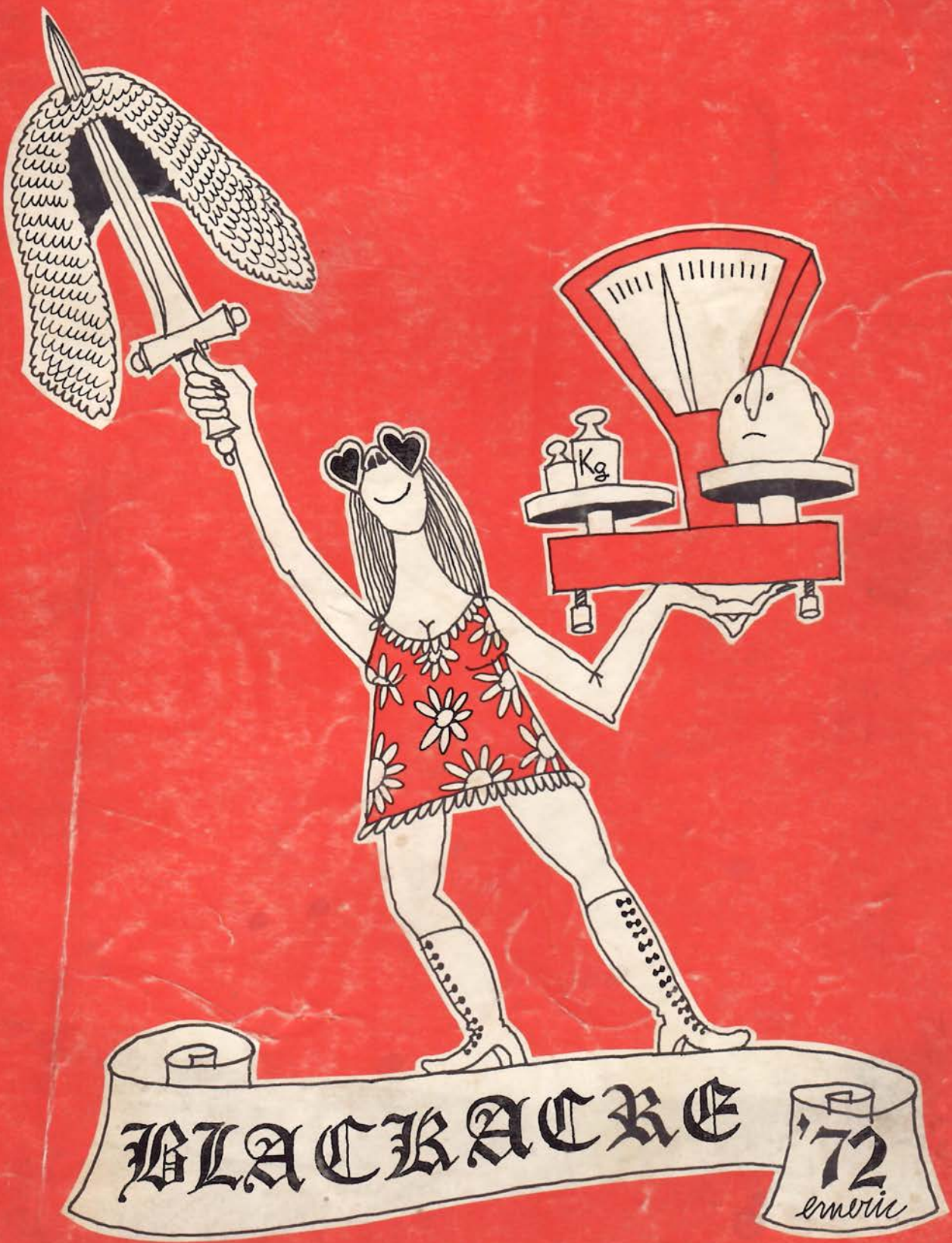
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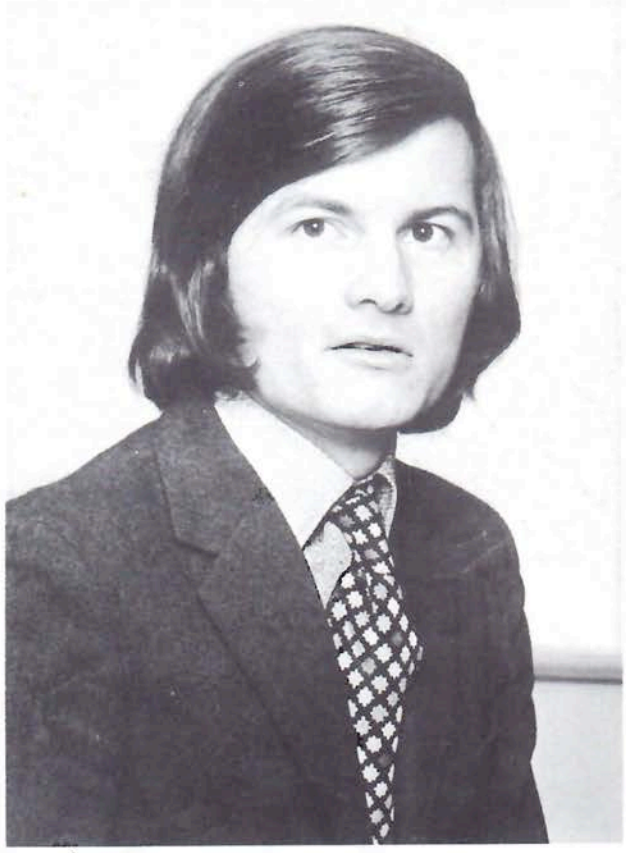

