Prologue: Introduction to Sensori-Legal Studies

David Howes*

En raison de son association classique avec la raison, le droit a été, et est encore à bien des égards, considéré comme étant opposé au domaine des sens, ou du moins situé en dehors de celui-ci, et ce, bien qu'il soit très impliqué dans la régulation de ce domaine. Cette dualité a été particulièrement remarquée dans le champ du droit et de l'esthétique : « L'art est assigné à l'imagination, à la créativité et au jeu; la loi au contrôle, à la discipline et à la sobriété » (Douzinas et Nead 1999, 3, traduction; voir aussi Manderson 2000).

Cette opposition entre le droit et l'esthétique a été, au cours des dernières années, remise en question par un certain nombre d'ouvrages qui explorent la façon dont ces deux champs interagissent : « les manières dont les systèmes politiques et juridiques ont façonné, utilisé et réglementé les images et l'art, et [...] la représentation du droit, de la justice et d'autres thèmes juridiques en art » (Douzinas et Nead 1999, 11, traduction; Huygebaert et al. 2018). Ce numéro spécial de la *Revue Canadienne Droit et Société* adopte une approche plus large, s'intéressant non seulement à l'esthétique, mais également aux dimensions sensorielles du droit et à la manière dont celles-ci sont liées aux façons de ressentir et de faire du sens au sein de notre culture.

Les questions suivantes constituent un échantillon des interrogations qui seront abordées dans ce numéro spécial : Comment les notions de justice s'inspirent-elles des modèles sensoriels? Quelles valeurs le design et l'atmosphère de la salle d'audience défendent-elles? Quels types d'expériences sensorielles peuvent être utilisés en qualité de preuves? Quel est le rôle du silence dans les procédures judiciaires? Peut-il y avoir une forme de propriété dans les sensations comme les couleurs ou les textures? Comment la force du droit est-elle ressentie par l'intermédiaire des sens dans les prisons ou dans les rues (p. ex., parmi les sans-abris)? Pourquoi certaines odeurs et certains sons en viennent-ils à être considérés

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comme des atteintes aux sens du public? Comment les traditions culturelles autochtones remettent-elles en question les hypothèses sensorielles du système juridique occidental, et suggèrent-elles d'autres possibilités?

By delving into the life of the senses in law, this special issue of the *Canadian Journal of Law and Society* seeks to bring law to its senses. While the conventional association of law with reason militates against this move by deflecting attention away from the body and senses, a moment's reflection reveals how intimately the administration of justice is imbricated in a particular ordering of the sensorium. Consider the traditional image of Justice: a blindfolded female figure standing erect and still, holding scales in one hand and a sword in the other (Jay 1999; Howes and Classen 2014, 94–8). The blindfold is supposed to guard against bias by removing the possibility of visual markers of social status exerting undue influence, and this message is amplified by the scales, which suggest that any decision will be based on the *weight* of the evidence alone. The fact that Justice's ears are uncovered in turn implies that justice involves "hearing both sides" of an argument (*audi alteram partem*) while her posture, with its connotations of straightness and uprightness, further emphasizes the immutability and righteousness of the law. Finally, the upraised sword betokens that Justice not only judges but also punishes impartially—and severely, by inflicting pain. The exercise of justice thus depends on a complex orchestration of the senses. Legal values and sensory values intertwine.

This special issue, by charting the sensory turn in law and legal studies, is of a piece with the "sensorial revolution" in the humanities and social sciences that, beginning in the 1990s, has challenged the monopoly that the discipline of psychology formerly exercised over the study of the senses and sense perception (Howes 2006). This work has revealed the extent to which the sensorium is a social formation. Perception does not just occur inside one's head: it is a cultural as well as psychological process, which means it is public and not merely private and subjective, as is commonly thought. For this reason, it is appropriate to inquire into the legal life of sensation—that is, into all the ways in which law is implicated in the governance of the sensuous.

Before broaching the sensory turn in the science of jurisprudence, or sensorial analysis of law, a few words are in order concerning the cultural turn in legal studies, or cultural analysis of law. A variety of factors contributed to taking law down from its pedestal and "making a place for a cultural analysis of law" (Silbey 1992). These factors included the development of the critical legal studies and law and literature movements, the rise of socio-legal studies, and the influence of interpretive (or "Geertzian") anthropology.

Clifford Geertz's (1983) description of law as "a distinctive manner of imagining the real" had a marked impact on legal scholarship. It repositioned law as a "cultural system"—that is, as embedded *in* the social rather than somehow above society, and it shifted the focus of legal studies from rules to meanings. The cultural turn in legal scholarship was manifest in the ensuing focus on the "production, interpretation, consumption and circulation of legal meaning" (Sarat and Kearns 1998, 6), and a radical redefinition of law itself. "Law" is no longer only what the legislators proclaim and judges interpret it to be; law is also what we (ordinary citizens) make of it.

