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The Sufficiency of Uncorroborated Hearsay in Administrative Proceedings: The California Rule

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THE SUFFICIENCY OF UNCORROBORATED HEARSAY IN ADMINISTRATIVE PROCEEDINGS: THE CALIFORNIA RULE*

> If we are to continue a government of limited powers these agencies of regulation must themselves be *regulated.* The limits of their power over the citizen must be *fixed and determined.* The rights of the citizen against them must be made *plain.*
>
> —Elihu Root (1916)[1]

I. INTRODUCTION

It has been almost sixty years since Elihu Root delivered his prophetic address to the American Bar. The "crude and imperfect" procedures of a "system of administrative law" then in its "infancy" have to a large extent improved. The heated debate seems to be over;[2] the administrative process is upon us and the "extravagant version of the rule of law" has yielded to a more modest and limited brand of "discretionary justice."[3] Due process has remained the legal bulwark; its new

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1. Root, *Public Service by the Bar,* 41 A.B.A. REP. 355, 369 (1916) (emphasis added). The impact of administrative law upon the democratic process has received a more favorable evaluation in recent years. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT 1-52 (1972) [hereinafter cited as ADMINISTRATIVE LAW TEXT]; J. FRANK, IF MEN WERE ANGELS 19-20 (1942); W. GELLHORN, WHEN AMERICANS COMPLAIN (1966); R. LORCH, DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW 95-114 (1969) [hereinafter cited as LORCH]; C. POUND, J. KURTZ & C. NAGEL, THE GROWTH OF ADMINISTRATIVE LAW 106-10, 135 (1923); R. POUND, ADMINISTRATIVE LAW (1942); J. ROSENFARB, FREEDOM AND THE ADMINISTRATIVE STATE (1948); Jones, *The Role of Administrative Agencies as Instruments of Social Reform,* 19 AD. L. REV. 279 (1967); Miller, *Administrative Decision Making—Mortal or Immortal?,* 25 HASTINGS L.J. 1131 (1974); Newman, *Two Decades of Administrative Law in California: A Critique,* 44 CALIF. L. REV. 190 (1956). *But cf.* W. DOUGLAS, GO EAST YOUNG MAN 297, 303-07, 315 (1974); H. WHEELER, DEMOCRACY IN A REVOLUTIONARY ERA 79-101 (1970); Freedman, *Crisis and Legitimacy in the Administrative Process,* 27 STAN. L. REV. 1041 (1975); Waters, *State of the State,* Los Angeles Daily J., May 15, 1975, at 3, col. 1.

2. K.C. DAVIS, DISCRETIONARY JUSTICE 27-51 (1969).

3. *Id.* at 1-26. The extravagant version of the rule of law attempted to root out all traces of discretionary power—this version of the rule operated in a world of absolutes.

enemies are "unnecessary discretion" and "abusive discretion."[4] With the advent of "discretionary justice," the courts have become more active in checking administrative abuses. This very decade has witnessed the genesis of what has come to be known as the "due process revolution," and with that revolution arose a "new concern with and scrutiny of the administrative process."[5] The tenor of the landmark 1970 due process decisions[6] was thought by many to signal the fulfillment of a legal prophecy—a prelude of things to come.[7] Implicit in the mandate of these decisions was the belief that the rights of the citizen could be made "plain," thereby affording a safety check against the abuses of unnecessary discretion.[8]

In our system of federalism, the states are relied upon to prescribe local administrative regulations; sometimes their policies retain a cautious distance from the earthshaking innovations of the general government or even the celestial movement of administrative bureaucracy at the regulatory agency level.[9] It is within that ambit of the law that old problems have a way of reappearing, even if in the guise of seemingly novel issues. What follows, then, commences an inquiry into an almost ancient legal issue now refined with a few new twists.

This Comment concerns itself with the evidentiary status of certain California administrative procedures. More specifically, this examination concentrates upon the sufficiency of uncorroborated hearsay in administrative proceedings. Accordingly, consideration will be allotted to the general issues of the overall role and regulation of hearsay evidence in California administrative law. To that end, emphasis will be placed on the historical development of decisional, judicial, and administrative

"Discretionary justice," on the other hand, set out to limit or check only *un*necessary discretion—this brand of justice operated on the premise that flexibility could be made compatible with fairness. *See id.* at 15-25.

4. *See* K.C. DAVIS, DISCRETIONARY JUSTICE 3-26 (1969). *See also* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671-1711 (1975).

