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AGAMBEN, HEGEL, AND THE STATE OF EXCEPTION

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ABSTRACT: In his account of the state of exception, Agamben repeatedly relies upon what Hegel would have called *Wesenslogik* or 'transcendental thinking'. Because of this reliance, the state of exception appears in Agamben's account as the hidden ground of modern liberal democracies. When conceived as such a ground, it appears to be a condition of possibility that inexorably persists in the modern state. Moreover, within the state of exception all juridical order is suspended, leaving no normative or juridical criteria on the basis of which to decide what the structure of any emergent political order should look like. This means that from the state of exception we can just as easily land in a totalitarian as we can in a liberal democratic or democratic socialist state. Without such criteria—lacking due to the total suspension characterizing the state of exception—Agamben's own alignment with Benjaminian revolutionary messianism over Schmittian authoritarianism is arbitrary, and he leaves us with no basis for making any such decision ourselves. Drawing upon Hegel's dialectic of freedom and his critique of transcendental thought, this paper argues that within the state of exception there is an implicit logic that points the way out of it. Furthermore, it does so in such a way that the state of exception is neither annexed by the structure of a predetermined juridical order along the lines proposed by Schmitt on the one hand nor posited by it as a transcendental structure underlying or always preceding modern liberal democracies on the other. This alternative is overlooked by Agamben precisely because of his own insistence upon conceiving of the state of exception in a transcendent way.

KEYWORDS: Hegel; Agamben; State of Exception; Freedom

INTRODUCTION: THE STATE OF EXCEPTION

Giorgio Agamben's recently published book *State of Exception*[1] takes as its explicit theme the 'state of exception' that had already received considerable attention in many of his earlier publications.[2] In the 'state of exception', the juridical order is suspended.

1. Agamben Giorgio, *State of Exception*, trans. K. Attell Chicago, The University of Chicago Press, 2005 (henceforth SE).

2. For instance, *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen, Stanford, Stanford University Press, 1998, pp. 15-29, (henceforth HS) (originally published in Italian in 1995); *Means Without End: Notes on Politics*, trans. Vincenzo Binetti and Cesare Casarino, Minneapolis, University of Minnesota Press, 2000, p. 5 and passim (originally published in Italian in 1996); *The Time that Remains: A Commentary on the Letter to the Romans*, trans. P. Dailey Stanford, Stanford University Press, 2005 (originally published in Italian in 2000), pp. 104-108; and *The Open: Man and Animal*, trans. K. Attell, Stanford, Stanford University

Modern states have used it to justify bypassing that juridical order—an order which requires due process, respecting recognized rights of citizens, the separation of powers, etc.—in cases deemed to be characterized by extreme necessity such as the threat of civil war, revolution, foreign invasion, and now terrorism. Although it has been called by various designations ('martial law' in the US, 'state of siege' in France, etc.), it is essentially characterized by the suspension of law and 'the provisional abolition of the distinction among legislative, executive, and judicial powers' (SE 7). Agamben writes, '[a]lthough the paradigm is, on the one hand (in the state of siege) the extension of the military authority's wartime powers into the civil sphere, and on the other a suspension of the constitution (or of those constitutional norms that protect individual liberties), in time the two models end up merging into a single juridical phenomenon that we call the *state of exception*' (SE 5).

The most notorious modern example was the Nazi regime: when Hitler came into power in Germany he immediately invoked the state of exception in the name of national security and suspended the existing constitution. From that point forward the entire Nazi regime was carried out within this state of exception. Predictably enough, Agamben caused quite an uproar in the US when he likened the Nazi concentration camps to the Bush administration's use of Guantánamo Bay (and other such camps in Afghanistan and elsewhere) to indefinitely detain people it suspected of 'terrorism'. However, his point was not that the same sorts of atrocities were being committed in the US versions, but rather that insofar as this practice of indefinite detention without recourse to any predetermined juridical order marks out a space in which the rule of law is suspended, they are *formally identical*.[3] As Agamben explained it in an interview,

> But I spoke rather of the prisoners in Guantánamo, and their situation is legally-speaking actually comparable with those in the Nazi camps. The detainees of Guantánamo do not have the status of Prisoners of War, they have absolutely no legal status. They are subject now only to raw power; they have no legal existence. In the Nazi camps, the Jews had to be first fully 'denationalized' and stripped of all the citizenship rights remaining after Nuremberg, after which they were also erased as legal subjects.[4]

The camp then becomes a type, a figure of the state of exception in modernity, in which the 'citizen' disappears into a 'bare life' over whose management the state has taken over and in which the rule of law is suspended.[5] It is not a question of whether or not atroci-

Press, 2004, pp. 37-38, (originally published in Italian in 2002). See the reference list at the end for full bibliographical information.

3. Furthermore, it is not at all clear that the June 29, 2006 court decision (in *Hamdan v. Rumsfeld*) against the Bush administration's use of military tribunals in Guantánamo has any bearing or effect on this, since the practice of indefinite detention was not *itself* called into question at all—a fact Bush himself quickly exploited by explicitly pointing it out to the public.

4. 'Interview with Giorgio Agamben – Life, A Work of Art Without an Author: The State of Exception, the Administration of Disorder and Private Life', Ulrich Raulff (interviewer), *German Law Journal*, no. 5, special ed., 2004, http://www.germanlawjournal.com/article.php?id=437 (retrieved on May 29, 2007).

5. Agamben, Giorgio, *Means Without End: Notes on Politics*, trans. V. Binetti and C. Casarino, Minneapolis, University of Minnesota Press, 2000.

ties will in fact occur in them but rather, given the suspension of the juridical order that the state of exception is, that there is nothing in place to prevent them from occurring. Thus whether it is the US detention camps in Guantánamo Bay, Canada's 'Security Certificate' that sanctions similar indefinite detention, the 'soccer stadium in Bari in which the Italian police temporarily herded Albanian illegal immigrants in 1991', or the New Orleans Centroplex in which hurricane Katrina's victims were corralled, these 'will all have to be considered camps' insofar as in all of them 'an apparently anodyne place (such as the Hotel Arcade near the Paris airport) delimits instead a space in which, for all intents and purposes, the normal rule of law is suspended and in which the fact that atrocities may or may not be committed does not depend on law but rather on the civility and ethical sense of the police that act temporarily as sovereign'.[6]

The camp as such a type is not a localized place, since it can appear at virtually any location and can apply to anyone, citizen or foreigner. Agamben's phrase 'dislocating localization' is apropos: 'The political system no longer orders forms of life and juridical norms in a determinate space; rather, it contains within itself a *dislocating localization* that exceeds it and in which virtually every form of life and every norm can be captured'.[7] It marks out the boundaries of a region within which prevails what David Luban called the 'limbo of rightlessness' where both domestic as well as international law are suspended and into which the US Patriot Act, for instance, enables the president to thrust anyone on the planet solely at his own discretion.[8] And although the latter may be the most prominent and visible example today it is not the only one.[9] The state of exception no longer designates an 'exception' in the strict sense of the word, but rather has come to designate the rule: 'The camp intended as a dislocating localization is the hidden matrix of the politics in which we still live, and we must learn to recognize it in all of its metamorphoses'.[10]

Now although the most well-known and perhaps pernicious examples of the state of exception are those imposed by the Right-authoritarian regimes of the twentieth and twenty-first centuries, Agamben cautions us: 'In any case, it is important not to forget that the modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one' (SE 5). Though there are ancient roots that Agamben will carefully trace, the state of exception is a modern phenomenon that belongs to the liberal democratic nation-state.

Furthermore, according to Agamben the state of exception is a presupposition of modern politics in general—both that of the Left as well as of the Right. Agamben frus-

6. Agamben, *Means Without End*, p. 41.

7. Agamben, *Means Without End*, p. 43.

8. Luban, David, 'The War on Terrorism and the End of Human Rights, in *Philosophy & Public Policy Quarterly*, vol. 22, no. 3, 2002.

9. Canada's 'Bill C-36', for instance, expands the criminal code to include 'preventive arrest' (http://www.justice.gc.ca/en/news/nr/2001/doc_28217.html) and its 'Security Certificate' allows indefinite detention without formal charges or due legal process. Although the latter was recently struck down by the high court, the court nonetheless 'upheld the principle' of security certificates (http://www.cbc.ca/canada/story/2007/02/23/security-certificate.html).

10. Agamben, *Means Without End*, p. 43.

trates any desire for the comfortable sanguinity of relegating the state of exception to the excesses of the Bush administration and other conservative regimes. Revolution likewise must invoke the state of exception insofar as it suspends the state and its juridical order and does so prior to the institution of any new legal order that will establish and preside over future norms. Although he doesn't explicitly mention it, this was precisely Leon Trotsky's problem: once the revolution has overthrown the previously existing juridical order, there is no measure of right and wrong other than the revolutionary party. Insofar as this party acts outside the past juridical order, and insofar as a new order has yet to be established, the party operates—and must operate if it is to operate at all—within the state of exception. Thus Trotsky had to say, 'My party—right or wrong … I know one cannot be right against the party … for history has not created other ways for the realization of what is right'.[11] This attitude of course then paved the way for Stalin, a more shrewd strategist, to exile him and eventually have him murdered.

Similarly, Agamben argues that the 'right of resistance' to the state—which includes any presupposition that citizens have a right and/or duty to resist the state when the latter is deemed to be unjust, which in principle can only be done outside the juridical order of the latter—is likewise operative within a state of exception. He cites as a contemporary example the 'draft of the current Italian Constitution' which 'included an article that read, "When the public powers violate the rights and fundamental liberties guaranteed by the Constitution, resistance to oppression is a right and a duty of the citizen"' (SE 10).

Although Agamben argues that the state of exception is the predominant paradigm of contemporary politics, he also maintains that it is only so because it has always been the condition of possibility for any juridical normativity whatsoever:

> In the decision on the state of exception, the norm is suspended or even annulled; but what is at issue in this suspension is, once again, the creation of a situation that makes the application of the norm possible…That is, the state of exception separates the norm from its application in order to make its application possible… (SE 36).