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This expanded understanding of normativity can be seen in the critical legal pluralist approach championed by the late Rod Macdonald, which views everyday legal knowledge as involving "narration," or "meaning-making activity" (Macdonald 2002; Kleinhans and Macdonald 1997; see also Adams 2010 on "improvised law"). It is also manifest in the way popular culture is now recognized as potentially equal in influence to the courtroom as a forum for "troubling" and re-negotiating legal meaning (Hamilton 2009).

The sensory turn in law and legal studies conceptualizes law as a *sense-making activity*. It focuses attention on the regime of sensation that undergirds and encompasses the "frame of signification" (Geertz), or semiotics of law. This focus builds on the multiple senses of the term "sense" itself. The latter term includes both signification and sensation, meaning (as in the "sense" of a word) and feeling, in its spectrum of referents. This expanded definition of meaning, with its extra-linguistic connotations, redirects attention from the law in books, or law as discourse, to law as both targeting and anchored in corporeal experience. Consider how law is felt, literally, through the concept of right. The word "right" refers to the right side of the body, the direction right, that which is "correct" or "proper," the forces of the political right (or establishment), a legal prerogative, and to "the law" itself, as in the case of the French word *droit*. As Robert Hertz observed in his classic essay, "The Preeminence of the Right Hand": "What resemblance more perfect than that between our two hands! And yet what a striking inequality there is!" when one considers the extent to which the left hand is "despised and reduced to the role of humble helper" (Hertz 1973, 3). This disqualification is further evidenced in the connotations of the Latin term for "left"—namely, *sinister*—and in the connotations of the French word *gauche*, which refers to that which is "awkward" and to the forces of subversion (or "left wing"). In all these ways, for all these reasons, the law presumedly feels right.

The first wave of the sensory turn in legal studies was heralded by a flurry of publications in the mid-1990s, including "Coming to Our Senses" (Hibbitts 1992; see also Hibbitts 1994) and *Law and the Senses* (Bentley and Flynn 1996), which were inspired by then breaking research in the history and anthropology of the senses (see Bentley and Flynn 1996, 12n20). During the intervening period, attention to the visualization of law has mushroomed (Douzinas and Nead 1999; Dahlberg 2012; Sherwin 2011; Wagner and Sherwin 2014; Manderson 2018) and there has been sporadic attention paid to acoustic jurisprudence (Renteln 2014; Parker 2015). But this literature has yet to grapple adequately with the full panoply of senses, and their interrelationships. Nor is it as informed as it should be by the many advances in sensory studies scholarship since the early 1990s (Stoller 1997; Classen 1997, 2001, 2014; Smith 2007).[1]

[1] The term "sensory studies" was coined in 2006 to refer to the emergence of the senses as an object of study in a range of disciplines, whence such subfields as the history of the senses, anthropology of the senses, geography of the senses, and so forth. It is also used as an umbrella term to refer to the interdisciplinary fields of inquiry that have crystalized around the subdivision of the sensorium, whence visual culture, auditory culture (or sound studies), smell culture, taste culture, the culture of touch, and "sixth sense"—in all its multiplicity (Bull et al. 2006; Howes 2018, IV, 1–3).

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"Sensing the Law" (2013), a conference organized by the Canadian Initiative in Law, Culture and Humanities, based at Carleton University, marked a turning point. This was the moment when sensory studies and socio-legal studies converged, giving rise to sensori-legal studies. This quickening of the senses is palpable in the plethora of conferences that have ensued, including: "Law and the Senses" (2013) hosted by the Westminster Law and Theory Centre; "Architecture, Law and the Senses" (2015) organized by the University of Technology Sydney; "Synesthetic Legalities: Sensory Dimensions of Law and Jurisprudence" (2015) sponsored by the International Roundtable for the Semiotics of Law (Marusek 2017); the "Synesthesia of Law" conference (2016) at Princeton University; and "The Othered Senses: Law Regulation Sensorium" workshop (2018) at Concordia University, Montreal, co-organized by the Centre for Sensory Studies and the Canadian Initiative in Law, Culture and Humanities. Most of the papers in this special issue were first presented at "The Othered Senses" workshop, one comes from the Princeton conference (Valverde), and one is derived from a Ph.D. thesis written under the direction of Rod Macdonald (Bouclin).

This special issue on the sensorial analysis of law is structured around two broad questions. The first is: *How does law sense?* Or, how does law see, hear, smell, etc.? These questions have to do with law's epistemology. The second is: *How is law sensed?* Or, what is the look of law, the sound of law, the feel of justice, etc.? These questions have to do with law's atmosphere and representation or iconography. Let us begin with the question of law's atmosphere.

