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## ARTICULATING JUSTICE: THE CONTINENTAL TRADITION AND THE RULE AND LANGUAGE OF LAW

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The contemporary era is frequently characterized as one in which the law’s legitimacy is under assault. In the popular imagination, this assault inexorably follows from the embrace of a Continental philosophical tradition that claims that “all truths are partial.”<sup>2</sup> Yet a more careful examination of several seminal Continental thinkers suggests that the Continental tradition provides the theoretical foundation for the rule of law that our pluralistic age increasingly lacks. I argue that Continental thought both legitimates American legal traditions and institutions while providing the justification for their dynamism and growth in the face of evolving notions of justice.

### I. Introduction

If all that enters consciousness, as Nietzsche believed, “becomes shallow, thin, relatively stupid... a herd-mark,” law and morality would seem to be in a great deal of trouble.<sup>3</sup> For Nietzsche, consciousness was a late development, a tool suited only to the needs of group survival, and which therefore corrupted whatever the great submerged mass of our thinking gave up to the surface of our consciousness.<sup>4</sup> Thus, what reason *discloses* to consciousness is at best superficial and at worst a series

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<sup>2</sup> See, e.g., Jeet Heer, *America’s First Postmodern President*, THE NEW REPUBLIC (July 8, 2017), <https://newrepublic.com/article/143730/americas-first-postmodern-president>; MICHIKO KAKUTANI, THE DEATH OF TRUTH (Tim Duggan ed., Tim Duggan Books 1st ed., 2018).

<sup>3</sup> FRIEDRICH NIETZSCHE, THE GAY SCIENCE 213 (Bernard Williams ed., Josefine Nauckhoff trans., Cambridge Univ. Press 2001) (1887).

<sup>4</sup> *Id.* at 212.

of useful fictions—“that a supremely fatal stupidity of which we some day will perish.”<sup>5</sup> If Nietzsche is correct, our systems of law and morality are perhaps sufficient for the mere survival of the species. Though, with problems more nuanced, intractable law and morality may be at a loss. It is important to note, however, that Nietzsche distinguishes consciousness from reason.<sup>6</sup> Reason continues to exist below the surface of our awareness, working its way through the tangles and snares of our lived experience, perhaps inducing a morality that remains just out of articulation’s reach.<sup>7</sup>

If reason can *induce* morality but cannot fully *disclose* morality to consciousness, how does the moralist proceed? How does the judge or the legislator? How is a culture that finds so much validity in the very act of reasoned articulation to justify itself? These are the questions this paper seeks to explore.

## II. Suspending the Ethical

We begin with Kierkegaard’s reading of the story of Abraham and Isaac. Abraham is asked by God to sacrifice Isaac, his only son and the reward for Abraham’s faith that endured decades of infertility.<sup>8</sup> The reader can only imagine the difficulty that must attend such an act. And yet, Abraham bound his son to the heath, drew the knife, saw his son’s eyes widen with horror until the ram that God had chosen as a substitute appeared along the road.<sup>9</sup> Can we say that Abraham acted morally in his willingness to sacrifice Isaac?

For Kierkegaard, Abraham’s act is justified only by a teleological suspension of the ethical.<sup>10</sup> To distinguish morality from ethics for the purposes of this paper requires some background in

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<sup>5</sup> *Id.* at 214.

<sup>6</sup> *Id.* at 213.

<sup>7</sup> THOMAS STEARNS ELIOT, *THE WASTE LAND: A FACSIMILE AND TRANSCRIPT OF THE ORIGINAL DRAFTS INCLUDING THE ANNOTATIONS OF EZRA POUND 7* (Valerie Eliot et al. eds., 1971) (1922) (“I could not speak ... I knew nothing, looking into the heart of light, the silence.”).

<sup>8</sup> *See generally* SØREN KIERKEGAARD, *FEAR AND TREMBLING/REPETITION 10-14* (Howard V. Hong & Edna H. Hong eds./trans., Princeton Univ. Press 1983) (1843).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 54.

