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ARTICLES

WHITEHEAD'S METAPHYSICS AND THE LAW: A DIALOGUE

*Jay Tidmarsh**

"That 'all things flow' is the first vague generalization which the unsystematized, barely analysed, intuition of men has produced."¹

I. INTRODUCTION

The purposes of this Article are to explore the relationship between Alfred North Whitehead's process philosophy and the nature of law, and to develop from that exploration a theory of "process jurisprudence." To some extent, this Article is a process of interpretation and imagination. Whitehead himself devoted little attention to the nature of law. Therefore, rather than attempting to declare definitively the implications of Whitehead's thought for the nature of law, this Article is structured in the form of a dialogue between "Whitehead" and a lawyer whom I have called "Chris." In Part II, as he discusses his system of metaphysics and its relationship to human civilization, "Whitehead" will take the leading role. In Part III, as Whitehead's understanding of civilization is applied to the specific role of law within a civilization, "Chris" becomes a more active participant in shaping a jurisprudence of process. This Article

* Associate Professor of Law, Notre Dame Law School. Many thanks to Mike Mlachak for research assistance and to the Friday Faculty Forum, especially Bob Blakey, Charlie Rice, Garth Meintjes, and Jack Pratt, for their critique of some of the ideas expressed in this paper. I am particularly indebted to Tom Shaffer for his comments and to John Robinson for his ideas and encyclopedic command of helpful sources.

¹ ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY* 317 (1929); ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY* 208 (corrected ed. 1978) [hereinafter *PROCESS AND REALITY*]. Following the present convention of Whitehead scholars, subsequent page citations to *Process and Reality* will be to the 1978 corrected edition rather than to the 1929 Macmillan edition.

does not pretend to predict how Whitehead himself would have resolved the jurisprudential issues (such as the nature, forms, and limits of law) that Part III poses; rather, it suggests the way that a Whiteheadian attitude should make us think about these issues.

Before the dialogue begins, a brief sketch of Whitehead and his work will be provided.² Born in England in 1861, Whitehead became a Fellow at Trinity College, Cambridge, in 1885.³ For many years, Whitehead was known primarily as a mathematician; between 1910 and 1913, he authored, along with his former student Bertrand Russell, the famous three-volume *Principia Mathematica*.⁴ After Whitehead went to the University of London in 1910, however, his work moved toward an exploration of the nature of science, religion, and existence.⁵ Subsequent to Whitehead's arrival at Harvard in 1924, this philosophical turn was accompanied by the publication of the three major works which staked out his mature process metaphysics—*Science and the Modern World*,⁶ *Process and Reality*,⁷ and *Adventures of Ideas*⁸—and by four other works which dealt with aspects of his thought.⁹ Whitehead died in 1947.¹⁰

² The definitive, albeit unfinished, biography of Whitehead is 1 VICTOR LOWE, ALFRED NORTH WHITEHEAD 1861-1910 (1985) [hereinafter 1 LOWE] and 2 VICTOR LOWE, ALFRED NORTH WHITEHEAD 1910-1947 (J. B. Schneewind ed. 1990) [hereinafter 2 LOWE]. For short biographies of Whitehead, see NATHANIEL LAWRENCE, ALFRED NORTH WHITEHEAD 11-24 (1974); W. NORMAN PITTENGER, ALFRED NORTH WHITEHEAD 1-10 (1969); and Dorothy M. Emmett, *Alfred North Whitehead*, in 8 THE ENCYCLOPEDIA OF PHILOSOPHY 290 (Paul Edwards ed. 1967). Autobiographical information is contained in three essays: Alfred North Whitehead, *Autobiographical Notes* [hereinafter *Autobiographical Notes*]; *Memories*; and *The Education of an Englishman*, in ESSAYS IN SCIENCE AND PHILOSOPHY 3, 15, 29 (1947) [hereinafter ESSAYS].

³ See *Autobiographical Notes*, *supra* note 2, at 3, 8.

⁴ See *id.* at 11.

⁵ See *id.* at 12, 13 (discussing the evolution of his interest in and study of society).

⁶ ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN WORLD (1925) [hereinafter SCIENCE AND THE MODERN WORLD].

⁷ PROCESS AND REALITY, *supra* note 1. *Process and Reality*, which was based on the Gifford Lectures that Whitehead delivered at the University of Edinburgh in 1928, is Whitehead's central work. See PITTENGER, *supra* note 2, at 7. Unfortunately, it is also his least accessible.

⁸ ALFRED NORTH WHITEHEAD, ADVENTURES OF IDEAS (1933) [hereinafter ADVENTURES OF IDEAS].

⁹ See ALFRED NORTH WHITEHEAD, MODES OF THOUGHT (1938) [hereinafter MODES OF THOUGHT] (discussing the importance of "clear and distinct" experiences); ALFRED NORTH WHITEHEAD, RELIGION IN THE MAKING (1926) [hereinafter RELIGION IN THE MAKING] (explaining what makes up religions and how they change over time); ALFRED NORTH WHITEHEAD, SYMBOLISM: ITS MEANING AND EFFECT (1927) (describing the different types of symbols and their meanings); ALFRED NORTH WHITEHEAD, THE FUNCTION OF REASON (1929) (considering the nature and essence of Reason). Some later essays and lectures have been

Because of his later works, Whitehead is regarded as an important figure in twentieth-century philosophy.¹¹ Many of his ideas overlapped with those of realists such as Russell, who is himself among this century's great philosophers, and the solutions he offered to the problems confronting philosophical realism were often elegant.¹² His ideas also overlapped with, and were influenced by, pragmatists such as William James and John Dewey, whose work has in turn been influential in the American legal academy.¹³ Process metaphysics has spawned a significant branch of theology known as process theology;¹⁴ it has influenced biologists, chemists, and physicists, including David Bohm and Nobel Prize winner Ilya Prigogine.¹⁵ It has also recently led to the emergence of process sociology and political theory.¹⁶

collected in a fifth work, *ESSAYS*, *supra* note 2 (gathering the remaining works on science and philosophy).

¹⁰ See PITTENGER, *supra* note 2, at 1.

¹¹ See, e.g., RON L. COOPER, HEIDEGGER AND WHITEHEAD 1 (1993) (stating that Whitehead's *Process and Reality*, along with Heidegger's *Being and Time*, "may have inspired more philosophical publications in the twentieth century than any other books").

¹² Whitehead saw himself as a realist, albeit as one who was attempting to ground much of nineteenth-century philosophical idealism on a more realist foundation. See PROCESS AND REALITY, *supra* note 1, at xiii (suggesting that a type of thought may involve "a transformation of some main doctrines of Absolute Idealism onto a realistic basis"). For a discussion of the relationship between Russell and other realists on the one hand and Whitehead on the other, see GEORGE R. LUCAS, JR., THE REHABILITATION OF WHITEHEAD 36-47, 109-25 (1989).

¹³ For points of agreement and disagreement between Whitehead and pragmatists such as James, Dewey, and Rorty, see *infra* notes 33, 316-41 and accompanying text. For the original influence and recent resurgence of pragmatism in American legal thought, see BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW 61-62, 183-85 (1994); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409 (1990); Symposium, *The Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

¹⁴ The most famous process theologian is Charles Hartshorne. See, e.g., CHARLES HARTSHORNE, A NATURAL THEOLOGY FOR OUR TIME (1967); CHARLES HARTSHORNE, BEYOND HUMANISM (1937); CHARLES HARTSHORNE, CREATIVITY IN AMERICAN PHILOSOPHY (1984) [hereinafter CREATIVITY]; CHARLES HARTSHORNE, THE DIVINE RELATIVITY (1948) [hereinafter DIVINE RELATIVITY]; Charles Hartshorne, *Whitehead's Idea of God*, in THE PHILOSOPHY OF ALFRED NORTH WHITEHEAD 513 (Paul A. Schilpp ed., 2d ed. 1951); Charles Hartshorne, *Whitehead's Metaphysics*, in WHITEHEAD AND THE MODERN WORLD 25 (Victor Lowe et al. eds., 1950). Other noted theologians are John Cobb, David Griffin, and Daniel Day Williams. See, e.g., JOHN B. COBB, JR. & DAVID RAY GRIFFIN, PROCESS THEOLOGY (1976); JOHN B. COBB, JR., A CHRISTIAN NATURAL THEOLOGY (1965); PROCESS PHILOSOPHY AND SOCIAL THOUGHT (John B. Cobb, Jr. & W. Widdick Schroeder eds., 1981); JOHN B. COBB, JR., PROCESS THEOLOGY AS POLITICAL THEOLOGY (1982) [hereinafter PROCESS THEOLOGY AS POLITICAL THEOLOGY]; DANIEL D. WILLIAMS, ESSAYS IN PROCESS THEOLOGY (Perry LeFevre ed., 1985).

¹⁵ See LUCAS, *supra* note 12, at 47, 189-99 (discussing the application of neo-Whiteheadian ontology to relativity theory and quantum theory); *id.* at 196-97 (examining Bohm's theory that "there is, even at the most fundamental level, a physically meaningful distinction be-

At the same time, it is fair to say that mainstream analytical and critical philosophy, as well as most other disciplines, have taken little account of Whitehead's metaphysics.¹⁷ That statement is certainly true of law, which until now has paid scant attention to process philosophy's jurisprudential implications.¹⁸ As Whitehead's

tween a determinate past and an indeterminate future"). Biologist and developmental psychologist Jean Piaget also has acknowledged Whitehead as the founder of an organic view of nature that his own work follows. *See generally* MIND IN NATURE (John B. Cobb and David R. Griffin eds., 1977) (combining essays of three leading structural biologists with two leading process theologians).

¹⁶ *See, e.g.*, SAMUEL H. BEER, *THE CITY OF REASON* (1949) (finding that "[t]he creative growth of the personality fulfills a Law or Will beyond man"); KENNETH CAUTHEN, *THE PASSION FOR EQUALITY* (1987) (describing different ways in which the idea of equality has been used); RANDALL C. MORRIS, *PROCESS PHILOSOPHY AND POLITICAL IDEOLOGY* (1991) (examining the social and political beliefs of Whitehead and Hartshorne); ROBERT C. NEVILLE, *THE COSMOLOGY OF FREEDOM* (1974) (explaining how cosmology handles the concept of freedom); DOUGLAS STURM, *COMMUNITY AND ALIENATION* (1988) (noting that Whitehead "promotes the ideal 'civilization' with its qualities of truth, beauty, art, adventure, and peace"); *PROCESS PHILOSOPHY AND SOCIAL THOUGHT*, *supra* note 14, at 19 (analyzing personal experiences with social thought); *PROCESS THEOLOGY AS POLITICAL THEOLOGY*, *supra* note 14, at 1 (developing "process theology in a way that responds appropriately to the challenge of political theology"); Douglas Sturm, *Process Thought and Political Theory: Implications of a Principle of Internal Relations*, 41 REV. POL. 375 (1979) (developing four aspects of political theory from a Whiteheadian perspective). *See generally Special Issue on Social Philosophy*, 15 PROCESS STUD. 241 (1986) (discussing whether, and to what extent, process philosophy can positively influence issues of social philosophy). For a short, somewhat outdated bibliography of other process-oriented works in politics and sociology, see COBB & GRIFFIN, *supra* note 14, at 175.

¹⁷ *See* David B. Burrell, *Does Process Theology Rest on a Mistake?*, 43 THEO. STUD. 125 (1982) (describing flaws in Whitehead's metaphysics that distance many modern philosophers from his work); D.S. Clarke, Jr., *Whitehead and Contemporary Analytic Philosophy*, 16 PROCESS STUD. 26, 26 (1987) (describing Whitehead's metaphysical system as being "dismissed as meaningless"); George R. Lucas, Jr., *"The Seventh Seal"—On the Fate of Whitehead's Proposed Rehabilitation*, 25 PROCESS STUD. 104, 114 (1996) (arguing that "many of Whitehead's contributions have been purloined . . . [by] the likes of Rorty, Kuhn, Sellars and Quine"); Robert Cummings Neville, *Contributions and Limitations of Process Philosophy*, 16 PROCESS STUD. 283 (1987) (comparing Whitehead's work with other speculative philosophy).

¹⁸ The legal philosopher most associated with Whitehead was Yale's F.S.C. Northrop, who had been one of Whitehead's students at Harvard. Although undoubtedly influenced by Whitehead in some ways, Northrop's own work primarily concerned sociological jurisprudence. *See* F.S.C. NORTHROP, *THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE* (1959) (collecting Northrop's writings in sociological jurisprudence). More recently, Douglas Sturm, a professor of religion and political science, has explored some of the relationships between law and process thought. *See* Douglas Sturm, *American Legal Realism and the Covenantal Myth: World Views in the Practice of Law*, 31 MERCER L. REV. 487, 488 (1980) (stating that legal realism is not dead; in fact, it is "alleged to be the actual, living, operating jurisprudence of the average lawyer in modern American society"); Douglas Sturm, *Corporations, Constitutions, and Covenants: On Forms of Human Relation and the Problem of Legitimacy*, 41 J. AM. ACAD. RELIGION 331, 331 (1973) (studying "the legitimacy of the modern corporation as a form of human relation"); Douglas Sturm, *On Meanings of Public Good*, 58 J. RELIGION 13 (1978) (discussing the concept of public good and the political process).

biographer has noted, "Whitehead is one of the most quoted philosophers of our century—and one of the least understood."¹⁹

II. WHITEHEAD'S METAPHYSICS

"Let me begin," said Whitehead, shifting in his chair, "by describing the nature of speculative philosophy²⁰ and its inadequacies when I began my own metaphysical inquiries. Once those inadequacies, and my methodology for seeking to overcome them, are made plain, perhaps the argument for my own metaphysical

A Westlaw search of the "TP-All" file reveals 93 law review articles that cite Whitehead. Search of Westlaw, TP-All Library (Sept. 21, 1998). A review of those articles, however, shows that nearly all of the citations were to one or more of Whitehead's well-known, often witty aphorisms on the subjects of education, mathematics, science, philosophy, and religion. Only five articles mention Whitehead's metaphysics; and, other than an earlier effort of mine, none of these seeks to extrapolate legal consequences from his views. Compare Jay Tidmarsh, *A Process Theory of Torts*, 51 WASH. & LEE L. REV. 1313, 1412-25 (1994) (locating torts within a Whiteheadian framework), with Drucilla L. Cornell, *In Union: A Critical Review of Toward a Perfected State*, 135 U. PA. L. REV. 1089, 1105 (1987) (suggesting in one paragraph of text how one of Whitehead's ideas could provide "guidance in evaluating competing moralities"), and David M. Frankford, *Privatizing Health Care: Economic Magic to Cure Legal Medicine*, 66 S. CAL. L. REV. 1, 92 n.269 (1992) (discussing aspects of Whitehead's methodology in a footnote), and David M. Frankford, *The Critical Potential of the Common Law Tradition*, 94 COLUM. L. REV. 1076, 1100 n.110 (1994) (describing Whitehead's metaphysics in a footnote), and Francis J. Mootz, III, *Legal Classics: After Deconstructing the Legal Canon*, 72 N.C. L. REV. 977, 1009 (1994) (discussing Whitehead in four sentences of text).

Three of our century's most famous judges—Felix Frankfurter, Jerome Frank, and Charles Wyzanski, Jr.—were also familiar with Whitehead's thought and, to some degree, influenced by it. See *Larson v. Jo Ann Cab Corp.*, 209 F.2d 929, 934 n.30 (2d Cir. 1954) (Frank, J.) (describing Whitehead's views on language); LUCIEN PRICE, *DIALOGUES OF ALFRED NORTH WHITEHEAD* 108-09 (1954) (describing Whitehead's account of his personal and intellectual friendship with Frankfurter); Bennett Boskey, *Seymour J. Rubin—Some of the Origins*, 10 AM. U. J. INT'L L. & POL'Y 1245, 1245 n.1 (1995) (recounting that the Frankfurters went to tea with the Whiteheads on the day that Frankfurter was nominated to the Supreme Court); Augustus N. Hand, *Mr. Justice Frankfurter*, 62 HARV. L. REV. 353, 353-54 (1949) (stating that Frankfurter "has been an intimate of Professor Alfred North Whitehead"); Anthony Lewis, *In Memoriam*, 100 HARV. L. REV. 720, 722 (1987) (describing Judge Wyzanski's references to Whitehead in a letter); Elliot L. Richardson, *In Memoriam*, 100 HARV. L. REV. 723, 723 (1987) (describing Judge Wyzanski's references to Whitehead during a speech); Bernard Schwartz, *Administrative Law Cases During 1992*, 45 ADMIN. L. REV. 261, 268-69 (1993) (recounting how Frankfurter sent one of Whitehead's books to Justice Reed). For the claim that Whitehead influenced the "contextualism" of Myres McDougal, the renowned internationalist from Yale Law School, see W. Michael Reisman, *Myres S. McDougal: Architect of a Jurisprudence for a Free Society*, 66 MISS. L.J. 15 (1996).

¹⁹ 1 LOWE, *supra* note 2, at 3.

²⁰ Whitehead typically called metaphysics "speculative philosophy." See, e.g., *PROCESS AND REALITY*, *supra* note 1, at 3 (characterizing speculative philosophy as a "method productive of important knowledge"); *ADVENTURES OF IDEAS*, *supra* note 8, at 285-86 (defining speculative philosophy as the "endeavour to frame a coherent, logical, necessary system of general ideas in terms of which every element of our experience can be interpreted"); *MODES OF THOUGHT*, *supra* note 9, at 236 (describing two schools of thought, the 'Critical School' and the 'Speculative School,' with the 'Speculative School' appealing to direct insight).

scheme will be clear. Then we might profitably consider its relevance to the question which interests you: the role of law in human affairs."

"Very well," replied Chris. A fire kindled with chestnut twigs cracked through the darkness of the autumn evening. Whitehead's hands invited Chris to sit on the sofa across from him.

A. *Whitehead's Methodology for the Practice of Metaphysics*

"Speculative philosophy," said Whitehead, "consists of the attempt to state the self-evident facts which form the basis of all existence. The goal of a system of metaphysics should be a 'coherent, logical, [and] necessary system of general ideas in terms of which every element of our experience can be interpreted.'²¹ A metaphysical scheme must also be 'applicable' and 'adequate,' meaning that the system must in fact apply to our experience and that no element of our experience can escape its explanatory power.²² 'We can never catch the actual world taking a holiday from [the] sway [of our metaphysical first principles].'²³ They must be capable of explaining our lived experiences, the observations of the physical sciences, and the intuitions of art, literature, religion —"

"And law?" asked Chris.

"Yes, even law," replied Whitehead. "Now, given this view of the role of philosophy, and of metaphysics within philosophy, any work in metaphysics must, as an initial matter, be strictly empirical. We must begin with that which we know, and that which we know lies entirely within our human experience.²⁴ Thus, we have a metaphysical rule of evidence: 'that we must bow to those presumptions, which, in despite [sic] of criticism, we still employ for the regulation of our lives. Such presumptions are imperative in experience.'²⁵

"From that empirical basis we can attempt to generalize to those aspects of experience in which the totality of the Universe shares. These universal aspects of existence then lead us to establish a working hypothesis about the nature of existence. Next, we can test the hypothesis against additional empirical evidence in order to

²¹ PROCESS AND REALITY, *supra* note 1, at 3. The same definition can be found in ADVENTURES OF IDEAS, *supra* note 8, at 285.

²² PROCESS AND REALITY, *supra* note 1, at 3.

²³ *Id.* at 4.

²⁴ See, e.g., MODES OF THOUGHT, *supra* note 9, at 97 ("[P]hilosophy is limited in its sources to the world as disclosed in human experience.").

²⁵ PROCESS AND REALITY, *supra* note 1, at 151.

determine whether the hypothesis adequately explains the real world. If all aspects of our actual world can be explained by the hypothesis, then the hypothesis is validated on the basis of existing knowledge; but if some aspects of the world escape its explanatory reach, then the hypothesis must fail."²⁶

"So you are a philosophical empiricist," said Chris.

"Yes, I follow in the line of British empiricists and thus stand in opposition to philosophical rationalists such as Descartes and Hegel, who insist that metaphysics is a process of *a priori* deduction from incontestable first premises. At the same time, I am not anti-rational; I recognize the role of reason in generalizing from initial observation to universal experience. My insistence on a 'coherent' and 'logical' metaphysics on the one hand, and on an 'applicable' and 'adequate' one on the other, demonstrates my desire to bridge the canyon separating rationalists from empiricists in modern philosophical discourse."²⁷

"My initial empirical orientation leads to another important philosophical consequence: Metaphysics will always have a tentative quality about it. 'Philosophers can never hope finally to for-

²⁶ Whitehead analogized his philosophical method to an airplane flight: "The true method of discovery is like the flight of an aeroplane. It starts from the ground of particular observation; it makes a flight in the thin air of imaginative generalization; and it again lands for renewed observation rendered acute by rational interpretation." *PROCESS AND REALITY*, *supra* note 1, at 5. For further explanation of Whitehead's methodology, see *ADVENTURES OF IDEAS*, *supra* note 8, at 283-305; THOMAS E. HOSINSKI, *STUBBORN FACT AND CREATIVE ADVANCE* 3-18 (1993). For its relationship to the methodology of Thomas Kuhn, Karl Popper, and modern science more generally, see *id.* at 12-14; LUCAS, *supra* note 12, at 132-37; Friedrich Rapp, *Whitehead's Concept of Creativity and Modern Science*, in *WHITEHEAD'S METAPHYSICS OF CREATIVITY* 70 (Friedrich Rapp & Reiner Wiehl eds., 1990).

Whitehead's work in metaphysics can be seen as the execution of this methodology. In *Religion in the Making* and in *Science in the Modern World*, Whitehead examined the evidence of religion and science, and began to formulate his metaphysics. See *RELIGION IN THE MAKING*, *supra* note 9, at 83 (explaining that "[r]eligion requires a metaphysical backing"); *SCIENCE AND THE MODERN WORLD*, *supra* note 6, 181-208 (describing the progress of science and religion through time). In *Process and Reality*, Whitehead broadly generalized from this evidence to create an abstract, universal metaphysical system. See *PROCESS AND REALITY*, *supra* note 1, at 13 (noting that "[m]etaphysics is nothing but the description of the generalities which apply to all the details of practice"). Then, in *Adventures of Ideas* and to a lesser degree in *Modes of Thought*, Whitehead returned to the evidence of human civilization and to the history of scientific and philosophical thought to confirm these generalizations. See *ADVENTURES OF IDEAS*, *supra* note 8, at 164 (explaining that "[a]part from metaphysical presupposition there can be no civilization"); *MODES OF THOUGHT*, *supra* note 9, at 143-71 (discussing the ideals of civilization).

²⁷ See *PROCESS AND REALITY*, *supra* note 1, at 4-6. A modern evaluation of Whitehead's attempts to overcome the empiricist-rationalist division can be found in Ivor Leclerc, *Whitehead and the Dichotomy of Rationalism and Empiricism*, in *WHITEHEAD'S METAPHYSICS OF CREATIVITY*, *supra* note 26, at 1.

multate these metaphysical first principles. Weakness of insight and deficiencies of language stand in the way inexorably.²⁸ As our experience unfolds new data about ourselves and about the physical world in which we live, we must be willing to re-examine, and perhaps even reject, our metaphysical system. 'Each method of limited understanding is at length exhausted. In its prime each system is a triumphant success: in its decay it is an obstructive nuisance.'²⁹

"In short, any philosophical system, including my own, must be evaluated for its internal coherence and logic and, more important, for its applicability to and adequacy for other topics of human experience. The greatest disappointment in my subsequent treatment by followers and detractors alike has been their emphasis on issues of internal coherence and logic. Most of the commentary on my work has been philosophical and theological exegesis—efforts to explain my system, to interpret ambiguities, or to divine the implications of my system for topics like politics, theology, and ethics, none of which I ever addressed in significant detail.³⁰

"Although I must admit that I have not emerged unscathed from these examinations into internal consistency,³¹ the consistency of my own system is somewhat besides the point. I did not expect it to be treated as a final statement of incontestable first principles. Too little attention has been directed toward the more important points: determining whether, with appropriate modification, a system descended from my own is consistent with the recent evidence in the fields of mathematics, physics, biology, history, and psychology,

²⁸ PROCESS AND REALITY, *supra* note 1, at 4; see ADVENTURES OF IDEAS, *supra* note 8, at 185-86 (asserting that "[w]e cannot produce that final adjustment of well-defined generalities which constitute a complete metaphysics"). For Whitehead's general theory of the importance and limitations of language, see MODES OF THOUGHT, *supra* note 9, at 44-57.

²⁹ ADVENTURES OF IDEAS, *supra* note 8, at 203.

³⁰ See, e.g., WILLIAM A. CHRISTIAN, AN INTERPRETATION OF WHITEHEAD'S METAPHYSICS 1-2 (1959) (noting the problems readers of Whitehead's writings have encountered in their interpretations of his work); IVOR LECLERC, WHITEHEAD'S METAPHYSICS (1958) (describing Whitehead's metaphysics); LUCAS, *supra* note 12, at 150-79 (describing recent exegetical and interpretive works); sources cited *supra* notes 14, 16 (attempting to discern theological or political implications of Whitehead's thought).

³¹ For some of the most unrelenting critiques, see W. NORRIS CLARKE, THE PHILOSOPHICAL APPROACH TO GOD 70-103 (1979); EDWARD POLS, WHITEHEAD'S METAPHYSICS 193 (1967); Burrell, *supra* note 17; Richard M. Rorty, *The Subjectivist Principle and the Linguistic Turn*, in ALFRED NORTH WHITEHEAD: ESSAYS ON HIS PHILOSOPHY 134 (George L. Kline ed.) (1963). Gentler critiques of his ideas are compiled in THE PHILOSOPHY OF ALFRED NORTH WHITEHEAD, *supra* note 14. Whitehead admitted that his system was hardly immune to criticism, and that he had never worked out many important problems. See Alfred North Whitehead, *The Philosopher's Summary*, in THE PHILOSOPHY OF ALFRED NORTH WHITEHEAD, *supra* note 14, 663, 664-65; *infra* notes 87-116 and accompanying text.

which were the fields of knowledge from which I primarily drew my own evidence;³² considering whether such a system might explain adequately the evidence of other topics of human experience—law, art, medicine, and so on—in which I demonstrated a lesser interest; and developing such a system to the point that it could serve as a source of ideas for these topics of experience.”³³

³² For one short effort, see LUCAS, *supra* note 12, at 180-99. On balance, Lucas finds that some modern scientific developments confirm a Whiteheadian perspective, even if not Whitehead's metaphysics *per se*. It should be noted, however, the scientists on whom Lucas focuses, although well-known, do not represent the mainstream of modern science. See John B. Cobb, Jr., Book Review, 19 *PROCESS STUD.* 279, 282 (1990) (reviewing LUCAS, *supra* note 12).

³³ See *MODES OF THOUGHT*, *supra* note 9, at 237 (“The use of philosophy is to maintain an active novelty of fundamental ideas illuminating the social system.”); Neville, *supra* note 17, at 284 (“[Speculative philosophy] bleeds off referentially into science, politics, religion, art, history, and practical affairs. The value of speculative philosophy in part resides in the insights and wisdom it provides for those engaged in other fields, not just for philosophers.”).

In contrast to Whitehead, classical modern philosophy, especially early twentieth-century analytic philosophy, was explicitly built upon the assumptions of foundationalism (the working through of conclusions from given first premises) and self-reference (the need to be “intelligible and valuable in a self-contained manner” without reference to other fields of human understanding). Neville, *supra* note 17, at 284; LUCAS, *supra* note 12, at 1. Obviously, analytic philosophy had no patience with Whitehead's sort of philosophical inquiry, which is neither foundationalist nor self-referent. In turn, Whitehead had little patience for foundationalist philosophies. For one of Whitehead's numerous attacks, see *ADVENTURES OF IDEAS*, *supra* note 8, at 287.