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The Journal of Sydney University Law Society

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Editorial

Law schools like governments must change. Renewal and a fresh assessment of direction come with any new administration and antiquity does not guarantee survival.

Since *Blackacre* was last published in 1970, another Law School has taken root in this City – at the University of New South Wales. For the first time there is competition and the monopoly held by the University of Sydney is ended.

While our Law School has developed an elaborate apparatus for producing graduates, Kensington analyses the role of Law and its practitioners.

The U.N.S.W. recruiting brochure asks "What will the world be like in the early years of the twenty-first century, when today's students will be Community leaders? Lawyers will have a big responsibility in shaping that world, and ensuring that social institutions work intelligently and efficiently, respecting justice and individual liberty while finding solutions to the enormous problems of complex, affluent, technological societies."

Perhaps in ten years this recognition of challenge and spirit of adventure will disappear. But it is there now and not at Sydney.

Some Sydney courses have recognised that students can add to an educational system. A large percentage of Law students come to Law School with a B.A. or B.Ec. They have shown acceptable familiarity with exam technique and have begun to develop some research capacity. The latter is largely ignored while the exam technique develops into a hit-or-miss November syndrome.

Consistent work for the nine-month academic year is often ignored in the three hour judgement day in November. Tipping ability for exams is perhaps the greatest talent for recent graduates – not missionary zeal to rationalise the rules of Evidence, to bolster the Companies Act, or to tidy up Succession.

There is little emphasis on law reform at Sydney University Law School. A pre-condition of reform is knowledge of the problems. Our law course relies heavily on posing problems. But what of the legal issue? What ought the law dictate? The Sydney rule: Find out later.

"And indeed there will be time
To wonder, 'Do I dare?' and, 'Do I dare?'
Time to turn back and descend the stair,
With a bald spot in the middle of my hair."

A few exceptions stand out. Who ought to win is frequently considered in Commercial Law. Jurisprudence is moving towards all-essay assessment – like the new Law and Social Justice course which has appealed to the students who have done it as the most stimulating course at Law School. Administrative Law is another early antidote for Novemberitis.