> This space devoid of law seems, for some reason, to be so essential to the juridical order that it must seek in every way to assure itself a relation with it, as if in order to ground itself the juridical order necessarily had to maintain itself in relation with an anomie (SE 51).

Interestingly, he pits against one another two theorists on opposite ends of the political spectrum who explicitly attempted to account for the state of exception: the Nazi jurist Carl Schmitt and Left intellectual Walter Benjamin. Both invoked the state of exception—the former to (ostensibly) protect the state and the civil order, and the latter to justify revolution and the deposing of unjust political orders. In both cases it is a question of violence—an extra-juridical violence brought to bear by the state under threat (Schmitt) or against the state by revolution (Benjamin). Insofar as this violence operates

11. Cited in Schapiro, Leonard, *The Communist Party of the Soviet Union*, 2nd ed., New York, Vintage Books, 1971, p. 288.

outside any juridical order, it cannot be governed by any predetermined set of legal criteria that could determine in advance what would be a 'legitimate' as opposed to an 'illegitimate' use of violence. Hence the state of exception is itself a kind of 'pure violence' in which the risk cannot be underestimated. Once the existing order is suspended and thereby rendered inoperable, which way it will go is not and cannot be predetermined.

One often enough finds a similar tension emerging in political discussions today: one side concerned with the security of the state and of the civil order against the violence of terrorist acts, and the other concerned with the state's use of these acts as possible excuses for extending state control and its appropriation of resources. It might be interesting to put the debate on different grounds. Rather than debating about whether or not there 'really is' a threat that 'justifies' military action abroad and the curtailing of civil liberties domestically, it might be interesting to ask how both sides of the debate fare with respect to the state of exception—especially given the fact that insofar as the state of exception is by definition outside the juridical order it may well undermine in advance any normative criteria whereby we might try to determine what 'justification' here would even mean.

With this problem in view Agamben lays out two radically different approaches respectively exemplified by his two chosen theorists:

1) Carl Schmitt's approach is to try to *annex* the state of exception *within* the juridical order itself. The difficulty here is that one then has a juridical order that includes a provision regarding its own suspension (insofar as the state of exception suspends the rule of law), making it difficult to make sense of how a legal order can govern, 'legally', the state of exception in which that very order is deactivated, as well as how any legal limitation can be applied to it. For instance, if it is asserted in a nation's constitution that the state of exception can only be invoked in the most extreme of emergency situations and can last only for a limited period of time, exactly what those 'situations' would look like and exactly how long the time period will be cannot be specified in advance, since these will depend upon the unforeseeable empirical contingencies existing at the time, making it a black hole that swallows up any legal or juridical way of getting out if it. It was precisely this black hole that allowed the Nazi regime to 'temporarily' suspend the Weimar constitution without abrogating it, and then to renew that suspension every four years, thereby creating an indefinitely extended state of exception. In the contemporary context, it is not difficult to imagine a 'terrorist threat' being invoked to justify a similar suspension.

Equally important is Agamben's claim that when the suspension of law is in effect, the decree of the political leader(s) has the so-called 'force of law' which attempts to combine the state of exception and the law in one person—and this, he suggests, is the road to either fascism on the one hand or to a Stalinist-type totalitarianism on the other hand. With perhaps an implicit reference to the US, he writes:

> Indeed, the state of exception has today reached its maximum worldwide deployment. The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that—while ignoring international law

> externally and producing a permanent state of exception internally—nevertheless still claims to be applying the law (SE 87).

2) Walter Benjamin's approach is to always *separate* the state of exception *from* the juridical order, thereby 'unmasking' (as Agamben puts it) the 'mythico-juridical violence' that attempts to unify them in the service of the authoritarian state (SE 63). Benjamin wrote shortly before his death that 'the tradition of the oppressed teaches us that the 'state of exception' is the rule' (cited in SE 57). Agamben follows Benjamin here and suggests that, because the state of exception is the 'anomic' space from which any legal order emerges at all, it is no longer even possible to return to liberal democracy: 'From the real state of exception in which we live, it is not possible to return to the state of law, for at issue now are the very concepts of "state" and "law"' (SE 87). Regarding the two possibilities exemplified by Schmitt and Benjamin, he then concludes,

> To live in the state of exception means to experience both of these possibilities and yet, by always separating the two forces, ceaselessly to try to interrupt the working of the machine that is leading the West toward global civil war (SE 87).

And thus:

> The only truly political action, however, is that which severs the nexus between violence and law. And only beginning from the space thus opened will it be possible to pose the question of a possible use of law after the deactivation of a device that, in the state of exception, tied it to life (SE 88).

As mentioned above, beginning from the state of exception, it is not predetermined which way it will go and so the risk is great. Will revolution bring a more just political order or a more oppressive totalitarianism? The state of exception in itself seems to be completely neutral in this regard—no normative imperative can be seen to arise from its black hole, and Agamben, although he evidently sides with the Left revolutionary Benjamin over the Right authoritarian Schmitt, cannot give us (or at any rate does not give us) a sound reason for this decision or any criteria by which we are to make it. The state of exception puts everything up for decision, but it cannot give us any guidance over what decision to make.

Agamben, following Benjamin, wishes to preserve the gap between the state of exception and the juridical order against the annexation of the former by the latter. He provides no reason for doing so other than the suggestion that one road leads to fascism and totalitarianism and the other perhaps opens a future outside of that, but what would bring one to side with Benjamin over Schmitt remains a mystery. Agamben's own alignment with the former seems arbitrary—that is, beyond the commonplace recognition that the Nazis were bad and so the ideas of Schmitt, a Nazi jurist, must be bad as well. One would hope for a stronger reason than that. Hegel may give us one.

THE HEGELIAN ALTERNATIVE: GETTING OUT OF THE STATE OF EXCEPTION

From the state of exception, as Agamben articulates it, the decision over it, which

decision Schmitt identifies with sovereignty, is not presided over by any preexisting juridical order or normative guidelines since all such norms and legalities are suspended. Hence the risk—will it lead to justice or to terror? Or terror in the name of justice? One might perhaps already foresee totalitarianism in the desire to control and preside over the state of exception in advance, a la Schmitt. But one may well also with justification worry about a Stalinist-type bureaucratic state, or perhaps the havoc of a Maoist cultural revolution, resulting from the Benjaminian project of holding open the state of exception. Indeed, this is Hegel's worry.

Hegel presents us with an alternative that neither holds open the state of exception in a constant referral back to it, nor attempts to preside over it in advance. Instead of leaving us with a void in which all decisions are arbitrary, and rather than making of the state of exception a condition of possibility for any juridical order, he shows us that the very negativity of its suspension implies a dialectic which, through its own immanent logic, generates a movement away from it toward the universality of right. Whether or not Hegel's ultimate vision of the state is where we want to end up, or whether that is where we must end up once we start with Hegel, is beyond the scope of this paper.[12] What I wish to examine here is, given the state of exception as an increasingly predominant and global political category and assuming, following Agamben, that the state of exception is the political space in which we live, does Hegel's political philosophy articulate a way out of it that winds up in neither totalitarianism nor undecidability?

A kind of suspension happens at the outset of all of Hegel's major works. The greater *Science of Logic* suspends presuppositions in general in order to think the pure immediacy of being, the *Phenomenology* suspends assumptions about consciousness, etc. But the *Philosophy of Right* suspends all assumptions about the political order, including any juridical structures it may entail, and so is not governed in advance by a predetermined norm. Since, unlike the *Logic* or the *Phenomenology*, it explicitly concerns that political order and any juridical norms emerging from it, this is the place to look in the Hegelian system for something resembling the state of exception.

Hegel is of course writing in the context of the great European Enlightenment discourses of freedom—in particular those of Rousseau and Kant. Rousseau argues that what he calls 'natural freedom' or the liberal conception of freedom articulated earlier by Hobbes and Locke, namely freedom defined primarily as mere absence of restrictions,[13]

12. Ample literature is available regarding the relevance and value of the entire Hegelian political philosophy for the modern world, and there are sound arguments against those who, in my view, rather grossly misread Hegel (or don't read him at all) by attributing to him statist tendencies that subordinate individual freedom to the collective order. For instance, see Houlgate, Stephen, *Freedom, Truth and History: An Introduction to Hegel's Philosophy*, New York, Routledge, 1991, pp. 77 ff., and Winfield, Richard, *Overcoming Foundations: Studies in Systematic Philosophy*, New York, Columbia University Press, 1989, pp. 171 ff.

13. Hobbes perhaps gives us the most concise formulation of this understanding of freedom when in the fourteenth chapter of *Leviathan* he writes, 'By *liberty*, is understood, according to the proper signification of the word, the absence of external impediments'. This same definition is repeated in the twenty-first chapter: 'Liberty, or freedom, signifieth, properly, the absence of opposition: by opposition, I mean external impediments of motion; and may be applied no less to irrational and inanimate creatures, than to rational', and hence in the human sphere 'a 'freeman' is he that in those things which by his strength and wit he is able

is inadequate. This impoverished understanding of freedom is replaced in the social state by the 'civil freedom' in which one understands that 'obedience to the law one has prescribed for oneself is liberty'.[14] However, Rousseau leaves the precise relation of natural freedom to civil freedom unclear—it's not clear exactly how we get from the former to the latter. This is particularly problematic insofar as from the perspective of each the other looks like unfreedom. If I am looking at the world through the lens of natural freedom, civil freedom merely looks like a set of societally-imposed restrictions that is at best a partial sacrifice of freedom for security or at worst a loss of freedom. Hence from this perspective it looks like 'man is born free, and everywhere he is in chains'.[15] Kant doesn't get much further in this regard. He takes freedom to be self-legislation, but this is based on a transcendental moral imperative, and the liberal conception of freedom merely seems to be shoved aside as an irrelevant misunderstanding.

