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Collective Reprisal and Individual Rights in Israelite Law: Reconsidering the ḥrm Ban through the Theory of the State of Exception

This essay examines the *ḥrm* ban in light of the theory of the state of exception in order to identify the presence and function of legal rights in biblical law, and to make a conclusion about the extent to which these “rights” applied to both Israelite and non-Israelite populations. Initially developed by early twentieth century political theorist Carl Schmitt, the state of exception has since been thoroughly discussed,¹ but it was not considered a theory until it was recently, and more substantially, developed by Italian philosopher Giorgio Agamben. The framework of the theory of the state of exception can be applied to law in the biblical text, and this application can highlight features of the law otherwise outside of the reach of the interpreter. First, I will introduce Agamben’s iteration of the theory of the state of exception, delving into Agamben’s treatment of Schmitt’s definitions of the necessary concepts relating to the sovereign and *Homo Sacer*, the “bare life” figure. Integral to the theory is the relationship between the sovereign and those over whom he is sovereign, including the manner in which he treats this bare life figure. Then, I will frame the description of the *ḥrm* ban in terms of Garry Trompf’s theory of retributive logic, a hermeneutic that will describe the world in which we are operating, and Jan Assmann’s description of collective memory, which will explore the past through the world that this hermeneutic has decoded.² Lastly, I will read the *ḥrm* law through the theory of the state of exception, ultimately exploring how it may or may not illustrate the presence of individual rights in ancient Israelite law. It is the essence of sovereignty both to decide on the state of exception

and to make the decisions appropriate to that exception,³ and in this exploration of the *hrrm* ban, we can discuss the sovereign's granting and suspension of rights to the inhabitants of ancient Israel.

The State of Exception, *Homo Sacer*, and the Sovereign

The theory of the state of exception is a political theory that has existed in one form or another since the early twentieth century. While it was never considered a formal political theory until recently expanded by Italian philosopher Giorgio Agamben, the state of exception was debated by many early to mid twentieth century political philosophers, and it would play a role of varying significance throughout the remainder of the twentieth century and into the twenty-first century.

In his recent work titled *Stato di eccezione*,⁴ Giorgio Agamben attempts to theorize the state of exception by examining its turbulent political existence in the twentieth century, and he argues that it has become a paradigm for international politics even today. By looking at the history of the state of exception in the twentieth century and as it appears in the ancient Roman *Iustitium*, a situation in which both the law and the administration of justice were suspended by the Senate,⁵ Agamben argues that the state of exception has a formidable position in the modern political landscape.

Loosely defined, the exception is the point at which a severe economic or political disturbance requires a response involving extreme measures.⁶ These extreme measures are the center of the theory of the state of exception, alongside the question: can one transgress the law if the aim of the transgression is to preserve the law? Should some individual rights be revoked in

order to preserve the greater application of those same rights? In Schmitt's discussion of the state of exception, people can be at once subjected to the law and abandoned by it.

In this way, the state of exception can be further described as the period of time in which the law is set aside in order for it to be preserved. The German term used by Schmitt, *Ausnahmezustand*, can also find parallels in the terms "martial law" or "emergency powers."⁷ Also indicative of the state of exception is "the provisional abolition of the distinction among legislative, executive, and judicial powers."⁸ A single ruling entity can completely control the function and operation of law in a community or nation.

Essential to the definition of the state of exception, therefore, is the role of the sovereign. According to Carl Schmitt, "*Soverän ist, wer über den Ausnahmezustand entscheidet*,"⁹ which Agamben and many others famously interpret as the sovereign is "he who decides on the state of exception."¹⁰ Part of the task of deciding on the state of exception includes making the appropriate decisions in response to that exception. By deciding on the state of exception, the sovereign is the entity who, placing himself outside of the law, has the ability to suspend the law itself.¹¹

Agamben admits that most authors have not recognized the state of exception itself as a theory, because what is called the "state of necessity" does not have a juridical form (*necessitas legem non habet*),¹² and he questions the boundaries of the law when evaluating the reach of the law during the state of exception:

if exceptional measures are the result of periods of political crisis and, as such, must be understood on political and not juridico-constitutional grounds, then they find themselves in the paradoxical position of being juridical measures that cannot be understood in legal

terms, and the state of exception appears as the legal form of what cannot have legal form.¹³

These exceptional measures can be found at the fringes of law, considered at once both inside and outside the realm of the legal. Instead of succumbing to a poorly defined exception, Agamben argues that in order for the law to employ the exception – that law itself could be abandoned in order for it to be fulfilled – a theory of the state of exception must exist in (at the very least) a preliminary state. If a “definition of the relation that binds and, at the same time, abandons the living being to law” exists, then the theory of the state of exception is necessary to this definition.¹⁴