Lecturers, it is often heard, do not have time to correct assignments during the year. But fortunately, students always have time next year to do the subject again. And so exam success may depend on whether a student's name begins with B or T (whether he gets a do-it-yourself or write-this-down lecturer); whether he noted the *special* intonation of "Now, this is important"; or, whether he was shrewd enough to get a medical certificate in September for the removal of his bunion which he picked up from his ski boots.

Some universities, notably Adelaide, like to be rid of their students in the fastest possible time and recognise that different students prepare for exams at different times. Deferred exams are more readily obtainable and tend to keep students on the move. Without lowering their academic standard, they simply have two Novembers every year and this is why there is twice the number of happy Law students in South Australia.

At Sydney, November comes but once a year. Anyone who does not pass must pay $400 and return to GO. This ensures that there is a significant percentage of experienced students to frighten the new students into studying each October (starting after the long weekend). Increased availability of deferred exams would free the Student Health Service for other duties in Michaelmas Term.

One day it will be different. Any exam system has its limitations, but mutual contempt is the only feeling which could explain annual exams of down to one hour's duration. Both staff and students are thereby seeking the minimum amount of work and in fact achieve minimum output.

Staff-student ratio and the exam system have been traditional grievances, but what is needed now at Law School is soul and a sense of direction. Let it teach not just what the laws are, but what Law ought to be.

the polls in November and thus the chances of repeal of the National Service legislation? Should he give himself up next time rather than continue his civil disobedience?

Footnotes

1. R. Martin, "Civil Disobedience," *Ethics*, Vol. 80 (1970), p.123.
2. J. Ladd, "Law and Morality: Internalism vs Externalism," in S.Hook (ed.) *Law and Philosophy*, N.Y. University Press, 1964, p.72.
3. H.L.A. Hart, "Positivism and the Separation of Law and Morals" (1958) *71 Harvard Law Review*, p.618.
4. Ibid, p.619, quoting from the Court's judgment.
5. G. Molnar, "Democracy and Dissent," *Union Recorder*, June 11, 1969, Vol. 49, No. 10, p.3
6. J. Rawls, "Legal Obligation and the Duty of Fair Play" in S. Hook, *op. cit.*, p.3 and "The Justification of Civil Disobedience" in H.A. Bedan (ed.) *Civil Disobedience, Theory and Practice*, N.Y. 1969, p.154.
7. J. Rawls, "Two Concepts of Rules" in P. Foot (ed.) *Theories of Ethics*, Oxford University Press, 1968, p.144
8. Editorial, *Blackacre* (Sydney University Law Society), 1970.

Law, Violence and Conscience

Upendra Baxi

Psychoanalysis, and recently ethology, have repeatedly tried to teach us that man is a violent *animal*. Only imperfectly understanding this truth, moralists have continually urged that *all* men ought to refrain from violence; and the political theorists have sought to educate us about the virtues of centralized monopoly of force by state and the evils of anarchism. Only the psychoanalyst and the ethologist offer us the facts; the rest proffer value assertions. But, as too often happens, we trade-in our facts for value judgements.

Because violence is "evil" its manifestations are exorcised rather than studied. Many of us feel relieved from the scientific responsibility of carefully elucidating the concept of violence. So also many of us secure a deliverance from the scientific duty to attempt to demonstrate rather than merely assert that violence will make things worse. All too often visions or obsessions of the collapse of "law and order", of societal disintegration are projected as consequences of permitted "private" violence. Personal nightmares of many decent and educated human beings then become indisputable political axioms. Every effort to think free of these axioms is to risk being regarded as either a fool or a knave.

Honesty compels less easy paths. Even if violence is evil, we must begin by an attempt to understand it, even as we attempt to regulate or banish it from the human scene, if for no other reason than that better understanding must help us in this enterprise. Violence, let us say, is taken to be the intentional use of physical force by one human being over other human beings or property. Certainly, not all such uses of force are condemned by all those who condemn violence. Those who condemn maiming by gangsters often see no evil in child-beating. People horrified by a street corner brawl elatedly watch the Frazier-Clay fight. Radio-Libs who protest against the massacre of defenceless children at My Lai do not shudder at the *idea* of abortion. Many a good catholic accepts with good grace the news of the *communists* who get killed in Indo-China.