Legal Atmospherics

The force of law is mediated by the senses. Consider the architecture of the traditional courthouse (Mulcahy 2012; Gialdroni 2018). Built of stone, designed to look massive and heavy, with its tall pillars and ascending stairs, the courthouse looms over society, emanates authority, and is intended to inspire feelings of respect in all those who enter its precincts. Next consider the atmosphere of the courtroom. A sense of order is engendered by the benches, boxes and railings which enforce the separation of roles by preventing judges and counsel, defendants and spectators from mingling, and by establishing clear lines of sight. The dark hue of the carved wood furnishings and the formal attire of the actors, including wigs and robes, or business suits, further contribute to a sense of solemnity and decorum (Brigham 2009; Kilburn 2018).[2] The acoustic ordering of the courtroom is especially pronounced due to the central role accorded to speech: "there is the oral reading of the relevant written material, the oral arguments, the oral exchanges between the court and the lawyers, … the oral evidence at the trial, the oral judgment of the court" (Jacob 1987, 19–20). Meanwhile, the court is called to order and dismissed by the resounding rap of the judge's gavel.

[2] In modern courtrooms, by contrast, "[t]he furnishings resemble those of the modern office, with blond wood often preferred over the sombre dark woods of the traditional courtroom. Such 'no fuss' courtrooms suggest a justice system that will operate in a brisk, business-like fashion unimpeded by antiquated rites or regulations" (Howes and Classen 2014, 101).

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The oral-aural immediacy of the courtroom is also, however, punctuated by silence. In his contribution to this special issue, Sean Mulcahy seeks to bring legal studies and performance studies together by exploring how silence plays in the courtroom and thereby to redirect attention to "the material, affective and aesthetic textures of legal process" (Mulcahy 2019, 194). He brings out how pauses in speech can have meaning in themselves, and how silence has a crucial role to play in the creation of a "listening space"—that is, a space for concentration and attunement. It lets words and environmental noises, which can be equally as significant as words, "sink in." By opening our ears, Mulcahy's article represents an important supplement to the extant literature on law and aesthetics (Douzinas and Nead 1999; Dahlberg 2012), which has so far been overly focussed on the analysis of visual imagery (for a more capacious discussion see Manderson 2000; Huygebaert et al. 2018).

Consider further the atmosphere of the prison. The design of the prison in the form of a panopticon (after Bentham) has the effect of individuating the inmates and subjecting them to the "eye of power," which they are supposed to internalize in the course of their incarceration so that they will become their own wardens, their own watchers, upon their release. This abstract model does not give us the whole picture, though. The prison is also a space of sensory overload and sensory deprivation at once. The hypervisuality of a space in which lights are kept on throughout the day and night is exacerbated by the din of inmates moaning, sobbing, ranting, and rattling bars. Yet even more inhumane and degrading, according to reformers, is the regime of solitary confinement or "administrative segregation." The practice of isolation is currently rationalized by reference to considerations of institutional security and the personal safety of select inmates, yet at its inception in the eighteenth century, it was motivated by considerations of a different order. Solitary confinement was understood to be instrumental to the reform of the prisoner's soul through "forced withdrawal from the distractions of the senses into silent and solitary confrontation with the self" in the confines of the cell where the prisoner would be compelled to heed "the inner voice of conscience and feel the transforming power of God's love" (Walfish 2018). What this Quaker-inspired redemptive vision of the uses of isolation failed to comprehend are all the perceptual distortions attendant upon confinement, from hypersensitivity to auditory and olfactory stimuli and temporal and spatial distortions, to depersonalization and hallucinations affecting all five senses.

In "Encountering the 'Muslim,'" Safiyah Rochelle examines the virulent form of sensory deprivation to which the prisoners, or rather "detainees," at Guantánamo Bay, who were rounded up in Afghanistan following the 9/11 attacks in the United States and transported to the American military prison in Cuba, have been subjected. Images of these Muslim men "chained, gloved, ear-muffed and masked … soaked in their own bodily waste" upon arrival, and looking not human but "like giant orange flies" in their orange jumpsuits, were seared into the public consciousness by the media (Rochelle 2019, 209–225). Rochelle introduces the concept of "apprehension" to refer to the "pre-figuration" of these Muslim bodies as inherently violent and therefore requiring containment. "Apprehension," with its connotations of perception, anticipation, anxiety or dread, and forceful encounter and detention,

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is a tremendously powerful analytic tool for unpicking the visceral complex of representations and affects that adhere to these racialized bodies. Incapacitated sensorially, rightless, and subject to indefinite detention in the "space of exception" that is Guantánamo Bay, the "detainees" were (and remain) divested of any agency. Except for one: the hunger strike. As Rochelle argues, the finality of death through self-inflicted starvation is the one form of agency, the one form of sensory discipline, the "detainees" have left to put an end to their indefinite detention. The obscure image of these incapacitated, emaciated Muslim bodies gives us access to the dark shadow cast by the shining image of Lady Justice discussed previously.