Hegelianism. For Hegel, what is called “ethical” must be universally applicable:<sup>11</sup> The individual is created by active engagement with a social order, and the ultimate product of this engagement is a code of conduct, a secular truth embodied by the state, to which all submit.<sup>12</sup> This universal, expressed in ethics, applies to all at all times.<sup>13</sup> For Hegel, the first stage in the emergence of the universal is the creation of the political individual through engagement with the institutions of property, contract, family life, the legal system, and civil society.<sup>14</sup> It was, in particular, through the institution of property, and its requisite emphasis on contract and exchange, that an otherwise “abstract concept” becomes a concrete individual.<sup>15</sup> For example, it is through a constellation of things owned that I am able to distinguish what is mine from what is another’s, and it is through this distinction that, according to Hegel, a self can be defined politically and legally in opposition to the other.<sup>16</sup> Contract similarly requires engagement with the other and recognition of the other as a rights-bearing person.<sup>17</sup>

Certain ancillary rights, this paper argues, must be derived from these Hegelian premises. Freedom of speech, freedom from violence, and the necessity to secure consent from individuals are prerequisites to contract, property ownership, and participation in civil society. Privacy is required for fulfillment through family life. Basic social welfare provisions are necessary for participation in the legal system. These social welfare provisions would include education (which is required for a basic understanding of the legal system), sustenance (required for education to be at all effective), and access to counsel.

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<sup>11</sup> GEORG WILHELM FRIEDRICH HEGEL, HEGEL’S PHILOSOPHY OF RIGHT 108-110 (T.M. Knox trans., Clarendon Press 1952) (1820).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 116.

<sup>15</sup> *Id.*

<sup>16</sup> See generally Alan Patten, *Hegel’s Justification of Private Property*, 16 HISTORY OF POLITICAL THOUGHT 576 (1995).

<sup>17</sup> HEGEL, *supra* note 11.

Hegel found the above to be insufficient for an ethical life, however.<sup>18</sup> Just as the concept of the political individual emerges dialectically from the assertion of rights against others, so does what is ethical emerge from the individual's relationship to the state.<sup>19</sup> The state forces individuals to realize their role in the collective life of a society and their obligations toward one another.<sup>20</sup> The state tethers individuals to a communal life, preventing individualism from tearing the social order apart.<sup>21</sup>

The teleological suspension of the ethical is Kierkegaard's response to this group-centered Hegelianism.<sup>22</sup> The story of Abraham, for Kierkegaard, demonstrates that duties exist *outside* the universal, and to engage in these duties therefore requires us to suspend the ethical.<sup>23</sup> How, after all, can Abraham explain his actions? If his actions are in accord with the universal and with established social norms, he would have no difficulty being understood. Indeed, if his actions conformed to the universal, he would have no need to justify himself in the first place. And yet from the perspective of the universal, Abraham appears to be a madman and a murderer.<sup>24</sup> Still, his conduct, while unethical, cannot be said to be immoral if we accept the premise of an absolute duty to some ultimate, invisible power. Indeed, that Abraham appears mad is what makes the act a courageous one: for Abraham, the ethical, conformity to which is otherwise our goal—is here the temptation.

Thus, for Kierkegaard, in the realm of ethics, the individual is subordinate to the universal, while, in the realm of morality, the individual is superior to the universal and cannot be mediated by it.<sup>25</sup> The consequences of this position are not lost on Kierkegaard. Will the universal itself be rejected? Will we all find ethics-suspending “duties to God” hidden under the rocks of our conscience? Will we

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<sup>18</sup> *Id.* at 200.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> KIERKEGAARD, *supra* note 8, at 54-55.

<sup>23</sup> *Id.*

<sup>24</sup> See generally Aaron Hollander, *Impossible Ethics: A Response to the Sacrifice of Isaac*, SWARTHMORE (2007), <https://www.swarthmore.edu/writing/impossible-ethics-a-response-to-sacrifice-isaac>.

<sup>25</sup> See generally, Yaroslav Senyshyn, *A Kierkegaardian Perspective on Society and the Status of the Individual as a Performing Musician*, 7 PHILOSOPHY OF MUSIC EDUCATION REVIEW 80 (1999).

