

Rethinking Space, Rethinking Rights: Literature, Law, Science

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Does the radius of the “interdisciplinary” extend so far as to encompass literature, law, and science? Do these three fields meet in any meaningful ways, in ways that bear on all three, clarifying the claims, the limits, and the premises of each? In answering “yes,” I want to argue not for a necessary, determinate connection between these fields, but for a dynamic continuum evolving through them, tracing a deep-rooted genealogy among some of their operative terms. Such a continuum makes it possible to imagine many specific contexts in which literature, law, and science do indeed come into contact and—intersecting as well as diverging—reciprocally define each other’s boundaries.

This Essay is an attempt to imagine one such context. Most particularly, it is an attempt to gather together (and to tease apart) some of the spatial postulates in law and literature, juxtaposing them against the scientific debate about “absolute” versus “relative” space. That debate, a turning point in modern physics—the point at which the world of Newton gives way to the world of Einstein—would seem to issue a corresponding challenge to other domains of thought.¹ This Essay takes that challenge seriously. In what follows, I appeal to Einstein’s “nonabsolute space” to develop an interlocking set of arguments about law and literature: arguments that ponder the

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1. Earlier this century, novelists, poets, and philosophers did draw inspiration from Einstein. The noncommunication between the humanities and the sciences is a relatively recent phenomenon. See GERALD HOLTON, *Einstein and the Shaping of our Imagination*, in *THE ADVANCEMENT OF SCIENCE, AND ITS BURDENS* 105-22 (1986).

meaning of spatial adjudication, both as it informs claims to rights in legal and ethical discourse and as it informs conflicts between neighbors in fiction.

I. THE SPACE OF RIGHTS

I begin with a trenchant statement from Mary Ann Glendon's *Rights Talk*.² Glendon is critical of the dominant role of the judiciary in the United States, a nation she dubs "the land of rights." According to her, this disproportionate centrality of law has led to a habit of speech likewise misguided, a speech overwhelmingly legalized and overwhelmingly shaped by one particular dialect, the "rights dialect." This dialect

is set apart from rights discourse in other liberal democracies by its starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities.³

For Glendon, the primacy of rights in the United States is most broadly registered in the linguistic practice of its citizens. American public life is dominated by a language which is anything but public-minded, a language fixated on the narrow meanings of personhood, to the exclusion of other—more capacious, and perhaps more compelling—meanings. Rights are "insular." To map our being along the lines of that insularity is to imagine our humanness in discretely spatial terms, which is to say, in terms of what we can safeguard, what we can defend against others. The assumption here is that there is a space of sanctity that ought not to be encroached. And, to make this space absolute, it is further assumed that any encroachment must result from someone overstepping a line, intruding into a place where he or she ought not to be.

In short, within the paradigm of individual rights, every moral dispute is spatially mappable, traceable to a territorial transgression. Given this logic, conflict resolution simply means a restoration of boundaries. This is something that can be done by going to court, by appealing to decisions of a juridical instrument. Glendon, for that reason, argues that rights are the cornerstone of a legalistic culture, one that looks to the bench and bar as the rule-giving authority.⁴ Law stands as the endpoint of ethical thinking, and its verdict is supposed to clear up all the perplexities, all the shadows and gray areas of that

2. MARY ANN GLENDON, *RIGHTS TALK* (1991).

3. *Id.* at x.

4. *See id.* at 3-6.

thinking. Since law has this alleged ability to cut through all dispute, “winning” and “losing” also become spatially segregable, each occupying an integral domain. One wins if one “has right,” and one loses if one has “no right.” The boundaries between these two can be juridically decided, can be mapped as inversions of each other. The space of sanctity goes only to one side; the other side comes away empty-handed.

According to Glendon, then, what the language of rights gives us is an ethical universe of undue clarity, a clarity issuing from the discrete spaces designated by the law. This judicial mapping breeds a kind of moral absolutism, fatal to the claims of others, and fatal to any hope for compromises, any hope for a “grammar of cooperative living.”⁵ Glendon’s argument, I should add, is not at all idiosyncratic. If anything, it is the summary of a line of thinking, a “critique of rights” that, in the past ten or fifteen years, has emerged as one of the liveliest intellectual movements of our time. This movement is associated, most particularly, with Critical Legal Studies in law, with the pragmatism of Richard Rorty, and with the civic republicanism of political theorists such as Michael Sandel.⁶ There is a considerable degree of oversimplification in Glendon’s sweeping critique.⁷ Still, it has captured the prevailing spirit in what is surely the most divisive dispute of our time, namely, abortion. This dispute—especially when it is conducted outside the courtroom, conducted in the popular language of rights Glendon calls the “American dialect”—does indeed take the form of a clash of absolutes. Here, the fetus’s absolute “right to life” is pitted against the woman’s absolute “right to choose.” Here, each claimant wants the space of sanctity only on one side; each tries to write opponents completely out of the picture.

5. *Id.* at xii.

6. See, for example, the special issue, Symposium, *A Critique of Rights*, 62 TEX. L. REV. 1363 (1984), especially Allan C. Hutchinson & Patrick J. Monahan, *The “Rights” Stuff: Roberto Unger and Beyond*, 62 TEX. L. REV. 1477 (1984), and Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984). See also Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988). For Rorty’s latest critique of rights, see Richard Rorty, *Fraternity Reigns*, N.Y. TIMES, Sept. 29, 1996, § 6 (Magazine), at 155-58; for Sandel’s latest statement, see MICHAEL SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996).