There is an abundant literature on the mediatization of law, from televised trials to courtroom serials and motion pictures. What is only now emerging are studies which explore how media, as extensions of the senses, can be deployed to give expression to, and help us empathize with, those who live on the margins of society, such as the homeless. In her cinematographic legal ethnography of governance of and by street-engaged people, Suzanne Bouclin adduces experiments with a series of different film techniques (e.g., the Close-up, the Tracking Shot, etc.)—or ways of seeing—that "invite us to imagine and feel the regulation experienced by street-involved people from different legal standpoints" (Bouclin 2019, 227–241, translation). She goes on to analyze how a number of community groups working for and with the homeless make implicit use of these techniques to advance governance models that support street-involved people's dignity and autonomy, whether it be through "watching the watchers" or constructing a "street archive" of alternative interactions. Bouclin's account should be read in conjunction with Robert Desjarlais's *Shelter Blues* (1997), a highly perspicacious sensory ethnography of how homeless people suffer and struggle to cope with all the sensorial assaults visited upon them by the dominant society.

It is not only in the courtroom and prison or on television that the force of law is sensed. The tentacles of the law also extend into everyday life through nuisance laws, which regulate offensive sensory stimuli, as will be discussed presently, to mention but one of countless possible examples. Historically, law's reach was extended via sumptuary laws which determined how different classes could dress and what pleasures (food, drink, etc.) they could consume legitimately, in accordance with their station (Hunt 1996). Nowadays, sensory experience itself is channelled through intellectual property law, as Charlene Elliott discusses in "Sensorium®." In the era of what Elliott calls "sensory capitalism," trademark protection has been extended beyond names and beyond logos to include colours, sounds, textures, shapes, tastes, and even smells, such as the "iconic smell" of Play-Doh modelling dough. This unrelenting drive to capitalize on the "secondary meaning" of the trade dress of branded products and services, such as the colour brown in the case of United Parcel Services or a leather texture wrapping on wine bottles, might give one pause, since sensations are normally understood to be for sharing. Indeed, formerly, judges worried about the enclosure of the sensory commons through the privatization of colours, scents, and other indicators and were reticent to extend protection to such "non-traditional" marks. But now such encroachments are seen as making good business sense given the massive investment of marketing dollars in building and securing brand recognition. Concerns over the propertization of the senses have been steadily waylaid, and now

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even propertization has been eclipsed by what Elliott styles the "monetization of the senses" in the time of sensory branding and "look-for advertising." Look-for advertising aims at creating "affective investments" and precise associations as to the source of commodities in the minds of consumers through the medium of the senses on a mass scale. The intensification of the sense appeal of commodities, enabled by recent "advances" in intellectual property law,[3] now makes them practically irresistible as objects of attention and desire (Howes and Classen 2014, chap. 5).

Law's Sensory Epistemology

"The evidence of the senses" might seem like a touchstone for truth, or that which is "evident," and this is the way the seventeenth-century empiricist philosopher John Locke used the phrase. But even as the new empirical philosophy spread, according to Anna Wierzbicka in *Experience, Evidence, and Sense*, references to "truth" declined and were supplanted by an emphasis on observation and experience. As David Hume remarked: "A wise man … proportions his belief to the evidence," whence the current understanding of the term "evidence" as "*possible* grounds for belief" and therefore potentially refutable (Wierzbicka 2010). This aporia sets the stage for the admission of the senses and sense impressions as well as memories into the courtroom, where their evidentiary value is hedged in by rules and massaged into agreed upon statements of "fact." This recognition compels us to inquire into not just how "the truth" but the senses themselves are constructed in the courtroom.

The bias in favour of ocular evidence or eye-witness testimony is a case in point. In the words of Lord Coke, *Plus valet unus oculatus testis, quam auriti decem*, "one eye-witness is worth more than ten ear-witnesses" (quoted in Moore 1908, 772). This adage agrees with the conventional hierarchization of the senses in Western thought and culture, which attaches pre-eminence to the sense of sight. However, it can create almost as much uncertainty as it forestalls. Consider the case reported in *The Seattle Times* of a blind woman who identified the youth who raped her by smelling his cologne and touching his hands in a line up at a police station. It was considered remarkable that a blind woman could pick someone out of a line up since "[a] lot of people can't even give a good [visual] description of a rapist," one police detective observed. But "[t]he sense of smell and feel … Is that enough to stand in a court of law? I don't know" (Associated Press 1990). Such hesitation is generated by the prior cultural construction of the sensorium.

The controversy over whether the plain view doctrine can be extended to other senses is another case in point. According to this doctrine, police officers may seize evidence that is in plain view without first having to file for a search warrant. By contrast, a Minnesota court overturned a conviction based on plain feel evidence on the ground that touch is more intrusive and less reliable than sight (Dery 1994; Howes and Classen 2014, 108–10). This issue is further complicated when the senses that pick up the evidence are other-than-human, such as when

[3] Elliott would agree with Hamilton when she writes: "Too often the voracious engine of intellectual property is naturalized as a structure, framed in an historical telos of legal-technological progress and disentangled from the very real political [and economic] relations in which it occurs" (Hamilton 2017, 12).

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dogs are used to sniff out contraband, or to identify criminals (van Oosten 1987). In such cases, it is the senses themselves that are put on trial and their unequal status either affirmed or overturned.