If the sovereign is the figure that decides on the exception, those directly impacted by the state of exception are known as *Homo Sacer*, the “sacred human” in Roman legal terms, otherwise known to Agamben as the bare life figure.¹⁵ The bare life figure is defined as the one who cannot be sacrificed, but at the same time is expendable. To describe the Roman *Homo Sacer*, Agamben cites Pompeius Festus’s treatise *On the Significance of Words*:

The sacred man is the one whom the people have judged on account of a crime. It is not permitted to sacrifice this man, yet he who kills him will not be condemned for homicide; in the first tribunitian law, in fact, it is noted that “if someone kills the one who is sacred according to the plebiscite, it will not be considered homicide.”¹⁶

The *Homo Sacer* is devoid of purpose and value, left to either live a life outside the comforts of legal rights, or become subject to a worthless death for which justice will never be wrought. The *Homo Sacer* is life in its most essential form.

The exception manifests itself in a very similar way to war, specifically internal strife or civil war, where tensions within a society have reached high enough heights to cause a profound disruption in that society.¹⁷ Agamben uses the term “global civil war,” which appears in the

works of both Hannah Arendt and Carl Schmitt in 1963,¹⁸ and this term describes the strife among contemporary states. Nation states participating in this global civil war have utilized the state of exception on many occasions. A glaring (and frequently cited) example of the state of exception at work is the 13 November 2001 military order issued by US President George W. Bush “which authorized the ‘indefinite detention’ and trial by ‘military commissions’ of non-citizens suspected of involvement in terrorist activities.”¹⁹ Once detained, these non-citizens lose any rights that may have once applied during or leading up to their imprisonment, all in the name of preserving national security. To Agamben, the state of exception is a fundamental biopolitical paradigm of the West.

During a state of exception, the sovereign’s role in the granting and suspension of rights functions in a way consistent with that of the above example. The sovereign wields supreme authority over any previously granted rights, gaining the ability to revoke these rights at any moment and without prior authorization or oversight. The premise behind the ability to grant and revoke these rights is the basis of the sovereign’s power.

Agamben understands the Roman concept of *Iustitium* as an ancient archetype of Schmitt’s *Ausnahmezustand*, and uses it to approach the state of exception in its paradigmatic form.²⁰ Even though the state of exception does not exist in Roman public law, Agamben describes the *Iustitium*, best translated as “standstill” or “suspension of law,”²¹ as a proclamation made after the senate, realizing a danger to the Republic, issued a final decree (*senatus consultum ultimum*) that required those in power to take any appropriate actions for the preservation of the state (“*rem publicam defendant, operamque dent ne quid respublica*

detrimenti capiat [Let them defend the state, and see to it that no harm come to the state]”²²).

Both law and the administration of justice were brought to a standstill during this time.²³ While ancient Israel does not necessarily have a term synonymous to *Iustitium*, I will later argue that the circumstances surrounding the institution of a *h̄rm* ban form a parallel to this Roman proclamation.

Additionally, Agamben discusses the concept of the ban in relation to both the sovereign and the bare life figure. The ban represents a semantic ambiguity: “the ban is the force of simultaneous attraction and repulsion that ties together the two poles of the sovereign exception: bare life and power, *homo sacer* and the sovereign.”²⁴ Banishment by the sovereign represents the ultimate power of the sovereignty, and the ultimate disempowerment of the *Homo Sacer* – the former exercising his sovereignty by rendering the latter without a purpose or a tangible amount of value to the society.²⁵ By reducing life to its most essential form, the sovereign demonstrates supreme power over not only those who become *Homo Sacer*, but also all others who might challenge his sovereignty, those who may, in terms of the *Iustitium*, present a threat to the preservation of the Republic.

Here is where the *h̄rm* ban enters the picture: the process of invoking the *h̄rm* ban and the subsequent utter destruction of a people follows the institution of the state of exception. Once the state of exception is invoked, individual rights are revoked for the greater good of the sovereign. The order to utterly destroy the people, livestock, and possessions of a community is precisely the extreme measures instituted by the sovereign in response to the exception. By all measures of law in the biblical narrative, the processes of collectively reclaiming of the land and destroying

its inhabitants violate several key biblical laws introduced. In the case of the *ḥrm* ban, the exception is oftentimes the mere existence of the non-Israelite people in the land, as they are occupying a place that has been promised to the Israelites. The rule of law must be transcended in order to enforce that very law against the threat of the exception. Suddenly, we find ourselves entering the fringes of law that can be described as the state of exception.