7. The actual adjudicative process inside the courtroom is rarely the “winner take all” situation Glendon describes. The right to free speech, for example, has never been declared an absolute right by the Supreme Court; rather, it is always subject to restriction where the interests of the state (in maintaining order, in preserving communal well-being) outweigh the individual’s freedom of speech. See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1941) (“[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.”). The critique of rights, furthermore, fails to recognize the importance of civil rights for minorities. For a defense of rights in the context of race, see Forum *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987), especially Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

This Essay is a dissent from such absolute claims. It is also an attempt to foreground—and to complicate—their spatial assumptions. What I hope to do, then, is to experiment with a twofold approach: a critique of rights which is also, in the same gesture, a reinvention of the concept.⁸ I would like to show that the adversarial language of rights can be subjected to a more nuanced arbitration, that clean verdicts can be restored to a more humane fuzziness, and that the very concepts of “winning” and “losing” also may be more complexly imagined. That is, they may be imagined not as binary opposites, categories defined by absolute inversion, but as overlapping domains, each putting pressures on the other, each affecting the shape of the other, each being qualified by the other’s constraints.

Eventually I want to show that this nondiscrete form of winning and losing, counterintuitive as it might seem, has actually been given a tentative expression in literature, especially in that late-nineteenth-century genre dedicated to confining and contested spaces: the genre called “local color.”⁹ This body of writing will be approached somewhat obliquely. I will start out at some remove, beginning with the discourse of law and extending to it an analytic term from modern science, a term broad enough, I hope, to sustain an argument both on the legal and on the literary front. This analytic term is “space.” It is this admittedly abstract coordinate that brings into relief the implicit “ground” for the concept of rights, for it is only upon a certain imagined terrain that rights can be posited as entities with the property of being integral or not, permeable or not, discrete or overlapping. In short, I want to trace what Mary Ann Glendon calls the “exaggerated absoluteness” of rights¹⁰ to a set of spatial postulates. Loading the dice, I will refer to these postulates as a paradigm of “absolute space.” This paradigm, the foundation of Newtonian physics, is the very one demolished, in the twentieth century, by Einstein’s theory of relativity.

II. NEWTON AND ABSOLUTE SPACE

Time and space, Newton said, are often seen from a contextual point of view, “from the relation they bear to sensible objects.”¹¹

8. Martha Minow suggests a parallel twofold approach. Taking rights as no more than “interpretive,” she in effect constitutes them as *prima facie*. See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987).

9. My emphasis on the philosophical resonances of this genre is at odds with the current New Historicist approach. For an influential New Historicist reading, see RICHARD H. BRODHEAD, *CULTURES OF LETTERS: SCENES OF READING AND WRITING IN NINETEENTH-CENTURY AMERICA* 107-76 (1993). For a theoretical justification of the practices in this paper, see Wai Chee Dimock, *A Theory of Resonance*, 112 PUBLICATIONS MOD. LANGUAGE ASS’N 1060 (1997).

10. GLENDON, *supra* note 2 at x.

11. ISAAC NEWTON, *MATHEMATICAL PRINCIPLES OF NATURAL PHILOSOPHY* 6 (Florian

Such are the “prejudices” of “the common people,” and he was determined to set things right. Newton’s magisterial treatise, the *Principia* (1686), thus stands as the founding text of the physical theory that has come to be known as “absolutism.” In its pages, Newton took it upon himself to distinguish, once and for all, between “absolute and relative, true and apparent, mathematical and common” space and time.¹² “Absolute, true, and mathematical time,” according to him, “flows equably without relation to anything external,” just as “absolute space, in its own nature, without relation to anything external, remains always similar and immovable.”¹³ Newtonian space and time are “absolute” because they are simply a given, a pre-assigned fact, something that has always been there and will always be there. They make up an a priori grid of the world. Only such an a priori grid would guarantee that there would always be true relations among things, relations neither circumstantial nor negotiable, relations that, “from infinity to infinity, do all retain the same given position one to another.”¹⁴

For Newton, then, a physics of absolute space was also, quite literally, the ground for a metaphysics: a metaphysics about what sort of entities were possible, what attributes constituted them, what positions governed them. Because the natural order was a direct manifestation of the divine order, what was at stake in these postulates about the absolute relations among things was not only the physical underpinnings of the universe, but also the moral underpinnings of human affairs. From the natural world, Steven Shapin notes, one could extrapolate “a set of ethical prescriptions about how to conduct oneself on earth.”¹⁵ These ethical prescriptives, disseminated by Anglican divines in, say, the Boyle Lectures,¹⁶ quickly extended Newton’s influence far beyond the technical spheres of science. The laws of physics seemed translatable into the laws of ethics; natural philosophy underwrote a civic religion. This broad intellectual mantle of Newton—what historians call “cultural Newtonianism”¹⁷—fueled

Cajori ed. & Andrew Motte trans., University of Cal. Press 1934) (1686) (commonly referred to as the *Principia*).

12. *Id.*

13. *Id.*

14. *Id.* at 9.

15. Steven Shapin, *Of Gods and Kings: Natural Philosophy and Politics in the Leibniz-Clarke Disputes*, 72 *ISIS* 187, 192 (1981).

16. The Boyle Lectures were named after Robert Boyle, who left £350 in his will to endow lectures defending Christianity.

