The Law of Bad Smells: Making and Adjudicating Offensiveness Claims in Contemporary Local Law

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Abstract

The sense of smell seems to have resisted the kind of objective measurement process that might have facilitated settling competing claims about offensive smells by applying a general rule or standard. As a result, authorities, including courts, cannot avoid making subjective judgements of taste. A nuisance lawsuit out of Ontario regarding a mushroom farm, or rather its smells, is used here as one source of material about the difficulties of adjudication in this subfield of the "law of the senses." Attention is also paid to a curious quasi-judicial entity, Ontario's Normal Farm Practices Protection Board, charged with resolving, mainly through mediation, disputes about farm smells between farmers and non-farming neighbours. Overall, the article shows that the ex post facto, situated and complaint-driven logic of nuisance that nineteenth-century law used to govern offensive noises as well as nasty smells, and which left plenty of room for subjective judgements of taste, keeps reappearing in the present day. Nasty smells seem particularly impervious to modernization, that is to being managed through objective measurement and preventive regulation.

Keywords: offensiveness, nuisance, smells, odours, farming practices

Résumé

L'odorat semble avoir résisté au processus de création de mesures objectives où l'on applique une règle ou une norme générale. Ce processus aurait pu faciliter la règlementation relative aux réclamations concurrentes sur les odeurs offensantes. Par conséquent, les autorités, y compris les tribunaux, ne peuvent éviter de porter des jugements subjectifs. Une poursuite pour nuisance, qui se déroule en banlieue de l'Ontario, et se rapportant à une champignonnière, ou plus précisément ses odeurs, est d'ailleurs utilisée dans cet article afin d'illustrer les difficultés dans la prise de décision judiciaire relativement au droit des sens. Une attention particulière est également portée à la Commission de protection des pratiques agricoles normales de l'Ontario, une curieuse entité judiciaire qui est chargée de régler, principalement par la médiation, les différends concernant les odeurs agricoles entre les agriculteurs et leurs voisins non-agriculteurs. Dans l'ensemble, le présent article montre que la logique de nuisance a posteriori, située et fondée sur les plaintes, qui

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était utilisée dans le droit du XIXe siècle afin de régir les bruits offensants et les mauvaises odeurs, et qui laissait une large place aux jugements subjectifs, ne cesse de réapparaître dans le monde actuel. Les odeurs désagréables semblent, en ce sens, particulièrement insensibles à la modernisation, c'est-à-dire à la gestion par des mesures objectives et à une réglementation préventive.

Mots clés : offensivité, nuisance, odeurs, pratiques agricoles

As the historical and anthropological studies of the social construction of sensory experiences referenced throughout this special issue demonstrate, legal as well as personal passions are often inflamed by the fact that unexpected sensory experiences that to some appear as a source of excitement and variety are for others an annoying or offensive or downright disgusting sight, sound, or smell—in other words, a nuisance (Howes 2005; Howes and Classen 2014).

Legal historians and sociolegal scholars have shown that authorities, often at the urban municipal level, have responded to these disagreements by deploying a variety of regulatory strategies. One venerable legal tool consists in legislatures giving municipalities the power to "abate" nuisances after the fact, generally leaving it to local authorities to fill in the content of the inherently vague notion of "nuisance." In more contemporary times, another common approach is for legislative bodies at both local and supra-local levels to pass regulations that proactively regulate, in advance, potential sources of annoyance (Hamilton et al. 2017).

For example, one strategy frequently used in North America is to differentiate urban space into zones in which heavy industry and perhaps other "noxious uses" are allowed and zones (generally classified as residential) in which such activities are not allowed. The legal differentiation of urban space is a very flexible and generic strategy that can further very different rationales and can have a variety of effects, as we shall see later in the article. Contrary to what critical urban studies scholarship would predict, the spatial differentiation logic, when used to manage sensory disturbances, is not hard-wired to social exclusion and class- and race-based segregation.

The legal differentiation of urban space into zones is justified mainly through appeals to the potential economic and health harms of mixing land uses (industrial and residential, high-rise and single-family, bars and homes). However, the same "police power of the state" that has long underpinned harm-based arguments supporting the legal differentiation of local space has also been deployed to regulate and spatially marginalize activities that pose moral or cultural rather than physical or economic risks, such as drinking establishments and "disorderly houses" (Novak 1996; see also Hall 2014; Peterson 2003). The history of the regulation of urban nuisances shows that moral or cultural offensiveness is inevitably intertwined with claims about health or other more utilitarian harms (as other articles in this issue also demonstrate).

