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### The Reformed Welfare State as the Radical Humanist Republic: An Enthusiasticc (If Qualified) Endorsement of Matthew Adler's Beyond Efficiency and Procedure

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THE REFORMED WELFARE STATE AS THE  
 RADICAL HUMANIST REPUBLIC: AN ENTHUSIASTIC  
 (IF QUALIFIED) ENDORSEMENT OF MATTHEW ADLER'S  
*BEYOND EFFICIENCY AND PROCEDURE*

ROB ATKINSON\*

I.	INTRODUCTION.....	339
II.	PROFESSOR ADLER'S QUARREL WITH "BIG-P" PROCEDURALISM.....	341
	A. <i>Four Arenas of Process</i> .....	342
	B. <i>The Case Against the Inherent Value of Procedure in the Political Microcosm</i> .....	344
	C. <i>The Case for the Inherent Value of Procedure in Macro-level Adjudication</i> .....	346
III.	PROFESSOR ADLER'S PREFERENCE FOR WELFARISM.....	349
IV.	PROFESSOR ADLER'S WRONG TURN (OR UNNECESSARY DETOUR): THE "META-MOVE".....	351
	A. <i>Making the Meta-Move</i> .....	352
	B. <i>Professor Adler's Causes for Concern</i> .....	354
	1. <i>The Illogic of Deriving Proceduralism from Metaethical Skepticism</i> .....	354
	2. <i>The Chimera of Big-N Nihilism</i> .....	355
	C. <i>Exorcising the Ghost of Nihilism Future</i> .....	356
	1. <i>The Logical Case</i> .....	357
	2. <i>The Psychological Case</i> .....	357
	a. <i>The Case Against the Strong Psychological Argument: The Platonic Socrates</i> .....	358
	b. <i>The Case Against the Weak Psychological Argument: You (and Descartes)</i> .....	359
	c. <i>The Strange Case of God</i> .....	361
	D. <i>Two Final Pitfalls</i> .....	367
	1. <i>Confusing Subjective Agreement with Objective Truth</i> .....	367
	2. <i>Invoking "True" Processes to Ensure "True" Results</i> .....	368
	E. <i>Summary</i> .....	369
V.	IMPLICATIONS FOR ADMINISTRATIVE LAW.....	370
	A. <i>Substance</i> .....	370
	B. <i>Process</i> .....	371
	C. <i>Meta-Matters</i> .....	372
VI.	CONCLUSION.....	373

I. INTRODUCTION

I am happy to find myself in very broad and deep agreement with Professor Adler's thoroughly thought-provoking paper. He sets out a plausible normative basis for just the kind of administrative system I want to have, what I would call a reformed welfare state. This is the bureaucratic complement to Woodrow Wilson's New Freedom and

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\* Professor of Law, Florida State University College of Law. I would like to thank Mark Seidenfeld for the invitation to participate in this symposium; I would also like to thank him and Matthew Adler for comments on this comment. Susan Avellone, Jed Freedland, and Kristie Hatcher-Bolin provided willing and able research assistance.

Fourteen Points, Franklin Roosevelt's New Deal and Four Freedoms, and Lyndon Johnson's Great Society and War on Poverty (and, I have to add, his campaign against communist imperialism). In America, we have no standard name or party that corresponds to this position; in Europe, it is the decades-old platform of the social democrats.<sup>1</sup>

Adler offers his welfarist model of bureaucracy as an alternative to two competing schools of liberalism. The first is a right-liberal school he calls the neoclassical. His neoclassical school is essentially the Chicago school, the modern law-and-economics movement. I have little quarrel with Adler's quarrel with the neoclassicals.<sup>2</sup> I suspect, as he argues, that wealth, in the neoclassicals' technical understanding of Kaldor-Hicks efficiency, is not something we should value in itself. At best it is a crude, if sometimes highly instructive, proxy for something like the utilitarian's happiness or Adler's own, more sophisticated notion of welfare.

The other alternative is a fellow left-liberal school, which Adler calls the proceduralists. He has—and, for what it's worth, I have—little if any quarrel with the proceduralists' substantive values. They, like Adler (and me), believe government should produce a complex but intuitively appealing mix that Adler calls welfare, commonly understood as the principled basis for the social-democratic notion of the welfare state (not, of course, in the narrower sense of a particular form of poverty relief program). Where he differs from his fellow travelers (and mine) on the liberal left is on the importance of process. He maintains that process is never more than a means to the end of producing welfare; they maintain (more precisely, as we shall soon see, he maintains they maintain) that process is to be valued in and of itself.

Here we shall see a kind of double irony: In what we generally think of as administrative law, process is not valuable in the way the proceduralists seem to believe. There, again, Adler is right. But as to several important kinds of procedures about which Adler's proceduralists have relatively little to say (criminal procedure, for example), Adler himself, and all of us who are liberals, right-wing or left, will find procedure itself fundamentally important.

To see why this is so, we shall have, finally, to address my most basic disagreement with Adler. He believes in something about which I am profoundly skeptical: objective value or, stated somewhat

1. See MICHAEL HARRINGTON, *SOCIALISM: PAST AND FUTURE* 1-2, 15 (1989).

2. As Adler notes, much of this criticism is not new, but none of it seems to have stuck with its targets. See Matthew Adler, *Beyond Efficiency and Procedure: A Welfarist Theory of Regulation*, 28 FLA. ST. U. L. REV. 241, 244-67 (2000). For examples of an earlier academic generation's critiques, which Adler duly acknowledges, see RONALD DWORIN, *A MATTER OF PRINCIPLE* 236-89 (1985) (Part Four, The Economic View of Law).

differently, moral truth. Furthermore, he seems to believe that objective value and moral truth, or at least a belief in them, are the foundation of the reformed welfare state in which he and I both believe. I am convinced otherwise. But I have an even deeper conviction: Even if I'm wrong about the vacuousness of objective value, my error is harmless; even if he's right, his objective values are unhelpful.

My position comes to this paradox: Though Adler and I disagree at the highest theoretical level, that disagreement cannot have any effect whatsoever on our shared commitment to the welfare state here, as it were, on the ground. And the reason our disagreement cannot matter is that the reason he and I believe in social democracy transcends any possible reason of the kind he is looking for. We do not believe in social democracy because it has been, or ever could be, proved to us as objectively right or true; we believe in it because it alone plausibly promises the kind of world we insist on living in, or at least working toward.

I want to begin my comment on Professor Adler's paper with his disagreement with the proceduralists. I then want to examine his own welfarist notion of both process and substance, albeit very briefly. Next, I must follow his lead into the stratosphere that philosophers call metaethics: literally, that which comes after (and in that sense lies beyond) ethics.<sup>3</sup> That meta-move, I'm convinced, is a snare and a delusion, if not a hunt for the snark. But it will take a bit of explaining to show you why. Be forewarned: To keep my points of disagreement with Professor Adler from seeming nit-picky, we will have to view his very fine piece from a broad, even panoramic, perspective. Finally, to merit my place on Professors Rossi and Seidenfeld's excellent program, I must say a bit about what all this means for administrative law.

## II. PROFESSOR ADLER'S QUARREL WITH "BIG-P" PROCEDURALISM

As I first read Adler's piece, it seemed plausible to me that the various schools he classes as proceduralist<sup>4</sup> do at least implicitly value process as an end in itself, not merely as a means to desirable outcomes. What's more, I thought the proceduralists themselves would agree, too. Just to make sure, I asked one of them, one of my best friends and one of their best exemplars, Mark Seidenfeld.<sup>5</sup> Much

3. See OXFORD ENGLISH DICTIONARY 662 (2d ed. 1989).

4. Professor Adler includes among his Proceduralists believers in "interest representation," adherents of civic republicanism, and proponents of "collaborative governance." Adler, *supra* note 2, at 243.

5. The equally good proof of both points is Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512 (1992), especially footnote \* (generously exaggerating my moral support in his writing of what has become one of the principal sources of civic republican bureaucratic theory), excerpted in PETER H. SCHUCK, FOUNDATIONS OF ADMINISTRATIVE LAW 25-27 (1994). As that article attests two points, our

to my surprise, he thinks he's a "little-p" proceduralist rather than a "Big-P" Proceduralist. Simply put, he says he sees process as a means only, not as an end or good or value in itself.

But Seidenfeld is wrong here; more precisely, he doesn't know what he really believes. On this point, I claim—perhaps arrogantly, but please await the proof—to know him better than he knows himself. My superior knowledge on this point is possible because I have had one experience that he has never had and can never have: I have had a conversation with him. In fact, I have had many conversations with him, two of the topics of which are directly relevant to Adler's claim and to Seidenfeld's denial that he is a Big-P Proceduralist. These two topics are personal virtue and social justice or, less abstractly, "How can I be good?" and "How can we be just?"

These are, of course, the two central and inseparable subjects of the Platonic dialogues, the twin foci of Western normative philosophy. To understand the dispute between Adler and Seidenfeld, we must distinguish these two related subjects, social justice and personal virtue. Once we make this distinction, we have the key to the controversy: It is possible to be a proceduralist on one or both points, or neither. I believe that Seidenfeld, and with him most civic republicans, and perhaps others Adler identifies as Big-P Proceduralists,<sup>6</sup> are guilty (or virtuous) as charged as to both social justice and personal virtue. Here Adler is right; Seidenfeld and his fellow Proceduralists value process as such. But, on a deeper point, Adler is wrong. He maintains that process is not an independent value. But all of us—not just the civic republicans among us—believe firmly that it is. Otherwise, I submit, we wouldn't be here, engaged in this discussion.

#### A. *Four Arenas of Process*

To make my point—to prove both that the civic republicans are Big-P Proceduralists and that process is, as they maintain, inherently valuable—we must map out in more detail the normative territory that includes both personal virtue and social justice. In particular we need to distinguish four paradigmatic levels at which process occurs. The debate between Adler and the civic republicans occurs at what I'll call the macrocosmic level, the level of policymaking in

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friendship and his scholarly eminence, so may this footnote. In one respect, this is more a self-fulfilling prophecy than a prayer; by citing my friend's work in my own, I automatically raise his stock on the Eisenberg-Wells exchange (even as I further debase the already dubiously inflated currency of that exchange). See Theodore Eisenberg & Martin T. Wells, *Ranking and Explaining the Scholarly Impact of Law Schools*, 27 J. LEGAL STUD. 373, 377 (1998) ("[T]he most often cited articles tend to be regarded as those with the highest quality.").