17. Shapin, *supra* note 15, at 190. For a reading of Newtonian natural philosophy as “justification for the pursuit of sober self-interest, for a Christianized capitalist ethics,” see MARGARET C. JACOB, *NEWTONIANS AND THE ENGLISH REVOLUTION, 1689-1720*, at 160 (1976). For the broad cultural influence of Newton, see BETTY JO TEETER DOBBS & MARGARET C. JACOB, *NEWTON AND THE CULTURE OF NEWTONIANISM* (1995).

the hope that human society itself could be orderly, rule-governed, and locatable on a firm and eternal foundation. And it was to this broad mantle that Hume paid tribute when, in the *History of England*, he sang the praises of Newton in this uncharacteristically rhapsodic note: "In Newton this island may boast of having produced the greatest and rarest genius that ever arose for the ornament and instruction of the species."¹⁸

Nor was the worship of Newton limited only to the British Isles. Newton was the "demi-god" of the Enlightenment, Peter Gay points out, and, throughout the eighteenth century, his "deification" proceeded as briskly on the Continent as it did in England.¹⁹ Voltaire spoke for an entire age when, in *Éléments de la philosophie de Newton*, he proudly put his hero on the pinnacle of human achievement: "This philosopher gathered in during his lifetime all the glory he deserved; he aroused no envy because he could have no rival. The learned world were his disciples, the rest admired him without daring to claim that they understood him."²⁰ In France, in the Netherlands, and in Germany, Newton's authority was "unsurpassed and unsurpassable."²¹ And so the abbé Jacques Delille surprised no one when, in the second half of the eighteenth century, nearly fifty years after Newton's death, he saw fit to adapt Pope's famous couplet for his French readers:

O pouvoir d'un grand homme et d'une âme divine!
Ce que Dieu seul a fait, Newton seul l'imagine,
Et chaque astre répète en proclamant leur nom:
Gloire à Dieu qui créa les mondes et Newton!²²

Such was the adulation from the religious-minded. Those more scientifically inclined did not lag behind. Indeed, for those Enlightenment thinkers who began with science before they turned to philosophy—d'Alembert, Condorcet, and Kant—Newtonian physics was nothing less than the pivot of all knowledge. Enlightenment philosophy might be said to be a collective tribute to Newton. But it was Kant, more than anyone else, who would proceed to unify physics and metaphysics, gathering the two into a formal ethical theory.

18. DAVID HUME, 6 *HISTORY OF ENGLAND* 374 (Boston, Phillips, Sampson & Co. 1856) (1688).

19. For a detailed account of Newton's centrality to the Enlightenment, see PETER GAY, *THE ENLIGHTENMENT: THE SCIENCE OF FREEDOM* 126-87 (1977).

20. VOLTAIRE, *Éléments de la philosophie de Newton*, in 22 *OEUVRES* 402 (1738), quoted in GAY, *supra* note 19, at 139.

21. GAY, *supra* note 19, at 129.

22. JACQUES DELILLE, 9 *OEUVRES DE J. DELILLE* 7 (Paris, L.G. Michaud 1824), quoted in GAY, *supra* note 19, at 132.

III. KANT AND ABSOLUTE RIGHTS

“[A]bsolute space has its own reality independently of the existence of all matter” and “is itself the ultimate foundation of the possibility of its composition,” Kant wrote in an early essay, *Concerning the Ultimate Foundation of the Differentiation of Regions in Space*.²³ If this sounds like a typical Newtonian statement, thirteen years later, in *The Critique of Pure Reason*,²⁴ that statement would be given a distinctly Kantian accent.

Here, Kant once again insists on the “*a priori* necessity of space,” but departing from Newton, he now makes it clear that “space does not represent any property of things in themselves, nor does it represent them in their relation to one another.”²⁵ Like Newton, Kant wants to think of space as a preassigned foundation. Unlike Newton, however, he doubts whether anything so foundational can ever come from the physical world. Indeed, by his stricter understanding, the “*a priori* necessity of space” suggests that it is “not an empirical concept” at all,²⁶ not a concept derived from the world, derived by observing its relational properties. Indeed, it has no referent outside of our apprehending minds. And so, for Kant, Newtonian space must now be turned on its head, which is to say, it must be transposed from a physical into a metaphysical concept. Kant is thus emphatic that space is a form of intuition antecedently given to us, “prior to any perception of an object.”²⁷ Not indebted to the world, it is also not limited by our limited knowledge of that world, and so can be counted on as a formal cognitive condition, from which we can affirm human “reason [as] the faculty which supplies the principles of *a priori* knowledge.”²⁸

The “synthetic *a priori*”—Kant’s technical term for a basis of knowledge that is given rather than derived—thus removes from Newtonian physics any experiential constraints. As Kant himself makes clear, this nonempirical form of knowledge is not adequate to physics; he insists, however, that it is adequate to ethics. Natural science “may accept many propositions as universal on the evidence of experience,”²⁹ Kant says, “[b]ut it is otherwise with Moral Laws.

23. IMMANUEL KANT, *Concerning the Ultimate Foundation of the Differentiation of Regions in Space*, in KANT: SELECTED PRE-CRITICAL WRITINGS 36, 37 (G.B. Kerferd & D.E. Walford eds. & trans., Manchester Univ. Press 1968) (1768).

24. IMMANUEL KANT, *CRITIQUE OF PURE REASON* (Norman Kemp Smith trans., St. Martin’s Press 1965) (1781).

25. *Id.* at 68, 71.

26. *Id.* at 68.

27. *Id.* at 70.

28. *Id.* at 58.