Nevertheless, the modernization and constitutionalization of national and, to a lesser extent, local legal frameworks have in recent decades required or at least encouraged greater use of utilitarian terms such as "harm" or "risk" and fewer overt declarations of governmental moral and cultural preferences (Hunt 1999;

Valverde 2005, 2011). When modernized legal frameworks (as instantiated in zoning by-laws, park regulations, and so on) attempt to eschew overt moral-cultural bias, however, administrative as well as judicial authorities often find themselves in the difficult position of having to resolve or adjudicate horizontal conflicts of taste in situations where objective, quasi-scientific knowledges of harm are not available. The multifarious everyday conflicts about what is and is not acceptable to one's senses that for many centuries were handled primarily through after-the-fact nuisance claims still exist today, and not all are amenable to being resolved by recourse to objective rules of general application.

This article focuses first on certain dynamics exhibited by the forms—the legal forms—that have been and are still being used to manage such horizontal conflicts of taste amongst neighbours, focusing mainly but not exclusively on the sense of smell. Secondly, it examines the kinds of knowledges of the good and the bad, the tolerable and the intolerable, that get deployed by various actors in the relevant administrative, legal, and judicial networks.

The larger context of the legal regulation of disputes about sensory experiences cannot be fully explored here, but I gesture toward the larger context through brief comments on the subjective standards of offensiveness that are inscribed in many Canadian noise by-laws. The noise by-law examples are nevertheless used for purposes of comparing and contrasting; the main focus of this paper is on the sense of smell. The article examines the way in which claims about unpleasant smells are turned into legally acceptable knowledge claims—with the focus being on the dynamics that develop in the course of battles of olfactory knowledge claims, not so much the legal outcomes. It needs to be emphasized that this article does not seek to provide an accurate picture of current Canadian law on conflicts around smell; there is no systematic discussion of the legal tools that exist to regulate such disputes in different provincial and local jurisdictions. Instead, much more modestly, a few instances of legally visible conflicts about smells are selected in order to shed light on the processes through which olfactory truth claims are elaborated, presented, and evaluated in a variety of legal venues—not only courts but also below-the-radar quasi-judicial bodies, specifically Ontario's "Normal Farm Practices Protection Board."

To put these perhaps obscure or trivial legal disputes in a larger frame, it can be said that cultural-moral conflicts regarding what is and is not acceptable in a shared micro-environment (such as a neighbourhood) persist today despite the proliferation, throughout the twentieth century, of all manner of general rules aimed at annoyances that have or could have negative effects on health, safety, and the environment. The rationalization of legal tools used to order and differentiate space and to allow, disallow, or segregate activities that can cause horizontal conflicts is an important twentieth-century trend, as the large international literature on the history of urban planning has shown.

Urban legal historians have documented the rise of myriad general-application regulations governing the location of slaughterhouses and other "noxious" businesses (Joyce 2003), regulations that superseded the after-the-fact remedies sought by traditional nuisance plaintiffs (Reiter 2012). And yet, even today, there are many neighbourhood-specific situations that give rise to conflicts and disputes

and claims about harm and annoyance that are not and cannot be covered by objective written rules and standards. Local officials, city councils, courts, and various tribunals are thus faced with the difficult task of legislating for or adjudicating disputes that are essentially conflicts of taste for which an objective rule of general application does not exist.

A major reason why efforts to modernize and objectivize the regulation of potentially offensive sensory experiences sometimes meet with defeat, and require adjudicative bodies to resort to clearly subjective and culturally specific standards, can be found in the conflicting spatiotemporalities of the two main types of regulation mentioned thus far. The ex post facto and highly local logic of nuisance continues to survive well outside of nuisance lawsuits and public nuisance rules, as I have shown elsewhere through analyses of Canadian and American courts' rulings on municipal by-laws governing offensiveness (Valverde 2005, 2011). The logic of nuisance, these studies show, has a very specific spatiotemporality: it is interactive, site-specific, backward-looking, and embodied. If neighbours have noses that happen not to be offended by a factory smell, or moral standards that are not bothered by sexually oriented businesses, there is no nuisance. The logic of modernist environmental and health rules is quite different: it uses objective rules of general application, does not depend on particular social interactions, and is forward-looking rather than complaint-driven. It follows that modernist regulation is not overtly embodied. Breaches of environmental regulations exist objectively, and can therefore be measured by a neutral party. Nuisance disputes, by contrast, and conflicts that, whatever their legal status, follow the logic of nuisance, can only be resolved by recourse to the explicitly fictitious and always indeterminate figure of the reasonable person, conjured into being by lawyers and courts—for lack of an actually existing neutral party that can objectively determine whether a general previously existing rule has been broken.

