



- Editor's Comments -

Welcome to the 'new look' *Dialogue e-Journal*, the first issue of Volume Six.

The editorial team has sought to revamp the journal by giving it a new logo and cover design. We are also aiming to run a number of themed issues or Special Editions this year, in addition to our general publications.

Volume Six, Issue One fields an eclectic group of papers from practical, theoretical and legal perspectives.

To begin, Dialogue 6:1 features "*The Great Rock n' Roll Firesale: The Politics of Popular Music Production and Consumption*" by Trajce Cvetkovski. This article, based on his book *The Political Economy of the Music Industry* explores the challenges facing the major firms of the music industry. With the rise of universally accessible digital technologies, serious questions have been raised about the future of the industry's organisational structure in terms of both commodification and consumption. It finds that the profits (and exploitation methods) of those major firms who control 80% of the global popular music industry is a thing of the past. Cvetkovski argues that it is the interconnection between illegitimate and legitimate technologies that are causing a multi-dimensional shift in the organisation of the music industry.

The second article, by Matthew John-Paul Tan entitled "*Numino-Political Analysis*", examines the question of theology and social scientific research. In particular, it studies the logic of religious actors and argues that the limitations of orthodox methods in the social sciences prematurely exclude the legitimacy of theological variables. Moreover, the paper highlights how postmodern approaches and even some models that take seriously the notion of a transcendent order, fail to fully engage with theological concerns and fall back onto the traditional or orthodox methodologies of the social sciences. The paper argues that Radical Orthodoxy offers a viable alternative with its concern with transcendence in temporal particularity.

The final article in this edition offers an argument "*For the Right to Silence*", and is written by myself, Shannon Brincat. It explores some of the changes regarding the right to silence that have flowed from the passage of the Australian 'anti-terror laws' and posits that the right to silence has been significantly eroded. It is argued that the right to silence is fundamental to the workings of an efficient and moral judicial system despite the seemingly overriding imperatives of national security. It argues that the loss of the right to silence neither serves the prosecution of terrorists, nor the bolstering of investigative procedures to apprehend them, but in fact weakens such processes and the democratic basis of the Australian judicial system in the rule of law.

In our *Book Review* section Erin O'Connor provides an extended review of two powerful books regarding the Holocaust - Hanna Krall's *The Woman From Hamburg and Other True Stories* and Jacob G. Rosenberg's *East of Time*. I then review Robert B. Pippin's *The Persistence of Subjectivity* with a particular focus on Pippin's



treatment of Adorno and the problem of the subject in modernity. In the final review, Paul Carnegie provides a witty, and brilliantly unconventional review of Jean Baudrillard's *The Intelligence of Evil or the Lucidity Pact*.

To our readers, your comments and feedback on *Dialogue* in the form of letters to the editor, article replies, or any general suggestions are more than welcome.

Thank you to all anonymous referees who assisted the editorial team and to all our contributors. I would also like to personally thank Erin O'Connor for all her hard work and the dedication that she has given into the Book Review section of this edition.

Shannon Brincat
7 April, 2008

The Dialogue team, 2008:

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SUBMISSIONS – VOLUME SIX, ISSUE TWO

Submissions from all disciplines and schools are actively encouraged. Submissions should enhance awareness of political and social issues and ideas. *Dialogue* aims to include submissions across the spectrum of political thought and disciplines including, but not limited to; politics, international relations, policy-studies, law, philosophy, economics, sociology, and cultural studies. Submissions can be theoretical, critical, policy related, or discursive.

Representing a cross-section of the University Community, *Dialogue* welcomes contributions from all members of the community.

Submissions can be in the form of argumentative essays, review articles, commentaries, poems, short stories, lyrics and cartoons. No strict word limit applies



but should be between 5000 to 8000 words. References should be in Harvard style. We ask that substantive submissions provide an abstract of 150-200 words.

Publication in *Dialogue* does not preclude publication elsewhere - authors retain copyright of their work.

Forward submissions to s.brincat@uq.edu.au

THE GREAT ROCK'n'ROLL FIRESALE: *THE POLITICS OF POPULAR MUSIC PRODUCTION AND CONSUMPTION*

By Trajce Cvetkovski

Abstract

The task undertaken in this article is to determine the extent of the challenge facing major firms who currently control over 80% of global sound carrier and publishing revenue in the popular (pop) music industry. The aim is to explain the disorganising effects currently responsible for up to 10% decline in music spending. I focus broadly on universally accessible digital technologies which have raised questions about the future of the industry's current organisational structure and processes both in terms of input (creation of music products in their commodified form) and output (access and consumption of music products). In short, the enormous profits once enjoyed by the handful of majors from traditional exploitation methods are a thing of the past. It is proposed four separate but interconnected challenges are affecting the highly concentrated status quo. Together, the positive and negative impacts of emerging technologies have created a serious dilemma for the controllers of the industry. I argue interconnected illegitimate and legitimate technological challenges are at play suggesting re-organisation is occurring multidimensionally.

Introduction

As its name suggest, pop music in Western culture is extremely influential and represents the bulwark of advanced commercial music exploitation. Its mode of production dominate the entire global industry (irrespective of world musical tastes).¹ This article explores the interacting technological challenges facing this dominant mode of cultural production. In short, it examines the rise and 'stall' of a multi-billion dollar industry.²

The central argument is that technology has significantly influenced the organisation of the pop music industry since its inception. However recent technologies have posed a threat to

¹ It is not suggested other popular (and informal) modes in non-Western cultures as described by Manuel (1993) and Connell and Gibson (2003) are irrelevant. However, the scope of this research is limited to the dominant mode which is underpinned by Western notions of intellectual property rights (IPRs) in music products.

² An examination of two leading industry journals; namely *Music & Copyright* and *Billboard* since 1999 clearly reveals the overall steady decline in *net* profits.

the *status quo* of the industry. The purpose of this article is to identify the key impacts technology has made on *traditional* modes of production in terms of:

- a) *music composition and production* (the creation of musical products);
- b) *recording for the purposes of reproduction and delivery* (distribution);
- c) *consumption* (the modes of access to music products).

It is stressed at the outset the issues and subsequent themes raised are limited to music products and services in their *commodified* or material form, and do not extend to that arm of the music business concerned with live performances.³ Furthermore, there is no exploration of current trends, tastes and styles in pop music *per se*. Pop music is a term used in this article to explain music commodification as a process that is driven by the need to maximise profit and reward commercial enterprise (Frith 2001). In terms of artistic expression and aesthetics, when any form of music becomes commodified for express commercial exploitation, it becomes popular.⁴

This article begins by setting the current scene; that is, a handful of major recording companies (the majors) essentially control this omnipotent, popular culture empire.⁵ But it is then argued that it appears this empire is being eroded by several interrelated challenges. Challenges and threats are not new to these resilient and seasoned major players. But the dilemma for them is unique in that the current global decline in traditional pop music consumption is unprecedented in that, historically, it has been the longest.

Industry Domination and the Status Quo

On a macrolevel, the 'industrialisation of music' is organised mainly by the dominant Major firms, labels (entities - often subsidiaries or licensees of the majors), and 'Indies' (independent labels not owned by the majors). On a global scale the multinational majors

³ Merchandising, ticket sales, concert revenue and other 'sundry income' not specifically related to selling (sound carrier sales) and publishing music in its commodified form.

⁴ Labelling genres and styles such as classical, country, rap and rock all become irrelevant politically because they are indistinguishable in terms of organisation (charts, prices, and accessibility). Therefore, all music products in the traditional industry are deemed popular.

⁵ Control in every sense from dictating the evolution of recorded formats (vinyl, cassette and CD) to setting the parameters of the market.

control most of the entire music industry. Towards the end on the 20th century these transnational few were responsible for 90% of the US music market and between 70-80% of the world-wide music market (Brown, 1997: 80). By 2004, this handful of majors became a 'club of four' owned by huge conglomerations (Vivendi (Universal), Sony Corporation (Sony), Thorn-EMI (EMI-Virgin after demerger in 1996), and Bertelsmann Group (BMG); plus one 'truly' independent major – Warner (after the Time Warner Group) sold it to an independent consortium (on condition) in 2003/2004. Together, these major firms form the core of the industry.⁶ It is likely that by the end of this decade further consolidation will result in a music landscape with only two or three majors.

The bulk of the industry's income is derived from the tangible and intangible use of recordings - from the sale of physical units (for example CDs) to intangible exploitation via broadcasting and public performance (permitting music to be played publicly. Excluding live concert revenue and related merchandising, in 1997 the popular music industry was estimated at being worth £19.5 [\$AUD51] billion world-wide, and is Britain's fourth largest export earner (Brown, 1997:80). In 2003, the sales (and related publishing) component of the industry was probably worth in excess of \$70 billion world-wide (*Music & Copyright*, 2003-2005). Overall, it is difficult to determine exact figures because royalty collection and calculation and overall accounting methodologies (particularly in terms of publishing) differ. Suffice to say, the music industry is big business; characterised typically by the representation of oligopolistic players.

Four primary factors have shaped the status quo: 1) historically favourable copyright and trade practices legislation (in terms of protection and low-level regulation); 2) favourable market conditions for the establishment of globally and locally well-organised horizontally and vertically integrated firms in control of music production technologies; and 3) powerful international and national associations (interest groups or lobby groups). Another reason why the industry has historically been shaped this way is because the major players are so powerful in that they have spent years nurturing, building and maintaining established contacts with retailers, the media and industry representatives (especially

⁶ On 7 November 2003 BMG and Sony announced they would enter in a Joint Venture to consolidate their

collection societies and associations). Through their networks and infrastructure, they have been able to maintain a stronghold. They act therefore, as a form of *Metagovernor* in the music industry universe because of their tangible and intangible control over pop music. Indeed, these favourable conditions have ensured the majors have remained the industry's 'Comptroller' over the past several decades.

By way of explanation, the first factor relates to the most core feature of the traditional music industry; namely that it is an highly integrated and complex business that centres around sophisticated management and appropriation of intellectual property (namely copyright) for repeated exploitation *several* decades after its initial acquisition. One popular misconception about pop music is that it is solely concerned with increasing sound carrier sales (the tangibles) because the bulk of the revenue is traditionally gained from album sales. But it is the intangible property which is usually initially assigned from creators⁷ of music (for example, recording artists and/or composers) that is of intrinsic value. Once procured, this property is traditionally controlled, exploited, and aggressively protected by the majors who have established themselves as the key producers of commodified pop music. Any change to traditional copyright control, therefore, is essentially a serious attack on the status quo. In other words, any loss in revenue essentially means a diminution in the overall value of copyrights.

In terms of the status quo, the majors have remained the primary beneficiaries of copyright protection because they have been the controllers of the industry, or as Attali remarks, "Copyright established a monopoly over reproduction, not protection for the composition or control over representations of it" (1985: 52). In addition to invoking the law in terms of protection, the law requires all agreements concerning IPRs to be generally evidenced in writing. An extensive review of 'standard contracts' in the UK, US and Australia reveals the industry has devised several onerous contracts to ensure the majors' interests are protected. These agreements have been devised over several decades to ensure these rights

recording interests.

⁷ The term 'creator' is used throughout this article to describe those involved in the 'creative' side of the production process. However, the expression 'author' is the actual technical term utilised in copyright law, and the term 'artist' features more prominently in the business sense throughout the industry. Accordingly these terms are interchangeable.

are protected to the full extent of the law. Copyright law primarily should be viewed as a form of protection implemented to protect the rights of those whose business it is to exploit this form of intangible property. While creators are also dependent on legal protection, the major benefactors of copyright legislation are clearly the key financial players in the music industry. And nothing is more important to the majors than pursuing, procuring and then securing and protecting copyright for *repeated* exploitation. Despite some progress in terms of moral rights for creators, copyright solely relates to creating surplus value and protecting profits and future economic interests. However it is argued below that two challenges affect this procedure: a) piracy because illegal consumption dilutes or diminishes the value of copyright's surplus value; and b) less onerous contractual obligations thereby inhibiting repeated exploitation by the majors (through back catalogues or otherwise).

The second factor relates to enviably successful industry integration. What is clearly evident is that irrespective of label name, different major record companies are organised virtually identically, and they all adopt identical processes. Their 'cultural products' are well differentiated, but the formats are uniform, thereby facilitating the rate of acquisition, appropriation and consolidation within the music industry. For example, all the majors have their stables of different superstars; but all rely on identical formats (namely CDs). The major players are remarkably fluid in terms of format production thereby enable superior economies of sale.⁸

Vertical integration relates to the co-ordination and subsequent organisation of the various stages involved production and distribution. In this sense, the music firm controls and manages the assets it owns, and possesses the relevant power. But in the corporate music model, the so-called labels by and large remain under the control of the parent company.

Comprehensive vertical integration in a major record company consists of downward or 'downstream' integration whereby the company includes the following stages in the

⁸ Prior to 1998, new release CD albums rarely sold for less than \$30.00; yet majors were able to physically reproduce them for less than \$1.50. Currently, new release albums are rarely sold for more than \$20.00. Considering royalties typically payable to a creator are less than \$1.50 per unit sold, it can be argued profits enjoyed by the majors are perverse.

production of pop music: a) offer the artist a recording contract (the best result would be to secure assignment of copyright), b) offer the artist an in-house recording studio in order to record the master, c) use its pressing plant to press (manufacture) the CDs, and d) distribute the finished product to the retail outlets. In the music industry, May and Singer refer to stages ‘c’ and ‘d’ as ‘interaction’ costs, that is “costs which are not directly associated with the production of the master copies” (2001: 1). Naturally each stage of production would be assessed in order to determine the most cost-effective way to complete the product for the purpose of maximising profits. Vertical integration in the recording industry also involves the company making a decision to determine which stage of the production it should keep ‘in-house’. By way of example, the case of *ACCC v Warner*⁹ demonstrates the ‘extent of market concentration’ and overall industry fluidity in the Australian music industry. This environment is not dissimilar to that of other Western nations where the existence of a small group of major record companies dominated the market, and this case highlights international harmonisation and the overall “homogeneity” of pop music products.