6. See *supra* note 4.

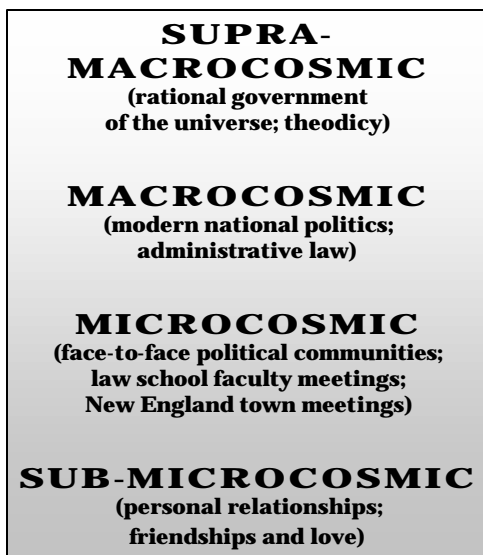
modern nation-states and their aggregates, regional groups like the European Union, and international bodies like the United Nations. This is the classic arena not only of administrative law, but also, and more generally, of both electoral and legislative politics. And this arena is, finally, the focus of modern political theory.

Just below the macrocosmic lies what I shall call the microcosmic level at which process occurs. Here I'm thinking of small, semi-autonomous, quasi-political units like the mythic New

England town, the modern American law school, and (farther up, near the border with the political macrocosm) the ancient Greek polis. At this level process occurs in a face-to-face setting; here all the members of the relevant units know, or at least recognize, each other.

The other two levels at which process occurs lie, respectively, below the microcosm of face-to-face political communities and above the macrocosm of modern politics. The sub-microcosmic realm is that of personal, as opposed to political, relationships: the realm of friendships, love affairs, marriages, and nuclear families. The final, supra-macrocosmic realm above modern politics may exist, I hasten to admit, only in myth and theory. This is the misty realm of classical theodicy and, maybe, modern physics' anthropic principle.<sup>7</sup> It is the realm in which theorists, poets, and perhaps physicists try to "justify the ways of God to men."<sup>8</sup>

It will be readily apparent that these four levels of process are really bands on a spectrum. They begin with the most intimate relations between two individuals, range through various voluntary associations into the smallest properly political units, from there in expanding scope up to the most inclusive international organizations and, ultimately, to what was once called, without embarrassment or



7. See Steven Weinberg, *A Designer Universe?*, N.Y. REV. BOOKS, Oct. 21, 1999, at 46 (reviewing books on the anthropic principle).

8. JOHN MILTON, *PARADISE LOST* bk. 1, l. 26 (John A. Himes ed., American Book Co. 1898); see also *Job* 34. The conclusions, of course, are not always so sanguine, see VOLTAIRE, *CANDIDE* (Random House ed. 1928) (1759), or so certain, see THORNTON WILDER, *THE BRIDGE OF SAN LUIS REY* (1928).

metaphor, the rational government of the universe. The lines I've drawn between my four levels are thus neither absolutely precise nor wholly arbitrary. These lines are, of course, much debated, and for some purposes they will need to be better drawn. But for our purposes they will work well enough.

*B. The Case Against the Inherent Value of Procedure  
in the Political Microcosm*

With this spectrum of arenas of process as our backdrop, let's look again at the question of whether Seidenfeld and his fellow civic republicans are, as Adler charges and as at least Seidenfeld denies, Big-P Proceduralists—whether, in other words, they value process as an end in itself, rather than as a means only. Most of their writing, it is important to note, considers the macrocosm of national politics. It is difficult to make Adler's case at this level, however, because Seidenfeld and his fellows<sup>9</sup> can interpose a practical impediment to Adler's theoretical claim. They can admit in theory that they would accept an administrative regime that produced the goods they prefer without the process they recommend, even while they can maintain that, in practice, no such regime can ever exist. They can plausibly argue that any real regime capable of delivering the goods will always have to follow something like their deliberative procedure.

There are, however, microcosms where this may well not be true. More specifically, there may be small political communities in which the outcomes civic republicans prefer can be produced by radically nondeliberative processes. In such communities, I hope to show you, Seidenfeld and his ilk would still insist, just as Adler predicts, on preserving their brand of process, even though it does nothing to enhance substantive values beyond itself. If I'm right, they value process for its own sake, at least in this arena, and thus Adler is right to call them Big-P Proceduralists here, if not elsewhere.

Fortunately for my and Adler's case at this point, it happens that I live with Mark Seidenfeld in just such a microcosmic political community: the modern American law school. The perspective I am about to offer you on that kind of community comes from another good friend of mine at another law school.<sup>10</sup> This other friend once complained to me that the new dean of his school was irritatingly inclined toward faculty democracy. Taking the bait, and echoing Churchill,<sup>11</sup> I asked my friend what alternative to faculty democracy he

9. In the remainder of this section, I focus on civic republicans; hence my point may not apply to all shades of Adler's Proceduralists. *See supra* note 4.

10. For reasons that, as we shall soon see, have to do with the content of his example, this friend is probably best left anonymous.

11. Churchill said, "No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms

could possibly prefer. Decanal dictatorship was his answer. In this latter model, as he described it, the dean serves for an indefinite term and never holds faculty meetings. If he or she produces good results, in the eyes of the faculty, his or her tenure goes on forever. But there is a downside—at least for the dean. If he or she produces bad results (again, in the eyes of the faculty), then the entire offending administration is metaphorically marched out into the quadrangle and shot, shortly to be replaced by a new dictator-dean responsible, as before, only for delivering the goods.

This microcosmic scenario nicely isolates the Mark Seidenfeld position—and, I suspect, the entire civic republican position—as Big-P Proceduralist. I believe even Seidenfeld has to admit that government on this small a scale could achieve, without the deliberative process he prefers, the ends that he sees as ideal (in particular, higher pay, perquisites, and status for people like him, that is, people who do the kind of scholarship he and his friends do and who teach it to their students). In this microcosm, in other words, nondeliberative government—indeed, dictatorial government—could achieve the ends Seidenfeld and his fellow civic republicans insist can only flow, in the macrocosm of federal administrative law, from deliberative government.

But even so—and this is the QED of my Adlerian argument—Seidenfeld and the other civic republicans would insist on massive doses of deliberation at the microcosmic, law school level. They might agree with Adler's neoclassicists that, as Oscar Wilde is supposed to have remarked about Fabian socialism, macrocosmic socialism takes too many evenings. But they would never accept a law school administration without regular and (preferably) frequent faculty meetings. For them, I suspect, deliberation is not a bitter potion we have to swallow to ward off the dysfunctions of dictatorship; it is, instead, an elixir they find rather tasty (and tend to insist that we join them in toasting) even if their interminable symposium slows down or diminishes delivery of the very goods we want. Like the English, they will share their pot of deliberative tea at four in the afternoon, though the ship of their micro-state go the way of the Titanic. Thus, if I know Seidenfeld (and, by extension, his fellow civic republicans) as well as I think, they are, just as Adler argues, Big-P Proceduralists.

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that have been tried from time to time." Winston S. Churchill, Speech Before the House of Commons (Nov. 11, 1947), in 7 WINSTON S. CHURCHILL: HIS COMPLETE SPEECHES, 1897-1963, at 7566 (Robert Rhodes James ed., 1974).



C. *The Case for the Inherent Value of Procedure  
in Macro-level Adjudication*

But there is another side to the coin of Big-P Proceduralism. On this side, I believe, Adler himself is also, in important respects, a Big-P Proceduralist—as, I hope, are all the rest of us. To see why this is so, we have to move back to the macrocosmic level of modern political process. Further, we have to focus on a procedural distinction deeply and properly ingrained in both administrative law and, more broadly, modern political theory: the distinction between legislation, or making laws of general application, and adjudication, or the application of law to particular cases.<sup>12</sup> The legal realists, of course, long ago showed that this bipolar opposition is far from perfect,<sup>13</sup> and modern administrative theorists hotly debate where the line should be drawn in particular decisionmaking contexts.<sup>14</sup>

For our purposes, however, the important point to note is that Adler's asserted little-p proceduralism—his insistence that process is only a means, never an end—depends for its plausibility upon a rulemaking rather than rule-applying context. To see why it loses much of its appeal outside the legislative context (where, at least to me, it is convincing), consider the case of criminal defense. And, to up the ante, consider me the criminal defendant. Assume I stand accused before the law school administration or, better yet, the state of Florida, of a very serious offense. Suppose one of my students asserts that, after regular business hours, in the relative privacy of my office, where we were supposed to be working together on a response to Adler's paper, I sexually assaulted him or her.

In such a case, the adjudicative process obviously matters very much to all of us. Less obviously, that process matters as more than a means to the socially desired outcome—my conviction if I'm guilty or exoneration if I'm innocent. That process also matters in and of itself. To see why this is so, let's focus on my own role in my case.

In the criminal phase of my case, I will be accorded, under the criminal procedures of Florida and all other Western-style democracies,<sup>15</sup> an opportunity to call witnesses, including the complainant.

12. See, e.g., Administrative Procedure Act of 1946, 5 U.S.C. §§ 551-559 (1994 & Supp. V 1999) (distinguishing between the two); 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.8 (3d ed. 1994); see also THE FEDERALIST NO. 47 (James Madison); MONTESQUIEU, THE SPIRIT OF THE LAWS bk. 3, at 21-24 (Anne M. Cohler et al. eds., Cambridge Univ. Press 1989) (1748).

13. See, e.g., Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

14. See, e.g., ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 89-90 (1975); Frederick Schauer, *A Brief Note on the Logic of Rules, with Special Reference to Bowen v. Georgetown University Hospital*, 42 ADMIN. L. REV. 447, 454 (1990).

15. The so-called inquisitorial civil law system is at least as insistent as the Anglo-American "adversarial system" on this right. See, e.g., Rudolf B. Schlesinger, *Comparative*

Revealingly, this right is known, at least here in America, as the right to confront my accuser.<sup>16</sup> Admittedly, that right is consistent with a purely outcome-oriented understanding of criminal procedure. The right to confront may help ensure a just outcome by increasing the probability that I will be exonerated if I am innocent. If my accuser must take the stand, the trier of fact can assess his or her credibility, making false testimony at least marginally less likely.<sup>17</sup>

But the probative value of this process is doubly dubious.<sup>18</sup> On the one hand, truth-telling witnesses are notoriously easy to rattle—perhaps especially easy to rattle, given the trauma they have truly experienced and are being forced, in a very real sense, to relive. On the other hand, lying witnesses may be well coached by counsel or co-conspirators, and being a good liar means, almost by definition, being personally persuasive.