Overall, then, nuisance governance is typically embodied, backward-looking, and micro-local,[1] while environmental and health regulations are forward-looking, preventive, objective, and spatially ambitious (usually covering a whole jurisdiction).

Contrary to what popular accounts of the modernization of governance through "seeing like a state" knowledges might suggest (Scott 1998), Davina Cooper's pioneering study of English urban nuisance law (Cooper 2002) and my studies of the persistence of the logic of nuisance within municipal regulation in the United States and Canada (Valverde 2005, 2011) together demonstrate that, even when courts and legislatures and/or the legal culture of the day push local authorities to adopt fixed, preferably numerical, standards and rules for potentially offensive activities, local authorities, local law enforcement, and adjudicative bodies find that they simply cannot dispense with the culturally rich and legally fuzzy legacy of "nuisance." Nuisance, taken here in a non-legalistic sense to cover public regulations that govern disturbing or annoying activities (as well as private nuisance

[1] Efforts made by local and state authorities to declare certain activities public nuisances by definition of course complicate this heuristically useful contrast, since labelling a whole industry or a type of activity as a nuisance before the fact starts to move away from the site-specific and remedial logic of private nuisance and towards general objective rules. In this paper I focus on horizontal conflicts, whether or not they fall within the legal category of nuisance.

actions and public nuisance rules), aims at nothing less than to provide remedies and/or mediate horizontal conflicts in regard to how one person's utilization of their private property affects others.

But a word on the changing scope of nuisance law is necessary to end this introductory section. While in the nineteenth century, private nuisance actions were often used to protect public, often environmental, goods, such as river water quality, the rise of environmental and health/safety regulations from the 1880s onward resulted in a narrowing of the scope of nuisance law (Benidickson 2007). Thus, today, nuisance actions and nuisance-type rules[2] centrally feature subjective claims about offensiveness that are not covered by objective environmental and public health rules. Such actions require enforcers and adjudicators to decide what is a mere annoyance that should be tolerated amongst neighbours (as the Quebec Civil Code would have it) and what is truly offensive and intolerable.

The unwitting reactivation of the older logics of nuisance is certainly visible in some cases discussed here, concerning unpleasant farm smells in Ontario. However, the epistemological difficulties visible in the legal regulation of current-day farm smells highlight not only the persistence of nuisance logics in the contemporary world of quantification and objective risk measurements, but also a curious phenomenon of a different sort. As we shall see, the province of Ontario has set up a special tribunal in which economic productivity is used as a rationale to protect selected economic actors from nuisance lawsuits. This legislative manoeuvre has foreclosed, to a large extent, the kind of horizontal litigation about sensory experiences that forms the bulk of nuisance jurisprudence. Nuisance lawsuits about unpleasant farm smells do still reach the courts, but in very small numbers. Just as (in Ontario) the vast majority of local disputes about zoning exceptions and zoning by-laws never make it to any court due to the existence of a provincially appointed quasi-judicial expert planning appeals tribunal, so too, in many jurisdictions, including Ontario, the majority of disputes about what is and is not a reasonable farm smell are diverted out of the courts. Other, more urban smells do not have a specialized tribunal (empirical research on by-law enforcement in Toronto suggests that such conflicts are generally mediated on site by municipal inspectors, occasionally with support from city staff or the local councillor [Valverde 2012]). The law of disputes about unpleasant sensory experiences (those that are not covered by environmental and health standards in particular) is thus not a field that is well suited to strictly legal research; reported cases are extremely scarce and those are, by definition, not representative.

Smell: The Difficulties of Objective Regulation

As sociolegal scholars and cultural historians have pointed out, if sensory experience in general is not always easily governed through "seeing like a state" objective rules of general application, smell is particularly resistant to quantified, objective, preventive governance. As Dayna Scott notes, "smells are far more difficult to

[2] "Nuisance-type rules" here include municipal by-laws of general application that ban "offensive" or "excessive" noise—such overtly subjective rules being a common component of local government's legal arsenal, alongside objective rules such as those based on decibel levels.

measure than sounds" (Scott 2017, 168; see also Classen, Howes, and Synnott 1994). While it is possible to ban certain types of noise in advance by means of a general rule, it is far more difficult to provide, in advance, unambiguous texts describing the kinds of smells that might be deemed inherently objectionable. Unfortunately for judges in smell-related nuisance lawsuits, there is no generally accepted classification of smells (Buhler 2017).