Horizontal integration in the industry is concerned with interrelationships between entities affiliated or connected with the majors (that is, industry associations, retailers, media, independent labels and so on). Because the majors present products to the market for consumption in the requisite format, it is fair to suggest they dictate the terms for the allied players. In other words, large music retail chains require a predictable, reliable and well supported product for presentation to customers whilst the media prefer the same standards so that advertisers can be assured of a listening audience. It is not the purpose of this article to analyse the complexities of these horizontal relationships; but suffice to say, these have been traditionally strong.

But even though, the pop music industry is both horizontally and vertically integrated it is stressed that monopolies are not illegal *per se*. Prior to the implementation of parallel legislation in Australia 1998, majors’ labels enjoyed statutory monopolies over their respective catalogues. This meant that prior to 1998 a retailer who wished to source a

⁹ (On appeal) *Universal Music Australia Pty Limited; Warner Music Australia Pty Limited & Others v Australian Competition & Consumer Commission* [2003] FCAFC 193

Warner product produced locally under licence by Warner (Australia) was *prima facie* unable to source the identical product from overseas suppliers. In recent years, new reproductive technologies have assisted in drastically reducing the interaction costs associated with CD duplication. These monopolistic practices were legally sanctioned, and to this end, the majors through their representatives vehemently opposed any change to the *Copyright Act 1968*. For over ten years their powerful interest groups were able to successfully thwart parallel legislation on two separate occasions. In 1998 their efforts failed so the majors resorted to ‘heavy handed’ tactics to destabilise the role parallel importation plays in the music market place (see ACCC case generally *supra*).

There is no doubt the major record labels and publishers (and to this extent collecting societies) enjoy a substantial degree of power (amounting to dominance) in the market for music rights. In the ACCC case, the trial judge found there was a breach of the relevant statutory provisions of the *Trade Practices Act 1974*. This decision was overturned on appeal to the Federal Court of Appeal as the High Court recognises that it is necessary for a court considering a case brought under s 46 of the Act to determine, as a threshold point, whether the relevant corporation has a substantial degree of power in the relevant market. That is, all majors in the music market have a degree of power, which may on occasions be abused; but in this case only *two* of the *five* significant players were before the court – not the entire industry.

The other two factors relate to the majors’ minders or protectors. As mentioned, the music industry is a complicated business because copyright is a very multileveled form of property. Each arm of copyright is capable of generating income, and in a bid to protect and trace the use of copyrighted works, various organisations have been established. The industry, especially recording, is therefore tightly represented by powerful associations both internationally and regionally that are vital in ensuring income is directed back to the major players. Politically, therefore, the most powerful members of the associations are the multinational majors who rely on these entities to ventilate their concerns in the appropriate forums (government, both the executive and legislature, parliamentary

inquiries, media and regulatory bodies). The pop music industry is a classic example of neopluralism at work in advanced capitalist societies.

The industry's lobby and watchdog groups are responsible for not only *substantively* protecting the majors' interests but also for procedurally ensuring the status quo is maintained via elaborate industry price setting arrangements and chart compilation initiatives. The purpose of the latter is to measure or gauge "success". But in essence, as charts are actually based on sales figures collected from retailers throughout Australia, industry associations are used to assess, determine and predict the strength of market domination enjoyed by the major stakeholders. In short their express purpose is to protect a near 'natural' monopoly created by the majors, however in the strict sense, the music industry is actually an oligopolistic market place dominated by a few identically organised majors.

What can be concluded is that the relationship between the major players is unequivocally tightly integrated. The entire industry has been accused of being self-serving and protectionist. Long-standing relationships and bilateral agreements have ensured the longevity of the system. But in the light of this exclusive arrangement, questions have regularly been asked whether these arrangements are anti-competitive.

The above four environmental factors explicate the fact that the majors' power and influence unequivocally create an overwhelming feeling of monopolisation and control at the direct expense of any independent or non-conformist player. In Australia - the ninth largest market in the world for example, the majors had a combined market share of almost 90% throughout 2003 (*Music and Copyright* [263], 2003: 9). Indeed any of the top ten international markets clearly reveal virtual carte blanche control of anywhere between 80 and 90%. The lego-political and economic framework overwhelmingly supports the omnipotence of the *status quo*. So if the formal conditions are so favourable, why then, is the traditional industry (namely the majors) in steady decline?

Cause for Concern

The past five to ten years have witnessed unprecedented losses of up to 10% in sound carrier (record) sales – namely CD albums (Cvetkovski, 2004 and 2007). Indeed, this conclusion has been positively affirmed by recent data from the *NPD Group* where it was reported a net 10% decline in CD sales in the US (the world's largest music market) for the years 2006 to 2007 (*mi2n*: 2008).

Accessible reproductive technologies, PC and Internet technologies have been identified (blamed) for the drop in revenue, and data released by key industry researchers suggests music *piracy* is the reason for the drop in revenue (especially from sales). However, these illegitimate practices partly explain challenges in relation to finished products (consumption).

The unresolved issue is that recent technological developments in the music industry have reached the point that this traditionally centralised and highly integrated industry is now being challenged by several direct and indirect technological developments that are destabilising, decentralising and fragmenting it. In other words, technology has now turned on an industry which has traditionally relied on new technologies for the creation of surplus value.

Four Contemporary Challenges¹⁰

There are four challenges guiding the focus of this article and they take into account the interacting organisational, individual and societal influences at work in and around the industry. They are summarised as follows:

¹⁰ These themes or “challenges” were empirically tested by way of doctoral research. For an examination of the methodological approach and the extrapolation of the subsequent data analysed, see generally, T. Cvetkovski, (2005) “The Political Economy of the Music Industry: Technological Change and the Political Control of Music”, PhD Research Dissertation, The University of Queensland.

The music industry has experienced disorganisation via technological developments and will continue to do so. This disorganisation has led to a significant decrease in profits for the majors who are the major stakeholders in the industry. A combination of a) *wholesale piracy* and b) *increased consumer interest in other forms of entertainment* has led to a significant downturn in the overall value of music products sold by the majors. Further, c) *an independent mode of production and its emancipatory effects* has not only diluted the overt power and control the majors have on creators' copyrights in terms of revenue negotiations, but has also increased the overall bargaining power of minor players. Finally, d) *the 'do-it-yourself' ethos (DIY)* has also provided an opportunity for independent creators to bypass the corporate model entirely. None of these phenomena should be viewed as isolated events.

The first two points are concerned with consumer behaviour in terms of finished products (output). The other two are concerned with industry players both at the input (production) and output end.

The first focuses on the most overtly insidious mode of illegal music consumption – piracy. Access to affordable CD reproduction technology has paved the way for a multibillion dollar piracy network whereby countless high quality CDs are replicated at a fraction of their recommended retail price. The Internet has also cultivated an easily accessible environment for illegally swapping and downloading MP3 music files especially through the use of P2P technology. That is, the 'net' has provided a relatively safe haven for unscrupulous sites or unwitting operators and software developers who traffic in copyrighted material that is capable of being downloaded onto a computer in a matter of minutes.

The proliferation of digital piracy in terms of CD replication and MP3 downloading has posed great threats to the majors as they comprise the bulk of the industry, and the majors own the bulk of the music being traded illegally. Together, these developments have resulted in significant overall losses to the majors.¹¹ Another ominously potent feature of the Internet is that it facilitates many websites which provide the 'free tools' to enable the downloading of high quality music from music websites. This has proved to be a most popular form of Internet

¹¹ The majors' industry representatives maintain that the last five years of consecutive losses in profits are directly attributable to piracy.

use in the last five years. This multidimensional illegal challenge has contributed to disorganisation within the industry and has created problems for those who work in relative partnership with the majors (collecting societies and music industry associations).

The proposition relating to these illegal developments may be summarised as follows:

- a) current digital production, reproduction and downloading technologies are relatively cheap and readily accessible thereby facilitating unauthorized use of copyrighted music; and
- b) this digital technology has compromised the majors' property because its relatively low cost and ease of use have contributed to copyright piracy *en masse* – internationally.

Several categories of illegal consumers exist. Organised pirates are major operators, akin to say, experienced drug manufacturers. However not many piracy cases have made it to court, so it must be argued that in recent years, the deterrent aspect has been minimal. Despite these general observations, the current environment in which anti-piracy policies are being implemented is of particular interest and concern because the literature shows the key actors have traditionally adopted both *reactive* and *anticipatory* policies in order to ebb the flow of illegal consumption. This tends to suggest these policies have produced mixed results despite the fact the industry is combating the damage to copyright property more strenuously than it ever has before.

But sophisticated pirates are not the only official targets. In its aggregated form, illegal music consumption is a large threat. In addition to sophisticated national and international pirates (organised crime), and illegal site operators, there also exists:

- a) Small time operators (for profit);
- b) Home users burning CDs for friends and family (not necessarily for profit)
- c) Curious users – down loaders ('ripped').

For whatever reason, these consumers have been likened to 'music swappers', and this practice is particularly popular with teenagers. Combined, this 'aggregate' behaviour is threatening to the industry overall because it is *devaluing* recorded music.

Antipiracy technology is usually the first line of defence but the findings concluded these technologies have failed spectacularly over the years. In the light of these costly failures, why do the majors continue to protect these interests at a heavy price? One explanation points to the manner in which the majors are horizontally integrated. Vested interests in maintaining the *status quo* for the purposes of protecting the CD format especially are the primary concern. This observation also highlights the tenacity demonstrated by the majors in terms of CD protection, and it is anticipated the majors will continue to invest in CD research and development.

In no uncertain terms the majors now consider the MP3 format as a technological burden. More specifically this burden is by way of illegal MP3 downloading or *ripping*. Currently, many legal downloads are ‘beginning to make their mark’ according to industry research. But there remains no consensus in relation to digital downloading – and it is doubtful harmonious and easy census will ever be reached by the majors. This is in stark contrast to the glory days when the majors owned and possessed dominant control of all previous formats

The impact is significant - however despite the emphasis placed by the majors on piracy as the main reason for a decline in record sales, illegitimate consumption does not adequately explain a fall in global music product revenue. Consequently, the majors will continue to lose significant profits, and it is doubtful whether they will regain and maintain high profits from the sale of pop music products in traditional formats (CDs, MP3, MDs, DVDs or otherwise).

But the illegitimate challenges are self-explanatory and form the bulk of the current debates concerning the future of the industry. In short, new technologies have greatly facilitated a parallel illegal industry. Organised piracy and home taping are nothing new; however accessing high quality music for free is a genuine ‘quality issue’ because currently ‘ripping’ (Internet downloads) and ‘burning’ (CD copying) mean near-perfect copying for no fee. This ‘music for free’ attitude is unprecedented and appears to be ingrained in modern popular culture. The impact is significant - however this book argues it does not adequately explain a fall in global music product revenue.

The second considers a more salient feature of music consumption. The music industry has experienced an external challenge in the form of other non-industry products. An important observation made is the perception that in recent years consumers have become ‘bored’ with music products. It is not suggested people have become disenchanted with music (relatively speaking, live music appears not to have suffered globally in the same sense); rather this seemingly legitimate challenge relates to *consumer loss of interest* in current pop music products, and a preference by consumers (especially teenagers) to purchase other entertainment products (music related or otherwise).¹²

With the advent of the PC, IT and telecommunications technologies (the net, mobile phones), a plethora of multiplatform and multimedia entertainment products are now available. Notwithstanding the fact enhanced music products (CDs with video footage) are currently marketed, in recent years, non-music specific products such as DVDs and interactive computer games (and accompanying software) have proved to be increasingly popular amongst young people particularly. Such products are in direct competition with pop music products. It is not suggested by this proposition that music has become less popular. Rather, music products in their current commodified form are being challenged.

These new, highly fashionable and attractive forms of entertainment have distracted a significant portion of music consumers from investing in traditional music purchases. Furthermore some of these consumers prefer to invest in these entertainment leisure products *primarily* because they can freely access high quality music in the form of Internet downloads or ‘CD burns’. Popular music products *per se* have become ‘second line’ items, and have lost value. From the majors’ perspective, the surplus value lost correlates to loss in album sales.

As with the former theme, this challenge is primarily concerned with consumption. It is in some respects vicariously associated with the above illegitimate challenges. That is, entertainment consumption is so complex and diverse that a Compact Disc (CD) product *per se* may appear unappealing to, for example, a teenager who might prefer to spend \$30.00 on

¹² New products such as interactive software, DVDs, mobile ringtones, and CD-ROMs all compete with traditional entertainment such as concerts, and movies. The entertainment market has become increasingly

downloading mobile melodies or multimedia products (notwithstanding the teenager's specific interest in the music specifically recorded on a particular CD). As a teenager's entertainment budget ('pocket money') is usually limited, she or he may justify the purchase of a non-music entertainment product by virtue of the fact that songs may readily be downloaded for free. In other words, it appears rational for a consumer to obtain quality 'free music' because limited resources may be better utilised by purchasing a more interesting product.

The industry therefore has a legitimate or "real" cultural technological challenge on its hands in the form of a general feeling a lack of consumer interest and discontent. What also emerges from this is that an inter-relationship between competing products and consumer behaviour and perception create tension. Apart from that, both society and technology have changed within the context of an ever-widening leisure market. Consumers are "music smarter". This view is consistent with the notion that people want *more value for money*, that the current price structure is unfair, and that consequently people turn to other leisure products because a) they refuse to pay high prices for music, or b) they prefer to "rip" the industry "off", rather than be "ripped off" by what is perceived to be a powerful industry.

