

Introduction: Law and Smell

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

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

—Heraclitus, *Fragment 37*

1. Law and the Senses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

⁴ Derek McCormack, 'Geography and Abstraction: Towards an Affirmative Critique', *Progress in Human Geography* 3, no. 6 (2012): 717–18.

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

2. Smell

Smell, just like taste, manifests itself only when stimulated, making it hard to recall its effect outside that moment of direct exposure. Smells are ‘transitory, evanescent, ephemeral.’⁵ Because they are activated only when experienced, they are often perceived as impressions or internal occurrences. Their connection to emotions feels more natural: they are intangible inscriptions of memory, often invoking intimate responses⁶ in an instantaneous and momentary way. There is, however, a fundamental difference between smell and taste: while taste only arises when something from outside enters one’s body, the sense of smell is ceaselessly and uncontrollably exposed to the outside. By having air as its medium, smell crosses boundaries, walls, edifices. This is the spatiality of smell. Smell’s

⁵ ‘So our sense of smell, champion among our sensations, and our taste, excellence in culture and refinement, bestow their rare treasure together, within a shared cycle.’ Michel Serres, *The Five Senses: A Philosophy of Mingled Bodies (I)* trans. Margaret Sankey and Peter Cowley (London: Continuum, 2008), 156.

⁶ Proust in *Swann’s Way* writes: ‘But when from a long-distant past nothing subsists, after the people are dead, after the things are broken and scattered, still, alone, more fragile, but with more vitality, more unsubstantial, more persistent, more faithful, the smell and taste of things remain poised a long time, like souls, ready to remind us, waiting and hoping for their moment, amid the ruins of all the rest; and bear unfaltering, in the tiny and almost impalpable drop of their essence, the vast structure of recollection.’ Marcel Proust, *Remembrance of Things Past, Volume I* (Ware: Wordsworth Editions, 2006), 63.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁶ ‘In fact, it has only now, in postmodern consumer culture, developed its full force through all-around pleasant atmospherics within which, to take smell as our example, the odors and stench of the past linger only as texts. Yet their force is remarkable.’ Rindisbacher, 2015: 29.

meaning,¹⁷ the sense of smell and its stimulus do not have a linguistically communicable quality of their own (blue, sweet, soft, loud). Verbal transcoding is needed, therefore, for odours to be classified and contextualised. The usual way is by association to a source, an event, an object, a material:¹⁸ ‘it smells *like/as/of...*’ One constantly resorts to similes, metaphors, obliqueness. In other words, smells are always something that are not; as Plato observed, they ‘are of a half-formed nature’, without names and only ‘distinguished as pleasant and unpleasant.’¹⁹ The elusiveness of smells manifests itself in their impossibility to be categorised.

Due to their ‘half-formed nature’, Plato tells us that smells ‘always proceed from bodies that are damp, or putrefying, or liquefying, or evaporating, and are perceptible only in the intermediate state, when water is changing into air and air into water; and all of them are either vapour or mist.’²⁰ The intermediate state is confirmed by *prepositions* (‘like’/‘as’/‘of’), always *preceding* the final *position*, condition or state. If the intermediate state is a place of change, crisis and convergence (of private and public space, of the body and its environment, of various bodies in an assemblage), smell always carries in it the instability of its source.²¹ Yet, when socially integrated, a

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

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

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

²⁰ Ibid.

²¹ Harvey, 103.

smell immediately calls for some sort of order that will respond to that ‘instability’, that is to say, that will approve (and therefore normalise) or cancel out the uncertain effect.²² As such, smells expose themselves as powerful ‘ordering’ agents that affect bodies and their surroundings, while at the same time operating via a strict classificatory *order* of appropriateness, acceptability, pleasantness, and so on. This is the double normativity of smell: ordering itself in an olfactory order of categorisation, while at the same time ordering its bodies of emergence according to the very order.