I think, accordingly, that the right to confront one's accuser has another function, a function that takes us directly to the inherent value of procedure, at least in some such critical adjudicative processes. Faced with severe public shame and private loss—certainly dismissal from my job and possibly loss of my physical freedom—I very deeply want to confront my accuser and also my judges. I want to be able to look each in the face, and I want each to have to look me in the face, or drop their eyes and lose face. In our culture, to look one's accuser unblinkingly in the eye is tantamount to saying, "If you dare bear false witness against me, be damned."<sup>19</sup>

I'm not alone in wanting this right of confrontation. You deeply want me to have this right, too—if you call yourself a liberal. And the reason for our agreement on this point is significant. The shared desire of all liberals for anyone accused of a serious crime to have this right to confront the accusers is independent of any truth-producing effect.<sup>20</sup> I want to be there at my own trial—and you want me to be able to be there—even if the color of my skin, or the shadow on my cheeks, or the anger in my eyes makes my unjust conviction more likely rather than less. To deny me this—even if you can guarantee me a more just outcome in my case—is, in the liberal world-view, to deny me an essential element of my dignity as a human being. To

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*Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 *BUFF. L. REV.* 361, 367 (1977).

16. See U.S. CONST. amend. VI.

17. See YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE* 953 (9th ed. 1999).

18. See, e.g., Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 *MICH. L. REV.* 1469, 1474-76 (1969).

19. See, e.g., *Exodus* 20:16 (King James) ("Thou shalt not bear false witness against thy neighbour.").

20. See, e.g., Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 *STAN. L. REV.* 1133, 1140-42 (1982) (analyzing due process in criminal trials in terms of fair play in agonistic contexts).

promise to save me, even to deliver on that promise, is not enough; you must let me work for my own salvation, even if it means only worsening my prospects and witnessing my own destruction.

Let's sum up this section. Adler alleges that the civic republicans and other administrative law proceduralists value process as an end in itself, not merely as a means to such ends as the greater production or fairer distribution of welfare. Seidenfeld, at least, denies this, in both the microcosm and the macrocosm. But, as my example of decanal dictatorship shows, Seidenfeld may be wrong here; he may, that is, mistake his addiction to process for a mere taste. If I'm right (and I am) Seidenfeld and his closest civic republican fellow travelers believe in the inherent value of process at both the macro- and microcosmic level, and in matters of both legislation and adjudication at each level. On the other hand, my criminal defense paradigm shows that Adler himself is probably also, despite his assurances to the contrary, a Big-P Proceduralist, at least in the limiting case of criminal law adjudication. And so, I earnestly hope, are we all.

In case you are curious about my own position, let me put my cards on the table. I, with Adler, am a very little-p proceduralist in matters of rulemaking at the macrocosmic level of national politics.<sup>21</sup> At the microcosmic, law school level, I'm an even littler little-p proceduralist. I'm convinced that a good decanal dictator would deliver more of the goods I want (and that a bad decanal dictator would cost me no more in terms of those same goods) than any conceivable deliberative regime. Even if I'm wrong, the dictatorial regime's savings in transaction costs would be substantial and, at least for me, that alone would almost certainly be full enough compensation. Faculty democracy, the microcosmic equivalent of Fabian socialism, takes far too many afternoons.

This last complaint warrants amplifying as a coda to this section: Governmental process in and of itself is much more often experienced as a cost than as a benefit, a pain rather than a pleasure, unless your tastes run much more toward the civic republican than mine. This truth is nicely captured out in my neck of the woods by a poster behind the meat counter at Bradley's Country Store:

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21. I suspect that, in this respect, I am not merely with Adler, but beyond him. Two of my favorite regimes were not only dubiously deliberative at the macrocosmic level; they were also distinctly undemocratic: Oliver Cromwell's mid-seventeenth-century Protestant protectorate in the British Isles and Franz Joseph Hapsburg's late nineteenth-century Roman Catholic empire in central Europe. But one need only examine the status of Jews under the Protector and the Emperor to appreciate their achievements in meritocracy and toleration, achievements never matched, to my knowledge, in any democracy, including, perhaps, our own. See, e.g., *THE NEW STANDARD JEWISH ENCYCLOPEDIA* 248 (7th ed. 1992); see also ABBA EBAN, *HERITAGE: CIVILIZATION AND THE JEWS* 208 (1984) (describing Cromwell's sponsorship of Jewish immigrant settlement in England and its colonies); Michael Ignatieff, *The Rise and Fall of Vienna's Jews*, N.Y. REV. BOOKS, June 29, 1989, at 21.

Arguing with a federal meat inspector about regulations is like wrestling with a big hog in the mud; after a couple of rounds, you come to realize that only one of you is enjoying yourself.<sup>22</sup>

So far, I have said nothing about the other two critical points on my spectrum of process: the sub-microcosmic, personal level and the supra-macrocosmic, universal level. I have not, however, identified those points for nothing. Only with them in mind can we fully appreciate Adler's substantive position, to which we should now turn. Moreover, only at these two levels can we adequately address Adler's meta-move, which I will discuss in section IV. As we shall see in each of these sections, substance and procedure are intimately and inextricably connected, at least at the highest and lowest levels of process, the personal and the universal.

### III. PROFESSOR ADLER'S PREFERENCE FOR WELFARISM

Adler identifies several candidates for the substantive good of social justice—economic efficiency, autonomous choice, overall well-being, equal distribution of well-being, and various perfectionist and deontological criteria.<sup>23</sup> He criticizes some, particularly the putative value of economic efficiency, and defends others, particularly his own favorite, which he calls "welfare." This, as he points out, is close to the happiness of sophisticated utilitarians like Mill—those, as he indicates, who can distinguish with Mill between satisfied pigs and dissatisfied Socrateses.<sup>24</sup>

His principal difference with the utilitarians lies in his rejection of their monistic view of value. Their reductivist insistence on happiness alone produces all manner of burry old chestnuts<sup>25</sup> that he avoids with the importation of a plurality of values. This theoretical expedient blunts much of the charge that utilitarianism would constantly cut corners with practical expedients like sacrificing the life of one for the happiness of many. Such sacrifices may make for greater overall welfare, Adler admits, but only at unacceptable costs in other values—deontological and perfectionist values in particular—that utilitarianism notoriously ignores but that Adler himself is happy to count.

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22. Bradley's Country Store, about fifteen miles north of Tallahassee on Old Centerville Road, is listed in the National Register of Historic Places. See *National Register Information System*, at <http://www.cr.nps.gov/nr/research/nris.htm> (visited Oct. 25, 2000). The pork sausage is especially fine, though I must admit to having turned a Bismarckian blind eye to the process of its production.

23. See Adler, *supra* note 2, at 288.

24. See *id.* at 288-89, 297; see also JOHN STUART MILL, *UTILITARIANISM* 14 (Oskar Piest ed., Bobbs-Merrill Co. 1957) (1861).

25. See J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 79-80 (1973); see also RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 51-60 (1981).

Adler's value-pluralism itself, of course, comes at a cost. As he admits, his multiplicity of goods, none reducible entirely to any other, strikes us as less elegant than utilitarianism's single touchstone.<sup>26</sup> We, like our fellows in physics, crave a unified field theorem.<sup>27</sup> And, as Adler also admits, his multiple goods require rank orderings, or at least ad hoc balances, that utilitarianism's single good neatly avoids. Complex protocols must govern Zeus and Odin's famously fractious family feasts; Jehovah and Allah presumably dine in peace at the heads of tables for one (and certainly in separate celestial palaces).

The way that Adler presents his multiple values and deals with conflicts among them is highly instructive and—if I may be so bold as to say—entirely admirable. He presents them to us as values that are already our own. As a matter of fact, he almost certainly gets this right. I reckon, with him, that none among us rejects any value that he presents, and I don't imagine, any more than he, that he has left out any value any of us takes as fundamental, or even very important.<sup>28</sup>

In a moment, we will need to reflect on our general agreement about basic values: why it is so and what it may mean. Let's look first, however, at the point where, as Adler rightly suspects, our agreement about values is likely to break down. We are quite likely to rank our shared values differently, if not in the abstract, then at least as they come up in specific cases. Thus, to take what may be the most significant example in the macrocosm of politics, many of us conscientiously differ about the proper trade-off between the good of alleviating undeserved wealth disparities and the attendant cost in productive incentives; to put it crudely, how much to take from the rich to give to the poor. Adler admits as much<sup>29</sup> and recommends to us the balance he prefers.

His balance values the fullest realization of the maximum number of human capabilities in the widest possible range of individuals, consistent with all the fundamental values traditionally cherished in the West. What's at least as significant, he offers a realistic prospect of delivering on what he promises.<sup>30</sup> More specifically, he values the market economy's emphasis on individual choice, and he recognizes

26. See Adler, *supra* note 2, at 300.

27. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 49 (1971) ("It is simply good fortune that the principles of celestial mechanics have their intellectual beauty.")

28. For this assessment to be fully accurate, I should specify that my "us" means those who place themselves inside the very wide spectrum of liberal humanism.

29. See Adler, *supra* note 2, at 321-22.

30. Cf. LEO STRAUSS AND JOSEPH CROPSY, *HISTORY OF POLITICAL PHILOSOPHY* 908 (3rd ed. 1987) (describing Strauss's understanding of the purpose of the modern West to be "the construction of a universal society of free and equal nations of free and equal men and women enjoying universal affluence, and therefore universal justice and happiness, through science understood as the conquest of nature in the service of human power").

the market economy as the only system with any real prospect of achieving, maintaining, and expanding the standard of living now enjoyed in the West.

For what it's worth, I'm quite happy with the balance he strikes. It is pretty much the New Dealish, Great Society nostalgia you'd expect from any academic outside Chicago (taken as a School, not a city). Substantively, that is to say, I'm solidly behind Adler's chastened welfare state. I'm a bit more skeptical about the processes—the reformed administrative regime—he recommends as the means of getting us there. But here my skepticism is purely empirical; if I were convinced his administrative procedures would work, I'd have no principled objection to them.

#### IV. PROFESSOR ADLER'S WRONG TURN (OR UNNECESSARY DETOUR): THE "META-MOVE"<sup>31</sup>

What I want to focus on, however, is neither the substantive outcomes Adler recommends nor the procedural reforms he advances as the most effective means to those ends. Instead, I want to focus on a different process and a different substance: the process by which Adler tries to persuade us of his position and the substantive foundation of both that position's recommended procedures and its preferred outcomes. This will take us back to the issue I deferred just now: Why do we share so many values, and what does that tell us?

Let me give you my conclusion. The process by which Adler recommends his position, the mode in which he casts his entire presentation, is essentially dialogic, and hence Socratic. We shall see in a bit what that entails. For now, it is enough to say that I wholeheartedly endorse it. To return to our four-phase spectrum of process arenas, I embrace the process Adler employs at the interpersonal, sub-microcosmic level to present to us his position on both substantive values and administrative processes at the macrocosmic, political level.