In all these activities violence is involved; only our responses to it vary, and so our justifictions for these responses. We are generally saying *not* that violence we personally approve is therefore justified but that institutionalized violence is. To say that something is institutionalized means at least that a pattern of behaviour has persisted over time and that in some manner the overall pattern of behaviour has the moral approval at least of persons involved in so behaving. Thus, child-beating. Frazier-Clay fight, war are institutionalized social practices; gangster-maiming, street-corner brawl, abortion are not.

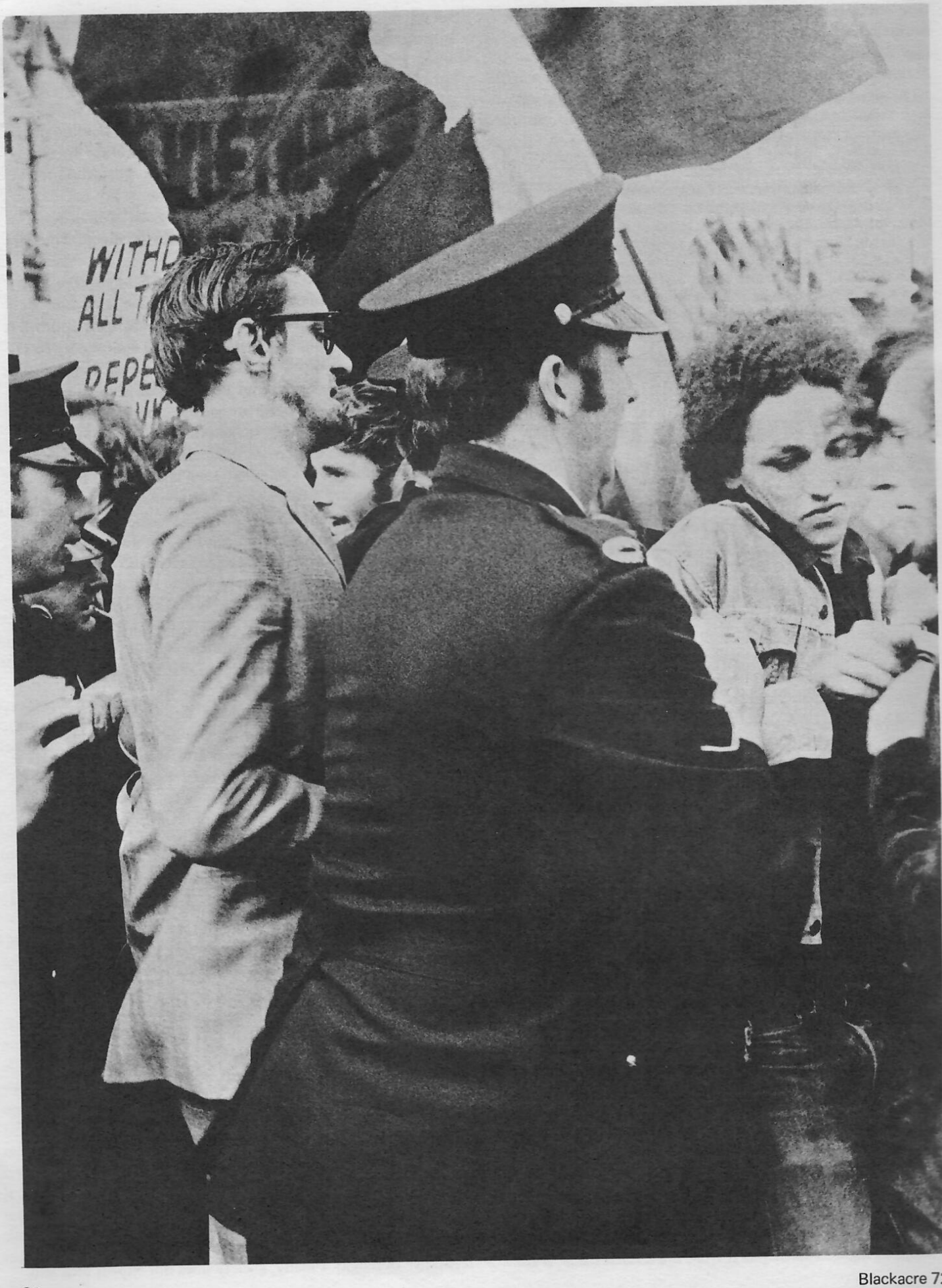
There are many difficulties in thus arguing. For when we say that the above sorts of behavioural violence patterns are institutionalized, and therefore justified, we do not quite mean this. Clearly, if all gangsters, brawlers and abortionists (and all involved in the range of these activities) persist in their behaviour with a feeling of moral approval of their actions, most of us will still want to regard these instances of violent behaviour unjustifiable. We would now have to say that certain types of institutionalized violence are justified, say, in sport or in war.