5. Carrow, *Administrative Justice Comes of Age*, 60 A.B.A.J. 1390, 1396 (1974).

6. Wheeler v. Montgomery, 397 U.S. 280 (1970); Goldberg v. Kelly, 397 U.S. 254 (1970).

7. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin action); Bell v. Burson, 402 U.S. 535 (1971) (driver's license suspension); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (liquor sale prohibition).

8. Since the protection granted was of a constitutional dimension, its sweep extended to the state levels as well. *See* Wheeler v. Montgomery, 397 U.S. 280 (1970); pt. V *infra*.

9. *See* THE COMPLETE JEFFERSON 134-37 (S. Padover ed. 1943). For an insightful discussion of the "decentralizing process" and its relationship to representative government, see generally D. SISSON, THE AMERICAN REVOLUTION OF 1800 at 58 *passim* (1974).

law germane to the central issue. The format chosen will include a statement of the present status of the applicable law in California, along with a discussion of the relevant evidentiary burdens, and an exposition of the state of the law regulating the adequacy of hearsay evidence in the administrative context. Having established the foundations of the respective California law, certain criticisms of the major tenets of it will be offered in order to permit a more exacting evaluation of some of the elusive aspects of the particular inquiry. Thereafter, the focus of the inquiry will shift to a consideration of the constitutional dimension of the administrative hearsay question. Finally, various California procedures will be evaluated in light of certain suggested modifications and alternative options.

II. BURDENS: WHICH ONES AND HOW THEY APPLY

When evidentiary issues arise in administrative proceedings, the particular application of the respective burdens will, to a great extent, affect the outcome of the case under consideration. Consequently, it is important that the applicable burdens be clearly defined and properly applied. The burden of proof is best viewed as consisting of two distinct elements—the burden of producing evidence and the burden of persuasion.[10]

Essentially, the burden of producing evidence refers to the burden of "*going forward* with the evidence or introducing some evidence on an issue."[11] At this stage, there is no burden to *prove* a fact; all that is necessary is that the evidence be sufficient to "avoid an adverse ruling on the issue involved."[12] The rule only requires that some "believable evidence" be introduced.[13] What this means is that "[a] party satisfies the burden of producing evidence by introducing evidence sufficient to sustain a finding in his favor on the issue involved."[14] The burden of persuasion, on the other hand, requires a party to "*convince* the trier of fact . . . of the existence or nonexistence of that fact" by the degree of proof required.[15]

10. 1 F. COOPER, STATE ADMINISTRATIVE LAW 355 (1965) [hereinafter cited as COOPER]. This evidentiary scheme derives from, but is not mandated by, the California Evidence Code. *See* CAL. EVID. CODE §§ 110, 115 (West 1970); note 57 *infra*.

11. B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK 780 (1972) [hereinafter cited as JEFFERSON] (emphasis added).

12. *Id.*

13. *Id.* at 781.

14. *Id.*

15. *Id.* at 777-78 (emphasis added).

The allocation of burdens depends upon the type of case before the agency. For example,

> [t]he state courts quite uniformly impose on agencies the customary common-law rule that the moving party has the burden of proof, including not only the burden of going forward but also the burden of persuasion. This means, of course, that when an applicant appears before an agency seeking to establish a claim or obtain a license, the burden is on him. Conversely, when the agency is the moving party, the burden is on it.[16]

The analytical process of distinguishing the two burdens is somewhat complicated by the fact that "the initial burden to produce evidence is on the party having the burden of [persuasion] as to [a particular] fact or issue."[17] This "coincidence of the two burdens"[18] requires the hearing officer to first determine which party has the burden of persuasion so as to establish the respective burdens of production.[19] As previously noted,[20] the burden of proof will generally lie with the "moving party."[21] Once this has been established, the moving party need only offer some evidence capable of sustaining a favorable finding on the issue involved;[22] the burden of production will thereafter shift to the opponent.[23] However, the burden does not shift where the evidence

16. 1 COOPER, *supra* note 10, at 355 (footnotes omitted).

17. JEFFERSON, *supra* note 11, at 792.

18. *Id.* (emphasis deleted).