The post-modern reaction to classical modern philosophy has not, however, been any more hospitable to Whitehead. Post-modern critics have sought to deconstruct analytic philosophy by exposing deep-seated political and sociological assumptions underlying allegedly objective pursuits of truth; and they have sought to replace philosophy as such with a call to “universal hermeneutics” or “edifying conversation.” LUCAS, *supra* note 12, at 137-41. Although sharing Whitehead's desire to reach beyond philosophy *per se* as a means of understanding, these philosophers have little patience with imaginative—Richard Rorty has called them “unscientific”—efforts to generalize and systematize all human and natural experience within a single set of metaphysical principles. See RICHARD RORTY, *THE CONSEQUENCES OF PRAGMATISM* 213-14 (1982) [hereinafter *CONSEQUENCES OF PRAGMATISM*] (“Whitehead [and a variety of other late nineteenth and early twentieth-century systems] seem to me merely weakened versions of idealism—attempts to answer ‘unscientifically’ formulated epistemological questions about the ‘relation of subject and object’ by ‘naive generalizations and analogies’ which emphasize ‘feeling’ rather than ‘cognition.’”); see also Rorty, *supra* note 31, at 145 (disparaging the “somewhat hackneyed quarrel about the value of doing the sort of ‘speculative philosophy’ which *Process and Reality* typifies”).

Although Whitehead had died before many of the recent developments in modern and post-modern philosophy, his statements on the utility and necessity of speculative philosophy leave little doubt about how he would have felt about an uncompromising post-modernist approach. See *PROCESS AND REALITY*, *supra* note 1, at 3-17 (explaining that “[s]peculative philosophy is the endeavour to frame a coherent, logical, necessary system of general ideas in terms of which every element of our experience can be interpreted”); *MODES OF THOUGHT*, *supra* note 9, at 237-38 (describing the divergence between the “Critical School” and the “Speculative School” as “the quarrel between safety and adventure”); *ADVENTURES OF IDEAS*, *supra* note 8, at 287 (critiquing philosophical anti-intellectualism). On the other hand, the distinction between Whitehead and post-modern critics should not be overstated; they do share considerable common ground. See LUCAS, *supra* note 12, at 137-41 (describing com-

B. Whitehead's Metaphysics: The Primacy of Becoming Over Being

"But enough methodology; let us turn to my metaphysical system," said Whitehead. "If I were to ask you what is the most basic entity, the most basic 'stuff,' which should form the beginning of any metaphysical reflection, what would you reply?"

"I suppose," said Chris, "I would say that it is matter—trees, squirrels, rocks, atoms, electrons. We would need to find some commonality among those sorts of things."

"Excellent," said Whitehead. "I think that I have just asked what you lawyers refer to as a leading question. And you answered exactly as someone grounded in Western philosophy should have answered."

"Now let me ask a second question: What do you think of the epistemological dualism of Descartes, Hume, and Kant?"

"Excuse me," laughed Chris, "but you forget that I am a lawyer, not a philosopher. If you want an intelligent response, ask me what I think of offensive collateral estoppel."

"Forgive me," said Whitehead. "Epistemology is the branch of philosophy which studies the nature of human knowledge and how we can know what we know. Beginning with Descartes, modern epistemology has focused on the problem of how a subject (that is, the person seeking to acquire knowledge of the world) can truly know an object (that is, something actually in that world). Hume's argument is the most famous: the only data we can know is our sense impression of a thing; we cannot know what that thing actually is, or even if it exists independently of our impression of it. Nor can we know that something that we perceive as a falling rock will continue to fall; all we can know is that our sense impressions have always observed apparently falling objects continue to fall, so that it is likely in some inductive sense, formed from past observations, that we will continue to observe the falling of the rock.³⁴ Kant, who was much influenced by Hume on this point but who still believed

mon ground between Whitehead and Rorty and suggesting that Whitehead's metaphysics, which seeks never-ending dialogue among disciplines and across cultures, is immune to the post-modern critique of the practice of metaphysics); RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 394 (1979) ("Perhaps a new form of systematic philosophy will be found which has nothing whatever to do with epistemology but which nevertheless makes normal philosophical inquiry possible.").

³⁴ For short summaries of Hume's philosophy, including his skeptical empiricism, see SAMUEL ENOCH STUMPF, *PHILOSOPHY: HISTORY AND PROBLEMS* 291-99 (2d ed. 1971); D.G.C. MacNabb, *David Hume*, in 4 *ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 2, at 74.

in the existence of a world external to us, suggested that we must distinguish between *phenomena*, which is how we perceive something and which is all we can truly know about that thing, and *noumena*, which is how that thing really is.³⁵ Thus, epistemological dualism, which tinges almost all modern philosophy, sharply distinguishes between subject and object, and makes it impossible to state that two events are in fact interrelated.

"This inability to know the interrelationships among objects or between subjects and objects finds some confirmation in post-Newtonian scientific materialism, which otherwise stands in stark contrast with Hume's skepticism. Scientific materialism holds that objects are simply located in space, and are internally unaffected by other objects. When there is interaction, for instance through gravitational attraction, the interaction is entirely external; neither object enters into the internal processes of the other.³⁶ While Hume denies scientific materialism's efficacy in describing the laws by which objects behave, both Hume and Newton deny the doctrine of internal relatedness between subject and object, or among objects."³⁷

"Perhaps it is the skepticism instilled by my education," said Chris, "but I find a great deal of truth in Hume's point. I can never know the truth about an object or an event."

"Let me try to dissuade you then," said Whitehead.³⁸ "In my mind, epistemological dualism is one of the two greatest missteps in the history of philosophy. The other misstep, with which we began, is that the basic stuff of existence is matter. Let me try to explain how these two issues are related, and how a metaphysic derived from basic human experience can overcome them both.

"I'll begin by stating the central concept of my entire philosophy: All things change. Nothing is everlasting; in Locke's famous phrase, everything is 'perpetually perishing.'³⁹ This is simple, self-

³⁵ For short summaries of Kant's philosophy, including his efforts to mediate between rationalism and empiricism, see STUMPF, *supra* note 34, at 300-22; W.H. Walsh, *Immanuel Kant*, in 4 *ENCYCLOPEDIA OF PHILOSOPHY*, *supra* note 2, at 305.

³⁶ For a brief discussion of Whitehead's interpretation of Newton and his scientific materialism, see ADVENTURES OF IDEAS, *supra* note 8, at 144-46. A longer treatment is contained in SCIENCE AND THE MODERN WORLD, *supra* note 6, at 39-55.

³⁷ On the relationship between Newton and Hume on this point, see SCIENCE AND THE MODERN WORLD, *supra* note 6, at 47, 51; PROCESS AND REALITY, *supra* note 1, at 137.

³⁸ Whitehead did not entirely reject Hume. Many of Whitehead's points of agreement and disagreement can be found in PROCESS AND REALITY, *supra* note 1, at 130-43, 166-67, 173-80.

³⁹ 1 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 238 (Dover ed. 1959) (1690). Whitehead sometimes used the phrase "perpetually perishing" as a shorthand for his

evident common sense. It comes from our own experience in life. We age and die, languages and institutions evolve. Time is asymmetrical; we can go forward but not back. Yet with the perishing of each past moment comes the possibility of the present and the advance into the future. Therefore, everything—and I mean *everything*, every real thing of which we can have experience—is in the process of becoming, of moving from the past through the present into the future. I challenge you to name an exception.”

“How about the color red? That never changes,” said Chris.

“Excellent,” said Whitehead, “you anticipate an aspect of my metaphysics that I will come to shortly.⁴⁰ For now, though, let me ask you whether you experience redness or you observe real things which are red?”

“The latter,” said Chris.

“Quite right.” agreed Whitehead. “Redness is an abstraction, meaningless apart from its instantiation in some real thing that changes. ‘You cannot know what is red by merely thinking of redness. You can only find red things by adventuring amid physical experiences in *this* actual world. This doctrine is the ultimate ground of empiricism”⁴¹

“I grant you that, upon that understanding, I can think of no real thing that remains forever immutable. Even the atom is a flurry of constant activity,” said Chris. “But I don’t see where that observation leads, or how it can explain the eternal constant of ‘redness.’”

“Let me address both difficulties in turn,” suggested Whitehead. “As far as my observation that all things flow, I grant that it does not seem such a dramatic insight, until you understand what a thoroughgoing commitment to process really means. It means, first of all, that there is no ‘unchanging subject of change.’⁴² Substance, or ‘being,’ is not the primary feature of existence; process, or ‘becoming,’ is. ‘Being’ is simply a secondary, final outcome of the process of ‘becoming,’ and it instantly perishes as the next stage of

basic philosophical insight. See, e.g., *PROCESS AND REALITY*, *supra* note 1, at 29 (asserting that “no subject experiences twice” is what Locke “ought to have meant by his doctrine of time as a ‘perpetual perishing’”); see also *id.* at 349 (“Neither God, nor the World, reaches static completion. Both are in the grip of the ultimate metaphysical ground, the creative advance into novelty.”).

⁴⁰ See *infra* notes 54, 72-82 and accompanying text (discussing the nature of eternal objects).

⁴¹ *PROCESS AND REALITY*, *supra* note 1, at 256.

⁴² *PROCESS AND REALITY*, *supra* note 1, at 29.

becoming commences.⁴³ 'Becoming' endures; 'being' flashes instantaneously and dies. This means that the only things which are really real—and thus the only things which can form the basis of metaphysical thought under an empirical, realist methodology—are units of becoming, not bits of substance.

"For lack of a better phrase, I have called these units of process 'occasions of experience' or 'actual occasions.'⁴⁴ Now these occasions —"

"I can appreciate that 'all things flow,'" interrupted Chris, "but do you really mean that this chair here and that book there are not primarily substances, but rather are comprised of a series of units of process—these 'occasions of experience'?"

"I do." Whitehead hesitated for a moment. "I appreciate your difficulty. Because this chair and that book endure in essentially unchanged form for long periods of time, it is often easier to think of them as a 'chair' or a 'book' rather than as a series of occasions of experience. But '[t]he chair is perpetually gaining and losing atoms'; in a million years neither the chair nor the book will be here in the form you see now.⁴⁵ However slowly, all objects ultimately change, and those units of change are more critical to an understanding of the nature of existence than the physical form which an object enjoys in a particular instant.

"I see from your expression that you are skeptical. Good—so is the sum of Western philosophy.⁴⁶ Let us return to that point in a

⁴³ A good, albeit technically difficult, summary of Whitehead's concept of the primacy of becoming can be found in *PROCESS AND REALITY*, *supra* note 1, at 18-36; *see id.* at 23 ("[H]ow an actual entity *becomes* constitutes *what* that actual entity is . . ."); *id.* at 81 (suggesting that the flaw of philosophical realists was to base doctrines on substance rather than process). *But see* JORGE L. NOBO, *WHITEHEAD'S METAPHYSICS OF EXTENSION AND SOLIDARITY* 1 (1986) (arguing that Whitehead accorded being and becoming equal status). Whitehead's notion that becoming has priority over (or at least equality with) being resonates more with Oriental than Western philosophy. *See* *CREATIVITY*, *supra* note 14, at 109 (suggesting congruence between Whitehead and certain Buddhist and Islamic philosophers); *PROCESS AND REALITY*, *supra* note 1, at 7 (linking Whitehead's philosophy to strains of Indian and Chinese thought); *see infra* note 46 and accompanying text (presenting the possibility that Whitehead was wrong about Western philosophical views on 'being' versus 'becoming').

⁴⁴ Whitehead used various terms for these units of becoming: "actual entities," "actual occasions," or "occasions of experience." *ADVENTURES OF IDEAS*, *supra* note 8, at 230; *PROCESS AND REALITY*, *supra* note 1, at 18. The terms are equivalent.

⁴⁵ Alfred N. Whitehead, *Mathematics and the Good*, in *THE PHILOSOPHY OF ALFRED NORTH WHITEHEAD*, *supra* note 14, 673-74 [hereinafter *Mathematics and the Good*].

⁴⁶ To some degree, Whitehead may have misread the commitment of Western philosophy to the primacy of being over becoming. *See* Burrell, *supra* note 17, at 128 (criticizing Whitehead's reading of Aristotle and Aquinas); Reto Luzius Fetz, *In Critique of Whitehead*, 20 *PROCESS STUD.* 1, 5 (James W. Felt trans. 1991) (suggesting that the notion of becoming was

while.⁴⁷ For now, however, you should be able to appreciate the difficulty in which I found myself. I needed to describe this ultimate basis of reality—the occasion of experience—and I needed to do so in a way which systematized not only the conscious, reflective experience of humans, but also the unconscious, non-reflective experience of chairs and books.

“In simplest form,⁴⁸ we must conceive of occasions of experience as comprising razor-thin slices of time; in the time that you have spent listening to this sentence, hundreds of such occasions have, quite literally, come into existence and perished. But each occasion does have a temporal ‘thickness’; the Newtonian concept of an instant of time is an error.⁴⁹

“Of course, the critical question is what occurs during this occasion of experience. I suggest that there are, in essence, three phases. The first phase involves the passive reception of data from the immediately prior occasion of experience. In the second phase the occasion of experience entertains novel possibilities. The third phase involves the reconciliation of the two prior phases: the initial desire to conform blindly to the past and the subsequent desire to achieve some new possibility. In that reconciliation, the occasion of experience takes on a definite form—it becomes *this* and not *that*. I call these three phases, taken together, the process of ‘concrecence.’⁵⁰

an important ingredient in Aristotelian thought); Leclerc, *supra* note 27, at 4-11 (demonstrating that Aristotle's notion of matter was closer to Whitehead's than Whitehead believed). For the sake of authenticity, Whitehead's error is repeated here.

⁴⁷ See *infra* notes 83-93 and accompanying text.

⁴⁸ In fact, the ensuing description is far too simplistic to catch the many nuances of Whitehead's description of actual entities, a task which comprised the bulk of the 533-page *Process and Reality*. A readable discussion of this portion of Whitehead's metaphysics, still encompassing 95 pages, is HOSINSKI, *supra* note 26, at 33-127.

⁴⁹ See *MODES OF THOUGHT*, *supra* note 9, at 207 (“[T]he notion of an instant of time, conceived as a primary simple fact, is nonsense.”). Whitehead never stated the precise duration of an occasion of experience, although he thought that there were dozens or more in each second. See *ADVENTURES OF IDEAS*, *supra* note 8, at 233 (discussing the immediate past with some influence on our present behavior as “lying between a tenth of a second and half a second ago”); 2 LOWE, *supra* note 2, at 268 (reporting on Whitehead's observation that the emission of a single quantum of energy was “[p]robably a whole shower of actual occasions”). Armed with the insights of modern quantum mechanics, perhaps he would be tempted to suggest something on the order of 10^{-43} seconds, which constitutes the lower limit on determining temporal intervals in physics. See LUCAS, *supra* note 12, at 198; Sharon Janusz & Glenn Webster, *The Problem of Persons*, 20 *PROCESS STUD.* 151, 151-53 (1991) (explaining that “[o]nly quantum events have the characteristics that one expects of actual occasions with respect to space-time”).

⁵⁰ *PROCESS AND REALITY*, *supra* note 1, at 211-13.

"But note what then occurs. Having finally taken on a definite form, the occasion of experience perishes. It is replaced by the succeeding occasion, which in its first phase passively receives the data of the preceding occasion, and seeks to maintain the same aim as that preceding occasion. But again, in the second phase, novel aims are entertained. Again, in the third phase, a reconciliation is attained and the occasion determines its 'subjective aim'—in other words, it chooses the form that it will take. Then this occasion also perishes, only to be replaced by another and then another in a perpetual process of concrescence.

"In order to explain these stages, I developed some additional concepts. The first is the notion of 'prehension,' or 'feeling,' which is the term I use to describe each occasion's grasping of, first, the prior occasion of experience, and, second, the novel possibilities. The former I call 'physical prehensions,' and the latter 'conceptual prehensions.'⁵¹ Put in different terms, all processes of concrescence contain both a physical pole, in which the occasion of experience seeks merely to perpetuate the aim of immediately preceding occasions, and a mental pole, in which the occasion entertains novel possibilities.

"The second concept that I needed to develop was a source for the novel possibilities which are felt through conceptual prehensions. That source was the realm of 'eternal objects,' or '[i]f the term "eternal objects" is disliked, the term "potentials" would be suitable. The eternal objects are the pure potentials of the universe; and the actual entities differ from each other in their realization of potentials.'⁵² An eternal object is forever constant. This is how I can account for the immutability of the concept of 'redness,' to which you just alluded: 'Redness' does not change even though things which are red do.

"Third, once we posit the existence of physical prehensions, we are logically required to admit that *each* occasion of experience pre-

⁵¹ *Id.* at 32-33.

⁵² PROCESS AND REALITY, *supra* note 1, at 149; *see id.* at 29 (discussing how eternal objects are the "potentials for the process of becoming" for an occasion of experience). In positing a Platonic world of "eternal objects," Whitehead was closely aligned with other philosophical realists of the early twentieth-century. *See* LUCAS, *supra* note 12, at 41 ("Thus, Platonic realism is also an essential feature of early twentieth-century Anglo-American realism."). Subsequent scholars have debated the strength of Whitehead's commitment to the notion of "eternal objects," whose existence creates certain difficulties for his metaphysics. *See* Ivor Leclerc, *Form and Actuality*, in THE RELEVANCE OF WHITEHEAD 169 (Ivor Leclerc ed. 1961) (describing the theory of "form" in relation to "actuality"); *see also infra* notes 72-82 and accompanying text (defining and explaining "eternal objects" and "actual entities").

hends *all* occasions of experience antecedent to itself. The reason is that, by means of a physical prehension, each occasion of experience prehends the immediately prior occasion of experience; and, by means of a physical prehension, that immediately prior occasion prehended the occasion before it; and so forth backward to the beginning of time. Thus, in each physical prehension the entire history of the universe is encoded. In the present occasion of experience, these past occasions are synthesized with conceptual prehensions into a subjective aim, and returned, by means of the now-completed present occasion of experience, to the realm of data to be prehended by future occasions. "The many become one, and are increased by one."⁵³

"But how is this possible?" asked Chris. "I cannot remember what I ate for lunch yesterday, much less know the entire history of a universe billions of years old. And surely you cannot mean that rocks and electrons are capable of 'prehending' this history."

"I do," replied Whitehead. "Many of my critics have for this reason called me at heart a Lamarckian or Hegelian idealist, rather than a true empiricist.⁵⁴ I think the criticism somewhat unfair. Perhaps it will ease your difficulty if you keep in mind two points. First, you must understand that a prehension is not a conscious or a rational activity, nor is it one associated with sense perception. You are confusing your ability consciously to feel and to remember with the sort of 'feeling' I am suggesting here.⁵⁵ Mentality, consciousness, rationality, and sense perception are all associated with the process of conceptual prehension; they are a second-stage filter that selects some portions of the massive physical prehension for emphasis and that concomitantly de-emphasizes the remaining

⁵³ PROCESS AND REALITY, *supra* note 1, at 21.

⁵⁴ For an exploration of Whitehead's ties to Lamarck's evolutionary cosmology and Hegel's idealism, see LUCAS, *supra* note 12, at 23-27, 51-72, 93-108; *cf.* PROCESS AND REALITY, *supra* note 1, at xi-xv (suggesting that his metaphysics could be viewed as "a transformation of some main doctrines of Absolute Idealism onto a realistic basis"). These forms of idealism had sought to resist Newtonian materialism and Humean skepticism through an emphasis on the role of emotion and the development of a unified philosophy of nature. For one critique of Whitehead's association with idealist objectives, see CONSEQUENCES OF PRAGMATISM, *supra* note 33; *see also* HOSINSKI, *supra* note 26, at 92-94 (discussing the problem of anthropomorphism in Whitehead's thought); Leemon B. McHenry, *Whitehead's Panpsychism as the Subjectivity of Prehension*, 24 PROCESS STUD. 1, 1 (1995) (stating that "prehension only makes sense as a concept of panpsychistic idealism").

⁵⁵ The need to distinguish between these two types of feelings was one of the reasons Whitehead coined a new word, "prehension," to describe the type of feeling that is characteristic of all actual entities. *See* PROCESS AND REALITY, *supra* note 1, at 18-20.

vague welter.⁵⁶ The power of discrimination associated with these faculties heightens vividness and thus the possibility of novel adventure,⁵⁷ but the very same power also invariably makes it impossible for us to be aware of the totality of past occasions that we receive in the first stage of physical prehension.

"Second, in staking out my theory, I did overstate one point. There are in fact two categories of prehensions: 'positive' and 'negative.'⁵⁸ Positive prehensions conform to the feelings I have been describing until now: positive integration of certain physical and conceptual feelings in the process of concrescence. Negative prehensions, on the other hand, exclude certain past occasions of experience and certain possibilities from the process of concrescence. Our capacity consciously to absorb past occasions of experience or the present range of possibilities is limited; hence, each occasion of experience positively feels, or prehends, less than the full range of past occasions and future possibilities.⁵⁹

"Fundamentally, however, my metaphysics does require an acceptance of the point that the massive weight of all past occasions of experience is felt in each present occasion of experience—whether that occasion is occurring in a rock or in a human person.⁶⁰ I will concede that, in lower, inorganic forms of order, the conceptual prehensions are so limited that 'so far as our observations go,

⁵⁶ For a summary of the ways in which Whitehead accounted for memory, consciousness, and sense perception in higher-grade beings, see HOSINSKI, *supra* note 26, at 99-127. In brief, Whitehead posited that the second, conceptual phase of concrescence was composed of an aesthetic phase and an intellectual phase, which can give rise, respectively, to propositional feelings and intellectual feelings. These phases form the basis for mentality, consciousness, sense perception, and rationality. Thus, sense perception arises rather late in the process of concrescence. By that time, the occasion of experience had already physically prehended prior occasions of experience. See PROCESS AND REALITY, *supra* note 1, at 121, 175-78, 256-80.

⁵⁷ See HOSINSKI, *supra* note 26, at 148 (noting that the "occurrence of novelty depends on an environment and a systematic background of order; and increasingly complex degrees of order can promote the emergence of more complex occasions capable of greater novelty and thus enjoying a greater intensity of experience"); ADVENTURES OF IDEAS, *supra* note 8, at 228-31 (explaining "the discovery of objects as factors in experience"); PROCESS AND REALITY, *supra* note 1, at 277-80.

⁵⁸ For discussions on positive and negative prehensions, see ADVENTURES OF IDEAS, *supra* note 8, at 329, 334-35; PROCESS AND REALITY, *supra* note 1, at 220-21.

⁵⁹ God, who positively prehends all past occasions of experience, is the one exception to this statement. See *infra* notes 76-82 and accompanying text (discussing metaphysics in relation to the concept of God).

⁶⁰ See HOSINSKI, *supra* note 26, at 94 ("If we are to achieve an interpretation of our experience of being united with all else in one, continuous world, then, Whitehead argues . . . we must theorize that these "mental" capacities . . . are present in even the lowest type of an occasion of experience.").

they are negligible. . . . The inorganic occasions are merely what the causal past allows them to be.⁶¹ But all organic forms of life—even the lowest—‘exhibit modes of behaviour directed towards self-preservation,’⁶² a result which suggests creative impulses beyond mere physical prehension of the past.

“Indeed, this must be so. If we are forced to admit that humans and other beings experience in different ways, we cannot avoid the problems of epistemological dualism. If we cannot avoid dualism, we are forced to admit that people ultimately are isolated and disconnected from each other and from the world. That conclusion has drastic and unacceptable consequences for our attitudes toward others, toward our own conduct, and toward the validity of any scientific or legal inquiry.

“My philosophy solves the puzzle of epistemological dualism. Part of the solution lies in the denial of the primacy of sense perception. Rather than being the sole source of information about the world, as Hume maintained, sense perception is a way in which *some* of the facts in the surrounding world are brought into focus. Independently of sense impressions, however, physical and conceptual prehensions integrate the historical world and its possibilities in each occasion of experience. An actual world lies beyond us, and we experience it.

“The remainder of the solution is this: As it engages in the process of concrescence, each occasion of experience is its own subject; but when it perishes, it becomes an object—one piece of data among the many—for other occasions of experience. In passing from subject to object, each occasion achieves an ‘objective immortality’;⁶³ all future occasionsprehend and must now grapple with the ‘stubborn fact’ of its existence.⁶⁴ This means that objects are in fact internally related to the present subject; the Humean and Kantian move to divide subject from object can be rejected. Therefore, unlike the

⁶¹ PROCESS AND REALITY, *supra* note 1, at 177.

⁶² *Id.* at 176.

⁶³ Whitehead often spoke of the “objective immortality” of occasions of experience once they had perished. See, e.g., ADVENTURES OF IDEAS, *supra* note 8, at 248, 305 (“Thus perishing is the initiation of becoming.”); PROCESS AND REALITY, *supra* note 1, at 29, 347, 351 (observing that as an occasion perishes subjectively, it becomes a part of other occasions, thus attaining immortality).

⁶⁴ Whitehead often called occasions of experience which had perished the “stubborn facts” with which each subsequent occasion needed to concern itself. See, e.g., ADVENTURES OF IDEAS, *supra* note 8, at 305 (finding that when occasions perish, it “does not mean that they are nothing”); PROCESS AND REALITY, *supra* note 1 at xiii-xiv, 128-29 (noting that each actual occasion arises from the passing of stubborn facts).

work of Hume or Kant, my philosophy affirms our daily lived impression that in fact we *are* 'in a buzzing world, amid a democracy of fellow creatures.'⁶⁵ We do act in, and are acted upon by, the world around us.⁶⁶

"Let me make a final point by way of conclusion and emphasis. While it is true that all prior occasions of experience internally determine that present occasion in the initial phase of concrescence⁶⁷—it is equally true that each occasion of experience is ultimately free to come to its own individual satisfaction. The fact that all prior occasions of experience have placed me here talking with you rather than on the moon means that I cannot collect moon rocks as the satisfaction of this present occasion. Yet I remain free to choose

⁶⁵ PROCESS AND REALITY, *supra* note 1, at 50. Whitehead called this move the "reformed subjectivist principle," which permitted him to acknowledge both that "subjective experiencing is the primary metaphysical situation which is presented to metaphysics for analysis" and that the "datum for experience" is not ultimately privatized and isolated within us. *Id.* at 160. See generally HOSINSKI, *supra* note 26, at 36-38 ("Whitehead's search for such coherence leads him to formulate what he calls the 'reformed subjectivist principle.'"); PROCESS AND REALITY, *supra* note 1, at 157-60, 166-67 (discussing the reformed subjectivist principle).

⁶⁶ For Whitehead, this fact made a further reply to Hume possible, while simultaneously solving the philosophical problem of causal efficacy. For Hume, it could never be said that *A* was a cause of *B*; it could only be said that all prior *A*'s had been observed immediately to precede all prior *B*'s, and that, therefore, the next observed *A* would likely immediately precede the next observed *B*. See STUMPF, *supra* note 34, at 291-99 (examining Hume's philosophy); MacNabb, *supra* note 34, at 80-82 (same); see also PROCESS AND REALITY, *supra* note 1, at 133-35, 173-75 (discussing Hume's notion of causation). Conversely, other philosophers and scientists have had to struggle with the question of how one substance, complete in itself and thus not dependent on other substances in the external world, could in any sense be an efficient cause (that is, one of a group of factors that, taken together, necessarily resulted in the particular outcome under study) with respect to other substances. See SCIENCE AND THE MODERN WORLD, *supra* note 6, at 139-56 (discussing the reactions of science to modern philosophy); PROCESS AND REALITY, *supra* note 1, at 48-57, 93-94 (discussing problems of modern philosophers and modern physicists in developing accounts of efficient causation).

Whitehead thought that no coherent notion of causation could be developed from within a traditional substance-quality framework. See PROCESS AND REALITY, *supra* note 1, at 56 (finding that it is impossible to describe actual causality by the "classical doctrines of . . . individual substances"). By re-orienting the primary metaphysical category from substances to occasions of experience, and by positing the doctrine of internal relatedness between objects and the present subject (that is, the present occasion of experience), Whitehead was able to confirm our common sense impression that a previously occurring *A* could be a cause of *B*. The reason was that, by means of a physical prehension, *A* entered into the occasion of experience whose end-product (or "satisfaction") was *B*. Thus, unlike Hume, Whitehead could say that *A* has a causal effect on *B*, and unlike other Western philosophers, he could explain the mechanism by which that effect occurred.