Now to say that X is justified and Y is not is at least to say that there are good reasons for doing X which are not present in the doing of the Y. What are, let us ask, good reasons for saying that the violence of John Snow's bouncers is justified whereas of a Hyde Park hoodlum is not? That's easy, you would say. Please try it out.

To say that cricket is an organized social activity in which the scale of violence is restricted by the rules and objectives of the game is to invite a parallel formulation for our Hyde Park hoodlum. His activities, too, are socially organized (both as far as the hoodlums and the police are concerned) and directed to the objectives of sexual or monetary gratification. The latter, unless the hoodlum is insane, also restrict the scale of violence involved in his activities.

But this comparison, you will be quick to say, is absurd. The violence of John Snow's bouncers is both socially approved as incidental to the game of cricket and limited in scope. If Snow bowled nothing but bouncers, the rules of cricket may require him to be taken off the field upon direction by the Umpire. And certainly batsmen *are* expected to deal with occasional bouncers, failing which the resulting injury, however regrettable, is to be borne for the good of the game.

All these features are absent in the activities of a Hyde Park hoodlum. The violence he uses is not socially approved. It is not incidental to the accomplishment of his objectives. Nor is his violence necessarily contained in scope by rules or regulative oversight. Finally, society does not expect men and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women relaxing in Hyde Park to be objects of monetary or sexual gratification by strangers without their consent and against their will.

Accordingly, although both cricket and hoodlum's activities are institutionalized, the differences between them lies in the underlying values served by both these activities, and the presence of norms restraining the scope of violence involved. When the underlying values can be ascribed to society in general, rather than to specific groupings within it, violence thus institutionalized is permissible. Most often, but *not* always, such permissible violence is recognized as *lawful*. But uses of force which do not serve values which can be ascribed to society as a whole and which are not carefully regulated are proscribed through law.

A prime function of law (in its cultural as well as social aspects) is to establish, maintain and justify distinctions between permissible and proscribed use of force in social relations. Force is permitted when the legal system delegates the discretion to use force by specific entities in specified circumstances. Thus, an individual acting in self-defence is using force permitted by, and on behalf of, the legal system; so is a magistrate refusing bail to the accused or sentencing a convicted felon to imprisonment. But a bank robber extorting money from a terrified teller or a demonstrator obstructing traffic at peak hours is using force neither permitted nor justified by the legal norms.

The intervention of legal norms provides one way of describing violence. Violence is the antithesis of the law. This antithesis contributes to a very low social visibility of the coercive aspect of the law. Because routinized administration of force through the legal system is not perceived as violence, legally permitted use of force does not even appear to us as use of force at all. One says normally that X, a convicted felon, has been sentenced to imprisonment of hard labour for five years, *not* that the magistrate has for a period of five years authorised prison officials to use force to keep the felon behind bars. One likewise normally says that the magistrate refuse bail to Y; *not* that the accused has been subjected to coercive processes affecting his freedom of movement for a specified period. Of course to say that X is sentenced to imprisonment or that Y has been refused bail is to express in a shorthand manner that coercive processes have been set in motion. The trouble, however, with these shorthand descriptions is that they enable the element of actual coercion in social relationships to be increasingly overlooked. Because coercion is justified by law, because it can be described in normative or non-behavioural terms, use of force appears the least significant aspect of a decision precisely authorizing such use.