Hegel affirms the Rousseauian and Kantian notions of freedom as self-determination rather than mere absence of restriction, but he does so by beginning from the desire for or gesture towards a sheer absence of restrictions or denial of limits in the liberal conception and then revealing an immanent logic implied in this conception that leads us to the more adequate conception of freedom as self-determination. This 'adequacy' in turn is measured not by a predetermined set of criteria but rather by the logic implied in the concept of freedom itself. Hegel can thereby specify the relation between what Rousseau calls natural and civil freedom, and he can do so without recourse to transcendental structures assumed as given in advance. It is part of the argument of this paper that by thinking such a self-determining structure can one account for the state of exception without either annexing it by the predetermined determinacy of a juridical order along the lines of Schmitt or by positing it as a transcendental structure underlying or always preceding modern liberal democratic structures as that from which they emerge and that to which they invariably return. However, given Agamben's insistence that the state of exception forms the political space in which we live today, and his denial of the relevance of modernist contractual notions,[16] why should we begin with a concept of 'freedom' at all? Given the contemporary geopolitical context, what is there to recommend this beginning?

For Hegel as a philosopher, the centrality of freedom is justified within the entire philosophical system insofar as, beginning without presupposing any underived determinacy in the *Science of Logic*, ontological determinacy in general shows itself to be a self-determining process, and it is this very self-determining process made explicit as such that is freedom. To put it another way, when the self-determining process of reason knows itself as self-determining, it recognizes itself as free. The process of reason

to do, is not hindered to do what he has a will to'. (Hobbes, Thomas, *Leviathan,* http://darkwing.uoregon.edu/%7Erbear/hobbes/leviathan.html, 1651 (retrieved on May 29, 2007).

14. Rousseau, Jean-Jacques, *On the Social Contract*, ed. and trans. Donald Cress, Cambridge, Hackett Publishing Company, 1987, p. 27 (Book I, chapter 8).

15. Rousseau, *On the Social Contract*, p. 17 (Book I, chapter 1).

16. 'All representations of the originary political act as a contract or convention marking the passage from nature to the State in a discrete and definite way must be left wholly behind' (HS 109).

becoming self-conscious as freedom is 'history' and therefore 'truth', viz. reason becoming explicit, is historical. It is the universal necessity of the logic in this process of reason becoming explicit, an immanent process of self-determination that submits to its own necessity and is only thereby free, that saves Hegel from historicism or historical relativism without having to abandon history for ahistoricity. This very process of self-determination leads humanity to the place where it recognizes that thought is self-determining and therefore that it can and must avoid externally imposed determinacy. In other words, humanity thereby comes to recognize a demand that thought be as fully self-critical as possible.

Thus for Hegel the fact that the *Philosophy of Right* begins with freedom is itself ultimately made necessary by the historical post-enlightenment demand that thought become as fully self-critical as possible, which itself requires that no determinacy be dogmatically assumed as merely given in advance and hence underived, which means that we must begin from something like the presuppositionless beginning of Hegel's system that finally gets us to the concept of freedom. And it is of course in the system of philosophy thus generated that the historical demand of the European Enlightenment (that thought be fully self-critical) is itself seen to be a necessity stemming from reason.

THE POSTMODERN REJECTION OF UNIVERSALITY

We could of course follow postmodern leanings and reject the post-enlightenment demand that thought become as fully self-critical as possible. This demand itself can be historicized and seen as an arbitrary social construction of modern Europe. One might further specify this construction as a masculine requirement for the autonomy of males in a patriarchal system that overlooks the feminine entirely, as premised upon a particular ontology deriving from the peculiarities of modernity, as 'Eurocentric', etc. We then land in the postmodern relativism of multiple language games that suffer from a vacuum of legitimacy.

Badiou currently stands as one of a few voices in the postmodern wilderness advocating the precedence of universality over postmodern relativism and its identity politics, but his 'event' itself, though breaking free of the predetermined variables that make up any historical situation and remaining indiscernible from the perspective of the preestablished set within which the event must appear, nonetheless falls into the same problem of any language game—viz. its criteria of legitimacy are derived from the rules that it itself sets up, and these rules themselves are therefore subject to the contingencies of that particular language game, making them essentially arbitrary and, viewed from outside that particular language game, merely relative again.

This is the problem, for instance, with Badiou's attempt to appropriate St. Paul's militant Christianity as a universal 'truth-procedure' that can be abstracted from the particular content of the Christian belief system. Badiou writes, 'Paul's unprecedented gesture consists in subtracting truth from the communitarian grasp, be it that of a peo-

ple, a city, an empire, a territory, or a social class'.[17] In this way he looks to Paul for the precedent of overcoming the contingency and relativism with which communitarianism is necessarily burdened. However, he also takes what is arguably the central tenet of Christianity—the resurrection of Christ from the dead—to be a 'mere fable', claiming that

> what is important is the subjective gesture grasped in its founding power with respect to the generic conditions of universality. That the content of the fable must be abandoned leaves as its remainder the form of these conditions and, in particular, the ruin of every attempt to assign the discourse of truth to preconstituted historical aggregates.[18]

Formalizing what he takes to be 'Paul's procedure' into a list of 'truth requirements', Badiou then asserts, 'There is not one of these maxims which, setting aside the content of the event, cannot be appropriated for our situation and our philosophical tasks'.[19]

From a Hegelian perspective of course this separation of form from content suggests that the result can only be an abstract universal, landing Badiou in the very abstraction of a universality freed from particular content that he perhaps rightly sees as belonging to capitalism, an empty universality of capital that is left behind by default once truth in general is relegated to postmodern relativism.[20] Hegel opposes to such abstract universality what he calls a 'concrete universal' in which form and content are no longer at odds. But what does Hegel's alternative actually look like? For this we need to take a detour through the opening pages of the *Philosophy of Right* in order to see how Hegel's beginning is relevant to the state of exception and how concrete universality emerges out of it.

THE OPENING OF HEGEL'S *PHILOSOPHY OF RIGHT*

At the outset of Hegel's *Philosophy of Right*,[21] the derivation of the concept of freedom is assumed (from the *Encyclopedia*). Political philosophy as Hegel understands it must take this concept as given and draw out its implications, but it must start with the most minimal conception of freedom so as to presuppose as little as possible or, more strictly stated, so as to presuppose only those determinacies whose necessity has already been

17. Badiou, Alain, *Saint Paul: The Foundation of Universalism*, trans. Ray Brassier, Stanford, Stanford University Press, 2003, p. 5.

18. Badiou, *Saint Paul*, p. 6.

19. Badiou, *Saint Paul*, p. 15.

20. The 'real unifying factor behind this attempt to promote the cultural virtue of oppressed subsets', Badiou claims, 'is, evidently, monetary abstraction, whose false universality has absolutely no difficulty accommodating the kaleidoscope of communitarianisms' (Badiou, *Saint Paul*, pp. 6-7). Naomi Klein makes the latter point in lay language: the multicultural rainbow merely opens up so many more target markets for capitalists—what she calls a 'market masala'—thereby subjecting all to the same uniform logic (Naomi Klein, *No Logo: Taking Aim at the Brand Bullies*, Vintage Canada, 2000, pp. 115 ff.).

21. Throughout I will be referring to the 1897 Dyde translation of Hegel's *Philosophy of Right* that is available online at http://www.marxists.org/reference/archive/hegel/index.htm (retrieved on May 29, 2007), (henceforth PR).

demonstrated. Nonetheless, this might seem to preclude the relevance of the concept of freedom for any discussion of the state of exception insofar as the latter is the suspension of the juridical normativity and so would seem to preclude any such presupposed determinacy.

The fact that Hegel also immediately invokes 'the will' might seem even less promising. However, the 'will' in Hegel is not a metaphysical posit, still less a theological hangover devised to remedy the problem of evil.[22] It is merely the practical side of freedom. When one seeks to actually become free in the world, that is 'willing', and hence

> The distinction between thought and will is only that between a theoretical and a practical relation. They are not two separate faculties. The will is a special way of thinking; it is thought translating itself into reality; it is the impulse of thought to give itself reality (PR § 4 A).

We will have to return to the question of the relevance of Hegel's discourse on freedom to the state of exception. Before we get there, however, our entry into that discourse might be better served by attending to Hegel's remarks on universality that immediately follow:

> Any idea is a universalizing, and this process belongs to thinking. To make something universal is to think. The 'I' is thought and the universal. When I say 'I', I let fall all particularity of character, natural endowment, knowledge, age. The I is empty, a point and simple, but in its simplicity active (PR § 4 A).

To think is to universalize—Hegel takes this to be an inescapable necessity. The *Phenomenology of Spirit* shows that when thought tries to avoid universality and say the absolutely singular and non-universal, it only winds up asserting the most abstract universality (e.g. abstract indicators like 'this', 'now', 'here', etc. that can apply to any content whatsoever) or taking refuge in the further abstraction of wordless pointing.[23] Whether any universal is going to be the same universal across different cultures or historical eras is another question, one not addressed in this passage.

But the further thing to attend to here is that the 'I' or ego *has no content*. It is the sheer vacuity of thought thinking itself in its pure universality. This is not yet a self that is socially constructed with all of the concomitant determinacies involved in it (e.g. those belonging to a particular social class, gender, ethnicity, culture, psychological history, and all the other empirical variables that converge in the self-identity of any particular individual). Rather, it is the *abstraction from* all such determinacy. Insofar as it is an abstraction from any and all determinate content, it cannot be pigeonholed as belonging to any particular variant of the latter.[24] Admittedly, this is precisely an abstract universal, but rather than jettison it in favour of a better conception, Hegel will ask us to first at-

22. E.g. as in Augustine's *On Free Choice of the Will*.

23. See the chapter on 'Sense-Certainty' in the *Phenomenology of Spirit* (Baillie translation), available online at http://www.marxists.org/reference/archive/hegel/index.htm (retrieved on May 29, 2007).

24. E.g. as a universality that is essentially 'masculine' insofar as women were excluded from the independence men enjoyed in patriarchal systems and so are more context-bound, as a Cartesian cogito, etc. These too would be particular determinacies from which abstraction is made in order to think the 'I' as a sheer universal.

tend to what is implied in it.