⁶⁷ Whitehead often remarked that prior occasions operate in "the mode of causal efficacy," although in his later work he preferred the more typical term "efficient causation." See, e.g., ADVENTURES OF IDEAS, *supra* note 8, at 251 (discussing "the causal relationship which is efficient causation"); PROCESS AND REALITY, *supra* note 1, at 168-83 (using the term "causal efficacy").

among other possibilities which the past has not excluded: I can continue to talk, walk away, or simply fall silent. Since each occasion of experience contains a lure to novel adventure in addition to a desire to conform to patterns of the past, each occasion is in a real sense its own 'final cause.'⁶⁸ 'The concrescence of each individual actual entity is internally determined and is externally free.'⁶⁹

"This insight constitutes my reconciliation of freedom and determinism. Since '[o]ne task of a sound metaphysics is to exhibit final and efficient causes in their proper relation to each other,'⁷⁰ this reconciliation is important philosophically. Indeed, I might say immodestly that my work in integrating bodily feelings, emotions, and intellect 'into a unified theory of perception, recovering [from Humean and Kantian critiques] the experience of causal efficacy' has been judged by others to be my 'chief contribution to the Western philosophic tradition.'⁷¹

"In many ways what you have said resonates," said Chris, "but I am not sure that I can accept it all. Forgive me if I sound stupid, but let me ask you about three things.

"First, unless I missed something, your realm of eternal objects seems to unravel your entire metaphysical enterprise. If I understand you, the only things which are actual are these 'occasions of

⁶⁸ For Whitehead, the term "final causation," which he also referred to as "*causa sui*" and "self-causation," meant an entity's ultimate ability to be its own cause—to choose for itself what it will do in spite of prior influences. See HOSINSKI, *supra* note 26, at 96 (describing the difference between "final" and "efficient" causation); PROCESS AND REALITY, *supra* note 1, at 24, 84, 86, 88, 221, 222 (noting that actual entities are "*causa sui*" and are responsible for their own decisions). Whitehead thought that medieval philosophy overly stressed the notion of final causation, while modern science overly stressed the notion of efficient causation. See PROCESS AND REALITY, *supra* note 1, at 84 (pointing to Aristotle as the root of this dichotomy).

⁶⁹ PROCESS AND REALITY, *supra* note 1, at 27.

⁷⁰ *Id.* at 84.

⁷¹ LUCAS, *supra* note 12, at 91.

This Whiteheadian rejoinder to Hume (and Kant) constitutes Whitehead's most seminal contribution to the history of Western philosophy. It is a contribution whose importance has been vastly underestimated by non-Whiteheadians. Moreover, since Russell explicitly adopted many of Hume's views on perception and causality, Whitehead's rejoinder constitutes an important refutation of the foundation of twentieth-century logical empiricism as well. . . . Whitehead . . . provides the only account of induction and causality that can respond to Hume while preserving a genuine role for empiricism, for experience, and for that stubborn grain of realism that remains deeply and perhaps forever imbedded in the scientific enterprise.

Id. at 113-14; see also 2 LOWE, *supra* note 2, at 269 ("[Whitehead] did one of the most valuable, and most needed, things in modern philosophy. He rehabilitated the idea of a direct experience of the external world, as an experience of causation."); Charles Hartshorne, *Freedom as Universal*, 25 PROCESS STUD. 1, 1 (1996) ("Whitehead is the greatest of the numerous philosophical defenders of freedom as causal indeterminism.").

experience,' which have the ability to select their own outcomes. But eternal objects, which are forever definite in form, can never change their form. If they are incapable of change, they cannot be real; and thus your metaphysical scheme collapses."

"I agree with the first half of what you said," said Whitehead, "but not the second half. You are right in thinking that eternal objects are not actual and that actual entities 'are the final real things of which the world is made up. There is no going behind actual entities to find anything more real.'⁷² You are wrong, however, to think that it is impossible for something to exist unless it is actual; our experience suggests that we can imagine things which are not, and will never be, real.⁷³

"But you allude to an important concern. Under the empirical ontological principle, only actual entities can serve as reasons for metaphysical explanation;⁷⁴ only they possess the power of agency.⁷⁵ Eternal objects, however, are totally abstracted from actuality. Hence, the problem: How can an eternal object ever have any efficacious relationship with an occasion of experience, so that it is capable of being prehended by and thus incorporated into that occasion of experience?"

"I'm not sure I'm clever enough to have alluded to anything of the kind," said Chris. "But it seems a valid point."

"It is," said Whitehead. "My response is to agree that no occasion of experience canprehend an eternal object unless that eternal object is itself located in some other occasion. The fact that each new occasion of experience prehends all prior occasions may seem to solve the problem, for as long as an eternal object was prehended in a prior occasion, it is also prehended in the present occasion. But you undoubtedly see that this explanation is a fudge, for we still need to explain how eternal objects were originally prehended in some past occasion of experience.

"You may be too polite to call me on this point, but I also have the related problem of accounting for the source of conceptual prehensions: What is it that lures an occasion of experience to novel adventure rather than blind conformation to the past?

⁷² PROCESS AND REALITY, *supra* note 1, at 18.

⁷³ See *id.* at 22.

⁷⁴ See *id.* at 19 ("The ontological principle can be summarized as: no actual entity, then no reason.").

⁷⁵ See HOSINSKI, *supra* note 26, at 157 (meaning that "only actualities can serve as the 'reasons' for things").

"My answer to both problems is to posit an actual entity: God.⁷⁶ But this God is radically different than the God of traditional Western religions. In the first instance, God must possess a 'primordial nature,'⁷⁷ in which God is the repository of all eternal objects, of all potentialities. Thus, through prehending God, an occasion of experience also prehends the full range of eternal objects, the full potentialities for a particular occasion.

"But I came to realize that God must also possess a 'consequent nature.'⁷⁸ As an actual entity, God too is in the process of becoming. God too is capable of prehending all prior occasions, but, unlike us, God is aware of all prior occasions and is capable of supplying every other occasion of experience with an 'initial subjective aim' that seeks to maximize the aesthetic potential of each occasion.⁷⁹ But each occasion is free in the subsequent stages of determining its subjective aim to reject God's initial persuasive lure and choose a different subjective aim. And God, of course, is powerless to change the past or create the future; God must accept whatever evil or tragedy has already occurred, and can only persuade the world to achieve whatever aesthetic potential is now possible.⁸⁰

⁷⁶ Whitehead enjoyed an Anglican upbringing, and as a young adult investigated Roman Catholicism. For most of his life, however, he was an agnostic. Thus, the existence of God was forced upon Whitehead by the necessities of his metaphysical system; he did not construct a metaphysical system to account for a God in whom he already believed. For a short account of the reasons for Whitehead's agnosticism and his ultimate turn toward theism, see R. MAURICE BARINEAU, *THE THEODICY OF ALFRED NORTH WHITEHEAD* 65-73 (1991).

⁷⁷ *PROCESS AND REALITY*, *supra* note 1, at 344; see *RELIGION IN THE MAKING*, *supra* note 9, at 149-58 (discussing the nature of God).

⁷⁸ *PROCESS AND REALITY*, *supra* note 1, at 344-51; see *ADVENTURES OF IDEAS*, *supra* note 8, at 323, 381 (discussing the tendency of nature to "urg[e] toward[] perfection"); *MODES OF THOUGHT*, *supra* note 9, at 128 ("The notion of a supreme being must apply to an actuality in process of composition . . .").

⁷⁹ *PROCESS AND REALITY*, *supra* note 1, at 244-45; see *HOSINSKI*, *supra* note 26, at 172-76 (describing God as the source for the initial subjective aim); see also *infra* notes 134-69 and accompanying text (discussing the concept of aesthetic potential in detail).

⁸⁰ For Whitehead, God is not an omnipotent ruler, not omniscient regarding the future, not distant from and unrelated to the world, and not the dispenser of good fortune or the cause of evil. See *COBB & GRIFFIN*, *supra* note 14, at 8-10 (discussing how Whitehead's concept of God is "philosophically and religiously opposed to much that has been meant by 'God' in metaphysical, theological, and popular traditions"). Some theologians found the God that Whitehead described—persuasive, contingent, reliant on the world, suffering with the world, "the poet of the world, with tender patience leading it by his vision of truth, beauty, and goodness"—to be so appealing that they developed a theology premised on Whitehead's metaphysics. *PROCESS AND REALITY*, *supra* note 1, at 346. See, e.g., *PROCESS PHILOSOPHY AND CHRISTIAN THOUGHT* (Delwin Brown et al. eds., 1971) (presenting essays discussing the relevance of process philosophy for Christianity); *HOSINSKI*, *supra* note 26, at 227-48 (describing Whitehead's influence and impact on Christian theology); sources cited *supra* note 14 (citing famous process theologians). Whitehead himself, however, never developed the notion of

"I acknowledge that it might be possible, as some of my adherents have done, to ground my metaphysics without any reliance upon the concept of God;⁸¹ and, by giving such possibilities the ontological status of actual entities, without explicit reliance on Platonic eternal objects.⁸² But my own solutions relied upon the existence both of God and of eternal objects."

"Even with these refinements, I do not see how your metaphysics will rescue us from isolation and individualism," said Chris. "If I understand you correctly, you are suggesting that I am nothing more than a group of millions of tiny occasions of experience. It seems to me that if you wanted to construct a philosophy of individualism and isolation, you could do no better than to create a system in which I am isolated even from myself and my own past experiences."

"You have suggested another frequent criticism," said Whitehead. "It is true that, under my theory of actual entities, 'the ultimate metaphysical truth is atomism.'⁸³ On the other hand, I would be foolish to deny that all of us also experience 'things' (or 'substances') with temporal durability. In order to account for the endurance of objects like books, and like people with a sense of individual personality, I developed the notion of 'societies.' Societies are groupings of occasions of experience that together exhibit some enduring

God in any detail. For instance, Whitehead first described the consequent nature of God in only a few pages at the end of *Process and Reality*. See PROCESS AND REALITY, *supra* note 1, at 344-51 (noting God's two natures: consequent (or conscious), and primordial (or conceptual)). Although he relied on this description in later works, he never returned to embellish or refine it. See, e.g., ADVENTURES OF IDEAS, *supra* note 8, at 381.

⁸¹ See, e.g., NEVILLE, *supra* note 16, at 34 (finding that God is "discerned in ontological reflection, [and] need not be considered among the cosmological categories"); Dorothy Emmet, *Creativity and the Passage of Nature*, in WHITEHEAD'S METAPHYSICS OF CREATIVITY, *supra* note 26, at 59 ("So creativity is not a predicate of everything quantified over by an existential quantifier."); Donald W. Sherburne, *Whitehead Without God*, in PROCESS PHILOSOPHY AND CHRISTIAN THOUGHT, *supra* note 80, at 305 (using Whitehead's theories as a framework for a discussion of the author's "disillusionment with the concept of 'God'").

⁸² See CHARLES HARTSHORNE, CREATIVE SYNTHESIS AND PHILOSOPHIC METHOD 59 (1970) (arguing for a nominalist, as opposed to Platonic, view of forms of definiteness); Emmett, *supra* note 81, at 67 (rejecting a "separate realm of eternal objects"); Everett W. Hall, *Of What Use Are Whitehead's Eternal Objects?*, in ALFRED NORTH WHITEHEAD, *supra* note 31, at 102 (suggesting that eternal objects are unnecessary to Whitehead's metaphysics); Charles Hartshorne, *Three Responses to Neville's Creativity and God*, 10 PROCESS STUD. 93, 95 (1980) (arguing for nominalist view of forms); Sherburne, *supra* note 81, at 325-28 (suggesting that use of Whitehead's pre-*Process and Reality* ideas avoids the need for eternal objects); cf. POLS, *supra* note 31, at 193 (arguing that the concept of eternal objects refutes Whitehead's claim that individuals possess freedom).

⁸³ PROCESS AND REALITY, *supra* note 1, at 35.

pattern or order—some sense of substance.⁸⁴ ‘The real actual things that endure are all societies. They are not actual occasions.’⁸⁵ A society contains a ‘common element of form illustrated in the definiteness of each of its included actual entities’; this defining characteristic is required to be reproduced in each occasion in the society.⁸⁶ At the same time, however, every society is constantly evolving. Aside from its ‘essential character,’ a society ‘has also accidental qualities which vary as circumstances alter.’⁸⁷ As long as it retains some identifying characteristic that unites each of its occasions, a society (unlike an occasion of experience) can change over time. Therefore, it is never possible, ultimately, to define a society until its existence is entirely in the past, ‘[f]or the realized nexus which underlies the society is always adding to itself, with the creative advance into the future. . . . [U]ntil the death of the man and the destruction of the earth, there is no determinate nexus which in an unqualified sense is either the man or the earth.’⁸⁸

“Societies can themselves be grouped into societies of societies, and societies of societies of societies, and so forth.⁸⁹ An atom is a society of electrons, protons, neutrons, and other subatomic particles; a molecule is a society of atoms; a rock is a society of molecules; the earth is a society of rocks and other societies such as water, plants, animals, and so on. Each of these larger, more abstract societies into which the subordinate societies are grouped also has its own defining characteristic; each is subject to evolution. The same is true of the human person.⁹⁰

⁸⁴ Whitehead's most extensive treatment of the various (and technically difficult) aspects of societies can be found in *PROCESS AND REALITY*, *supra* note 1, at 34-35, 90-109, 198-99. More readable treatments can be found in *ADVENTURES OF IDEAS*, *supra* note 8, at 258-67; and in *HOSINSKI*, *supra* note 26, at 128-39.

⁸⁵ *ADVENTURES OF IDEAS*, *supra* note 8, at 262.

⁸⁶ *Id.* at 261; see *PROCESS AND REALITY*, *supra* note 1, at 89 (noting that every member of a society shares a common character).

⁸⁷ *ADVENTURES OF IDEAS*, *supra* note 8, at 262.

⁸⁸ *Id.*

⁸⁹ See *PROCESS AND REALITY*, *supra* note 1, at 99-100 (discussing “structured” societies).

⁹⁰ According to Whitehead, a human being is a large and complex society of societies that is comprised of many smaller societies and societies of societies. Like all large and complex societies, a human person has a defining characteristic—or, as Whitehead also called it, a thread of “presiding occasions”—which defines personal identity. See *HOSINSKI*, *supra* note 26, at 138-39 (“When we speak of a ‘human being’ we are usually referring to the entire complex living society”); *PROCESS AND REALITY*, *supra* note 1, at 109; see also Alfred N. Whitehead, *Immortality*, in *THE PHILOSOPHY OF ALFRED NORTH WHITEHEAD*, *supra* note 14, 682, 689-92 [hereinafter *Immortality*] (discussing briefly the matter of personal identity, whose survival through occasions of experience is “a most remarkable character of the World of Fact”). Whitehead conceded, however, that his philosophy never provided an entirely

"In this way, I rescue my philosophy from your criticism of rampant individualism. Each person is connected to the many occasions of experience that comprise his or her own body. Each person is also unavoidably connected to his or her environment through physical and conceptual prehensions; conversely, that person's existence and conduct unavoidably affects the lives of all persons and all other things forever. Therefore, human experience is thoroughly social and interconnected. Far from being a ground for a political or social philosophy of individualism, I should think that my philosophy teaches interdependence and coordination with, nonetheless, a very healthy respect for the rights of individual determination."⁹¹

"But the fact that I am ultimately a series of discrete, unobservable occasions seems to make any notion of personal agency or moral responsibility an impossibility," said Chris. "Do I ultimately bear personal responsibility for my actions when the millions of subatomic occasions of experience within me are the ultimate vehicles that propel me forward?"

"There is no doubt," replied Whitehead, "that my commitment to atomistic occasions of experience makes the development of a coherent notion of human agency problematic."⁹² Perhaps it would be wiser for me to give ground on my strict atomism, as some of my adherents have done, and retreat to the position that certain macroscopic entities, such as people, are actual entities responsible for their actions.⁹³ That would do little violence to my metaphysical

"adequate account of this undoubted personal unity, maintaining itself amidst the welter of circumstance." ADVENTURES OF IDEAS, *supra* note 8, at 240. One effort to develop a theory of personal identity in greater detail is that of Whitehead's follower, Charles Hartshorne. See Charles Hartshorne, *Personal Identity from A to Z*, 2 PROCESS STUD. 209 (1972) (discussing the development of his theory of personal identity). Critiques of this account of personal identity on ethical and epistemological grounds are found in Peter A. Bertocci, *Hartshorne on Personal Identity: A Personalistic Critique*, 2 PROCESS STUD. 216 (1972), and J.P. Moreland, *An Enduring Self: The Achilles' Heel of Process Philosophy*, 17 PROCESS STUD. 193 (1988).

⁹¹ See MORRIS, *supra* note 16, at 72 ("Process philosophy rejects the Hobbesian supposition that an individual first exists and then subsequently enters into relations with others . . .").

⁹² For various criticisms of Whitehead's commitment, see CLARKE, *supra* note 31, at 69-70; EDWARD POLS, *THE ACTS OF OUR BEING* 204-06, 229 n.10 (1982); Burrell, *supra* note 17, at 128; Janusz & Webster, *supra* note 49, at 151-53; Duane H. Whittier, Book Review, 16 PROCESS STUD. 49, 49 (1987).

⁹³ In *Science and the Modern World*, Whitehead seemed to regard macroscopic entities such as people as actual entities. In *Process and Reality*, he became committed to the extreme atomism discussed in the text. See Emmet, *supra* note 81, at 64-68 (discussing the apparent shift in viewpoint between Whitehead's earlier and later works). For efforts to reformulate Whitehead's metaphysics along his earlier lines, see LUCAS, *supra* note 12, at 144-

system, and it would provide a coherent explanation of agency: rather than being a society of independent albeit coordinated occasions of experience, people are themselves occasions of experience who must choose, in each instance of becoming, what they will become."

C. Relating Whitehead's Metaphysics to Human Civilization

"Having now described my basic metaphysical scheme," Whitehead said, "we can examine other empirical evidence to determine its adequacy.⁹⁴ One of my primary sources of evidence for doing so was the history of human civilization. That evidence, I suspect, should bring us closer to the nature of law and its role in human civilization.

"Let me preface our inquiry by extrapolating one point from our earlier discussion. The point may be obvious, but it is central to any systematic understanding of human institutions.

"The tension between the physical and the mental poles in an occasion of experience is a tension between conformity to the past and creativity in the future. Put differently, it is the tension between order and chaos, where order involves conformation of the present occasion to those of prior occasions, while chaos involves a leap into an unknown possibility that is different from, and therefore contrasting with, the order given by past occasions. The contrast between conformity and a leap into novelty creates discordant feelings, and each occasion of experience must seek to resolve the contrast and discord.

"Another way of saying the same thing is that every eternal object represents a particular mode of perfection. An occasion of experience embraces some, but not all, of those modes of perfection in its process of concrescence.⁹⁵ As it passes on that perfection to the occasion succeeding it, that next occasion has the choice to continue those prior modes of perfection, to select new modes of perfection, or to blend prior modes of perfection with new modes. If either of the latter choices is made, an advance into novelty occurs. But this ad-

47, 154-61; Emmet, *supra* note 81, at 64-68; Janusz & Webster, *supra* note 49; Whittier, *supra* note 92, at 52.

⁹⁴ See *supra* notes 24-26 and accompanying text (describing Whitehead's methodology).

⁹⁵ See *PROCESS AND REALITY*, *supra* note 1, at 29, 187; see also *supra* notes 50-53 and accompanying text (describing the process of concrescence).

vance creates, from the viewpoint of the initial perfection, a type of imperfection, of disorder, of chaos.

"So often in our culture we think of order as 'good' and chaos as 'bad.'⁹⁶ That is so because we feel in chaos the disruption of conformity. Yet we must recognize that under a process metaphysics chaos is inevitable; simply put, '[t]he Universe refuses the deadening influence of complete conformity.'⁹⁷ We must also recognize that chaos, although 'evil' in a certain sense, can be a positive force. Greater good can be achieved only with progress. Progress, however, requires that we forsake some present perfection for some greater possible perfection. This is true even when the greater perfection cannot yet be perfectly attained; '[t]here are in fact higher and lower [grades of] perfections, and an imperfection aiming at a higher type stands above lower perfections.'⁹⁸ In aiming at these higher types of perfection, we necessarily must entertain ideas that conflict with the present perfection. In short, therefore, '[p]rogress is founded upon the experience of discordant feelings.'⁹⁹

"But surely progress is not inevitable, and just as surely chaos and discord do not inexorably lead to progress," said Chris.

"Oh no, of course not!" said Whitehead. "I am no muddle-headed optimist; indeed, many of the events of the past hundred years give scant reason to put any faith in the continued progress of the world.¹⁰⁰ A gospel of inevitable progress conflicts with the metaphysical reality of the self-determination of each occasion of experience, which must have the freedom to choose badly—very badly indeed.¹⁰¹ Nor does discord invariably lead to good. 'When fundamental change arrives, sometimes heaven dawns, sometimes hell yawns open.'¹⁰² All that I mean to say is that without advances

⁹⁶ *MODES OF THOUGHT*, *supra* note 9, at 108.

⁹⁷ *Id.* at 119.

⁹⁸ *ADVENTURES OF IDEAS*, *supra* note 8, at 330; *see id.* at 339 ("Perfection at a low level ranks below Imperfection with higher aim").

⁹⁹ *Id.* at 330; *see also* *BARINEAU*, *supra* note 76, at 105 ("Discordant occasions can be beneficial for progress and can be referred to as good even though in and of themselves the occasions would be evil").

¹⁰⁰ *See infra* notes 194, 197 and accompanying text (describing how the Industrial Revolution and laissez-faire liberalism "did more harm than good").

¹⁰¹ *See* *RELIGION IN THE MAKING*, *supra* note 9, at 96 ("This instability of evil does not necessarily lead to progress."); *see also* *PRICE*, *supra* note 18, at 344 (describing a conversation shortly after the end of World War II and the dropping of atomic bombs, in which Whitehead observed that, "we are on the threshold of an age of liberation, a better life for the masses, a new burst of liberated creative energy, a new form of society; or mankind may all but exterminate itself and desolate this planet").

¹⁰² *MODES OF THOUGHT*, *supra* note 9, at 131.

into novelty there is no *possibility* of ever achieving higher perfections. 'Error is the price which we pay for progress.'¹⁰³

"Therefore, rather than seeing order as necessarily 'good' and chaos as necessarily 'evil,' we must appreciate that the calculus is nuanced and complex. 'Order is never complete; frustration [of established order] is never complete.'¹⁰⁴ Without order, advances into novelty do nothing to enhance the vividness or aesthetic beauty of an occasion of experience. '[S]urvival requires order';¹⁰⁵ for instance, human beings, who are capable of producing great progress, depend on the orderly functioning of the cells and organs of their bodies. Without novelty, on the other hand, there would be blind repetition of past occasions of experience. Existence would be trivial. The higher grades of experience, and all organic life, would be impossible. Whatever you want to call it—chaos, discord, advance into novelty, Adventure¹⁰⁶—some disequilibrium is essential to the notion of process and to the possibility for progress.

"Now, a moment's reflection should disclose that there are two types of disequilibrium, or, to use the term I prefer, two types of advance into novelty. The first is 'the discovery of novel pattern'; the second is 'the gathering of detail within assigned pattern.'¹⁰⁷ The two forms of advance can be represented by the distinction between the Hellenic mentality—the development of novel ideas in ancient Greece during a time filled with delight, speculation, and discourse—and the Hellenistic mentality—the subsequent Alexandrian and medieval scholastic tradition that worked Hellenic ideas pure through concentration, thoroughness, and investigation.¹⁰⁸ Hellenism was an advance of the first type: a movement beyond known modes of perfection in search of higher modes. Hellenistic scholarship was an advance of the second type: an effort to work within a given state of perfection (here, Hellenism itself) in order to explore new ways to achieve this perfection. This latter type of perfection is possible precisely because any eternal object, or mode of

¹⁰³ PROCESS AND REALITY, *supra* note 1, at 187.

¹⁰⁴ MODES OF THOUGHT, *supra* note 9, at 119.

¹⁰⁵ PROCESS AND REALITY, *supra* note 1, at 205.

¹⁰⁶ At one point or another in his writings, Whitehead used all of these terms. See ADVENTURES OF IDEAS, *supra* note 8, at 147 (chaos), 330 (discord), 352 (Adventure); MODES OF THOUGHT, *supra* note 9, at 109 (advance into novelty).

¹⁰⁷ MODES OF THOUGHT, *supra* note 9, at 80; see PROCESS AND REALITY, *supra* note 1, at 338 (contrasting order "as the condition for excellence" and as "stifling the freshness of living").

¹⁰⁸ See ADVENTURES OF IDEAS, *supra* note 8, at 134-38 (discussing Hellenism and Hellenistic thought).

perfection, is vague and indefinite, and can be embodied in any of a number of actual occasions. Thus, different moral codes, political institutions, and social structures are consistent with the Hellenic mentality, and it can be expected that over time, various civilizations that aim at the Hellenic ideals will have different codes, institutions, and structures.

"This latter form of advance into novelty, however, generates a rather minor form of chaos, for it merely brings one possibility consistent with a particular perfection into contrast with other occasions also consistent with that perfection. Harmony among the occasions is overwhelming. Over the long run, however, 'even perfection will not bear the tedium of indefinite repetition. To sustain a civilization with the intensity of its first ardour requires more than learning.'¹⁰⁹ Sooner or later, the various possibilities for advance within a mode of perfection will play themselves out. At that point a slow decadence, 'undisturbed by originality or by external forces,' takes over.¹¹⁰ The ultimate collapse may take a thousand years, as in the case of the empires of Byzantium and China.¹¹¹ But all the while 'the values of life are slowly ebbing.'¹¹² 'Staleness then sets in. Repetition produces a gradual lowering of vivid appreciation. Convention dominates. A learned orthodoxy suppresses adventure.'¹¹³

"Is there an antidote?" said Chris.

"Adventure is essential, namely, the search for new perfections,"¹¹⁴ replied Whitehead. "This Adventure is an advance into novelty of the former type. Eventually there will be, there must be, 'the leap of imagination . . . beyond the safe limits of the epoch, and beyond the safe limits of learned rules of taste.'¹¹⁵ In this type of adventure, an extant mode of perfection is brought into contrast with a possibility representing a novel idea. An uneasy sense of discord is present, at least until the contrasts can be resolved into new and larger patterns of harmony.

¹⁰⁹ *Id.* at 332.

¹¹⁰ *Id.* at 359.

¹¹¹ *See id.* at 331-32.

¹¹² *Id.* at 359.

¹¹³ *Id.* at 357.

¹¹⁴ ADVENTURES OF IDEAS, *supra* note 8, at 332. Whitehead often preferred to use the term "Adventure," as opposed to "advance into novelty" or "creative advance," to describe the search for new types of possibility within human civilization. *Id.* at 352-65.

¹¹⁵ *Id.* at 360.

"In human affairs, as in all others, nothing can prevent this more chaotic form of advance into novelty.

"The foundation of all understanding of sociological theory—that is to say, of all understanding of human life—is that no static maintenance of perfection is possible," Whitehead continued. "This axiom is rooted in the nature of things. Advance or Decadence are the only choices offered to mankind. The pure conservative is fighting against the essence of the universe."¹¹⁶

"And slowly answer'd Arthur from the barge:

"The old order changeth, yielding place to new,

And God fulfills himself in many ways,

Lest one good custom should corrupt the world."¹¹⁷

"Exactly," said Whitehead. "Obviously, this understanding of human life follows inexorably from the metaphysical principle that we discussed last evening: 'that the very essence of real actuality—that is, of the completely real—is *process*.'¹¹⁸ Everything, including every human civilization, inherits the past, comes of age, and perishes. There is no moment when the process halts or when being—whether the being of an occasion of experience or the being of a large, complex civilization—can be understood independently of becoming.

"A related metaphysical principle also bears on the understanding of civilization. The first of these is 'the doctrine that every occasion of actuality is in its own nature finite. There is no totality which is the harmony of all perfections. . . . There are always 'others,' which might have been and are not.'¹¹⁹ Simply put, there exists no end-state, no ideal world, 'no perfection which is the infinitude of all perfections.'¹²⁰ Every perfection pursued leaves an infinity of perfections excluded, and at any moment it is possible to set out in pursuit of an entirely different and previously unrecognized ideal.