The gaze of objective quantification has not been inactive in regard to the problem of offensive smells, however. One news report out of Vancouver claims that a private company operating in Canada is—or was, in 2012—using a machine called "European Odor Unit" to measure smells. The machine is reportedly like a scuba diving tank strapped into a backpack; the ambient smells are fed into the machine through tubes. Apparently the European Union's European Committee on Standardization approved the use of this machine (though I was unable to find any reference to the machine's validation for legal purposes). Nevertheless the British Columbia environmental appeal board ruled in 2012 that the city of Vancouver could not use this gadget to regulate smells, because the measurements provided by the machine were apparently "too flawed" to be relied upon in court[3] (Lindsay 2012).

It is difficult to imagine any machine that would successfully capture, through the kind of visualization techniques that are used to objectify sound (such as needle-drawn graphs), the everyday, necessarily embodied and not easily described problem that the Toronto municipal code variously names as "noxious smells," "obnoxious smells," and "offensive odours." (The variety of official names used in one influential municipal code for what is presumably the same legal object is perhaps one indicator of the governance problem.)

So what are some of the strategies currently used by local authorities to attempt to govern the "noxious" or "obnoxious" smells in question—or rather, to stick to the legal issue at hand, to govern the conflicts that arise amongst citizens about these bad smells?

From Legal Islands to Jurisdiction-Wide Protection of Economically Productive Bad Smells

One traditional strategy for addressing conflicts about non-harmful but unpleasant smells involves creating legal islands, such that industrial or other uses that might emit offensive smells are protected under the banner of economic usefulness. This strategy is visible in a well-known case taken to the Supreme Court of Canada in 1896 by Montreal stable owner Drysdale, a leading Canadian nuisance case helpfully analyzed by Eric Reiter (2012). One current example of the legal island strategy, by which a defined space is marked out on which economically useful activities are allowed to trump any potential nuisance claim, is the Redpath sugar refinery located on Toronto's east-downtown waterfront. A site-specific by-law for a space that is very close to some high-end condominium properties and about

[3] The *Post* story adds that the machine has been used in Toronto to hunt for marijuana grow-op operations, but this claim cannot be confirmed.

three blocks from the bottom of Yonge Street protects the Redpath refinery from nuisance claims by declaring that, while the firm is required to install noise and smell mitigating features that meet the standards prevailing in the industry, nevertheless "noise from the Redpath factory is likely to be audible [to neighbours], and odours may be unpleasant" (City of Toronto By-law 1049-2006).

The strategy of making official declarations that neighbours must tolerate a certain amount of noxious smells and sounds if they emanate from a site of protected, perhaps grandfathered, economic activity (such as the Redpath factory, which was in its current location long before residential gentrification transformed the waterfront) can mark out a relatively small space successfully, especially if the "noxious" use has existed for a long time. The strategy can also be re-scaled, however, to cover a much more expansive space. This happened when the province of Ontario decided to protect farmers from being sued in nuisance by city folks who move to the "country."[4] It should be noted that in both the case of the Redpath factory and that of the Normal Farm Practices Protection Board about to be discussed, one traditional feature of nuisance law is maintained, namely the notion that if someone moves into a neighbourhood where a particular land use has existed for some time, one's senses deserve less legal protection than if one is a longstanding legal occupier suddenly faced with a "new" and annoying neighbour—situatedness and relationality being key logics in nuisance governance.

Faced with a rising number of complaints raised by in-movers—city folk bearing certain aesthetic expectations about "the country"—in 1998 the province of Ontario passed the "Food Production Protection Act." Pursuant to this law, the province set up a quasi-judicial tribunal called the "Normal Farm Practices Protection Board." This board (whose decisions are available on CanLii, though its process does not seem to resemble that of other provincial expert tribunals) hears a tiny number of cases (zero to one per year). In the government's own view, as expressed in reports available on the Ministry of Agriculture's website, the scarcity of cases demonstrates the effectiveness of the mandatory mediation process underpinning the board—although no empirical study exists, to my knowledge, that would confirm that all parties do find the mediation appropriate.

Smell issues were clearly important in the lead-up to the law and the new Board. A 1997 survey by the Ontario Ministry of Agriculture (likely designed to gather evidence to justify the new law and the creation of the Board) found that there were a couple of hundred disputes and complaints every year in Ontario farm country and that, when neighbours brought these complaints directly to the farmer, "farm odours predominated" (see "Farmer and Neighbour Relations Preventing and Resolving Local Conflicts," http://www.omafra.gov.on.ca/english/engineer/facts/05-001.htm)

Ontario farmers are told by the Ministry, on its website, that they must be open to hearing complaints from neighbours (specifically, complaints about noise, odour, smoke, light, vibration, and flies). They are further told that they should be

[4] This strategy is common. For example, the state of Connecticut has a law declaring that no agricultural or farming operation shall be deemed to constitute a nuisance, either public or private, due to alleged objectionable odour from livestock, manure, fertilizer, or feed ("Right to Farm" Law).