29. IMMANUEL KANT, *THE PHILOSOPHY OF LAW* 15 (W. Hastie trans., Edinburgh, T. & T.

These, in contradistinction to Natural Laws, are only valid *as* Laws, in so far as they can be rationally established *à priori* and comprehended as *necessary*.³⁰ The moral universe is a universe unindebted to empirical observations. In its preassigned domain, it can enjoy that loftiest of privileges, the privilege of “apodeictic certainty.”³¹

Kant’s ethics, in short, is an ethics that claims to transcend the limits of epistemology, disclosing a truth as noncontingent as it is nonempirical. It is this claim that enables Kant to go forward, from his first *Critique* to his second *Critique*, and to make what might look like the opposite argument. *The Critique of Pure Reason* had begun with the premise that our relation to the world is not transparent, but mediated. *The Critique of Practical Reason*,³² on the other hand, begins with the premise that our relation to morality is not mediated, but transparent.³³ Good and evil are concepts that we know: know in their absolute and eternal essence, in advance of their actual manifestations in the world. We can have direct access to a moral law that can be “unconditionally commanded as a law.”³⁴

The ethics that results is an ethics dominated, not surprisingly, by that celebrated Kantian construct, the “categorical imperative.”³⁵ The moral law, Kant says, “proclaims itself as originating law,” and issues its commands as “*a priori* principles”:

[T]his principle of morality, on account of the universality of its legislation which makes it the formal supreme determining ground of the will regardless of any subjective differences among men, is declared by reason to be a law for all rational beings. . . . The moral law for them, therefore, is an imperative, commanding categorically because it is unconditioned.³⁶

Unconditionality, for Kant, turns out to be the very condition for morality. Kantian ethics is thus unconcerned with human disagreement, not only because the categorical imperative is supposed to be present in all of us, but, perhaps even more basically, because the Kantian moral law is, by definition, preassigned and predetermined, its “categorical” character giving it a putative common ground,

Clark 1887). This is a translation of Kant’s *Metaphysische Anfangsgründe der Rechtslehre* (1796), also translated as *The Metaphysical Elements of Justice*.

30. *Id.* at 15-16.

31. KANT, *supra* note 24, at 68.

32. IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (Lewis White Beck trans., Macmillan 1993) (1788).

33. *See id.* at 3-33, 59-74.

34. *Id.* at 31.

35. *Id.* at 31-33.

36. *Id.* at 32.

a putative unity of expression. Kantian ethics, in other words, is not only formalized outside the empirical world of human relations, it is also profoundly indifferent to those relations, untroubled by the unsettled disputes that run through them. Morality thus entails a transaction between each of us and a preexisting moral law, not a transaction between human beings actually existing side-by-side. The categorical imperative is “supremely self-sufficing”³⁷ in this sense, for the Kantian moral agent need only regulate himself in its image, his relations to actual human beings entering not at all into the picture.

This a priori conception of morality—its status as a given, un-negotiated and un-negotiable—seems to me to be one of the most destructive legacies of Kant’s ethics. And, to the extent that the Kantian tradition remains the dominant ethical tradition of the West, many of us are still in its shadow. The importance of Kant to John Rawls is a good measure of just how long that shadow is.³⁸ My critique of rights is a critique of this Kantian tradition. For while the concept of individual rights might indeed be traceable to antiquity, as Leo Strauss and Richard Tuck have argued,³⁹ and while Hobbes and Locke were central to its seventeenth-century articulation, as Ian Shapiro has shown,⁴⁰ there is something about the unbendability of rights that makes this concept recognizably Kantian.⁴¹ It is only in an a priori moral universe that rights can be what they are and as they are—not only antecedent to any social relations, but, in their categorical givenness, also imagined to be discrete, to exist as absolute claims.

Rights, we might say, are the inhabitants of a moral “absolute space.” Their ontology is “unconditioned.” And so, it is perhaps not surprising that most of us, having rights, will now press forward our claims, will now insist on our due. There is no acknowledgement that there might be necessary constraints here, constraints under which “our due” would have to be modified, truncated, perhaps even surrendered. The language of rights is a language burdened by little awareness of conflicting, overlapping, or incommensurate claims. For

37. *Id.* at 33.

38. *A Theory of Justice* is a self-professed Kantian exercise. See JOHN RAWLS, *A THEORY OF JUSTICE* 251-57 (1971). I should point out, however, that, more recently, Rawls puts considerable distance between himself and Kant. See JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

39. See LEO STRAUSS, *NATURAL RIGHTS AND HISTORY* (1953); RICHARD TUCK, *NATURAL RIGHTS THEORIES* (1979).

40. See IAN SHAPIRO, *THE EVOLUTION OF RIGHTS IN A LIBERAL THEORY* 82-89 (1986). For a discussion of the importance of the Lockean tradition in the American context, see LOUIS HENKIN, *THE AGE OF RIGHTS* 83-108 (1990). For my own discussion of rights within the Hobbesian and Lockean tradition, see WAI CHEE DIMOCK, *RESIDUES OF JUSTICE: LITERATURE, LAW, PHILOSOPHY* 183-91 (1996).

41. For an analysis of the tension between the moral law and conflict resolution in Kant, see LESLIE A. MULHOLLAND, *KANT’S SYSTEM OF RIGHTS* (1990).

that reason, it also has no ability to predict its own limits, no provision for any sort of self-qualifying responsiveness. This moral absolutism seems to follow directly from the Kantian abstraction of Newtonian physics. To transform it, perhaps we need not only to undo its abstraction, but also to revisit the physical theory that lies at its metaphysical foundation.