This disillusionment is a relatively new phenomenon, and the risk of consumers interested in purchasing non-music products rather than music products is actual rather than theoretical. Consumers in possession of the 'entertainment dollar' have never been more tempted with newer and more complex 'affective pleasures'. For example, mobile phones actually serve as multidimensional, interactive audio-visual entertainment. All an audio CD is capable of offering is one dimensional entertainment. A full price CD, therefore hardly constitutes value for money.

Accordingly, one fundamental error made by the international recording industry has been a failure to recognise the relevance of external competition at the outset. Specifically, consumers of pop music now see music as just another interest, and a dominant one. The Internet therefore has turned a potentially frontline music consumer to a casual and curious

saturated.

(potential) consumer who might prefer to research music online. Together, these recent technological developments have culturally modified consumer behaviour and this in turn has had a direct effect on the majors and their relationship with music retailers especially.

One clear example is the surge in the sale of Sony Playstations earlier in this decade. These are now multiplatformed to enable most digital formats to be played on them. These exciting and multidimensional external products introduced by the majors' parent companies have significantly increased the rate of entertainment saturation, and have distracted consumers from considering the purchase of CDs. In effect the majors have greatly assisted in blurring the boundaries between formatted entertainment products for consumers. Coupled with Internet as a viable alternative to traditional entertainment formats, consumers have been overloaded by the current choice. If this is the case, then the majors have instigated a form of external 'cannibalisation' by turning on each others' music products with their own external products. This observation is consistent with Mandel's hypothesis (1974) that in this late stage of capitalism, firms will eventually turn on each other. Indeed, the following extract of an interview with a Director of a major recording company best summarises this point:

Specifically kids which are the major consumers of music now see music as just another interest. Now kids cruise the net, they look at visual images, listen to music, scan porn, and are generally entertained or amused by surfing for all sorts of things on the net. In the old days you would go to the movies, buy a magazine or CD. The majors were the purveyors of culture. Now you might do all that plus there's the multimedia product and fancy mobiles with games and MPEG photos – the budget is limited – and the competition is fierce.¹³

What transpires is that a strong correlation exists between consumer loss of interest and a perception of feeling 'ripped off'. Technology has created an avenue to express this resentment. These responses highlight the complexity of music consumption.

¹³ See T. Cvetkovski, (2005) "The Political Economy of the Music Industry: Technological Change and the Political Control of Music", PhD Research Dissertation, The University of Queensland.

The third challenge introduces a more complex theme. Indeed the following are complicated in that they are connected both with input (the production side of the business); and output (the products or consumption). Historically speaking music technologies (and especially the reproduction and distribution technologies) have been expensive to acquire and access, and it is for these reasons the majors have traditionally been the financial intermediaries within the industry. The currency in the bargain for access to music technologies is usually the (potentially) valuable copyright as consideration. And irrespective of genre or style, this relationship appears to have been the *status quo* since the industry's inception.

Accordingly, therefore, the industry sources its products from creators willing to have their music exploited commercially. In this sense music creators and music companies are involved in a mutualistic or symbiotic relationship in order to form an exploitable product. These parties invariably align themselves with one another in order to get the product to the consumer. As producers, both parties rely on *distinct* technologies to perform their respective obligations. Historically, in terms of technological access and use, the delineation between these two distinct groups has been well defined: the former relied on technologies associated with music creation whilst the latter depended on improved technologies associated with music reproduction and distribution. Furthermore, consumers have also been separated from producers and these divisions have created quite specific delineations in the music industry (see especially Longhurst, 1995).

As the majors form the bulk of the music industry and their respective corporate structures are highly complex, one significant advantage of submitting to the majors' model is that these companies can offer a well established and comprehensive music commodification package - from recording to distribution.¹⁴

Prior to the recent availability of new technologies, quality music recording equipment had not been easily accessible. Whilst affordable 'demo quality' analogue recorders have

¹⁴ A major is in a most enviable position to guarantee wide distribution but usually deducts 25% for manufacturing and packaging. As mentioned previously, if the price of a CD to the retailer/dealer is \$20.00, \$5.00 is deducted before royalties can be paid to the artist. As most majors own pressing plants, it is argued that current CD pressing would not be more than \$1.50 when CDs are produced in large volumes, say 5,000 or more. That is, a major record company could make up to \$4.00 gross profit just on packaging alone.

existed for several years, the most serious inroad had been the use of digital recorders. These recorders have generally remained in the possession of sound recording engineers who have dictated the prices for recording services. Incapable of financing the recording themselves, creators would bargain with their intellectual property.¹⁵ Traditionally, therefore, it has been the responsibility of the record company to finance high quality recordings because of issues relating to cost.

But new and emerging technologies have created more bargaining rights for artists and composers because of a wide range of affordable music recording software. That is, 'recording equipment' is so accessible and affordable that professional and high quality recordings can be made independently on a format capable of being reproduced; and without the need to assign copyright to majors. Independent players who are in a position to present a high quality sound recording, are now in a better negotiating position to *license* ('hire') rather than *assign* (forego or "sell") their compositions to a recording company. Naturally there is no substitute for an experienced sound engineer, but the issue is not the quality of the recordings *per se*, but rather, access to high quality recording equipment - equipment regarded as 'industry standard'.

It is argued that the corporate-driven industry cannot be properly organised without securing the intangible property owned by music creators. Technological change has challenged this conventional practice, and this general disregard for copyright assignment is evident in the production and distribution of several music sub-genres, for example, *Techno* (dance) music.

This article maintains that such universal flexibility is unprecedented in the history of the political economy of the music industry. Independent players are now in a significantly better position to pursue distribution agreements *per se* (distributors may be independents or majors) and/or enter into mutually beneficial joint ventures whereby the bargaining position is more

¹⁵ Copyright is regarded as a valuable intangible asset and is a sophisticated form of collateral (capable of being assigned or even secured by way of mortgage). Most music recording and publishing agreements are complex and *prima facie* onerous. By virtue of his or her previous success a creator is in a better position to bargain with this asset but it is not unusual for most agreements to be initially 'one sided'.

evenly balanced.¹⁶

The final theme is by far the most speculative challenge and follows on from the previous proposition that new technologies are assisting in providing a more level playing field. Over the last ten years, significant reductions in manufacturing costs have also enabled independent creators/producers to self-finance their own releases whilst maintaining copyright control.¹⁷ Creators now are in a significantly better position to bypass the need for entering into ‘standard industry music’ contracts, and to simply ‘DIY distribute’.

Again the major impetus for this technological phenomenon has been accessibility to affordable technologies such as PCs (along with accompanying peripherals such as CD burners). Prices of blank CDs and pressing costs generally have also dropped considerably. Furthermore, communications technology, most notably the Internet has encouraged countless independent labels and artists to promote, self-distribute and market their own musical products at a relatively low cost. The DIY method is not a new concept but new technologies have created a genuine alternative to submitting to the majors’ formula.¹⁸

One of the obvious disadvantages to the DIY model in terms of distribution and marketing is that majors are able to provide access to long-established distribution chains and marketing networks. While this cannot be denied, in the last ten years, the Internet has proved a most valuable distribution and marketing tool for all players in the music industry. All players have been able to design and maintain websites at a very low price. This ‘world wide web’ of marketing has created tremendous opportunities for independent recording artists who wish to gain exposure without the need to sign to major labels.

Technology has permitted greater creativity, and such creativity has extended to the organisation of the music product itself. This emancipatory effect has inspired a new wave of

¹⁶ Typically, a distribution agreement does not require any consideration of copyright.

¹⁷ Eight years ago, the cost for a run of 1000 CDs would have been more than \$5.00 per unit in Australia (inclusive of CD, four page colour booklet printing and jewel case). Presently the same run would be less than \$2.50 per unit.

¹⁸ The 1970s punk rock DIY ethos – however this approach was crude and poor in quality in terms of recorded product.

musical enthusiasm for music composition.¹⁹ This, in turn, has promoted the proliferation of styles and genres beyond the conventional, traditional and rational recognition of pop music.

By way of illustration, Techno music (as a specific dance music genre) is a popular musical style or movement that is typically reliant on computer technology in terms of music production, reproduction and distribution. Techno, because of its mutative style, would usually not be regarded as a category of music capable of being successfully rationally organised for mass production. Generally speaking, low cost PCs and related computer music programs have assisted in greater experimentation in music composition (production) and high quality music recording (for reproduction). To a large extent Techno is marketed online and the bulk of releases are not connected to the majors in any aspect. Its approach is disconnected, disorganised, unpredictable and irrational in the traditional sense as it does not necessarily centre on the transfer and appropriation of IPRs and subsequent exploitation for the purposes of commercial *success*.

The emancipation of music production by virtue of affordable recording and reproduction technology in conjunction with greater marketing options such as the Internet has enabled greater self-determination for the musical creator. Technology has equipped the creator not only with the tools for creation and production, but also for distribution and marketing. In this respect, the current organisational structure of the major recording companies and the publishers (and their respective affiliates) must come into question.

It is proposed that current technological developments are facilitating a decentralised, non-traditional environment for the major players in the music industry. These are described in this book as legitimate challenges to the *status quo* – both in terms of cultural and format homogeneity.

Indeed, emerging music genres styles and their respective unorthodox approaches to music production appear disinclined to traditionally align themselves with the majors, and therefore have resisted in being subsumed by the majors. It is argued these independent developments

¹⁹ In the current climate, the ‘bedroom music technician’ is free to experiment at home without the economic burden a creator faces in the recording studio.

are capable of challenging the traditional *modus operandi* within the *status quo* because of reluctance to hand over intellectual property rights (IPRs) – or even deal in them. More specifically new technologies have completely blurred these delineations within the traditional music commodification model. The implications for the major controllers of the industry are obvious: a perfect or near-perfect product at the input stage of the process means a lower probability of perpetual copyright acquisition. In other words, the majors' overtly strong bargaining position is potentially diluted or diminished because of a reduced catalogue of copyrighted works for future exploitation. The extent and nature of recent independent developments (or challenges) are therefore worthy of ongoing analysis.

What then is the organisational impact of such disorganisation to the majors' capacity to horizontally and vertically integrate the firm? One clear consequence is the "hollowing out" of the firm. If consumers are devaluing music products through piracy, if new entertainment products are more enticing; and if creators' rights are not being assigned, then there is no need for elaborate and hierarchal interaction and control. Therefore outsourcing and joint ventures between relevant stakeholders might set the new business standard. Indeed empirical evidence (Cvetkovski, 2005) strongly suggests the traditionally centralised firms with all their intricate departments and "army of sales reps" have been reduced to lean organisations that prefer to deal with external players at arm's length rather than consuming them under a broader dominant control rubric. Whatever the reasons for structural re-organisation, one fact is indisputable – currently more than 10% of music industry revenue continues to be lost. Interestingly there is a very strong correlation between new and emerging technologies and the steady decline in traditional music sales. More importantly, these new technologies are not controlled by the majors or indeed the music industry generally. That is, unlike CDs, MP3s are not industry controlled, and unlike the traditional media and "bricks'n'mortar" retailers, the Internet has never been harnessed by the majors. Therefore if the industry is not capable of subordinating, subsuming and integrating the tangible dimension, then it is highly likely it can possess the clout to control the intangible side of the business. A clear divergence exists between the traditional music universe and the current state of play. It is highly doubtful the two are compatible.

Conclusion

This article has attempted to explain why the music industry – essentially controlled by the majors is in steady decline. Specifically, four interrelated challenges guided by technological change may assist in explaining this phenomenon. The formal structures are designed to protect the status quo yet this omnipotent form of popular culture has quite simply, stalled. There is a significant body of empirically grounded evidence gathered utilising quantitative and qualitative methodologies to suggest challenges are working concurrently and cumulatively to create a disorganising effect for the main stakeholders.²⁰

Indeed one concrete development is that major firms are being “hollowed out” and the effectiveness of their mode of product delivery has seriously come into question. The majors have acknowledged some of the above developments but the concerns raised by them and their representatives bodies seem to centre around the following issues:

- Stemming the flow illegal music consumption
- Conceding that other products are in direct competition to traditional music products
- Accepting that the Internet as a viable form of music consumption and therefore attempting to harness MP3 music consumption
- Licensing copyright or simply acting as a distributor or entering in loose arrangements (joint ventures)

However, these concerns are completely one dimensional. What ought to be comprehensively recognised by the major players is that:

- Illegal music consumption is a natural phenomenon not only because consumers recognise that it is freely available but also because they perceive the current value of pop music to be exorbitantly high;
- Consumers are genuinely discontent, or bored, in relation to the current products on offer by the majors;

- Consumers are actively searching the Internet for alternative offerings provided by organised Indies and DIYers (usually for free);
- Independent players are not subscribing to the majors' model and therefore are guarding IPRs more jealously;
- Recent technologies relating to music production; namely MP3 (and related digital technologies) and their decentralised modes of consumption have not been created by the majors and therefore are not easily capable of being controlled by them.

All of these developments are inextricably linked to the future of copyright and it is more than likely that copyright will be re-organised to the point that its potential to create surplus value will likely be diminished.

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²⁰ Indeed these challenges were tested as propositions in 2003 and 2004 in my earlier doctoral research.