Indeed, once categorised, the ‘lower’ end of the olfactory spectrum is submitted to the necessity of social purification. Unpleasant, inappropriate odours must be cleared out, and the malodorous, associated with bodies, communities and physical spaces must be sanitised, or better deodorised to allow for an ordered space to emerge.²³ As the word suggests, deodorisation is the act of removing (de-) the odour, thus becoming a form of normative organisation. Purification and cleanliness are technologies of social marginalisation through their olfactory classification and normativity. This does not only take place on the level of direct normativisation but, significantly on the level of desire. Not only does smell

²² Plato continues: ‘wherefore the varieties of smell have no name, and they have not many, or definite and simple kinds; but they are distinguished only as painful and pleasant, the one sort irritating and disturbing the whole cavity which is situated between the head and the navel, the other having a soothing influence, and restoring this same region to an agreeable and natural condition.’

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

‘inscribe’ rules of what is considered socially acceptable or proper, but consolidates the atmospherics of commodification of the order of smells that are considered proper and therefore desirable.²⁴ Although order might present itself as odourless, it is intrinsically an odorous process.

3. Smell and the Law

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

²⁴ For instance, scent (olfactory) trademarks and copyright. Controversially, the Dutch Supreme Court has held that the fragrance of a perfume qualifies as a copyright work. *Kecofa v. Lancôme*, Case C04/327HR, [2006] ECDR 26.

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

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

Anosmia is, therefore, an anathema for contemporary dispositifs of judgement. Consequently, with the rise of olfactory products such as deodorants, perfumes, aromatherapy and home scenting items, scents have gradually become a matter of production, a marketing tool.²⁷ Far from being harmed by technology and digitisation – its medium traditionally being the molecular, rather than the digital²⁸ – the olfactory has gone through a technological development, and smell has become instrumentalised into electronic noses, odour biometrics, artificial fragrances and flavours, as well as militarised smell (stink bombs).²⁹ In such a growing olfactory actualisation and demand, the sense of smell is ordering and organising society by becoming both regulatory target (towards subjects, objects and processes) and regulatory tool, performing the deodorising role needed for the space of order to emerge. As Victoria Henshaw shows in the context of the urban hygienisation process (but abounding in undertones of atmospheric engineering), particular smells are 'heavily associated with dirty, unhealthy and

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

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

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

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

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

The olfactory ordering operates on the same level as the legal ordering, yet the former's role in the latter is marginalised and elusive to pinpoint. In view of the fact that the law habitually aims at presenting itself as rational and objective, smell is one of the least integrated senses in the legal edifice, in comparison to, say, seeing and hearing. This can be attributed to various factors, one of which,

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

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

³² Henshaw, *Urban Smellscapes*, 165.

however, is that the sense-making of smell and law is different, even antithetical. Smell operates undercurrent, tickling the olfactory antennas of individual and collective bodies while habitually hiding behind other sensory volumes. Law, on the other hand, has an interest in appearing present, universal, constant. Olfactory sense-making relies on its elusiveness; legal sense-making invests in its obviousness. Yet, the two can interact in most unexpected ways, as this volume amply shows. If anything, smell exposes to view, or better, it *airs* the way in which law conceptualises and contextualises its own actuality. Smell brings law forth by allowing it to show its underbelly, its elusive sense-making that is invariably sacrificed in preference to the necessity of legal impressions of constancy. However, smell's fragmentary, discontinuous and unstable nature, despite all the ordering that goes to it, poses a peculiar challenge to the law. This volume sets out to investigate this juncture.

Smells do not remain on the surfaces. Being 'inscribed' on to the air, they penetrate. The power of smell emanates from its possibility to affect the physical, psychological and the social. We are conscious of smells, whether pleasant or unpleasant, only when they intrude into our spaces. While the sense of smell operates within its reductive signification in language, its spatiality extends beyond language. In contrast to the modern and linear view which focuses on 'privacy, discrete divisions and superficial interactions',³³ olfactory volatility allows smells to