"Applying this principle to human civilization, each civilization aims at a certain type of perfection, and at its culmination it will have largely realized that type. This 'culmination can maintain itself at its height so long as fresh experimentation within the type'—

¹¹⁶ *Id.* at 353.

¹¹⁷ Alfred Tennyson, *The Passing of Arthur*, in *IDYLLS OF THE KING* (1869), reprinted in 5 *THE WORKS OF TENNYSON* 399, 415 (Hallam Tennyson ed., 1913).

¹¹⁸ *Id.* at 354.

¹¹⁹ *Id.* at 356.

¹²⁰ *Id.* at 330.

the second form of advance into novelty I discussed above¹²¹—'is possible.'¹²² But once this form of novelty is exhausted, the civilization must either decay or, if the civilization has not yet 'exhausted its own creative springs of originality,' move quickly through a period of unsettling transition toward a new perfection.¹²³ This latter option, of course, corresponds to the first form of advance into novelty.

"Of course, the *possibility* of progress is not the *guarantee* of progress. Bad choices as well as good can be made. Thus, in addition to a sense of Adventure, a civilization must possess four other qualities: 'Truth, Beauty . . . Art, and Peace.'¹²⁴ Truth, which is the conformation of appearances to the more complex reality, assists a civilization by assuring that its present choices will work within the underlying welter of reality. A commitment to Beauty assures that a civilization will seek to find ways either to avoid mutual inhibitions among its prehensions (the minor form of Beauty) or to find in the contrasts among seemingly irreconcilable prehensions new reconciliations and conformation of feelings (the major form of Beauty).¹²⁵ Art, of course, seeks to represent Truth and Beauty, and its depiction of 'Truthful Beauty'¹²⁶ calls us forward to new Ad-

¹²¹ See *supra* notes 107-13 and accompanying text (discussing the second form of advance into novelty in terms of Hellenistic scholarship).

¹²² ADVENTURES OF IDEAS, *supra* note 8, at 357.

¹²³ *Id.* at 359.

¹²⁴ *Id.* at 367. The first part of *Adventures of Ideas* contains Whitehead's most systematic effort to trace these virtues in the history of Western civilization. See *id.* at 1-127. The last part of *Adventures of Ideas* is devoted to their more theoretical development. See *id.* at 307-81. Other treatments of these issues include MODES OF THOUGHT, *supra* note 9, at 21-27, 62-63 (discussing modern thought's attention to history and how the study and criticism thereof has "passed through phases"); PROCESS AND REALITY, *supra* note 1, at 338-39 (explaining how the concept of "order" creates a paradox among theories of education); RELIGION IN THE MAKING, *supra* note 9, at 13-34 (discussing the historical effect of religion on humanity); SCIENCE AND THE MODERN WORLD, *supra* note 6, at 195-208 (noting the effects of science and technological advances on social progress). A good discussion of Whitehead's study on civilization and the somewhat idiosyncratic meanings Whitehead assigned to the virtues and how they are consistent with his metaphysical scheme is found in A. H. Johnson, *Whitehead's Philosophy of Civilization*, in WHITEHEAD AND THE MODERN WORLD, *supra* note 14, at 42-43.

¹²⁵ See ADVENTURES OF IDEAS, *supra* note 8, at 324 (explaining that the major form of Beauty "presupposes the first form [minor form of beauty]"). According to Whitehead, there is a relationship between Truth and Beauty, in that the truthful is often beautiful as well. But that is not invariably the case, since Beauty deals with Reality and Truth merely with the conformation of Appearance to Reality. See *id.* at 341-51. Of the two, "Beauty is a wider, and more fundamental, notion than Truth. . . . Apart from Beauty, Truth is neither good, nor bad. . . . In the absence of Beauty, Truth sinks to triviality. Truth matters because of Beauty." *Id.* at 341, 344.

¹²⁶ See *id.* at 344 ("The perfection of art has only one end, which is Truthful Beauty.").

venture.¹²⁷ Lastly, a civilization needs Peace: 'the understanding of tragedy, and at the same time its preservation.'¹²⁸ Peace sees in tragedy the disclosure of an unrealized ideal: 'What might have been, and was not: What can be.'¹²⁹ Peace thus gives to civilization the sense that impersonal, selfless, 'high aims are worth-while.'¹³⁰ 'In this way the World receives its persuasion towards such perfections as are possible for its diverse individual occasions.'¹³¹

"You never mention 'Goodness' or 'the Good' as an essential component of human society," noted Chris. "I should think that the pursuit of 'Goodness,' however defined, is more important than, say, the pursuit of Art."

"True, I do not elevate 'the Good' to a primary rank, but I have not excluded it either. Goodness is 'a qualification belonging to the constitution of reality . . . in depths and distances below and beyond appearance. . . . The real world is *good* when it is *beautiful*.'¹³² Thus, Goodness can be joined to Beauty and through Beauty to Truth. It is not necessary to provide for the notion of Goodness separately."

"But is there a necessary correspondence between the two?" pressed Chris. "I am put in mind here of Kant's *Critique of Judgment*, in which he argues that 'the beautiful is the symbol of the morally good, and only in this light . . . does it give us pleasure . . . '¹³³ Is that the sort of thing you mean?"

Whitehead considered his words carefully. "I confess that my knowledge of Kant is inadequate, and sometimes erroneous. I could have profited a great deal from a more thorough understanding of

¹²⁷ See *id.* at 344-46 (finding that the business of Art "is to render the Day of Judgment a success, now").

¹²⁸ *Id.* at 368.

¹²⁹ *Id.* at 369. Whitehead thus recognized that every actual fact has an intrinsic value. Pragmatists shared this belief with Whitehead, but they were never able to "give sufficient accounts of their supposition . . . Whitehead did." Neville, *supra* note 17, at 293 (arguing that Whitehead's account of how facts have intrinsic value is one of his most significant philosophical accomplishments). For further discussions of Whitehead's perception that each occasion of experience lay simultaneously in the "World of Fact" and the "World of Value," see *Immortality*, *supra* note 90, at 682-700; see also JUDE D. WEISENBECK, ALFRED NORTH WHITEHEAD'S PHILOSOPHY OF VALUES 64-90 (1969) (discussing Whitehead's "aspects of value").

¹³⁰ ADVENTURES OF IDEAS, *supra* note 8, at 371.

¹³¹ *Id.* at 381.

¹³² *Id.* at 345 (emphasis added).

¹³³ IMMANUEL KANT, THE CRITIQUE OF JUDGMENT 223-24 (James C. Meredith trans., 1952) (1790).

his *Critique of Judgment*.¹³⁴ Some of my own writing suggests that I too saw the same type of one-to-one correspondence between Goodness and Beauty.¹³⁵ But ultimately I must reject any simplistic equation of the two. For me, aesthetic experience is primary and highest; it cannot be reduced to a mere symbol of moral experience."¹³⁶

"So there can be Beauty without Goodness, and Goodness without Beauty?" asked Chris.

"I dislike such stark dichotomies," replied Whitehead, "Moral goodness is a species of Beauty, a part of Beauty."¹³⁷ Thus, an occasion of experience might be quite beautiful even though, from a moral point of view, it lacks the goodness of other potential satisfactions of that occasion. Conversely, the occasions of experience that are 'the most morally good' are not necessarily the occasions that

¹³⁴ Whitehead's discussions of Kant's moral theory were brief and never indicated that Whitehead understood how Kant's *Critique of Judgment* sought to unify aesthetic and moral notions. See, e.g., RELIGION IN THE MAKING, *supra* note 9, at 104-05 (explaining that Whitehead sought to extend Kant's argument); see also LUCAS, *supra* note 12, at 91-92 (speculating on how Whitehead's work might have been influenced had he read and appreciated Kant's *Critique*).

¹³⁵ In *Mathematics and the Good*, Whitehead described how to realize the Good in the same terms in which he had previously described how to achieve Beauty. Compare *Mathematics and the Good*, *supra* note 45, at 677-78 (describing mixture of order and adventure necessary for the Good), with ADVENTURES OF IDEAS, *supra* note 8, at 324-36 (describing mixture of order and adventure necessary for Beauty). For an analysis of how Whitehead's "Beauty" equates with "the Good," see John Goheen, *Whitehead's Theory of Value*, in THE PHILOSOPHY OF ALFRED NORTH WHITEHEAD, *supra* note 14, 437, 437-43. But see LUCAS, *supra* note 12, at 91-92 (considering arguments on both sides of the issue whether Whitehead would have accepted a Kantian notion that the beautiful is a symbol of the good, and finding no clear answer); Paul A. Schilpp, *Whitehead's Moral Philosophy*, in THE PHILOSOPHY OF ALFRED NORTH WHITEHEAD, *supra* note 14, 606-08, 614-15 (arguing that Whitehead inappropriately subordinated Goodness to Beauty).

In the text, I follow the line of thinking that I believe to be truer to the majority of Whitehead's own thought. See RELIGION IN THE MAKING, *supra* note 9, at 104-05 (noting that Whitehead's "metaphysical doctrine . . . finds the foundations of the world in the aesthetic experience, rather than—as with Kant—in the cognitive and conceptive experience"). It is also the line of thinking that joins the issue with Kant most clearly.

¹³⁶ See 1 LOWE, *supra* note 2, at 134 (noting that "Whitehead's emphasis on the aesthetic . . . has several sources"); LUCAS, *supra* note 12, at 92; WEISENBECK, *supra* note 129, at 106-08 (discussing the "Primacy of Aesthetic Values"); RELIGION IN THE MAKING, *supra* note 9, at 105 ("All order is therefore aesthetic order . . .").

¹³⁷ According to Whitehead, the three types of Beauty are sensible (aesthetic), intellectual, and moral; and of those three, "intellectual fineness" can be regarded as beautiful only "by stretch of metaphor." ADVENTURES OF IDEAS, *supra* note 8, at 12-13; see RELIGION IN THE MAKING, *supra* note 9, at 105 ("[T]he moral order is merely certain aspects of aesthetic order."); *Autobiographical Notes*, *supra* note 2, at 8; see also LYNNE BELAIEF, TOWARD A WHITEHEADIAN ETHICS 51-52 (1984) (stating that Beauty's "metaphysical primacy" does not mean that morality is irrelevant to an occasion's fulfillment); WEISENBECK, *supra* note 129, at 91 (stating that, in Whitehead's system, "[i]n some sense, all value are aesthetic values").

are the most beautiful. An occasion may be more aesthetically beautiful than it is morally good, or it may be more morally good than aesthetically beautiful."

"And when morals and aesthetics differ, should we opt for the occasion that is, overall, the most beautiful or the occasion that is, overall, the most good?"

"An occasion of experience is free to opt for either (or for neither), as long as it is possible to do so. My metaphysics creates no normative command that an occasion or a civilization *must* choose one or the other. To the extent that an occasion of experience or a civilization aims at the highest perfection then attainable—and I think that this is the question that you are really asking—my answer would be that the occasion or the civilization should aim for the beautiful. Beauty necessarily occupies a primary rank in my system. The aesthetic experience of receiving and reconciling conflicting prehensions into patterns of harmony is constitutive of each and every occasion of experience; 'an actual fact is a fact of aesthetic experience.'¹³⁸ '[T]he primary factors in experience are first the animal passions such as love, sympathy, ferocity, together with analogous appetitions and satisfactions; and secondly, the more distinctly human experiences of beauty, and of intellectual fineness, consciously enjoyed.'¹³⁹ Morality and goodness do not occupy the same rank; '[t]he moral element is derivative from the other factors in experience.'¹⁴⁰ This does not mean that morality and goodness are irrelevant to beauty; as I said, 'moral beauty' is an aspect of that Beauty that represents the highest perfection for an occasion of human experience. But it does mean that the achievement of morality and goodness are not the highest goals of all occasions of experience."

"The highest goal being Beauty?" Chris asked.

"Yes," replied Whitehead. "'The teleology of the Universe is directed to the production of Beauty.'¹⁴¹ '[B]eauty, moral and aesthetic, is the aim of existence';¹⁴² 'Beauty is left as the one aim which by its very nature is self-justifying';¹⁴³ Beauty alone 'provides

¹³⁸ PROCESS AND REALITY, *supra* note 1, at 280; *see id.* at 279 ("An intense experience is an aesthetic fact . . .").

¹³⁹ ADVENTURES OF IDEAS, *supra* note 8, at 12.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 341.

¹⁴² *Autobiographical Notes*, *supra* note 2, at 8.

¹⁴³ ADVENTURES OF IDEAS, *supra* note 8, at 342.

the final contentment for the Eros of the Universe.¹⁴⁴ The pursuit of moral goodness is justified to the extent that this pursuit creates Beauty; otherwise, the pursuit has 'no special importance.'¹⁴⁵

"Your emphasis on Beauty is reminiscent of the work of your contemporary, G.E. Moore," said Chris.

"To a degree," said Whitehead. "Many of my colleagues at Oxford and Cambridge were influenced by Moore's notion that the enjoyment of beautiful objects was a primary component of goodness in human experience.¹⁴⁶ But I was not particularly influenced by Moore."¹⁴⁷

"Perhaps then you had better tell me more about Beauty," said Chris.

"Certainly," replied Whitehead. "Let me begin by discussing the notion of evil. '[E]vil is exhibited in . . . [the] loss of the higher experience in favour of the lower experience.'¹⁴⁸ There are two basic forms of evil. The first type is 'the evil of triviality', or the failure to aim for the highest perfection possible.¹⁴⁹ The second type of evil is

¹⁴⁴ *Id.* at 13. "Eros of the Universe" is one of Whitehead's phrases for God. Compare *id.* at 354 (calling the Eros "the urge towards the realization of ideal perfection"), with *PROCESS AND REALITY*, *supra* note 1, at 342-44 (describing God as the entity that supplies each occasion of experience with its initial subjective aim to achieve beauty).

¹⁴⁵ *ADVENTURES OF IDEAS*, *supra* note 8, at 342.

¹⁴⁶ See G.E. MOORE, *PRINCIPIA ETHICA* 188-202 (1959) ("[P]ersonal affections and aesthetic enjoyments include *all* the greatest, and *by far* the greatest, goods we can imagine . . .").

¹⁴⁷ Whitehead knew Moore, an influential member of the "Bloomsbury Circle" of Oxford and Cambridge cognoscenti at the turn of the century, both through Moore's contacts with Whitehead's then-collaborator, Bertrand Russell, and through their subsequent joint membership in the London Aristotelian Society. See 1 LOWE, *supra* note 2, at 230-31 (discussing Russell and Moore's relationship); 2 LOWE, *supra* note 2, at 90 (noting prominent members of the Aristotelian Society). But Whitehead credited his wife Evelyn, who "taught [him] that beauty, moral and aesthetic, is the aim of existence," as the person who primarily influenced his views on the importance of aesthetic values. *Autobiographical Notes*, *supra* note 2, at 8. According to his principal biographer, Whitehead was also influenced by a friend, Roger Fry. See 1 LOWE, *supra* note 2, at 132-34. The same biographer dismisses the notion that Moore had any significant influence on Whitehead. See *id.* (noting, instead, the influence of others on Whitehead, such as Roger Fry and Nathaniel Wedd); 2 LOWE, *supra* note 2, at 109 ("[C]ommentators have mistakenly assumed that [Whitehead's] views were largely shaped by Russell and Moore."). Indeed, there were some significant disagreements, both personal and philosophical, between the two. See 2 LOWE, *supra* note 2, at 91-92 (recounting Moore's rude confrontation with Whitehead); see also *id.* at 185 (describing philosophical divergence and Moore's "scathing review" of one of Whitehead's works). Whitehead never refers to Moore or his ideas in any of his works. See WEISENBECK, *supra* note 129, at 15 (describing this absence of reference as a "curious fact"). Whitehead himself traced the philosophical argument for the primacy of aesthetic values to Plato, who recognized that Harmony, which Whitehead argued was a component of Beauty, was one of the seven generalities regulating all existence. See *ADVENTURES OF IDEAS*, *supra* note 8, at 354, 366.

¹⁴⁸ *RELIGION IN THE MAKING*, *supra* note 9, at 95.

¹⁴⁹ *Mathematics and the Good*, *supra* note 45, at 679.

the evil of 'active deprivation.'¹⁵⁰ This form of evil arises from the entertainment of two or more realities or concepts that conflict.¹⁵¹ The entertainment of such a conflict creates a 'feeling of mutual destructiveness, so that one or other—or both—of the component feelings fails to attain the strength properly belonging' to it.¹⁵² When this sense of 'destruction [becomes] a dominant fact in the experience,'¹⁵³ we experience 'the feeling of evil in the most general sense': the experience of 'aesthetic destruction.'¹⁵⁴ In essence, therefore, evil is associated either with an excess of order—hence the evil of triviality—or an excess of discord—hence the evil of aesthetic destruction.

"Beauty is the absence of the latter form of evil. That which is beautiful contains no inharmonious or conflicting feelings—no sense of aesthetic destruction. 'Beauty is the internal conformation of the various items of experience with each other, for the production of maximum effectiveness.'"¹⁵⁵

"That seems a very broad understanding of Beauty," said Chris. "Many different, and even inconsistent, things could be beautiful under that definition."

"True," replied Whitehead. "I was simply describing the minimal content of Beauty. With such a minimal understanding, many different things could be said to be beautiful. Indeed, 'any part of experience can be beautiful.'¹⁵⁶ Even when the vulgar or ugly dominates, 'there is some minimal degree of harmony between the component parts of all entities.'¹⁵⁷

"There are, however, 'gradations in Beauty and in types of Beauty.'¹⁵⁸ Some occasions contain more Beauty than others. The minimal standard of Beauty that I just described, in which an occasion simply shuts out all non-conforming and conflicting feelings, is beautiful only in a minor sense; there exists only 'the absence of

¹⁵⁰ *Id.*

¹⁵¹ Whitehead recognized that three distinct types of conflict were possible: "a concept may conflict with a reality, or two realities may conflict, or two concepts may conflict." *Id.*

¹⁵² ADVENTURES OF IDEAS, *supra* note 8, at 329-30.

¹⁵³ *Id.* at 333 (quotations omitted); *see id.* at 339 ("When the direct feeling of such Destruction dominates the whole, there is the immediate feeling of evil . . .").

¹⁵⁴ *Id.* at 330 (quotations omitted); *see Mathematics and the Good*, *supra* note 45, at 679 (calling this type of destruction "the intense evil of active deprivation").

¹⁵⁵ ADVENTURES OF IDEAS, *supra* note 8, at 341.

¹⁵⁶ *Id.*

¹⁵⁷ WEISENBECK, *supra* note 129, at 103.

¹⁵⁸ ADVENTURES OF IDEAS, *supra* note 8, at 324.

painful clash, the absence of vulgarity.¹⁵⁹ This Beauty is trivial, and therefore, although not evil in the latter sense, it risks being evil in the former sense. There is also, however, 'the major form of Beauty,' which 'presupposes the . . . form [of minor Beauty], and adds to it the condition that the conjunction in one synthesis of the various prehensions introduces new contrasts of objective content with objective content.'¹⁶⁰ The contrasts among the strong individual components of the experience are not shut off or dismissed; they are consciously raised and then reconciled within a broader feeling of conformity. Anything beautiful in a major sense unifies the disparate parts of an occasion while still preserving their individuality; the unity of the whole and the individuality of each part are both maintained.¹⁶¹ Therefore, that which is beautiful in a major sense avoids both the evil of triviality and the evil of aesthetic destruction."

"But minor and major Beauty are just the two general types of Beauty, aren't they?" asked Chris. "What I'm getting at is the question whether there are further gradations of Beauty within the general types, minor and major. And if so, is it possible to say that one particular satisfaction of an occasion of experience is *the* most beautiful outcome for that occasion, so that all other outcomes, however much Beauty they might create, are less beautiful?"

"Yes," said Whitehead, "there is 'the perfection of Beauty,' which we can define 'as being the perfection of Harmony.'¹⁶²

"And so is it true that this highest perfection of Beauty is what we should aim for in each occasion of experience?"

"No," said Whitehead, patiently. "Remember, no perfection is everlasting and imperfections that aim at ideals greater than the highest perfection now attainable are preferable to the present perfection.¹⁶³ To avoid the descent into tedium caused by the pursuit of a particular form of Beauty and to achieve even greater Beauty at some point in the future, it is necessary, at least on some occasions, to select an aim destructive of, or inconsistent with, the highest

¹⁵⁹ *Id.*; see *id.* at 339 ("A mere qualitative Harmony within an experience comparatively barren of objects of high significance is a debased type of Harmony, tame, vague, deficient in outline and intention.").

¹⁶⁰ *Id.* at 324.

¹⁶¹ See *id.* at 338-39, 363-64 (explaining that Beauty "derives its strength from the concurrence of significant individual objects, and its own existence adds to the significance of those objects").

¹⁶² *Id.* at 325.

¹⁶³ See *supra* notes 98-99 and accompanying text.

form of Beauty attainable at the moment.¹⁶⁴ On other occasions, however, you are correct: the aim that maximizes present Beauty is the aim that an occasion should ideally select. Sometimes the evil of aesthetic destruction is preferable to any immediately attainable Beauty; sometimes the attainable Beauty is preferable to its aesthetic destruction.”

“How are people to know how to conduct themselves, so that they strive for the most beautiful when appropriate and strive beyond that beauty when appropriate?” asked Chris.

“For a civilization to advance, three conditions must be integrated in each present occasion: ‘the infusion of pattern into natural occurrences, and the stability of such patterns, and the modification of such patterns.’¹⁶⁵ The first two conditions, of course, ensure the existence of order; the last condition guarantees a measure of chaos. Moreover, I can also describe the way in which these conditions must interact in order to achieve the optimal blend of Beauty and Novelty at any given time.

The art of progress is to preserve order amid change, and to preserve change amid order. . . . What is required . . . is order entering upon novelty; so that the massiveness of order does not degenerate into mere repetition; and so that the novelty is always reflected upon a background of system.

But the two elements must not really be disjoined. It belongs to the goodness of the world, that its settled order should deal tenderly with the faint discordant light of the dawn of another age. . . . The old dominance should be transformed into the firm foundations, upon which new feelings arise, drawing their intensities from delicacies of contrast between system and freshness. In either alternative of excess, whether the past be lost, or be dominant, the present is

¹⁶⁴ See ADVENTURES OF IDEAS, *supra* note 8, at 330-31 (“[T]he contribution to Beauty which can be supplied by Discord—in itself destructive and evil—is the positive feeling of a quick shift of aim from the tameness of outworn perfection to some other ideal with its freshness still upon it.”).

¹⁶⁵ *Mathematics and the Good*, *supra* note 45, at 677-78. Whitehead described these three conditions as “the necessary condition[s] for the realization of the Good.” *Id.* at 678. In this context, Whitehead seemed to intend “the Good” to mean “the optimal advancement of a civilization,” not “the morally most appropriate.” But Whitehead’s loose language is not free from doubt. See *supra* notes 135-36 and accompanying text (referring to Whitehead’s seemingly contradictory positions concerning the relationship between Goodness and Beauty).

enfeebled. This is only an application of Aristotle's doctrine of the 'golden mean.'¹⁶⁶

"A fine theory, Professor Whitehead," said Chris, "but you didn't answer the question. Can you tell me what my optimal conduct at this moment actually is?"

"Sadly, no. We are incapable of consciously prehending the massive details of past occasions that might help us know the best outcome for the present occasion. God, who holds in mind all such occasions, knows; and God supplies each occasion with its lure to achieve the greatest Beauty possible.¹⁶⁷ We in turn can be sensitive to that lure; hence, the importance of religion. But beyond that, we can only aim at an approximation of the combination of ideals—freedom, equality, justice, compassion, and so forth—that in fact is optimal."¹⁶⁸

"Then how can anyone ever speak with moral authority?" asked Chris. "You concede that Goodness is not fundamental in the way that Beauty is. Now you concede that we need not always pursue Beauty; chaos and discord, which are so often destructive of both Beauty and Goodness, are also fundamental. I recur my earlier question about human agency. Is it ever possible to say that *this* is right and *that* is wrong; that mass campaigns of genocide are immoral; or that we are in any meaningful sense accountable for what we do?"

"I believe so." Whitehead replied. "Moral beauty is an aspect of Beauty. Beauty, either in the present or (after a period of discord) in the future, is the aim of existence. Therefore, although I concede that the pursuit of moral goodness is not the sole aim of existence, I refuse to concede that the pursuit of moral goodness is irrelevant to the aim of existence.

"Indeed, even though my own work lacks any systematic treatment of morality,¹⁶⁹ I recognize its central place in a civilization."¹⁷⁰

¹⁶⁶ PROCESS AND REALITY, *supra* note 1, at 339. Note again Whitehead's rather loose use of the word "goodness." See *supra* note 135 and accompanying text.

¹⁶⁷ See *supra* notes 78-79 and accompanying text.

¹⁶⁸ See WEISENBECK, *supra* note 129, at 82-83 (noting that "it is evident both that not all ideals are realized nor is any one ideal ever realized perfectly").

¹⁶⁹ Scholars have long debated Whitehead's commitment to moral and ethical theory. See WEISENBECK, *supra* note 129, at 130-33 (discussing how morality and ethical principles are the "least developed aspect[s] of his theory of values"). It is clear that Whitehead never developed a complete ethical system. He was, however, extremely "interested in the good of human society and the problems and future of human civilization." *Id.* at 131. Others following in Whitehead's tradition have sought to develop a more thoroughgoing ethical theory. See, e.g., BELAIEF, *supra* note 137, at 53 (elaborating on Whitehead's ethical theories). For a

'Morality consists in the control of process so as to maximize importance;' it 'is always the aim at that union of harmony, intensity, and vividness which involves the perfection of importance for that occasion.'¹⁷¹ Put differently, morality 'consists in the aim at the ideal, and at its lowest it concerns the prevention of relapse to lower levels.'¹⁷² Therefore, at a minimum, the moral life will prevent a relapse to lower levels of perfection; ideally it will go beyond that and aim at higher levels of perfection.¹⁷³

"Certain general precepts can be derived from this stance toward morality. Most important,

[w]e have no right to deface the value-experience which is the very essence of the universe.¹⁷⁴ The destruction of a man, or of an insect, or of a tree, or of the Parthenon, may be moral or immoral. . . . Whether we destroy, or whether we preserve, our action is moral if we have thereby safe-guarded the importance of experience so far as it depends on that concrete instance in the world's history.¹⁷⁵

development of Whitehead's notion of aesthetics, see Daniel D. Williams, *Moral Obligations in Process Philosophy*, 56 J. PHIL. 263 (1959).

¹⁷⁰ See PROCESS AND REALITY, *supra* note 1, at 105 ("[W]hether or no (sic) it be for the general good, life is robbery. It is at this point that with life morals become acute. The robber requires justification.").

¹⁷¹ MODES OF THOUGHT, *supra* note 9, at 19.

¹⁷² ADVENTURES OF IDEAS, *supra* note 8, at 346.

¹⁷³ See WEISENBECK, *supra* note 129, at 134 (defining Whitehead's morality as "the control of process, that is, the control of activity in which there is a choice among alternatives"). Whitehead bemoaned the fact that "[m]ankind has been afflicted with low-toned moralists" fiercely opposed to "new ideals"; afflicted, in other words, with persons who have used morality merely to maintain the status quo and to prevent relapses to lower levels of perfection. ADVENTURES OF IDEAS, *supra* note 8, at 346; see also *id.* at 345 ("[T]he defence of morals is the battle-cry which best rallies stupidity against change."). Whitehead thought that morality had a nobler calling: to carry humanity toward higher levels of perfection. Under this view, "stagnation is the deadly foe of morality." *Id.* at 346.

¹⁷⁴ MODES OF THOUGHT, *supra* note 9, at 151.

¹⁷⁵ *Id.* at 20. For instance, Whitehead believed that, given the circumstances to which the world had then come, the British decision to fight in World War I was justifiable. Although he recognized that compulsory military service was a "grave evil" because "[t]he forcing of conscience is always an evil," he believed that compulsory service "is not comparable to the awful evil involved in the breakup of a state—in particular, not comparable to the horrors through which the world is now passing." Letter from Alfred North Whitehead to Bertrand Russell (Apr. 16, 1915), reprinted in 2 LOWE, *supra* note 2, at 35-36 [hereinafter Letter]. Indeed, Whitehead's refusal to adopt a categorically pacifist stance during World War I has been suggested as a primary reason for the cooling of the fertile relationship between Whitehead and Russell, who ultimately went to prison for his pacifist activities. See 2 LOWE, *supra* note 2, at 27-28, 34-40; LUCAS, *supra* note 12, at 111 (explaining that while Whitehead attributed the cooling off "to a divergence of 'fundamental points of view,'" Russell conceded that his pacifist views strained the friendship and created a tension for which he took the principal blame).