Collective Reprisal and the Theory of Retributive Logic in Ancient Israel

In order to arrive at a point where we can read the *ḥrm* ban in light of the theory of the state of exception, we must evaluate the literary and historical dimensions of the *ḥrm* ban in the biblical text. The logic behind the *ḥrm* ban in biblical law, which is the law as it appears in the biblical text, could operate on a much smaller scale in Israelite law, which is law as it was operative in the community.²⁶ For the purposes of this study, I utilized Garry Trompf's theory of retributive logic and Jan Assmann's treatment of collective memory, both in order to explore the function of the *ḥrm* ban as it appears in the biblical text, and to speak about the retributive logic behind the *ḥrm* ban as it may have found its basis in the collective memory of the community. I will now summarize this analysis.

The developed retributive logic of a community determines the community's response to conflict, and this retributive logic is regulated by both the present context of the community and the events that shape the collective memory of the community. For ancient Israel, this means that although we can determine, through extra-biblical sources including archaeology,²⁷ that the *ḥrm* ban as a form of collective reprisal likely never occurred on the scale that appears in the biblical text, the very appearance of the ban suggests that it is an extreme example of an otherwise

commonplace response to conflicts in the present, based on responses to events in Israel's past. Distilled to its very essence, the *harm* ban yields a situation in which humankind is reduced to its most essential form of life, and, subsequently, nothingness. Even though the scale of the retribution may change, the logic remains the same.

Garry Trompf's theory of retributive logic assists in our understanding of the role of collective reprisal in responding to events, and the basis of retributive logic resides in the collective memories of the community.²⁸ Trompf's theory describes retributive logic as endemic to humanity, and, as such, it transcends time and place to find itself applicable to many contexts throughout history as a cross-cultural phenomenon. By applying the theory of retributive logic to various contexts, Trompf is able to gain insight into patterns of human thought and behavior that underlie decisions to respond reciprocally or in revenge. By using the theory of retributive logic as a hermeneutic in order to analyze collective reprisal in the biblical text,²⁹ we can gain insight into ancient Israelite law as it may have been preserved through biblical law, specifically how the logic behind the *harm* ban may have reflected a more general logic behind Israelite law.

Trompf defines the idiom "retributive logic" in two precise and complementary ways. In the first case, retributive logic can be defined as "biblical and Graeco-Roman beliefs about the divine distribution of rewards and punishments in history."³⁰ Secondly, retributive logic can be defined as "any logical framework of ideas enabling people to give reasons for their retaliations and concessions, and interpret the dramatic changes of human existence in terms of rewards and punishments, praise and blame."³¹ Examples of both definitions of retributive logic can be found in the biblical and ancient Near Eastern material.

Perhaps more appropriate for this study is the latter definition, as we are not especially interested in divine distribution of rewards and punishments. The god of Israel, however, has an important role in the retributive logic behind the *ḥrm* ban.³² This second definition of retributive logic probes specific reasons for behavior, whether that behavior is to receive positive or negative reinforcement. Instances of collective reprisal, whether they are instances of revenge, retaliation, or even concession, can illustrate retributive logic at work.

The mechanics of retributive logic are rooted in the community, in values found in that community's life and in its literature. Trompf notes that in certain communities in Melanesia, "the rational bases of revenge and reciprocity in their case are almost always consistent with socially sanctioned ways of accounting for significant events."³³ The way that people act and react to events in the real world is heavily influenced by their accounting of significant events. If people perceive a significant event in a certain way, that perception will influence future judgements of revenge and reciprocity. These significant events, and the community's responses to these events, will eventually dictate how the community will think in terms of seeking revenge or granting reciprocity in future situations.

To speak about the retributive logic behind instances of the *ḥrm* ban amounts to exploring the reasons behind condemning to utter destruction, as the conquest comes as retribution for inhabiting the land promised to the Israelites. There are three elements present in cases where the *ḥrm* ban was utilized to cause wide ranging and total destruction. First, the *ḥrm* ban was put into place to clear the land of a foreign presence, paving the way for the settlement of the Israelites. Second, the *ḥrm* ban clearly indicates that anything subject to the ban cannot be reappropriated

amongst the Israelites. Finally, the *ḥrm* ban is applied to the offending parties in order to fulfill a covenant with the god of Israel.

The first element, clearing the land of a foreign presence, can be noted in the conquest narratives in the biblical text. In many of these cases, the goal of the *ḥrm* law is utter destruction. The book of Joshua contains the most occurrences of *ḥrm* used as a command to utterly destroy. Trompf might read the retributive logic evident in this element of the *ḥrm* ban as a way to repay the inhabitants of Canaan for their occupying the land.