One might still ask for the motivating factors. Why would one *want* to make such an abstraction? Hegel has his own answer—it is a requirement of the idea of freedom becoming objectively actual that only becomes explicit in the modern era. Insofar as that demand requires abstraction from all particular determinacy in order to first become self-determining and thereby free, however, it requires abstracting from the very historically determinate conditions of its own appearance at a particular time and place in history. This is a point often missed by Hegel's critics who all-too-easily assume that if one can find some historical condition (whether it be related to gender, ethnicity, or any other empirical variable) without which Hegel's system may not have appeared at all, one can then mobilize this condition as the Achilles heel that brings down the entire system—or at least 'situates' it in such a way as to relativize it and thereby take away its claim to universality. But insofar as abstraction is made from all determinacy per se, this abstraction *includes the determinacy of the conditions of this very abstractive move itself*, and hence it cannot be caught short by pointing out some such condition.[25]

For this reason it really doesn't matter *why* one would want to make such an abstraction. The fact remains that we *can* do it, and in such a way that abstraction is made from the enabling conditions of the abstractive move itself. Therefore motivating factors do not enter into it as presupposed determinacies that infect or 'contaminate' the conception. In other words, any such conditions are at most *enabling* but not *determining* conditions. As Winfield put it, 'Although thought has preconditions on which its exercise depends, these preconditions cannot play the role of juridical conditions that determine what counts as valid thought'.[26]

But equally it must not be assumed that this abstraction is a ground or foundation for further propositions about freedom or the political order. It is not a ground or foundation; it is merely a starting point, and one that will be transformed as we follow the immanent logic it implies. Thus we neither remain at this abstract level nor do we return to it. It merely gets us started insofar as the determinacy of particular content is cleared away in order that nothing be merely assumed as given in advance. Were this move not made, then there would be some externally given factor that would determine the development from the outside, and this external determination would undermine freedom. This point becomes more clear in the exposition of this beginning abstraction, but here we might see how any such external determinacy would make *self*-determination at best partial and at worst a sham.

> The will contains [a] the element of pure indeterminateness, i.e., the pure doubling

25. Indeed, Hegel sharply criticizes this very kind of reflective thinking that always triumphs in positing a ground or condition for something as if the immediacy of that very ground or condition is not itself at least equally suspect. Such 'criticism' has failed to be fully self-critical insofar as it persists in a certain way of thinking (which Hegel called *Wesenslogik*) that has not itself been critically examined at all. See the sections in Book Two of the greater *Science of Logic* on 'Reflection' (Chapter 1C) and 'Ground' (Chapter 3). As we will see below, this *Wesenslogik* is also precisely the problem with Agamben's conception of the state of exception.

26. Winfield, *Overcoming Foundations*, p. 4.

> of the I back in thought upon itself. In this process every limit or content, present though it be directly by way of nature, as in want, appetite or impulse, or given in any specific way, is dissolved. Thus we have the limitless infinitude of absolute abstraction, or universality, the pure thought of itself (PR § 5).

We can put the above point in reverse. Just as the ego is found by abstracting from every determinate content, so also this abstractive move is itself the 'I'. Thus it is not that we first make the abstraction in order to become an ego, but rather that the ego is this abstractive process itself. Hence the ego is the universalizing character of thought. To think is to conceive the universal, which is simultaneously to be an 'I'. Thus rather than positing the abstract individuality of modernity as an immediate given (Descartes), as a product of economic relations (Marx), as an effect of psychological variables (Freud) or as resulting from a history of metaphysical determinations of being (Heidegger), Hegel understands it to be the universalizing character of thought as such made explicit. And it is in this abstraction from content that we find the first determination of freedom: freedom as 'flight from limit' or, as more commonly known, the liberal conception of freedom as absence of restrictions. Thus the very self-identity of the 'I' as the universalizing character of thought contains the concept of freedom in its first form.

The will is simply the activity of this abstraction viewed *as activity*, that is, as practical. Viewed as theoretical, it is the abstraction of thought from content. Just as is the case with so many of Hegel's distinctions, it is a matter of emphasis: abstraction from *content* is the theoretical level of thought, whereas *abstraction* from content is the practical level of the will. Hence the theoretical and the practical are two sides of the same process.

However, it is here in this first shape of freedom as 'negative freedom', the abstraction made from all determinate content, that we come across something in Hegel's text that looks very much like the state of exception with which Agamben is so preoccupied.

NEGATIVE FREEDOM AS THE STATE OF EXCEPTION

> The will on one side is the possibility of abstraction from every aspect in which the I finds itself or has set itself up. It reckons any content as a limit, and flees from it. This is one of the forms of the self-direction of the will, and is by imaginative thinking insisted upon as of itself freedom. It is the negative side of the will, or freedom as apprehended by the understanding. This freedom is that of the void, which … becoming actual it assumes both in politics and religion the form of a fanaticism, which would destroy the established social order, remove all individuals suspected of desiring any kind of order, and demolish any organization which then sought to rise out of the ruins. Only in devastation does the negative will feel that it has reality…(PR § 5)

> This phase of will implies that I break loose from everything, give up all ends, and bury myself in abstraction… (PR § 5 A).

What Hegel here calls 'negative freedom' is the liberal concept of freedom as absence of all restriction, the 'absence of external impediments' which Hobbes understood liberty

to be, or the 'natural freedom' of Rousseau that wants to throw off the shackles of societally imposed order. It is the most abstract concept of freedom and hence presupposes the least, and hence also for Hegel it is where the philosophy of freedom or political philosophy must begin. However, one cannot help but notice that in its suspension of limit, restriction, order, normativity, etc., it is formally identical to the suspension of juridical normativity that characterizes the state of exception.

In the state of exception any and every juridical order is suspended. Abstraction from all limit in the political sphere is the suspension of the juridical order, over which no predetermined set of norms can preside. This anomie is indeed the space of revolution, as Benjamin rightly saw. The problem emerges, however, when this space is understood as the essence of freedom itself or, to put it in Agamben's language, as the hidden ground of any juridical order whatsoever. More specifically, the problem is not in the state of exception posited merely as a *beginning*, but rather in the state of exception posited as a *ground*.

As such a ground, the state of exception would make possible or underlie any further determinacy that may be added to it or derived from it. It would always remain as the underlying deep structure of any juridical order, which is the function it seems to provide in Agamben's account of it (I will return to this below). To borrow Winfield's phrase, it would be conceived as a 'privileged determiner'.[27] But this is to already posit a determinacy within it that is not necessarily derived from it. In other words, to immediately take the state of exception as the hidden ground of the juridical order is to already make a decision about it, viz., to decide in advance that the state of exception must serve a certain function.

However, we may be able to agree with Agamben that the state of exception provides the space from which the juridical order must emerge insofar as the institution of the latter cannot presuppose any prior normative or juridical order and still be the *institution* of a juridical order (rather than, say, the further development of an already existing juridical order). But we will part company with Agamben's essentially Schmittian hypothesis that any juridical order depends upon the state of exception in determining its limit and thereby also allowing the determination of when and where it is in effect. The first step in that parting of the ways is taken as soon as we attend to the implied determinacy *in the very indeterminacy* of negative freedom. The latter, taken by itself, is 'one-sided'. However, 'as this one-sidedness contains an essential feature, it is not to be discarded' (PR § 5 A).

Now all we have to do is attend to what is implicit in the abstract negative freedom that we have before us. Negative freedom is itself defined as the negation of limit. It is the abstraction from every determinate content, the state of exception that suspends any normative or juridical determinacy. But insofar as negative freedom withdraws from all limitations, it is itself *limited by that very withdrawal*. It appears to be thoroughly negative in its denial of limit, in its insistence upon the absence of restrictions, or in its suspension of normative order. But that suspension is itself a limit. It cannot, in other words, simply

27. Winfield, *Overcoming Foundations*, p. 42.

be a juridical order. It cannot simply assume some pregiven set of normative standards. Insofar as it cannot do these things, this 'cannot' names a limit—that limit which defines it as the abstraction that it is. To put it another way, the very negativity of its abstractive move and the anomie it brings about *is itself its own positive character*. Hence the absence of all limit *is itself its limit*.

Therefore negative freedom is a standing contradiction: its very character as negation of limit is itself its limit. Alternatively stated, its very flight from all content *is* its content. The abstractive move of the state of exception itself is its own positive character. But this in turn means that negative freedom *negates itself as absence of limits*. It is defined as *absence* of limits. But insofar as this *is* its limit, this negates its character *as* absence of limits. We do not need to merely oppose a better concept of freedom to it, as do Rousseau and Kant. Negative freedom is not negated by *some other* concept of freedom but *by itself*. To put it another way, the state of exception is not overcome by some other juridical order that is imposed upon it or which has to annex it in advance. Rather, its own negativity as the suspension of all normativity/juridicality is itself negated by *the positive character that this very negation is*.

Here we can also see that, rather than posit an external condition not accounted for in the system as its limit or content, abstraction is made from any and all such externally given determinacies. However, abstraction cannot be made from its own character as abstraction. Any attempt to do so merely repeats the abstraction and hence reproduces the same determinacy. As Hegel puts it,

> In that it is the abstraction from all definite character, it has a definite character. Its abstract and one-sided nature constitutes its definite character, its defect and finitude (PR § 6, R).

To understand this positive moment in terms of the will—that is, to understand it in terms of the activity of thought here as this abstractive move, but now with the recognition of its positive character as such—the will in willing to be free of restrictions or limits is no longer merely the vacuity of a will that has nothing to will. It no longer merely wills the void or the empty suspension of the first moment of negative freedom. Rather, in the actualization of freedom that the will is, it has a content to will—namely its own content *as* this negative freedom.

Insofar as it negates all limit, negative freedom is negative. But insofar as this flight from limit is its own limit, it has a positive character. Thus insofar as the will is nothing other than the willing of freedom, the will now wills this positive character. The step is certainly minimal, but a subtle shift has occurred from willing the absence of limit to willing a limit, even if that limit be nothing other than the very willing of the absence of limit. We've moved from a will that wills nothingness to one that wills its own positive character, and hence from willing nothing to willing something.