"Concomitantly, we must preserve the freedom of people to be diverse, to enter into the novelty of experience. With sameness comes anesthesia and, eventually, collapse. When we provide the freedom to be different, we provide the possibility for adventures that aim at new, previously undiscovered ideals of perfection."

"But you cannot derive from this stance toward morality any specific rules of moral conduct, can you?" asked Chris.

"You cannot derive any precise and everlasting code of conduct, if that is what you mean," said Whitehead.

There is no one behaviour-system belonging to the essential character of the universe, as the universal moral ideal;¹⁷⁶ the notion that there are certain regulative notions, sufficiently precise to prescribe details of conduct, for all reasonable beings on Earth, in every planet, and in every star-system, [must] be put aside.¹⁷⁷

"But moral codes, commandments, proscriptions, taboos, and other 'formularized moral precepts' are hardly useless; they have great value for the 'general health of social life.'¹⁷⁸ These 'codifications carry us beyond our own direct immediate insights. They involve the usual judgments valid for the usual occasions in that epoch.'¹⁷⁹ Moral precepts become useless, or worse, only when they become unduly rigid and intolerant. At best, the details of a particular moral code 'are relative to the social circumstances of the immediate environment'; the fact that 'in details [moral codes] fail to agree either with each other or with our existing moral intuitions' is sufficient proof of this point.¹⁸⁰

For example, consider the ten commandments. Can we really hold that a rest day once in seven days, as distinct from once in six or eight days, is an ultimate moral law of the universe? . . . Evidently, the commandments are to be construed with common sense. In other words, they are formulations of behaviours which in ordinary circumstances, apart from very special reasons, it is better to adopt.¹⁸¹

"Therefore, a successful moral code will always retain a certain provisional quality that deals tenderly with novel conduct that aims

¹⁷⁶ *MODES OF THOUGHT*, *supra* note 9, at 20.

¹⁷⁷ *ADVENTURES OF IDEAS*, *supra* note 8, at 375.

¹⁷⁸ *Id.* at 373.

¹⁷⁹ *MODES OF THOUGHT*, *supra* note 9, at 19.

¹⁸⁰ *ADVENTURES OF IDEAS*, *supra* note 8, at 374.

¹⁸¹ *MODES OF THOUGHT*, *supra* note 9, at 19-20.

at higher perfections. To the extent that a moral code lacks this sensitivity, it can be ignored in pursuit of greater perfection. For this reason, two of the great grounds of creative advance—Love and Art—are ‘a little oblivious as to morals.’”¹⁸²

“But cannot the serial murderer say that he was morally justified because his conduct was a creative advance aimed at some ideal of perfection?” asked Chris.

“Of course not, for four reasons,” answered Whitehead crisply. “First, a moral choice requires a balance of importance between personal fulfillment and the fulfillment of others.

Morality of outlook is inseparably conjoined with generality of outlook. The antithesis between the general good and the individual interest can be abolished only when the individual is such that its interest is the general good, thus exemplifying the loss of the minor intensities in order to find them again with finer composition in a wider sweep of interest.”¹⁸³

Barring extenuating circumstances that you have not revealed, these principles suggest that your serial murderer cannot be morally justified.

“The second reason follows from the nature of Beauty. Morality aims to bring about the creation of some form of Beauty. Beauty, however, requires that feelings of discord and disharmony be eliminated.¹⁸⁴ For everyone save perhaps the murderer, the serial murders will create dominant feelings of senseless destruction; discord and disharmony will reign. In no circumstances that I can presently envision would serial murder create Beauty.

“Third, the murderer’s claim ignores the true nature of freedom. Individual freedom is not absolute; on the contrary, the notion of absolute freedom denies the metaphysical relatedness of the past to the present.¹⁸⁵ Absolute freedom means absolute chaos; and we have already established that a modicum of order is essential to any progress toward higher ideals.¹⁸⁶ Therefore, to the extent that the

¹⁸² PROCESS AND REALITY, *supra* note 1, at 343. In this quotation Whitehead was referring specifically to love. For a nearly identical statement regarding art, see ADVENTURES OF IDEAS, *supra* note 8, at 345-46.

¹⁸³ PROCESS AND REALITY, *supra* note 1, at 15.

¹⁸⁴ See *supra* notes 148-57 and accompanying text.

¹⁸⁵ See *supra* notes 63-70 and accompanying text.

¹⁸⁶ See *supra* notes 104-05 and accompanying text; see also ADVENTURES OF IDEAS, *supra* note 8, at 86 (“Freedom means that within each type [of character] the requisite coordination should be possible without the destruction of the general ends of the whole community.”).

serial killer justifies himself in terms of the freedom to do as he wishes, his justification fails.

"The final reply to the murderer is more complex, and involves the relative merit of persuasion in relation to force. That I prefer persuasion to force should be no surprise. I prefer progress. Progress requires diversity and freedom. Force retards progress, for its demand of conformity to an established order stifles diversity and freedom. I cannot deny that force is to some extent necessary; in any society '[t]here can be no evasion of the plain fact that compulsion is necessary and that compulsion is the restriction of liberty.'¹⁸⁷ But persuasion is the vehicle through which progress is ultimately fostered. Persuasion does not demand; it lures. It gives each actual occasion the opportunity to be free, arguing for a particular outcome but not demanding it. Persuasion urges an occasion beyond the known safe patterns of order 'towards such perfections as are possible.'¹⁸⁸ This is how God works,¹⁸⁹ and this is how civilized advance has been possible. "The creation of the world—that is to say, the world of civilized order—is the victory of persuasion over force.'¹⁹⁰ 'The worth of men consists in their liability to persuasion,' not in their capacity to impose their will on others.'¹⁹¹

"Your murderer uses force rather than persuasion, which is the presumptively worse choice. Thus, the murderer bears a heavy, and likely insurmountable, burden of justification."

"Your notion of persuasion being better than force would seem to have significant implications for the structure of social institutions and for the role of law," said Chris.

"Certainly you are correct with respect to social, economic, and political arrangements. "The worth of any social system depends on the value experience it promotes among individual human beings. . . . Thus social life is the provision of opportunity.'¹⁹² In the

¹⁸⁷ ADVENTURES OF IDEAS, *supra* note 8, at 71.

¹⁸⁸ *Id.* at 381.

¹⁸⁹ See *supra* notes 78-80 and accompanying text (describing God as one who possesses the power of persuasion, but not the absolute power to control past or future occasions).

¹⁹⁰ ADVENTURES OF IDEAS, *supra* note 8, at 31; see *id.* at 53 ("Force is always against [the great idea]. [The] victory [of an idea] is the victory of persuasion over force."); see also *id.* at 109 ("The progressive societies are those which most decisively have trusted themselves to . . . the way of persuasion.").

¹⁹¹ *Id.* at 105.

¹⁹² Alfred North Whitehead, *An Appeal to Sanity* [hereinafter *An Appeal to Sanity*], in ESSAYS, *supra* note 2, 64-65; see Alfred North Whitehead, *Liberty and the Enfranchisement of Women*, 7 PROCESS STUD. 37, 37 (1977) [hereinafter *Liberty*] (reprinting 1906 speech of Whitehead supporting women's suffrage, during the course of which Whitehead remarked

days of iron utensils, subsistence farming, and pestilence, the dominance of force over persuasion was inevitable.¹⁹³ With the technological, transportation, and communications advances of the last century, however, the possibility of an era of widespread opportunity and freedom has arrived.

"So how do we set about making this possibility a reality?¹⁹⁴ First, 'a doctrine as to the social mingling of liberty and compulsion is required. A mere unqualified demand for liberty is the issue of shallow philosophy, equally noxious with the antithetical cry for mere conformation to standard pattern.'¹⁹⁵ Next, '[i]n the immediate present, economic organization constitutes the most massive problem of human relationships.'¹⁹⁶ A laissez-faire attitude, which presupposes, in contradiction to established fact, that individuals are rational economic actors, must be abandoned.¹⁹⁷ Workers 'must

that the State was "that great organism on whose well-being depends the nature of opportunities which life can offer to each individual").

¹⁹³ See *ADVENTURES OF IDEAS*, *supra* note 8, at 84 ("Birth and death, heat, cold, hunger, separation, disease, the general impracticability of purpose, all bring their quota to imprison the souls of women and of men.").

¹⁹⁴ Writing in the 1920s and 1930s, Whitehead expressed some doubt that the materialism rampant in Western societies could be harnessed for the good. See *SCIENCE AND THE MODERN WORLD*, *supra* note 6, at 205. Whitehead remarked that,

[i]t is obvious that the gain in material power affords opportunity for social betterment. If mankind can rise to the occasion, there lies in front a golden age of beneficent creativeness. But material power in itself is ethically neutral. . . . [D]uring the last three generations, the exclusive direction of attention to this aspect of things has been a disaster of the first magnitude.

Id.; see *id.* at 203 ("It may be that civilisation will never recover from the bad climate which enveloped the introduction of machinery."). There is little reason to suppose that the economic history of the past 60 years would make Whitehead more optimistic. See, e.g., Johnson, *supra* note 124, at 48-49 (noting that Whitehead felt that "Beauty is lost or degraded [and] [t]ruth . . . wilt[s] under the glare of modern advertising," because merchandising involves little initiative).

¹⁹⁵ *ADVENTURES OF IDEAS*, *supra* note 8, at 71.

¹⁹⁶ *Id.* at 79; see *id.* at 85 ("[T]he plain economic facts of life must be the governing force in social development.").

¹⁹⁷ See *id.* at 41-44 (criticizing foundations and results of classical laissez-faire liberalism); see also *id.* at 91 (arguing that development of classical economics was the result of "moralizing tendency" of dominant commercial classes to believe that the "ideal of commercial activity [was] the main occupation of perfected civilization"; this mistake "led to the consideration of economic laws which *should* hold, and to the neglect of economic procedures which in fact *did* hold"); *id.* at 118-20 (rejecting "artificial simplifications" of classical economics); *SCIENCE AND THE MODERN WORLD*, *supra* note 6, at 200 (arguing that science of political economy "did more harm than good," for it "dehumanised industry"). Whitehead saw no contradiction in his desire to provide individual opportunity and his dislike of the laissez-faire state. Whitehead believed that the most intense value experiences (and the ones to which the freedom to pursue the novel lure will hopefully lead) regard the common good rather than the private good. See *supra* notes 130, 183 and accompanying text (explaining the importance of the balance between personal fulfillment and the fulfillment of others and

have more opportunities to do creative work, diversified and satisfying.¹⁹⁸ Business leaders must shake off excessive concerns with profits, for 'the motive of success . . . produces a short-sighted world which destroys the sources of its own prosperity. . . . A great society is a society in which its men of business think greatly of their functions.'¹⁹⁹ Action in accordance with the general greatness of the community is essential to sustained prosperity.

"More specifically, we must create 'a wide distribution of institutions founded upon professional qualifications.'²⁰⁰ Professional training can overcome narrow self-interest by uncovering the connections between a specific field of practice and issues of broader social concern. Professionals and business people must receive a liberal education in art and aesthetic appreciation in addition to depth of training in their specific field.²⁰¹ Philosophy, which weighs together 'the fact, the theory, the alternatives, and the ideal,' lies at the heart of such an education.²⁰²

"Finally, we must be committed to the proposition that 'freedom of action is a primary human need.'²⁰³ For too long we have been deceived by the poet and the politician to regard other freedoms—'freedom of thought, freedom of the press, freedom for religious

the theory that peace teaches civilization that selfless acts are worthwhile). In Whitehead's view, the relationship between individuals and the civilization is complex and symbiotic: the civilization survives only by preserving the diversity of individual opportunity, while the individual pursuit of diversity must consider the good of all. See *PROCESS AND REALITY*, *supra* note 1, at 15.

¹⁹⁸ Johnson, *supra* note 124, at 49. For Whitehead's own words, see *ADVENTURES OF IDEAS*, *supra* note 8, at 123-25 ("Low thoughts mean low behaviour, and . . . low behaviour means a descending standard of life."); *SCIENCE AND THE MODERN WORLD*, *supra* note 6, at 200-04 ("A static value, however serious and important, becomes unendurable. . . . The soul cries aloud for release into change."); see also PRICE, *supra* note 18, at 94 ("[T]here has always been misery at the bottom of society: in the ancient world, slavery; in the mediaeval world, serfdom; since the development of machine technique, industrial proletariates.").

¹⁹⁹ *ADVENTURES OF IDEAS*, *supra* note 8, at 124.

²⁰⁰ *Id.* at 72. Whitehead defined a profession to be "an avocation whose activities are subjected to theoretical analysis, and are modified by theoretical conclusions derived from that analysis. . . . [F]oresight based upon theory, and theory based upon understanding of the nature of things, are essential to a profession." *Id.*

²⁰¹ See *SCIENCE AND THE MODERN WORLD*, *supra* note 6, at 198-99 ("We are too exclusively bookish in our scholastic routine.").

²⁰² *ADVENTURES OF IDEAS*, *supra* note 8, at 125. As always, Whitehead conceived of philosophy not as "a ferocious debate between irritable professors," but as "a survey of possibilities and their comparison with actualities;" it is "at once general and concrete, critical and appreciative of direct intuition." *Id.*

²⁰³ *Id.* at 84.

opinions'—as the primary freedoms, when in reality, they are subservient to the freedom from the brute needs of survival."²⁰⁴

"And on the political front?" asked Chris.

"In international affairs, tolerance is essential. There are two methods by which different nations can interact: first, by force, war, slavery, and government compulsion; and second, by persuasion, cooperation, and commerce in goods and ideas.²⁰⁵ Force sometimes is required.²⁰⁶ But rarely, since, '[w]ar can protect; it cannot create. Indeed, war adds to the brutality that frustrates creation. The protection of war should be the last resort in the slow progress of mankind towards its far-off ideals.'²⁰⁷ For the most part, only political institutions founded upon notions of persuasion and cooperation can hope to survive.²⁰⁸

"Consider the evidence of human history. The Roman Empire, the glorious empires of China, of India, and of Egypt—all ultimately relied upon 'the sway of conquerors over conquered populations . . . upon the rule of individual masters over slaves . . . [and upon the] rule of men over women.'²⁰⁹ Each ultimately degenerated and failed, for the simple reason that '[t]he Gospel of Force is incompatible with a social life.'²¹⁰ Granting that some 'dominion of men over men' is necessary insofar as 'it secures the coordination of be-

²⁰⁴ *Id.* ("Prometheus did not bring to mankind freedom of the press. He procured fire . . .").

²⁰⁵ *See id.* at 105-06.

²⁰⁶ *See Letter, supra* note 175, at 35 (admitting that a State has the right to use force "against enemies, external and internal"). Whitehead thought that the Allies were correct to fight in World War I, and ultimately (though sadly) reconciled himself to World War II. *See PITTENGER, supra* note 2, at 9-10 (explaining how Whitehead, instead of minimizing the war, saw "in it the working out of the purposes of good"); PRICE, *supra* note 18, at 18, 129-30 (discussing the impact of World War II on the Whiteheads and their views on whether America should become involved in World War II); *supra* note 175 (describing Whitehead's views on compulsory military service during World War I).

²⁰⁷ *An Appeal to Sanity, supra* note 192, at 74; *see id.* at 59 (suggesting that Germany should be forcibly prevented only if it violently interferes with other states, if consequences of a war are less than the consequences of non-action, and if war will be successful in obtaining its object). In *An Appeal to Sanity*, Whitehead argued, naively in retrospect, against Britain waging war in order to stop Germany's expansion in Europe. *See id.* at 59-63.

²⁰⁸ *See id.* at 69 (arguing that, within the British Empire, "[t]he final ideal is a large friendly cooperation of the populations concerned, each self-governing"); *id.* at 74 (stating that "a new world [is] waiting to be born" from the "fusion" of Muslim and Jewish cultures, "each with their own skills and their own memories, and their own ideals"); *see also* ADVENTURES OF IDEAS, *supra* note 8, at 105 ("The recourse to force, however, unavoidable, is a disclosure of the failure of civilization, either in the general society or in a remnant of individuals.").

²⁰⁹ ADVENTURES OF IDEAS, *supra* note 8, at 106.

²¹⁰ SCIENCE AND THE MODERN WORLD, *supra* note 6, at 206.

haviour necessary for social welfare,' it is nonetheless 'fatal to extend this dominion beyond the barest limits necessary for this coordination. The progressive societies are those which most decisively have trusted themselves to . . . the way of persuasion.'²¹¹

"Next to the Gospel of Force, the great danger in international relations is 'the Gospel of Uniformity. The differences between the nations and races of mankind are required to preserve the conditions under which higher development is possible. . . . Other nations of different habits are not enemies: they are godsend.'²¹²

"I have rarely considered a domestic political agenda. Charles Hartshorne has argued that process philosophy's 'metaphysics of freedom' is unequivocally a 'metaphysics of democracy.'²¹³ I am inclined to accept his judgment,²¹⁴ although I am not blindly optimistic about democracy.²¹⁵ '[T]he task of democracy is to relieve mass misery and yet preserve the freedom of the individual.'²¹⁶ But it too involves coercion: the coercion by the majority against the minority. The vision of the ruling majority can be unfortunately narrow unless the democracy contains a populace that can see beyond self-interest to the society's broader interests.²¹⁷ This is especially true now, when the pace of change means that the world fifty years hence will be significantly different from the world of today.'²¹⁸

²¹¹ ADVENTURES OF IDEAS, *supra* note 8, at 108-09.

²¹² SCIENCE AND THE MODERN WORLD, *supra* note 6, at 206-07.

²¹³ DIVINE RELATIVITY, *supra* note 14, at 50. For a synthesis of Hartshorne's effort to equate process metaphysics and democracy, see MORRIS, *supra* note 16, at 116-31. Hartshorne's critical response to Morris's interpretation is found in Charles Hartshorne, *Some Comments on Randall Morris' Process Philosophy and Political Ideology*, 21 PROCESS STUD. 149 (1992).

²¹⁴ See MODES OF THOUGHT, *supra* note 9, at 151 ("The basis of democracy is the common fact of value-experience, as constituting the essential nature of each pulsation of actuality. Everything has some value for itself, for others, and for the whole."); *An Appeal to Sanity*, *supra* note 192, at 65 (noting that "the 'totalitarian' doctrine is hateful," because in a totalitarian regime, "human nature is dwarfed" by its "complete subordination to the limitations of one community").

²¹⁵ Nor was he committed to any particular form of democracy. See PRICE, *supra* note 18, at 272 (quoting Whitehead as saying that "[w]e English and Americans . . . are singularly unimaginative in our interpretations of the term 'democracy'; we seem unable to admit under our definition any form of society which does not conform closely to our own").

²¹⁶ *Id.* at 94 (quoting Whitehead).

²¹⁷ See ADVENTURES OF IDEAS, *supra* note 8, at 124-25 (discussing how philosophy is needed for a democratic society to be successful); SCIENCE AND THE MODERN WORLD, *supra* note 6, at 198, 203, 206-07 (noting Whitehead's belief that in order to preserve a society, there must be mutual assistance).

²¹⁸ See ADVENTURES OF IDEAS, *supra* note 8, at 117-18 ("We are living in the first period of human history for which this assumption [that children will live in the same conditions as

Whitehead paused. "You have been exceedingly patient," he said at last. "I wish that I now had the time to recount the intellectual, scientific, religious, economic, and political history that provides the empirical proof of these propositions. But I have done so elsewhere,²¹⁹ and I ought not test your patience further. I hope, however, that this groundwork will allow us to make easier work of our discussion about law."

D. Whitehead's Views on the Nature of Law

"The simple fact is," said Whitehead, "that I have never given much thought to law; the bulk of my thoughts can be found in a few scattered references in *Adventures of Ideas*.²²⁰ In my work, I have always assigned an instrumental role to law. As I said earlier, each civilization aims at a certain type of perfection.²²¹ Toward that end, each civilization develops various institutions: 'Churches and Rituals, Monasteries with their dedicated lives, Universities with their search for knowledge, Medicine, Law, methods of Trade.'²²² Thus, law is one of the numerous civilized institutions whose collective aim is to establish the structure within which a civilization pursues its perfection."

"I assume that you would see law as an aspect that is oriented toward order, as you have defined that term," said Chris.

"Yes, I should think so." Whitehead seemed hesitant. "Although I suppose I might be tempted to make a partial exception for the law of contract. Contract prefers the way of commerce—of persua-

their parents] is false. . . . [A]ccordingly our training must prepare individuals to face a novelty of conditions.").

²¹⁹ For Whitehead's main efforts to show that these aspects of Western history provide evidence for his metaphysical system, see sources cited *supra* note 124. Briefly, Whitehead argued that the history of the rise, fleeting brilliance, decay, and replacement of human civilizations, religious institutions, and scientific paradigms was a powerful macroscopic confirmation of a reality conceived of as a series of discrete occasions of experience, each receiving the past, transforming the past into the present by choosing its own perfection, and perishing into a datum for occasions in the future. See Johnson, *supra* note 124, at 53 (noting that "Whitehead's philosophy of civilization is consistent with his general metaphysical position").

²²⁰ See *ADVENTURES OF IDEAS*, *supra* note 8, at 20, 23, 80-81, 104, 105, 113, 120, 246, 351, 374 (mentioning briefly, common law, legal systems, legal determinations, legal organizations, legal agencies, and legal contracts). Only one passage discusses law in any detail. See *id.* at 80-81 (examining the foundations of property and contract law). In other places in *Adventures of Ideas*, as well as in other works, Whitehead often referred to "law," but he was referring to the physical laws of nature. See, e.g., *id.* at 139-53, 172-77; *PROCESS AND REALITY*, *supra* note 1, at 91, 92, 98.

²²¹ See *supra* notes 121-23 and accompanying text.

²²² *ADVENTURES OF IDEAS*, *supra* note 8, at 351.

sion—rather than the way of force. In this way, contract assists the advance into creative novelty. On the other hand, every contract is entered into against a backdrop of custom and status—in other words, a certain form of order.²²³ Thus, the law of contract does not itself demand spontaneity and creative advance; it merely provides the orderly framework within which persuasive, creative advances are possible. Contract law is best understood as an *aid* to creative advance, rather than a creative advance itself.

"I have briefly considered the law of property. Most of the thinking about property is dominated by those committed to one or the other of the two 'extremes as to the nature of property—simple-minded assertion and simple-minded denial.'²²⁴ Until rather recently, the common law's rather absolute view of property rights fell on the side of simple-minded assertion. This seems wrong on both theoretical and practical grounds. Theoretically, under a principle of internal relatedness, '[t]he whole concept of absolute individuals with absolute rights, and with a contractual power of forming fully defined external relations, has broken down. The human being is inseparable from its environment in each occasion of its existence.'²²⁵ Practically, with advanced forms of communication and transportation, with vast systems of credit, and with enormous corporations, 'private property is mainly a legal fiction, and apart from such legal determination its outlines are completely indefinite.'²²⁶ That this 'legal determination is probably, indeed almost certainly, the best way of arranging society,'²²⁷ I do not doubt. But the law's treatment of property lacks nuance and sophistication."

"Anything else?" asked Chris.

"I have made two general observations about the role of law in civilization. First, I have considered the role of law in regulating the professions, which, as I said before, play a particularly important role in the economic system appropriate for our present American civilization.²²⁸ Within the areas of their competence, profes-

²²³ See *id.* at 81 ("There can be no contract which does not presuppose custom, and no custom leaving no loophole for spontaneous contract."); *id.* (stating that the Anglo-American common law of contract "is an instrument, in the hands of skilled experts, for the interpretation of explicit contract in terms of implicit status.").

²²⁴ *Id.* at 80.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See *supra* notes 200-02 and accompanying text (discussing the importance of professional training and education).

sional institutions must be free to act in accordance with general professional opinion and without legal interference. Obviously the state, which 'represents the general wisdom of the community,' can provide

a general judgment on the activity of the various [professional institutions] . . . whether they welcome ability, whether they stand high among the kindred institutions throughout the world. But where the state ceases to exercise any legitimate authority is when it presumes to decide upon questions within the purview of sciences or professions.²²⁹

"Second, I once remarked that

[a] wise government makes provision for the interweaving of alternative forms of community life. The most valuable part of legal doctrine is concerned with the relation of the state to this indefinite group of communities within, and around, it. In this way an international element becomes an essential factor in human life."²³⁰

"That's all?" Chris asked.

"Yes," Whitehead replied, his hands falling weakly to his sides. "I have had no training in law, you understand. I can speak of law only in great generality. As for specifics, the evidence simply eludes me."

"It may still be enough," said Chris. "It may be enough."

Whitehead looked at the clock on the mantel. "It is late now. Let us resume our conversation in the morning."

Whitehead saw Chris to the door, and slowly ascended the darkened stairway.

III. BEYOND WHITEHEAD: A JURISPRUDENCE OF PROCESS

A. *The Nature of Law*

Whitehead was sitting on the porch the next morning when Chris bounded up the stairs. A heavy dew still lay on the grass. "You have the look of a young cat in pursuit of its prey." Whitehead smiled.

²²⁹ ADVENTURES OF IDEAS, *supra* note 8, at 78.

²³⁰ *An Appeal to Sanity*, *supra* note 192, at 65.

"I was thinking," said Chris, sitting on the bench next to Whitehead, "How might a process thinker like yourself respond if he or she was asked to describe the nature of law?"

"I don't know," answered Whitehead. "Do you have any ideas?"

"Might we conceive of law as analogous to morality?" Chris asked rhetorically. "Like morality,²³¹ the nature of law, in optimal circumstances, is to aim at the highest perfection then obtainable by a civilization; at a minimum, it prevents the relapse of society to lower levels of perfection. It accomplishes its aim by means of rules, arguments, and attitudes that make unthinkable certain choices that lead away from some selected perfection (these are the choices that we call 'illegal'), while at the same time commending to our attention other choices that lead toward that perfection (these are the choices that we call 'legal'). The specific rules, arguments, and attitudes of a specific civilization constitute the legal code of that civilization; this code, like the analogous moral code, 'involve[s] the usual judgments valid for the usual occasions in that epoch' of the civilization."²³²

"An intriguing idea," said Whitehead, "but tell me: How are law and morality distinct?"

"In their means," said Chris. "Morality seeks to control the private (that is, non-governmental) arrangement of processes, institutions, and behaviors among individuals within a civilization. Law seeks to control the public arrangements of processes, institutions and processes, and the behaviors of individuals in their relationship both toward the civilization and toward each other insofar as the civilization claims an interest in such relationships. Morality ultimately operates on conscience; law operates on self-interest and the human desire to be free of exclusions or sanctions from public institutions. Morality is effective only to the extent that its aim at perfection is persuasive; a claim loses moral strength to the extent that threats of excommunication or ostracization implicitly condition the claim's acceptance. With its implicit or explicit threat of sanction, on the other hand, law can be effective (at least in the short term) even when its aim at perfection is not persuasive."

Whitehead pursed his lips. "Must both law and morality aim at the same perfection?"

²³¹ See *supra* notes 169-91 and accompanying text (discussing Whitehead's treatment of morality, moral codes, and moral justification of conduct).

²³² *MODES OF THOUGHT*, *supra* note 9, at 19; see *supra* note 179 and accompanying text (discussing moral codes).

"No," said Chris. "As I understand your notion of morality, morality need not aim at the highest perfection available in civilization; it need only aim at a perfection at least equivalent to the present state of perfection. At any given moment, many alternative perfections might be regarded as 'moral.' The same is true of law. Since law also can aim at many different perfections equivalent to or greater than the present perfection, many different arrangements might be 'lawful.' Therefore, the relationship between the perfection at which a particular legal code aims and the perfection at which that civilization's moral code aims is contingent. They might both aim at a single perfection, but it is equally possible that law might aim at one perfection and morality another. I cannot invent any *a priori* argument that in each and every situation both law and morality must be aimed toward the same perfection."