The second element can be found in many instances of the *ḥrm* law in both the conquest narratives and the legal texts, especially where a great deal of property is encountered. A good example of *ḥrm* functioning in this fashion describes the fall of Jericho, which appears in Josh 6:17-18, 21:

והיתה העיר חרם היא וכל אשר בה ליהוה רק רהב הזונה תחיה היא וכל אשר אתה בבית כי החבאתה את המלאכים אשר שלחנו: ורק אתם שמרו מן החרם פן תחרימו ולקחתם מן החרם ושמתם את מחנה ישראל לחרם ועכרתם אותו: ויחרימו את כל אשר בעיר מאיש ועד אשה מנער ועד זקן ועד שור ושה וחמור לפי חרב:

The city and all that is in it will be devoted to destruction for YHWH, only Rahab the prostitute shall live, and all that are in her house, because she hid the messengers that we sent. And only you, you must guard yourself from the things devoted to destruction lest you yourself are devoted to destruction, so you will not take any of the devoted things and set them in the camp of Israel for they are devoted and you will bring trouble upon it. They then destroyed all that was in the city, the men and women, the children and the elderly, oxen, sheep, and donkeys by the sword.

In this example from the biblical text, the retributive logic of the community demands that the possessions may not be reapportioned amongst the Israelites. This illustrates a calculatedness of retribution: even though the Israelites are exacting retribution against the people who live in the

land, according to the prevailing logic of retribution, the Israelites are not allowed to take the property of their enemies, but it must instead be destroyed. Whether or not destroying that property illustrates an even greater level of retribution than merely taking those possessions is debatable, but devoting both the people and their possessions to destruction represents the calculated cost of collective reprisal upon the enemy cities.

The third element highlights the relationship between the god of Israel and its people. Scholarly consensus of the *ḥrm* law indicates that the term is characteristic of the ritual destruction of enemy cities, and that it is a word that often appears in narratives about war.³⁴ The *ḥrm* is not uniquely Israelite, as we find the idea circulating in Moabite texts as well, as the Moabite king devotes Israel to destruction: “So I went by night and fought against it from the break of dawn until noon, taking it and slaying all, seven thousand men, boys, women, girls, and maid-servants, for I had devoted them to destruction for (the god) Ashtar-Chemosh.”³⁵ Here, the relationship between the Moabite king Mesha and the god Ashtar-Chemosh is fulfilled through the Moabite equivalent of the *ḥrm*. In the biblical text, and according to the Deuteronomistic thought, the *ḥrm* is linked to the idea of the covenant, a relationship between the king of Israel (or, in later Israelite thought, *the entirety of Israel*) and its deity. The idea of covenant, specifically the fulfillment of the relational covenant between a deity and a king or a people, might undergird Israelite laws.

Taken together, these three elements illustrate the total reach of the retributive logic behind the *ḥrm* ban. The calculated cost of the initial offense, which, in many of the extant examples, involves solely the inhabitation of the land promised to the Israelites, demonstrates

that retribution was measured. In regards to that measurement, the command to utterly destroy even the possessions of the target illustrates an exacted cost present in the retributive logic. Finally, we can determine that this measured response was planned in relation to the covenant with the god of Israel. Even though it appears that people and objects could not be sacrificed, we can determine that their devotion to the god of Israel satisfied this covenantal relationship. Even in the Moabite document, we find an ancient Near Eastern equivalent to the biblical *ḥrm* ban acting in a way that preserves a relationship between a people and its deity.

This hermeneutic and Jan Assmann's theory of cultural memory work together, as "the theory of cultural memory explores the textuality of the past within the linguistic framework of our experience of the world that hermeneutics has decoded for us."³⁶ After using hermeneutics to explore the world in which the texts emerge, effectively illustrating a world otherwise lost to contemporary scholarship, one can use the theory of cultural memory to explore the people behind that world expanded and illuminated by hermeneutics.

Assmann, using the theories of Maurice Halbwachs,³⁷ argues that memory itself is both a social phenomenon and an individual one.³⁸ Cultural memory does not exist without the many generations of individuals who make up the community preserving the memory itself. It is in this collective environment that specific memories persevere or perish. In his definition of cultural memory, Assmann defines three other types of memory: "mimetic memory" refers to action, and the process of learning through imitation; "the memory of things" involves the physical or material objects that surround humankind in the course of everyday life; and "communicative memory" describes participation in the community, and the resultant memories that emerge from

interaction with others.³⁹ Cultural memory, as Assmann defines it, is “the handing down of meaning” and all three of the other forms of memory merge into cultural memory at the point where they transcend their own limits: when actions become rituals, when things take on additional purposes or meanings, and when language and communication mean more than what is initially communicated.⁴⁰ Cultural memory, therefore, refers to the treasury of cultural capital that moves from one generation to the next in order to preserve a collective identity.