"proactive" in establishing good communications. But clearly the Ministry is on the side of farmers. The "Farmer and Neighbour Relations" part of the Ministry website is almost scathing (by government prose standards) about the expectations of those fleeing the city, stating that "increasingly they [farmers] are surrounded by relative newcomers who have migrated from urban areas in search of a pastoral lifestyle in the countryside." Diverting complaints based on what the Agriculture Ministry calls pastoral myths into informal, and then if needed, formal mediation is the main mechanism (http://www.omafra.gov.on.ca/english/engineer/nfppb/guide.htm) used by the Ministry to address such conflicts. Only if the mediation fails is it then legally possible to proceed to a formal hearing—before a quasi-judicial tribunal whose very name reveals its pro-farmer bias: Normal Farm Practices Protection Board.

The chair of the board is a lawyer, but most of the members are farmers. From the few documents available it appears that the board relies on opinions of agronomists as well as the knowledge held by the farmers on the board when deciding what is and is not a normal farming practice. It thus seems that this Board is not as lawyerized as many other Canadian administrative tribunals; neither does there seem to be a professionalized body of expert witnesses such as the licenced planners who frequently testify at the provincial planning-law appeals tribunal. When issuing one of its rare decisions, the Board seems to rely primarily on what could be called "trade knowledge," that is, industry insider knowledge arising more from practical experience than from university training—the kind of knowledge of normal vs. abnormal risks that a factory foreman would have (on trade knowledge in Ontario liquor licence decisions, see Levi and Valverde 2001).

The annual reports of the Board present a rosy picture of successful conflict resolution. The Ministry receives between 120 and 200 complaints per year, with 97 or 98 percent of these being settled through informal conflict resolution. The handful of complaints that proceed to the board are in turn almost all resolved through mediation rather than going to a full hearing (http://www.omafra.gov.on.ca/english/engineer/nfppb/annual-report2014.htm).

As a result, the Board has only issued six formal decisions in the last eight years.[5] For the most part, these feature seemingly litigious individuals whose erratic behaviour, at the tribunal and outside of it, then becomes the main issue in the case, with the original complaint disappearing into the background. It is common for complainants to abandon their claims—perhaps because they realize at some point that the Board is not likely to issue injunctions regarding the source of the offensive noise or smell (the remedy that complainants appear to desire).

No recent Board decisions concern farm smells—or more specifically, no recent decision deals substantively with the question of what is and is not a tolerable smell. Nevertheless, given the high proportion of smell complaints amongst the farm-related complaints that the Ministry receives (see chart in 2014 annual report just cited, as well as the 1997 study previously cited), it seems that in Ontario,

[5] It should be noted that the jurisdiction of the Board includes deciding whether municipal by-laws negatively affecting farming operations are or are not legal, an interesting power not held by many other quasi-judicial administrative tribunals.

smells such as manure smells are indeed now successfully legally protected over large areas. For the most part, then, Ontario farmers need not defend themselves against their non-working neighbours as the famous Mr. Drysdale had to do in regard to his rue Saint Denis stables back in 1896 (Reiter 2012).

Nuisance Principles Vindicated: When Bad Farm Smells Manage to Get to Court

A few farming smell cases nevertheless do manage to get to court in Ontario from time to time. Here we will focus on one farm smell case that generated much debate, inside and outside legal venues. The case got to court only because it had commenced before the bureaucratic machinery of the Board existed; even more exceptionally, the litigation proceeded up to the Ontario Court of Appeal (see *Pike v Tri Gro Enterprises*). The case is thus obviously anything but representative of on-the-ground conflicts about smell—but since extensive documentation is available, it can be examined for what it tells us about how knowledges of bad smells are generated for and circulate in legal arenas.

A group of neighbours in the suburban fringe around Toronto launched a lawsuit against a local mushroom farm a few years before the Normal Farm Practices Protection Board came into existence, at a time when a nuisance lawsuit was indeed the "normal" legal recourse for neighbours claiming that the smells emanating from the farm were not only offensive but unbearable.

The mushrooms themselves (contrary to what actor-network scholars might imagine) were not actors in the legal network. They played no role and nobody mentioned them. The conflict centered not on the mushrooms but on the compost, made on the farm itself, in which the mushrooms were grown. The compost, seemingly in keeping with mushroom-farm norms, was elaborated from a variety of organic materials, and by all reports emitted extremely unpleasant smells.