On the other hand, there are no corresponding shorthand descriptions blunting, minimizing or obscuring the use of force not permitted at law. What is socially *most* visible about the activities of a bank-robber, a thief, or a demonstrator blocking traffic is his use of force contrary to law. Descriptions of the bank-robbers' activities, do not customarily suggest that his activities were directed towards the well-being of his family or of his creditors, even if this in fact were the case. Even when a demonstrator's objectives are well publicized, the "violent" nature of his activities can by no means be rendered as invisible as in the case of a magistrate refusing the bail.

Legal systems thus more or less appropriate unto themselves the domain of legitimate force in society. This appropriation function is among the key functions of law in society. But because law appropriates force, it also accustoms us to its exercise according to legally ordained procedures. We think of and fool the legal application of force in purely normative rather than existential or behavioural terms. Above all, and here lies *the* danger, the institutionalization and routinization of force reinforces continually the authority of the law, to a point where the mere existence of a legal rule proscribing become self-justifying. The real question is thus very often overlooked: what are the good reasons for the legal system's further appropriation of force?

Clearly, the legal boundaries between permissible and proscribed use of force are by no means immutable. And the fluctuation of the boundaries, a historical process, by no means follows a preordained path delineated by the Divine or human reason. Ultimately, the decision to appropriate force is a political decision. In other words, it is a decision generated by the processes through which power-wielders seek to maintain or maximize their power. Such decisions no doubt are in a way oriented to the "common good"; but it is the calculus of power which predominates. Law, as Rudolph von Ihering presciently stated "evolves as the politics of force."

It is notorious that political power cannot be wielded by those disinclined to compromise or inclined to reject, in most matters, expedient solutions in favour of principled ones. Thus it happens that very often precisely when community welfare requires the legislature to regulate and proscribe certain behaviour patterns it finds itself unable to act. And likewise statutes proscribing certain behaviour patterns symbolize the values held by dominant groups in society, for example laws against homosexuality, prostitution.

The socio-ethical convictions which transpersonalize power or give legitimacy to it are almost always convictions held by the majority groups in society. In modern democracies might *per se* is not right; rather the legislative *voting* might is right. And this legislative voting might is more a function of party loyalties and party discipline (including the Whip) than of continuing confrontation by individual legislator with the moral rightness of the law's further approriation of force unto itself. To describe political processes in this manner is not necessarily to impeach the integrity of politicians or legislators. Such description rather indicates that the political framework imposes very substantial constraints on the scope of moral deliberation, a pre-requisite for the extention of the law's domain of force. Law, to this extent, becomes and remains an instrument of political power.

Most contemporary analysis of alienation, conscience and the law narrowly focus on one select aspect of the legal process. They, for example, seek answers to the questions. Ought we allow an individual to disobey the law with immunity in the name of conscience? Can violence produced by alienation be tolerated by the law? They posit law as given datum and organize thought and analysis around it. And in so doing they tend to exploit (inadvertently or otherwise) the symbolic potential of the law as a preserver of social peace, security and welfare.

But this relegation of conscience to the obedience phase

of the legal process is an indirect and unsatisfactory way of approaching the broader question of the relevance of conscience to political and legal decision-making. For, a given legal rule is a product of the law-making process; and that process in turn is a part of an ongoing political system. The focus on the role of conscience at the obedience stage presupposes answers to questions which have not even been asked about its like role at the stages of formulation, enactment and enforcement of laws.