The *hrm* law as it appears in the conquest narratives incorporates a type of retributive logic common to the region, specifically to the ancient Israelites and perhaps the Moabites as well, but it also preserves a memory of utter destruction. Whether this memory represents the conquest of the Israelites or an experience of destruction experienced by the Israelites is uncertain, but it likely can represent campaigns undertaken by a neighboring empire upon the region. The inhabitants of Israel, in forging a new identity, could have utilized an experience of conquest preserved in their collective memory, and reframed it with themselves in the role of conquerer. Based on their own experience of large, successful empires, and utilizing a retributive logic common to their own legal system, they could emanate the perception of great conquests and utter destruction that would have signified, at least in their own eyes, a powerful and successful nation.

Reading the *hrm* Ban through the State of Exception

In the Pentateuch, *hrm* takes two distinct roles: first, as a command related to purity and sacrifice; and second as a command ordering the complete destruction of cities and populations. In the case

of the latter, issues of purity and sacrifice are also relevant. In each of these senses, *ḥrm* is something both to be offered to the deity, and, more importantly, barred from being sacrificed to the deity or in any way involved with a sacrifice. Those who are marked by the *ḥrm* are essentially set aside, and are unable to function in the way that the rest of society is able to function. They figure as lesser beings in society, ones that have lost the essence of what it means to be human, while not even capable of being sacrificed to the deity. Those subjugated by the *ḥrm* in cases where cities and populations are ordered to be destroyed are subsequently condemned to death.

There are several laws governing the use of *ḥrm* in ancient Israel. In Exod 22:19, anyone who worships a god other than YHWH is to be considered *ḥrm*. In Lev 27:28-29, any possessions that are considered *ḥrm* must not be sold, as they are devoted to YHWH, and any person considered *ḥrm* must be put to death. In Num 18:14, all things labeled *ḥrm* are considered possessions of YHWH. Several passages in Deuteronomy, alongside cases where the *ḥrm* appears as a command to destroy, dictate how objects subjected to *ḥrm* are to be treated. Deut 13:17 avers that no one should take any possessions devoted to *ḥrm*, lest YHWH not turn from his anger toward compassion. In many of these cases, *ḥrm* appears as especial devotion to YHWH.

Particularly relevant to how the *ḥrm* operated in biblical law is the appearance of *ḥrm* in Lev 27:28-29. This passage reads:

אך כל חרם אשר יחרם איש ליהוה מכל אשר לו מאדם ובהמה ומשדה אחזתו לא ימכר ולא יגאל: כל חרם קדש קדשים אשר יחרם מן האדם לא יפדה מות יומת:

Nevertheless, all things that have been devoted to destruction for YHWH, a man or beast or land or any of his possessions, may not be sold or redeemed; every devoted thing is most holy to YHWH. All that has been devoted to destruction from the man cannot be ransomed; he shall be put to death.

There is a striking resemblance between the person or thing devoted to the god of Israel and the *Homo Sacer*. In the Lev 27:28-29, this state is even called קדש קדשים, or most holy to the god of Israel. These people may not be ransomed, and the things may not be sold or redeemed.

According to the *hrm* law outlined in Leviticus, those who are subject to the *hrm* law are reduced to their most essential form of life, and dwell in the same capacity and status as the Roman sacred man figure.

In the cases where the *hrm* ban is instituted, the first question we might ask regards the identity of the sovereign. In the above examples from the legal texts, the *hrm* ban is precisely related to a relationship with the god of Israel. According to many of the narratives, the *hrm* ban comes directly from the deity.

The sovereign, therefore, can be identified in these cases as the one (or ones) who speaks for the deity. The command to utterly destroy is raised on behalf of the deity, and those who represent the deity are charged with relaying the divine's commands. The assertion of the complete and total power of YHWH over other deities in the conquered lands is the central theme to these narratives. Fulfilling the *hrm* ban upon the native peoples effectively demonstrates the ultimate sovereignty of the god of Israel.

The second question to ask of the *hrm* ban is related to the people: how might Agamben's analysis of the *Homo Sacer* influence a reading of this text? There is little doubt that the *Homo Sacer* in the narratives might be anyone other than those subjugated by the ban, and even the law

from Leviticus illustrates those subjugated by the ban as קדוש קדשים, the most holy. The moment that the command to utterly destroy without consequence is given, those who are subjected to the ban are a people without meaning or value, a mere presence inhabiting a land promised to another people.