simply descend into naked subjectivism? Kierkegaard notes that “people...are afraid that the worst will happen as soon as the individual takes it into his head to comport himself as the individual.”<sup>26</sup> Yet Kierkegaard argues that existing as an individual is the most terrifying experience of all, and that therefore the authentic individual will encourage others, if anything, to leap back into the universal.<sup>27</sup> Indeed, how could this be otherwise? Abraham cannot justify his actions in the language of the universal. He is an ethical outcast, robbed of any sensible speech, any possibility of receiving empathy, and yet he must persist. Existing as an individual, in short, requires the most profound isolation, because it requires denying oneself all the privileges of social life. Were ours a world of Abrahams, the dread of this isolation might not be any less the case. To frame the problem of Abraham in Nietzschean terms, Abraham’s moral duty exists beneath the level of articulation.<sup>28</sup> As consciousness is superficial and gives rise only to “herd-marks,” the only *language* in which the act can be justified is the language of the universal, and yet that language fails Abraham here.<sup>29</sup>

### III. The Law’s Response: Flexibly Manifesting the Universal

Surely, the law surely cannot find this answer offered by these celebrated philosophers satisfying. Would the law permit Abraham to say that his attempted murder is legally excused, because of a nondelegable duty to his God?<sup>30</sup> That his actions were justified, because any legislature considering his act would surely grant an exception for duties to God? That he had abandoned his act before its consummation? Most ludicrously, could Abraham possibly claim that his duty existed below the level of articulation, and was therefore beyond the scope of a mere judicial opinion? If the law were to

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<sup>26</sup> KIERKEGAARD, *supra* note 8, at 69.

<sup>27</sup> *Id.*

<sup>28</sup> Kenneth Barton, *Saving Isaac: Nietzsche and Kierkegaard on Religion*, BOSTON COLLEGE (Dec. 2001), <https://www.sorenkierkegaard.nl/artikelen/Engels/152.%20Saving%20Isaac%20Nietzsche%20and%20Kierkegaard%20on%20religion.pdf>.

<sup>29</sup> NIETZSCHE, *supra* note 3, at 213.

<sup>30</sup> For further examination on this concept, see Vivian Yee, *At Educational Event, a Modern Legal Interpretation of a Biblical Story*, NEW YORK TIMES (Nov. 16, 2014), <https://www.nytimes.com/2014/11/17/nyregion/at-educational-event-a-modern-legal-interpretation-of-a-biblical-story.html> (Discussing a courtroom conversation about a defendant being charged with murder who attempted to use the “voice of God” defense.).

grant such an exception, any murder, performed in good faith obedience to a deity would be permissible. And what of the problems of proving good faith when the stakes are as high as they are here? What if, under some theology, every crime is the product of divine urgings, the criminal desire itself a symptom of blessedness? What if the victim considers his duty to be the preservation of all life, or at the very least does not consider it his duty to submit to murder? Indeed, such an approach to law would be one of such resignation that law would lose the very legitimacy that sustains it in a non-authoritarian society. The law, then, must largely manifest the universal.

It should be noted, however, that the law's alliance with the *ethical* does not necessarily change the *moral* status of the actor. Abraham may still be held a moral actor even if convicted for attempted murder by the state, since he fulfills the duties demanded by his belief—that there is an absolute duty to God. Ultimately, however, our concern is neither Abrahamic theology nor religion in general. Rather, the dilemma for the law is reconciling the demands of the psyche with the demands of the universal. The story of Abraham simply frames this problem in the starkest and most horrific terms. Powerful variations on this theme, however, are plentiful. Cases such as *Walker v. City of Birmingham*, 388 U.S. 307 (1967), provide historically significant examples.<sup>31</sup> *Walker* concerned a Birmingham police commissioner's refusal to grant a parade permit to a group of civil rights marchers, including Martin Luther King, Jr., on grounds that the marchers' views would adversely affect the "public welfare, peace, safety, health, decency, good order, morals or convenience" of the city.<sup>32</sup> The marchers were additionally enjoined from marching after their intention to violate the ordinance was discovered.<sup>33</sup> The group marched nevertheless, and eight ministers were arrested, King among them.<sup>34</sup> The courts refused to review the constitutionality of the injunction and the dispute ultimately reached the

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<sup>31</sup> *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

<sup>32</sup> *Id.* at 349 n. 1.

<sup>33</sup> *Id.* at 312.

<sup>34</sup> *Id.* at 340.

Supreme Court, where Justice Potter stated that the proper way to challenge the ordinance was through a suit rather than via its violation.<sup>35</sup> King accepted his arrest and drafted a letter from prison that set out a natural rights philosophy to justify his conduct.<sup>36</sup> Within the Kierkegaardian framework, this is King's existential moment. King defies the universal by violating the law, and yet engages in an act that must be moral under the premises of his moral and political philosophy.<sup>37</sup> King nevertheless submits to the law's punishment, because the law largely embodies the universal.<sup>38</sup> Ultimately, however, King was able to transform the universal by resisting it, and this fact is crucial to the moral framework that will govern this analysis.