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

cross boundaries, disrupt the apparent anosmic order, and transgress the socially and legally constructed ‘olfactory’ limits. They challenge and evade the spaces in which law operates, thus simultaneously obliterating and reinstating the boundaries between the private and the public: smell is a powerful agent not only in connecting and creating social bonds, but also in dividing spaces, groups, tribes, packs, herds. Always delivered and actualised by air, smell embodies the air’s paradoxical attribute to ‘unite and divide, empower and disempower.’³⁴ Smell challenges law’s tendency to contain and disqualify. Law excludes and incriminates the transgressive nature of smell, stench, malodour, the improper redolence disturbing the public (domain), the city, and the body.³⁵ Such divisions are not just conceptual narratives, but are materialised in the different sensorial responses that construct them. Once again, the double ordering of the olfactory is at work: law performs its role of continuously making divisions, while at the same time different cultural, habitual and spatial practices, whether individual or collective, sustain and reinforce such normative demarcations.³⁶

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

³⁴ Ibid.

³⁵ As Hyde nicely puts it: ‘law facilitates the construction and abjection of hated others whenever it permits classification and exclusion around issues of sameness or propriety.’ Alan Hyde, ‘Offensive Bodies’ in *The Smell Culture Reader*, ed. Jim Drobnick, 53.

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

Western jurisprudential and social principles: property. Free circulation of smells in the city are still ‘often blocked by objections that this would infringe on property rights.’³⁷ Hyde notes that in the nineteenth century, public baths excluded the poor, not on the premise of their status, but by using the delineation afforded by the institution of private property ‘and conceptualizing of bathing as a private privilege.’³⁸ At the basis of it all, however, remained the olfactory judgement of the undesirable, in conformity to a strict olfactory ordering. Control of perceptibility is a focal point of law’s performance. In so doing, the law serves its own conative, namely self-perpetuating and self-establishing, purposes. The law’s position is understood not only as a regulatory authority, but also as an enabler of new sensory meanings. It is along these lines that this series engages with the olfactory: not as law’s object of regulation, but as a means and medium through which the law performs, actualises, perpetuates and materialises itself.

Smell and law, therefore, share similar qualities: they both have the potential to perform the same acts of unification and division when constructing normative

³⁷ Howes and Classen, *Ways of Sensing*, 112. Classen notes that one London sanitary reformer in 1854 has put: ‘When your orders are addressed to some owner of objectionable property which is a constant source of nuisance, or disease, or death ... you will be reminded of the ‘rights of property’ and of ‘an Englishman’s inviolable claim to do as he will with his own.’ quoted from Constance Classen, ‘The Deodorized City: Battling Urban Stench in the Nineteenth Century’, in *Sense of the City: An Alternate Approach to Urbanism*, ed. Mirko Zardini (Montreal: Canadian Centre for Architecture, 2005), 296.

³⁸ Hyde, ‘Offensive Bodies’, 55.

spaces. Of course, while smell is often caused by subjective reactions, the law appears to be objective. However, by acknowledging the cultural normativity that sustains them, and by drawing on Classen et al.'s discussion on odours, both law and smells can be said to be 'invested with cultural values and employed by societies as a means of and model for defining and interacting with the world', and by that token, as simultaneously social and historical phenomena.³⁹ The sense of smell is an attribute that is learned and assimilated through memory, informing one's identity/culture. The normative becomes actualised, or recognised in the moment it is inhaled.

In fact, the process of inhaling is a protective device: smell is 'a sensor for self-preservation against potentially harmful substances in the atmosphere'.⁴⁰ It alarms against an intrusive and potentially noxious environment, and calls for an intervention by the censor to block and clear the air of pollution. Law expands this function to the social, translating what once was one's own private and intimate space (of waste and body odours) into a matter of public moral and public policy.⁴¹ At the same time, smell is also 'a hedonic agent for the enjoyment of fragrances',⁴² another function it shares with law. By indulging smell, refraining from resisting to its allure of instability, we overcome its immunological function,

³⁹ Classen et al. *Aroma*, 3.

⁴⁰ Engen, *Odor Sensation and Memory*, 2.