IV. EINSTEIN'S RELATIVITY

It might be helpful, then, to take a short detour across a landscape familiar to neither law nor literature, the mysterious world of modern physics. Here we will find that Newton's theory is no longer the supreme theory it once was. It has been challenged, and to some extent superseded, by Einstein's theories of relativity. Einstein begins, in fact, with an explicit critique of Newton. "Absolute space" and "absolute time," he argues, are not meaningful concepts.⁴² It is not meaningful to talk about either distance or duration without specifying the states of motion from which that distance and that duration are being measured. Using the example of a moving train against the stationary background of an embankment, Einstein shows that there can be no absolute agreement in the units of space and time measured from these two different frames of reference.⁴³ This is what he calls the relativity of space⁴⁴ and time.⁴⁵

The world summoned into being by Einstein is not a preassigned yardstick but an operational consequence. Here, physical descriptions cannot proceed from a single frame of reference, but only by engaging the world conjunctively, only by recognizing the problem of noncoincidence between two different frames. The self-sufficiency of a single object is replaced by the disagreement between two differently moving objects. This disagreement, in turn, points to a deep structure of constraints, a relational structure, by which the description of any one term must be linked to the translation of a second term, and must be conditioned by that second term. Einstein thus speaks, not of space, a freestanding entity, but of "space-time," an interlocking continuum, a continuum that we cannot cleanly cut through, cleanly chop up, resolve into discrete units. And, as he moves from his special theory of relativity to his general theory, he also gives us the most dramatic account of just what sort of constraints this space-time continuum is subject to. In this expanded analytic universe, a universe

42. ALBERT EINSTEIN, RELATIVITY: THE SPECIAL AND THE GENERAL THEORY 155-78 (Robert W. Lawson trans., Crown Publishers, Inc. 1961) (1916).

43. *See id.* at 25-29.

44. *See id.* at 29.

45. *See id.* at 26.

governed by gravity, space-time is also compelled to respond to this added determinant. It is compelled, that is, to take the form of a “curvature” in the presence of a massive body, so much so that “the propositions of Euclidean geometry cannot hold exactly,” and the very “idea of a straight line also loses its meaning.”⁴⁶

The *bendability* of space-time is the single most intriguing image offered by relativity.⁴⁷ It is certainly tempting to turn that image into a lesson in ethics. Einstein, however, is the first to caution against such a move. In a short essay, *The Laws of Science and the Laws of Ethics*, he explicitly says: “Scientific statements of facts and relations, indeed, cannot produce ethical directives.”⁴⁸ Physics, in other words, is not directly translatable into ethics. It cannot serve as a foundation for our human affairs. And yet, in refusing to serve as a foundation, it nonetheless issues a challenge which, Einstein says, ethics cannot afford to ignore.

And here, striking a distinctly un-Kantian note, Einstein suggests that the challenge of science to ethics is the challenge of *empiricism*. The axioms of ethics, Einstein argues, should be “tested not very differently from the axioms of science,”⁴⁹ which is to say, they should be tested as a set of as-yet-incomplete postulates—postulates that have to be continually revised, continually supplemented. Seen in this light, ethics has nothing to do with the preassigned dictates of the moral law, or the compliance with that law by the moral agent. Rather, it is a negotiated feature of human history, occasioned by it and modified by it. Its very shape must derive from “the accumulated emotional reaction of individuals to the behavior of their neighbors.”⁵⁰ There can be no categorical imperatives here, no axioms that precede the contexts of their usage. And so Einstein is emphatic in stating, “I have never been able to understand the quest of the *a priori* in the Kantian sense.”⁵¹

46. *Id.* at 91.

47. In the words of John Boslough: “Spacetime told mass how to move, and mass told spacetime how to bend.” JOHN BOSLOUGH, *MASTERS OF TIME: COSMOLOGY AT THE END OF INNOCENCE* 168 (1992).

48. Albert Einstein, *The Laws of Science and the Laws of Ethics*, *Preface* to PHILIPP FRANK, *RELATIVITY: A RICHER TRUTH* at vi (1950).

49. *Id.* at viii.

50. *Id.* at vii.

51. ALBERT EINSTEIN, *The Problem of Space, Ether, and the Field in Physics*, in *IDEAS AND OPINIONS* 278 (1954). As Gerald Holton reports, Einstein

at the tender age of thirteen was introduced to Immanuel Kant’s philosophy, starting with the *Critique of Pure Reason*, through his contacts with a regular guest at the Einstein home, Max Talmey. He reread Kant’s book at the age of sixteen and enrolled in a lecture course on Kant while at the Technical Institute in Zurich. . . . [A]t the Institute in Princeton his favorite topic of discussion with his friend Kurt Gödel was, again, Kant.