Clearly, the court, and for that matter the lawyers, were not in a position to themselves smell anything. As Sarah Buhler points out in her fascinating account of Ontario tenants whose eviction due to bad smells was legalized and confirmed by the Landlord and Tenant Board, when having to scrutinize claims about bad smells, tribunals and other legal actors are in the unenviable position of having to rely on verbal descriptions that are necessarily more metaphoric than photographic (Buhler 2017). One can transport many objects into a courtroom as exhibits, and one can also produce any number of two-dimensional representations of objects that cannot fit into the courtroom or that for other reasons are not available (injured and dead bodies among them). And while in today's audiovisually sophisticated world it may be the case that not all judges or juries would necessarily believe that a police photograph or an audio recording of a 911 call lets them "see the evidence for themselves," nevertheless, the absence (in the case of annoying smells) of both visual representations of smells and of any accepted system for generating numerical representations of "noxiousness" does put courts rather in a quandary.

In the mushroom farm case, witnesses asked to describe the smells used very graphic imagery meant to both convey their own disgust and produce disgust in the hearer. They compared the smell of the compost to that of meat gone bad, rotting carcasses, sewage, and the contents of an outdoor privy. Such imagery might

provoke in a judge a nauseous feeling similar to the nausea actually caused, on the site, by the bad smell; but in all cases the smell was described by recourse to analogies. The smell was not turned into a graph or chart; no photographs or audiovisual recordings of it were produced; and it could not be described without metaphor.

According to "the facts" of the case, the farm owners had by no means ignored the neighbours' complaints. On the contrary, after receiving the complaints, the business had first changed the formula used to make the compost and had then taken numerous other steps to mitigate the smells. The farm owners planted five hundred trees to create a barrier. They also built a tall wall out of bales of hay to try to contain the smells; and, in an interesting turn to technoscience, they hired an expert who attempted to objectively measure the smells—whether with the European Odour machine mentioned earlier or with another gadget, the available documents do not reveal. However, neighbour complaints persisted despite all of these mitigation measures—over a four year period, from 1995 to 1999.

Towards the end of that period, the Ontario government set up the Normal Farm Practices Protection Board, as mentioned above, which meant that future complaints would be diverted from the regular lower court that heard the mushroom farm smell case. Various legal actors could have worked to delay the case to ensure that the farming practices board had indeed come into operation and could now adjudicate the old complaint; and apart from that, the court could have decided, once this legal machinery existed, that it no longer had jurisdiction. But the trial judge did not make this move. After hearing from neighbours who claimed that they could no longer have summer outdoor gatherings or engage in gardening due to the frequent recurrence of disgusting smells, the judge ruled in their favour, and somehow came up with a figure for damages.

The mushroom farm appealed the decision. Evidence at trial suggested that if the decision stood, it would be extremely difficult for any mushroom farm using "normal" practices to function in an inhabited area in Ontario. This would have encouraged the business owner to undergo the otherwise cumbersome and expensive appeal. A nuisance can quickly become a non-nuisance if the source of the problem is relocated to some other convenient location where neighbours do not exist or will not complain, but in this case relocating may not have solved the business's legal problems, since it was likely not possible to get assurances in advance that the Normal Farm Practices Protection Board would declare that the bad-smelling compost that has to be used to grow mushrooms counts as normal.

It is highly unusual for a low-level nuisance case to reach the Ontario Court of Appeal, but in this situation, there was a somewhat interesting strictly legal issue, namely whether the trial judge should have abdicated jurisdiction to the new Board. In the event, two of the three justices on the Ontario Court of Appeal panel upheld the lower court judgement. One, however, dissented, stating that a nuisance had certainly been established, but that the complaints should have been heard by the Board.

Jurisdictional issues aside, what is relevant to the issue of law's management of sensory disputes is that all three justices agreed that what is and is not a normal farming practice is a question that cannot be translated into technical and objective language. Even after the inauguration of the seemingly expert tribunal on

"normal" farm practices, the Court of Appeal noted that what is and is not normal in regard to farm operations depends—as nuisance law always has depended—on context, on site-specific circumstances. Citing a case in which the noise-making bird-scaring machines commonly used in vineyards were declared to be a nuisance when used in another place for other purposes (to scare away coyotes), all three judges agreed that what is and is not a normal farming practice depends on the particularities of the social and economic (that is, farm-activity specific) context and the physical surroundings.