The cultural contingency of the regime of sensation that undergirds and informs the law of evidence is especially apparent in situations of legal pluralism or "cross-cultural jurisprudence" (Howes 2005a). Thus, when Indigenous peoples seek to have their jurisdiction over ancestral lands recognized in court, in countries such as Canada and Australia, the clash of legal orders (formal/informal, official/customary) is exacerbated by the clash of sensory orders.

The first challenge is for the official legal system to set aside the self-serving doctrine of *terra nullius* ("land belonging to no-one") and recognize that Indigenous peoples have their own constitutions—that is, that they constituted "autonomous and distinct" societies at the time of contact, and this fact represents an enduring source of rights in land. The second challenge is for the official legal system to create room within the prevailing law of evidence for entertaining and giving effect to "performance evidence" (Elliott 2018), or what we would call the sensory archive and repertoire of legal transmission (see Biddle 2016; Howes and Classen 2014, 118–22). Thus, in Australia, pursuant to the *Aboriginal Land Rights Act*, Aboriginal claimants have been "afforded" latitude to present evidence in support of their land claims in the form of:

> *sound* (singing, chanting, humming, clapping, slapping, instrumental accompaniment, silence and all of these mixed with storytelling narrative); *movement* (ceremonial dancing and related mimetic actions, swaying, jumping, walking, hopping, beating the ground, pointing and gesturing); … *imagery* (painted body designs, ground sculpture, ground paintings, designs on ceremonial objects, mud maps); and *material culture* (site features, ceremony grounds and objects … [bush medicine plants, bush tucker, wooden, gum and stone artefacts] (Elliott 2018, 49).

These hearings, or "views" as they are called (Sculthorpe 2014), as they are conducted on aboriginal territory at sites of cultural significance to the claimants (rather than in the courtroom), are rightly seen as exercises in *sensational jurisprudence*. They are riddled with objections regarding admissibility, issues of (in)commensurability, and questions of authority, which legal minds are hard pressed to sort out because they entail sensing "the law" from all sides (within and without) and depend on "cross-cultural legal reasoning" for successful resolution (Howes 2005a). For the legal anthropologist, this would be a matter of course.

One of the most serious hindrances in the Australian context has been the insistence on transcribing into writing and translating into oral testimony all the "expressive modalities" (Elliott 2018, 42) of Indigenous law described above so they are intelligible in Western legal terms. For example, some Aboriginal claimants reject the assumption that "the Dreaming" (i.e., Aboriginal cosmogony) should be explicable in human language,[4] and object to the reduction to writing of

[4] In his discussion of "The *Dreaming* as Unwritten Constitution," Craig Elliott observes that "the Dreaming"—or "Law" as it is often called in Aboriginal English—is viewed as "essentially immutable and cannot be declared through institutions [courts, for example] that function by means of human agency … It is the foundation of reality" (Manziaris, quoted in Elliott 2018, 46).

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their cultural practices, since the latter are intrinsically multisensory or "multimodal" (in contrast to the unimodality of writing).

In Canada, the decision of the Supreme Court of Canada in *Delgamuukw*, which overturned the trial court's dismissal of the aboriginal title case brought by the hereditary chiefs of the Wet'suwet'en and Gitksan First Nations to ownership and jurisdiction over their ancestral lands in the interior of British Columbia, represented a major breakthrough. The plaintiffs had supported their claim with direct testimony of their connection to land as evidenced by their sacred oral tradition—the *kungax* or spiritual songs and stories, as well as totemic crests and other ritual paraphernalia, that formed the basis of their authority over specific territories and people. The trial judge discounted this testimony on the ground that "much of the plaintiff's historical evidence is not literally true" (because the narratives included elements of myth), and went on to attach greater credence to the writings of outside observers, despite the latter being laced with racist stereotypes (quoted and discussed in Howes 2017, 63–6).[5]

In the Supreme Court of Canada, Chief Justice Antonio Lamer set aside the trial judge's findings of fact on the ground that "a court must take into account the perspective of the aboriginal people claiming the right … while at the same time taking into account the perspective of the common law," and concluded by stating that "[t]he laws of evidence must be adapted in order that this type of evidence [i.e., Aboriginal oral history] can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of written documents" (*Delgamuukw* 1997, 1065 and 1069). Only by "bridging" perspectives could the ultimate goal of reconciliation between Indigenous peoples and the state be achieved, according to Chief Justice Lamer. His decision is to be lauded for opening the ears of the court to nonliterate, sensorial modes of legal transmission, though it fell short of extending full faith and credit to the Indigenous definition of the legal process in terms of "the way the feast works" (Mills 1994).

