

**OF PUBLIC SPACE: SEX AND MERCY**

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Welcome to our new refereed journal, *Public Space: the Journal of Law and Social Justice*, which is being launched as part of the 30th year celebrations of the Faculty of Law of the University of Technology, Sydney through UTSePress.

The concept of public space is almost boundless. At its most simple, public space may conjure images of Romans disclaiming and, if this journal does no more than provide a forum for diverse views then it will be of some value. But we think public space is much more than this.

Public space is a site of regulation, contestation, and an invitation to transgression. It is a space in which we show off, bend the rules, or try to enforce them. It is a site of inclusion and exclusion, of differences and reconciliations. It is a place for discussion. Most of all, public space holds the promise of a community in the best Kantian sense – a *sensus communis* where the very act of speaking for or of the other bears witness to our (indeterminate) concept of the community and our openness to judgement. This willingness to judge and be judged in a public space is one of the great gifts and challenges of academic life.

It might be thought that there are already more than enough law journals but we believe *Public Space* provides something quite different. First, *Public Space* is a multi media forum which allows authors to explore new ways of thinking about and presenting their ideas. In this edition Welby Ing's fascinating, often humorous, exploration of the intersections between law, architecture and language in the story of same sex encounters in public toilets, is enriched and illuminated by his use of audio files, video, photographs and text (including poetry). In 'A Convenient Exchange' we

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see the ‘cottages’, we hear the language, and we watch the oral history participants as their story unfolds. Such layering of meaning is the very stuff of academic discourse.

Secondly, *Public Space* is not restricted to traditional legal analysis or legal commentators. Our sub heading, *The Journal of Law and Social Justice* is wide enough to encompass a broad range of discursive practices. Most importantly, the reference to social justice is meant to transcend time and ideology. Although for some readers, the term social justice will always retain a certain whiff of seventies dagginess, of norms and precepts, we hope that for many more the very idea of social justice remains an ever present challenge to thought.

Finally, *Public Space* contains both refereed and non refereed material. Our non refereed section, Open Space, is designed to allow publication of a wider range of material including responses to published articles, reviews, references to upcoming events, reports on past conferences as well as materials which may challenge or exceed the bounds of academic discourse. Open Space is reader driven and readers are invited to submit materials specifically identified for publication in Open Space.

Our first edition of *Public Space* is devoted to the intersections of law, sex and mercy. It is not the well trod path of the public-private dichotomy which led us to this choice (although anyone reading these articles will be led to think about this), nor was it the desire to engage specifically with law and emotion studies (although law and emotion studies play a significant role in this edition). Rather, it was the desire to engage with an ongoing public discussion, in a way which did not reproduce the culture of opinion and opinion pieces, which led us to sex and mercy.

Whether it be the perceived leniency of sentences for sex crimes; sex and the clergy; the outing of child sex offenders; or town planning and brothels – today the public discussion of law, sex and mercy has been loud and steady but strangely circumscribed. What can and can’t be said, the part to be played by each participant, and the denouement appear to be as carefully scripted as any morality play.<sup>2</sup>

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<sup>2</sup> Although, as the Federal Government’s recent intervention in the Northern Territory’s child abuse allegations shows us, there can be some plot twists.

The authors in this edition of *Public Space* do not seek to capture this discussion, nor do they pretend that they can ignore the conventions of the morality play. Rather each author, in turn, provides a thoughtful and thought provoking intervention into the endlessly fascinating discussion of sex and mercy in such a way as to subtly re-shape it.

The first two articles, Penny Crofts' 'Brothels and Disorderly Acts' and Welby Ing's 'A Convenient Exchange', examine the language of brothels and bogs to show how language, law and public space intersect in surprising ways to organise our very understanding of sex and place. Croft draws on Mary Douglas' seminal work, *Purity and Danger: An Analysis of the Concepts of Pollution and Taboo*, together with the words of local councillors, public protesters, the Courts and even the legislation itself to demonstrate that the continuing restrictive treatment of brothels, despite a decade of legalisation, can be understood as a desire to impose order on the disorderly, to deal with 'matter out of place' and to regulate taboo.

Ing, on the other hand, traces one hundred years of law reform, public toilet design and 'bogspeak' in New Zealand to tell a story of an 'extraordinary process of criminalised ritual' which operates and adapts 'just under the surface of the New Zealand urban landscape'. From euphemism ('tearooms' and 'gardening') to self-denigrating parody ('bog queens' and 'fruit bowl'), overt hostility ('shaker', 'urinal sniffer' and 'filth' for the police), to the truncations of mobile phones and online cruising (ct/hung 2bg 4de gloryhle), the 'almost inaudible voices' of the men who have cruised public toilets over time emerge to bring life to a tale of law, architecture and life.

The next two articles, Lesley Townsley's 'Conceal or Reveal? The Role of Law in Black Collar Crime' and Prue Vines' 'The Power of Apology: Mercy, Forgiveness or Corrective Justice in the Civil Liability Arena?' take us close to the border between law and personal responsibility, between mercy and forgiveness. Townsley considers the concealment by clergy members and churches of child sexual abuse perpetrated by other clergy members. She suggests that the state plays a role in this insofar as it provides both a possible exemption from prosecution for concealment of a crime by members of the clergy and a privilege based on religious confession. She seeks to

destabilise the accepted justifications for both the exemption and the privilege by exposing their shaky foundations based on history, freedom of religion and spiritual considerations. The history, she shows us, is not settled; the concept of freedom of religion is misapplied; and the role of spiritual considerations in determining the law in a secular society is questionable.

Vines too shakes the foundational assumptions of certain laws, but in this case it is the 'recent rash of apology-protecting legislation' relating to tort law. She examines the nature of an apology, its role in civil society and the impact of the attempt to bring apology within the realm of (negligent) liability. She concludes that the new legislation may have both unexpected legal effects and wider, unexplored social effects. There is nothing simple, one must conclude, about saying you are sorry.

The final two articles, Joseph Azize's 'The Prerogative of Mercy in New South Wales' and Costa Avgoustinos' 'The Compassionate Judge' turn to the question of judgement but in two very different ways.

Azize takes the reader on a journey through the thickets of black letter law to demonstrate that the prerogative of mercy is in danger of being displaced by the extraordinary avenue of appeal established by Part 7 of the *Crimes (Appeals and Review) Act 2001* (NSW). He uncovers the tensions and assumptions which have caused the Crown to shy away from the exercise of mercy and to channel any plea back into the courts. At the same time he demonstrates that there are very real limits on the ability of the courts to effectively deal with such pleas and no power in the courts to grant a pardon. This does, and must, remain with the Crown. Azize concludes that reform of the legislation is necessary to clarify the role of the Crown in exercising the prerogative and to ensure 'that the power is more frequently evoked in deserving cases'.

Finally, Costa Avgoustinos' lyrical meditation on compassion takes the reader to the very heart of legal judgement. Drawing on the work of law and emotion scholars, literature and case law Avgoustinos argues compellingly that compassion is not peripheral to good judgement but constitutive of it. To the extent that compassion allows the judge to appreciate the difference and distance between the judge and the

person being judged, compassion makes good judgement possible. Compassion, he argues, serves the judge in ‘specific and pragmatic’ ways to render judgement more transparent and open.

With these six articles we welcome you to *Public Space*. We hope that you will not only read and enjoy, but will be encouraged to take up your pen, digital recorder or tape to contribute to our journal in the future.