If Nietzsche is correct and our consciousness cannot disclose the full shape or limits of our morality, we must approach law and moral philosophy with some skepticism.<sup>39</sup> More importantly, we must be willing to accept the possibility that an act that cannot easily be placed within an articulated moral framework may nevertheless, were the subjectivity of the actor fully disclosed to us, be "moral." Such is the case with Abraham, whose acts defy the universal and thereby defy articulation itself.<sup>40</sup> Nevertheless, Abraham must be punished for his acts, as the law's interest must be in the universal if there is to be law at all. If, however, an act that defies the universal is ultimately made articulable within the language of the universal or *transforms* the universal by dredging up moral principles from the judicial unconscious, the inarticulable moral act must, be transformed into an articulable legal act as well.

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<sup>35</sup> *Id.* at 319; *See also* Ex Parte Walker, 279 Ala. 53 (1965).

<sup>36</sup> Letter from Martin Luther King Jr. at Birmingham Jail, to Clergymen (April 16, 1963) (on file with University of Pennsylvania).

<sup>37</sup> *See generally* Roger S. Gottlieb, *Kierkegaard's Ethical Individualism*, 8 PHILOSOPHIA 351 (1978).

<sup>38</sup> Letter from Martin Luther King Jr. at Birmingham Jail, to Clergymen (April 16, 1963) (on file with University of Pennsylvania).

<sup>39</sup> *See* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 98 (Keith Ansell-Pearson ed., Carol Diethe trans., Cambridge Univ. Press 1996) (1887).

<sup>40</sup> *See Genesis* 22:5.

It follows from this general principle of skepticism that the law ought not to be so perfectly clear that it is understood by all. This may at first seem to be in contradiction with the framework advanced above, since the law embodies the universal. However, because the law embodies the universal, the majority of crimes should be *malum in se* and therefore crimes for which others have notice by virtue of a communal life.<sup>41</sup> At the same time, avoiding perfect intelligibility allows for a kind of “prudent obfuscation,” as Dan Kahan has argued.<sup>42</sup> Rather than allowing anyone to exploit loopholes in laws that, however clear, cannot perfectly encapsulate the moral principles that drive the universal (because not all such principles are disclosed to consciousness), prudent obfuscation would allow individuals to attempt to reveal new moral principles that an obfuscating statute can then accommodate.<sup>43</sup> In short, prudent obfuscation leaves open the possibility that an individual will be able to transform the universal.<sup>44</sup>

In *Walker*, simply by coming into an antagonistic relationship with the state and continuing to advocate his interpretation of the events and of the law, King placed himself at a tentative remove from the universal.<sup>45</sup> He was, in some sense, a kind of Abraham. Abraham suspended his own understanding of the universal in order to act in obedience to God, and this, surely, was a trial in all senses of the word. King, however, even if he understands himself to be acting consistently with the universal, engages a similarly powerful antagonist. The state proves an immense, expanding, and often invisible force. It achieves a Foucaultian level of subtle oppression. Foucault’s concern with a kind of creeping disciplinary culture that normalizes and regularizes human behavior through our social institutions (schools, hospitals, factories, prisons) is certainly relevant here.<sup>46</sup>

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<sup>41</sup> See generally Richard L. Gray, *Eliminating the (Absurd) Distinction Between Malum In Se and Malum Prohibitum Crimes*, 73 WASH. U. L. Q. 1369 (1995).

<sup>42</sup> Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only For the Virtuous*, 96 MICH. L. REV. 127, 139-41, 150, 153 (1997).

<sup>43</sup> *Id.* at 140-141.

<sup>44</sup> *Id.*

<sup>45</sup> See generally *Walker v. City of Birmingham*, 388 U.S. 307 (1967); Letter from Martin Luther King Jr. at Birmingham Jail, to Clergymen (April 16, 1963) (on file with University of Pennsylvania).

<sup>46</sup> MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 228 (2d ed. 1995).