"Indeed, an argument could be made the other way," said Whitehead. "Sometimes two contrasting perfections can be resolved into a harmony greater than either of the perfections held in contrast. The imperfection created by holding a moral code aimed at one perfection and a legal code aimed at another might force us to find a novel solution that harmonizes law and morality within some new and greater Beauty."

"Precisely," said Chris.

"Of course, the risk is that this novel solution might also be far worse than the perfection of either law or morality," said Whitehead.

"Yes," said Chris. "But it seems that I recall someone saying that '[e]rror is the price which we pay for progress.'"²³³

Whitehead smiled wryly. "Under this understanding of law, then, law is no greater and no less than any other aspect of civilization that seeks to lead us to the achievement of Beauty: science, art, literature, education, religion, medicine, morality, love, and so on. Morality has no more claim on law than do these other aspects of human endeavor."

"True," said Chris, "but there are natural affinities between law and morality. Both operate by creating rules, arguments, and attitudes about appropriate conduct. Both try to control the process of change by making some practices unimaginable. Art, literature, and love, on the other hand, often resist established practices, and

²³³ PROCESS AND REALITY, *supra* note 1, at 187.

lure us toward the new. Thus, the oft-perceived correspondence between law and morals is not mere happenstance.

"The important thing, however, is to hold all aspects of civilization in proper balance. When a particular perfection represents the maximal Beauty attainable at a given time, then all the aspects of a civilized life—science, art, morality, law, and so on—should combine to work toward that Beauty, with their exact relationship of dominance and subservience determined by the nature of the perfection. When the road to maximal Beauty requires that some imperfection and contrast be introduced for the time being, the various aspects of civilized life are likely to pull in different directions until the contrasts are resolved in the higher Beauty."

"Typically, though, a civilization will aim at a particular type of perfection rather than aim in a free-wheeling way at the greatest perfection possible," said Whitehead. "Often this perfection will be less than the greatest perfection possible. What is the role of law in this more realistic setting?"

"Essentially the same," replied Chris. "By definition, law cannot aim at a lower perfection than the perfection already achieved by the civilization. Therefore, two options are open to law: it might continue to aim at the perfection already chosen by the civilization, or it might aim at any other perfection *equivalent to or greater than* the civilization's chosen perfection. If it aims at the civilization's own perfection, law contributes to the overall sense of harmony felt by the civilization as it realizes its chosen perfection. If it aims at a different perfection, law destabilizes the civilization by introducing a contrast among perfections, and challenging the civilization to find a way of reconciling the contrast in a broader pattern of Beauty. In this way law can assist a civilization's creative advance toward equivalent or greater Beauty."

"I see that art and love are likely to generate imperfections that lure a civilization beyond its staid perfection," said Whitehead. "But can law realistically aim at anything other than the civilization's chosen perfection? The implicit premise of much of your argument is that it can. How can that premise be defended, if law is to be understood, as I understand it, as a force that maintains order (and hence the selected mode of perfection) in a civilization?"²³⁴

"It can't be," said Chris. "Which means either that my premise is wrong or that your original understanding of law is wrong. Either

²³⁴ See *supra* note 222 and accompanying text.

law has the ability to lure a civilization to novel adventure toward a new form of perfection; or it is an element in a civilization from which the lure to novelty invariably struggles to escape.

"The shortest route to finding an answer travels through your description of the law of contract.²³⁵ By granting the parties the freedom to reach beyond the safe and established order of things, the law of contracts fosters, protects, and nurtures the lure to novel adventure. Therefore, law can contain some elements of destabilization; it can affirmatively put into place structures that advance a civilization's efforts to move beyond a settled order.

"The longer answer to your question requires us to consider in more theoretical terms the mechanisms by which law fosters order and the mechanisms by which it fosters novel adventure; and then to see whether the latter, destabilizing mechanisms exist in fact."

"An excellent approach," agreed Whitehead.

"The mechanisms for infusing order seem plain enough," said Chris. "The first is simply to establish a comprehensive regulative code: a detailed list of proscribed, permitted, and prescribed conduct and methods. When these substantive legal codes elicit conduct consistent with the civilization's selected perfection, they are instruments which advance the civilization's established order."²³⁶

"Quite so," said Whitehead. "And these are the types of formulations which retard progress as soon as the vision of the lawgivers, the Founding Fathers, or whoever else is selected as the source of the civilization's perfection, is exhausted."²³⁷

Chris nodded. "A second mechanism is suggested by your description of the role of custom in contract. When the law chooses to

²³⁵ See *supra* note 223 and accompanying text.

²³⁶ Cf. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860*, 253-54 (1977) (arguing that by the middle of the nineteenth-century, American law was reshaped to accommodate the interests of large industry and wealthy individuals).

²³⁷ See *supra* notes 121-34 and accompanying text. I think it is fair to conclude that Whitehead would have taken issue with the "original intent of the Founders" line of thinking occasionally fashionable in constitutional analysis:

[I]n the long run, no written document or artistic structure can perform this service [of producing progress in Western life]. For example, it is possible, and almost usual, to construe the Bible, Greek literature, and the American Constitution with all the limitations of their periods of origin. And then these heritages from the past are transformed into barriers to progress instead of its foundation. In asserting this danger, I am merely repeating the Catholic doctrine that a living Church is required to interpret lifeless documents.

An Appeal to Sanity, *supra* note 192, at 66; see PRICE, *supra* note 18, at 203 (quoting Whitehead as observing that "[t]he men who founded your republic . . . had an uncommonly clear grasp of the general ideas that they wanted to put in here, then left the working out of the details to later interpreters, which has been, on the whole, remarkably successful").

create standards of conduct based on custom, community standards, or the standards of the civilization's mythical reasonable person, no fixed code of conduct is created. Rather, conduct and methods conform to fluid standards that evolve as the civilization's aims evolve.²³⁸ In this respect, such a mechanism is less rigid than the creation of fixed rules of conduct. But, as long as the selected standard is equivalent to the conduct that best advances a civilization's aimed-at perfection, this mechanism also advances the civilization's order."

"And what are the mechanisms by which law can serve as an advance into novelty?" asked Whitehead.

"I can think of four. The first is to enact a hard-and-fast code of allowed and disallowed conduct and methods, just as before, except that the code aims at a perfection different from the civilization's selected perfection. By bringing the civilization's present perfection into contrast with a legal code at variance with that perfection, law assists the civilization's advance into novelty."

"Of course, such a hard-and-fast code is bound, sooner or later, to wear out its welcome," said Whitehead. "If the code selects as its level of perfection something less than the maximal perfection available, it retards from its inception the achievement of the maximal Beauty attainable by the civilization. Even if the code aims at the maximal Beauty obtainable at the present time, however, that Beauty may not represent the maximal Beauty attainable in the future. Unless a civilization is committed in a thoroughgoing manner to periodic revision, the code will eventually act as an anchor and not as a sail."

"True," replied Chris, "but at least you must concede that this mechanism shows that law is not invariably associated with the extant order. Moreover, there are three other mechanisms by which law can foster novelty. The second mechanism is still to use legal standards such as 'custom,' 'community norms,' or 'reasonable person'; rather than the order-maintaining standards of the people who represent the civilization's present perfection, however, the standards would be those of the people who represent a perfection dif-

²³⁸ See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 22-23 (1921) (explaining that, in law, "[e]very new case is an experiment; and if the accepted rule . . . yields a result which is felt to be unjust, the rule is reconsidered"); LEON GREEN, *JUDGE AND JURY* 145-47, 163 (1930) (stating that the "law of negligence" cannot be highly standardized because the process in negligence cases is highly flexible and the concept of the "ordinary prudent person" is an adaptable standard).

ferent from, but at least equivalent to, the civilization's present perfection. Ideally, the standards would aim at a higher—and best of all, at the highest—perfection for the civilization. For example, law could defer to the standards of others within our society—whether the priests, the professionals, or the metaphysicians—who seem particularly capable of and sensitive to the upward lure to novel adventure.”²³⁹

“This method seems preferable to the first for infusing novelty,” said Whitehead.

“The risk of this second method, of course, is that we put faith in groups of people to stay ahead of, and strive to reach beyond, a civilization's aim at perfection,” said Chris. “Over the long run, it is unrealistic to believe that any group will consistently maintain such a position; indeed, at least with regard to professions, there is reason to fear that they might sometimes fall beneath the civilization's aim.”²⁴⁰

“That concern leads me to the third mechanism by which advances into novelty can occur: Law can establish a system of freedoms, rights, and immunities in areas where creative advances are most likely to pull a civilization beyond its staid perfection toward some greater perfection. For example, once the means of commerce in a civilization is possible, a strong affirmation of the freedom of contract can foster creative advance. Likewise, access to a general and liberal education might instill individuals with the breadth of knowledge necessary to heed the lure to novel adventure.”²⁴¹ In proper circumstances, so will other freedoms: freedom of thought, freedom of speech, freedom of religion—

“Do not neglect freedom from economic privation,” said Whitehead.²⁴²

“Then there is a fourth mechanism,” replied Chris. “Law can have a hortatory or persuasive dimension. The first three mecha-

²³⁹ Cf. *Repouille v. United States*, 165 F.2d 152, 154 (2d Cir. 1947) (Frank, J., dissenting) (suggesting that the issue of “good moral character” in a naturalization proceeding could be resolved by an examination of “the attitude of our ethical leaders”). On Whitehead's views about the role of professions, see *supra* notes 200-02 and accompanying text.

²⁴⁰ Cf. *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932) (rejecting the argument that the custom of an industry is conclusive on the issue of negligence, because “a whole calling may have unduly lagged in the adoption of new and available devices”).

²⁴¹ See *supra* notes 200-02 and accompanying text (arguing that a liberal education can overcome short-sightedness and self-interest by illuminating issues of broader social concern).

²⁴² See *supra* notes 192-93, 203-04 and accompanying text (asserting that greater economic opportunity and prosperity can foster greater creative advance).

nisms sought to establish rules that foster novel advance. But law—and here I think of reasoned judicial, legislative, or administrative decisions in particular—can also seek to persuade the civilization of the value of pursuing a greater perfection. A legal rule may reorient only a small segment of conduct toward a new perfection, but the language and logic beneath the rule may contend for a broader shift in the civilization's aim. The language and logic are persuasive only; but if they are persuasive enough, the civilization will follow their call.

"As I see it, those are the mechanisms by which law can dissociate itself from the civilization's selected order. Can we now agree that law can foster creative advance? The consequence of agreement is the concession that it is possible to maintain my understanding of law but not yours."

"In theory I willingly concede," said Whitehead, "although I should like to know whether law ever avails itself of these mechanisms. The test of any theory is the world of fact; the test of any theory of law is the data of real legal decisions and judgments."

"I can think of examples of each mechanism," said Chris. "First, law does sometimes require conduct that aims at perfections other than those already achieved by the civilization: for instance, the passage of the thirteenth through fifteenth amendments, which abolished slavery and guaranteed certain rights of equality;²⁴³ the nineteenth amendment, which guaranteed the right of suffrage to women;²⁴⁴ and the civil rights legislation of the 1960s, which sought to redress long-standing problems of racism.²⁴⁵ Second, at least on some occasions, law defers to the judgment of professionals who appear to be aiming at higher forms of perfection for the civilization.²⁴⁶ Third, law can create rights that foster the advance into

²⁴³ See U.S. CONST. amend. XIII, XIV, XV; cf. GARRY WILLS, *LINCOLN AT GETTYSBURG* 121-47 (1992) (arguing that the Gettysburg Address served as a turning point in American civilization by reorienting American society toward the ideal of equality).

²⁴⁴ See U.S. CONST. amend. XIX.

²⁴⁵ See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241-68 (codified as amended at 28 U.S.C. § 1447, 42 U.S.C. §§ 1971, 1975a to 1975d, 2000a to 2000h-6 (1994)) (protecting against discrimination in public accommodations, facilities, education, and employment opportunities); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)) (protecting against discrimination in voting rights).

²⁴⁶ See, e.g., *Brune v. Belinkoff*, 235 N.E.2d 793, 798 (Mass. 1968) (abolishing local custom in favor of national custom as the standard of care in medical malpractice cases). In general terms, it is fair to say that for the last 25 years American law has been less deferential to the judgments of professionals. See, e.g., *Helling v. Carey*, 519 P.2d 981, 983 (Wash. 1974) (rejecting use of custom as the standard of care for ophthalmologists). This fact confirms

novelty. For example, the United States Constitution guarantees the rights to freedom of religion and speech, as well as the right not to have the government impair the obligation of contracts.²⁴⁷ Immunities for activities thought to be beneficial to society are commonplace.²⁴⁸ Finally, I should need to cite only *Brown v. Board of Education*²⁴⁹ as an example of a reasoned appellate decision that sought to persuade American society to aim at a greater perfection of equality—not only in its public educational system, but in all aspects of American life.

“Nonetheless, I do not wish to overstate my conclusion. My claim is only that nothing prevents the civilization from tailoring its legal system to aim—in whole or in part—at equivalent or greater perfections, not that it must do so.”

“I cannot disagree on theoretical or empirical grounds with your basic claim that law is associated neither with a civilization’s order nor with advances beyond that order,” said Whitehead. “I was wrong to think the contrary. But I wonder whether law might be more aligned with a civilization’s selected order than your definition suggests. It seems more likely that a legal code will in fact reflect a civilization’s aim at perfection rather than some other aim;²⁵⁰ it seems more likely that the ‘custom,’ ‘community,’ and ‘reasonable person’ of the law will reflect the mores of a civilization rather than the mores of dissenters or adventurers;²⁵¹ it seems more likely that a civilization will guarantee those structures, freedoms, and immunities that accord with its own aim at perfection; and it seems more likely that judicial decisions will seek to persuade their readers of

rather than refutes a Whiteheadian understanding of law. Given that professions are increasingly operated as businesses rather than as professions in the Whiteheadian sense, there is little reason to suppose that law seeking an advance into novelty would put its faith in the hands of the modern “professional.” See *supra* notes 196-202, 228-29, 240-42 and accompanying text (arguing that business leaders are overly concerned with personal profit, and not the general prosperity of the community).

²⁴⁷ See U.S. CONST. amend. I (protecting the freedoms of religion, speech, assembly and petition); see *id.* art. I, § 10, cl. 1 (denying states the power to impair the obligation of contracts).

²⁴⁸ See, e.g., 42 U.S.C. §§ 300aa-11 to -17 (1994) (tort immunity for manufacturers of childhood vaccines); *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (qualified or good faith immunity for government officials).

²⁴⁹ 347 U.S. 483 (1954).

²⁵⁰ See ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 17-18 (1986) (“Most legal traditions of the past” have relied upon a “secular or sacred vision of the one right and necessary order of social life”).

²⁵¹ See Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1020-27, 1052-54 (1994) (discussing whether the “reasonable person” standard in torts is equivalent to community norms of fairness).

the value of the civilization's already chosen perfection. Law will more often be an anchor than a sail.

"Moreover, the bottom line of law is a 'Gospel of Force':²⁵² If you do not act according to our norms, then we will sanction you. Indeed, even aspirational language in judicial opinions carries an implicit threat of sanction if conduct does not catch up to rhetoric. The conduct and methods that people are forced to follow are also a homogeneous standard of sameness—a 'Gospel of Uniformity,' if you like.²⁵³ The conduct or method that is diverse is castigated. Yet the tolerance of diversity, which is thwarted by a system of universal norms, is essential to the search for new perfections.

"So do not be too taken by law's transformative potential, my friend."

"In some sense I acknowledge that you are right," said Chris. "While we might disguise law with a velvet glove, the iron fist remains inside. But if law is generally more compatible with a civilization's order than with novel lures beyond, perhaps we should just forswear the transformative function of law."

"And reject the evidence, which you just provided, that law can help to lure a civilization beyond its settled aims?" asked Whitehead. "No. You have rescued me from that mistake; I will not let you now commit it again."

"Then how is a civilization to determine how much of its own aim and how much novelty to infuse into its legal code and decisions?" asked Chris. "Is the best mix the Aristotelian golden mean between order and creativity, which you had suggested last night was essential to the sustained flourishing of any civilization?"²⁵⁴

Whitehead considered his words a long time before answering. "Be careful of the fallacy of division—that which is true of the whole is also true of each part. What is important is that a civilization as a whole achieve the balance between the maintenance of present perfections and the advance toward new perfections, not that each and every aspect of civilization achieve that balance. Whether law drags its heels behind, keeps pace with, or races ahead of other aspects of civilization, seems to me a question that cannot be an-

²⁵² On Whitehead's dislike for the "Gospel of Force," see *supra* notes 205-11 and accompanying text.

²⁵³ On Whitehead's dislike for the "Gospel of Uniformity," see *supra* notes 212-18 and accompanying text.

²⁵⁴ See *supra* notes 164-66 and accompanying text (discussing the optimal blend of order and novelty in sustaining civilization's aim and advance at perfection).

swered deductively or in advance of the actual circumstances faced by an actual civilization.

"Insofar as we are concerned about maintaining the Aristotelian mean between order and creativity, however, it seems to me that other aspects of civilization—art, literature, love, science, education, divine inspiration, even religion and morality—are far superior to law as mechanisms for luring the civilization to adventure. Law, on the other hand, is superior to many of those aspects as a mechanism for maintaining a civilization's order. The potential to consider novel adventure, that you identified as intrinsic in law, prevents law from being utterly associated with a civilization's order. But law is less likely to be successful, and more likely to cause considerable upheaval, when it leaps beyond the aims of art, love, and the other more adventurous aspects of life."

"So the cutting edge of adventure is not law's preferred position," said Chris.

"Yes," agreed Whitehead.

"That conclusion seems to imply further that, when law is not on the cutting edge, we should aim to possess and use as little law as possible, at least if we wish our civilization to advance in a sustained and measured fashion," said Chris.²⁵⁵

"So it seems to me," Whitehead replied.

²⁵⁵ Implicit in this statement, as in much of Whitehead's work concerning the benefits of Commerce, is a preference for market solutions rather than central government planning. See generally *supra* notes 194-97, 205 and accompanying text (discussing the distinction between government forces and market forces). "Governments are clumsy things," Whitehead once observed, "inadequate to their duties. A wise government makes provision for the interweaving of alternative forms of community life." *An Appeal to Sanity*, *supra* note 192, at 65. On the other hand, Whitehead was a severe critic of the laissez-faire capitalism of Adam Smith, which he thought had done "more harm than good." *SCIENCE AND THE MODERN WORLD*, *supra* note 6, at 200; see *supra* notes 194, 196-99 and accompanying text (describing Whitehead's concerns with unfettered capitalism). Although he devoted little attention to the point, it appears Whitehead desired a mixed economic system with primary emphasis on market solutions, but some central planning to prevent the excesses of unbridled greed. See *MORRIS*, *supra* note 16, at 140-47 (describing the economic ideas of Whitehead and Hartshorne); *ADVENTURES OF IDEAS*, *supra* note 8, at 44 (suggesting that some "directive agency" was needed to check "mere individualistic competition" espoused by classical liberalism); Johnson, *supra* note 124, at 49 (discussing Whitehead's reformative suggestions on economic conditions). Furthermore, given Whitehead's unwillingness to suggest absolute structures for all civilizations, it is safe to assume that Whitehead believed a mixed economy to be the best solution available today, not necessarily the best solution available into eternity. See *supra* notes 114-23 and accompanying text (discussing the process of human civilization and advancement to creative novelty and perfection).

"But you do concede that there are occasions when the law has adequate reason to abandon its optimal preferences?" Chris inquired.

"I do. The civilization as a whole may be adventurous; or in a less adventurous society, no other aspect of civilization may be willing to leap to the fore of adventure when such a leap is essential. Thus, this power to depart from a civilization's order, however infrequently exercised, is a power of some consequence. When art, love, and morality fail to call the civilization to a new perfection, why should law be silent? When a civilization is complacent and unwilling to set out along the road to greater Beauty, why should judges not marshal the law's persuasive powers and, if necessary, its considerable engines of compulsion? It is sophism to think that the combined forces of love, art, morality, and divine inspiration would have brought American civilization to a voluntary acceptance of desegregation, fair housing, and equal opportunity in employment, even though such forms of equality assuredly aim at a greater perfection than the perfections which preceded them."

"Then the difficult question for law is when to move a civilization forcibly toward a higher perfection and when to bide its time," said Chris.

"True," replied Whitehead. "My strong presumption would be to make law bide its time. But I am no pollyanna. In intractable circumstances, the usual forces of persuasion, left to their own devices, cannot effectively move the civilization toward its next adventure. Then law can—not must, but can—help to bring about positive change."

"Even when law must rely on legal force rather than on its persuasive powers?"

"Yes," said Whitehead. "However much any force might signal a failure of the civilization employing it, legal force will sometimes be required if a civilization is to advance.²⁵⁶ It is important, though, that this force be kept to a minimum, in order that the way of persuasion is given the broadest possible latitude."

²⁵⁶ See *supra* notes 187-91, 211 and accompanying text (recognizing that force is necessary to some extent, but that persuasion is preferable and ultimately the vehicle that fosters progress).

B. The Forms of Law

"If law's essential nature is to maintain or advance a civilization's chosen perfection, then how is law to organize itself to accomplish its task?" Chris asked.

"Let me speak of the way that I would expect law to operate if my metaphysical scheme is adequate," said Whitehead. "Indeed, if it does not act in this way, my scheme will have foundered on the stubborn facts of the real world, and must be abandoned."²⁵⁷

"Recall that, under my metaphysical scheme, the ultimate real entities of the world are occasions of experience."²⁵⁸ In the nearly instantaneous process of becoming, these occasionsprehend both the totality of past occasions and the range of novel possibilities discoverable in the realm of eternal objects.²⁵⁹ Ultimately, each occasion aims at one or more of these forms; it hardens into definite form; and it perishes, forever immutable.²⁶⁰ Therefore, the only things that can change are things that endure temporally—in other words, societies of occasions, and societies of societies. Each of these enduring societies has an essential defining characteristic, as well as other, accidental features.²⁶¹

"We should find the same patterns replicated in law. There must be the 'occasions of experience' of law—what we might call for lack of a better phrase 'the discrete instances of legal judgment.'²⁶² In each such instance, there must be a 'physical pole,' in which the definite forms of past occasions of experience, including prior discrete instances of legal judgment, are prehended and seek to perpetuate themselves. Then there must be a 'mental pole,' in which novel ideals are entertained. Finally, the discrete instance of legal judgment must come to its satisfaction through a reconciliation of the past physical reality and the novel ideal; must pass into immutable, objective fact; and must become available for appropriation by later occasions of experience."

²⁵⁷ See *supra* notes 21-26 and accompanying text (arguing that if some facts of the world escape the proposed hypothesis of the metaphysical scheme, then the hypothesis must fail).

²⁵⁸ See *supra* notes 44-50 and accompanying text.

²⁵⁹ See *supra* note 52 and accompanying text.

²⁶⁰ See *supra* notes 50, 53, 63-64 and accompanying text; see also ADVENTURES OF IDEAS, *supra* note 8, at 262 ("[An occasion of experience] never changes. It only becomes and perishes.").

²⁶¹ See *supra* notes 86-88 and accompanying text.

²⁶² By "legal judgment" I refer not to a judgment of a court, but rather an occasion (whether administrative, legislative, judicial, private counseling, or conduct) in which the law informs the occasion's aim at satisfaction.

"For instance," said Chris, "let us assume that a civilization faces a particular occasion in which one person has failed to live up to a promise. If we assume that no civilization has ever before established any legal arrangements at all, then a civilization that establishes a legal solution prehends at least two forms, or 'eternal objects.' First, it must prehend the possibility that the civilization can legitimately claim an interest in the relationship between the parties in a way that maintains or advances a civilization's order (in other words, the possibility of law). Second, it likely will prehend an ideal or group of ideals that help it to decide whether the loss should be rectified. The principles could be anything: the fact that it is Tuesday, the fact that the complainant is powerful, the fact that the agreement is a commercial one, the fact that it is fundamentally unjust or inefficient to break one's promise. In the words of Cardozo, at that moment the legal judgment's 'form and content [are] uncertain. Any one of many principles might lay hold of it and shape it.'²⁶³ So let us further assume that the civilization as a whole aims at commercial progress, or that such an aim will create equivalent or greater Beauty than its present aim. Should the civilization choose to enforce the promise because enforcement will foster commercial progress, the civilization is legitimately making law."

"Your understanding is superb," said Whitehead.

"Now another situation comes to the attention of the civilization. It too involves a breach of a promise to perform, but otherwise its facts are entirely different: different parties, different places and times, different witnesses, and different circumstances entirely. No commercial agreement is involved. Again the civilization must choose whether to assert an interest in the resolution of the dispute (in other words, to make law). If it does, it then prehends the historical fact of the prior judgment, including its form; for '[o]nce declared, [the legal judgment] is a new stock of descent. It is charged with vital power.'²⁶⁴ There is a momentum for the new judgment to be decided according to the previously selected form. If this occurs, the agreement is not enforced; the sense of harmony between the prior and the present occasions is dominant; and a certain form of Beauty—legal protection only for commerce—is maintained.

²⁶³ CARDOZO, *supra* note 238, at 22.

²⁶⁴ *Id.*

"But this need not occur. The lawgiver can—not must, but can—prehend forms that suggest a different resolution, or at least the same resolution for different reasons. This new eternal object aims at an advance beyond the civilization's present level of perfection. Now the decision maker must choose. First, she can select the new form, and discard or subordinate the rest; this process may be either conscious, as through a series of lexically ordered principles in which she determines that 'Form A trumps Form B, which trumps Form C';²⁶⁵ or subconscious, as in the case of negative prehensions.²⁶⁶ Second, she can seek a compromise of forms, finding a middle ground neither completely consistent nor completely inconsistent with either form. Third, she could engage in the effort to find some new form or ideal that creatively synthesizes the contrasts into a pattern of greater harmony.²⁶⁷ Whichever route is chosen, discord—the inability to implement a worthy ideal—is felt; and in some circumstances the sense of discord may even be dominant. The discord is worthwhile as long as it creates a lure toward some greater Beauty."

"In most circumstances, the first two methods you describe, which merely ignore the tension, are least preferable," said Whitehead, "for at most, they lead to trivial Beauty."²⁶⁸ The third way, the way of compromise, seeks to create some greater Beauty, though 'usually such compromises lose much of the power of the views they mediate with little compensatory gain.'²⁶⁹ The final way, the way of creative synthesis, holds out the greatest promise for achievement of a major type of Beauty.²⁷⁰ But such advances are not always

²⁶⁵ For a description of the way in which such lexical ordering works, see JOHN RAWLS, *A THEORY OF JUSTICE* 42-44 (1971).

²⁶⁶ See *supra* notes 58-59 and accompanying text (explaining the two categories of prehensions—positive and negative).

²⁶⁷ For a discussion of these three alternatives, albeit not in the context of legal judgments, see John B. Cobb, Jr., *The Political Implications of Whitehead's Philosophy*, in *PROCESS PHILOSOPHY AND SOCIAL THOUGHT*, *supra* note 14, at 11, 20-21.

²⁶⁸ See *supra* notes 158-61 and accompanying text (discussing the forms of Beauty).

²⁶⁹ Cobb, *supra* note 267, at 20.

²⁷⁰ See *supra* notes 160-61 and accompanying text (explaining how a major type of Beauty unifies disparate parts of an occasion while not dismissing contrasts among the individual components). This way of creative synthesis may sound like a Hegelian dialectic. Hegel's dialectical method, however, was more optimistic than Whitehead's idea that the engagement of opposing ideals would lead to progress. For Whitehead, the synthesis of contrasting forms held out the greatest promise of progress, but he also understood that this effort did not guarantee progress. Thus, in Whiteheadian terms, the Hegelian dialectic might lead a legal code toward greater Beauty; but its injudicious use might also lead a code toward less Beauty, and thus jeopardize the code's status as a "legal" code. For somewhat different interpretations of how Whitehead's metaphysics fits within Hegel's dialectical philosophy of

practical in political or legal arrangements, for we can rarely afford to wait for the beautiful advance, which may be a hundred years distant.²⁷¹ Therefore, I would expect to see the law influenced and re-directed by such creative syntheses, but only on a periodic basis. In the intervening times, the other methods of resolving tensions will dominate."