19. *Id.*

20. See text accompanying note 15 *supra.*

21. *See* CALIFORNIA ADMINISTRATIVE AGENCY PRACTICE 183-84 (M. Nestle ed. 1970) [hereinafter cited as ADMINISTRATIVE AGENCY PRACTICE]; 1 COOPER, *supra* note 10, at 355; ADMINISTRATIVE LAW TEXT, *supra* note 1, at 287; 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 326 (1958) [hereinafter cited as ADMINISTRATIVE LAW TREATISE]; W. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS 49 (1966) [hereinafter cited as ADMINISTRATIVE MANDAMUS]; C. KUCHMAN, CALIFORNIA ADMINISTRATIVE LAW AND PROCEDURE 127 (1953); 4 B. JONES, JONES ON EVIDENCE: CIVIL AND CRIMINAL 339-42 (S. Garded ed. 1972) [hereinafter cited as JONES]; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCCE 853 (E. Cleary ed. 1972) [hereinafter cited as MCCORMICK]; B. WITKIN, CALIFORNIA EVIDENCE 28 (2d ed. 1966) [hereinafter cited as WITKIN]; 2 CAL. JUR. 3d *Administrative Law* 412-13 (1973); *cf.* CAL. LABOR CODE ANN. § 5705 (West 1971). A relaxation of this rule in the *claimant's* favor may be found in Kerner v. Fleeming, 283 F.2d 916, 922 (2d Cir. 1960).

Two appellate decisions have held that where evidence as to *discrimination* is offered, in those cases, "[i]t is within the discretion of the hearing officer to determine the *order of the proof.*" Feist v. Rowe, 3 Cal. App. 3d 404, 412, 83 Cal. Rptr. 465, 470 (1970) (emphasis added); Ehrlich v. Connell, 214 Cal. App. 2d 280, 287, 29 Cal. Rptr. 283, 288 (1963).

22. JEFFERSON, *supra* note 11, at 780.

23. *Id.* at 793.

offered is not "sufficient in itself to support a finding."[24] Consequently, unless expressly provided for by statute, an offer of certain kinds of evidence cannot sustain the moving party's burden of production, thereby preventing that party from meeting the required burden of persuasion.[25] (Here the issue pertains to the *sufficiency* of the evidence rather than to its *admissibility*.)

The rationale of these rules is that a person should not be deprived of a legally protected interest until such time as another party, legally empowered to divest that person of that interest, has established a prima facie case as required under the applicable laws. License revocation and administrative disciplinary cases exemplify the procedural guarantees required where the deprivation of a vested interest[26] is threatened.

The California rule in license revocation cases thus requires that the party asserting revocation or suspension of the holder's license come forward with evidence of a kind sufficient to sustain a finding, and that revocation may issue only on a showing of "good cause."[27] Absent this

24. CAL. GOV'T CODE ANN. § 11513(c) (West Supp. 1975); *see* Walker v. City of San Gabriel, 20 Cal. 2d 879, 881, 129 P.2d 349, 351 (1942); *id.* at 882, 129 P.2d at 351 (Traynor, J., concurring); La Prade v. Department of Water & Power, 27 Cal. 2d 47, 51, 162 P.2d 13, 15 (1945).

25. *See* note 24 *supra*.

26. The standard definition of the phrase provides:

> An interest when vested, whether it entitles the owner to the possession now or at a future period, is fixed and present; so that the right of ownership, to the extent of the estate, may be aliened.

BALLENTINE'S LAW DICTIONARY 1339 (1969), *citing* Allison v. Allison's Ex'rs, 44 S.E. 904 (Va. 1903). Where the interest has the legal status of a right, California courts have held:

> "The term 'vested right' is often loosely used. In one sense every right is vested. If a man has a right at all, it must be vested in him . . . . The term, however, is frequently used to designate a right which has become so fixed that it is not subject to be divested without the consent of the owner, as contra-distinguished from rights which are subject to be divested without his consent."

Adoption of Graham, 58 Cal. 2d 899, 905, 377 P.2d 275, 279, 27 Cal. Rptr. 163, 167 (1962), *quoting* Stohr v. San Francisco Musical Fund Soc'y, 82 Cal. 557, 560, 22 P. 1125, 1126 (1890). *See* note 27 *infra*.

27. Walker v. City of San Gabriel, 20 Cal. 2d 879, 881, 129 P.2d 349, 351 (1942) (revocation of a license to conduct a wrecking business); note 77 *infra*; *see* La Prade v. Department of Water & Power, 27 Cal. 2d 47, 51, 162 P.2d 13, 16 (1945) (discharge of civil service employee); Sunseri v. Board of Medical Examiners, 224 Cal. App. 2d 309, 317, 36 Cal. Rptr. 553, 558 (1964) (suspension of physician's license); Vaughn v. Board of Police Comm'rs, 59 Cal. App. 2d 771, 780-81, 140 P.2d 130, 135 (1943) (license revocation). The question of "competent evidence" generally goes to the issue of the admissibility of certain kinds of evidence. The concern is not with the *amount* of evidence, but rather with the *kind* of evidence presented. See ADMINISTRATIVE AGENCY PRACTICE, *supra* note 21, at 155-56, 158-60; *id.* at 16-17 (Supp. 1973); LORCH, *supra* note 1, at 132-39; WITKIN, *supra* note 21, at 25-28, 31-33; *id.* at 4-5 (2d ed. Supp. 1974).