A deviation from the theory of the state of exception might be considered the devotion of these people and their property to the god of Israel. If they are considered a sacrifice to the god of Israel, they might be given value that is not indicative of the *Homo Sacer*, or the most sacred. This value might be considered the same as anything else sacrificed to a god, especially something that benefits the god, and therefore might not be considered along the same lines as the Roman “sacred man.” I would argue, however, that the status of devotion to destruction for a specific deity places the people and their property outside the realm of sacrifice, as the deity functions in the role of the sovereign. Sacrifice, therefore, falls in a sphere separate from that of the *hrm* ban.

When the people and their property are placed under the *hrm* ban they are outlaws condemned to an existence outside the law. Part of the *hrm* ban demands their utter destruction. Until that destruction is carried out, the people are left without a mutuality amongst those surrounding them. In effect, they are unequal to their peers in status.

What, then, is the exception that caused the response indicated by the *hrm* ban? In the accounts of the conquest, the exception is brought about by their presence in the land promised to another. If we step back from the accounts of the conquest, and review the *hrm* ban as it may have operated in Israelite law and according to the above analysis of retributive logic and

collective memory, we can conclude that the exception may have been any act that reduced or threatened the sovereignty of the god of Israel.

Ultimately, the exception in the narratives is related to the sovereignty of YHWH. The presence of the Canaanites in the land is a challenge to the sovereignty of the god of Israel. Banishment, a powerful weapon in the sovereign's arsenal, is utilized to reduce human life to its most essential form, and to exercise and assert the sovereign's control over the land and those who occupy it. The *ḥrm* ban functions as a response to the exception, and it is proclaimed by the sovereign and in the name of the sovereign.

Conclusion: Individual Rights in Ancient Israel

The best way to speak about the granting and suspension of individual rights in biblical law, and to make assertions about these processes in Israelite law, is by reading the *ḥrm* law through the theory of the state of exception. The *ḥrm* ban stands at the fringes of biblical law, where law is transcended in order to be fulfilled. There are stark contrasts between the illegality of murder and the command to utterly destroy, both of which take the unique form of law in ancient Israel.

The idea of individual rights is a modern one, and we cannot reasonably expect to find anything in ancient Israel resembling our modern understanding of human rights. But we can speak about individual rights much more abstractly, especially in the legal sense of the terms “equality” and “mutuality.” If a law, as Douglas Knight writes, “articulates a social, legal relationship of mutuality,”⁴¹ then a system exists that implies a hierarchical, or at least varying, sense of mutuality. Mutuality is not given, and requires law in order to be upheld. In a state without law, individual rights would not exist – certain individuals, whether distinguished by

clan or family, would not be granted the same rights as another group of individuals protected by such laws. Once mutuality is lost, so are, effectively, individual rights. In this regard, we may speak about individual rights in terms of the greater community.

Deprivation of rights in the narrative context of the *ḥrm* ban targets non-Israelite populations almost exclusively. It is difficult to establish a level of mutuality amongst the populations of Canaan before the conquest narratives, but we can establish a very sudden lack of mutuality after the *ḥrm* ban is instituted. Part of the function of the *ḥrm* ban is to remove the mutuality between the targets of the ban and those surrounding them. By issuing the *ḥrm* ban and reducing the various local populations to the status of *Homo Sacer* (קדש קדשים), the sovereign dissolves whatever remained of the inherent mutuality between the Israelites and the local populations. The relationship between the sovereign and the *Homo Sacer*, as it has been demonstrated, is one that serves the purposes of the sovereign: at once, the *ḥrm* ban demonstrates the absolute sovereignty and authority of the sovereign, and the complete subjugation of the *Homo Sacer*, who is reduced to the most essential form of human life.

In other legal texts in the pentateuch, specifically Lev 27:28-29, the law does not appear to discriminate between Israelite and non-Israelite populations. However, the same type of retributive logic is present. The relationship between the sovereign and the *Homo Sacer* (explicitly קדש קדשים in this case) does not represent a relationship of mutuality. Again, the *ḥrm* ban produces inequality in demonstrating the power of the sovereign in relation to the powerlessness of the sacred man figure. Regardless of national or ethnic identity, one placed under a *ḥrm* immediately loses any and all rights attributed under Israelite law.

The state of exception delineates the limits of the sovereign's power, which extends far beyond the ordinary confines of law. Once the sovereign has recognized the exception and has taken appropriate action indicated by issuing a state of exception, that sovereign extends himself beyond the limits of the locally prevailing law. Shifting the balance of mutuality in the relationship between the *Homo Sacer* and all of those around him, the sovereign rescinds all individual rights of those he places under the *ḥrm* ban.