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

⁴² Engen, *Odor Sensation and Memory*, 2.

becoming fully exposed and permeable to its penetration. There is a masochistic pleasure in letting oneself being penetrated by smell, in becoming-smell, vulnerable to its unpredictable whiffs, just as there is a masochistic pleasure in letting oneself being penetrated by law, as Leopold Sacher-Masoch does, abandoning oneself to its formal harmony, transforming its punitive mechanism into a device for hedonistic enjoyment.⁴³

Finally, Howes and Classen observe that ‘the least amenable to informing perceptions of justice is smell. This is because in the modern West we tend to associate smell with intuition, ephemerality and idiosyncratic personal memories.’⁴⁴ However, for pre-modern societies the sense of smell was often considered the sense to ‘perceive essential truths’: the real judgement moment in which one could ‘ascertain the true state of affairs.’⁴⁵ As Isaiah utters, the Messiah will judge people by his sense of smell:

And by smelling in awe of the Lord.
and not with his eyes see will judge.
and not by what his ears hear will he decide.⁴⁶

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

⁴⁴ Howes and Classen, *Ways of Sensing*, 96.

⁴⁵ Ibid.

⁴⁶ Ibid., 93, Isaiah 11.3. A similar reference is found in the Babylonian Talmud, concerning the Bar Koziba, leader of the Jewish revolt against the Romans in the second century claiming to be the messiah. ‘Bar Koziba ruled for two and one-half years and said to the rabbis, “I am the messiah.” they said to him, “Of the messiah it is written that he smells and judges. Let us see if he can do so.” When they saw that he was unable to judge by scent, they killed him.’ Ibid, 96, quoting Green, *The Aroma of Righteousness*, 246, n106.

Continuing from the opening fragment by Heraclitus, while the smoke appears imperceptible to the eyes because of its uniformity, it is the sense of smell that is capable to differentiate. Hence its inherent paradox: ‘were one to accept uncritically the ‘evidence’ of the one, the world is a unity; of the other, a diversity; when the truth of the matter is that for Heraclitus the world is *both*.⁴⁷ Smell as intrusive ordering, pre-conscious differentiator, insidious commodicator, undercurrent streamer of desire; yet, at the same time, smell as pure desire, promise of oneness, dream of final justice.

In Patrícia Branco and Richard Mohr’s chapter, *Odore di Napoli: Normativity from Objects and Smells*, cities are smellscapes par excellence where the spatiality of odours is never casual. Branco and Mohr focus on the city of Naples as a smellscape in which the materiality of everyday experience brims with different olfactory markers and symbols.⁴⁸ They question the rules and regularities of the olfactory legal environment of Naples by looking into the encounters experienced within the city, and by examining the rules and (ir)regularities in the environment.

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

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

⁴⁸ Henshaw, *Urban Smellscapes*.

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

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

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

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

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

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

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

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

For Sarah Marusek, smell is an instance of transformation from one state to another. Her contribution explores the spatial overlap of law and smells and the active role of the law in the production of 'reasonable' smells. She suggests that culturally determined norms stimulate inequality by constructing narratives of acceptance and refusal (nuisance and reasonableness). This reveals that law is not neutral but contingent on cultural normativity, using smell as a sensory marker to manifest its power and authority. Marusek's notion of olfactory jurisprudence is then an alternative approach to a traditional understanding of jurisprudence.