requisite showing, there cannot exist an adversary hearing sufficient to warrant a decision. Until the moving party establishes a prima facie case with sufficient evidence, the party adversely affected may rightfully claim that "there [is] no evidence to rebut."[28] Although this has been the rule in license revocation and employee discharge-suspension cases,[29] the courts have been consistent in holding that in *application* cases the applicant bears the burden of proof.[30] Furthermore, there

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While the requisite showing of "good cause" is not identical with the "sufficiency" requirement, nevertheless, it operates to assure the credibility of certain evidence. This showing not only lends support to the propriety of an agency's findings, but ensures due process guarantees:

> In order to revoke a license the board obviously must examine the facts, resolve any conflicts in the evidence, and exercise its judgment with respect thereto. A revocation may be only "for *good cause*" and, accordingly, the board must afford an opportunity for a full hearing, an essential element of a quasi judicial proceeding . . . . This does not mean, of course, that the "discretion" given to the board is absolute, since it must be exercised in accordance with the law.

Covert v. State Bd. of Equalization, 29 Cal. 2d 125, 131, 173 P.2d 545, 548 (1946) (emphasis added) (hearing to revoke an "on sale" liquor license).

In much the same manner, this rule emerges in disciplinary proceedings:

> It may be conceded that in disciplinary administrative proceedings the burden of proof is upon the party asserting the affirmative . . . and that [a finding of] guilt cannot be based on surmise, conjecture, suspicion or theoretical conclusions, or uncorroborated hearsay.

Cornell v. Reilly, 127 Cal. App. 2d 178, 183-84, 273 P.2d 572, 576 (1954) (revocation of liquor license).

28. Walker v. City of San Gabriel, 20 Cal. 2d 879, 882, 129 P.2d 349, 351 (1942) (Traynor, J., concurring). Other courts have noted:

> In any proceeding of this character, evidence must be adduced to sustain the charges. It is not incumbent on the employee to proceed. The burden does not rest on him to refute the charges made.

La Prade v. Department of Water & Power, 27 Cal. 2d 47, 51, 162 P.2d 13, 15 (1945).

29. *See* La Prade v. Department of Water & Power, 27 Cal. 2d 47, 51, 162 P.2d 13, 16 (1945) (discharge of civil service employee); Sunseri v. Board of Medical Examiners, 224 Cal. App. 2d 309, 317, 36 Cal. Rptr. 553, 558 (1964) (suspension of a physician's license); note 10 *supra.*

30. Southern Cal. Jockey Club, Inc. v. California Horse Racing Bd., 36 Cal. 2d 167, 177, 223 P.2d 1, 7 (1950) (application for horse racing license); Savelli v. Board of Medical Examiners, 229 Cal. App. 2d 124, 134, 40 Cal. Rptr. 171, 177 (1964), *cert. denied,* 380 U.S. 934 (1965) (applicant failed to prove that he met the statutory conditions precedent to having the right to take an examination); 1 COOPER, *supra* note 10, at 355-56; ADMINISTRATIVE LAW TEXT, *supra* note 1, at 287. It has been pointed out that

> [t]he burden of proof is always upon any applicant for any license, unless by statute the burden is shifted. In short, the burden of proof is upon the party undertaking an affirmative action of any sort through an adjudicatory proceeding, except where the statute provides otherwise.

LORCH, *supra* note 1, at 131; *see* 2 PIKE & FISHER, ADMINISTRATIVE LAW 53-67 (2d ed. H. Fischer and J. Wills eds. 1965); *id.* at 33-43 (1970 Supp.).

The application of this doctrine also occurs in the judicial review setting. Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 44-45, 520 P.2d 29, 40, 112 Cal. Rptr. 805, 816 (1974); Bixby v. Pierno, 4 Cal. 3d 130, 143-47, 481

is case law to the effect that if a license is renewable merely upon payment of a fee, or some similar activity, and no further showing is required, the licensee is under no burden to prove any additional matters.[31] Such holdings afford maximum protection to the *holder* of a right, even after the express duration of that right has expired. The license renewal cases are noteworthy examples of how far the courts will go to extend the burden of proof rule in order to guarantee substantial justice to the party adversely affected.