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Numino-Political Analysis

By Matthew John-Paul Tan¹

Abstract

This article seeks to contribute to the study of the logic driving religious actors by exploring the incorporation of theology into social scientific research. It will expose the limitations of orthodox methods with prematurely exclude the legitimacy of theological variables before they are even explored. It will also show how current postmodern approaches and even some models that purport to posit social action as participation in a transcendent order, end up shying away from full engagement with the transcendent and prove themselves to be pale replicas of methodological orthodoxy. However, this article argues that one particular substrand of the "transcendent order" argument, Radical Orthodoxy, surpasses these models through its serious engagement with transcendence as expressed in temporal particularity.

...those who thought that religion and politics could be kept separate, understood neither religion nor politics

Mohandas K. Gandhi

Introduction

This paper seeks to provide a response to Mark Juergensmeyer's call to adopt a "cultural approach" that "reconstruct[s]...[religious] world views from within (Juergensmeyer 2003:13)" and in so doing have a better "appreciation for religion itself" to find a cure for religiously motivated violence (Juergensmeyer 2003:249). Since the end of the Cold War, many social researchers have been frustrated in their attempts to decipher the cryptic logic of the political actions of religious actors. Whilst the violent re-entry of religion in the public sphere in recent years has given fresh impetus to the enterprise, commentary that sought to make sense of either the liberatory or bellicose potential of religion has been startling for its lack of clarity. Such ambiguity has resulted in anything associated with religion, be they institutions,

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ideas or groupings, being caught in this nebulous conceptual web of violence. Any discussion between and religious discourses often ends up becoming a plethora of monologues bypassing each other. Because an interesting question then arises as to the influence of such esoteric articulations and their relationship with the socio-political action that is often the visible criteria by which religion as a whole is judged, a key task thus becomes one of establishing traction between the political and religious discourses.

This short article would briefly canvass two broad schools of analysis, Modern Behaviouralism and Constructivism. While recognising the capacities of the latter in exposing the constraints of the former's logic of autonomy, aspects of this "postmodern" approach that replicate this Modern (and thus Cartesian) logic actually inhibits the ability of Social Constructivism to incorporate the numinous aspects of religious actors into research frameworks. Arguing for a more thorough postmodernism paves the way to consider the inclusion into research frameworks of another variable, that of an order that transcends the material and strategic to touch the numinous. While some analysts have undertaken this unorthodox research trajectory, the vestiges of Modernity inherent in these models arguably impair any thoroughgoing engagement with the numinous aspect that analysis into the logic of religious actors demands. In closing, this article proposes Radical Orthodoxy, as a possible analytical entry point into the subject of the numinous which at the same time rejects any entanglement in the Cartesian web.

The Behavioural Limits

The search for answers into the questions raised by the resurgence of religion often initially canvasses the possibilities of conventional approaches of Behaviouralism², centred on issues of management and institution building. However, the sheer volume of literature discrediting this prevailing orthodoxy is often sufficient to dissuade any author from further engagement. For the vast bulk of the literature, a common starting point in projects critical of the prevailing orthodoxy is to point out the flaws of post-

² The author is taking his cue from Tow, William. 2003. "Apocalypse Forever? International Relations Implications of 11 September." *Australian Journal of Politics and History* 49(3):314-325., p317-22



Enlightenment Modernity, from which the prevailing orthodoxies stem (Thomas 2005:54-63). What becomes apparent upon more thorough examination of this critical literature is that inherent in these dominant methodologies is a near total reliance on the primacy of rational interest-maximisation. One cannot ignore powerful critiques posed by postmodern and critical theorists against one of Modernity's major assertions which makes the concept of rational interest maximisation possible, that of an extra-contextual, value-neutral, Archimedean insight into an objectively real world that trumps all other insights. The problematic nature of this important underpinning of much of contemporary theorising becomes clearer if one considers the writings of Alasdair MacIntyre. Doubting the Kantian notion of "rationality" as "autonomous... [with a] history... [that] can be written without much reference to the history of anything else (Knight 1998:106)", MacIntyre considered it

an illusion to suppose that there is some neutral standing ground, some locus for rationality as such, which can afford rational resources sufficient for enquiry independent of all traditions. Those who have maintained otherwise...have simply been in error (MacIntyre 1988:367)

This is a view consistent with Hans-Georg Gadamer, who writing almost a decade before MacIntyre, hinted at limitations that exist even in the freest of human existence, the truth of which would not only mean that reason must remain "constantly dependent on the given circumstances in which it operates (Gadamer 1979:245)".

Of course the question then arises: if a "view from nowhere" does not exist in its own right, where then does "rationality" exist? Returning to *Whose Justice?*, MacIntyre lays the foundation of his work on virtue ethics by first stressing that "rationality" is a term that must be embedded in some prior dynamic, since it is that dynamic that gives the word meaning.

For MacIntyre, that prior dynamic lies in a "social life" to which a rational individual conforms, a model very different to the one Modernity puts forward (Knight 1998:116). The "social life" here, is one where "concepts were conveyed through its



histories”. For MacIntyreans, an actor must know who it is before it knows what it wants, but such an identity must necessarily be underpinned by some living social and cultural tradition, one that is shaped by any given combination of particularist philosophies, cultures, religions and mythologies, and is able to transmit the knowledge inherited from one generation to the next (Somers 1994:606, 618). John Rawls, having initially defended his concept of the “original position” which regards all situations “not only from all social but also from all temporal points of view (Rawls 1972:587)”, would later regard as more persuasive a narrative account that which acknowledged the embeddedness of his “original position”, opining that

[w]hat justifies a conception of justice is not its being true to an order antecedent and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realisation that, given our history and traditions embedded in our public life, it is the most reasonable doctrine for us (Rawls 1980:518-9).

If that were the case, then MacIntyre opens a new field of enquiry with this claim: that for rationality to be understood in its fullest sense, it must be understood as *a* rationality that is embedded in *a* prior dynamic. To try and remove from consciousness the relevance of any prior dynamics led to the paradoxical result of imposing a theme in its place, one assuming itself to be superior in terms of intellectual sophistication (Bellah 1970a; Derrida 1998:14; Milbank 2006:2).

But can the behaviouralist methodological orthodoxy explore these prior dynamics? With the insistence that only the scientifically tested phenomenon is knowable, the tendency to let the methodology determine the subject results in a rationalistic rejection of the metaphysical as irrational, unprovable opinion (Voegelin 1952:4). Such approaches proceed unaware of secular modernity’s positing of itself as the epitome of political neutrality through its forcing of an opinionated political position as not one of myriad independent political discourses but as their very foundation, then defining on its own terms the proper subjects of inquiry (Cox 1986:209; Hurd 2004:239, 245; Neufeld 1995). Through Louis Herman (1997), the reader can become aware of the machinations of conventional social scientific analysis, and their



limitations. The problematic nature of the methodological orthodoxy becomes manifest in the compartmentalisation of the once organic and interlinked aspects of human experience followed by the reification of those compartments into self-sufficient concepts bounded with congealed conceptual membranes. Going even further, such compartmentalisation reduces any relationship such concepts may have to one another in terms of mutual opposition, and prescribing a hierarchical treatment which counts as “good” the seemingly measurable, objective and rational aspects of humanity as experienced in the temporal sphere, and treats as anathema the subjective, immeasurable, and thus irrelevant esoteric experiences of the supernatural (Herman 1997:78-80).

Some regard hermeneutical analysis into religious actors as imperative. But to do so using methods that simultaneously disengage the religious underpinnings from other aspects of the actor’s total experience *and* deny that underpinning any kind of cognitive validity, despite its centrality to the inquiry, is eventually a self defeating exercise. Perhaps the more fundamental problem rests in the fact that the scientism of the social sciences often lead to a (deliberate?) failure to appreciate the possibility of religious discourses actually seeking to transcend essentially materialistic political and economic concerns. Whilst such concerns may be the first point of contact with religious discourses, it only serves as a prelude to rearrange such issues against a supernatural backdrop (Burrige 1969:108), and in so doing tackle a variable that has been central to Western thinking in the wake of the disasters of the twentieth century, namely the issue of meaning (Dallmayr 2004:251; Henningsen 2000:810-2; Singh 1985:391-4), whether of the isolated events of life, or even that of life itself (Casey 2001:1; Euben 1997:430). The Modern avoidance of metatheoretical analysis that made sense of the need for meaning, meant that such a need was either left unfulfilled by the prescriptions of scientific processes, or dealt with by simply denying its legitimacy (Lapid 1996:9). Both solutions fly in the face of much historical data whereby actors have implemented socio-political programs with this very need in mind (Voegelin 1997:225).



Meaning & the “Lightness” of Constructivism?

Many argue that the search for meaning raises the prospects of constructivism sufficiently broadening the contours of orthodox political inquiry. In so doing they also argue the prior dynamic discussed earlier can be engaged. To its credit, constructivism has made inroads in transcending the context-free rationality that underpins the prevailing orthodoxy, and bringing meaning back the forefront of their research agenda (Reus-Smit 2001:217), by contending meaning to be constitutive of a socially constructed, underpinning identity (Bellah 1970b; Giddens 1991:35), which in turn informs interests and prescribes actions (Wendt 1992:398). The constructivist insistence on identity has paved the way for the consideration of the dimensions of the human condition deemed “irrelevant” in the analysis of the prevailing orthodoxy, not the least of which are cultural and religious variables. As such, it is often assumed that with such a substantial conceptual widening, constructivism would be able to undertake analysis into the cultural dynamics that underpin much of the contemporary “identity”. Upon closer scrutiny, however, one can question whether constructivism can actually provide an adequate theoretical understanding of the religious variable in its entirety, which includes not merely the systems of meaning, but also their “inexplicable” supernatural object, a variable that has acquired growing credence in social analysis given the recognition of the salience of the search for meaning (Bauman 1993:33).

One can see complications emerging after considering the most recent contributions on constructivism by Scott Thomas. Whilst acknowledging the positive contributions of the approach, Thomas criticised constructivism in its current state as having an “almost unbearable lightness (Thomas 2005:93)”. He, like Reus-Smit, agrees that constructivism recognises the behaviour of actors as the result of the marriage of social interaction with widely accepted norms and practices (Reus-Smit 2002:131). However, Thomas criticises the constructivist turn in political theory as merely shifting the analytical base from the state level to the ideational. Put another way, Thomas criticises the failure of constructivism to adequately inquire as to how such norms and practices originated, or how or why they become internalised by particular



political actors in particular ways. Constructivists thus emphasise the salience of social constructions, but then gloss over the actual content of those constructions, or for the reason behind such constructions.

In citing reasons for such reticence, one could point to the current manifestations of postmodernism and its effects in limiting Constructivism's engagement with meaning. In trying to provide a more pluralistic political space, current postmodern approaches expose a major flaw through their insistence on everything being, as Richard Rorty puts it, "a product of time and chance (Rorty 1989:xv)". This claim has often been translated into an ethical stance of suspicion of "meaning" being anything beyond a fragmentary and transient variable (Hughes 2003:14). The association of totalising cognitive projects with tyranny yields a distillate of strong opposition to totalising conceptualisations of the "whole" of human experience that, at least for religious actors, incorporates both temporal and numinous. This hostility towards holism creates similarities between Modernity and postmodernity in the latter's Cartesian dichotomising and hierarchicising of the elements of human experience, giving priority to the various isolated parts of a person's existence against existence as a whole (Herman 1997:81). Moreover, current postmodern approaches, when coupled with this suspicion of totalising projects, often manifest themselves in a superficial visitation of the supernatural sphere, only to conceptually fold that sphere back (and exclusively) onto some temporal dynamic and limit analysis to that temporal dynamic without any further reference to its supernatural backdrop. This can be exemplified in the centring of the experiences of religious actors, and their underpinning metaphysics, around the notion of "identity", or the Foucauldian tendency to treat metaphysical claims as cynical exercises in strategic power projection (Bernstein 1986:206). This results in what Fred Dallmayr observed as a tendency in postmodernism "to celebrate a purely speculative otherness while stubbornly shying away from any contact or engagement with a concrete [in this case religious] 'other' (Dallmayr 1993:203)"

At best, constructivism in this light would appear to be a method of analysis that lacks the incisiveness to quarry the depths of religious meaning, and synthesise these



variables into a cohesive framework. At worst, it is argued that in the absence of any underpinning account behind the formation of any identity, religious or otherwise, the conceptual focus is placed squarely back onto the agency of the actor. Jonathan Fox and Shmuel Sandler assert that whilst both parents of constructivism, critical theory and postmodernism acknowledge the salience of ideas (even the transcendent), they are still “in man’s mind and under his control”. This tendency feeds into constructivism and makes decisive not the cognitive factors, but rather the actor as an autonomous rational agent (Fox and Sandler 2004:30). This in turn implies the formation and adoption of various identities to be little more than strategic choices with the aim of fulfilling self-centred desires, despite constructivist accounts that such identity constructs are rarely adopted as the result of a purely rational exercise (Pasic 1996:86). This of course leaves culture and religion back at the margins of relevance (Pasic 1996:88).

So if the persistence of the Modern differentiation and dichotomisation of human experience in an attempt to find a reducible human behavioural distillate, renders the constructivist assertion that “identities are the basis of interests” a distortion, how does one overcome this foundational problem? How can a method of analysis give due consideration to the sphere in which culture and religion, so central in gaining an understanding of religious actors, reside, in order to avoid the caricature of political science “fiddl[ing] while Rome burns (Strauss 1962:327)”?