But this is self-determination in its most germinal form. The abstraction from all limit abstracts from every externally imposed or pregiven determinacy. But that very movement reveals its own determinacy *as* such abstraction, and hence it is only now in a position to will *itself* as freedom. The limit it now wills is *its own* limit rather than a pre-

given one, and hence it has 'given itself' that limit or, to look at it another way, is submitting to the limit that it is. Insofar as it submits to its own limit, it gives its limit to itself or is self-determining. Thus from out of the suspension of law a self-imposed law emerges. This is not yet the fully explicit legal system of a juridical order, of course, but is the minimal limit out of which any such legal order must emerge if it is to be self-determining and thereby free. It is from here that we can get from Rousseau's natural freedom to a freedom defined as 'obedience to the law one has prescribed for oneself'.[28]

We can see from this that if the determinacy of the limit that is self-imposed here is the very abstractive move of negative freedom, then the latter is not simply jettisoned in favour of a better conception. Rather, it is taken up into self-determination as a subordinate aspect that no longer serves as the guiding principle but which nonetheless functions within it. This is the process Hegel famously called *Aufhebung* (a simultaneous negation and preservation) in which a previously dominant determinacy becomes a subordinate 'moment' within a more developed and concrete determinacy. Freedom is now no longer defined solely in terms of a negative flight from limit, but rather as its own positive character that is willed as such. However, since the positive character that is willed as such is the negative moment that abstracts from limit, this negative character still makes itself known.

The shape of freedom we thus have contains both the negative moment of flight from limit as well as the positive moment that wills this as its own character. Hegel understands the unity of these two moments to correspond to freedom defined as 'free choice'. Thus I am free when I can choose whatever I please and I am not forced to accept anything that is not of my choosing. Right away we see the two previously mentioned moments or aspects come to the fore: the negative aspect is seen in the rejection of any externally-imposed limitation that would limit my ability to choose whatever I please. The positive moment is seen in the desire to preserve my freedom of choice. Once again, both flight from limit and willing freedom as that flight from limit are apparent in the structure of choice.

But this structure nonetheless reveals a fatal contradiction. In willing my freedom to choose I reject eternally imposed limits. But in order to exercise my freedom to choose I must choose something. However, what I choose can only be taken from externally given options and so, insofar as I am limited by these options in their empirical number, variety, and availability, I am subject to an externally imposed limit. Thus if I wish to choose the clothes I want to wear, I am limited both by the variety of clothing that is available to me as well as by my own purchasing power, neither of which are determined by my freedom but rather are given independently of whatever I will. True, I may be able to overcome this somewhat by improving my purchasing power (e.g. training to get a better job) and by seeking out independent manufacturers or becoming a tailor myself, thereby increasing my options. But no matter how much I am able to maximize my options they will nonetheless be finite and limited, whether that be due to my own limited abilities or to empirical circumstances beyond my control, and these limits will

28. Rousseau, *On the Social Contract*, p. 27 (Book I, chapter 8).

not be of my own choosing but rather will be imposed upon my exercise of choice. In this way freedom as the freedom to choose will always be subject to externally imposed limits and thereby find its freedom compromised—both in the negative sense of flight from limit as well as in the positive sense of the ability to be self-determining.

But it gets worse. The above considerations apply to what we might call the 'objective' side—the particular content that is willed when I make a choice (e.g. the clothing I choose to procure and wear). This side tends to receive the most attention when we think of 'free choice', but whenever I think that I am free when I can choose whatever I please, the question I am not asking is this: What is it that determines what 'I please'? What determines my appetites and desires on the basis of which I then make choices? We might call this the 'subjective' side consisting of desires, appetites, and impulses. The problem, however, is that these are not chosen either—I don't choose to want. Rather, I want, and then on that basis I choose. So my choice is driven by something externally imposed. Merely because it is 'within me' in the sense of residing within my organism in some way does not reduce its external character in the slightest, for its 'externality' consists in the fact that it is not determined by choice but rather determines what choices are made. To put it another way, the externality of 'my own' desires, appetites, and impulses consists in the fact that they do not come from my freedom but rather are imposed upon my freedom, thereby limiting it. Insofar as this limitation is not a self-imposed limit, it compromises freedom just as much as the externally given options mentioned above. In fact, it is precisely these desires, appetites, and impulses that are targeted by advertizing campaigns, making my 'freedom' to 'choose' a commodity a dubious freedom indeed. As Rousseau put it, 'To be driven by appetite alone is slavery'.[29] Because the subjective side is driven by the arbitrariness and capricious character of such impulses and appetites, Hegel calls this way of understanding freedom 'caprice'. Today we might refer to it as a 'consumer model' of freedom.

Thus on both the subjective as well as the objective sides, freedom defined as free choice is saddled by externally imposed limits that are not of its own choosing. What is then left for freedom? If it chooses something, it is immediately subject to limits from within and without. If it does not choose anything, its 'freedom' is merely an empty possibility. Freedom per se seems to have no content whatsoever, making it an empty formal abstraction. It is at this point that the reductionist enters and proclaims freedom to be an illusion. But whether that be due to the reinforcement contingencies of behaviorist theory or the genetically determined 'hard-wired' structures of our neurophysiolology, the essential point is the same as the theological conception of predestination—your choices are only apparent; behind them lurk the real driving forces. Indeed, Hegel agrees with them:

> In the controversy carried on, especially at the time of the metaphysic of Wolf, as to whether the will is really free or our consciousness of its freedom is a delusion, it was this caprice, which was in the minds of both parties. Against the certitude of abstract self-direction, determinism rightly opposed a content, which was

29. Rousseau, *On the Social Contract*, p. 27 (Book I, chapter 8).

> externally presented, and not being contained in this certitude came from without. It did not matter whether this 'without' were impulse, imagination, or in general a consciousness so filled that the content was not the peculiar possession of the self-activity as such. Since only the formal element of free self-direction is immanent in caprice, while the other element is something given to it from without, to take caprice as freedom may fairly be named a delusion (PR §15 R).

The important proviso here of course is that this is not the ultimate and final shape of freedom. Hegel claims that he puts the debate between 'freedom and necessity' to rest, not by 'proving' that we are free empirically, but by showing that the concept of freedom assumed in the debate is itself deficient. Thinking through this deficiency (i.e. the contradiction) will show us a more adequate concept of freedom that is not subject to such a debate. We might also add that once we take the reductionists' way out, that more adequate concept of freedom will likely never be discovered since we will have already given up on the possibility.

The quandary freedom is faced with here leads to the desire to withdraw from any choices made, to suspend one's commitment to them, and thereby to preserve freedom against the externally imposed limits, even though these limits came about through the very exercise of free choice itself. I like to characterize this as the 'Lynyrd Skynyrd' concept of freedom, in reference to the southern rock band and their song 'Freebird' which celebrates a man leaving his companion because he no longer wants to be tied down:

> If I stayed here with you, girl,
> Things just couldn't be the same.
> 'Cause I'm as free as a bird, now,
> And this bird you cannot change.

Liberalism and libertarianism typically embrace this concept of freedom but, unlike the Lynyrd Skynyrd version, include the recognition that freedom can never really get what it wants—to be totally free—and so must resign itself to accepting certain limitations. John Hospers provides an apt characterization of this freedom that must nonetheless accept limitations even when pushed to the libertarian end of the spectrum:

> If I own my life, then it follows that I am free to associate with whom I please. If I own my knowledge and services, it follows that I may ask any compensation I wish for providing them for another, or I may abstain from providing them at all, if I so choose. If I own my own house, it follows that I may decorate it as I please and live in it with whom I please…all that which I own in fact, I may dispose of as I choose in reality. For anyone to attempt to limit my freedom to do so is to violate my rights.
>
> Where do my rights end? Where yours begin.[30]

30. John Hospers, 'What Libertarianism Is', in *Social Ethics: Morality and Social Policy*, T. Mappes and J. Zembaty (eds.), New York, McGraw Hill, 2002, p, 321. In order to make this claim to right and thereby defend this conception of freedom, Hospers must presuppose that property rights are already established and inviolable. He reasons that freedom is grounded upon property rights and so, if we are to be free, we must assume property rights. Hegel, on the other hand, requires no such presupposition, and in fact will derive the right to own property from a more developed conception of freedom than the structure of choice.

However, as soon as we recognize that, in withdrawing from the options chosen—in preserving my freedom to suspend the choices I have made—I am in fact seeking to preserve and protect my freedom from the externalities that seem to threaten it, then a shift in perspective can occur and once again we find ourselves in a similar situation to the one discussed above in which we recognized that the flight from all limit was itself a limit. Here, however, what calls for recognition is the fact that what I am most concerned about in preserving my freedom to choose is freedom, and not so much the particular content of the choices that are made.[31] It is this move that marks the decisive difference between freedom as self-determination and the consumer model of freedom in which merely multiplying the available options from which to choose is the key issue. We have seen that no matter how much this store of available options is increased, it will always be restricted by limits that are not chosen, and so therefore will always compromise freedom when conceived as free choice. Liberalism and libertarianism accept that compromise and then seek to expand freedom as much as possible within those limits that cannot be overcome or eliminated without also preserving the recognition of everyone's equal right to freedom.

But if we see clearly what the problem is with this conception of freedom, we can see what is needed to alleviate the problem, and then we can also see that the resources for doing so are already there in the concept itself. The problem is this: freedom does not have itself for its content. Its content is instead given externally—on the objective side as the givenness of available options from which to choose, and on the subjective side as the givenness of drives and impulses that determine what options I want or desire. This at first seems to reduce freedom to a vacuous formality that one might easily be tempted to reject entirely—as in the various forms of reductive determinism. On the other hand, one might be tempted to seek recourse in metaphysical speculation and posit a ghost in the machine that would remain free regardless of nature's mechanical necessity. The former gives up freedom, while the latter preserves it by requiring metaphysical commitments.