The Indigenous institution of the feast or potlatch was (and remains) a highly effective and vital multimodal forum for the transmission of rights in land and titles as well as the resolution of disputes, as anthropologist Antonia Mills attested in her expert opinion report commissioned by the Wet'suwet'en, subsequently published as *Eagle Down is Our Law*. The feast functions much like a registry office, only its records are oral instead of written, and grounded in consensus rather than the ruling of a third party official. What is more, collective understandings are sealed by the sprinkling of eagle down and the distribution of gifts of food and valued artifacts (e.g., coppers, blankets), which makes them more memorable, due to the engagement of all the senses in the process, than any title deed (Howes 2017, 118–22).

[5] The trial judge declared that "the plaintiff's ancestors had no written language, no horses or wheeled vehicles, slavery and starvation was not uncommon, and there is no doubt, to quote Hobbs [*sic*] that aboriginal life in the territory was, at best 'nasty, brutish and short'"—hardly an "organized society" (quoted and discussed in Howes 2017, 65).

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In the Introduction to *Sensing Law*, Sheryl Hamilton observes that

> for the sensual to be knowable by the legal it must be translated into legal terms. Such processes of translation … rely on notions of expertise, quantification and scientific epistemologies … which take what is ostensibly irrational (that which we experience corporeally) and make it into something rational (that which we can measure and explain through reason). (2017, 16)

The objectification of the sensual is both facilitated and complicated by the proliferation of digital technologies in modernity, particularly visualizing technologies (Sherwin 2011), such as aerial photography, the focus of "High Altitude Legality," Christiane Wilke's contribution to this special issue. Wilke critically interrogates what happens when video evidence of NATO aerial strikes occupies the whole of the court's sensorium in cases of contested aerial violence from the former Yugoslavia and Afghanistan. Only evidence from the aerial perspective (i.e., the point of view of the bomber) is considered, and courts—guided by experts—usually concur with the visual interpretations of the military personnel as to whether persons on the ground could be seen as non-combatants (i.e., civilians) or not. "These visual alignments," she argues, "are based on widely shared cultural preferences for the aerial view as the perspective of knowledge, power, and objectivity as well as on 'racially inflected regime[s] of visuality' in which some bodies are pre-emptively identified as violent" (Wilke 2019, 261–280). The use of visual technology is deemed to fulfill requirements of due diligence, even though the human beings on the ground appear as nothing more than "dots on a screen" without further identifying characteristics. Due to the partitioning of jurisdiction and the usurpation of vision by technology, the deaths of civilians caught up in the conflict (who are often displaced persons or refugees) are rendered incidental rather than deliberate, and the prosecution therefore stayed. Wilke introduces the term "legal anaesthesia" to underscore how the mediation of law's vision through forms of technological enhancement results in a numbing of the senses of the perpetrators of the violence, and of the court, due to the distancing of the viewer from the consequences of their visual deductions.

In "The Nuclear Sensorium," John Shiga brings together legal studies and science and technology studies (STS) to explore the ecological and humanitarian as well as legal consequences of U.S. nuclear testing in the Pacific Proving Grounds (PPG). He points to how "sensing became an imperial instrument and a type of weapon" in the work of U.S. ocean scientists employed by the nuclear regime as the U.S. Government, through its legal, administrative, and military structures, "sought not only to occupy and control but to transform colonized spaces and bodies in order to use them as laboratories for sensing, collecting and monopolizing data about weaponized energy" (Shiga 2019, 281–306). The devastating effects of the nuclear tests on Indigenous bodies and lands were treated as "restricted data." Yet, as Shiga goes on to show, in a momentous about-face, the weaponization of sensing and militarization of ecological knowledge (or "dark ecology") eventually gave birth to the concept of ecology as we know it. Environmental groups, in solidarity with the Indigenous peoples of the Pacific Islands, would, in turn, deploy the emergent notion of "environment-as-ecosystem" against the nuclear regime in

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their struggle for pacification (disarmament) and compensation for the horrific toll the testing took on Indigenous bodies and homelands.

In elaborating on Joseph Masco's (2004) notion of "nuclear technoaesthetics" (the raw sensory pleasure/terror of the blast), and the legal regime that enabled this regime of sensation, Shiga's article represents another important supplement to the literature on law and aesthetics by exposing the dark underside of conventional, bourgeois notions of the aesthetic. Furthermore, his discussion of the "intermediality"—or "intersensoriality"—of early (above ground) nuclear testing and the measures used to capture it, and his exposé of the ways in which the distinction between "sensed and sensing bodies" was operationalized in the Pacific Islands, reminds us that law and science do not work through visualization alone.

The next two articles, by Mike Mopas and Mariana Valverde, take the sensorial analysis of the law of evidence in two further, largely uncharted directions by asking *How does law hear?* (Mopas) and *How does law smell?* (Valverde). Both articles are informed by the paradigm for sensori-legal studies that Valverde (2011) put forward in "Seeing like a City," which highlighted the continuing relevance and interplay of pre-modern (experiential, embodied, relational) and modern (objective, predominantly quantitative) approaches to environmental regulation.