But, having said that, I must sound a note of serious disagreement. What Adler says about the substantive basis for his positions, both substantive and procedural, is at worst wrong, and at best unnecessary. At the risk of obscuring with technical terms,<sup>32</sup> I must

31. This section of my paper should be dedicated to the late Leon Lipson of the Yale Law School. According to one of his colleagues, the late Arthur Leff, Lipson once boasted, presumably in jest, "Anything you can do, I can do meta." A.A. Leff, *Unspeakeable Ethics*, *Unnatural Law*, 1979 DUKE L.J. 1229, 1230 n.2 (1979).

32. In one of our earliest ethical conversations, see *supra* note 5, Mark Seidenfeld identified a nagging problem: "not knowing the -isms and the -ologies." I offered to write them out for his convenient reference on a 3-by-5 index card; for a summary that is doubtlessly clearer, and only slightly longer, see 4 ENCYCLOPEDIA BRITANNICA 578 (15th ed. 1998).

question Adler's metaethics even as I embrace his ethics.<sup>33</sup> More importantly, even if I'm wrong about metaethics, I think I can show that my mistake cannot matter to my agreement with Adler on ethics. Indeed—and here things get a little weird—the reason that our metaethical disagreement cannot undercut our ethical agreement at the macrocosmic level is precisely the reason why my metaethics is better, and why the dialogic procedure he and I share at the sub-microcosmic, personal level is the best. On the other hand, precisely that sub-microcosmic procedure—Socratic dialogue—is very much at odds with Adler's metaethics at all levels, as to substance as well as process.

#### A. *Making the Meta-Move*

If I haven't lost you already, I must try to give some content to these abstractions. First, let's look back at the way Adler makes the case for his particular mix of substantive values and administrative processes. As we have seen, he presents them to us as a mutually acceptable balancing of shared values; he invites us, in the manner of the political philosopher John Rawls, to reach with him a "reflective equilibrium."<sup>34</sup> Notice, for now, how different that is from two other familiar reasoning processes. Unlike the mathematician, Adler does not begin with a set of unproved axioms and reason deductively from them to a proof that all rational people would, as such, see as correct. Nor does he follow Ronald Dworkin's mythical liberal judge, Hercules, extrapolating from the data of our entire legal culture by a process which, while not precisely deductive, is supposed to give objective, and usually single, right answers to legal questions.<sup>35</sup> Adler simply draws up for us a normative world—an ordering of values—and asks us to join him in working toward its realization (or to show him something more appealing).

By my lights, that's quite enough; indeed, almost certainly all that is possible. But Adler explicitly believes there is more, and he implicitly suggests at several points that he would provide more, and could provide more, if only he had more time or space. What is this more? For Adler, it is some kind of proof that the values he is ordering (and perhaps the ordering itself, and the process by which that ordering is recommended to us and implemented in the world) is "really" and

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33. It is worth noting that the opposite can also occur. Thus, for example, Richard Posner and I share a skeptical metaethical position, although he emphatically rejects the ethical position I, with Adler, embrace: social welfarism. See RICHARD A. POSNER, *THE PROBLEMATICS OF LEGAL AND MORAL THEORY* 3-17, 51 (1999) (embracing metaethical skepticism but ridiculing "welfare liberalism").

34. RAWLS, *supra* note 27, at 48-52.

35. See RONALD DWORIN, *LAW'S EMPIRE* at vii-viii, 225-66, 337-54 (1986); DWORIN, *supra* note 2, at 117-177 (Part Two, Law as Interpretation).

“objectively” “right” or “true.” I place these last two adjectives and adverbs in scare quotes to “problematize” them.<sup>36</sup> They pose, I’m afraid, real but avoidable problems, the very kind of fly-bottle Wittgenstein famously declared proper philosophy to be in the business of getting philosophers out of.<sup>37</sup>

Is there, above or beyond all the competing values and value systems afoot in the land, some ultimate arbiter of the right and the good, some atemporal, transcendent, and true template that is the measure of all normative claims? Beyond this question, the signpost on the high road to metaethics, lie two paths.<sup>38</sup> Adler, as we have seen, takes the path marked “yes.” If this is not the first path, it is by far the best trodden. Those who take it believe that ultimate, objective values await our discovery somewhere “out there” and that we will know them when we see them. Accordingly, they know themselves as cognitivists, and they insist that the values they seek—or know—are “real” or “objective.” In technical metaethical terms, their epistemology is cognitivist; their metaphysics, realist.<sup>39</sup>

The other path through the alps of metaethics takes the opposite turn, in the direction of a more or less thorough-going skepticism about the existence or knowability of the kind of values the cognitivists seek. Hard skeptics deny any such values; softer skeptics doubt them to varying degrees. But all stop at the Scottish verdict: Not proved. All modern skeptics, the soft as well as the hard, are brought up short by David Hume’s musing:

I cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality . . . I have always remark’d, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz’d to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*.

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36. Problematizing is, of course, postmodern jargon for pointing out an oddity, the sort of thing Socrates did classically, and presumably with inflection rather than punctuation; putting problematizing itself in scare quotes, of course, problematizes the postmodern posture of problematizing everything in a self-consciously self-referential way. On this and other postmodern postures, see Steven Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193 (1996), and TERRY EAGLETON, *THE ILLUSIONS OF POSTMODERNISM* 28 (1996).

37. See LUDWIG WITTEGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 309, at 103<sup>e</sup> (G.E.M. Anscombe trans., 1953).

38. See 6 *ENCYCLOPEDIA BRITANNICA MACROEDIA* 980 (15th ed. 1974) (“The cognitivist and noncognitivist are two main varieties of meta-ethical doctrines on the meanings of ethical terms and judgments and the methods of supporting the judgments.”).

39. See *id.* (“The cognitivist doctrines affirm and the noncognitivists deny that moral terms signify qualities in the world and that moral judgments are a kind of knowledge.”); see also Rob Atkinson, *Beyond the New Role Morality For Lawyers*, 51 MD. L. REV. 853, 874-81 (1992).



This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. . . . [T]his small attention wou'd subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason.<sup>40</sup>

As you may know—or safely have guessed—the air up here in the metaethical stratosphere is really rarified. Lest you lose interest—if not consciousness—let me briefly sketch why Adler leads us up here, and why we needn't take his way out to arrive at his political position. (If it's any consolation at this dark point, remember the light we left in the distance and are headed back to: I disagree radically with Adler's metaethics but embrace whole-heartedly his explicit welfarist politics and his implicitly dialogic ethics. What I'm trying to show you now is how to believe in the virtues of Adler's earthly politics and ethics without buying into his metaethical heaven, which may well be a vacuum.)

### B. *Professor Adler's Causes for Concern*

Why does Adler invite us to venture with him up this theoretical Everest? Emphatically for our own good, to save us from two snares, the first quite real, the second wholly illusory.

#### 1. *The Illogic of Deriving Proceduralism from Metaethical Skepticism*

The first (and very real) snare is the illogic of inferring Big-P Proceduralism from metaethical skepticism. As Adler ably shows, it is both tempting and wrong-headed to reason as follows:

*Major premise:* If metaethical skepticism is true (and thus there are no fundamental, objective values), and

*Minor premise:* If all substantive normative systems (Mill's utilitarianism, Adler's welfarism, etc.) entail fundamental, objective values, then

*Conclusion One:* No substantive normative system can justify public decisions (since all such systems are equally groundless), and

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40. DAVID HUME, A TREATISE OF HUMAN NATURE 469-70 (L.A. Selby-Bigge ed., Oxford Univ. Press 1964) (1739).

*Conclusion Two:* By default, some form of proceduralist normative system wins, most probably pluralism, which maintains that government is properly indifferent to substantive preferences.

Stated more succinctly, if there are no real values out there to be discovered, then it is tempting to conclude that the only proper process of arriving at substantive valuations in public affairs is by some species of pluralism.<sup>41</sup>

The superficial appeal of this pseudo-syllogism lies in the destructive power of its major, skeptical premise: If metaethical skepticism is granted, no single substantive normative position—utilitarianism, or welfarism, or whatever—can claim to be right or true. Conclusion One, in other words, is thoroughly sound.

But, as Adler points out, to affirm Conclusion Two is to assume too much. In particular, to derive a normative blessing on pluralistic process from the skeptical major premise is to violate that premise itself. As a matter of definition, if we grant the skeptical premise, we cannot consistently claim that any process, pluralistic or otherwise, is proper. The skeptical premise, in other words, sweeps away means as well as ends; there is no more an objectively right or good procedure for making public decisions than there is an objectively right or good result of such decisions. Thus Adler is entirely correct to conclude, “Normative pluralism grounded upon skepticism is self-defeating,” and “More generally, any kind of proceduralism founded upon skepticism is self-defeating.”<sup>42</sup> As a matter of logic, such arguments are, as Adler shows, technically invalid.

But it is one thing to say that the argument from the skeptical premise to a normative pluralist conclusion is invalid, and quite another to say that the skeptical premise is false. Adler not only embraces the first position, as we have seen; he also quite explicitly embraces the second. Thus he insists that “[t]here are objective moral standards applicable to governmental choices and other human actions,” urging that “[a] persuasive case against moral skepticism, and in favor of moral cognitivism, has been presented by a number of contemporary philosophers working in metaethics.”<sup>43</sup>

## 2. *The Chimera of Big-N Nihilism*

Here we come, I'm convinced, to the second, and more significant, reason Adler offers to lead us up the metaethical alps: Quite explicitly, as we just saw, he believes that meta-ethical skepticism is wrong. But, at least implicitly, he must believe that error on this point matters as to his principal topic, his spirited (and I think gen-

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41. See Adler, *supra* note 2, at 269-72.

42. *Id.* at 271.

43. *Id.* at 270-71.

erally successful) defense of welfarist politics. Otherwise—to put it as politely as possible—he’s wasting his time, and ours. But he isn’t—or, which for me comes to the same thing here—he sincerely believes he isn’t.

Recall that Adler doesn’t need to deny the metaethical skeptics’ premise to show the illogic of deriving Big-P Proceduralism from it. As we have seen, he has already done that quite handily, in complete agreement with metaethical skeptics like me, as he himself maintains.<sup>44</sup> We affirm, as he does, that from our basic skeptical premise no “proper” procedure could possibly follow logically. But for Adler, I suspect, Big-P Proceduralism in political matters is, ultimately, a pretty small fish. What he and his fellow metaethical realists really fear is a true—or truly chimerical—Leviathan, what I will call Big-N Nihilism.