However, if we merely attend to the problem we can also see that what is needed in order to rectify it is not some additional feature or property. Rather, what is needed is a form of freedom that *has itself for its content*—this alone could avoid the problems that are the direct result of a freedom that relies upon externalities for its content. A freedom that had itself for its content would not will external options as its end, nor be motivated by factors that do not stem from freedom itself. Such a freedom can only will itself—a possibility we already saw in the positive character of the first shape of freedom that wants to reject all limitation. But this is precisely what we already have as soon as we recognize that what I am most concerned about in preserving my freedom to choose is freedom, and not so much the particular content of the choices that are made. If this is my primary concern, then I am really willing my freedom, not the externally given

31. For a more detailed discussion of the deficiency of freedom when defined in terms of choice and the transition out of it, see Stephen Houlgate, *Freedom, Truth and History*, pp 79 ff. The present account of choice is greatly indebted to his interpretation.

content of available options. So too, if this is my primary concern, then I am motivated by something not merely reducible to those drives and impulses that determine my wants and appetites and thereby also the options to be sought. In willing itself, freedom submits to its own necessity, and hereby the age-old dichotomy between freedom and necessity is seen to result from a concept of freedom that has not been sufficiently thought through.

Once freedom wills itself, its content is nothing other than itself and so there is no longer an externality standing over and against it to limit it. But this is a limit nonetheless, since freedom must will itself in order to be free—it cannot 'choose' to do otherwise and still remain freedom. As we saw earlier, insofar as freedom submits to its own limit it is self-determining. The self-determination we now have before us has been purged, as it were, of the vestigial externalities still present in the structure of choice. It is not that our freedom to choose is eliminated and we can no longer make choices. Of course we can. It's just that this no longer defines freedom.

Freedom has here gained a greater degree of concreteness over the merely abstract universality characterizing a will that, in rejecting all limitation, winds up being an empty formality devoid of content. An abstract universal is one that is other than its particular content—the separation of form from content is what makes it abstract. Once we take the step to a will that wills itself, to a freedom that has itself for its content, then we have a concrete universal—the concrete universality in which the form of freedom is the same thing as its content. What the will henceforth must do in order to be free is not to withdraw from all determination but to *determine itself*. A freedom that wills itself universally is what Hegel calls a 'right'.[32] The minimal structure of right is this universal willing of freedom. Initially it shows itself merely as the bare right to be free, but Hegel will then attempt to show that this entails further determinacies such as property, morality, ethical life and, at the macro-level, civil society and the political order of the state. The universality of freedom then will not be an abstract universal that subsumes particular content given to it externally, but rather will be the concrete universal that determines itself further and thereby gains particular content through that self-determination.

An estimation of Hegel's success in deriving these further determinacies from the concept of freedom on an immanent basis, as well as of the value of his own articulation of these structures, is well beyond the scope of the present paper, and I do not presume that traveling thus far with Hegel necessarily commits us to the remainder of the journey. Sufficient for the purposes outlined here is the demonstration that the state of exception need not leave us in an undecidable limbo between Benjaminian revolution and Schmittian authoritarianism or between socially progressive and regressive alternatives, nor need we be left with the meager hope for an indeterminate post-legal existence after the death of liberal democracy. The universalizing tendency with which we began,

32. Contra Hospers, we are now in a position to see that the demand to recognize rights and to respect the laws that preserve them is not a restriction that is externally imposed upon freedom but rather is something implied by the character of freedom itself—something we would not be able to see if we followed him by beginning with a pregiven right to own property.

having brought about the 'state of exception' in which the juridical order is suspended, has now emerged out of that state into the concrete situation of a free will that wills itself universally. Furthermore, it has done so not through being rescued by something external to its own suspended state nor by a teleologically or eschatologically conceived end point beyond it. Rather, it has emerged out of it through its own immanent dialectic.

At this point we can return to Agamben's account of the state of exception and highlight the transcendental way in which he conceives of it and thereby ensures in advance that it will remain an indeterminacy from which we cannot escape.

AGAMBEN'S TRANSCENDENTAL WAY OF CONCEIVING THE STATE OF EXCEPTION

I call 'transcendental' any structure that is said to determine other things but is not determined itself in the process. The classic modern sense is that given to it by Kant, for whom the transcendental conditions of possibility for all experience, insofar as they determine that experience, are not themselves determined by the latter and so are not empirical. As Kant put it:

> Reason is present in all the actions of men at all times and under all circumstances, and is always the same; but it is not itself in time, and does not fall into any new state in which it was not before. In respect to new states, it is determining, not determinable. We may not, therefore, ask why reason has not determined itself differently, but only why it has not through its causality determined the appearances differently.[33]

But it is perhaps Hobbes who first gives us transcendence in its modern form insofar as for him the social contract is first made possible by the coercive power that is able to enforce its provisions, and this power is rooted in the sovereign power over life and death that is outside the contract itself—a point not lost on Agamben, whose analysis of the state of exception follows Hobbesian contours (HS 104ff). Because the sovereign power makes the social contract possible, it cannot be itself party to the contract. Hobbesian sovereignty is thereby transcendent—it determines the social order and, for that reason, is not itself determined by that order. No longer necessarily referring to something metaphysical or divine, Hobbes gives transcendence its modern secular form and sharpens its definition as well: it is simply that which determines without being itself determined, and it can have either empirical or metaphysical referents. As such it is the sense later inherited by Kant, but it also equally pertains to the 'forms' of Platonism as well as to the divine transcendence of God assumed by Medieval thinkers.

The key point for our purposes, however, is that such transcendental thinking does not have to adopt those specific transcendental determining conditions that Kant or Hobbes privileged. As Winfield has pointed out, any variable can be selected and then elevated to the status of a 'privileged determiner', one that is 'given the privileged role

33. Kant, Immanuel, *Critique of Pure Reason*, trans. N.K. Smith, New York, St. Martin's Press, 1929, A556/B584.

of being the prior condition of all other terms'.[34] From this perspective it matters little whether that privileged determiner be the history of being, language games, cultural context, or the state of exception—in each of these cases, the problem of grounds comes to the fore insofar as, whatever the condition selected to occupy the role of privileged determiner, 'the question naturally arises as to how that condition can have its own determinate character'.[35] And as I will argue below, merely attributing indeterminacy to the privileged determiner does not mitigate the problems involved but, at worst, merely masks them by making it appear to have no need for such justification (a strategy perhaps dating back to Anaximander's *apeiron*).

We already saw Agamben underline the transcendental character of the state of exception ('anomie') as a privileged determiner when he writes that it is 'as if in order to ground itself the juridical order necessarily had to maintain itself in relation with an anomie' (SE 51). In Agamben's account, the state of exception persists within the juridical order—and within any juridical order—as that which grounds it and makes it possible. For him this suggests what a theory of the state of exception should do:

> The essential task of a theory of the state of exception is not simply to clarify whether it has a juridical nature or not, but to define the meaning, place, and modes of its relation to the law (SE 51).

Here we see that Agamben must think of the state of exception and the law as coexisting in a mutual relation. As he further puts it, 'That is to say, everything happens as if both law and logos needed an anomic (or alogical) zone of suspension in order to ground their reference to the world of life' (SE 60). But if we follow Hegel we also see that there is no need to posit a relation between two poles or constructs in this way. The state of exception contains a dialectic which immanently leads to its resolution in the sphere of right, from which the juridical order proceeds. This is neither annexation nor a mutual relation of two structures that creates a 'zone of absolute indeterminacy between anomie and law, in which the sphere of creatures and the juridical order are caught up in a single catastrophe' (SE 60). What does emerge is a political order that does not have to 'subsist only by capturing anomie' as if both were posited in advance in some way, but rather one which emerges out of the state of exception without leaving the latter remaining behind as a ground. If we follow the immanent dialectic implied in the state of exception, then from a Hegelian perspective one can actually agree with Agamben's claim, 'For law, this empty space is the state of exception as its constitutive dimension' (SE 60). That is, law is indeed constituted out of the state of exception, but the latter does not persist behind or within the former as a grounding dimension.

According to Agamben, Benjamin 'unmasks' the Schmittian 'attempt of state power to annex anomie through the state of exception' as a juridical fiction, replacing it with 'civil war and revolutionary violence, that is, a human action that has shed every relation to law' (SE 60). However, in siding with Benjamin against Schmitt's program of annexation, Agamben nuances the transcendental character of the state of exception:

34. Winfield, *Overcoming Foundations*, p. 62.
35. Winfield, *Overcoming Foundations*, p. 63.

> [P]ure violence (which is the name Benjamin gives to human action that neither makes nor preserves law) is not an originary figure of human action that at a certain point is captured and inscribed within the juridical order … It is, rather, only the stake in the conflict over the state of exception, what results from it and, in this way only, is supposed prior to the law (SE 60).

Although he does not acknowledge it here, in a way Agamben opts for a quasi-Heraclitean ontology of strife (*polemos*) within an open space of conflict, even employing a metaphorics of sport to clarify the contest between revolutionary violence and state authoritarianism as they compete within the void of the state of exception, each remaining a 'stake in the conflict' that results from the latter. Thus the latter, the state of exception itself, remains as transcendental ground or, what is the same thing from a Hegelian perspective, an abyss. Indeed, insofar as the state of exception does not indicate 'that somewhere either beyond or before juridical apparatuses there is an immediate access to something whose fracture and impossible unification are represented by these apparatuses' (SE 87) it is indeed a kind of abyss.

The abyss of its indeterminacy, however, is not sheer indeterminacy per se (e.g. as in the beginning of Hegel's greater *Logic*), but is the specific indeterminacy of the state of exception relative to the juridical order, whether the latter be a preexistent structure or a possible one to come. Agamben himself as much as asserts this in his comparison of the state of exception relative to the juridical order on the one hand with 'being' relative to the *logos* in the Platonic text on the other: 'In both cases, the conflict seems to concern an empty space: on the one hand, anomie, juridical *vacuum*, and, on the other, pure being, devoid of any determination or real predicate' (SE 60 Agamben's emphasis). Once again, however, Agamben's insistence upon transcendental thinking leads him to overlook the determinacies that might be developed immanently based on the implicit determinacy of a specifically juridical 'vacuum', an oversight evident in his own emphasis upon the noun rather than the adjective here—he writes 'juridical *vacuum*' rather than '*juridical* vacuum'.