Like Shiga, Mopas deals with the scientization of sensation. Also like Shiga, Mopas alerts us to the politics of perception that continue to percolate despite the transformation of "that which we experience corporeally" (Hamilton 2009) into ostensibly objective data through the quantification of sensation (e.g., the decibel meter). Together with Valverde, he also breaks new ground by focussing attention on rural regions whereas most of the extant scholarship on nuisance law has concentrated on campaigns for noise abatement and olfactory silence in the city.

In "Howling Winds," Mopas takes up the cause of a group of farming families in rural Ontario who mobilized to try and stop the introduction of industrial wind turbines to their region. Their bid was unsuccessful because they failed to establish a direct causal link between the noise that was expected to be generated by the turbines (which remained within accepted decibel levels) and the self-reports of adverse impacts on health and wellbeing by non-expert witnesses living in close proximity to wind farms in other counties whom the plaintiffs summoned to testify before the Environmental Review Tribunal. Mere "annoyance" was deemed not to be an actionable legal category.

In "The Law of Bad Smells," Valverde takes a look at disputes over offensive farm smells between diverse farming operations (both family-run and industrial) and non-farming neighbours (who have typically retreated from the city to the countryside in search of sensory quietude). Her inquiry also addresses the creation of the Ontario Normal Farm Practices Protection Board, a quasi-judicial body charged with resolving such disputes, mainly through mediation. As its very name implies, though, the Board routinely normalizes such olfactory nuisances. Canadian songster Bruce Cockburn once wrote: "the trouble with normal is it always gets worse." The question is: Why? Why are rural residents deprived of the same recourses as urban residents who have, historically, been able to counter and curb olfactory and noise pollution in the city by relying on the experiential, embodied and relational understanding of offensiveness embedded in traditional nuisance

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law (Valverde 2011)? Mopas and Valverde offer many illuminating reflections on this urban/rural discrepancy in the regulation of transgressive sensory stimuli. Mopas' argument in particular pivots on the recognition that "[t]he perceptual … is *political*" (Bull et al. 2006, 6), and raises questions about the scientization of sensation (see further Parr 2010). In the case of the offensive farm smells treated by Valverde, it could be wondered whether the creation of the Normal Farm Practices Protection Board was not motivated by the imperviousness of smells to objective measurement, which poses problems for preventive regulation (Classen, Howes and Synnott 1994, 169–72). Due to a dearth of reported cases, Valverde's analysis is largely based on a single case involving a dispute over the smell given off by compost at a mushroom farming operation. It would be equally salutary to investigate the animal welfare issues which underlie the intensive animal farming practices on factory farms that also produce noxious odours (Howes and Classen 2014, 112–4).

In the final article of this special issue, Sheryl Hamilton inquires into the "legal affect and effect" of the business handshake. She begins by examining how handshakes and contracts are "co-articulated" in representations of this tactile gesture both within and without formal law. She goes on to explore how the "proper handshake" plays a role in the construction of "contract-able subjects" (as "calculable" liberal autonomous individuals) and negotiation of power relations in a peculiarly gendered fashion: "women are 'problems' for contractual personhood" (see further Hamilton 2009, chap. 3). Then, in a fascinating section on "Business Handshakes in Pandemic Culture," she delves into the problematization of "cont(r)acting hands" in post-SARS public health discourse. Concerns over contamination have destabilized the performativity of this time-honoured gesture. Business manuals now worry over its etiquette and propose hygienic alternatives, such as the fist bump or the Japanese practice of bowing. However, manual contact is so fundamental to the formation of business relationality in the West that most businesspeople persist in putting "the deal before the disease" (Hamilton 2019, 343–360). Hamilton's article opens up many critical avenues for investigation into how we have come to "sense our bodies differently" due to the "shifting *habitus of hygiene*" in contemporary pandemic culture.

Hamilton and I invited Mark Antaki to comment on the papers presented at "The Othered Senses" workshop that we co-organized in May 2018. He did so, brilliantly, and the experience inspired him to write "Le tournant sensoriel en droit," which serves as the epilogue to this issue. It is far more than an epilogue, though; it is a manifesto for sensori-legal studies in the twenty-first century, and a virtuoso exercise in sensational jurisprudence. To pick up on a line of Michel Serres (2016), author of *The Five Senses: A Philosophy of Mingled Bodies*, which nicely captures the spirit of Antaki's prolegomenon: "If a revolt [in law and legal studies] is to come, it will have to come from the five senses!" (quoted in Howes 2016, 173).

