what you have been telling me is just a story, and stories are narratives that don't matter to me, unless I am called to be the narrator.

Jeanne d'Arc: I can certainly tell you a lot more about this and it would render your calling a very delicate matter. It could actually be quite a humbling experience for you. An experience where being noticed is just being, noticed.

Law: Yes but if you can refer to Karen Barad in my calling, it all depends on legal cultures and jurisdictions. Don't you think?

Jeanne d'Arc: I don't think, I am. Emerging, extracting, invading, transitioning, cocooning.

Law: OK I understand, but how would it make a difference whether smelling or touching, hearing or seeing was involved in the process. In a meta perspective, it is just another aspect of the embodiment of cognition.

Jeanne d'Arc: It is quite clear to me that you have learned about your own potential for reflexivity and I honour that. I simply want to put forward a story about your odour.

Law: The odour of a corpse would reveal its age as well as its history of touch. Sometimes I am numb to the subtle hints of mindfulness that would allow me to orchestrate my doing and undoing in a more sensitive and informed way. This is why I care whether you had a shower and if you were able to get rid of the smell of overindulgence or pain written into your DNA.

Jeanne d'Arc: That is exactly what I was trying to hint at all this time. As you are trying to figure out who you are, I am reminding you that I was a symbol of purity and regression, as well as of (female) progress and power. My body was crucial in my becoming as well as in my decomposition. I was burnt, hidden and reborn. A bit like a historiographical Jesus. You know, this is why smell is so crucial: because my menstruation would not allow me to be near you at times, metaphorically and practically speaking, and all these spices would reveal your history of colonial power. The idea of

the all-encompassing purity of being supernatural is ingrained in your hopes and dreams, thereby your supposed fascist enemy is becoming your father. What is being swept under the rug will first reveal itself through olfactory hints. Whether you have to tolerate the odour or are the one who is being tolerated matters a lot to your becoming doesn't it?

Law: I don't differentiate in such a vulgar way. My position between purity and regression, and (female) power and progress is a delicate one. I am not all encompassing, or am I and if I am not, do I exist at all? That seems to remain the question, so for you to hint at my smell is actually making me sweat out of pores that I am just about to rebuild. Ontology as humility is an idea that smells like sea salt and vinegar. Coming out of the unknown and seeking, into pragmatic daylight.

Jeanne d'Arc: So I actually don't know where you can find traces of my bodily existence. Fertility and mortality are not compatible with purity. My scent was very revealing in this sense. Pragmatic daylight is too sober to reveal any aspects of what we are actually looking for, when we are searching for hidden aspects of substance or personality behind your narcissistic and/or obsessive-compulsive performance. But I slowly want to get to the main point of our conversation. Tell me how do you smell?

Law: Obsessive compulsion is keeping me alive and narcissism is keeping me relevant. I want to tell you a story of my becoming.

From a distance I could smell the rotten fish, they came from the sea of our collective unconsciousness in order to determine my ability to walk through the sand. It was a crippling thought, crippling in that it took any autonomy away from me, as I would not have been able to move within the sand with the smell of rotten fish in my nose. I would need an authority to grant me the option of vomiting into a basket that has been hidden under the ocean. It laid there for so long. As long as it lies there we cannot breathe without a defibrillator. A defibrillator is what I immediately yearned for and they gave it to me. Right there in the sand I noticed the fresh air within my nostrils, the decent and subtle smell of the Unforgiven that laid beneath the new becoming and I became. I became a state, a presence, a warlord, filled with rage and hopeful thinking. I would kill them with kindness, because kindness smells like birth and birth will overshadow fish. Fishes – I was never able to fish or see or hear, only smell. I especially loved the smell of oysters within my nostrils, as they captured the freshness of the air and reminded me of my of birth and death at the same time. Of defecation as a sort of disintegration, because disintegration was everything I longed for, after I grew into a state of being, because a state, is a state of death and death doesn't fit her. It fits me too well.

Jeanne d'Arc: So actually I feel like I have been resurrected by your story. A history of symbiosis and separation, vulnerability, violence and contrafactual transformations. This story however is not defining you in any way. It is a story about the conditions of your

existence. It doesn't say anything specific about you and the pragmatic daylight trickles away on a post-Freudian couch. This is more of a neon light. I have to ask you this in a more pressing and in a more serious manner. How do you smell?

Law: Your nose is unfit for me because it has never encountered a real vacuum and it likes to create flowers out of defecation. So to be nothing is to be everything. I am the original, I am the light. I lighten up your integration, reintegration and disintegration and in doing so I become a guideline to an Italian restaurant. I tell you what to order, I like onions and tomatoes, I like the smell of German money in a Greek bank, I like the smell of greed and envy, I like the sourness on your tongue because it keeps me alive in my nothingness, it keeps me relevant in my endless undoing which has a non-scent in its nonsense. I met you there in a small alley on a winter's day and you waved me goodbye and finally I saw my reflection. Finally I knew why I did not have a scent. I have accepted this faith of being a non-odour, a frightening shadow of a violent past, dwelling on the bodily memories of desired and unwanted touch ingrained in the olfactory memory of the sea. Salt is the result of that trembling tremor and it is oh so salty. We have to put it onto everything we eat in order to decorate its livelihood, in order to hide away from the ghosts of our past. I became the salt. I ceased to be the ghost. I became the law and in its becoming, I became its undoing.

Jeanne d'Arc: Finally I am able to sense your odour. You smell like vanilla and burnt plaster! What a revelation.

*Fin.*

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Butler, Declan. 'Joan of Arc's Relics Exposed as Forgery'. *Nature* 446, 593 (2007). <https://doi.org/10.1038/446593a>

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**The Westminster Law & Theory Lab** is a research lab based at the University of Westminster, UK, experimenting with collapses between law and other disciplines, such as geography, religion, anthropology, art theory, political theory and so on.

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Although somewhat marginal in relation to the other senses, smell is the most potent way of anchoring ourselves to the world. We subconsciously find our place in it through an incessant olfactory flow consisting of bodies, human and nonhuman, that are agents of generation, consumption, diffusion, reproduction and dissolution of odours.

The law presents itself as rational and objective. Smell, on the other hand, is one of the least integrated senses in the legal edifice, in comparison to, say, seeing and hearing. The sense-making of smell and law are different, even antithetical. Smell operates undercurrent, tickling the olfactory antennas of individual and collective bodies while habitually hiding behind other senses, while law has an interest in appearing present, universal, constant. Olfactory sense-making relies on its elusiveness; legal sense-making invests in its manifested presence. Yet, the two interact in unexpected ways. If anything, smell 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. Smell's fragmentary, discontinuous and unstable nature poses a peculiar challenge to the law. This volume investigates precisely this juncture.



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