This argument is of course wholly consistent with the longue-durée of the jurisprudence on nuisance-style rules and by-laws. The particularities of the neighbourhood have always been a crucial factor in legally determining what is and is not a nuisance, and what is and is not to be tolerated, more generally. What is particularly interesting in this case is that the emphasis on situatedness was declared by the Ontario Court of Appeal panel to be central to the legal regulation of sensory disturbances, even in the age of audiovisual recordings and decibel-measuring machines. It is not known how this authoritative confirmation of the validity of ancient nuisance logics was received by the members of the Normal Farm Practices Protection Board, but the court decision would tend to validate the situated "trade knowledge" of working farmers that seems to be employed there, and would tend to discourage the replacement of practical people by more professionalized experts.

Sensory Zoning? From Farm Smells to Urban Commercial Noise

Shifting now from smell to noise, for comparative purposes, a 1998 Ottawa case involving noise emanating from a bar (canned music coming from a loudspeaker) illustrates how highly situated knowledges of order and disorder, of what is normal and what is abnormal, are not only tolerated but are essential to the workings of the machinery of local law. In this way, without going into detail on the law of sound or the practical management of noise complaints, one can discern some epistemological moves that may well be common throughout the whole realm of "the law of the senses."

The impugned Ottawa by-law appeared to be objective and of general application, since it forbids all "amplified sound" between 11 p.m. and 7 a.m. on weekdays, up to 9 a.m. on Saturdays, and up to noon on Sundays. (Very similar or even identical regulations are embedded in other Canadian municipal codes.) However, inserting the logic of nuisance into an apparently objective regulation, the by-law adds that amplified sound is forbidden only if people are disturbed. And hewing even closer to the nuisance tradition, the only people whose peace and quiet are considered, legally, are neighbours enjoying their nearby "dwelling houses"—not workers who might be employed in a bar, on construction sites, or for that matter on a mushroom farm[6] Also in keeping with the legal traditions of both nuisance and local police powers, the neighbours of the Ottawa noise case are envisaged not only as leisured people enjoying a quiet evening at home, but more specifically as

[6] See text of the by-law, cited in *Ottawa (City)*, Par 3.

middle-aged family-oriented folks who are presumed to be resolutely opposed to loud partying. The "neighbours" protected by the Ottawa by-law are regarded as desiring nothing but the "quiet enjoyment" of their private property that nuisance law has always imagined as the supreme and indeed only value of local life, even the life of densely populated urban centres (Cooper 2002).

However, undeterred by the long history of nuisance thinking in local regulation, the owner of an Ottawa bar attempted to have the by-law struck down, leaving the time of day rules in place but drawing attention to the inherent vagueness and subjectivity of the "disturbing the peace" component of the by-law.

The judge, who likely realized the noise by-law was not the only part of the municipal code that included words such as "disturbing" or "unusual," agreed with the city of Ottawa's argument that there was nothing overly subjective or vague about the "disturbing" element of the by-law. Further, the clearly uneven enforcement of the by-law (certain downtown areas, it emerged, were allowed by municipal inspectors to be noisier) was not legally fatal. For the court, it was eminently reasonable for city council and its enforcement officers to govern the city by setting different standards for peace and quiet depending on the neighbourhood. The court stated, as a fact within judicial notice, that "tolerance to noise will vary from community to community depending on the make-up and characteristics of the community residents involved" (*Ottawa City,* Par 9).

Legally created sensory zoning (the zoning being created first by differential enforcement practices and then by the court's ratification of these) is thus presented here as if it merely reflected and followed from the empirically documented tastes and preferences of different groups. This is a perfect example of the constitutive power of law appearing in the guise of "what the people want" or "what everyone knows," as critical legal studies scholars have long argued. There appeared to be no evidence presented to prove that young people living in rental high-rises might not want to have their peace and quiet protected to the same degree as homeowners in single-family detached neighbourhoods. And the jurisprudence generally suggests that no court would even ask for or expect such evidence. In similar cases involving other types of nuisance, courts have made a point of *not* inquiring into the actual preferences of different people. They simply assume that those living in cheaper accommodation or housing—cheaper because it is near industry—will "naturally" tolerate more noise, worse smells, more fumes, etc. (see Valverde 2005).

The point here is that the judge in the Ottawa by-law case was reproducing both the content of traditional nuisance law and the epistemological frame that has long underpinned it—a frame that disguises law's constitutive action by claiming, as a matter of common knowledge, that some types of "dwelling houses" and some styles of domestic life are naturally entitled to more protection from disturbing smells and noises than others. For the Ottawa judge, the city of Ottawa is "naturally" differentiated into zones whose imputed collective sensibilities entitle the inhabitants to greater or lesser protection from nuisances.