The Quest for Transcendent Order

If the MacIntyrean ruminations considered above are correct, then the essential aims of political actors must encompass more than mere fulfilment of self-serving interests or the acquisition of a stable launchpad to enable the confident fulfilment of interests. Such actors must also seek a sense of locatedness within some theme that precedes that identity launchpad. Also, in order to give the kind of holistic meaning discussed before, this theme cannot be a random collection of fragments of meaning. Rather it has to be a totalising concept which gives cohesion to separate and unrelated events, even to the point where an actor can acquire comprehension of “the ultimate truths pertaining to the whys and wherefores of human existence and history (Hughes



2003:19)". This of course necessitates the source of meaning to be an ultimate and exhaustive one. To talk of the acquisition of meaning then, one must talk of the "quest for and conception of the symbolic order...and of the quest for participation in such an order (Eisenstadt 1968:xii)".

The inclusion of order as a relevant variable can provide promising inroads in the enterprise of understanding the religious logic of religious actors. But what becomes problematic in the incorporation of order is the great temptation to refer to the order that is exhaustively rooted in the temporal sphere. The temporality of order was raised by Emile Durkheim when he declared that the religious life is an eminently social one (Durkheim 1995). This tendency to fold the seemingly transcendent aspects of religion back into purely temporal experiences, and make the former contingent on the latter, is also borne out in more recent works such as Robert Pape's *Dying to Win* (2005). In speaking of the social logic of suicide bombings Pape apparently reduces the significance of the martyrology associated with suicide terrorism to that of community approval. This is encapsulated in Pape's assertion that "only a community can make a martyr (Pape 2005:82)". Such arguments beg the question as to whether social embeddedness itself constitutes a self-sufficient goal for the search for meaning. Indeed, the much deeper question concerns whether an exhaustive source of meaning can be found in the temporal sphere alone. Given, as was said earlier, the religious consideration of socio-political issues as subordinate to more primary supernatural frames of reference, can one determine the object of the order in which they participate to be purely terrestrial? The post-World War II philosopher Jacques Maritain seemed to suggest in *Religion and Culture* that, whilst it is true that religious order guides one's steps on this earth, such order nonetheless had as its ultimate object "things far in excess of the requirements of any nature that ever was or ever could be created (Maritain 1931:9)". Other philosophers have similarly pointed the direction that our analysis must take, for in Wittgenstein's words "the solution of the riddle of life in space and time lies outside of space and time (Wuthnow 1987:40)³".

³ This paper has bracketed Wittgenstein's other claim, that because one cannot know what lies outside of space and time one necessarily had to pass over it in silence, for some consideration below. My addressing of it here would be beyond the scope of this article and thus would be far from satisfactory.



But the paper thus far has established that current manifestations of social science cannot take this transcendent divine object seriously, given that their very foundations ignore this divine object before study into it even begins. If the key lies in meaning embedded in order, and if analysing that order necessitates transcending the temporal sphere, what frameworks can enable the analyst to at once engage both the actions of religious actors, and transcendental dynamics that animate such action?

Max Weber provides a possible inroad. Indeed, Weberian ideas are a step in the right direction, given Weber's recognition of the salience of both meaning, and of an extra-temporal sphere which provides that meaning (Hamilton 1995:137; Weber 1985). However, Roxanne Euben suggests most incisively that Weberian frameworks evince problems regarding the relationship between the religious and political sphere. Euben's reading of Weber suggests that he regards involvement in the spiritual life as part of a set of inherently incompatible strands: a "this-worldly" strand where religious life necessitates contempt for the temporal sphere, which cancels out participation in the other, "other-worldly" strand where the spiritual life is so inextricably entwined with the temporal that the latter eclipses the former (Euben 1997:432; Hamilton 1995:143-5). One may find such Weberian understandings unable to encompass the entirety of spiritual experience, as well as incompatible with the subjective understandings of a great variety of religious actors and their subjective conceptualisation of the two spheres. In other words, so long as reliance on Weberian conceptions that see the spiritual and the temporal worlds as the mutually exclusive "sacred" and "profane" persists, the analyst may remain unable to hermeneutically understand, for example, the Carmelite Monastic tradition, which prescribes withdrawal from the temporal sphere, but only as a means to engage it yet again, but in an ostensibly richer way.

Peter Berger and Thomas Luckmann's *The Social Construction of Reality*, however, provides a more promising avenue to explore this phenomenon. According to Berger and Luckmann, the world as experienced by any actor is not an objective "real" world



as such, but the result of a process of social projections which later coalesce into a reified world that stands outside the subjectivity of the individual and imposes itself on the individual to the point that the latter must adjust his or her activity the former (Berger and Luckmann 1967). Whilst this seems almost identical to constructivist models, what sets Berger and Luckmann apart is the notion that this process occurs whilst being nestled in concentric frames of increasingly comprehensive meaning, the ultimacy of which resting in what he calls the “symbolic universe”. Promising as this model might be, however, it is not without its problems. The most pressing is the circularity of the process of world creation so central to the model, which leaves silent the issue on how exactly the religious underpinnings infuse meaning into and maintain the social world. Nor do they provide any insight as to the source of these religious insights into the social world apart from the social world itself. While this “symbolic universe” is referred to as transcendent, it is only to the extent that it transcends “everyday reality”, rather than complete temporal reality. What is more, *Social Construction* describes symbolic universes as merely a “matrix of all *socially* objectivated and subjectively real meanings (emphasis is the author’s)”, thereby sourcing all ultimate meaning of temporal experience back onto the temporal sphere and locking out the supernatural (Berger and Luckmann 1967:113-4). This point is not insignificant, for one cannot logically derive a framework that is supposed to provide cohesion exclusively from a social world that is characterized by a lack of a framework.

Because Berger asserts that religion stems from participation in the life of the social world, there might arise the Durkheimian impression of religion as merely a symbolic method of participation in the events of this temporal world and no other (Wuthnow et al. 1984:10). Indeed, in *The Heretical Imperative*, Berger himself contends that this is not the case.

to say that religion is a human projection [as he did in the *Social Construction* and later the *Social Reality*] does not logically preclude the possibility that the projected meanings may have an ultimate status independent of man (Berger 1969:180).



Whilst such an assertion of the transcendent as a non-contingent variable puts him apart from many other constructivists who make these projected meanings as but a residual and contingent element of predominantly temporal concerns. But Berger provides no clear answer as to the exact relationship between his constructed “reality” and this enigmatic variable which has an “ultimate status independent of man”, save that it is a human enterprise to deify certain objects of temporal experience (Berger 1973:34).

It should become evident that hermeneutical understanding of religious actors is dependant on not just a radical expansion of conceptual horizons to encompass the temporal and spiritual spheres, but also a radical harmonisation of those two spheres into a coherent framework. In this regard, another possible step in the right direction is exemplified by Eric Voegelin, who asserted that

[e]very society is organised for survival in the world and, at the same time, for participation in the order of being that has its origin in world-transcendent divine Being; it has to cope with the problems of its pragmatic existence and, at the same time, it is concerned with the truth of its order (Voegelin 2000:68).

This Voegelinian conception of history is key to our understanding of the religious component of religiously based political action, for it puts that transcendent component into the very foundations of the research agenda. It is unlike the constructivist conception of socio-political action, where the search for meaning is treated as but an element of the quest for the rational fulfilment of interests, an approach which has proven inadequate for reasons stated above. Voegelinian conception of politics provides space for the serious engagement with the transcendent, since he acknowledges that it has been the historical source of the creation and maintenance of these webs of meaning to actions taken in the temporal sphere. But Voegelinian models conceptualise these webs of meaning in a way that is unlike Weberian frameworks, for the natural and supernatural spheres are not seen as mutually exclusive but symbiotic. In other words, Voegelinian versions equate all socio-political action as being simultaneously participating in both temporal and



numinous spheres, in a sort of *metaxic* “in-between” space where the two spheres overlap. Thus, in order to comprehensively understand temporal action, Voegelinian models demand engagement with coinciding transcendental dynamics.

The incorporation of Voegelin’s framework at the foundations of social scientific research also overcomes the circularity of Bergerian frameworks canvassed above, by understanding social construction as set against a backdrop of a simultaneous participation in the divine arena. However, it would be premature to regard Voegelinian foundations as the end to this search. Despite the great conceptual leap that Voegelin allows, such models evince one major shortfall: that whilst Voegelin emphasises openness to transcendent experience in *general*, he rejects *particular* encapsulations of the transcendent experience. Historians of Voegelin point to his caution against the codification of transcendent experience in doctrine, which impeded accessing the *essence* of the transcendent experience which is a “predogmatic reality of knowledge (Voegelin 1978)”. Whilst acknowledging the practical purposes of doctrine, Voegelin argued that it was the over-reliance on doctrine rather than experience that contributed to the slide into the doctrinaire ideologies of the eighteenth, nineteenth and twentieth centuries, whose cost to humanity seemed to outweigh the benefits. However, in seeking this pre-dogmatic reality of knowledge, critics argue that Voegelin essentially leaves the description of content of transcendent order, or the “course” of history that was the above mentioned *metaxic* meeting point as a “mystery”, or “divine flux (Federici 2002:169)”. Because it is a mystery, “Thou shalt not rest in conclusion[s of the mystery] lest thou fall into certitude, the unforgivable sin against openness (Federici 2002:172)”.

This opposition to certitude is mirrored in some strands of postmodern theology, like John D. Caputo. Whilst critical of post-Enlightenment rationality, Caputo echoed the anti-dogmatism of Voegelin, rejecting the propriety of taking seriously the particular articulations of transcendence in theology. Specificity in articulation of the divine, argued Caputo, is always tainted by arrogance and violence and is thus antithetical to the freedom that experience of transcendence demands (Caputo 2001:307). The effect of this thrust is like that of constructivism mentioned before, either a refusal or



reluctance to quarry the actual content of particular expressions of the transcendent experience. According to Voegelin scholar Gerhart Niemeyer, the net result of this kind of reluctance would be to once again, albeit unintentionally, render the transcendent as another form of disengaged “Platonism”. The reason behind the rejection of the content of doctrine is not so much the doctrine in and of itself, but rather the fact that “Voegelin has approached a great spiritual reality from a standpoint extraneous to it”. Putting Niemeyer’s point into even sharper focus, Harold Weatherby and Bruce Douglass, argue in sympathy with Niemeyer, that this reluctance to quarry arises from Voegelin’s complete reliance on philosophical discipline to analyse an essentially theological reality (Federici 2002:170).

A more fundamental critique can be gleaned from James K.A. Smith’s thoughts on Caputo’s idea of “religion without religion”. While the motivations for providing a counter to the worst forms of fundamentalism are correct, the premises from which Caputo and Voegelin base their rejection of particularist articulations of the transcendent are essentially replications of the Modernity that they seek to overcome. If Smith is correct, both Caputo and Voegelin actually accept the Modern Cartesian framework surrounding the issue of epistemological certainty, that is, accepting the Cartesian dichotomy of either being in a position of omniscience or complete ignorance in relation to a subject (Pickstock 2000:63; Smith 2006:118). While to deal with this issue of the philosophy of language would be beyond the scope of this article⁴, one can argue to comprehensively transcending the Modernity of the methodological orthodoxy is dependent on rejecting the Cartesian logic of determination, equating knowledge with omniscience, and taking seriously a logic of incarnation, where the inquirer is incapable of omniscience regarding a subject, but is at capable of knowledge of elements of the subject that have been revealed. To apply such a logic in the case of hermeneutically comprehending religious actors, knowledge of the transcendent variable is made possible through knowledge of the manifestations of transcendence via particular media of language and articulated theology (Smith 2002).



We arrive here at a very crucial and highly controversial point. It would be futile to comprehensively respond to Juergensmeyer's call for a greater appreciation of religious sources, however open they are to the transcendent ground, so long as they do not seriously engage the specific articulations of theology as a concrete expression of the transcendent. This state of affairs will persist so long as the topic of action that engages both the temporal and transcendent spheres is analysed from standpoints external to the project of theologising. At the same time, undertaking a hermeneutical approach that is coupled with a deep suspicion of particularity risks asserting an indeterminacy which makes any engagement with the concrete content of religious sources impossible.

It is here that Thomas' nod to Radical Orthodoxy becomes a way forward. Indeed, Radical Orthodoxy's ontology is consistent with that of Voegelin, for meaning in the temporality exists insofar as temporality is suspended from the transcendent (Smith 2004:75). However, Radical Orthodoxy proceeds from a rejection of the Cartesian equation of knowledge with omniscience. This means that unlike Voegelin and Caputo, Radical Orthodoxy is able to locate in the very particular and finite expressions of "doctrine" that *metaxic* experience of the transcendent (Crockett 2001:35). Because of this, one no longer needs the experience be defined as a mysterious "divine flux" in an attempt to somehow maintain an indeterminate transcendence that is at the same time universally immanent. Whilst maintaining the universal may be a valid effort, doing so through the avoidance of particularity is not, since it replicates the versions of postmodernism that in turn replicate Modern dichotomies. Also, as Pickstock reminds us, a *metaxic* mode of participation necessitates the universal to be accessible via cleaving to "specific, time-bound [and] traditional" particularity. Indeed, for those proceeding from Radical Orthodoxy, this cleavage to particularity is the very thing that enables "participation in the true universal which is transcendent and inaccessible". "In disdain of particularity", says Pickstock, "one actually loses the universal irrevocably (Pickstock 2000:175)". The

⁴ A much more comprehensive take on this issue can be found in Smith, James K A. 2002. *Speech and*



advantage of Radical Orthodoxy over Voegelinian conceptualisation thus lies in its serious engagement with the particular. In this case, that particular subsists in theology as expressions of the transcendent. The content of theology becomes a concrete locus of analysis into the logic of the religious actors from which such theology springs forth.