In other words, the state of exception is indeterminate with respect to law or, as we saw in Hegel's version, to limit, and this gives it a *specific kind* of indeterminacy. But a specific kind of indeterminacy is in fact a determinacy nonetheless. Indeed, its indeterminacy mitigates against seeing that this specific indeterminacy is its very determinate character. Once its determinate character is overlooked, it may appear to readily offer itself as a transcendental privileged determiner insofar as, being indeterminate, it seems to require no account of its own determinacy. Insofar as its specific indeterminacy masks the determinate character of that very indeterminacy, it may well appear to be a kind of ultimate abyss or 'vacuum' beyond which we can venture no further—or, as Hegel saw, it may appear to be the final and ultimate shape of freedom in which the one sided character of indeterminacy is 'exalted' to the 'sole highest place' (PR § 5 A). It is precisely this 'one sided character of indeterminacy' in the state of exception that Agamben does indeed exalt as the ground of law. But as long as we think of it as that which makes the juridical order possible, either because of its sheer indeterminacy or in spite of it, we are

still conceiving of it in a transcendental way and will then be left with whatever arbitrary result concludes the contest Agamben leaves us with.

Agamben has been trying to think the state of exception at least since the 1995 publication of *Homo Sacer*, in which we also see the same transcendental way of conceiving of the relation between the state of exception and the juridical order. In this earlier work he is ostensibly addressing what he calls the 'bare life' which, in his account, is placed at the center of the political realm constituting 'the original—if concealed—nucleus of sovereign power' (HS 6). But what is telling for our purposes here is his immediate addition that, with this implication of bare life in political power, it is 'as if politics were the place in which life had to transform itself into good life and in which what had to be politicized were always already bare life' (HS 7). The 'always already' indicates a transcendental structure that remains as an underlying or persisting structure determining any further political development, and so the very possibility of dialectical transformation is ruled out right at the outset of his inquiry.

If there is any doubt whether or not this structure underlying political existence is conceived in a transcendental way, such doubts are quelled as soon as Agamben situates the notion of 'bare life' within the state of exception: 'At once excluding bare life from and capturing it within the political order, the state of exception actually constituted, in its very separateness, the hidden foundation on which the entire political system rested' (HS 9). The past tense here does not refer to an ancient regime that has been superseded, but rather to the process whereby the modern liberal democracy came to be established. This process ultimately reveals, in Agamben's view, 'an inner solidarity between democracy and totalitarianism', a thesis he advances 'with every caution' but which he claims he 'must' advance nonetheless (HS 10). The price one pays for overlooking the possibility of genuine transformation within an autonomous and self-determining political order may be great indeed.

At times Agamben seems to come close to Hegel's immanent account, almost as if he wants a mutually grounding relation without a necessary development that follows from its implicit determinacy:

> The exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule (HS 18).

But whereas this may at first seem close to Hegel's derivation of the 'rule' or the juridical order of right from the state of exception, there is a crucial difference: for Hegel that order, having arisen from the unsustainability of the state of exception, no longer needs to 'maintain itself in relation to the exception'. It is the persistence of a privileged determiner as ground that marks the crucial difference between Hegel and Agamben and, more importantly, determines whether humanity gets out of the state of exception or remains mired in its abyssal limbo of rightlessness.

As Richard Winfield has pointed out,[36] Carl Schmitt's attempt to understand the

36. Winfield, Richard, 'Rethinking Politics: Carl Schmitt vs. Hegel', in *The Owl of Minerva*, vol. 22, no. 2, 1991, pp. 209-225.

state of exception, and all the attempts to annex the latter into the juridical order that follow from this understanding, consistently make one crucial assumption: it is assumed that the political order is constituted in and through a relation with an exterior. Although this may be understood predominantly in terms of a 'friend-foe opposition' within the context of a plurality of nation-states, the basic gesture is that the political realm is defined in relation to its outside, an outside over which it has no a priori jurisdiction. As Winfield puts it:

> By making such a friend-foe opposition constitutive of political association, Schmitt adopts the novel strategy of advancing a doctrine of politics where the state is a particular body politic irreducibly defined in relation to others. Most traditional political theories address the relations of citizens to one another and their government before turning to international relations and their impact upon the domestic life of each state. Schmitt's first thesis instead suggests that the doctrine of the state must conceive every aspect of politics in terms of the plurality of particular states.[37]

Consequently, Schmitt identifies 'sovereignty with the power to decide when there are situations of emergency or normalcy' and explicitly rejects the 'immanence conception of sovereignty, whose most radical practitioner is Hegel'.[38] This means that 'the objective necessity of the laws must lie not in their content but in a command that assures their competence and authority' and hence according to Schmitt 'the legal order itself rests on a decision that only a sovereign power can make, the decision that determines when a normal situation prevails, first permitting legal norms to have their jurisdiction'.[39]

The state of exception then for Schmitt names this relation to an outside over which the sovereign prevails and must prevail if there is to be a juridical order at all. Agamben recognizes this fundamental assumption in Schmitt when he asserts:

> The 'ordering of space' that is, according to Schmitt, constitutive of the sovereign *nomos* is therefore not only a 'taking of land' (*Landesnahme*)—the determination of a juridical and a territorial ordering (of an *Ordnung* and an *Ortung*)—but above all a 'taking of the outside', an exception (*Ausnahme*) (HS 19).

But then without qualification Agamben seems to immediately embrace this assumption himself:

> Since 'there is no rule that is applicable to chaos', chaos must first be included in the juridical order through the creation of a zone of indistinction between outside and inside, chaos and the normal situation—the state of exception. To refer to something, a rule must both presuppose and yet still establish a relation with what is outside relation (the nonrelational). The relation of exception thus simply expresses the originary formal structure of the juridical relation … In its archetypal form, the state of exception is therefore the principle of every juridical localization, since only the state of exception opens the space in which the determination of a certain juridical order and a particular territory first becomes possible (HS 19).

37. Winfield, 'Rethinking Politics', p. 217.
38. Winfield, 'Rethinking Politics', p. 221.
39. Winfield, 'Rethinking Politics', p. 211.

Based on this logic, eight years later Agamben will write: '*Being-outside, and yet belonging*: this is the topological structure of the state of exception, and only because the sovereign, who decides on the state of exception, is, in truth, logically defined in his being by the exception, can he too be defined by the oxymoron *ecstasy-belonging*' (SE 35 Agamben's emphasis).[40] However, Winfield shows that this assumption—viz. that the political order is defined in relation to an outside—is both problematic as well as unnecessary and, though he applies this critique to Schmitt, it applies to Agamben as well to the degree that the latter accepts the same assumption. It is the 'unique reflexivity' of the political order that renders such an assumption unnecessary:

> Unlike family participation and civil activity in the economy and courts of law, political engagement involves acting so as to determine the very totality of right within which one's own agency as a citizen proceeds. To participate in self-government, whether as campaigner, voter, or official, is thus to engage in an activity that acts upon itself. By contrast, household activity operates within strictures of family rights and obligations that are never laid down by the acts that conform to them. Similarly, economic activity is always concerned with particular satisfactions and never directed at determining the working of the economy itself.[41]

Precisely due to this reflexivity in which the political order is self-determining, it is not primarily defined in relation to an outside and hence does not first need at its foundation a sovereign that would decide on the state of exception. Indeed, such a sovereign would only serve to undermine the very self-determining character that gives legitimacy to the political process and assures the 'universality of its aims'.[42]

Winfield's critique of Schmitt is similar to the critique he had earlier leveled against other political theories that in some way always ground the political order on something outside it, e.g. on a pre-political or extra-political realm such as the economy for Marxism, the private interests of individuals for liberalism, or the historically contingent character of a community for communitarianism.[43] However, it is not immediately clear that Agamben would necessarily fall prey to such a critique. Agamben is very emphatic that the state of exception, or the bare life which the former negotiates in producing the political space, is included in the political order *through* its exclusion. It is not that the law comes along and is 'applied' to a life that stands outside it, but rather that the latter is 'abandoned' by law, 'that is, exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable' (HS 28). We have seen that the state of exception in Agamben's thought is marked by an irreducible ambivalence between

40. It was Heidegger who recalled for us the Greek root combining ek—'outside', with stasis—'to stand', in the word 'ecstasy, which then literally signifies 'to stand outside', and hence in the fevered pitch of ecstasy one is 'outside oneself' or 'beside oneself'. See Heidegger, Martin, *Being and Time*, trans. Joan Stambaugh, New York, State University of New York Press, 1996, pp. 302 ff.

41. Winfield, 'Rethinking Politics', p. 221.

42. Winfield, 'Rethinking Politics', p. 221.

43. Winfield, *Overcoming Foundations*, pp. 171 ff. For the specific application of this critique to communitarianism, see also Winfield, Richard, 'Ethical Community without Communitarianism', in *Philosophy Today*, vol. 40, no. 2, 1996, pp. 310 ff.

inclusion and exclusion—its very inclusion is its exclusion and vice versa, a structure Agamben has been grappling with for some time and is a struggle that can be seen in various ways across many if not all of his writings. Thus the state of exception is not simply something outside the political order on which the latter rests as its foundation. The founding character if the state of exception is more subtle than that—it is the 'dislocating localization' or 'inclusive exclusion' that grounds the political order.

Thus although a Winfieldian critique would no doubt assert that Agamben misses the reflexivity of the political order, we would have to add that if he does so, he does so not so much through a simple external grounding upon something other but rather through the transcendental structure of the included exclusion itself. To put it another way, whereas Winfield looks to the already constituted political realm for its 'interactive' and reflexive structure, a structure which has no need for anything external upon which to base itself, in order to meaningfully address Agamben's argument we have to look at the state of exception *prior* to the political order and trace its development *into* the latter. This reveals the immanent logic implied in its peculiar determinacy, a logic that brings us out of the political limbo which otherwise—that is, when the state of exception is viewed as a transcendental determiner—will always characterize it and will thereby seem to 'always already' found the political order.