*Nielsen v. Preap*,<sup>47</sup> a matter in which the Supreme Court held that immigrants can be detained for years without a bail hearing, proves relevant here, as does the Bush-era Military Commissions Act.<sup>48</sup> Indeed, Foucault’s fundamental insight that all knowledge is *produced* rather than discovered as the consequence of a power acting upon the world proves particularly apt in the circumstances that characterize these cases.<sup>49</sup> By denying detainees’ right to a timely hearing, as in the *Nielsen* case, or seeing evidence of the charges against them, as in the Bush era, the state creates a kind of legal panopticon.<sup>50</sup> The state is able to see the time ahead of and the evidence against its detainees, but the detainee sees nothing. The detainee is at best aware that the gaze of the state has turned upon him, overlays him with “evidence” of which he knows nothing, and thereby reconstitutes him for the purpose of prosecution and imprisonment.<sup>51</sup>

Insofar as law must embody the universal, the government’s actions here fail to pass muster. As described above, the Hegelian framework requires access to the legal system.<sup>52</sup> However nebulous such a requirement might be in certain instances, here it applies with clarity. If detainees are prohibited from receiving any knowledge of the evidence raised against them, they cannot respond to that evidence in order to defend themselves. If they cannot be certain *when* they will speak, they similarly cannot respond to the law’s self-understanding. By directly denying the detainee the ability to defend himself, the government has indirectly denied the detainee access to the legal system altogether.

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<sup>47</sup> See *Nielsen v. Preap*, 139 S. Ct. 954, 965 (2018).

<sup>48</sup> *Military Commissions Act of 2006*, ACLU, <https://www.aclu.org/other/military-commissions-act-2006> (last visited Oct. 10, 2019).

<sup>49</sup> FOUCAULT, *supra* note 46, at 10.

<sup>50</sup> See *Nielsen v. Preap*, 139 S. Ct. 954, 965 (2018); see also *Military Commissions Act of 2006*, ACLU, <https://www.aclu.org/other/military-commissions-act-2006> (last visited Oct. 10, 2019); see also MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 228 (2d ed. 1995) (Michel Foucault, in this quintessential work, propounded on the concept of the panopticon as applied to social control. The panopticon is an architectural design used in prisons, in which all incarcerated individuals can see a security guard from any vantage point, at all times. The panopticon is designed to encourage incarcerated individuals to act as though they are being observed by an authority figure at all times. The architectural design has been used in other institutional settings, such as hospitals, psychiatric institutions and schools.).

<sup>51</sup> See generally Spencer J. Weinreich, *Why prisoner abuse and deprivation persists in America*, WASH. POST (March 7, 2009), <https://www.washingtonpost.com/outlook/2019/03/07/why-prisoner-abuse-deprivation-persists-america/>.

<sup>52</sup> HEGEL, *supra* note 10, at 116.

Although the government's actions here are clearly in violation of the universal, it is the tendency of the law to extend beyond its proper bounds; this is because mistaking the conventions of the majority for the particular rights embodied by the universal is the driving concern of the moral and legal frameworks that govern this analysis. If the moral theory advanced here allows for acts that fail to fit neatly within the universal, and if the legal theory advanced here correspondingly requires a skepticism as to condemning those acts, it is because the universal must be aware of two things: (1) the possibility of its corruption, as with immigration detention and the MCA, and (2) the possibility of its transformation, as with Martin Luther King, Jr. By allowing the individual the moral latitude to engage in inarticulable acts, to exist as an individual in the Kierkegaardian sense, the universal leaves itself open to the possibility of being dragged along by an individual who brings certain moral principles to the level of articulation, as King did.<sup>53</sup>

This, in essence, is a reconciliation of Hegel and Kierkegaard, prompted by Foucault. Foucault described the logical consequences of Enlightenment-era rationalism if left unchecked.<sup>54</sup> These consequences, arguably, are also due to limitations of rationalism described by Nietzsche—consciousness as superficiality, or “herd-marks.”<sup>55</sup> The antithesis of this is a kind of Kierkegaardian non-rationalism that rejects the “tyranny of reason” and the dominance of the Hegelian universal.<sup>56</sup> The world described by Foucault involves the most insidious oppression, while Kierkegaard, if followed to the letter, would allow chaos under the guise of religion.<sup>57</sup> These realities must be mediated and engage each other in a Hegelian dialectic. As the state slowly dominates every aspect of being through rationalism or the dominant paradigm of the cost-benefit analysis that can be manipulated to

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<sup>53</sup> See generally, Yaroslav Senyshyn, *A Kierkegaardian Perspective on Society and the Status of the Individual as a Performing Musician*, 7 PHILOSOPHY OF MUSIC EDUCATION REVIEW 80 (1999).