I suspect that he shares a fear common among metaethical realists. They fear that the other metaethical turn, the negative answer of metaethical skepticism, inevitably leads, psychologically if not logically, to Nihilism at all normative levels: the personal, the micro-political, the macro-political, and the cosmic.<sup>45</sup> I, accordingly, need to show why metaethical skepticism cannot lead to Nihilism in theory and need not lead to Nihilism in fact.<sup>46</sup>

### C. *Exorcising the Ghost of Nihilism Future*

To the extent that Adler’s fear has a logical foundation, it can easily be shown to be misguided. Indeed, the logical derivation of Nihilism from metaethical skepticism partakes of precisely the same flaw as the logical derivation of normative pluralism from that source. Adler rightly shows that no normative positives, procedural or substantive, flow from metaethical skepticism. But he, or at least some of his fellow realists, seem to believe that something negative follows, namely, the negative conclusion that, normatively speaking, nothing can matter or, more strongly, we should value nothing. This is a sub-

44. See *id.* at 270-72.

45. See Atkinson, *supra* note 39, at 885, 956-57.

46. I should, perhaps, point out that Nihilism is not the worst “-ism” afoot in the land. Indeed, as I have argued elsewhere, it is a particularly unstable position; once you become too firmly committed to valuing nothing, nothing becomes, paradoxically, the thing you value. More dangerously, Nihilism can transmogrify from an essentially passive absence of commitment to valuing anything into an all-too-active commitment to destroying everything. This distinction is nicely captured in the realist fear, not so much that Nihilism will become Nazis, as that Nihilists will have no answer to Nazism. See *id.* at 956-57. It is also nicely captured in the following exchange in the movie *The Big Lebowski*:

Dude (Jeff Bridges): They were Nihilists man, they kept saying they believe in nothing.

Walter (John Goodman): Nihilists! F— me, I mean, say what you want about the te nets of National Socialism, Dude, at least it’s an *ethos*.

THE BIG LEBOWSKI (Polygram 1998).

tle, but very significant, logical lapse. Its source lies in an improper unpacking of the skeptical premise.

### 1. *The Logical Case*

Metaethical skeptics maintain (or, in their weaker form, suspect) that nothing has objective moral worth in and of itself. There is nothing out there that we should value, or that we ought to do, *per se*. But the last Latinate phrase is critical. Metaethical skepticism does not hold that there is nothing out there we can value, or that some things out there are not the proper means to ends that are capable of being valued. On the skeptical premise, we are not obliged in an objective, ultimate sense to value anything. But it does not follow that we are, in an objective, ultimate sense, forbidden to value anything, or obliged to value nothing. Stated more succinctly, metaethical skepticism neither requires nor forbids any substantive values or value systems, including Big-N Nihilism. To be sure, we are free to reject all possible values, but we are not logically compelled to. From metaethical skepticism, no norms necessarily follow, positive or negative. We are free, logically at least, to value whatever we choose.<sup>47</sup>

### 2. *The Psychological Case*

But to be free to choose is not necessarily to be able to choose. Having dismissed realist worries that metaethical skepticism logically leads to Nihilism, we are still left with their somewhat vaguer worry that metaethical skepticism is somehow psychologically debilitating. This latter worry seems to be that, without the moral vitamins of real and objective values, our moral spines will somehow snap or, more likely, melt. In its stronger form, the worry is that metaethical skepticism inevitably leads to Nihilism; in its weaker form, that it typically or usually does.

Since the psychological case against metaethical skepticism is more a matter of anxiety than argument, it is more difficult to dispel than the illogical logical critique. Of its two forms, the stronger presents less of a problem; all we need is the single example of a metaethical skeptic who did not lapse into Nihilism. The less ambitious doubts of the weaker form are the real challenge, for they are more insidious and individualized, if not more insistent: never mind that someone, somewhere, managed to cast off normative absolutes without sinking into Nihilism; what about me, here and now?

My argument applies to both forms, starting with the stronger and moving to the weaker. This is largely because the stature of my

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47. See Atkinson, *supra* note 39, at 881-886.

historical counter-example is so great, and the nature of his skepticism so accessible, that once we understand his case, we can scarcely help feeling better about our own.

a. *The Case Against the Strong Psychological Argument: The Platonic Socrates.*—My example of a metaethically skeptical non-Nihilist is none other than the Platonic Socrates. The Delphic Oracle famously, if delphically, declared Socrates the wisest of men. Socrates assumed that the distinctiveness of his wisdom lay in one very peculiar piece of knowledge: unlike other people, he *knew* that he knew nothing about the things that really matter.<sup>48</sup> This is, obviously, a very skeptical beginning. But it didn't lead him to Nihilism; it led him to a life of inquiry.<sup>49</sup> We all know the Socratic maxim: Know thyself. We often fail to note, however, that it is not a declaration of moral fact, but a moral imperative, a recommendation, if not a command. It is, I think, what Kant would call a hypothetical imperative.<sup>50</sup> These imperatives are of the form "if you want X, then you must do Y." For Socrates, the desired X was a life worth living, and the required Y, the only way to get there, was to live out the imperative, "Know thyself." The undesirability of any alternative is captured in the third famous Socratism: "The unexamined life is not worth living."<sup>51</sup>

Socrates proved that third, negative point over and over again, in his dialogues with Athens's sophomoric pseudo-savants<sup>52</sup> and misdirected men of action.<sup>53</sup> Again and again, he shows them up as fools. Not, significantly, as living lives out of accord with some objective, cosmic order, but simply as living lives not worth living, in the only sense that he seemed to think mattered: lives that we who share his life of inquiry would not want to live. And, in doing this, he ultimately proved his positive point: that the examined life is worth living. If we live that way, we may not be objectively right by any external, eternal standard. But we will be like Socrates. For some of us,

48. See PLATO, *Apology*, in GREAT DIALOGUES OF PLATO 423, 427 (Eric H. Warmington & Philip G. Rouse eds., W.H.D. Rouse trans., Mentor Books 1956).

49. See *id.* at 429.

50. See IMANNUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 31-32 (Lewis White Beck trans., Macmillan Publ'g Co. 1959) (1785).

51. See PLATO, *supra* note 48, at 443.

52. See, e.g., PLATO, *Gorgias*, in COLLECTED DIALOGUES 229 (Edith Hamilton & Huntington Cairns eds., Princeton Univ. Press 1961) (Socrates's dialogue with the sophist Gorgias and his followers); PLATO, *Ion*, in COLLECTED DIALOGUES, *supra* at 215 (Socrates's dialogue with Ion, an award-winning reciter and interpreter of Homer).

53. See, e.g., PLATO, *Euthyphro*, in COLLECTED DIALOGUES, *supra* note 52, at 169 (Socrates's dialogue with a young man about to prosecute his father for murder); PLATO, *Symposium*, in GREAT DIALOGUES, *supra* note 48, at 116 (Socrates's jesting at the expense of Alcibiades, subsequently an ill-fated leader of Athenian forces in the Peloponnesian War).

that's enough; in any case, it's not nothing, and it's certainly not Nihilism.

*b. The Case Against the Weak Psychological Argument: You (and Descartes).*—But, even if I'm right about Socrates, I've only dispensed with the strong psychological case against metaethical skepticism, that is, that it always leads to Nihilism. That is cold comfort to the rest of us, for it leaves the weak case very much intact: Maybe metaethical skepticism leads to Nihilism not always, but often—or usually, or in all cases but that of Socrates. And this weak case may include the psychologically scariest case, one's own: Maybe I will become a Nihilist if I become a metaethical skeptic.

For what it's worth, the worries of that "I" are not true for me. I know I deeply doubt the existence of objective values, and I also know that I am not a Nihilist. But it would be impossible for me to convince you of that, and unseemly for me to try. Asserting for your edification that I myself am a metaethical skeptic, but not a Nihilist, would be no better than an empty boast unless you already knew that to be true. And you could not really know that unless you and I were already friends in the way that, for example, Mark Seidenfeld and I are friends: fellow inquirers into the things that really matter, always with the utmost concern for one another's souls. For the ultimate insurance against Nihilism is this: Your friends won't let you fall into the abyss; they will be your lifeline back to the light—and you, theirs. And, in any case, neither my case nor Socrates's could fully reassure you that you aren't in danger of Nihilism.

Thus, to rebut for you the weaker form of the psychological argument against metaethical skepticism, the example I need to give you is none other than you, yourself. That, alas, I cannot do in the abstract and from afar; I would have to be your friend. But, short of that, I can do several, hopefully useful, things. First, I can show you that you are already closer to metaethical skepticism than you may suppose. Even so, I can show you, in the second place, that you are in no danger of losing your grip on the values you hold dear. Finally, I can assure you that your incipient metaethical skepticism will not isolate you from an enduring strand of the western moral tradition—that, indeed, it is close to the position of several of our moral heroes (and to God, if God is as those heroes have said).

First, then, let's see if you don't share with me (and, much more impressively, with Hume and Socrates) a doubt that the foundation of goodness or rightness lies any deeper than your dialogue with me (and again, more impressively, with them). To approach your own metaethical skepticism, try this two-part thought experiment. First of all, try to remember the foundation of your moral beliefs, and the line of proof that you think is their ultimate pedigree. Either you can remember it, or you can't. If you can remember it, allow yourself to

wonder whether Socrates or Hume (never mind me) couldn't refute it, couldn't show you that it is seriously flawed, or at least not so internally consistent or so externally well grounded as you would like to think.

If you are not convinced that the great skeptics could not shake your moral foundation, ask yourself this further question: Am I in deep despair? And I mean deep enough to take you to Big N-Nihilism, deep enough to make you indifferent to leading a meaningful life, or more mundanely, to helping out or even caring for your closest friends and family. If you are, you have my condolences, but also my congratulations: You have proved that metaethical skepticism may lead to Nihilism.

(But, before you congratulate yourself too roundly, read on. In particular, beware the *post hoc, ergo propter hoc* fallacy. Recall that my congratulations were conditional: you have only proved that metaethical skepticism *may* cause Nihilism, not that it actually does, or did, even in your own case. You may have lapsed into Nihilism on account of events in your psychological life other than your brush with metaethical skepticism. Your despair of all meaning in life may well be the result of a dangerous chemical imbalance, not an allegedly dangerous idea. Nor do I doubt that external events can drive one to Nihilistic despair—loss, for example, of one's friends or family, cause, or country;<sup>54</sup> what I doubt is that metaethical doubts about the pedigree of all value will ever lead anyone to despair of the value to himself or herself of these very particular things.<sup>55</sup> And note, finally—and, from my perspective, hopefully—that you cannot have lapsed quite yet into total Nihilism; if you had, you would most likely not have read on this far.)