CONCLUSION

Following Hegel, we can agree that the state of exception is indeed the necessary beginning in allowing the very reflexivity Winfield highlights to unfold. However, it does not persist behind the scenes as a ground or foundation, nor as a 'zone of indeterminacy' between the outside and the inside that holds open the space in which the juridical order becomes possible. That is, the state of exception is not conceived transcendentally. Rather, the suspension of law that the state of exception is *is itself suspended* in the dialectic that leads us out of it and into the sphere of right. By beginning with this state of exception rather than, following Winfield, simply opposing the Schmittian conception of sovereignty based on it to the reflexivity that is possible in the political order, one can show the necessary genesis of that very reflexivity from the state of exception itself, thereby undermining the Schmittian position as an alternative (which Agamben, due to the transcendental way in which he conceives of it, has to leave open—while hoping that Benjamin wins out in the 'gigantomachy concerning a void') (SE 59 ff).[44] Therefore when Agamben's concludes that 'the task at hand is not to bring the state of exception

44. Although Agamben apparently identifies the pure violence of Benjaminian revolution with 'being' and the Schmittian strategy of annexing the state of exception into the juridical order with 'the meshes of the logos' (HS 60), a comparison more in keeping with the implicit reference to Plato's *Sophist* here might be to identify pure violence with pure becoming (*dunamis*), a power which by itself lacks direction and so risks self-destruction (for an interesting account of this interplay between power and direction in Plato's text, see Edward Goodwin Ballard, *Man and Technology*, Pittsburgh, Duquesne University Press, 1978, pp. 11 ff.). Agamben's immediate gesture, once again, is to situate both law and *logos* in terms of a ground: 'That is to say, everything happens as if both law and logos needed an anomic (or alogical) zone of suspension in order to ground their reference to the world of life' (SE 60).

back within its spatially and temporally defined boundaries in order to then reaffirm the primacy of a norm and of rights that are themselves ultimately grounded in it' (SE 87), we can assert that the sphere of right is precisely *not* 'ultimately grounded in' the state of exception at all and so Agamben fundamentally misconceives the task at hand.

Because the state of exception does not persist within the juridical order as its ground, any Schmittian attempt to annex and preside over the state of exception from the perspective of a predetermined juridical order would fall prey to a Hegelian critique as a regression or a mere misunderstanding. The attempt to dominate the state of exception from the perspective of the juridical order has already turned the state of exception into something else—viz. a regression to arbitrary and irrational rule. It is precisely this arbitrariness and caprice that is exploited by the Bush administration, for instance, when it claims the prerogative of stripping any human being on the planet of all rights and consigning him/her to what Luban calls the 'limbo of rightlessness'.[45] And rather than following Agamben and seeing this as manifesting the hidden ground of modern democracy, most people rightly see it as the regression to arbitrary exercise of power that it is.

On the other hand, the Benjaminian formula of bringing on the state of exception and overturning the state may well look like the mere flight from all limits of negative freedom that Hegel discusses with the French revolution in view. However, to bring on the state of exception a la Benjamin is to open up the beginning of freedom again, from which the dialectic can then take us forward and into the universality of right. Whether or not this is a regression or the necessary clearing away of obstacles that prevent the realization of freedom can only be empirically determined with respect to the specific historical context in which such revolution occurs. So Hegel does indeed offer the only viable way out of the state of exception that does not merely leave everything up for grabs. Nor does Hegel attempt to annex the state of exception in advance along lines similar to Schmitt's program. If anything, Hegel eliminates justification for Right-authoritarian invocation of the state of exception insofar as the latter attempts to include the state of exception within its sphere of legitimacy. But *the state* can never return to the state of exception—or to negative freedom—without being a mere regression. This precludes the authoritarian program of Schmitt. Though we cannot make this claim in any a priori way, revolution on the other hand may well—though not necessarily—operate against a state-structure that has replaced self-determining freedom with a mere simulacrum of the latter.

If the state of exception is conceived as a ground that must forever remain situated in relation to the juridical order, however, no such forward movement is possible—we always wind up back again at the *same* determinacy (which is the determinacy of suspended determinacy—still nonetheless a determinacy as we have seen), and so the most Agamben can leave us with is a vague prophesy that

> One day humanity will play with law just as children play with disused objects, not in order to restore them to their canonical use but to free them from it for

45. Luban, 'The War on Terrorism and the End of Human Rights'.

> good. What is found after the law is not a more proper and original use value that precedes the law, but a new use that is born after it' (SE 64).

Agamben seems to see this as the only alternative to a misguided desire to return to a lost origin. But whether we seek a lost origin or a future child-play with law, both still imply the same determinacy of suspended determinacy—and for Hegel the latter is simultaneously the problem with negative freedom as well as the catalyst for progressive movement that gets us out if it.

On the other hand, to follow the Schmittian program in which the juridical order presides over the state of exception is to impose an external authoritarian control over the dialectic of freedom. Because such authority is externally imposed, it effectively blocks the dialectic from unfolding and instead makes the state of exception appear as the space within which the political state operates or as its hidden ground, thereby also concealing its regressive character. Therefore we can get from Benjamin to the universality of freedom and the normativity it generates as self-determination—provided we do not follow Agamben and conceive of the state of exception as a ground—but we cannot do so from Schmitt. This is why the latter leads to totalitarianism—a fact Agamben indicates without being able to provide an explanation.

The problem Agamben has to deal with is that he tries to account for the state of exception from the perspective of the state a la Schmitt and also from the perspective of the oppressed who live under the state a la Benjamin. In both cases, the juridical order appears as predetermined alongside the state of exception, and the problem is to set up or articulate a relation between the two. This invites the positing of one as ground of the other. Indeed, for Agamben the state of exception must be actively maintained in relation to the juridical order: although 'unthinkable' from the perspective of the law, 'this unthinkable thing nevertheless has a decisive strategic relevance for the juridical order and must not be allowed to slip away at any cost' (SE 51). To be sure, Agamben does not necessarily endorse any and every relation or 'strategic relevance' between the state of exception and the juridical order here—for him whether the emergent result is Schmitt's totalitarianism or the quasi-messianic community to come he sees intimated in Benjamin, everything depends upon the kind of relation it is. But by beginning with both as *given* rather than thinking the origin of the juridical order out of the state of exception in terms of the dialectic of freedom as Hegel does, Agamben is misled into the kind of transcendental thinking that looks for essences and grounds rather than the non-foundational thinking that alone can establish non-arbitrary and universal normativity for the political order.

Winfield's critique of communitarianism is instructive in this regard. He argues that the flaw in communitarianism is that it cannot reconcile the universality of its ethical norms with the particularity of its content.[46] If the community establishes its own norms, no normative evaluation can preside over it without being imported from elsewhere and externally imposed, which would thereby undermine its communitarian character.

46. Winfield, Richard, 'Ethical Community without Communitarianism', in *Philosophy Today*, vol. 40, no. 2, 1996, pp. 310 ff.

He frames the problem in terms of Wittgenstein's 'language games' in which the rules of each game are internally generated within that game but, viewed from outside that particular language game, the rules are merely arbitrary. If normativity depends upon 'extrinsic foundations', it is for that very reason not a 'communitarian' ethic at all. If it does not depend upon extrinsic foundations, its particular content is arbitrary and contingent, a product of particular historical contingencies. In either case we have an abstract universal that cannot bridge the gap between its universal form and its particular content. This problem is merely repeated in Badiou when he abstracts a formal truth procedure from its particular content, discarding the latter in favour of the former. In a certain way, Agamben's way of conceiving the state of exception as hidden ground also reinstates an abstract universal insofar as this ground remains behind the scenes, as it were, underwriting the juridical order but never actually *becoming* that order, and so the universality of the state of exception always remains other than the juridical order which either seeks to dominate it (Schmitt) or is overthrown by it (Benjamin).

Winfield further argues that the only solution to this problem of abstract universality is to found a community on self-determination. This 'founding', however, is not a *foundation*—it is rather a beginning that progressively determines itself without assuming anything as given in advance upon which it would be based or to which it would return. It is freedom conceived as self-determination that 'owes its measure to nothing but itself, overcoming the gap between legitimating factor and legitimated conduct'[47]—or, to put it in the terms Agamben borrows from Schmitt, between the law-making constituent power and law-preserving constituted power. The contingencies of history and nature—the 'physical, astronomical, chemical, biological, and psychological conditions without which rational agents cannot interact at all, do not thereby prescribe what shape ethical community should have'.[48] To put it another way, these contingencies are enabling but not determining conditions.[49]

But the key element in this 'self-grounding, presuppositionless character that fundamental normativity requires'[50] is that in and of itself, without reference to anything outside the suspension of all normativity—that is, without reference to anything outside the 'state of exception' that alone does not presuppose any predetermined normativity—it implies in itself a logic specifying a normative determinacy that arises out of it. If this is to be the case, the state of exception cannot be a principle or ground that then is situated in relation to something else—be it a juridical order or otherwise—but rather must itself *become* that normative determinacy *through* its own suspension of all normativity. This suspension itself reveals a character specific to it—that of an indeterminate determinacy or a negation of all limit. It is only in submitting to the logic implied by the indeterminate determinacy of the state of exception that it becomes self-determining, viz., that it is subject to the limits imposed by its own structure and so is not subject to

47. Winfield, 'Ethical Community without Communitarianism', p. 314.
48. Winfield, 'Ethical Community without Communitarianism', p. 314.
49. Winfield, *Overcoming Foundations*, p. 63.
50. Winfield, 'Ethical Community without Communitarianism', p. 314.

an externally imposed measure.

In this way and in this way only, any normativity generated is neither a contingent and thereby also an arbitrary result of historical/cultural circumstances, nor the formal abstraction of a universality that can be conceived outside the determinacy of its particular content (e.g. as ground, principle, truth procedure, etc.). Therefore also in this way and in this way only, its particular content is identical to its universal form and abstract universality is overcome. And finally, in this way and in this way only we neither return to an originary state beyond or before juridical apparatuses nor are we merely left with a humanity that plays with law just as children play with disused objects. We are not left in a political limbo hoping for a good outcome in the contest between revolutionary violence and state authoritarianism as they both spar within the zone of indeterminacy held open by the state of exception. Rather, we have a concrete universal normativity implied by the structure of self-determination that necessarily arises out of the state of exception's own self-negation.

Thus in the context of the view presented here, it is neither mere coincidence nor unreflective habit that the most common immediate reaction to a state-ordered suspension of the juridical order—such as the US under the Bush administration has attempted in the Guantánamo Bay detention camp—is to demand that the rights of those detained be respected rather than routinely ignored by means of facile justifications.

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