<sup>54</sup> FOUCAULT, *supra* note 46, at 227-28.

<sup>55</sup> NIETZSCHE, *supra* note 3, at 212-13.

<sup>56</sup> KIERKEGAARD, *supra* note 8, at 54-55.

<sup>57</sup> See generally FOUCAULT, *supra* note 46; But cf. Kierkegaard, *supra* note 8.

justify all policies the name of national security, the non-rational individual engages in an act of resistance that cannot always reach the level of articulation. If this act of resistance corresponds to general moral principles that consciousness simply has not disclosed to us, the individual may be able to transform the universal, allowing a kind of radical freedom to force back the domination of the state.

The difficulty here arises when seemingly non-rational acts are brought into articulation. If the actor cannot, as Abraham could not, force his conduct into the language of the universal, or any language, how can the actor transform the universal?<sup>58</sup> We have seen actors like Martin Luther King, Jr. achieve such a transformation by framing his acts within the language of the universal.<sup>59</sup> His conduct was nothing less than an attempt to resist the universal and ultimately transform it, to reject the universal's tendency to stasis and ossification of the individual. More generally, however, this is the lawyer's function. The lawyer must bear the burden of articulating the conduct of the Abrahams of our world in the language of the universal.

This lawyerly function is precisely a consequence of the belief that "all truths are partial." The individual transforms the universal essentially by way of Nietzschean perspectivalism.<sup>60</sup> Due to the limitations of our consciousness, we cannot be certain that what we believe is *true*, even if those beliefs compel us, morally, to act in accordance with them. The law attempts to find the truth by allowing individuals to advocate their view of the truth, and as witnesses and evidence are brought forward by each side, combined perspectives should lead us to the "objective" answer. As Nietzsche trenchantly put it, objectivity is:

understood not as 'disinterested contemplation' (which is a non-concept and a nonsense), but as the capacity to have all the arguments for and against *at one's disposal* and to suspend or implement them at will: so that one can exploit that very *diversity* of perspectives and affective

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<sup>58</sup> See *Genesis* 22:5.

<sup>59</sup> Letter from Martin Luther King Jr. at Birmingham Jail, to Clergymen (April 16, 1963) (on file with University of Pennsylvania).

<sup>60</sup> See generally NIETZSCHE, *supra* note 3.

interpretations in the interests of knowledge. From now on, my dear philosophers, let us beware of the dangerous old conceptual fable which posited a ‘pure, will-less, painless, timeless knowing subject,’ let us beware of the tentacles of such contradictory concepts as ‘pure reason,’ ... ‘knowledge in itself’—for these always ask us to imagine an eye which is impossible to imagine, an eye which supposedly looks out in no particular direction, an eye which either restrains or altogether lacks the active powers of interpretation which first make seeing into seeing something—for here, then, a nonsense and a non-concept is a demand of the eye. Perspectival seeing is the only kind of seeing there is, perspectival knowing the only kind of knowing.... The more eyes, different eyes through which we are able to view the same matter, the more complete our ‘conception’ of it, our ‘objectivity’, will be.<sup>61</sup>

It is perhaps the peculiar genius of the adversarial system to have made this observation centuries before one of the greatest thinkers in Europe. It is manifested, however, not merely in the pitting of two advocates against one another, but also by allowing expert testimony and the presence of juries—twelve “perspectives” from which to form a more complete objectivity.

Full perspectivalism requires an acknowledgement of competing narratives as well. In this sense, we might say the prosecutors role, in criminal cases, is “fundamentally to prosecute.”<sup>62</sup> He has no ethical duty to moderate his client’s position if his client insists on pressing forward, even if he finds the charge unlikely to prevail, though he still has to prove his case beyond a reasonable doubt because the prosecutor is removing the accused from the universal. The burden to provide the missing perspective required for objectivity to emerge, however, falls to the other party. Nevertheless, just as the earlier analysis of Hegel required that the law uphold freedom of speech, perspectivalism requires that each party have sufficient freedom, as a moral as well as legal imperative, to assert its perspective. We must therefore guard against several ways in which market power and the narrative power of the state might impair this freedom.