The conclusion to be made based on this reading has three parts. Firstly, while a modern conception of individual rights cannot be applied to Israelite law, the lack of mutuality present in the relationship between the sovereign and the *Homo Sacer*, as signified by the sovereign's issuing of the state of exception and response to the exception (*ḥrm* ban), demonstrates an abstract presence of rights, specifically as they are revoked. Secondly, when human life is reduced to the state of *Homo Sacer* (קדש קדשים), it is set aside and expendable without regard. When the mutuality between the sovereign and the *Homo Sacer* is no longer established, the mutuality between the *Homo Sacer* and the rest of the population is also impacted. Finally, setting aside the grandiose narratives of conquest, the retributive logic behind the wide ranging *ḥrm* ban can function on a much smaller scale, illustrating the possibility that logic behind the *ḥrm* ban was at one time operative in Israelite law. Ultimately, in cases of both the narrative and legal material in the biblical text, the *ḥrm* law illustrates a break in the mutuality between the sovereign and the *Homo Sacer*, the one who orders the *ḥrm* ban and the one subjugated by it. This relationship illustrates the rescission of legal rights, and banishment to a realm outside the normal protections of law.

1. For the purposes of this study, I will utilize Attell's English translation: Giorgio Agamben, *State of Exception*, tr. Kevin Attell (Chicago: University of Chicago Press, 2005). Some citations will come from the Kindle eBook edition, which will be appropriately labeled with location numbers rather than page numbers.

2. Jan Assmann, *Religion and Cultural Memory: Ten Studies*, tr. Rodney Livingstone (Stanford: Stanford University Press, 2006), ix.

3. Schmitt's definition of the sovereign as "he who decides on the state of exception" can be found in: Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, tr. George Schwab (Chicago: University of Chicago Press, 2005), 5.

4. Giorgio Agamben, *Stato di eccezione* (Torino: Bollati Boringhieri, 2003).

5. Agamben, *State of Exception*, Kindle Electronic Edition: loc 573/1259.

6. Schmitt, *Political Theology*, 5.

7. Agamben, *State of Exception*, Kindle Electronic Edition: loc 61/1259.

8. Agamben, *State of Exception*, Kindle Electronic Edition: loc 106/1259.

9. Carl Schmitt, *Politisches Theologie* (Berlin: Duncker und Humblot, 2004).

10. Agamben, *State of Exception*, 1. Tracy Strong adds to this statement, however, illustrating Schmitt's favor of a complex definition: "Schmitt is saying that it is the essence of sovereignty both to decide what is an exception and to make the decisions appropriate to that exception, indeed that one without the other makes no sense at all." Tracy Strong, Forward to

Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, tr. George Schwab (Chicago: University of Chicago Press, 2005), xii.

11. Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, tr. Daniel Heller-Roazen (Stanford: Stanford University Press, 1998), 15

12. Agamben, *State of Exception*, 1.

13. Agamben, *State of Exception*, 1.

14. Agamben, *State of Exception*, 1.

15. Agamben, *Homo Sacer*, 71-74.

16. As cited in: Agamben, *Homo Sacer*, 71. “At homo sacer is est, quem populus iudicavit ob maleficium; neque fas est eum immolari, sed qui occidit parricidi non damnatur; nam lege tribunicia prima cavetur “si quis eum, qui eo plebei scito sacer sit, occiderit, parricidia ne sit.”” Ibid.

17. Agamben, *State of Exception*, 2.

18. As cited in: Agamben, *State of Exception*, Kindle Electronic Edition: loc 44/1259. See Hannah Arendt, *On Revolution* (New York: Penguin, 1990); Carl Schmitt, *The Theory of the Partisan: A Commentary/Remark on the Concept of the Political* (Berlin: Duncker & Humblot, 1963), a translation appears online: Carl Schmitt, “The Theory of the Partisan,” tr. A. C. Goodson, *Michigan State University Press*, accessed 5 October 2013, <https://web.archive.org/web/20060624044413/http://www.msupress.msu.edu/journals/cr/schmitt.pdf>.