Gerald Holton, *Einstein and the Cultural Roots of Modern Science*, *DAEDALUS*, Winter 1998, at 1, 18 (citations omitted). Holton also points out, however, that “[a]ll this, typically, did not make

Understood as a challenge to the a priori, Einstein's physics invites us to think of ethics, not as the enactment and reenactment of a transcendent injunction, but as the making and remaking of an empirical theory. This challenge has led to some spirited critiques of Kant within the philosophy of science, especially in the work of Hans Reichenbach and Rudolf Carnap.⁵² Among the American pragmatists, Charles Sanders Peirce, too, has independently objected to the "confusion of a priori reason with conscience," pointing out that conscience so conceived "refuses to submit its dicta to experiment, and makes an absolute dual distinction between right and wrong."⁵³ Against this moralization of a priori reason, Peirce proposes instead a radicalization of the "doctrine of fallibilism." Ethics, in other words, is granted no transcendence from the fallible truth-claims of epistemology; its tenets cannot be formalized antecedently, cannot be located beyond doubt.⁵⁴ Following Peirce, William James, too, has put forward a definition of philosophy itself as no more than a "radical empiricism."⁵⁵ This radical empiricism, elaborated by John Dewey in the 1920s and with a direct reference to Einstein, takes the form of a challenge, not only to Newton's absolute space and time, but also to Kant's epistemology and ethics.⁵⁶

More recently, in law, a skepticism toward the a priori has also led to some stimulating arguments. In an essay entitled *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, Laurence Tribe directly invokes Einstein to argue for a legal paradigm forthright about its own less-than-discrete, less-than-transcendent ontology. "Just as space cannot extricate itself from the unfolding story of physical reality," Tribe writes, "so also the law cannot extract itself from social structures."⁵⁷ The rule of law, in other words, does not emanate from anything that might be called "absolute space." Law does not stand "above" human conflict. It does not have the privilege of antecedence over what it adjudicates. Rather, it is a party

Einstein a Kantian at all," for "Einstein objected to the central point of Kant's transcendental idealism by denying the existence of the synthetic a priori." *Id.* at 19.

52. See RUDOLF CARNAP, *Kant's Synthetic A Priori*, in AN INTRODUCTION TO THE PHILOSOPHY OF SCIENCE 177-83 (Martin Gardner ed., Dover ed. 1995); Hans Reichenbach, THE RISE OF SCIENTIFIC PHILOSOPHY 39-49, 58-67, 125-33 (1951); Hans Reichenbach, *The Philosophical Significance of the Theory of Relativity*, in ALBERT EINSTEIN: PHILOSOPHER-SCIENTIST 287-311 (Paul Arthur Schilpp ed., 1970).

53. CHARLES SANDERS PEIRCE, *The Scientific Attitude and Fallibilism*, in PHILOSOPHICAL WRITINGS OF PEIRCE 42, 46 (Justus Buchler ed., Dover ed. 1955).

54. *Id.* at 58-59.

55. See WILLIAM JAMES, *ESSAYS IN RADICAL EMPIRICISM* (Ralph Barton Perry ed., University of Neb. Press 1996) (1912).

56. See JOHN DEWEY, 4 THE LATER WORKS, 1925-1953, at 47-50, 89-104, 113-17, 137-45 (Jo Ann Boydston ed., Southern Ill. Univ. Press 1981).

57. Laurence Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 7 (1989).

to the grievances that come before it, a shaping force and an active contributor to that very fabric of relations that give rise to the grievances.

For Tribe, then, the crucial point here is that law is not neutral. But Tribe's spatial language—his sense that the shape of the law might not coincide with the shape of human lives—also seems to suggest another line of inquiry. Indeed, what especially strikes me, in this context, is a question that leads directly back to the spatial dimension of rights, namely, the degree of coextension between our rights and our humanness, and, on a more pragmatic level, the degree of coextension between the domain of juridical action and the domain of human conflict. If the contours of the law correspond only imperfectly, and sometimes not at all, to the contours of our warring claims, what might we do to rectify the discrepancy? How big and how central a part can we assign to the law in our fabric of human association? And, if it turns out that there is an entire spectrum of phenomena, an entire spectrum of conflict, that is not resolvable through legal action, can we think of some other avenues of redress, more roundabout but perhaps also more humane? What kind of agency, what kind of expression, do we have besides litigation?

If the last question seems pathetic, it only helps to underscore how much we are boxed into an adversarial culture, and what gleeful warriors we have become under its dispensation. Still, as Judith Shklar astutely points out, "the spirit of legalism is not now, and never has been, the only morality among men even in generally legalistic societies."⁵⁸ Law does not cover the field, does not exhaust the full spectrum of ethical possibilities. In the rest of this paper, I want to turn to one domain of thought not fully covered by the law, a domain informed by its spirit but not subsumable under it. This is a domain less fortified by the clarity of its boundaries, and less confident about the mappability of disputes.

V. NEW ENGLAND "LOCAL COLOR"

The New England literary genre called "local color" is a genre mindful of space. It is especially mindful of nonabsolute space—space described not through one reference frame, but through the problem of disagreement between reference frames. Early in the nineteenth century, the legal battles in this region over water rights—pitting the common law right of prior holding against the developmental right of mill owners—had given the idea of "trespass" a markedly contested definition.⁵⁹ By the late nineteenth century, the economic stagnation

58. JUDITH SHKLAR, *LEGALISM 2* (1986).

59. See MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 47-

of rural New England gave an even more somber aspect to its finite resources.⁶⁰ In the narrowness of its opportunities, the decaying village here is relational in quite a stifling sense: It is a web, a history of entanglement, a space-time continuum alternately registered as friction and kinship, endearment and encroachment.⁶¹ To my mind, this body of literature is one of the most compelling correctives to the fantasy of discreteness that so often accompanies the claim of rights. And, in renouncing that fantasy, it also offers the best hope for a form of human habitation that, however uncertain in its spatial mappings, can nonetheless be said not to be a simple inversion of winners and losers.