Conclusion

This very short article has only skimmed the surface of some foundational conceptual issues concerning attempts to make sense of religious actors. It has proceeded on a twofold claim that in order to hermeneutically understand the logic that underpins the political actions of religious actors, it is necessary to engage the religious variable in its fullness. The need to engage this religious variable leads to the second claim that in order to fully engage the religious variable, it is necessary in turn to engage the sphere in which the object of the religious variable resided. Proceeding from those two claims means that the political scientist will inevitably encounter conceptual hurdles. In conventional approaches, the hurdles stem from an autonomous rationality that from the start shuts out the religious variable. The explanatory focus of such approaches often leads to a fragmentation of the entirety of human experience. Providing cohesion through an exploration into the meaning of those experiences thus meant that the religious variable could not be just slotted into the analytical process without some conceptual widening. However, so long as reticence in acknowledging that meaning had to be part of a comprehensive narrative led to the twofold result of shying away from the numinous object of religious activity, and like its conventional counterparts, allowed the re-emergence of the spectre of a disembodied “rationality”. Ensuring that such a spectre remains buried meant that to speak of meaning, one has to speak of order. But unlike earlier writers who took all order to be exhaustively rooted in temporality, this paper has argued instead for a religious order that incorporates and synthesises both the temporal realm in which socio-political activity takes place, and the transcendent realm from which meaning is injected into those actions.

Theology: Language and the Logic of Incarnation. London: Routledge.



Coming to a comprehensive synthesis, however, requires casting off the vestiges of Cartesian logic still inherent in current postmodern manifestations. This includes the rejection of the argument that openness to the transcendent must be coupled with a persistent suspicion of articulations of that transcendence. The paper has argued that only a thoroughgoing postmodern Radical Orthodoxy can provide a key analytical entrance into this contentious subject. The trajectory of such study can enable the creation of sophisticated inroads into a growing literature that not only critiques traditional models that shut themselves off from the transcendent just as a growing proportion of political activity treats the transcendent as a given. Its significance can also stem from its potential to provide alternatives that constructively engage these ideational others on their own terms.



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FOR THE RIGHT TO SILENCE

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Abstract

This article explores some of the changes regarding the right to silence that have flowed from the passage of the so-called ‘anti-terror laws’, particularly the amendments to the ASIO Act (1979). It finds that the right has been significantly weakened through a number of provisions in the legislation. The writer contends that the judicial protection of the accused, embodied in the right to silence, is fundamental to the workings of an efficient and moral judicial system despite the seemingly overriding imperatives of national security. It argues that the loss of the right to silence neither serves the prosecution of terrorists, nor the bolstering of investigative procedures to apprehend them, but in fact weakens such processes and the democratic basis of the Australian judicial system in the rule of law.

“Innocence claims the right of speaking, as guilt invokes the privilege of silence”

- Jeremy Bentham (Bentham, 1827)¹

Introduction

The right to silence is a fundamental principle of Australian criminal law and lies at the centre of legal rules excluding involuntary and improper confessions. In recent years however, this long held established legal protection has been under concerted political attack and is straining considerably. Sweeping changes to the right, “rammed” through parliament in the wake of the September 11 terrorist attacks in the United States, have radically and detrimentally altered the principle of the right to silence within the Australian criminal legal system (Topsfield, 2005). These wide-sweeping changes, and the lack of a concerted opposition against them, represent a fundamental normative shift in the legal principles governing the Australian judicial system. The successful - and undebated - passage of many aspects of the ‘anti-terror’ laws represents an unabashed victory for the proponents of over-zealous law enforcement agencies against the rights of the accused and with this loss comes the moral questioning of our commitment to

¹ The author would sincerely like to thank the late Julian Phillips for his comments, support, and belief in the strength of this argument.

liberalism and the protection of the individual.

This article explores the contemporary status of the right to silence in the Australian legal system and the changes to this principle primarily under the *Australian Security Intelligence Agency Act 1979* (Cth).² It shall argue for the re-strengthening of the right to silence by revealing the inherent dangers of the alteration to this fundamental principle of criminal procedure. It shall be argued that detrimental changes to the right to silence are both an affront to basic common law principles and democratic values. Moreover, it shall posit that the anti-terror laws are corrosive of the two fundamental principles that underpin the Australian criminal law, namely; that the judicial system is geared to the ascertainment of the truth; and that the judicial system operates fairly to the accused (Zander, 1998: 15-17).

While the right to silence is usually viewed, unfortunately, as being primarily an issue of law this article takes a much more expansive view of the problem. While it gives an overview of the status of right to silence in Australian law, the argument for its retention is based on philosophical reasons – protection of the individual, reasonableness of confession, and the maintenance of the democratic ethos. While scholars of jurisprudence tend to focus on legal arguments for or against the right to silence, little work has been done that concentrates on the philosophical and political legitimacy for the right to silence which is the purview of this article. The first part of the article gives a general overview of the status of the right to silence in Australian law and the second part addresses the changes to it brought about by the passage of the anti-terror laws.

The Right to Silence in Australia

Judicial restraints and limitations on policing methods form an integral part of any democratic system's protection of the individual. The rights of the accused, which includes the right to silence and all other forms of due process, are essential to the workings of a democracy based on the rule, as it is such safeguards that legitimises the state's monopoly of coercive violence in the exercise of criminal law (Crelinsten, Ozkut, 1996: 8). One of the

² Australian Security Intelligence Act 1979, Act No. 113, of 1979, as amended, Act No. 21, 2007. Also of interest are The Anti-Terrorism Act (2004), No. 104, 2004 and The Anti-Terrorism (No. 2) Act (2005), which

most important principles of the rule of law, established progressively since the *Magna Carta*, is that the state ought not to have arbitrary power to interfere with the liberties of any citizen. From these ancient beginnings has grown the principle that no citizen is under obligation to answer questions from any government official, whether or not the government was acting lawfully in detaining that person for any length of time (Law Council of Australia, 2002). The right to silence stems from this principle and is essentially a common law right that has been given a degree of statutory recognition within Australian law (for examples, *Crimes Act 1958* (Vic): s464J). Yet as found by Lord Mustill in *Smith v. Director of Serious Fraud Office*³, the right to silence does not denote any single right but rather refers to a disparate group of immunities which allow a person to refuse to answer questions put to him or her by persons in authority. At its most fundamental level, the right to silence provides that a person who believes on reasonable grounds that he or she is suspected of an offence is entitled to remain silent. The central tenet of the principle is that silence can never amount to an admission if it is occasioned by the conscious exercise of a known right to remain silent, whether the suspect has been told of this right or not (*R v. Bruce*).⁴ While I do not wish to detail at length the legal status of the right to silence, some general background is necessary to understand the gravity of the changes that the ASIO Amendment provides.

There has been subtle erosion of the principle of the right to silence by the judiciary proceeding the passage of the anti-terror laws. This gradual weakening of the right was first evidenced in the decision of *Woon v R*⁵ which allowed evasive and selective answering of questions to be used as evidence showing consciousness of guilt. The case held that an inference of consciousness of guilt may be drawn from conduct or demeanour (which may include silence) when taken in combination with other evidence. In this case, the accused was willing to talk with police (although he refused to answer some questions) but showed his consciousness of guilt by what he said. Moreover, in *R v Alexander*,⁶ inferences of guilt were held to be permissible where the accused failed to protest his innocence during a conversation with his friends about the suspected murder of his wife. In an English study, it was found that in the majority of cases where the accused had exercised their pre-trial right of

allows for detention under the New Division 105 of the Criminal Code.

³ (1993) AC 30-31.

⁴ [1998] VR 579, 593.

⁵ (1964) 109 CLR 529.

silence that the jury were made aware of this (Zander and Henderson, 1993: 145) and though we must presume that in all cases that the jury were directed by the judge to not impute this as evidence of guilt, the prejudicial affect, regardless of the judge's direction, cannot be denied.

The problems stemming from the prejudicial affect of the exercise of the right to silence was identified in *R v Reeves*.⁷ In this case it was held that where evidence is given which discloses the accused had exercised their right of silence that a direction should invariably be given to the jury to make it clear that the accused had a fundamental right to remain silent and that this exercise must not lead to any conclusion. However, despite this ruling as seeming to bolster the right to silence, the case represents a watershed decidedly in the other direction. The consequence of the decision was to deform the rule which had ensured that the accused's exercise of their pre-trial right of silence was inadmissible against them into a rule about how juries should be instructed (Aronson, 1998: 521). It is highly questionable whether juries can perform such "mental gymnastics" (Williams, 1994: 629) and overcome their own subjective impression of the silence of the accused regardless of a clear, unambiguous direction from the judge. Though this criticism predominantly attacks the pre-texts of the jury system its pernicious effect on the right to silence is yet further evidence of the myriad of problems the exercise of the right to silence entails.

One of the most clear elaborations on the Australian right to silence was given in *R v. Weissensteiner*.⁸ In this case, the High Court recognised the right to silence as a fundamental common law right within Australian law. However, as Bagaric has argued, this positive re-statement of the established common law principle by the High Court was "more fanciful than real" as the distinctions made in the judgement entailed that the scope of the right was in fact significantly limited (1997: 366-367).

The case against Weissensteiner was circumstantial and at the trial the accused remained silent. There was no obligation on the accused to give evidence and guilt could not be inferred from his failure to do so, and consequently, there was no evidence from him to refute the

⁶ [1994] 2 VR 258-263.

⁷ (1992) 29 NSWLR 109, 115.

prosecution evidence (Bagaric, 1997: 370). On appeal, the majority judgement stated that “[i]t is only when the failure of the accused to give evidence is a circumstance which may bear upon the probative value of the evidence which has been given... that they [the jury] may take it into account only for the purpose of evaluating that evidence”⁹. For the court, the accused’s silence could be used against him or her where the failure to give evidence was “clearly capable” of assisting the jury in the evaluation of the evidence and the exercise of the right to silence at a trial could itself warrant the drawing of unfavourable inferences. According to *Weissensteiner*, failure to testify could be used as a basis for concluding that there are no reasonable hypotheses consistent with innocence, and that guilt has accordingly been proven beyond a reasonable doubt. *Weissensteiner* reveals that the exercise of the right to silence can be used against the accused where the failure to testify may mean that prosecution evidence remains uncontradicted (Williams, 1994: 629). Consequently, a corrosive pattern against the right to silence is clearly discernible in recent case law which reveals that the strength of the right is to a large extent illusory, even without the recent promulgation of anti-terror legislation.

The ASIO Amendment and the Right to Silence

The amendments to the *ASIO Act 1979* (Cth) has further eroded the right to silence, effectively terminating it for those suspected of terrorism, and even for those persons only ancillary to the investigation of terrorism. Provisions in s 34E, under Division 3, of the Act provides that under issue of a questioning warrant that the detainee must give information, and/or produce records or things that may be relevant, or important, to a terrorism offence.¹⁰ Furthermore, s34L(2) provides that a person “must not fail to give any information requested”, or fail to produce any records or documents, that are requested under warrant. Such a provision allows for the detainee to be liable for offences colloquially known as “lack of cooperation” (Wyndham, 2003) and s34L(2) provides that failure to comply with questioning carries a penalty of five years imprisonment.¹¹ The Senate Legal and

⁸ (1993) 178 CLR.

⁹ *Ibid*, 1993: Mason CJ, Deane and Dawson JJ, 239.

¹⁰ See *ASIO Act 1979 (Cwth)*, s 34E(4)(a)(i) and (ii). Similar provisions are repeated in 34G, 7(a)(i) and (ii) regarding the issuing of questioning and detention warrants.

¹¹ Section 34L “Giving information and producing things etc.” of the *ASIO Act 1979 (Cwth)*, provides that: (1) *A person must appear before a prescribed authority for questioning, in accordance with a warrant issued under this Division or a direction given under section 34K.*

Constitutional Legislation Committee consequently determined that there was *no* right to silence in the Act (2002: 5) and Das and Kratcoski have demonstrated how such provisions have imperilled the rule of law and significantly undermined established judicial procedures (2003).

The right to silence has essentially been abrogated for detainees under the ASIO Act who, by their refusal to answer any questions, risk imprisonment (Hocking, 2003: 357). Most disconcerting is the fact that ASIO agents would be thus empowered to act accordingly against anyone, including children, and even those not suspected of terrorism, evincing an abandonment of many fundamental legal protections in the investigation of terrorist-related activities (Emerton, 2006). The Senate Standing Committee for the Scrutiny of Bills condemned this aspect of the legislation as it allowed for the detention of persons for the purpose of collecting information, not just for the investigation of an offence (2002: 4-7). These extreme powers conferred under the ASIO Act expose an arrant lack of faith by parliament and the executive in the ability of the Australian police forces because the underlying assumption is that the capacities of policing need strengthening at the price of certain civil liberties. In light of the numerous federal police blunderings in the Haneef case this consternation may not be unfounded (Skehan, May and Dhillon, 2007). Arguably, the principal necessity in combating terrorism lies in the need of extra resources and skilled personal, not in the attainment of clandestine powers. Professor Williams has warned that ASIO is not an enforcement body and that if it is to be granted coercive police powers, such as contained in the amendment, that legislation must subject the organisation to the same political and community scrutiny and controls that apply to any other police force (Williams, 2002: 201-252).

The offence of failing to give the information, record, or thing requested in interrogation in s34L can be regarded as effectively *reversing* the onus of proof from the investigative and prosecution powers of the Crown onto the accused. That is, in s34L it is the

Penalty: Imprisonment for 5 years.

(2) A person who is before a prescribed authority for questioning under a warrant issued under this Division must not fail to give any information requested in accordance with the warrant.

Penalty: Imprisonment for 5 years.

(3) Subsection (2) does not apply if the person does not have the information. Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the Criminal Code).