Alternatively, what if you can't even remember the foundation of your moral beliefs? Either you have forgotten it or you never had one. If you've forgotten it, but remember having had it, try to recover it; if you do, go back to step one. If you can't remember ever having had one, ask yourself this: How have I made it this far, without lapsing into Nihilism? At this point, you may discover that you have been a metaethical skeptic all along. If you don't suddenly feel yourself slipping into deep despair, I've made my case to you, though, of course, only provisionally—as you get used to the idea, it might drive you over to the Dark Side. Or you may realize that you never really thought about such supposedly deep matters, but simply assumed

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54. See CHRISTOPHER HILL, *THE EXPERIENCE OF DEFEAT passim* (1984) (examining the effects of the monarchy's restoration on proponents of the Puritan Revolution).

55. See, e.g., Rob Atkinson, *Nihilism Need Not Apply: Law and Literature in John Barth's The Floating Opera*, ARIZ. ST. L.J. (forthcoming Fall 2000) (arguing that protagonist's depression, not his metaethical skepticism, lay at the root of his Nihilism); see also ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 558 (1981) ("A depressed person not only chooses to be affectless—he chooses that the world correspond and be valueless too.")

that what you held dear was ultimately grounded on some very real goodness. If that's the case, you're ready to dig down and find it. But are you really excited about it? More importantly, if your digging just took you, as it were, not to the bottom of things, but simply out the other side of the earth, would you despair? I doubt it; more importantly, don't you doubt it?

A third kind of doubt is relevant here. As we have seen, you may find yourself doubting that your moral system has any foundation, in the sense of being objectively right or true. This first worry is metaethical: Does the moral faith I keep have any foundation other than me, keeping it; do the things I value have any value other than my valuing them? What's more, you may find yourself doubting whether your own adherence to your moral system can survive your doubts about its foundation. This is a psychological worry: If I am the only foundation of the faith I keep, can I keep on keeping it? If my valuing is the only value of the things I value, will they remain valuable to me? But notice that there's a third doubt you can't have, either logically or psychologically: you can't doubt that you have a moral system, or that there are things you value. (Not, in any case, if that doubt disturbs you.) Psychologically, you may lapse into Nihilism, the loss of all value. But logically, you aren't there yet, or more precisely, you can't always have been there. If you were, again, you wouldn't be reading this.

Now suppose you dig down, really deep, and don't simply fall out the other side of the ethical earth. Instead, you discover Golden Tablets of Universal and Eternal Norms. Never mind, for now, how you'd know they're genuine (a doubt I doubt we could ever really get past). Let's assume you're convinced they are real, and you proceed to read them. To your surprise—and remember: this is only a thought experiment—they tell you that everything you ever held dear was way off base, that your moral up was really down, and vice versa. Notice—critically—that at that very moment you would have a choice. You could embrace the new and true way, turning your back on all you have ever held dear, which most certainly reflects similar judgments by all those you've known and loved, living and dead. Or you could stick with what you've got. Indeed, if you're tempted to ask your friends about what you've found, notice how near you've come to making their opinion or, more precisely, your conversation with them—the touchstone of your Golden Tablets.

c. *The Strange Case of God.*—Now we must backtrack a bit. So far, we have been dealing with those who don't know—or have serious doubt about—the foundations of their value systems. Now we must turn to those who, in effect, have found the Golden Tablets, or at least know where to look for them.



Some of you, I suspect, gave a sheepish answer at Step One. In your heart of hearts, you admitted, with wholly unnecessary embarrassment, that you know the foundation of your moral system and that it—more likely, He or She—is God. Many a moral system, including some of the most elegant, takes essentially the form of a bumper sticker: “God said it, I heard it, and that settles it.” For the metaethical realists, that’s fine: all you have to do to make such a system coherent—indeed, logically unassailable—is to assume that what God declares to be good is, really and truly, good.<sup>56</sup> For metaethical skeptics, that’s also fine: all you have to do is ally yourself with the God party, for whatever reasons you yourself find appealing.

But those who take a different line pose a bit of a problem for you, and for God. You will have noted that the form of argument you find compelling (“because God said so”) doesn’t have much purchase on them. To talk constructively with them, at least until they, too, hear God’s voice, you will have to put your argument in terms that are intelligible, and appealing, to them. If they, like Adler and I, are welfarists, and if your God takes a propitious view of humanity, that shouldn’t pose any real problems. You can work to advance human welfare because it is God’s will; they, because human welfare is their will.

But what about God? Let’s suppose God, too, is a welfarist.<sup>57</sup> Suppose He were to present us with a very detailed blueprint for human welfare, completely in accord with Adler’s concept. And suppose, further, that He were to say “Just do it”—not “or else,” but “for your own good.” “I’ve got it all figured out, down to the last detail. I’ve not only rank-ordered all of the various values that go into *my* and Adler’s version of welfare; I’ve also resolved all particular applications. It’s all right here.” Wouldn’t He be leaving something out, and wouldn’t that something be, in a word, process? Constituted as we are, don’t we want to have a hand in just that ordering process, at the retail

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56. See Leff, *supra* note 31, at 1230 (“There is then, this one longstanding, widely accepted ethical and legal system that is based upon the edicts of an unchallengeable creator of the right and the good, in which the only job of the person who would do right is to *find* what the evaluator said.”); cf. ENCYCLOPEDIA BRITANNICA MACROEDIA, *supra* note 38, at 983 (distinguishing the classical version of ethical naturalism, which included norms derived from divine commands, from most modern versions, which do not); Atkinson, *supra* note 39, at 879 n.97 (distinguishing realism based on divine fiat from other forms).

57. See MILL, *supra* note 24, at 35. God’s being a welfarist is hardly a necessary assumption. The most likely alternative is that God puts Himself first. See JAMES M. GUSTAFSON, ETHICS FROM A THEOCENTRIC PERSPECTIVE (1981) (outlining a theocentric, as opposed to anthropocentric, ethics); Robert Burns, *Holy Willie’s Prayer*, in 2 NORTON ANTHOLOGY OF ENGLISH LITERATURE 89, 95 (5th ed. 1986) (parodying the God of theocentric ethics as “thou, wha . . . [s]ends ane to heaven and ten to hell, A’ for thy glory”). But this alternative is somewhat out of current favor and is in considerable tension with Jewish and Christian tradition, as we shall see; in any case, it’s a bit hard on God. Why consider Him any less humane than we humans aspire to be?

level if not at the wholesale? To put it most succinctly, doesn't human welfare include, at least at the margin, choosing what human welfare is to be?

Though Adler admits the "intuitive resonance" of this position, which he calls "the interest-based defense of proceduralism," he rejects it emphatically. His reason reveals the root of the problem: He cares nothing for procedures that do not enhance "the accuracy of the . . . decisionmaking process."<sup>58</sup> But this, of course, assumes that the decision is merely a choice among means to pre-existing, exogenous ends. If ends themselves are to be chosen in the process, then it makes no sense to speak of "accuracy of decisionmaking," because, *ex hypothesi*, we don't know at the beginning of the process what particular ends we are aiming for.

At this point, as I hope you're beginning to see, the supra-macrocosmic and the sub-microcosmic levels collapse into each other, at least in the Platonic tradition of humanism. What we want is a cosmic order that recognizes and values the delight we take in deciding, in conversations among ourselves, the very things we value, up to and including the meaning of justice at the very highest level. Socrates, in principle, would doubtlessly be happy for God to join in the discussion. But Socrates, in practice, was very loath to have anyone, probably including God himself, have the final say. When he got the cryptic word from Delphi about his wisdom, remember, he didn't send for further divine enlightenment. Instead, he started talking with his friends.

Socrates is not alone in this attitude, nor is this attitude as irreligious as you might suppose. (Socrates himself, you will remember, said he pursued his skeptical inquiry in the service of the god,<sup>59</sup> though his initial purpose had been to prove the Delphic oracle wrong in declaring him the wisest man.<sup>60</sup>) Consider the following debate, recorded in the Talmud, between Rabbi Eliezer and Rabbi Yehoshua. Substantively, it involved a classically mundane matter of administrative law, the ancient equivalent of an OSHA or EPA regulation: the proper configuration of a kosher bread oven. Procedurally, it more resembled *Marbury v. Madison*<sup>61</sup> for it raised the issue of ultimate appeals in Toranic disputes. Here, in its entirety, is the case:

On that day, Rabbi Eliezer used all the arguments in the world. He produced powerful arguments to justify his position that the oven should be considered unreconstructed and not susceptible to ritual impurity. But the Sages did not accept his arguments, and insisted that the oven was susceptible to ritual impurity. After

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58. Adler, *supra* note 2, at 284.

59. See PLATO, *supra* note 48, at 429.

60. See *id.* at 427.

61. See *Marbury v. Madison*, 5 U.S. 137 (1803).

Rabbi Eliezer saw that he was not able to persuade his colleagues with logical arguments, he said to them: "If the Halakhah is in accordance with me, let this carob tree prove it." The carob tree immediately uprooted itself and moved one hundred cubits—and some say four hundred cubits—from its original place. The Sages said to him: "Proof cannot be brought from a carob tree." Rabbi Eliezer then said to the Sages, "If the Halakhah is in accordance with me, let the channel of water prove it." The channel of water immediately flowed backward, against the direction in which it usually flowed. The Sages said to him: "Proof cannot be brought from a channel of water either." Rabbi Eliezer then said to the Sages: "If the Halakhah is in accordance with me, let the walls of the House of Study prove it." The walls of the House of Study then leaned and were about to fall. Rabbi Yehoshua, one of Rabbi Eliezer's chief opponents among the Sages, rebuked the falling walls, saying to them: "If Talmudic scholars argue with one another in their discussions about the Halakhah, what affair is it of yours?" The walls did not fall down, out of respect for Rabbi Yehoshua, nor did they straighten, out of respect for Rabbi Eliezer, and indeed those walls still remain leaning to this day. Rabbi Eliezer then said to the Sages: "If the Halakhah is in accordance with me, let it be proved directly from Heaven." Suddenly a heavenly voice went forth and said to the Sages: "Why are you disputing with Rabbi Eliezer? The Halakhah is in accordance with him in all circumstances!" Rabbi Yehoshua rose to his feet and quoted a portion of a verse (Deuteronomy 30:12), saying: "The Torah is not in heaven!"<sup>62</sup>

If these two examples, Socrates and Rabbi Yehoshua, are a bit highfalutin for you, I have a final, homier model of metaethically skeptical humanism: Huckleberry Finn. Remember the morally pivotal scene in which Huck contemplates writing the Widow Douglas to tell her that her escaped slave, Jim, is with him. Huck is convinced this is the right thing to do, and he firmly resolves to do it. But then his thoughts drift back over how he and Jim have befriended each other on their odyssey down the river. He realizes—ironically of course—that he can't do what is right: more or less literally sell his friend down the river. He has already written the "redeeming" letter; now he is having second thoughts about it. In his own words:

It was a close place. I took it up, and held it in my hand. I was a trembling, because I'd got to decide, forever, betwixt two things, and I knowed it. I studied a minute, sort of holding my breath, and then says to myself:

"All right then, I'll *go* to hell"—and tore it up.