19. Agamben, *State of Exception*, Kindle Electronic Edition: loc 47/1259.

20. Agamben, *State of Exception*, 41.

21. Agamben, *State of Exception*, Kindle Electronic Edition: loc 574/1259.
22. Agamben, *State of Exception*, Kindle Electronic Edition: loc 570/1259.
23. Agamben, *State of Exception*, Kindle Electronic Edition: loc 574/1259.
24. Agamben, *Homo Sacer*, 110
25. The ban is a form of relation: “the pure form of reference to something in general, which is to say, the simple positing of relation with the nonrelational” Agamben, *Homo Sacer*, 29.
26. For the distinctions between biblical law and Israelite law, I utilize Douglas Knight’s definitions found in: Douglas A. Knight, *Law, Power, and Justice in Ancient Israel* (Louisville: Westminster John Knox Press, 2011), 10-16.
27. Take, for instance, the cities of Jericho and Ai. Jericho (even though its stratigraphy is quite complex) and especially Ai, it has been determined, were not even cities of any significant magnitude during this time. For these and other non-existing cities, see: Koert Van Bekkum, *From Conquest to Coexistence: Ideology and Antiquarian Intent in the Historiography of Israel’s Settlement in Canaan* (Leiden: Brill, 2011), 41-42; and the sources cited in Van Bekkum.
28. For Trompf’s work on retributive logic, see especially: Garry W. Trompf, *Payback: The Logic of Retribution in Melanesian Religions* (Cambridge: Cambridge University Press, 1994); chapter three in: Garry W. Trompf, *Melanesian Religion* (Cambridge: Cambridge University Press, 2004), 51-77; Garry W. Trompf, “Retributive Logic: Payback and explanations for trouble, sickness, and death,” in *Melanesian and Judeo-Christian Religious Traditions*,

UPNG Extension Studies, ed. Garry W. Trompf (Port Moresby: Institute of PNG Studies, 1975), 38-43; for his work on retributive justice in the early Christian tradition, mentioned later in this paper, see Garry Trompf, *Early Christian Historiography: Narratives of Retributive Justice*, Studies in Religion (London: Continuum, 2000); and his festschrift: Carole M. Cusack, Christopher Hartney, eds., *Religion and Retributive Logic: Essays in Honour of Professor Garry W. Trompf* (Leiden: Brill, 2010).

29. In order to use Trompf's theory of retributive logic to study an ancient culture that is only preserved in a heavily edited and redacted text, we must evaluate how we might be able to engage in this enterprise. It is now understood that, methodologically, "the logic of retribution presents itself as a rubric to help explain human behavior and draw cross-cultural relationships." (Trompf, *Payback*, 12) Trompf suggests that retributive logic could be understood as a structure, an object of thematics, a component in an identifiable *Lebenswelt*, or as a hermeneutical tool. (Trompf, *Payback*, 12) As such, we will engage with the theory of retributive logic as a hermeneutical tool, so, in Jan Assmann's terms, cultural memory can complement the world that a hermeneutic derived from Trompf's theory of retributive logic illustrates.

30. Trompf, *Payback*, 1.

31. Trompf, *Payback*, 1-2.

32. Trompf, *Payback*, 1-2

33. Trompf, *Payback*, 9.

34. For the most recent study and consensus, see: Philip Stern, *The Biblical Herem: A Window on Israel's Religious Experience*, Brown Judaic Studies 211 (Atlanta: Scholars Press,

1989). Additionally, see: Moshe Greenberg, "Herem," *Encyclopedia Judaica* 8 (1971): 344-350; and Susan Niditch, *War in the Hebrew Bible: A Study in the Ethics of Violence* (Oxford: Oxford University Press, 1993).

35. James B. Pritchard, *Ancient Near Eastern Texts Relating to the Old Testament with Supplement*, 3rd ed. (Princeton: Princeton University Press, 1969), 320.

36. Assmann, *Religion and Cultural Memory*, ix. Hans Georg Gadamer, Assmann avers, has "repeated argued that all understanding is nurtured by a pre-understanding that comes from memory." Assmann, *Religion and Cultural Memory*, x.

37. Halbwachs represents the second generation of the Durkheimian school of French sociologists. Maurice Halbwachs, *On Collective Memory*, tr. Lewis A. Coser (Chicago: University of Chicago Press, 1992). For an opposing understanding of memory, particularly as it relates to Assmann's treatment of Moses, consult Sigmund Freud, *Moses and Monotheism*, tr. Katherine Jones (New York: Vintage, 1939).

38. Maurice Halbwachs actually argues this point: "While the collective memory endures and draws strength from its base in a coherent body of people, it is individuals as group members who remember." Maurice Halbwachs, *The Collective Memory*, with an introduction by Mary Douglas (New York: Harper, 1950), 48. Simply put, "memory depends on the social environment." Halbwachs, *On Collective Memory*, 37.

39. Jan Assmann, *Cultural Memory and Early Civilization: Writing, Remembrance, and Political Imagination* (Cambridge: Cambridge University Press, 2011), 5-6.

40. Assmann, *Cultural Memory and Early Civilization*, 6-7.

41. Knight, *Law, Power, and Justice*, 38. Additionally, Knight comments on the extant evidence of legal rights in ancient Israel: “Though we know of no listing of legal rights guaranteed to Israelite citizens or residents – nor should we expect to find such since the jurisprudential interest in human rights is largely a modern phenomenon – the reciprocal duties and obligations bearing on Israelites are at least implicit and often explicit throughout the legal corpora.” Knight, *Law, Power, and Justice*, 39.