It should be noted that sub-section 8 provides that this duty to provide information includes information that incriminates the person, though under sub-section 9 these admissions are not admissible against the person in other criminal proceedings.

person being interrogated that must prove that they *do not* have the information to escape prosecution which logically forms an irresistible compulsion to speak in bearing this evidential burden. In this sense, this provision shifts judicial principles toward the inquisitorial approach requiring the accused to provide evidence to refute the state's case rather than compelling the prosecution to adduce evidence to support the charge. The reversal of the onus of proof was opposed by several submissions, including the Law Council of Australia (The Age, 2005) and Amnesty International, which objected that the 'reverse onus' also violates the presumption of innocence (see Senate Legal and Constitutional Committee, 2003: 6.53-6.55).

The imperatives of national-security and the protection of Australian democracy against terrorism have been the assumed justification, the *raison d'être*, behind the gamut of anti-terror laws. However, as Bagaric has argued, the prospect of utilitarian gains – including that of national security - cannot justify preventing a man from doing what he has a right to do (Bagaric, 1997: 375). Moreover, Chalk argues that the institutionalised counter-terrorist policies may pose an even greater threat to democratic freedoms than the terrorists themselves (Chalk, 1998: 373). The question is, if we abrogate our democratic rights, how are we to distinguish ourselves from the terrorist threat that we are attempting to secure ourselves from? Wardlaw had gone so far as to argue “that depriving citizens of their individual rights... is to put oneself on the same moral plane as the terrorists who believe the ‘end justifies the means’” (Wardlaw, 1989: 69). Ultimately, if the legislative response to terrorism is the rejection of constraints on state power established by the rule of law, then terrorism prevails at the expense of our own political rights (Abbott, 2002: 3). As Lynch and Williams warn, we must not let ourselves become the victim to our own fears (2006).

Although the ASIO amendments do not compel a detainee to speak, by providing that silence may result in five years imprisonment irrefutably constitutes an irresistible, and possibly, a coercive pressure to do so. The threat of imprisonment can be seen to border on coercion when we couple it with the other investigative powers given to agents by the Act, such as the lengthy amount of time available for questioning (*ASIO Act 1979 (Cth)*: s34R). The element of fear that the accused would necessarily possess in such circumstances would be palpable and is geared solely towards the coercion of the detainee. This begs the question

of the veracity of such ‘information hunting’ expeditions. If a detainee were compelled to speak, solely for fear of imprisonment, then doubts must seriously be raised as to the degree of reliability that could be attached to information obtained by such duress.¹² Moreover, the new ASIO powers force the accused into believing that the only way to remain free is to disclose all requested information. Not only would this ultimately lead to capricious testimony but it could be stridently argued that this amounts to an inducement and therefore contrary to specific provisions in the rules of evidence (For example the *Evidence Act 1958 (Vic)*: s149).

Questions must also be raised as to the rational efficacy and worth of information obtained by such means. As Hocking writes, under the anti-terror laws it is the provision of information, regardless of its veracity, that has become the sole means of preventing one’s own imprisonment. This allows for unsubstantiated reporting, all too reminiscent of the probing, witch-hunt techniques of McCarthyism (Hocking, 2003: 400). While some argue that the right to silence obscures the search for the truth, it can be countered that it actually facilitates that goal by reducing the risk of false confessions. History shows us that the compulsion to speak can and does lead to gross distortions of the truth and the example of the Birmingham Six provides irrefutable evidence of this. Under the rationalist model of the judicial system, the right to silence provides a fundamental benefit in the ascertainment of the truth amidst the plurality of competing truth-claims. Testimony that is produced under pressure, particularly the threat of imprisonment, may be unreliable and consequently the right to silence can be seen as consistent with the goal of rectitude (Easton, 1998: 170-179). The right to silence is thus best accounted for not just as a judicial protection but as a feature of the criminal justice system which is required as a functional necessity. As the police and ASIO agents endeavour to lay the foundations for the construction of a case against a terror suspect rather than for an impartial inquiry, the accused’s right to silence is the only genuine safeguard at his or her immediate disposal. As Easton surmises correctly, “[f]ar from undermining the objective of rectitude, the right to silence may be instrumental in achieving it, in forcing the police to search more widely for probative evidence”(Easton, 1998: 170-179). An investigative procedure that encourages the prosecution

¹² It is possible that the anti-terror laws would also offend other common law principles such as judicial exclusionary discretions of *Bunning v. Cross* (1978) 141 CLR 54, and *R v. Lee* (1950) 82 CLR 133. The anti-terror laws would render these broad discretions useless, as an inference could be drawn from silence which would be inherently unfair (Lee) and could even be argued to be obtained improperly (Bunning and Cross).

to gather additional evidence other than merely the suspect's admissions should be considered as crucial in facilitating the ascertainment of the truth and can only lead to a strengthening of the criminal process rather than detract from it.

Similarly, the moral authority of judicial decisions may become impugned if it were achieved through the violation of the right to silence. It is clearly essential that for criminal law to be effective and to maintain legitimacy that verdicts must be held by the community to possess moral authority (Sprige, 1987: 216-217). Yet, the erosion of the right to silence raises questions concerning the legitimacy of the confession obtained for it may be factually unreliable (as the detainee is compelled to say *something* to gain their freedom), or misused to compel other incriminating evidence (as in the Haneef case where statements made during interrogation were relied on for prosecution) (The Australian, 2007). If either of these risks materialises the legitimacy of the criminal verdict may be compromised in the eyes of the public. While the Haneef case was made pursuant to s1C of the Crimes Act, and not the ASIO Amendment, its example nevertheless highlights the danger of the loss of the right to silence because in the first instance Haneef freely gave information and denied legal representation. This information was then used against him. This example not only illustrates how the fear of remaining silent can be construed by suspects in certain circumstances but also how effective legal representation (that Haneef subsequently relied on) was able to protect the suspect against such oppressive investigative strategies.

It was Jeremy Bentham who first abstracted human nature to such a degree that he could generalise that it is innocence that claims the right of speaking and guilt that invokes the privilege of silence (Menlowe, 1988: 287). Utility was to override judicial protections of the accused and it is this ontological assumption that continues to captivate the imagination of our legislators and has now pervaded our system of justice through the wide sweep of the anti-terror laws. It is common for critics of the right to silence to claim, on unfounded grounds, that it is professional criminals who disproportionately take advantage of, and abuse, the right to silence. Conservative Party Home Secretary went so far as to assert that “[t]he so-called right to silence is ruthlessly exploited by terrorists. What fools they think we are” (Howard, 1994: 235 Column 26). However, Professors Seidmann and Stein have demonstrated, via a game-theoretic perspective, that the perception that the right to silence helps only criminals is mistaken.

They illustrate that the right to silence actually assists in the search for truth because it helps to distinguish between innocent and guilty suspects/defendants (2000: 430-510). Any generalisation of human behaviour within the legal system leads inevitably to inequity, irrationality, and the erosion of the guiding principle of the justice system to ensure that the criminal law is rationalised so that it accords with modern democratic societal values (Phillips, 1998: 16).

To assume that silence is an act of a guilty mind is to vastly over simplify the human psyche. Quite simply there may be many factors contributing to the detainee's silence during interrogation that those captured by Bentham's ideology are blind toward - fear, anxiety, the desire to protect someone else, embarrassment, outrage, lack of clarity in thought, language barriers. Any generalisation of human behaviour in such highly charged circumstances is both imprudent and unfounded. Statistical analysis simply does not support the generalisation implicit in the Benthamite logic (see Easton, 1998: 145ff) and as such, rationality and empirical verification must replace the ASIO Act's current basis in abstraction. The majority of suspects find being in police detention extremely threatening and while in such a fearful state may be at risk of making false admissions, particularly after 48 hours of gruelling interrogation. Similarly, what might appear to be a peripheral factor in the early stages of an interrogation, and therefore not mentioned, could later transpire to be crucial to the defence. During the initial interrogation the suspect may not be aware of the full extent of the case against him, nor the legal consequences. Alternatively, a person of low IQ who did not understand the right to silence could not be expected to comprehend the importance of his confession. It was for this reason that the Royal Commission on Criminal Procedure recommended retaining the right to silence (Easton, 1998: 145ff) Amnesty raised similar concerns asserting that the provisions in the ASIO amendments would unduly impact on vulnerable detainees, including those with language difficulties and children (Senate Legal and Constitutional Committee, 2003: 6.53-6.55). Furthermore, Easton has posited that unattractive and inarticulate defendants may do themselves more harm than good by speaking, and if they speak in an unpopular dialect, may further prejudice those against them (Easton, 1998: 144-152). This factor increases in importance in the investigation of terrorism when we consider the racialist underpinnings of the "archetypal" terrorist, commonly depicted as an Islamic fundamentalist. Many detainees of Arab or Persian descent – and those following the Muslim faith generally - may fear the attachment of such

prejudice if they speak a language other than English, or with an accent. In all these circumstances it would not be ‘professional terrorists’ who would be adversely affected from the abrogation of the right to silence but the very weakest in our community; recent immigrants, persons of non-English speaking backgrounds, people with a low IQ. Inquiries into wrongful convictions have shown that the suspect’s own admission may be crucial to conviction and that it is harder for appellants to win on appeal (Easton, 1998: 144-152). It is therefore difficult to see how the innocent can be helped in any way by the abolition of the right to silence.

The example of the UK provides a historical case that illustrates the dire consequences that can result from the policy-shift against the right to silence. Contrary to its ancient common law principles, the British legislature felt that public opinion, law enforcement, and public security matters warranted an abrogation of the right to silence for the sake of prosecuting IRA members – a decision which, in some instances, was to have tragic consequences (Jackson, 1995: 587). The Runciman Commission examined the miscarriages of justice that followed from these legislative changes to the judicial protection in the cases of the Bridgewater Three, the Birmingham Six and the Guildford Four - all of which entailed the waiver of the right to silence (Easton, 1998: 170-179). In these cases, confessions obtained during interrogation were made without the right to silence, under duress, and were found to be factually defective, sometimes only years later. Yet unfortunately, our legislature has failed to heed the findings of this Commission, the injustices of which can now be repeated since the threat of imprisonment in s 34L has transformed silence into a weapon of interrogation for investigative agencies.

Unfortunately, to date no study has been undertaken to test the empirical viability and success of the anti-terror laws in the investigation and prosecution of terrorism. The Haneef affair tends to support the view that such laws have had the opposite effect to that intended, and have in fact confused police efforts rather than strengthened them. Unfortunately, since 2001, more than 30 pieces of counter-terrorist legislation have been passed through Parliament but little has been done to measure the success or practicality of these laws (Bankroft, 2006). Without such data it is hard to justify their continued operation. The need of such laws is rendered even more dubious by the fact that security reports indicate the peaceful calm of domestic Australian politics (O’Sullivan, 2006). If this is the case, then there is little need or justification for such a dramatic and oppressive amplification of the laws governing domestic

security.

Finally, we must have recourse to the principles of customary international law regarding civil and political rights. Many aspects of the ASIO Act, particularly 34L, would, *prima facie*, offend our international obligations under the Universal Declaration of Human Rights (1948: Article 2 and 11(1)), and the International Covenant on Civil and Political Rights (1966: Article 9). The Parliamentary Joint Committee produced a bipartisan advisory report critical of the human rights implications of many aspects of the anti-terror laws (Wyndham, 2003: 2) and determined that the original ASIO Amendment “would undermine key legal rights and erode the civil liberties that make Australia a leading democracy” (Parliamentary Joint Committee on ASIO, ASIS, and DSD, 2002). Along similar reasons, Amnesty International also opposed the legislation (Amnesty International, 2002) and the Senate Standing Committee for the Scrutiny of Bills questioned why protection from terrorism could only be achieved by removing legal protections such as the right to silence (2002: 7-10).

Conclusion

The fundamental question regarding the appraisal of the right to silence is that of *balance* between the interests of the community in bringing terrorists to justice and the rights and liberties of the individual. The rule of law should not be seen as a limitation on the protection of democracy but its definition, its very essence (Justice Kirby, 2001). The common position of those who seek to weaken the right to silence generally hold to Bentham’s logic, though unsupported by empirical evidence, that the right is used predominantly by the guilty. In distinction, those who seek to maintain the status of the right to silence posit that it is crucial for the protection of the innocent in the judicial process. As a democratic state with the rule of law as a primary source of political legitimation, we must remember the weak in our society who will be the most adversely affected by the loss of judicial protection.

The nature of the right to silence as a legal principle mediating the relationship between the state and citizen manifests as a yardstick from which to judge the socio-political values prevalent within the state and civil-society. As the outcome of this issue relies primarily upon the prevailing social values of the contemporary community to which it effects, the discussion is an

illuminating hallmark of the Australian community standards of ethics and the law – and the ASIO Act is a particularly sad indictment of contemporary Australian values. It is hardly surprising however, as the inexorable encroachment on civil and political freedoms has long been recognised through expansion of executive power. While some may argue that the right to silence is still sacrosanct, and that the threat of imprisonment in the exercise of the right within the ASIO Act is not indicative of compulsion, such legalistic sophistry has dubious merit in jurisprudence and is logically inconsistent precisely because it affords no *protection* to the accused. The power of a right lies solely in its ability to protect and when this capacity is undermined by fear of imprisonment the right cannot be reasonably said to be in existence any longer. Consequently, the ASIO amendment has relegated the right to silence a mere *formal* existence, an undermined judicial protection that, while not being explicitly expunged, has been significantly weakened.

It can only be speculated as to the long-term effect of this loss of the right to silence on the Australian community - the tainting of the moral authority of police investigation activities, the loss of the presumption of innocence, and the weakening of the rational model of judicial inquiry seem likely. Though the provisions contained in the ASIO amendment seem at odds with the principles and history of the Australian legal system, unfortunately, they seem anomalies that are unlikely to be corrected in the near future. To further erode the right to silence would render the relationship between the executive powers of the state and the liberties of citizens out of balance. We must remember that democracy is not just threatened by terrorism and external forces, but can be weakened from within through the acquiescence of the judiciary to the more insidious, yet less obvious, tendencies of the executive towards autocracy.