We can find an almost generic sense of this spatial mapping in the stories by Mary Wilkins Freeman, an author much read in the nineteenth century (and singled out for praise by William Dean Howells), but oddly neglected today. Born in Randolph, Massachusetts in 1852, moving to Brattleboro, Vermont in 1867, and returning to live in Randolph from 1883 to 1902, Freeman was especially alert to the narrow prospects, the involuntary nature of trespass, perhaps inevitable to anyone living in that environment. The central spatial paradigm in Freeman is thus the paradigm of overlap. Human association here turns out not to be a harmonious grid, not a grid of clean and pain-free adjacencies, for the commingling of lives is always a form of imposition. This is what happens in *A New England Nun*,⁶² a story most often read with an emphasis on the last word of the title. In the context of this paper, we can also read it as a story about a woman not just giving up a man but, above all, being irritated by a man, irritated by the mere fact that he is a spatial entity. Louisa Ellis has waited fourteen years for her lover, Joe Dagget, to come back from Australia, and now expects to marry him in a week. His very footsteps, however, fill her with dread:

He seemed to fill up the whole room. A little yellow canary that had been asleep in his green cage at the south window woke up and fluttered wildly, beating his little yellow wings against the wires. He always did so when Joe Dagget came into the room.⁶³

54 (1977).

60. See Rollin Lynde Hartt, *A New England Hill Town*, 83 *ATLANTIC MONTHLY* 561-74, 712-20 (1899); see also HAL S. BARRON, *THOSE WHO STAYED BEHIND* 31-50 (1984); HAROLD F. WILSON, *THE HILL COUNTRY OF NORTHERN NEW ENGLAND* (1936).

61. For useful accounts of "local color" literature, see JOSEPHINE DONOVAN, *NEW ENGLAND LOCAL COLOR LITERATURE: A WOMAN'S TRADITION* (1983); and MARY R. REICHARDT, *A WEB OF RELATIONSHIP: WOMEN IN THE SHORT STORIES OF MARY WILKINS FREEMAN* (1992).

62. MARY WILKINS FREEMAN, *A New England Nun*, in *SELECTED STORIES OF MARY E. WILKINS FREEMAN* 109 (Marjorie Pryse ed., W.W. Norton 1983) (1891).

63. *Id.* at 111.

The very presence of Joe is an infringement, as far as Louisa is concerned. All during the visit, she is oppressed by the sense that he has left traces of himself everywhere, violating not only the neatness of the room but also the neatness of her life. When he is finally gone:

[Louisa] set the lamp on the floor, and began sharply examining the carpet. She even rubbed her fingers over it, and looked at them.

“He’s tracked in a good deal of dust,” she murmured. “I thought he must have.”

Louisa got a dust-pan and brush, and swept Joe Dagget’s track carefully.⁶⁴

It is possible to argue, I think, that the central character in *A New England Nun* is not really a human character, but an exacting ideal, a dream of absolute space, a dream so uncompromising that even specks of dust are taken as signs of trespass. However, this dream is not allowed to stand alone. It is qualified by a contrasting scene that unfolds outside Louisa’s window, a world as unruly as hers is self-contained. This is a world of ceaseless overlap, ceaseless commingling: “[T]he air was filled with the sounds of the busy harvest of men and birds and bees; there were halloos, metallic clatterings, sweet calls, and long hummings.”⁶⁵ Creatures human and nonhuman, noises animate and inanimate—all these are meshed with one another, permeated by one another, in an auditory area in which boundaries fall apart, in which space itself has become a realm of the negotiable.

Like a good many nineteenth-century American authors, including Frederick Douglass, Henry David Thoreau, Walt Whitman, and Mark Twain, Freeman is fascinated by the phenomenology of sound. In her case, that fascination is directly linked, I think, to the spatial attributes of sound—the attributes of permeability and (if you would forgive me for coining this word) overlappability. For Freeman, these attributes are also the starting point for a conditional epistemology, as well as a conditional ethics, both issuing from the fact of human disagreement. It is this conditionality of sound that is dramatized in the story *A Far-Away Melody*,⁶⁶ a story detailing a quarrel between two sisters over what one is able to hear and the other is not. Priscilla and Mary Brown are twin sisters grown old together and looking almost exactly alike: the same face, the same height, the same “thick, white-stockinged ankles showing beneath their limp calicoes.”⁶⁷ This

64. *Id.* at 113.

65. *Id.* at 125.

66. MARY WILKINS FREEMAN, *A Far-Away Melody*, in *A HUMBLE ROMANCE AND OTHER STORIES* 208 (N.Y., Harper & Bros. 1899).

67. *Id.* at 209.

perfect agreement breaks down one day, however, when, in the presence of Mary and a neighbor, Priscilla suddenly drops her work and whispers “Hush!”

The other two stopped talking, and listened, staring at her wonderingly, but they could hear nothing.

“What is it, Miss Priscilla?” asked the neighbor, with round blue eyes. She was a pretty young thing, who had not been married long.

“Hush! Don’t speak. Don’t you hear that beautiful music?” Her ear was inclined towards the open window, her hand still raised warningly, and her eyes fixed on the opposite wall beyond them.

Mary turned visibly paler than her usual dull paleness, and shuddered. “I don’t hear any music,” she said. “Do you, Miss Moore?”

“No-o,” replied the caller. . . .