Another class of cases in which the burden of proof rule is invoked are those cases involving administrative disciplinary proceedings.[32] Thus where the dismissal is of a police officer,[33] civil service employee,[34] or a school teacher who is not reinstated because of the lapse of a teaching credential,[35] the general rule remains that the party asserting the affirmative action has the burden of proof.[36]

The license and disciplinary cases illustrate that the burden of proof will properly lie with the applicant but never with the party threatened by termination, suspension, revocation, or renewal proceedings.[37] Consequently, in all of these proceedings, the primary focus is on the party who stands to lose a vested interest.[38] Furthermore, this requirement is most vital in those cases which involve the essentials of life.[39]

P.2d 242, 251-54, 93 Cal. Rptr. 234, 243-46 (1971); C. KUCHMAN, CALIFORNIA ADMINISTRATIVE LAW AND PROCEDURE 188-95 (1953). The same distinction can be found at the federal level. *See* Richardson v. Perales, 402 U.S. 389, 402 (1971); Goldberg v. Kelly, 397 U.S. 254, 261, 267, 269 (1970).

31. Hall v. Scudder, 74 Cal. App. 2d 433, 436-38, 168 P.2d 990, 992-93 (1946) (application for renewal of a real estate license). In *Hall*, the court observed:

> None of the procedure which is applicable to the matter of original applications, and none of that which must be followed before there can be an order of suspension or revocation is expressly, or at all, made applicable to proceedings for renewal of licenses.

Id. at 436, 168 P.2d at 992.

32. *See, e.g.*, Cornell v. Reilly, 127 Cal. App. 2d 178, 183-84, 273 P.2d 572, 576 (1954).

33. Martin v. State Personnel Bd., 26 Cal. App. 3d 573, 582, 103 Cal. Rptr. 306, 311-12 (1972) (dismissal of prison correction officer); Johnstone v. City of Daly City, 156 Cal. App. 2d 506, 515, 319 P.2d 756, 762 (1958) (dismissal of police inspector).

34. Steen v. City of Los Angeles, 31 Cal. 2d 542, 547, 190 P.2d 937, 940 (1948); La Prade v. Department of Water & Power, 27 Cal. 2d 47, 51, 162 P.2d 13, 15-16 (1945).

35. Mass v. Board of Educ., 61 Cal. 2d 612, 619-20, 394 P.2d 579, 584, 39 Cal. Rptr. 739, 744 (1964).

36. *See* note 10 *supra.*

37. *See* notes 10, 29, 30, 32, 33, 34 & 35 *supra.*

38. *See* note 26 *supra.*

39. *See* McCullough v. Terzian, 2 Cal. 3d 647, 653-54, 470 P.2d 4, 7, 87 Cal. Rptr. 195, 198 (1970). Similar statements can be found in the opinions of the Supreme Court. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); Goldberg v. Kelly, 397 U.S. 254,

Certain procedures have been established under California law which enumerate the specific course of administrative adjudication to be followed. The California Administrative Procedure Act (APA)[40] provides the evidentiary procedures to be followed by the agencies affected.[41] However, it does not provide for a specific set of rules regulating the burden of proof in administrative hearings. Since the burden of proof requirement has been settled by case law,[42] the absence of an express statutory rule poses no problems of consequence. Those rules apply whether or not the proceeding is affected by the APA,[43] unless otherwise expressly provided for by statute.[44]

All burden of proof questions necessarily require a showing of the requisite *quantum* of proof. The quantum of proof necessary to prevail in an administrative action varies with the kind of case under consideration. In only limited proceedings (*e.g.*, criminal), however, is the "beyond a reasonable doubt" standard invoked.[45] Generally, absent specific statutory pronouncements, the "preponderance of the evidence" test will apply where the proceeding is civil in nature.[46] Where the proceeding involves the disciplining of licensees, some courts have held that "convincing proof to reasonable certainty" is required.[47] While certain procedures have been fashioned for particular proceedings, such as Worker's Compensation cases,[48] nevertheless, the "pre-

264 (1970). In *Dandridge*, Justice Stewart, writing for the majority, noted: "The administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings . . . ." *Id.* at 485; *see id.* at 508, 522 (Marshall, J., dissenting).

40. *See* CAL. GOV'T CODE ANN. § 11371 *et seq.* (West 1966).

41. *See id.* § 11501 (West Supp. 1975).