"Well, whatever method a particular legal judgment uses to come to its satisfaction," said Chris, "that judgment cannot dictate that subsequent legal judgments follow its path. So, as each succeeding occasion comes along, the process of prehension of past instances of legal judgment and of eternal objects repeats itself."

"And through this interplay of forms or principles, and the mass of facts, a legal code is slowly fleshed out," said Whitehead. "As distinct as they otherwise are, these myriad individual legal judgments should all be united by a single characteristic, or form. If our hypothesis is correct, then that defining characteristic is the public arrangement of processes, institutions, and behaviors in a way designed either to advance a civilization to a higher perfection or at least to prevent relapse to a lower perfection.²⁷² If law operates as other complex societies do, however, then at intermediate levels between the discrete legal judgments and 'law' in its most general sense, there will be other societies and other societies of societies. The first level of society should organize discrete legal judgments into their allegiance to, or consistency with, a particular form or perfection. The next level organizes these societies into larger societies in which the clash among the forms of the lower level is either reconciled within a form of greater generality or held in tension in a way productive of a perfection at least equivalent to the level of perfection at which the civilization presently aims. The same result would obtain for societies of these intermediate societies, until at last we reach the top of the pyramid—that overarching society whose defining characteristic is that of 'law.'

"Each higher level of society is obviously another level of abstraction removed from the discrete legal judgments that comprise the society; in order to find some unifying harmony among these socie-

history, compare MORRIS, *supra* note 16, at 178-81 (arguing that the two are consistent), with Cobb, *supra* note 267, at 20-21 (suggesting important differences).

²⁷¹ See Cobb, *supra* note 267, at 21 (arguing that advancement toward creative synthesis by the dialectic model "while possible, is not inevitable" and "not ideal for political guidance").

²⁷² See *supra* notes 231-32 and accompanying text (defining the nature of law).

ties, a civilization must ignore more and more of each legal judgment's rich individual detail. A specific occasion of legal judgment may be consistent with hundreds, perhaps thousands, of forms of perfection. Whether consciously or not, a civilization harmonizes discrete legal judgments into societies by selecting some of those forms as relevant and rejecting other forms. The process is repeated as a civilization harmonizes the first level of societies into societies of societies, and so on, until a civilization reaches the level of societies just below the top of the pyramid. This level, which contains highly general and abstract forms, comprises the 'fields of law'—the ultimate, fundamental abstractions, other than the even more abstract notion of law itself, around which a civilization organizes its legal arrangements."

"These fields of law, and their defining characteristics, would seem so general that they are indeterminate regarding specific legal consequences," said Chris, "that many societies could use identical fields as organizing principles. Where their legal systems will differ, and differ dramatically, is at the level of the specific doctrines and arguments—the 'accidental qualities' of the society, as you called them²⁷³—that are used to decide discrete instances of legal judgment within each field."

"That's correct," replied Whitehead. "But let us make sure that we are clear about three things. First, do not forget that each of these lower societies must contain the defining characteristic of law. Thus, the form of the field of contract law is not enforcing promises to perform; it is actually enforcing promises to perform when enforcement sustains the civilization's selected objective or aids in the progression of it toward an equivalent or greater form of Beauty.

"Second, the defining characteristics of lower societies need not be 'either-or' propositions; for instance, contract law need not be described in terms of the two forms of 'promises with consideration' and 'promises without consideration.' I should be surprised if the divisions among the societies in a real legal system were so logically sharp. For instance, perhaps we could break down our societies into 'promises in which efficiency demands enforcement' and 'promises in which justice demands enforcement.' Some subset of enforceable promises will belong to both societies. Hence, discord

²⁷³ See *supra* note 87 and accompanying text (discussing the nature of accidental qualities).

will be felt more at the margin than at the center; the legal system will possess a greater degree of order and stability; and the call for the advance to achieve some new perfection that overcomes the discord will be less acutely felt.

"Finally, keep in mind that, aside from the defining characteristic of a particular society or society of societies, there will be many additional forms of relevance. Assume that the defining characteristic of a lower society in contract law is 'promises with consideration.' In deciding how to resolve itself, each discrete instance of legal judgment can appeal to many other forms: corrective justice, economic efficiency, pragmatic politics, class, and so on. These other forms also overlap and clash, just as essential forms do. Hence, it is inaccurate to think that the law advances toward new perfections simply because of the clash among the defining characteristics of societies; other forms are also relevant."

"Then it seems that there is nothing inevitable about the fact that we might choose 'commercial promises' rather than 'justly enforceable promises' as a lower society within the field of contracts, nor is there anything inevitable about our selection of 'promise to perform' itself as a field of law," said Chris. "We can always re-order our basic legal categories—and even our fields of law—simply by emphasizing certain forms that have not been regarded as 'defining' and discarding those forms that have been so regarded."

"So it seems."

"So how does a civilization choose the societies and the fields of law into which it actually organizes its legal system?" asked Chris.

"There is no way to answer that question normatively or deductively," said Whitehead. "Three components should, however, loom large. The first is history. As I have said, we are never entirely free of the past.²⁷⁴ The choices made by prior civilizations influence our present choices. Unless the next succeeding civilization has a vision significantly at odds with that of prior civilizations, the general forms of law that served prior civilizations are likely still to be regarded as useful categories, even though the specific doctrinal content of the forms might well be different.

"The second component is the aim of the present civilization. Given that law's function is to assist in the maintenance of present perfections or the achievement of equivalent or greater perfections, we should frequently expect those persons charged with the process

²⁷⁴ See *supra* notes 67-69, 118-19 and accompanying text.

of bringing discrete legal judgments to their satisfaction to choose those fields and intermediate forms of law that advance the civilization's aim.

"The third component is the advance into novelty. Those charged with bringing each discrete legal judgment to its satisfaction might seek to reorient the civilization's aim toward some equivalent or greater perfection. Hence, they will suggest or establish the overthrow of the dominant intermediate rules, forms, or fields of law, and advocate their replacement with different rules, forms, or fields that better correspond to the new perfection.

"Therefore, I should expect to find inconsistencies and tensions within the legal structure, as some fields of law perpetuate past perfections, others confirm present perfections, and others seek out future perfections. The various rules, attitudes, and arguments operative within any field of law will reflect similar tensions. Some will fit nicely within, albeit not be precisely demanded by, the civilization's own aim; others will be forms or ideals associated with some past perfection; still others will be an imaginative leap beyond the present perfection. Like continental plates rubbing against each other, fields of law can be expected to generate the most interesting, most beautiful, and most destructive outcomes in the areas in which forms overlap."

"How are we to know what the relevant forms and societies that comprise a field of law are?" asked Chris.

"The only way to define any field of law adequately is to examine the rich detail of thousands of discrete legal judgments that are regarded as lying within its scope."

"If this description of law is correct," Chris said, "then the practice of law consists of two things: the study of the actual abstractions we have made from discrete instances of legal judgment, and the exercise of our imagination to discover new possibilities never before entertained. The search for everlasting structures for law is futile."

"Quite so," Whitehead said.

"This entire line of argument also implies that it is impossible ever to know definitively what the form of a field of law is," said Chris.

"As long as a field of law is living, we can never say with certainty: 'This is what this field of law will always be,'"²⁷⁵ said Whitehead. "Of course, we can claim certain limited types of knowledge. We can know the forms of fields of law long since dead; for instance, with adequate historical information, we can know the form or forms which defined Roman contract law. We can also know the form or forms which have defined American contract law up to this moment. But we cannot say that American contract law must always be responsive only to these forms. A field of law is capable of continued evolution and change through the infusion of new forms; its defining characteristic is subject to amendment and modification."

"Then can we even be certain of what law itself is?" Chris asked. "Is the very definition of law which we have established also subject to amendment and modification?"

"All we can do," replied Whitehead, after a moment's thought, "is identify the defining characteristic of law as it has manifested itself to this time. But law, just like any of its fields, is ultimately subject to the infusion of new forms or ideals. Two millennia hence, it may be folly to speak of law in the terms we now do."

"This is maddening," said Chris. "Every time I think I have locked something down as a given, it wriggles away."

"In the first instance," said Whitehead, "we have locked nothing down. Right now we are operating in the world of imaginative speculation; we have not yet considered whether the evidence of actual legal judgments fits our hypothesis. Beyond that, however, the nature of my metaphysical system requires that our understanding be constantly subject to revision in light of the stubborn and often unanticipated facts of reality. Absolute certainty is impossible."²⁷⁶

C. The Limits of Law

"So certainty about any absolute limits on law is also impossible," said Chris.

"I should think so," said Whitehead. "What sort of limits did you have in mind?"

²⁷⁵ See *supra* note 88 and accompanying text (stating that evolving societies cannot be defined with certainty because of their constant change).

²⁷⁶ See *supra* notes 28-29 and accompanying text (noting that metaphysical schemes are themselves limited, and that we must be willing to re-examine them as new insight and experience come to light).

"Justice would be one," said Chris. "Perhaps equality is another."

"No, justice is not an absolute limit on law. Unlike Plato, I do not regard justice as an essential element in my metaphysical scheme.²⁷⁷ For reasons we discussed when we were talking about the Good,²⁷⁸ however, justice is extremely important to my metaphysical scheme. Each form of justice is an ideal, a type of perfection or Beauty. Therefore, various ideals of justice can inform discrete legal judgments and become the basis for a particular legal system. Justice helps to achieve Beauty.²⁷⁹ But at the same time justice is not Beauty. Ultimately and ideally, law must transcend any particular form of justice, and even justice itself, to work for the enhancement of Beauty. And that enhancement will typically require the active entertainment of Beauties other than justice.

"The same is true of equality.²⁸⁰ I doubt that absolute equality—absolute sameness of opportunity for all in a civilization—is a worthwhile aim. Inequalities among members of a civilization are sometimes necessary for survival of the whole.²⁸¹ At other times inequality is even desirable, for it ensures the diversity of ideals necessary for further creative advance. Within these parameters, however, I will concede that law should work for the greatest equality consistent with the achievement of some present Beauty or some equivalent or greater Beauty. 'External constraint upon the rational self-direction of conduct is, indeed, inextricably interwoven

²⁷⁷ See Cobb, *supra* note 267, at 26. For trenchant criticisms of Whitehead's failure to emphasize justice, see MORRIS, *supra* note 16, at 209-21 (suggesting that the ideological commitment of process philosophy is bourgeois, First World liberalism that threatens to keep Third World countries in positions of dependence); see also Henry W. Clark, *Process Thought and Justice*, in *PROCESS PHILOSOPHY AND SOCIAL THOUGHT*, *supra* note 14, at 133 (examining the "inability of Process Thought to productively address the issues of personal inviolability, equity and rights which constitute major aspects of what justice is all about"); George V. Pixley, *Justice and Class Struggle: A Challenge for Process Theology*, 4 *PROCESS STUD.* 159, 159 (1974) (examining the limitations placed on social justice by process theology).

²⁷⁸ See *supra* notes 132-45, 166 and accompanying text (discussing Goodness, Beauty, and the relationship between the two).

²⁷⁹ See Clark M. Williamson, *Whitehead as Counterrevolutionary? Toward Christian-Marxist Dialogue*, 4 *PROCESS STUD.* 176, 184 (1974) ("The absence of justice from Whitehead's list of cultural aims is verbal, not conceptual. . . . Whitehead's own writings on the history of society show that 'peace' is unstable apart from justice. . . . The more justice, the more just that justice is, the greater the strength of beauty . . .").

²⁸⁰ For an effort to develop an ethic of equality from a Whiteheadian base, see CAUTHEN, *supra* note 16.

²⁸¹ See *supra* notes 212, 230 and accompanying text (arguing that differences between nations and people are necessary to make higher development possible); see also PRICE, *supra* note 18, at 94 (quoting Whitehead as saying that, "I wouldn't have a dead level of income. Families with wealth are free to experiment. And the rich man's fad of one generation becomes the poor man's necessity of the next").

in the nature of things. But wherever it exists, and is removable without some corresponding loss of liberty, it is the evil, it is the enemy."²⁸²

"As long as our hypothesis about law remains accurate, however," said Chris, "there is one 'absolute' limit that pertains. That limit, of course, is that *every 'legal' judgment must advance either the civilization's aim or else some equivalent or greater aim.*

"Let me be clear. I do not mean to imply that a legal judgment, which necessarily has the freedom to come to its own satisfaction, may never aim at a perfection that is less than the present perfection of civilization. It can. But such regressive outcomes are, by definition, not *legal* judgments. They are facts; and like all tragic facts, they are the stubborn reality with which all subsequent occasions of experience, including subsequent legal judgments, must deal."

"Your point is well-taken," said Whitehead, "as long as you keep in mind that this limit is not an eternal absolute. But it is an absolute as long as the present defining characteristic of law remains accurate."

"The consequence of this limit is that the line between that which is 'lawful' and that which is 'unlawful' is always capable of shifting." Chris said. "Suppose for simplicity's sake that there are five levels of perfection at which a legal judgment could aim: Level 1, Level 2, Level 3, Level 3A, and Level 4. The levels are arranged in ascending order of Beauty, with Level 1 being the least beautiful; the exception is Level 3A, whose perfection is different than, but equivalent to, Level 3. If the civilization is presently aiming at the perfection of Level 3, then a judgment could be 'lawful' if and only if it either aimed to maintain Level 3, or aimed at Level 3A or Level 4. But once it aims at Level 4, then (barring extenuating circumstances making the return a necessity) subsequent efforts to return the law to Level 3 or 3A are now unlawful."

"But suppose that, rather than aiming at Level 3, 3A, or 4, however, a discrete legal judgment chooses to regress to Level 1," said Whitehead. "Once that has occurred, may we describe any further

²⁸² *Liberty*, *supra* note 192, at 37. This remark was made during a 1906 speech by Whitehead for women's suffrage, of which Whitehead was a tireless supporter. See 1 LOWE, *supra* note 2, at 313-14 (discussing Whitehead's support of women's suffrage and position as chairman of the Cambridge branch of the national Men's League for Women's Suffrage); see also *supra* notes 104-05, 186-91, 195, 211 and accompanying text (describing the appropriate blend of liberty and compulsion in a civilization).

choices as 'lawful' when they aim at Level 1 or any of the higher levels?"

"I should think that, if the law aims at Level 2 in such a situation, we cannot say that it is 'unlawful' simply because it is less beautiful than the perfection of Level 3 achieved in some past occasion. 'Lawfulness' is determined in accordance with present facts, not in accordance with past facts whose perfection may exceed the present grasp."

"This analysis is generally sound," said Whitehead, "as long as a civilization's former level of perfection becomes unattainable because of events beyond the civilization's control. Possibilities are always hedged in by stubborn fact; just because regression has made the attainment of former levels of perfection impossible, we should not disparage the legal judgments that make the best of a bad situation.

"But when a civilization voluntarily brings itself to a lower level of perfection, and then continues to maintain itself at that level through its legal arrangements, I should think that we can continue to judge those arrangements unlawful. Without this caveat, we would be capable of judging the initial legal arrangements of Nazi Germany as 'unlawful'; but we would be forced to acknowledge that later legal arrangements of the Nazi regime were 'lawful.'²⁸³ Therefore, only after the civilization finally begins the ascent from barbarity, and starts to aim at higher perfections, can we regard its efforts as 'lawful.' If we postulate that the level of perfection obtained in the Weimar Republic was Level 3 and it regressed during the Nazi years to Level 1, the legal judgments of post-war Germany can be seen as lawful as long as they aim at Levels 2, 3, 3A, or 4. The fact that the ravages of the war make the attainment of the former perfection of the Weimar Republic (Level 3) impossible for the time

²⁸³ Compare H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618-21 (1958) (suggesting that the laws of the Nazi regime were "lawful"), with Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 653-57, 661 (1958) (suggesting that the laws of the Nazi regime were invalid because they were immoral). In arguing that laws that aim at lesser perfections should be regarded as "unlawful," I am obviously siding with Fuller to the extent that I recognize some ultimate check on the legality of discrete legal judgments; my disagreement with Fuller, which is undoubtedly a greater one, is that I find the check to lie in the notion of Beauty rather than in the notion of Morality. Little in the text, however, turns on whether "laws" that aim at lesser perfections are "unlawful" or merely "bad." If they are "unlawful," then the reason not to enact or support them is manifest. If the "laws" are viewed merely as being "bad," Whitehead's claim that aesthetic experience is the primary value provides the needed justification not to enact or support them. See *supra* notes 132-45 and accompanying text.

does not permit us to declare 'unlawful' those post-war efforts that seek to aim at the greater perfections of Level 2."

D. The Process Rejoinder to Some Common Issues in Jurisprudence

"This is fascinating," Chris said at last. "Your theory navigates between the common dichotomies of modern jurisprudence. You tell us: 'Neither a formalist nor a realist, neither a natural lawyer nor a positivist, neither a marxist nor a pragmatist, be!'"

"I should rather hope that I fare better in the end than Polonius," laughed Whitehead, "nor am I sure that I catch your meaning."

"First, a great debate in modern jurisprudence is between formalism and realism. In a general sense, formalism holds that law contains certain forms or first principles from which the outcome in the present case can be logically deduced.²⁸⁴ Realism holds that no first principles exist, that formal analysis is therefore misguided, and that law needs to be guided by 'a more philosophically and politically enlightened jurisprudence' in which the actual workings of the law are examined and considered.²⁸⁵

"A process perspective sides with neither approach; rather, it overrides the dichotomy. Since the law has both formalist and realist strands, neither the formalist nor the realist perspective can be regarded as constitutive of law; a way must be found to encompass both. A process perspective, rather than being distracted in a question over method, recognizes that multiple forms of Beauty can be achieved in each legal judgment; thus, multiple approaches to law are possible and legitimate. Some Beauties—typically those associated with the preservation of established order—are better achieved with a formalist approach. Some Beauties—typically those associated with newer and greater Beauties—are better

²⁸⁴ See KUKLIN & STEMPEL, *supra* note 13, at 147-51, 188-89 (comparing formalism and realism in law and legal education); G. EDWARD WHITE, TORT LAW IN AMERICA 56-62 (1980) (explaining the effects of legal science on tort law principles); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 509-17 (1988) (defining formalism and arguing for a rethinking of the contemporary aversion to formalism); Robert E. Scott, *Chaos Theory and the Justice Paradox*, 35 WM. & MARY L. REV. 329, 337-38 (1993) (discussing formalists' disregard of the "Justice Paradox" as ultimately leading to a rejection of formalism); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988) (defending and elucidating formalism's role today).

²⁸⁵ The definition of realism, which is admittedly a broad one, is taken from AMERICAN LEGAL REALISM xiii-xiv (William W. Fisher III et al. eds., 1993). For other descriptions of the realist enterprise, see KUKLIN & STEMPEL, *supra* note 13, at 150-58; WHITE, *supra* note 284, at 63-113; Scott, *supra* note 284, at 338-42.

achieved with a realist approach. Neither approach is per se illegitimate."

"From your description," Whitehead said, "it seems that both formalist and realist approaches are inadequate. The formalist approach pays insufficient attention to the world of stubborn fact, preferring instead the realm of abstracted ideals. The realist's pursuit of fact neglects the value of forms, ideals, and abstractions. Though I certainly have sympathy for the realist attitude, at least initially,²⁸⁶ I think it necessary to navigate a course between the two sides. Like the formalist, I recognize that 'the advance of the finite human understanding requires adherence to some judicious abstraction, and the development of thought within that abstraction.'²⁸⁷ But like the realist, I hold that excessive abstraction obscures the inconsistencies and conflicts with which all occasions of experience are laden, and thus deadens the impulse for creative escape from massive order.²⁸⁸ Any principle will eventually retard, rather than maintain or advance, a civilization's progress; any principle, when unseasonably adhered to, is a positive evil.²⁸⁹ Moreover, when a lawgiver chooses to follow only the extant forms, she soon discovers that the forms often operate at such a level of generality that any of a number of results may be derived from a given form or series of forms."²⁹⁰

"It seems to me that a process understanding of law can also steer the middle course between legal positivism and natural law,"²⁹¹ said Chris. "Positivism denies any necessary connection between law and morality. Law is created by humans for human purposes; law is whatever the lawgiver says it is. Therefore, while law can express and affirm moral demands and rights, its failure to do so does not invalidate the law. Rather, a law's validity is measured by whether it was promulgated in accordance with the sover-

²⁸⁶ See *supra* notes 12, 21-27 and accompanying text (explaining how Whitehead's ideas overlapped with those of realists).

²⁸⁷ *MODES OF THOUGHT*, *supra* note 9, at 76.

²⁸⁸ See *id.* at 82 ("In proportion to our relapse towards abstraction, many entities will alternatively produce the same abstract effect."); *id.* at 55 (noting that abstraction "has its dangers").

²⁸⁹ See *supra* notes 109-13, 275 and accompanying text.

²⁹⁰ In this respect, a process metaphysics confirms a common criticism of formal analysis by realists and critical scholars. See, e.g., UNGER, *supra* note 250, at 5-14.

²⁹¹ Whitehead was well aware of the division between scientific positivism and the opposing view that the forces of nature were governed by an immanent or an imposed Law of Nature; he thought his own metaphysics provided a better alternative than these approaches. See *ADVENTURES OF IDEAS*, *supra* note 8, at 142-204.

ured by whether it was promulgated in accordance with the sovereign's procedures or in accordance with other neutral criteria thought to be essential to the creation of 'law.'²⁹²

"Hence the laws of the Nazis are as valid as the laws of Moses or Justinian."

"To take the extreme example, yes," said Chris. "As you might guess, natural law holds the opposite. Beyond the legal rules of a particular state—the positive law—there lies another, natural law.²⁹³ Such law has been thought by some to derive from God's eternal law;²⁹⁴ by others from the implicit structure or order of law.²⁹⁵ In either event, 'the very nature of law [is] to express moral demands and affirm moral rights.'²⁹⁶ The relationship between law and morality is a necessary one; the validity of any particular set of legal rules can be measured by the extent to which they correspond to the higher demands of morality and justice."

"And how does a process perspective contribute to this debate?" asked Whitehead.

"The metaphysics of process categorically rejects the notion that any fixed legal principles can forever guide the advance of the world,²⁹⁷ just as it rejects the notion that any fixed moral principles can do so.²⁹⁸ Rights and obligations are contextual to the civilization in which they are found; we do not know the rights that will be necessary to guarantee the advance of civilization and the sorts that will be irrelevant to that advance."

"That would certainly be the start of my critique of natural law," said Whitehead, "but there is another half: Natural law theory has

²⁹² See generally W.J. WALUCHOW, INCLUSIVE LEGAL POSITIVISM 80-82 (1994) (discussing the nature of legal positivism); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-62 (1897) (arguing that morality and law are not co-extensive); see also Hart, *supra* note 283, at 594-621 (describing various branches of positivism).

²⁹³ See 1 & 2 NATURAL LAW (John Finnis ed. 1991) (surveying the present state of thought regarding natural law); ROBERT P. GEORGE, MAKING MEN MORAL (1993) (arguing that law has a legitimate subsidiary role to help people become moral).

²⁹⁴ See, e.g., 2 THOMAS AQUINAS, SUMMA THEOLOGICA 1008-13 (Dominican Province trans. Christian Classics ed. 1981) (ca. 1271) (deriving scope of natural law, in part, from scripture); JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 371-411 (1980) (examining natural law as "participation of Eternal Law").

²⁹⁵ See, e.g., LON L. FULLER, THE MORALITY OF LAW 96-106 (rev. ed. 1969) (discussing morality and natural law); Ronald A. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982) (espousing naturalism as a theory by which cases should be decided and addressing certain arguments against naturalism).

²⁹⁶ WALUCHOW, *supra* note 292, at 80.

²⁹⁷ See *supra* notes 234-56, 263-67, 274-76 and accompanying text.

²⁹⁸ See *supra* notes 176-82 and accompanying text (arguing that civilization's advance requires moral codes to be sensitive to novel creativity that aims at higher perfection).

misunderstood the nature of the relationship between law and morality."

"The true relationship being that both are in service to Beauty." Chris finished the thought.

"Exactly. The relationship of law to morality is not that of servant to master; both are servants to Beauty, each according to its methods. The order imparted by moral and legal codes helps to guide the choice of the beautiful in a particular occasion of experience, but neither law nor morality can define Beauty. Art, science, religion, education, love, and all the lures to adventure also come into play.

"Thus, natural law theory commits the sin of inadequate breadth of insight. The focus on the law's relationship to morals abstracts from the welter of actual relationships enjoyed in discrete legal judgments. Although abstraction usefully selects some elements of our experience for deeper understanding and thus makes civilization possible,²⁹⁹ it also leads us away from rich detail, and thence from Truth, and thence from Beauty.³⁰⁰ An undue effort to cast law only in terms of its relationship to morality or natural rights is bound to fail, once the novelty of the particular theory of morality or rights wears off."

"Exactly the same point—the service of law to Beauty—distances your process metaphysics from positivists as well," Chris said. "There is more to judge a law against than asking whether there was a quorum in the Reichstag on the day the Nazi regime was established. Like moral codes, legal codes may be judged according to whether they help to foster a balance of order and freedom conducive to the maintenance or advance of Beauty. Although, as the positivist says, legal and moral systems need not exist in harmony, any disharmony between the systems will lead to needless destruction unless the tension is a productive one. Hence, in no meaningful sense are law and morality disjointed from each other."

"Let me be clear, though," said Whitehead. "You certainly do not mean to suggest that law and morality are necessarily more connected than law and education, or law and science, or law and any other discipline that helps to achieve Beauty."

"No, I don't," said Chris. "Because they operate in similar ways to regulate behavior, law and morality have a natural affinity. But

²⁹⁹ See *supra* notes 263, 271-72, 286 and accompanying text.

³⁰⁰ See *supra* note 287 and accompanying text.

more than law and morality is needed to achieve Beauty. Law is located in a broad web of relationships, of which morality is but one part."

"So how will we defend ourselves against the inevitable indictment of relativism?" Whitehead asked. "Here is what will be said against us: your metaphysical scheme guarantees us no absolute rights. We can never know, once and for all, what justice is. For you everything depends on context, on aims at evanescent, ever-changing, and manipulatable notions of 'Perfection' and 'Beauty.' Your scheme can provide no sure argument against the legality of death camps, of horrific genocide, of monstrous inhumanity, repression, and brutality."³⁰¹

"I will open our defense by appealing to the evidence of human experience," responded Chris. "Has there ever been any legal system or any legal code that has survived without change? The answer is no. Has there ever been a single rule of law that has survived without change? I know of none. The evidence of law buttresses the hypothesis of process metaphysics: No rule of law is fixed, eternal, and undebatable. Notions of justice have always operated in the context of the aims at perfection of particular civilizations."

"That would be the start of my response," said Whitehead, "but I would go beyond that. I would also return to the metaphysical process by which discrete legal judgments come to their satisfaction."³⁰² Specific notions of justice are types of eternal objects—pure ideals that do not change.³⁰³ Each form of justice represents a particular type of perfection. Some forms of justice have long since been forgotten; others have not yet been discovered. Since there is no end-state of the world—no final Perfection of Perfections awaiting at the end of civilization³⁰⁴—no form of justice can ever be regarded as the Ultimate Justice. Just as an occasion of experience prehends eternal objects in the process of coming to its satisfaction, a discrete legal judgment can apprehend *any* of these forms of justice. Nothing can deprive a legal judgment of the freedom to choose and create its own aim.

³⁰¹ See Clark, *supra* note 277, at 132-39 (criticizing process thought for neglecting to address or discuss justice).

³⁰² See *supra* notes 258-62 and accompanying text.

³⁰³ See *supra* note 263 and accompanying text.

³⁰⁴ See *supra* notes 114-16, 119-21 and accompanying text.

"Having said that, however, I must object to the conclusion that relativism draws from this freedom to choose. A process perspective enjoys numerous tools to evaluate the appropriateness of the choices made in each discrete legal judgment. The first ground for evaluation is whether the judgment achieves the perfection at which it has aimed itself. Second, a legal judgment can be evaluated by asking whether the judgment advances the order of the particular form or forms of justice that govern that legal field. Third, a legal judgment can be evaluated by asking whether the judgment advances the aim selected by a civilization as its defining order, or some equivalent or greater order. Finally, we can ask whether the discrete legal judgment has aimed at the greatest perfection possible for that judgment.