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62. *Tractate Bava Metzia* 59B, in 3 THE TALMUD 235-237 (Steinsaltz ed. 1990).

It was awful thoughts and awful words, but they was said. And I let them stay said; and never thought no more about reforming.<sup>63</sup>

Nothing—not divine wrath, not eternal damnation, certainly not metaethical theorizing—could make Huck betray a friend or, more to the point, the moral world he and his friend had created together. His was not quite so bold a declaration of moral independence as that of Milton's Satan:

The mind is its own place, and in itself  
Can make a Heaven of Hell, a Hell of Heaven.<sup>64</sup>

It was more akin to his own maker's homey quip, "Heaven for climate, hell for society"<sup>65</sup>—with the critical qualification that Huck's society was his friends.

It is, of course, entirely possible that one of your friends will be God. We have already supposed that He might well be a welfarist; neither case is wholly hypothetical. The Jewish and Christian scriptures tell us Abraham was His friend.<sup>66</sup> And consider the preamble to the very Decalogue itself—"I am the LORD your God, who brought you out of the land of Egypt, out of the house of bondage."<sup>67</sup> This is sometimes read to stake out a kind of proprietary claim: "I've delivered you from bondage; now you're *my* slaves." But isn't it better read as a reminder of past friendship, and promise of more to come: "I am the LORD, and I have your welfare at heart; remember how wretched you were back in Egypt? That's all behind you now; what's ahead is a land flowing with milk and honey. I know all about you, all the way back to Adam and Eve, and I'll tell you this: If you really want to flourish in the land I'm about to give you, you would do well to consider these Ten (Very Serious) Suggestions. Ignore them at your peril. And that's not a threat; it's a prediction."

Indeed, isn't thinking that God is not a welfarist tantamount to reading all those Biblical sheep-and-shepherd metaphors a bit too literally? Do you really think He plans to fleece us—or worse? And if you really thought He did, would you really be so docile? There is, in fact, good reason to think that God Himself would tolerate, maybe even prefer, less sheepish metaphorical sheep. In the Christian parable of the final judgment, the proverbial separation of the sheep from the goats, Christ the King welcomes just such independent sheep into his Father's fold:

63. MARK TWAIN, *THE ADVENTURES OF HUCKLEBERRY FINN* 297 (Harper & Bros. 1884).

64. MILTON, *supra* note 8, bk. I, ll. 254-55.

65. MARK TWAIN, *Tammany and Croker*, in *MARK TWAIN'S SPEECHES* 117 (1910).

66. See 2 *Chronicles* 20:7; *Isaiah* 41:8; *James* 2:23.

67. *Exodus* 20:2.

Then the King will say to those at his right hand, "Come you that are blessed by my Father, inherit the kingdom prepared for you from the foundation of the world; for I was hungry and you gave me food, I was thirsty and you gave me something to drink, I was a stranger and you welcomed me, I was naked and you gave me clothing, I was sick and you took care of me, I was in prison and you visited me."

Then the righteous will answer him, "Lord, when was it that we saw you hungry and gave you food, or thirsty and gave you something to drink? And when was it that we saw you a stranger and welcomed you, or naked and gave you clothing? And when was it that we saw you sick or in prison and visited you?"

And the King will answer them, "Truly, I tell you, just as you did it to one of the least of these who are members of my family, you did it to me."<sup>68</sup>

Those who did the Father's will, albeit not because they knew it to be His will, turn out nonetheless to have been on His side, in His flock. They did not despair of doing social justice for want of the knowledge of that foundation, nor were they rejected because they did not know. The Father knew them by their fruits; as the Gospels tell us elsewhere, so should we. Those fruits, you will have noticed, are very like Adler's notion of welfare. And so the parable should apply, I would argue, to metaethical skeptics who embrace Adler's position.

The Talmud is as elegant as the Gospel—and a good deal less ambiguous—on precisely the point of God's preference for dialogue. Consider, again, the debate between Rabbi Eliezer, Rabbi Yehoshua, and—near the end—God. Subsequent commentators wondered among themselves how Rabbi Yehoshua had managed to get the better of God. Opinions varied, but one of them, attributed to a vision of the prophet Elijah, was this:

The Gemara relates that generations later Rabbi Natan met the Prophet Elijah. . . . Rabbi Natan asked Elijah about the debate between Rabbi Eliezer and Rabbi Yehoshua. He said to him: "What did the Holy One, blessed be He, do at that time when Rabbi Yehoshua refused to heed the heavenly voice?" In reply, Elijah said to Rabbi Natan: "God smiled and said: 'My sons have defeated Me, My sons have defeated Me!'" God's sons "defeated Him" with their arguments. Rabbi Yehoshua was correct in his contention that a view confirmed by majority vote must be accepted, even where God Himself holds the opposite view.<sup>69</sup>

Note, too, that in these two traditions, the Socratic and the Judeo-Christian, there is another collapse that parallels the merger of the

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68. *Matthew* 25:34-40.

69. *Tractate Bava Metzia* 59B, in 3 *THE TALMUD*, *supra* note 62, at 237.

super-macrocosmic and the sub-microcosmic arenas of process. The way things are valued, dialogue itself becomes a fundamental part of human welfare. In that way, process and substance merge. To paraphrase Mill, what we welfarists really want is neither a pig satisfied, nor Socrates dissatisfied, but the best of both: Socrates satisfied. And Socrates satisfied, in Socrates's own terms, is Socrates talking with anyone who will join him about the things that really matter.

Thus, at least at the sub-microcosmic level, contrary to what Adler suggests, process is not merely instrumental. Nor is it merely one preference among others, on the same level as "discrimination or governmental action that violates moral rights," to use those he tentatively lists alongside it.<sup>70</sup> In its highest, Socratic form, process is, rather, as Aristotle put it,<sup>71</sup> working with our friends to make ourselves good. That, to be sure, sounds like an instrumental value, a means to welfarist ends. But, for Aristotle, there is more: friendship is the one value that we would not give up, even if we were offered all the others.<sup>72</sup> And the reason is that it and the others are inseparable: the process of deciding with our friends what goods to value, and how much, is itself an end, perhaps the highest.

#### D. Two Final Pitfalls

##### 1. Confusing Subjective Agreement with Objective Truth

But perhaps we have proved too much: If, through this very sort of dialogic process, you find yourself agreeing with me, perhaps we have found objective moral truth. Adler, and his fellow realists, suggest as much, in either of two equally unpersuasive ways. First, they suggest that our shared subjective preference for certain values is just the kind of objectivity they are looking for. In Adler's words, "[s]ome of our idealized preferences or judgments *do* converge; and it is just in the case of such convergence that we can speak of objective rightness or goodness, rather than mere subjective preference."<sup>73</sup>

The problem here is an ambiguity in what it means for a statement about morals to be true or "objectively right." It is quite true, in a descriptive sense, to say, "The Romans thought slavery was morally right"; in fact, they did. But that is a long way from concluding that the Romans were themselves right to think so, in a normative sense. This is so, by the same token, for our own agreed values. It is objectively true that we share them, but from that it does not follow

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70. Adler, *supra* note 2, at 284-85.

71. See ARISTOTLE, *NICOMACHEAN ETHICS* 219-227 (Martin Ostwald trans., Macmillan Publ'g Co. 1962).

72. See *id.* at 214.

73. Adler, *supra* note 2, at 300 (footnote omitted).

that they are normatively right. This is precisely what the metaethical skeptic J.L. Mackey meant with the observation that “[s]ubjective agreement would give intersubjective values, but intersubjectivity is not objectivity.”<sup>74</sup>

## 2. Invoking “True” Processes to Ensure “True” Results

But this merely sets the stage for the realists’ next move, the suggestion that there is something about the way we arrived at our agreement that makes it special, that is, objectively true in a normative, not merely descriptive, sense. Here is the argument in barest outline, beginning with an example. The Romans, clever fellows though they were, were notoriously under-inclusive in their normative conversations; so, too, were their much-admired moral preceptors, the classical Greeks. Process, or at least circumstances, may undermine the rightness of moral agreement. Conversely, it is tempting to conclude, we may be able to get it right if we go about it rightly. Thus, to quote Adler again, “Objectivity, with respect to matters of value, morality, and norms, is plausibly understood as the convergence of judgments or preferences *under ideal conditions*.”<sup>75</sup>

This, too, is a very old game, and one that we cannot play out fully here. But we can at least see where it is headed, and how much it looks like where we have already been. This is, in effect, the perfect procedural complement to the realists’ substantive search for objective goodness; it simply replaces looking for objectively good “whats” with a parallel search for objectively good “hows.”<sup>76</sup> And, once we move from the abstract to the concrete, the complementarity is even more striking. The ideal condition is usually one of “perfect rationality” or “thoughtfulness” or being “well informed.” Thus the conditions under which objectively right ends are found involve having one such end already: typically, reason.<sup>77</sup> This, alas, comes dangerously close to circularity: to guarantee our arrival at the right substantive good, we must insist on following a procedure that itself implies that good. We reach reason by proceeding rationally. The expedient of turning nouns into adverbs may get you where you want to go, but it does not guarantee that where you wind up will be on any higher or more solid ground, metaethically speaking.

Adler, very much to his credit, admits as much. As he sees it, the proper philosophical foundation for welfarism will have to be either

74. J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 22 (1977).

75. Adler, *supra* note 2, at 298 (emphasis added).

76. See Leff, *supra* note 31, at 1236 (“By definition, one who considers force an appropriate way to deal with conflicting desires is just as justified as one who feels otherwise, for the propriety of activities in the world is no different from any other subject of evaluation.”).