Mary Brown rose and went to the door, and looked eagerly up and down the street. “There ain’t no organ-man in sight anywhere,” said she, returning, “an’ I can’t hear any music, an’ Miss Moore can’t, an’ we’re both sharp enough o’ hearing. You’re jest imaginin’ it, sister.”⁶⁸

The dispute goes on for the rest of the day, with Mary sticking to a single refrain: “There ain’t no music.”⁶⁹ That night, Priscilla dies. Grief-stricken, Mary is now the one to “sit at the kitchen window and listen day after day.”⁷⁰ She hears nothing for a year. Finally, on her deathbed, a “cry of rapture” comes from her: “I’ve heard it! I’ve heard it! . . . A faint sound o’ music, like the dyin’ away of a bell.”⁷¹

How are the claims of the two sisters to be adjudicated? Which of the two does truth side with? And does it make sense, in this case, to think of truth as “taking sides”—as mappable by a dividing line and locatable within an absolute space? Freeman would seem to suggest not, for the elusiveness of sound is such as to lend itself perpetually to dispute, to the overlapping but noncoinciding truth-claims of different hearers. This epistemological disunity, in turn, calls for a negotiated ethics. I want to conclude then, with another Freeman story overshadowed by the trajectory of sound, a story that, perhaps not quite accidentally, also poses as its central problematic a deep disunity among human beings, a disunity exacerbated (but eventually also redressed) by the frontal collision of sounds in space.

*A Village Singer*⁷² features an aging soprano, Candace Whitcomb,

68. *Id.* at 213-14.

69. *Id.* at 215.

70. *Id.* at 217.

71. *Id.* at 218.

72. MARY WILKINS FREEMAN, *A Village Singer*, in *SELECTED STORIES*, *supra* note 62, at

who has just been dropped by the church in which she has been singing for the past forty years. There have been complaints about her (some people think that her voice has “grown too cracked and uncertain on the upper notes”) and now they have found someone to replace her.⁷³ Candace is not about to reconcile herself to this sort of treatment. And, as her house happens to be next door to the church, it is easy enough for her to take matters into her own hands. The first Sunday that the new soprano takes her place in the choir, Candace also takes her seat, in front of her own parlor organ, and sings as loudly as she can, “singing another hymn to another tune,” and completely drowning out the voice of her rival.⁷⁴

When she is confronted by the minister, Candace has no apology. The fault is not hers; she is fully entitled to do what she does. “If I ain’t got a right to play a psalm tune on my organ an’ sing, I’d like to know. If you don’t like it, you can move the meetin’-house.”⁷⁵ It is not surprising that the language of rights should come gushing out at just this point, when Candace is most angry, most vulnerable, when she feels most keenly that she has been denied her due. She has, after all, given her whole life to the choir, and, by her reckoning, it would “be more to the credit of folks in a church to keep an old singer an’ an old minister, if they didn’t sing an’ hold forth quite so smart as they used to, ruther than turn ‘em off an’ hurt their feelin’s.”⁷⁶ That forbearance being denied her, she is determined, in turn, to pull no punches in laying claim to what is within her rights. Singing, she says, is something she is entitled to do in the privacy of her own house. She is not going to give it up just to accommodate other people.

And yet, in the context of the story, it is also clear that this adversarial language is literally put into quotation marks: It is a language coming out of the mouth of a woman whose claim is both deeply felt but also deeply unsustainable. The claim of rights is unsustainable because the spatial property of sound is such that it will always extend beyond its rightful boundaries, will always interfere with other sounds, will sometimes drown them out. Taking this as a salient example of what it means to be alive, to be human, to have demands upon the world and to be surrounded by other people who also have demands, *A Village Singer* comes very close, I think, to a conception of rights with a generic proviso for conditionality, a generic proviso for overlapping claims. Like so many other stories

126.

73. *Id.* at 126.

74. *Id.* at 127.

75. *Id.* at 136.

76. *Id.* at 134.

within the “local color” genre, this is a meditation on trespass, a phenomenon that arises not only from the spatial needs so clamorous in all of us, but also from the lack of fit between those needs and the world, the lack of fit between the discreteness of our claims and the failure of the world to honor that discreteness.

Mindful of this empirical fact, the story ends with Candace, on her deathbed, leaving her house to the new soprano (who happens to be engaged to Candace’s nephew). This goodwill gesture, however, is not an absolute concession, not even a sign that the battle is over. Cantankerous to the end, Candace does not hesitate to comment on the singing of the recipient: “You flatted a little on—soul.”⁷⁷ This is the only “triumph” she is allowed to have. It is not much, and perhaps that is the point. For, in this qualified happy ending, in the overlapping domains of “satisfaction” and “disappointment,” Candace’s triumph is also a triumph for her opponent. The story sides with neither one. Instead, it recognizes the irresolvable conflict between these two women; it gives full weight to their disagreement. Giving weight to that disagreement, it turns this unhappy fact into a structure of constraints: constraints on the claims of each woman, constraints on the physical and emotional space assigned to each. Compromises and concessions, rather than absolute victories, mark the endpoint of this spatial paradigm.

Freeman’s stories are not a refutation, not even a response, to Newton and Kant. Still, they do play out the consequences of a different set of spatial postulates, consequences that become legible only when seen against the more dominant tradition of Newtonian and Kantian space. Seen against that tradition, these stories point to a conceptual continuum, subtly interlocking but also variably inflected, generating echoes as well as dissonances across different domains of thought. Nonabsolute space, given mathematical expression by Einstein, has perhaps also been expressed in other idioms, other contexts. It invites us, in any case, to rethink the meanings of human habitation in law and literature both.

77. *Id.* at 144.