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

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

References

- Bently, Lionel and Leo Flynn, eds. *Law and the Senses: Sensational Jurisprudence*. London: Pluto Press, 1996.
- Chalmers, Alan. 'Level of Realism: Feel, Smell, and Taste in Virtual Environments'. In *The Oxford Handbook of Virtuality*, edited by Mark Grimshaw. New York: Oxford University Press, 2014.
- Classen, Constance et al. *Aroma: The Cultural History of Smell*. New York: Routledge, 1994.
- Deleuze, Gilles. *Masochism: Coldness and Cruelty & Venus in Furs*. New York: Zone Books, 1991.
- Douglas, Mary. *Purity and Danger: An Analysis of Concepts of Pollution and Taboo*. London: Routledge, 2002 [1966].
- Drobnick, Jim. 'Introduction: Olfacocentrism'. In *The Smell Culture Reader*, edited by Jim Drobnick. Oxford: Berg, 2006.
- Engen, Trygg. *Odor Sensation and Memory*. New York: Praeger, 1991.
- Green, Deborah. *The Aroma of Righteousness: Scent and Seduction in Rabbinic Life and Literature*. University Park: Pennsylvania State University Press, 2011.
- Hamilton, Sheryl et al., eds. *Sensing Law*. Abingdon: Routledge, 2017.
- Harvey, Susan Ashbrook. *Scenting Salvation: Ancient Christianity and the Olfactory Imagination*. Berkeley: University of California Press, 2006.
- Henshaw, Victoria. *Urban Smellscapes: Understanding and Designing City Smell Environments*. New York: Routledge, 2014.
- Heraclitus. 'Fragments': *A Text and Translation with a Commentary*. Edited and translated by T.M. Robinson. Toronto: University of Toronto Press, 2003 [1983].
- Hibbitts, Bernard J. 'Coming to Our Senses: Communication and Legal Expression in Performance Cultures', *Emory Law Journal* 41, no. 4 (1992).
- Howes, David. 'Law and the Regulation of the Senses: Explorations in Sensori-Legal Studies', Centre for Sensory Studies, <http://www.centreforsensorystudies.org/related-interest>

- /law-and-the-regulation-of-the-senses-explorations-in-sensori-legal-studies
- Howes, David and Constance Classen. *Ways of Sensing: Understanding the Senses in Society*. New York: Routledge, 2014.
- Hyde, Alan. 'Offensive Bodies.' In *The Smell Culture Reader*, edited by Jim Drobnick. Oxford: Berg, 2006.
- Kettler, Andrew. *The Smell of Slavery: Olfactory Racism and the Atlantic World*. Cambridge: Cambridge University Press, 2020.
- Laporte, Dominique. *History of Shit*. Massachusetts: MIT Press, 2000.
- Lytard, Jean-Francois. *Libidinal Economy*. Translated by Iain Hamilton Grant. London: Athlone Press, 1993.
- Marinucci, Lorenzo. 'Structures of Breathing: East Asian Contributions to a Phenomenology of Embodiment', *Studi di Estetica* 2/2017, 99–116.
- Martin, Bronwen and Felizitas Ringham, eds. *Sense and Scent: An Exploration of Olfactory Meaning*. Dublin: Philomel, 2003.
- McCormack, Derek. 'Geography and Abstraction: Towards an Affirmative Critique', *Progress in Human Geography* 3, no. 6 (2012).
- Philippopoulos-Mihalopoulos, Andreas. 'Atmospheres of Law: Senses, Affects, Lawscapes.' *Emotion, Space and Society* 7 (2013): 35–44.
- Philippopoulos-Mihalopoulos, Andreas. 'Ontological Anosmia', *Rivista di Estetica*, Special Issue *The Senses of Smell: Scents, Odors and Aromatic Spaces* 78 (2021).
- Plato. *Timeus*. Available at: <http://www.gutenberg.org/files/1572/1572-h/1572-h.htm>
- Proust, Marcel. *Remembrance of Things Past, Volume I*. Ware: Wordsworth Editions, 2006.
- Reinarz, Jonathan. *Past Scents: Historical Perspectives on Smell*. Chicago: University of Illinois, 2014.
- Rindisbacher, Hans J. 'When the Stink Begins to Rise: Nazi Smellscapes.' In *Non Liqueur: The Westminster Online Working Papers Series, Law and the Senses Series: The Smell Issue*,

- edited by Danilo Mandic et al. London: The Westminster Law & Theory Lab, 2015.
- Serres, Michel. *The Five Senses: A Philosophy of Mingled Bodies (I)*. London: Continuum, 2008.
- Stevenson, Richard J. 'The Forgotten Sense.' In *The Multisensory Museum: Cross-Disciplinary Perspectives on Touch, Sound, Smell, Memory, and Space*, edited by Nina Levent and Alvaro Pascual-Leone. Plymouth: Rowman & Littlefield, 2014.
- Yoo, Joanne. 'Tracing the Immaterial Spaces of You.' *Qualitative Inquiry* 1–6 (2020). <https://doi.org/10.1177/1077800419898485>; journals.sagepub.com/home/qix