77. See Adler, *supra* note 2, at 300.

“sophisticated preferentialism” or “sophisticated objectivism.” Under the former, welfare is what people really want, “under ideal conditions . . . suitably restricted”; under the latter, welfare is, again, what people really want, but only “in light of the totality of objective welfare goods.”<sup>78</sup> Adler prefers the former, largely because it is closer to neoclassicalism,<sup>79</sup> but he admits serious, and closely parallel, problems with both, very much as I have suggested. “Sophisticated objectivism” raises an obvious question: “What are the grounds for placing various goods on the list?”<sup>80</sup> Similarly, in Adler’s words, “sophisticated preferentialism, as here articulated, contains a large and embarrassing lacuna: the failure to state just how preferences should be ‘restricted’ such that thus-restricted preferences, and only those, are welfare productive.”<sup>81</sup> Adler admits the danger, which I identified above, that specifying these conditions will collapse into circularity.<sup>82</sup> But he believes “the problem of preference restriction . . . will eventually be solved.”<sup>83</sup> Thus Adler himself does not purport to have the very solution he admits to be critical to his position; he is not so much a metaethical realist as a metaethical optimist.

#### *E. Summary*

I, as a metaethical skeptic, very much doubt we will find what Adler would have us look for. That, however, does not make me a pessimist, over against his optimism. As I said at the outset, I’m convinced he’s looking for something we don’t need. We who have adopted the substantive ethical position of (human) welfarism already have the only metaethical answer we need: our own affirmation, in dialogue with each other, of our shared position. In that sense, I am not so much a metaethical skeptic, much less a metaethical pessimist, as I am a metaethical triumphalist: we have met—better yet, chosen—the ultimate moral measure, and it is us.

You, with Adler, may well be more comfortable awaiting objective proof of his procedurally perfect world. I, for my part, only hope you see how much a world of “ideal conditions” and “suitably restricted preferences,” unpacked to your and his liking, would resemble the sub-microcosmic world of Socratic dialogue. That would be a familiar world, and to many of us a comfortable world—exactly the world we would choose to occupy ourselves and extend to others. But the fact

78. *Id.* at 265.

79. *See id.* at 267. He is also impressed that “preferentialist views are much more widely adopted by modern philosophers and other contemporary scholars doing rigorous work on the nature of well-being.” *Id.* (footnote omitted).

80. *Id.* at 266 (footnote omitted).

81. *Id.* at 265-66.

82. *See id.* at 266.

83. *Id.* at 267.



that we desire it does not make it any more objectively good. Fortunately (but I think not fortuitously), the fact that it is not objectively good (or may not be) does not make it any less desirable (or need not).

## V. IMPLICATIONS FOR ADMINISTRATIVE LAW

I promised my friend Mark Seidenfeld I'd at least try to make my philosophical points relevant to administrative law. At the core of my ethos, nothing is more important than delivering on such a promise—or, at very least, explaining to the friend why you can't. Here, thankfully, I can. My philosophical conversation with Adler bears on administrative law in three related ways: as to substantive matters, as to procedural matters and, finally (for want of a better word), as to meta-matters.

### A. *Substance*

The ideal welfarist state will give Socrates what he wants: a world in which everyone who is willing can join his conversation about the two fundamental questions with which we began: personal virtue and social justice. Though this is admittedly abstract and metaphorical, I mean it also as concrete and literal. Plato clearly designed his dialogues to draw his readers into a life-altering encounter—a very real conversation—with Socrates; no welfarist can be satisfied with any state that doesn't guarantee all its citizens a reasonable opportunity to read Plato in precisely this way. That, I hardly need to remind you, will require a massive redirection of our current educational system.

There must, of course, be more. We may well have enjoyed our morning with Seidenfeld and Adler and—metaphorically at least, with Socrates. But, for my part, I want to spend at least some of my late afternoons more literally with Socrates, communing with him in the dialogues of Plato. And some afternoons I want to spend in a way that the Platonic Socrates thought dangerous: with the tragic poets and their modern counterparts, the writers of fiction. Some whole days, dawn to dusk, I want to spend almost entirely differently, simply cultivating my own garden. Not metaphorically, and not for the reason Voltaire's *Candide* gave: because I must. Rather, because my pantheon includes not just Plato and Homer, but also Le Nôtre and Capability Brown. If I were a better person, as humanists have always understood better person to be and as many of you doubtlessly are, I'd reserve a little of the evening to do what Socrates said the gods enjoined him to do all along: practice music.<sup>84</sup> I'd learn to play,

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84. See PLATO, PHAEDO 4 (F. J. Church trans., The Liberal Arts Press 1951).

at least a bit, and I'd learn to listen better, with deeper understanding and with wider appreciation. And most of us, I suspect, look forward, as the evening grows later still, not only to rest, but also to delights the original Puritans were unembarrassed to claim as part of their Paradise.<sup>85</sup>

It is not too much to ask that a just society make all of this, and more, available to every human being on earth. Indeed, in the welfarist, social democratic tradition, to ask anything less is to ask just that much too little.

### B. Process

As Adler rightly foresees, however, this does not require that a welfarist be a Big-P Proceduralist at the micro- or macro-political level—except, as I argue, in matters of adjudication. Now, I think, we are in a better position to see why process is so important in that context. When fundamental goods are at stake, we want those who are about to lose them to be able to enter into a dialogue with those who are about to take them. And now, too, we are in a better position to see why the civic republicans value process in the rulemaking side of politics as well. They long, quite consistently with their own Socratic leanings, for a political world in which everyone acts with the supreme Socratic social virtue: concern for one another's souls, or, in Adlerian terms, for each other's welfare. I don't doubt that this is desirable, but I very much doubt that it is possible. To put it bluntly, the world is too big, and too bad.

Too big in the sense that, as Seidenfeld admits and our own Federalists foresaw,<sup>86</sup> a continental nation cannot run its business in the way of a Greek polis or, for that matter, a confederation of Swiss Cantons or Dutch provinces. The internet may make us all neighbors, but nothing can make it possible for us all to be friends.

But that isn't the worst news. It is ultimately the world's badness, as much as its bigness, that means we cannot all be friends, and that, accordingly, deliberative process is a dubious goal for politics, micro and macro. Here, I believe, Augustine makes the best case: evil is not merely a matter of ignorance, as Socrates seemed to think,<sup>87</sup> or even of willful turning from good, as some Jewish and Christian sects suppose.<sup>88</sup> It derives, rather, from a fundamental flaw in human na-

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85. See MILTON, *supra* note 8, bk. IV, ll. 492-502, 689-775 (describing Adam and Eve's "blissful bower" and "the rites [m]ysterious of connubial love").

86. See THE FEDERALIST NO. 9 (Alexander Hamilton).

87. See PLATO, *Protagoras*, in PROTGORAS AND MENO 94 (W.K.C. Guthrie trans., Penguin Books 1956).

88. The Christian version was classically articulated by Pelagius, a contemporary and antagonist of Augustine. Though Pelagius's doctrine was condemned as a heresy in his own day, it has been a hardy perennial in the history of the church. See 3 JUSTO L. GONZALEZ, *A HISTORY OF CHRISTIAN THOUGHT* 283-287 (1975).

ture itself, a basic inability, not merely a voluntary refusal, to embrace humanist, or welfarist, values.<sup>89</sup> But, in the arena of politics, maybe it was Socrates who, ironically, made the best case against deliberation: the Athenian assembly, after hearing his *apologia pro vita sua*, put him to death.

This is emphatically not to suggest political Nihilism, a despair of successfully pursuing welfarist goals in political arenas. Those most thorough-going of Augustinians, the English Puritans, were proof enough of that. Nor is it to say that deliberation is never good, as a means toward welfarist goals. Both the English and the American Revolutionists included deliberation in their constitutions for precisely this reason, and rightly so. It is to say, however, that one can embrace their proceduralism-with-a-little-p, as a means rather than as an end. One can be, as Adler and I are, welfarists in politics, micro and macro, without being Big-P Proceduralists. One can say to process-mired administrators, as the Lord Protector said to his first Parliament, "I think it my duty to tell you that it is not for the profit of these Nations, nor for common and public good, for you to continue here any longer."<sup>90</sup>

### C. Meta-Matters

By labeling these last items meta-matters, beyond being cute, I want to emphasize an important implication of something I've already said: the absence of any "real" foundation for our political and ethical commitments cannot undermine our faith in welfarist values. If this is so, and if advancing those values is fundamental to our politics, then it must follow that what administrative law scholars like Adler and Seidenfeld do is more important than what scholars of metaethics do. As a sometime scholar of metaethics myself, I firmly believe that. To put it otherwise, I'm a little-m metaethicist. To me, the kind of concerns I discussed above have no intrinsic interest. They only matter as a means of keeping us on the welfarist track and preventing derailment in either of two directions. The first, and least troubling, is the worry that metaethical skepticism will lead to the nowhere of Big-N Nihilism.

The second, and more serious risk, is not presented in Adler's paper, but is very much afoot in the larger world. It is the danger that some of his fellow realists will convince you that welfarism is "really" wrong, and that you should not embrace it. The answer to that, I have tried to show, comes down to this: Gimme that old time religion;

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89. See AUGUSTINE, ON FREE CHOICE OF THE WILL 3-5, 125-26 (Anna S. Benjamin & L.H. Hackstaff trans., Bobbs-Merrill Co. 1964).

90. Oliver Cromwell, Dissolution of the First Protectorate Parliament (Jan. 22, 1665), in 8 THOMAS CARLYLE, OLIVER CROMWELL'S LETTERS AND SPEECHES: WITH ELUCIDATIONS 94 (3d ed. 1857).

if it was good enough for Socrates (and Oliver and Abe and Woodrow and Franklin and Eleanor and Lyndon), it's good enough for me. And what was good enough for them, let us not forget, was looking out for the least well off, even as they cultivated the excellence of the best.

## VI. CONCLUSION

If what I've said about meta-matters is right, then our scholarship should not move back defensively toward its foundations, but forward, toward its goals. We need to design, in careful consultation with anyone who's interested, an acceptable and practicable means of achieving the great goal of humanism, classical and modern: universal human flourishing. To that end, it is vitally important that we get the process right; the horrific wrong turns of thorough-going humanisms like Leninism and Maoism are proof enough of that. To avoid both similar catastrophes and smaller mis-steps, we need exactly the kind of scholarship to which the participants in this symposium have devoted their careers (myself excepted, not out of false modesty, but for labor in a neighboring vineyard). Of such scholarship, I can think of no better example than the paper Professor Adler has presented to us.

My only real contribution is to make explicit what is deeply implicit in his mode of presentation. The only basis on which we can be asked to accept any such proposal is this: our careful mutual consideration. That must ultimately be the measure of all things, human and even divine. (Indeed, if what we value most in ourselves is truly made in the image of God—and if what Huck Finn and Socrates and the Talmudic scribes all teach us is true—then God Himself wouldn't have it any other way.)