Of course, the question of relevancy of conscience arises only on certain approaches. As with the concept of a Supreme Being, so in relation to conscience one may either be a believer or a disbeliever or an agnostic. And the concept of conscience, like that of a Supreme Being, remains fundamentally "unsayable" on any of these approaches. For sceptics who doubt or cynics who denigrate conscience, no question of its relevance to legal or political processes arises. The relevancy question remains important only for the believer and the agnostic.

This paper does not seek to explore a whole range of issues that may arise in a proper assessment of the relevance of conscience to all aspects of legal process. But it must be indicated that the decision to make or not to make law proscribing a particular behaviour is *psychologically* more open to conscientious moral deliberation than a decision whether or not to obey a given legal rule. For an authoritative rule of law in the latter situation brings with it the emotive and symbolic aspects of law, which very often complicate such deliberation. And yet it is a curious feature of majoritarian representative democracy that precisely at a point where moral deliberation is *not* thus complicated that it is least encouraged or undertaken.

Those who assert decisive relevance of conscience over laws at the obedience phase ought also to advance thought about reform of decision-making structures with a view to making them more responsive to claims of individual conscience. This, however, would mean questioning the rules of the political game such as party discipline, or the power of a Party Whip. And thoughtful suggestions along these lines could scarcely stop short of a fundamental restructuring of the political system.

A Slice of Cheesecake

John Sackar

The Problem:

Censorship of sexual material is one of those topics that traditionally finds its way into most University Orientation Week forums. It has joined its other contemporaries such as conscription, abortion reform and drugs in the stockpile of debatable, thoroughly emotional social issues. However, apart from the philosophical discussion of sexual censorship, commercially sex has become a force to be reckoned with in most countries of the world. As well as its influence on commerce, politics in Australia have taken on a schizophrenic trend. The Federal Government is apparently trying to liberalise their attitudes on erotica, whilst many State Governments work furiously to firmly oppose these attempts. Together with books and films, visual erotica has become more available to Australians.

On any newsstand an array of sensual colour is available for those who desire it. Many view the availability of such materials as just another step towards what they consider to be the inevitable social decay brought about as a natural consequence of permissiveness. Most of the visual erotic material is produced predominantly for the male population. The recurrent theme; nudity. The aim; to appeal to human sexual fantasies.

Internationally sex is a multi-million dollar industry. For example, in the United States alone, in 1969 *Playboy*, probably one of the best known of such magazines, sold just under 64 million copies and had retail dollar sales of over 65 million dollars.

Australian production cannot, of course, rival this, but, nevertheless, sales of similar materials indicate its commercial success. For example, last year *Man* an Australian publication comparable to *Playboy* sold 81,000 copies. Taken on a pro rata basis, it would appear that this publication has the same community penetration as its American counterpart.

Many reasons have been submitted to try and stifle local production and importation of visual erotic materials. Some members of the community label all such items as pornography and see the lifting of existing legislative restrictions as inviting increased rate in sexual crimes, corruption and generally unfavourable sexual activity. In short, the community is frightened that the lowering of restrictive barriers will make their children objects of liberated perverts, and, perhaps, the decay of society itself.

Because this is such an emotional issue, the element of common sense is frequently precluded. Also the area is fraught with difficulty in definition. Not only is there confusion as to what "obscene" means, but writers cannot yet decide whether to label such material as pornography or erotic realism.

The reason for difficulties in definition depend on sociological trends because subject matter of the material condemned as pornographic or obscene, varies from society to society and within a society from time-to-time. For example, in *Brennan v. Walker (1885) 6 L.R. (N.S.W.) 276* literature advocating contraception was found to be obscene. Today the inoffensiveness of such literature cannot be seriously questioned.

One of the main difficulties the Courts have faced in the area of visual erotica is the question: when does a photograph of a nude human body become obscene?

The Courts have rarely attempted to formulate the criteria which distinguishes acceptable from non-acceptable nudity. However, some judges have indeed made such an attempt.

In the American decision of *Sunshine Book Company v. Summerfield (1955) 128 F. Supp. 564* Judge Kirkland of the