The Normal Farm Practices Protection Board uses a similar logic but in the service of a very different, perhaps even opposite goal. Both the provincial "food production protection" law and the quasi-judicial tribunal set up to mediate disputes between farmers and their neighbours have as their explicit goal to protect farming

activities from lawsuits and sub-legal complaints by declaring that, whatever the character of one's property or one's household, areas of Ontario that contain working farms do and will continue to contain unpleasant odours, noises, and other nuisances (including "flies" and "smoke"; there is, incidentally, no justification given for including flies and smoke while leaving many other entities unmentioned).

Thus, the government, on the Ministry of Agriculture website, is officially telling Ontarians that many nuisances that would probably not be tolerated in an urban environment have to be tolerated by people who move to farm country. The characteristics of the neighbour and of her/his property do not matter; all that matters is that the area contains working farms. Thus, the Ontario system for dealing with objections to farm-related nuisances establishes a "sensory zoning" comparable to that enshrined in municipal codes and noise by-laws.[7] The province legally protects activities that would be considered nuisances if they were found within the boundaries of cities but which are deemed to be "normal" in farm country. The noses of rich retirees who buy a home in farm country are thus condemned to either remain offended—or get used to it. Similarly, people living in rental high-rises in downtown Ottawa are being told that the city will tolerate more commercial noise outside their windows than is the case for single-family residential areas, whatever their personal preferences. Again, a specific space has its own sensory law, one that cannot be disputed. Of course there are also numerous laws of general application that cover the whole of the province or an entire municipality; but this section of the article has shown that legal mechanisms of different kinds enshrine in law certain ideas about the relationship between one's spatial location and one's protection from disturbing or even downright disgusting sensory experiences. The legal protection of certain "bad" smells and sounds (including nuisances such as flies and smoke), furthermore, does not follow the conventional class- and race-based exclusionary logic of zoning; other factors are at work in providing content for the legal strategy of differentiating space for purposes of protecting people from some but not all unpleasant sensory experiences.

Conclusion

The cases and laws discussed here show that the apparatus of nuisance law and nuisance-style regulation is a highly flexible one. For the most part, and over the long run, this apparatus has been primarily used in a way that is similar to the apparatus of zoning, namely to legally protect dominant sensibilities (those of the middle-class middle-aged non-partying homeowner whose "quiet enjoyment" of private property must be defended). Just as in the context of zoning, where someone moving to a residential single-family suburb would be unable to launch any kind of legal challenge to relocate to their new address a shop or a bar that had been previously legal elsewhere, so too, the legal tools that are part of the somewhat fuzzy but significant machinery of nuisance-style law act to privilege certain respectable class-specific and lifecourse-specific sensibilities from potential legal challenges.

[7] For a recent restatement of the principle of sensory zoning see the Supreme Court of Canada's decision in regard to a Montreal noise by-law that was similar to the Ottawa one just discussed (*Montréal (City) v. 2952-1366 Québec Inc*).

And yet, nuisance-style legal tools do not merely draw lines across demographic groups, or enshrine class- and gender- and generation-specific cultural preferences. There is a spatial dimension that is very important as well. Ontario farmers, most of whom operate in semi-suburban areas increasingly populated by non-farmers, have been able to insulate themselves from many if not most of the complaints that arise when "normal" farming operations emit noises and smells that offend neighbours. This is interesting, in part because it shows that what urban scholars often see as unique to zoning—the mechanisms used to institutionalize and legally protect bucolic, leafy family-oriented legal islands—has been used by the government of Ontario to achieve quite different ends.

The voluminous jurisprudence on the inescapably contextual basis of nuisance—most famously enshrined in the US Supreme Court's principle that a pig belongs in a farmyard but not in a parlour [*Village of Euclid v Rambler Realty*])—has certainly served, over the years, and throughout North America, as a major strategy for social exclusion and for the institutionalization of the aesthetic preferences of the powerful. But the same logic can be used to protect older industrial or farming uses that have come to be surrounded by gentrifying homeowners.

In conclusion, then, legal strategies associated with class and race exclusion (mainly, the differentiation of space for legal purposes) are not hard-wired to those particular political projects. Furthermore, the legal differentiation of sensory protection is not only demographic, but also spatial. Particular spaces (even those that are fuzzily defined, such as the Ontario Ministry of Agriculture's stipulation about living "near" working farms) can have their own sensory law, one that applies to everyone who comes into the space. Law is geographical as well as cultural.

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