"These evaluative questions—in particular the last two—separate process metaphysics from Positivism and Relativism. Not all forms of justice are equally appropriate in all situations. There does exist an objective measure by which the quality of particular choices can be judged. That measure is Beauty. Some perfections, and the forms of justice that advance those perfections, will create more Beauty than others. In the proper circumstances, some imperfections, and the forms of justice that advance those imperfections, create more Beauty than any perfection.³⁰⁵ A discrete legal judgment can be criticized for its failure to generate as much Beauty as other, untaken alternatives. A particular judgment can even be declared 'unlawful' when it aims at a perfection that is less than the level of perfection presently achieved in a civilization.³⁰⁶

"That the notions of 'Beauty' and 'Perfection' are vague, I do not deny. Certainly more work needs to be done to develop ethical guidelines for the achievement of Beauty.³⁰⁷ Until that task fails, however, I am unwilling to pronounce my metaphysics, and the legal consequences we have teased out of my metaphysics, a failure."

"So how would you handle the Marxist critique that, in the final analysis, a civilization's material substratum defines the ideas that the civilization considers, and thus, presumably, determines the forms that shape the civilization's legal code?"

³⁰⁵ See *supra* notes 98-99, 163 and accompanying text (discussing higher and lower grades of perfection and how attaining higher perfection means discord with present perfection).

³⁰⁶ See *supra* note 283 and accompanying text (explaining that laws aiming at anything less than the present perfection are unlawful).

³⁰⁷ See *infra* notes 346-47 and accompanying text (pointing out that "middle principles" may be extracted from Whitehead's ideas).

"I confess that my work contains very little consideration of any continental philosopher after Kant and Hegel, so I never regarded fully the Marxist critique," said Whitehead.³⁰⁸ "But I would largely agree with Marx's point. The physical facts of the real world precede our grasp for novel ideals, and to a large extent determine which ideas we will positivelyprehend and which of those we will be able to act upon.³⁰⁹ Marx's view of history is also similar to mine; sometimes social injustices must be tolerated because all alternatives are worse.³¹⁰

"In other ways, however, Marx and I diverge significantly. Unlike Marx, I do not believe that human history will culminate in any end-state, nor that any single economic or socio-political system is the goal of humanity.³¹¹ Nor do I view individuals who act in history primarily in terms of their class;³¹² I concede that class influences are a historical fact and thus form a part of every physical prehension, but I am more sanguine that, at least on some occasions, people can break free of their past and be lured by the novel ideal. Thus, I emphasize the balance between the individual and social influences, as well as the balance between past occasions and the lure to novel adventure."

³⁰⁸ See PRICE, *supra* note 18, at 272 (quoting Whitehead as saying that he thought Marx's political thought was a daring new idea, but that he could not "speak of [Marx] with any confidence"); ADVENTURES OF IDEAS, *supra* note 8, at 43-44 (briefly reacting to Marx's notion of class warfare). There have been some recent efforts to consider the points of agreement and disagreement between Marx and Whitehead. See, e.g., MORRIS, *supra* note 16, at 209-19; Cobb, *supra* note 267, at 16-26; Franklin I. Gamwell, *A Discussion of John B. Cobb, Jr., "The Political Implications of Whitehead's Philosophy,"* in PROCESS PHILOSOPHY AND SOCIAL THOUGHT, *supra* note 14, at 29. For a somewhat differing interpretation of the relationship between Marx and Whitehead, suggesting even greater affinity between their thought, see Williamson, *supra* note 279.

³⁰⁹ For Whitehead, the classic exemplar of the relationship between the material substratum and the power of ideas was the institution of slavery. According to Whitehead's interpretation, the legality of slavery simply acknowledged the reality that such civilization as was then possible depended upon large numbers of individuals forcibly committed to meeting the basic needs of the civilization as a whole. The ideal of abolishing slavery had been prehendend for at least two millennia; but for most of that time it was not practical, for such little civilization as was then attainable would have perished. Only with the advent of modern agricultural and industrial technology did these restrictions on freedom become unnecessary. Although resistance to the new ideal was stiff, the ideal of freedom ultimately prevailed once it was possible in a material sense to allow it. See ADVENTURES OF IDEAS, *supra* note 8, at 14-35.

³¹⁰ See Cobb, *supra* note 267, at 16 (claiming that "[t]here have been circumstances . . . where the alternative to a system of slavery would be worse than the continuation of slavery").

³¹¹ See *supra* notes 114-16, 119-23 and accompanying text.

³¹² See ADVENTURES OF IDEAS, *supra* note 8, at 43-44 (critiquing the notion of "class war," while still finding value in Marx's ideas).

"You sound like a pragmatist in so many ways," said Chris. "You urge us to aim at some notion of the Good—Beauty, you call it—but you recognize that the Good is ever-changing. You seek to sail a course between absolute rights and abject relativism. You reject the 'fact-value' or 'is-ought' distinction that has plagued so much of this century's philosophical and legal discourse.³¹³ Tell me: Is the effect of your philosophy pragmatic, or does it have something unique to offer? I ask because, at the present, legal pragmatism is enjoying a renaissance,³¹⁴ and I wonder whether it would be just as easy to get to your endpoint without carrying the controversial baggage of your metaphysics."

"Ah, still you doubt," chided Whitehead.

"Perhaps that was rather a harsh way to put the question," said Chris apologetically.

"No, it was fair, very fair," Whitehead said. "There is great affinity between my work and that of the pragmatists. 'I am . . . greatly indebted to . . . William James[] and John Dewey.'³¹⁵ I regard William James as one of the four great Western philosophers.³¹⁶ John Dewey liked a great deal of my basic method,³¹⁷ and I admired his.³¹⁸ 'One of my preoccupations has been to rescue their type of thought from the charge of anti-intellectualism, which rightly or wrongly has been associated with it.'³¹⁹ Pragmatists and I both emphasize the role of experience, the lack of foundationalist principles (legal or otherwise), the need to adjust as circumstances warrant, the tolerance of diversity, the desire to find the most aesthetically

³¹³ Whitehead overcame the "fact-value" problem by finding that every "fact" (i.e., actual occasion) has an intrinsic value and represents in its concrescence the full range of possible values. See *supra* notes 129, 214 and accompanying text. Pragmatists arrived at the same conclusion, albeit by somewhat different means. See Ruth A. Putnam, *Pragmatism*, in 2 *ENCYCLOPEDIA OF ETHICS* 1002, 1003 (Lawrence C. Becker & Charlotte B. Becker eds., 1992). For brief discussions of the "fact-value" or "is-ought" problem in philosophy and jurisprudence, see HORWITZ, *supra* note 236, at 211, 250-51; KUKLIN & STEMPEL, *supra* note 13, at 17-18.

³¹⁴ See *supra* note 13 and accompanying text (explaining current debate on pragmatism in American legal thought).

³¹⁵ *PROCESS AND REALITY*, *supra* note 1, at xii.

³¹⁶ The others were Plato, Aristotle, and Leibnitz. See *MODES OF THOUGHT*, *supra* note 9, at 3-4. For Whitehead, James's singularly important contribution was his "protest against the dismissal of experience in the interest of system." *Id.* at 4.

³¹⁷ See John Dewey, *The Philosophy of Whitehead*, in *THE PHILOSOPHY OF ALFRED NORTH WHITEHEAD*, *supra* note 14, at 643-61 (generally praising Whitehead's philosophy).

³¹⁸ See Alfred N. Whitehead, *John Dewey and His Influence*, in *ESSAYS*, *supra* note 2, at 120 (concluding that Dewey "has disclosed great ideas relevant to the functioning of the social system").

³¹⁹ *PROCESS AND REALITY*, *supra* note 1, at xii.

pleasing outcome in circumstances of conflict, and the recognition that the search for an ever-changing Beauty is never-ending.

"In spite of these similarities, no pragmatist would want to claim me. Certainly the great differences between myself and pragmatists are philosophical. Although both Dewey and James had their metaphysical moments,³²⁰ neither found as much value in the creation of a logical, coherent metaphysical system as I do.³²¹ Likewise, my devotion to metaphysics makes me one of the 'bad guys' for latter-day neo-pragmatists such as Richard Rorty.³²²

"This disagreement between pragmatists and myself is hardly a minor one; it has many consequences which we could perhaps explore someday.³²³ One consequence is significant for our present

³²⁰ For examples of the occasional metaphysical turns of Dewey and James, see JOHN DEWEY, *EXPERIENCE AND NATURE* (1925); WILLIAM JAMES, *ESSAYS IN RADICAL EMPIRICISM* 2-4 (1912).

³²¹ John Dewey was generally sympathetic to Whitehead's efforts to emphasize the primacy of experience and to align human and natural experience. He was less sympathetic with Whitehead's efforts to systematize that experience within a set of principles of which all particular instances were exemplifications. See Dewey, *supra* note 317, at 657-61. C. S. Peirce, who, along with William James, founded pragmatism, showed a similar suspicion of metaphysics, which, he once observed, "is a subject much more curious than useful, the knowledge of which, like that of a sunken reef, serves chiefly to enable us to keep clear of it." *PHILOSOPHICAL WRITINGS OF PEIRCE* 40 (Justus Buchler ed., 1955).

³²² See *supra* note 33 and accompanying text (highlighting Rorty's views of Whitehead's system and its shortcomings).

³²³ Two differences concern the starting point of each philosophy and the problem of epistemological dualism. By grounding its philosophy on conscious experience, as Dewey did, or on human language, as Rorty does, pragmatism starts with distinctive features of human experience that make it difficult for pragmatism to make links to other, non-human experience. Process philosophy, on the other hand, seeks to ground itself in the common experience of all objects, thus making the high-level consciousness and language of human experience an exemplar of all experience. See *supra* notes 55-56 and accompanying text. This move makes possible the inclusion of non-human experience within philosophical discourse.

Second, pragmatism cannot provide an answer to the problem of epistemological dualism that Whitehead saw as the critical mistake of modern Western philosophy. Although, like Whitehead, pragmatists deny the epistemological gap, their method for doing so is simply to deny this gap has any consequence for the way in which we live our lives; therefore, it is possible to ignore it. See Putnam, *supra* note 313, at 1002-03 (noting that pragmatists reject the gap between the knower and what is known); Richard Rorty, *Pragmatism as Anti-Representationalism*, in JOHN P. MURPHY, *PRAGMATISM FROM PEIRCE TO DAVIDSON* 1, 5 (1990) ("Dewey and Davidson are content to take up one traditional dualism after another, point to the difficulties to which it has led, and suggest that we can do without it."). Obviously, the Cartesian gap between known and unknown, subject and object, has not been closed by this move. The failure of pragmatism to provide any insight into the problem of dualism is one of the reasons that the bulk of twentieth-century philosophy has simply ignored it. See, e.g., Rorty, *supra* (conceding that pragmatists such as Peirce, James, and Dewey are "treated as provincial figures" in philosophical discourse); *id.* at 1 (quoting Martin Heidegger that "the American interpretation of Americanism by means of pragmatism still remains outside the metaphysical realm"). From a Whiteheadian perspective, epistemological dualism is a philosophical problem which must be, and is, tackled head-on. See *supra*

discussions: Pragmatism does not provide the same justification for good action that my process metaphysics does. Pragmatism can be defined as a commitment to measure the value of ideas and actions in terms of the consequences which those ideas and actions will have in practice.³²⁴ The pragmatist, however, cannot really assign any reason that humanity should prefer the course of conduct which results in the best consequences for humanity. It is pragmatism's great article of faith.

"My metaphysics provides the reason. Recall that each occasion of experience is supplied an initial subjective aim by God.³²⁵ The aim to achieve whatever perfection is then possible is not an article of faith; it is a real fact incorporated into each occasion of experience.

"But you, Chris, are a lawyer—a person of action in the world. You are enough of a pragmatist not to care about petty intellectual squabbles; you want to know what effect these squabbles have for a proper understanding of the nature of law."

"I was starting to think just that thing, yes," laughed Chris.

"Very well, we should answer the question directly," said Whitehead.

notes 34-37, 63-66, 71 and accompanying text (explaining epistemological dualism and Whitehead's rejection of such).

³²⁴ An exact definition of pragmatism, which had as many as twelve distinct branches by the turn of this century, and which has grown numerous additional branches since, is difficult. See MURPHY, *supra* note 323 (pointing out that the study and definition of pragmatism differs from country to country); H.S. Thayer, *Pragmatism*, in 6 *ENCYCLOPEDIA OF PHILOSOPHY* 430 (Paul Edwards ed. 1967) (attempting short definition of pragmatic movement). The classic definition of C.S. Peirce, which has probably not been improved upon, states: "[c]onsider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object." 5 CHARLES S. PEIRCE, *COLLECTED PAPERS* 258 (Charles Hartshorne & Paul Weiss eds., 1934).

A short description of the ways in which the leading early proponents of pragmatism—Peirce, James, and Dewey—deviated can be found in Putnam, *supra* note 313, at 1003-04. Of importance to Putnam's article is the movement from Peirce to Dewey on two matters: Peirce postulated both that scientific inquiry would lead, "in the indefinitely long run, to one final opinion, the object of which will be reality," and that there was an "absolute aim for human conduct"; while Dewey ultimately rejected the notion of a final opinion in favor of a claim that truth is merely warranted assertion, and thought that human conduct was destined only to continue forever the "problem of establishing social conditions in which a 'working harmony' prevails." *Id.* at 1003. In both regards, Whitehead's views corresponded more closely with those of Dewey; hence, the philosophical and practical distinctions between Peircean pragmatism and Whiteheadian metaphysics are generally greater than the distinctions discussed in the text.

³²⁵ See *supra* note 79 and accompanying text.

"We could begin with Dewey's philosophy of law,³²⁶ and see where you differ," suggested Chris.

"An excellent approach," agreed Whitehead.

"For Dewey, there are three questions: What is the source of law? What is its end? And what is its application?³²⁷ His answers are these: The ultimate *source* of law is custom; law is not ultimately found in some external source, as the natural law tradition has it, or the sovereign state, as the positivists have it.³²⁸ The *end* of law and its *application* are integrally connected. 'A given legal arrangement is what it *does*, and what it does lies in the field of modifying and/or maintaining human activities as going concerns.'³²⁹ Therefore, in choosing the law to apply in particular settings, 'the standard is found in consequences, in the *function* of what goes on socially.'³³⁰

"Dewey is essentially a legal realist. He evaluates law in terms of how it aids us in the ongoing process of human living. The standard by which legal rules are judged is not an external, absolute norm. An external reference is needed only 'if social facts are not taken as going concerns;' if social facts are going concerns, as Dewey believes, then it is senseless to create law to deal with those ongoing concerns by appealing to an external standard 'with which, by definition, [the concerns] have nothing to do.'³³¹ Indeed, like you, Dewey uses the fact of historically and culturally conflicting legal rules as 'sufficient evidence that they were not derived from any *a priori* absolute standard.'³³² 'For what reason is there,' he asks, 'for thinking that the standards now put forth by those who appeal to a

³²⁶ Dewey wrote about law and the philosophy of law in various works throughout his prolific career. See Stephen Toulmin, *Introduction*, in 4 JOHN DEWEY THE LATER WORKS, 1925-1953 at xviii-xxii (Jo Ann Boydston ed.) (1984) (summarizing and analyzing Dewey's legal thought). Dewey's most famous formulation is contained in John Dewey, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW 71, 73-85 (1941). In the text the discussion will focus on the philosophy articulated in *My Philosophy of Law* for two reasons: first, it is the most mature and complete representation of Dewey's thinking about law; and second, it was published in 1941, the same year in which Dewey's analysis of Whitehead's metaphysics was published. See Dewey, *supra* note 317. It seems appropriate to engage Dewey's philosophy of law written at the time when Dewey was himself most engaged with Whitehead's work.

³²⁷ See Dewey, *My Philosophy of Law*, *supra* note 326, at 73.

³²⁸ See *id.* at 78-82.

³²⁹ *Id.* at 77.

³³⁰ *Id.* at 84.

³³¹ *Id.* at 83.

³³² *Id.* at 84.

non-empirical absolute end, will have a different fortune from those put forward in the past?"³³³

Whitehead was silent for a moment. "As you said, Dewey and I have common points, in particular our views about the process-oriented nature of experience. The refutation of natural law which he draws from this common ground is in some regards identical to the one we just developed, and in other regards is parallel. The same is true of his argument against positivism.

"But I am not sure that I would be quite so willing to accept Dewey's answers for the source, end, and application of law. Dewey, and pragmatists generally, treat ideas *qua* ideas with less respect than I do. For me, ideas have a status and function independent of their utility in choosing the action that, in some pragmatic sense, is 'best.' Therefore, I would wish to stake out a position somewhere between the pragmatic ideal of how law should be done and the natural law ideal that neither Dewey nor I can accept.

"Let me begin this task by asking you whether the pragmatic method that Dewey advances—the consideration of legal rules in light of their consequences—is the only method that lawyers and lawgivers have used to establish and interpret legal rules?"

"By no means," said Chris. "The pragmatic methodology is highly controversial even today. There are those who defend a formalist methodology.³³⁴ There are many more who use natural law, justice, or efficiency principles to try to deduce a true or correct state of legal rules.³³⁵ On top of that are the thousands of legal decisions each year in which judges simply declare the rule, apply it to the facts, and reach a judgment without so much as a mention of the unsavory social consequences of the rule or the judgment."³³⁶

"So it is fair to say that Dewey's argument contains both descriptive and normative components?" asked Whitehead.

"Yes," Chris replied.

"And if we wished to account for law in all its rich detail, we would need a description that accounted for both a pragmatic, re-

³³³ *Id.* (italics omitted).

³³⁴ See Schauer, *supra* note 284, at 509-11 (explaining that the notion of formalism is still useful for today's legal decision makers); Weinrib, *supra* note 284, at 951 (defending formalism in order for law to be "differentiated from politics").

³³⁵ See, e.g., CARDOZO, *supra* note 238, at 177 ("One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian . . .").

³³⁶ See Tidmarsh, *supra* note 18, at 1360 n.162 (observing this phenomenon in tort cases).

sult-oriented approach and other, principle-oriented approaches?" asked Whitehead.

"Yes," said Chris.

"My process philosophy can do so," said Whitehead. "The explanation begins with the distinction between occasions of experience and eternal objects. Each legal result is an occasion of experience. Each legal principle—justice in its many permutations, efficiency, pragmatism, and so forth—is an eternal object. As an eternal object, it can be conceptually prehended in a legal judgment. I say 'can be,' for a legal judgment may—in fact, is almost certain to—negatively prehend most of the legal principles that could be applied to the judgment.³³⁷

"In my metaphysical system, there is no need to reconcile eternal objects with each other. The pure possibility of redness is different from that of blueness. On the other hand, the enduring society of actual occasions that we call a 'rose' achieves a definite satisfaction of its form. It is red; it is not blue; blue is only a pure possibility that has never been included in the final satisfaction of the rose's many actual occasions.

"What is true of the rose is true of the law. The rose is the actual legal judgment. Redness and blueness are the ideals about the way in which lawyers can 'do' law: positivist or natural law, formalist or realist or pragmatist, justice or utility or policy, and so on. Obviously, no single legal judgment could give effect to all of the principles held in opposition; one judgment might be positivist, pragmatic, and utilitarian, while another is oriented toward natural law, formalism, and justice. Each judgment accepts certain ideals in its final satisfaction; it rejects, whether consciously or unconsciously, many thousands more.

"These facts lead to my three problems with Dewey. My first, fundamental disagreement with a pragmatic attitude toward law regards the matter of method. Dewey suggests that law has a standard method by which it should do its business. I, on the other hand, would not prescribe any preferred method. My general presumption in favor of diversity³³⁸ strongly counsels me that more Beauty is ultimately achievable by using both pragmatic and non-pragmatic approaches to law.

³³⁷ See *supra* notes 58-59 and accompanying text (explaining positive and negative prehensions).

³³⁸ See *supra* notes 212, 230 and accompanying text.

"Second, Dewey says that the end of law is to achieve greater societal good. I am reluctant to accept the qualifiers 'greater' and 'societal.' First, law need not aim at a *greater* good; law can legitimately structure societal relationships in a way that a present or equivalent level of perfection is maintained. Therefore, a pragmatic perspective is far more wedded to the notion of continual legal reform and change than is process thought. Second, I am more reluctant to say that the end of law is to achieve *societal* good. Human civilizations are but one aspect of reality, and the legal arrangements that achieve the greatest Beauty from the viewpoint of humanity are not necessarily the arrangements that achieve the greatest Beauty within the broader context of the universe. For me, the latter arrangements ultimately are more important.

"Third, the greater respect that my metaphysics has for ideas *qua* ideas leads me to disagree somewhat with Dewey's claim that custom or habit is *the* source of law. Certainly he is right that experience forms one of the bases of all legal judgments; for each legal judgment inherits the mass of prior experiences.³³⁹ By suggesting that custom and habit are the sole foundations of law, however, Dewey neglects the role of ideals. I cannot say whether the first legal pronouncement of the first prehistoric tribe merely codified habit or whether it leapt from the brain of some wise ruler who saw an opportunity to advance the tribe toward some new, more beautiful mode of perfection. Since that time, though, legal codes have operated with a mix of law descended from custom and law departing from custom."³⁴⁰

"So the sources of law for you are, first, experience and, second, the eternal objects," said Chris. "The two combine to create individual legal judgments, which, upon their creation, become the newest data in massive experience. In some situations Beauty might be best achieved by the syllogism; in some by the pragmatic consideration of consequences. Similarly, although the pursuit of natural law can never lead to an immutable system of revealed rules, its basic notion—to try to state a set of rules that accord with the wishes of God as we can best divine them or the dictates of na-

³³⁹ See *supra* notes 258-59 and accompanying text (explaining the formation of occasions of experience).

³⁴⁰ For instance, Whitehead regarded the law of contract as a mix of custom and the effort to reach beyond custom. See *supra* note 223 and accompanying text.

ture as we presently understand them³⁴¹—is one with which we should have some sympathy.³⁴² Sometimes one method, sometimes another; we are committed to no particular approach for the achievement of Beauty.”

“You are starting to sound like me,” laughed Whitehead.

IV. CONCLUSION: WHERE DO WE GO FROM HERE?

“And so,” Chris said, “where do we go from here?”

“From your point of view or from mine?” asked Whitehead.

“From yours first,” said Chris.

“I have set out my metaphysical principles,” explained Whitehead, “I have surveyed the evidence of science, philosophy, and history, and found them consistent with these principles. Today we have mostly talked in general, hypothetical, deductive terms about what law is and how law should operate if my metaphysical principles are valid. The issue is whether the evidence of law and legal judgments bears out our predictions. If it does, I have received an important new confirmation of my metaphysics. If it does not, I must either abandon my metaphysics, modify our hypothesis about law, or both.”

“What evidence are we to look for?” Chris asked.

“First are the empirical checks of my theory. One: Does law aim for a degree of Beauty equivalent to or greater than the Beauty selected by the present civilization? If it does, then the understanding of law we have developed is more secure.

“Two: Do we find in law a balance between order and novelty, with the greater weight on order? We have predicted this,³⁴³ now it needs a more complete proof. A related proof would be to discover that civilizations which are enduring and fluid strike the balance between order and novelty by placing a greater emphasis on laws that foster novelty.

“Three: Do we find in law the interaction of ideals with actual legal judgments? Here the interaction is two-fold: first, we should

³⁴¹ These two understandings of natural law are examined in NORTHROP, *supra* note 18, at 165-72.

³⁴² The former approach focuses on discovering God's initial aim for each occasion of experience. See *supra* note 79 and accompanying text (noting that God's initial aim is to maximize the aesthetic potential of each experience). The latter approach keeps law in dialogue with the physical and social sciences. See PROCESS AND REALITY, *supra* note 1, at 83-128 (discussing the order of nature and the universe).

³⁴³ See *supra* notes 243-53 and accompanying text.

expect to see laws (or categories of laws) that aim at certain ideals and perfection; and second, we should expect to see the evolution of legal rules as new types of perfection are brought into active contemplation.

"Four: Do we see tensions between ways of thinking about law? Is there uniformity or disparity in rules and results? If the law is rigidly all of a piece across cultures and through centuries, I might be unable to defend my claim that each occasion of experience contains an inherent lure to novel adventure. On the other hand, disparity in theory, rule, and practice provides evidence for my cause.

"If these initial checks validate a process metaphysics, the second stage would be a detailed, systematic analysis of the categories of law. What are the perfections at which Contracts and Property and Criminal Law aim? Does each contain a single perfection? Multiple perfections? Are some perfections common to two or more categories of law? Are some valuable perfections missing? How do the contrasting modes of perfection relate to each other? These types of questions, which require legal philosophers to treat seriously the theory, rules, and practices of all fields of law, can help us to achieve Beauty in our legal judgments.

"The preliminary evidence we have discussed seems to support my metaphysics. But much more evidence needs to be gathered before law can truly be said to confirm it."

"Now I see what legal philosophy can do for metaphysics," said Chris. "So what can your metaphysics do for legal philosophy?"

"My metaphysics suggests a number of lessons for the legal philosopher. First of all, keep legal philosophy tied to the evidence of the real legal world. The practice of jurisprudence should be the same as the practice of speculative philosophy, only in microcosm. Begin with the evidence of legal judgments. Use that evidence to form a hypothesis that logically and coherently systematizes a field of law. Return from this imaginative leap to the evidence of other legal judgments to determine whether the hypothesis is in fact accurate. Moreover, this process is ongoing; any philosophy of law must have the tentative quality of a hypothesis subject to revision as new legal data suggest error.

"But no philosophy of law can turn entirely in on itself and its own specialized forms of knowledge. A wide breadth of outlook is also required. Legal philosophy must scour other disciplines and professions—art, science, medicine, business, religion, psychology, philosophy, economics, education, and so on—for ideas that might

lead to greater perfections;³⁴⁴ it must also be sensitive to how the stubborn facts revealed by those disciplines might require revision of the aims contained in law. No aspect of law should be immune from the searching critique of the physical and social sciences; indeed, the legal philosopher must lead the critique."

"Conversely, the legal philosopher must act as a critic of the physical and social sciences," said Chris, "for the data of legal judgments might well suggest that the aims of other disciplines need adjustment."

"You are, of course, correct," said Whitehead. "And then there is a final task for legal philosophy. You were frustrated earlier when we could not identify with any precision that which is the most beautiful in an occasion of experience. You posed the serial murderer as your example.³⁴⁵ My response to you suggested that we could, at least in general terms, apply some principles that would make it quite difficult for the murderer to justify such brutal conduct. My metaphysics does not let me go so far as to posit a specific rule of conduct—"Thou shalt never, ever kill"—that can be said to represent, in any and all circumstances, the achievement of Beauty. But the principles I suggested at least set out a framework that could be used to determine that which best achieves Beauty in certain instances, and that which does not.

"Several evaluators of my philosophy have suggested that it might be possible to extract from my metaphysics certain 'middle principles' that establish ethical guidelines for the achievement of Beauty.³⁴⁶ Although I never turned my own attention to the matter,³⁴⁷ I am inclined to agree. The development of such middle principles ought to be a focus of a jurisprudence of process. Such principles could suggest in general terms the sorts of legal structures, theories, rules, and practices that best suit particular occasions of experience, and thus are most conducive to the achievement of Beauty."

³⁴⁴ See, e.g., Glenn Harlan Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110, 110 (1991) (analyzing an application of post-Newtonian concepts to modern Constitutional Law); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 3 (1989) (applying modern physics to the analysis of Supreme Court decisions).

³⁴⁵ See *supra* notes 183-91 and accompanying text.

³⁴⁶ The term "middle principles" is used in Goheen, *supra* note 135, at 458. For similar arguments, see BELAIEF, *supra* note 137, at xi; WEISENBECK, *supra* note 129, at 141-47; Schillp, *supra* note 135, at 601-08, 613-14.

³⁴⁷ See WEISENBECK, *supra* note 129, at 143 (stating that Whitehead seems to hold that it is possible to discover universal ethical principles).

"Let us begin the task right now," said Chris with some excitement.

"Perhaps another day," said Whitehead with a sad smile. "I have a lecture to prepare this afternoon."

"Then soon."

"Yes, soon. Very soon."

They shook hands warmly. Whitehead watched Chris move lightly over the mottled sunshine on the pavement. It was nearly noon.