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- Book Review -

Robert B. Pippin, *The Persistence of Subjectivity: On The Kantian Aftermath*, Cambridge University Press, Cambridge, 2005, pp 369, ISBN 0-521-61304-3.

Pippin's work forms part of the growing trend amongst scholars to re-explore and critically assess the Kantian and Hegelian legacy in social theory and political philosophy. Much of this book has been published previously but it is only here that Pippin comprehensively examines the highest values of the "modern West"; the ideal of bourgeois philosophy. For Pippin, what lays at the heart of this ideal is a philosophy of freedom that looks to how individuals may direct the course of their own lives as *independent, rational and self-reflective* beings.

Today, 'bourgeois' creates images of self-indulgent hedonism and connotes a form of egoism, a "well-organised selfishness" and "cultural crudity". Post-Hegelian thought has maintained a profound suspicion of the claims of bourgeois philosophy and the idea of individuals as self-determining centers of causal agency. Yet Pippin is a rare, if vociferous, example of a defender of such Enlightened ideals and in defending this end he offers – for this reader at least – an array of highly persuasive arguments.

The problem with which the book grapples with is the post-Kantian denial of the ontological claim of bourgeois philosophy, the hostile rejection of the existence of – even potential for - a *self-conscious, active, self-determining* subject. It also deals with the loss of the ideal of freedom that has accompanied this rejection - the widely held contention that the ideal of the *homo-bourgeois* is not only a self-deceived fantasy but a destructive one also. Though Pippin agrees with these charges, the purpose of his book is to argue that this bourgeois sense of freedom is not false but is rather *incomplete* and is in need of a proper - *fuller* - realisation. For Pippin, the attempt by some to jettison the commitment to a bourgeois subject has involved "throwing out the baby with the bathwater", the loss of the aspiration of a free, self-determining life. For Pippin the most important implication of bourgeois freedom is the idea of natural right, that by just being human places all under an obligation "to act in no way inconsistent with the availability of action for all". For Pippin, the Owl of Minerva still rests firmly on its perch and the appeal of the bourgeois notion of right cannot, and has not, been explained away by some new philosophical insight. Ultimately, the problem is not the ideal of a free subject but the matter of its incompleteness in modern life – how the subject continues to be torn apart (*Zerissenheit*). Hence Pippin appeals to overcoming what Marcuse identified as the 'one-dimensionality' of the modern subject.

Pippin comes at the problem of what he calls *genuine* [bourgeois] subjectivity through asking what are the conditions under which one could actually "lead a life", that is, acting and experiencing as oneself without being determined by exogenous requirements, the will of others, or the distortions of false consciousness. He condemns modern life for



obliterating this possibility and yet remains hopeful in finding *shared reasons* that may provoke transformation in the normative structure of society through art and literature. Pippin – like Hegel before him - concedes nothing to the relativist problem but treats the ideal of “bourgeois subjectivity” as a norm achieved historically and as inseparable from complex relations of dependence. This position concerning a historically and socially mediated form of individual subjectivity is not new of course, but what Pippin attempts is to argue *for* the extension of Western liberal democracy *for* the subject by examining the phenomenological manifestations of the problem of subjectivity in modern literature and art.

Essentially, Pippin looks to an aesthetic exploration for the problem of subjectivity and intimately reflects on modernist art, literature and philosophy in order to understand the shape of existing philosophy which, for him, no progressivist narrative can explain. These areas are deemed as particularly important in attempting to understand the “fate” of the bourgeois ideal of the free, rational, self-determining subject. It is the later half of the book that deals with these questions, in which Pippin explores the diverse ‘modern mores’ and ‘expressions’ that illustrate the status of the subject and the modern ideal of freedom through abstract art, medial practice, literature, amongst others.

In the first half of the book, Pippin critically interrogates a host of theorists who challenge the legitimacy – and potential - of a free, bourgeois subject, including Heidegger, Arendt, Strauss, Gadamer, Frank, McDowell and Adorno. Foregoing, as does Pippin, the necessary book-length treatment owed to such a group, I will restrict my comments to the chapter on Adorno. In this chapter, Pippin argues that Adorno’s concept of non-identity is based on a distorted picture of Western modernity and its wrongly assumed drive toward reification/identitarian thinking. While Pippin agrees with Adorno that the bourgeois notion of freedom was so conceived not because of bad philosophy but because it was a conception necessary in a world of property-owners committed to scientism, he argues against Adorno’s linking of this misconception to identity-thinking in bourgeois society. For Pippin this claim is made “with little or no justification” and is “too great a stretch”. Yet, despite this misapprehension, Pippin argues that Adorno does actually gesture towards an extension of the bourgeois ideal of realized freedom as evidenced in Adorno’s praise of Kant’s Principle of Justice. Pippin thus reduces emphasis on the postmodern interpretation and qualities of Adorno’s thought and contends that Adorno in fact provides Utopian anticipations of a “reconciled life of the free”. By reference to the Kantian ideal of an *independent, rational* and *self-reflective* being, Pippin argues that there are conditions in which such an existence - such a free life - could be said to be more or less likely to exist. On this basis he concludes that reconciliation must await the transformation of our understanding freedom to a *fuller actualization of freedom* that does not defer to the non-identical of Adorno but is made in relation to others.



Such is the general thrust of Pippin's claims throughout the book, though the specific content obviously differs in relation to the nuances of the different theorists he interrogates. For example, in regards to Strauss, Pippin disputes the claim that through the manufactured "artificial experience" in modernity that we are at a loss about how to live. Instead he sees this relation between experience and philosophy as consonant with the central theme of philosophy since Hegel and thus interprets Strauss as referring to a lost "human experience" which is indeed "*findable*". As you can tell, despite the varied contexts of his argument, what Pippin stridently maintains is a continued return and re-emphasis on the theme of defending the legitimacy of bourgeois freedom and demanding that society provide a "fuller" realisation of it.

There are two general points of criticism however. The first concerns Pippin's selection of theorists. Evidently, Pippin excludes the postmodernists and their distinct challenge to the notion of the 'free' subject. Pippin's overall position could have been significantly strengthened if he had grappled with some of the postmodern objections to the Kantian conception of freedom and confronted this with a spirited defence of the ideal of the rational, self-reflective subject. On a related point, Pippin also does not engage with the abundant feminist literature regarding the viability and ethicality of the bourgeois *man*, considered as rational, self-directing, independent, and the stark divergence of this ideal to the bourgeois *woman* who is made subordinate to him, emotional, servile, dependent. Again, Pippin needs to engage with these fundamental issues to show the gendered side of the bourgeois subject. If he could somehow demonstrate this, much of the estrangement between critical and feminist theory could be assuaged for the betterment of both. One could also extol Pippin to look at post-colonial literature and the racialist, superiority that has seemingly underpinned the spread of bourgeois (white) man. Engaging with these debates would offer a crucial advancement by re-focusing political theory squarely within the normative realm – and the perennial questions therein. I would welcome a future work regarding these questions by Pippin with great anticipation.

The other, somewhat trifling criticism, relates to style. This book covers incredibly dense material and is, make no mistake, a heavy read. However, the weight of this burden upon the reader could have been significantly lightened if Pippin did not insist on incredibly long sentences (the worst example being a whopping fifteen line, single sentence, paragraph, p 20 – even Hegel would be proud!). Pippin also possesses a proclivity to over-use technical/philosophical terms which, at times, unduly clouds the overall argument. On the other hand, such language is sometimes unfortunately necessary to carry the argument without risking the charge of misappropriation.

Whether you agree with the ideal of the bourgeois subject or not, Pippin's book is an intriguing - if not essential - read and should be commended for offering a refreshing defence of a socio-political ideal. Such an honest defence is something sadly missing in most political texts these days with authors who seem timorous and reticent to openly express their own values.



***The Persistence of Subjectivity* is available in Australia from Cambridge University Press, \$160 AUD in Hardback, or \$59.95AUD in paperback.**

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- Book Review -

Jean Baudrillard. *The Intelligence of Evil or the Lucidity Pact*. New York, Berg Publishers, 2005. pp. 208, \$15.95, ISBN 1-84520-334-8.

Firstly, before beginning this review I'll take the opportunity to pay my respects to one of France's most pre-eminent thinkers, the inimitable Jean Baudrillard. At the age of 77 his simulacrum departed as an indelible image for the twenty-first century. Secondly, a word of warning, reading Baudrillard is still the extremist of sports; exhilarating, dangerous and liable to produce vertigo. It would be fair to say that engaging his work is one of life's most unsettling, confronting, confounding yet ultimately playful and liberating experiences. If you want ways to think afresh about the world, who you are and why you believe what you believe you'll definitely be shown just how deep the rabbit hole goes.

For those unfamiliar with his oeuvre, if he was not elsewhere, Baudrillard's trenchant critique of the 'hyper' capitalist age not only disrupted our reality but dismissed day-to-day understandings of current events. And like many of his contemporaries from '68 he was an unwavering *agent provocateur* to the last.

To briefly elaborate, let me tell you the story of an imperial map, a representation produced so detailed that it ended up coming into one-to-one correspondence with the actual territory. Eventually, the map covered up the very things it was designed to represent and everything that had once been directly lived. So, when the empire declined, the map faded into the landscape and there was neither the representation nor the real remaining just the hyperreal. But things aren't what they always seem to be. Baudrillard's hyperreality does not 'exist' or 'not exist'. In sociological terms, it describes information to which the consciousness is exposed to and where there is no subject/object dichotomy. Confused?

Well hit ■ ■ hold that thought while I turn to 'The Intelligence of Evil or the Lucidity Pact', a distillation of some of his last work. Once again astutely translated by Chris Turner, Baudrillard's quixotic amalgam of sociology, anthropology, cultural studies, media theory, political economy, semiotics and psychoanalysis comes to the fore. And once again, it generates remarkable originality and insightfulness.

Quickly, press ► jump on board and let's continue the story... a totalising, integrated and sealed reality hermetically envelopes the 'world' and its image. What? You mean the incomprehensibility of the 'world' becomes transposed by an 'integral reality', forcing the whole of the 'real' into the transparency of the 'visual' and 'resemblance'?

Hang on a minute, ◀◀ the technical saturation of life based on money and sign exchange seeks to abolish 'elsewhere' by viewing all systems, except itself, as relative? Isn't any particularity that tries to totalise itself bad news? Surely the prevailing logic of such a system would be to relentlessly push towards a concentration of all the forces of 'good' to eliminate 'evil' from the world...??



▶▶▶ ...yes but the 'world' isn't that simple. Any minimal symbolic cycle is a relationship of reversibility and interconnectedness. Do you mean the antipodal exchange is reciprocal? Well, any misguided attempt to forcibly remove 'one' will do irreparable damage to the 'other'.

▶▶▶ if the sign is reduced to the status of commodity wouldn't sign exchange value take precedence? Certainly signs would cease pointing towards an object or signified which lies behind it, but rather to other signs. What would happen if images were bound to nothing but appearance?

Well their power to seduce, the power to stand for or to simulate could disconnect us from the essential play of symbolic social existence. Would this trick our consciousness into detaching from any real emotional engagement in exchange for artificial s(t)imulation, and endless reproductions of fundamentally empty appearance? I'll leave that with you. But if we forgot the symbolic side to social existence wouldn't this reduce patterns of social interaction to little more than circuits in an integrated system? Quite possibly, it could certainly contribute to the simultaneous experience of the loss of reality and the encounter with hyperreality.

Overtime would reality become less important than an egoistical image of it? Not exactly but fed a diet of saturated excess, repetition and endless consumption we'd be incapable of separating the two. We'd not only absorb images passively but become a media overwritten by those who speak for it. All that we'd think was real would actually be a simulation of reality capable of thinking us rather than vice-versa. Effectively humans would not only be victims of images but accomplices in transforming themselves into images. Ultimately the violence done to the image, including the image of humanity would be the experiment humanity conducts on itself. To coin Marshall McLuhan's phrase *'the medium is the message'*.

That's not really something people want to hear. Exactly, as Baudrillard once noted, *"the reality-fundamentalists equip themselves with a form of magical thinking that confuses message and messenger: if you speak of the simulacrum, then you are a simulator; if you speak of the virtuality of war, then you are in league with it and have no regard for the hundreds of thousands of dead ... it is not we, the messengers of the simulacrum, who have plunged things into this discredit, it is the system itself that has fomented this uncertainty that affects everything today."*

In typical Baudrillardian fashion he left a telling aide memoire, *"the allergy to any definitive order, to any conclusive power, is happily universal."* Does that mean the capacity for contraction is immanent to such a world-system? Well maybe for all its seduction, reversibility always haunts the projection into the desire of others. Integral reality's very lack of oppositional elements could unsuspectingly propagate its own reaction. Does that mean silences create extreme situations, a paroxysm arriving as an image feedback?

Finally, whether Baudrillard's work has meaning is not really for me to answer and somehow misses the point. After all, if you listened there was always something very



faint, very human maybe all too human in Baudrillard's *ça ira*. The encounter remains considerably unnerving yet seemingly necessary and affirming; sympathy for the devil indeed.

Caution objects in the mirror are closer than they appear to be, bienvenue au désert du vrai.

Jean Baudrillard, philosopher and sociologist, born July 29 1929; died March 6 2007

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***The Intelligence of Evil or the Lucidity Pact* is available in Australia from Berg Publishers for \$15.95.**

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