La critique sensorielle de la rationalité légale

Serres n'avait pas à l'esprit les études juridiques lorsqu'il a écrit sur la révolte des sens. Toutefois, comme l'attestent les articles de ce numéro spécial, sa remarque est particulièrement pertinente dans le champ du droit. Comme il a été argué ailleurs

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(Howes 2017, 178–80), la critique sensorielle est le début de la critique sociale – et, idéalement, de la réforme sociale et juridique. Considérons, à ce sujet, l'exposé de Marx sur la dégradation et l'aliénation des sens de la classe ouvrière sous le régime du capitalisme industriel. Dans l'usine, « les sens sont blessés autant les uns que les autres par l'élévation artificielle de la température, par l'atmosphère chargée de poussière, par le bruit assourdissant... » (Marx 1954, I, 401-2, traduction), et lorsque les ouvriers retournaient dans leurs logements situés dans les bidonvilles industriels, leurs sens continuaient à se détériorer en raison des conditions de vie sordides et les régimes alimentaires qui se restreignaient à des pommes de terre scabreuses et du gin (Marx 1987, 117). Comme Marx l'observait, la bourgeoisie ne pouvait pas non plus aspirer à une quelconque satisfaction sensorielle puisque c'était l'une des règles cardinales du capitalisme : « moins vous mangez, buvez et lisez des livres; moins vous ... chantez, peignez, faites de l'escrime, etc., plus vous économisez – plus grand devient ainsi le trésor que ni les mites et ni la poussière ne pourront dévorer – votre *capital* » (cité et discuté dans Howes 2005b, 282–4, traduction souligné dans l'original). Marx a ainsi imputé la répression des sens à « la tyrannie avilissante et oppressive des rapports de propriétés capitalistes » et a également avancé que « l'émancipation de tous les sens et les qualités de l'homme » devrait attendre l'abolition de la propriété privée sous le communisme (Marx 1987, 139, traduction).

Marx serait fort probablement consterné par la situation décrite par Charlene Elliott dans « Sensorium® ». À l'ère du « capitalisme sensoriel », comme elle l'appelle, le régime de la « Look-for advertising » vise à créer, dans l'esprit des consommateurs, des « investissements affectifs » et des associations précises par rapport à l'origine des produits, et ce, par le biais des sens sur une grande échelle. Comme elle le montre, ce régime est renforcé par les récents développements dans le droit de la propriété intellectuelle. L'« émancipation des sens » dont rêvait Marx semble ainsi plus lointain que jamais. De même, il est intéressant de conjecturer quant à la réaction qu'aurait eue Marx par rapport à la persistance de l'utilisation de la poignée de main au sein de la culture pandémique contemporaine, comme l'a expliqué Sheryl Hamilton dans « Cont(r)acting Hands ». Est-ce que les mains des capitalistes pourraient devenir propres ou resteront-elles toujours sales?

L'interrogation critique du droit de la propriété intellectuelle dans l'article d'Elliott et du discours sur la santé publique dans la contribution de Hamilton est complété par l'article « Encountering the "Muslim" » de Safiyah Rochelle, qui dépeint le régime excessif de privation sensorielle auquel sont soumis les prisonniers, ou plutôt les « détenus », du camp de Guantánamo. L'article « The Nuclear Sensorium » de John Shiga aborde, quant à lui, la colonisation des terres, des corps et des sens des peuples autochtones des Îles du Pacifique sous le régime nucléaire impérial étatsunien (Pacific Proving Grounds).

Dans l'introduction de *Sensing Law*, Sheryl Hamilton (2017, 16) souligne comment le processus de transformation de l'expérience sensorielle en « données » ou en « informations » intelligibles pour les décideurs juridiques dépend de plus en plus des notions d'expertise, de quantification et d'épistémologies scientifiques. Mike Mopas aborde la question de la quantification des sensations dans son exposé sur la pollution sonore dans les régions rurales de l'Ontario, régions dans lesquelles les résidents se sont mobilisés pour tenter d'arrêter l'installation d'éoliennes ainsi

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que dans le but de contester l'utilisation du compteur de décibels afin de trancher les différends. Son analyse s'inspire du paradigme des études sensori-juridiques proposé par Mariana Valverde dans « Seeing Like a City », qu'elle poursuit dans son article sur les nuisances olfactives, « The Law of Bad Smells ».

Christiane Wilke, à travers sa critique du recours exclusif à des preuves vidéo (du point de vue du bombardier interprété par des experts), notamment dans les cas de violences aériennes contestées qui ont été perpétrées par l'OTAN en ex-Yougoslavie et en Afghanistan, présente un puissant réquisitoire contre la médiation de la vision du droit par le biais des formes d'améliorations technologiques. Or, malgré ceci, les technologies de vision peuvent également être utilisées dans le but de contester l'application de la loi. Dans sa contribution à ce numéro spécial, Suzanne Bouclin explique comment les groupes communautaires qui travaillent pour, et avec, les sans-abri perturbent le régime scopique de la gouvernance urbaine en tournant les objectifs de leurs caméras vidéo sur les actions de la police et cherchent également à créer des « archives de rue » sur les formes novatrices d'interaction. Tous ces articles traitent de la politique du droit et montrent comment notre compréhension de la politique du droit peut être enrichie en reconnaissant que « le sensible est… *politique* » (Bull et al. 2006, 6, traduction).

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David Howes
Full Professor
Department of Sociology and Anthropology
Concordia University
Adjunct Professor
Faculty of Law
McGill University
david.howes@concordia.ca

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