If, for example, a defendant has not been fortunate enough to raise funds for his legal defense and his counsel was of sufficiently poor quality, the government would indirectly have denied the defendant’s perspectival engagement, even if, under our initial Hegelian principles, the defendant

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<sup>61</sup> NIETZSCHE, *supra* note 3, at 98.

<sup>62</sup> *Id.*

might be said to have “access to the legal system” by virtue of simply having counsel.<sup>63</sup> The current state of immigration detention and the Bush-era Military Commissions Act have already been discussed, but in addition to denying, indirectly, access to the legal system, the government’s historical attempts to deny *habeas corpus* utterly destroy the perspectival underpinnings of the legal system.<sup>64</sup> As Nietzsche argued, “the *more* eyes, different eyes through which we are able to view the same matter, the more complete our...‘objectivity’ will be.”<sup>65</sup> Here, the government denies the possibility of objectivity by denying the views of all relevant parties.

Early in the 2007 film *Strange Culture*, which concerns an artist arrested on charges of bioterrorism who is not permitted to see the evidence against him, the question is raised: “If we don’t own our identity, how can there be identity theft?”<sup>66</sup> The question arises in response to the contention that our biological identities are enmeshed in a political, a social, and an economic network.<sup>67</sup> Our analysis thus far requires (1) that it be morally permissible for the individual to violate the universal if he in good faith has an inarticulable duty to do so, (2) that the legal system, while not condoning violation of the universal, be open to the possibility that such violation may positively transform the universal, and (3) that perspectivalism allow the legal system to determine whether an individual’s violation of the universal positively transforms the universal or not. Thus, denying the individual the chance to make his case, to engage in perspectival dialogue, ultimately denies her the chance to transform the universal by leaving her forever stranded outside of it. By thus becoming forever subservient to the universal, except for the rare instances in which an absolute duty elevates the individual above the universal, the individual loses her identity.

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<sup>63</sup> See generally Cheong Cheng Wen, *Individualism from A Hegelian Perspective*, EPOCHÉ (May 12, 2017), <https://epochemagazine.org/individualism-from-a-hegelian-perspective-a21d586353bb>.

<sup>64</sup> See Robert Longley, *Why Bush and Lincoln Both Suspended Habeas Corpus*, THOUGHTCO (Aug. 22, 2019), <https://www.thoughtco.com/bush-lincoln-both-suspended-habeas-corpus-3321847>.

<sup>65</sup> NIETZSCHE, *supra* note 3, at 87.

<sup>66</sup> STRANGE CULTURE (Lynn Hershman Leeson 2007).

<sup>67</sup>*Id.*

This, then, is identity theft, the claim for which can exist apart from biological ownership. If an individual is denied the chance to craft a narrative that contributes to the creation of objectivity, she has in some sense lost her identity. Indeed, preventing an individual from articulating her perspective is functionally equivalent to articulating her perspective in violation of her wishes—revealing her secrets, for example. The latter act prevents the individual from crafting the image she presents to the world and therefore from creating her identity.<sup>68</sup>

Similarly, a detainee who has been awaiting trial for years can be said to lose his capacity for self-creation. The government hangs about as an almost spectral presence, due to the fact that a trial date has not been set. Defendants cannot speak as freely, or, alternatively, maintain silence. The government might use something said carelessly as evidence against them or compel them, for reasons of evidence, to deal with facts they might rather leave behind. Either circumstance, as argued above, is central to identity.

#### **IV. Conclusion**

Ultimately, then, the current era of detention strands individual outside the universal, in the position of Abraham. Under the moral and legal framework advanced here, our duty, through our legal representatives, is to articulate our conduct within the language of the universal or transform the universal to accommodate that conduct. To the extent that the state, steadily advancing its interests, attempts to stifle the individual by denying perspectivalism, it acts illegitimately. To preserve the legitimacy of the rule of law, our duty is indeed to embrace that “all truths are partial.” But rather than employing truth’s contingency as a pretext for silencing the weakest among us, it compels the legal system to bring those truths to the light.

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<sup>68</sup> See generally Alison Parker, *Lost in Detention*, THE MARSHALL PROJECT (March 4, 2015), <https://www.themarshallproject.org/2015/03/04/lost-in-detention>.