42. *See* notes 10, 28-29, 32-34 *supra.*

43. *See* CAL. GOV'T CODE ANN. § 11500 (West Supp. 1975).

44. Bertch v. Social Welfare Dep't, 45 Cal. 2d 524, 527, 289 P.2d 485, 487 (1955); Serenko v. Bright, 263 Cal. App. 2d 682, 690, 70 Cal. Rptr. 1, 6 (1968); CAL. GOV'T CODE ANN. § 11513 (West 1975); CAL. WELF. & INST'NS CODE ANN. § 10955 (West 1972).

45. Webster v. Board of Dental Examiners, 17 Cal. 2d 534, 538, 110 P.2d 992, 994 (1941); Realty Projects, Inc. v. Smith, 32 Cal. App. 3d 204, 212-13, 108 Cal. Rptr. 71, 77 (1973) (dictum).

46. Perales v. Department of Human Resources Dev., 32 Cal. App. 3d 332, 340-41, 108 Cal. Rptr. 167, 173 (1973); Pereyda v. State Personnel Bd., 15 Cal. App. 3d 47, 52, 92 Cal. Rptr. 746, 749 (1971); 4 JONES, *supra* note 11, at 337.

47. Realty Projects, Inc. v. Smith, 32 Cal. App. 3d 204, 212, 108 Cal. Rptr. 71, 77 (1973); *cf.* Furman v. State Bar, 12 Cal. 2d 212, 229, 83 P.2d 12, 21 (1938).

48. See note 122 *infra.* Some courts have found the appropriate standard to be "that degree of certainty upon which men may reasonably act, and by which their affairs may reasonably be determined." Engels Copper Mining Co. v. Industrial Accident Comm'n, 183 Cal. 714, 717, 192 P. 845, 846 (1920); West v. Industrial Accident Comm'n, 79 Cal.

ponderance of the evidence" test is likely to be invoked absent compelling considerations which require otherwise.[49]

The importance of the burden of proof issue is that it establishes a firm foundation for an initial, and perhaps final, determination of the priorities in the case. Where the kind or degree of evidence necessary to sustain the allegations is lacking, the burden may not be satisfied. In such instances, compelling the non-moving party to affirmatively rebut such evidence results in an improper shifting of the burden. "It is not incumbent on [that party] to proceed."[50] Unfortunately, it has become the practice—certainly an erroneous one—for the non-moving party to proceed with his or her evidence after the mere *recitation* of any allegations.[51] Rather than expediting matters, this practice serves only to prolong consideration of the question until a reviewing court rehears the particular legal issue. Where this practice does expedite matters, it will most likely do so at the expense and to the detriment of the party affected. A more practical approach could be implemented by requiring a more exact standard for an early evaluation of the moving party's case, thereby relieving all parties of the presentation of unwarranted and unnecessary evidence. Accordingly, where insufficient evidence alone is presented, the proceeding should come to an end at *that* point.[52] This practice could be triggered by the

App. 2d 711, 719, 180 P.2d 972, 977 (1947), *citing* City & County of San Francisco v. Industrial Accident Comm'n, 183 Cal. 273, 283, 191 P. 26, 29 (1920). Other rules of a similar nature have also been fashioned. *See* Cornell v. Reilly, 127 Cal. App. 2d 178, 183-84, 273 P.2d 572, 576 (1954); WITKIN, *supra* note 21, at 29-30. On the role of "presumptions" in administrative proceedings, consult ADMINISTRATIVE AGENCY PRACTICE, *supra* note 21, at 185; 1 COOPER, *supra* note 10, at 359-61.

49. Perhaps some comment should be made as to the distinction between the "preponderance of evidence" test and the "substantial evidence" standard. The former is the test employed by the agency in the first instance; it regulates the quantum of proof required to establish a prima facie case and is therefore properly labeled as a standard of proof. The latter concerns itself with the sufficiency of the evidence for purposes of *judicial* review; it is a standard of review.

50. La Prade v. Department of Water & Power, 27 Cal. 47, 51, 162 P.2d 13, 16 (1945).

51. Interview with Edward S. Mizrahi, Staff Attorney, Legal Aid Foundation of Los Angeles, June 4, 1975.

52. This technique was employed in Walker v. City of San Gabriel, 20 Cal. 2d 879, 880, 882, 129 P.2d 349, 350-51 (1942). A 1958 Note on the "residuum rule" labeled this practice as the "first" of "two stages" of the administrative hearing at which evidence is evaluated:

> The first demand for determining the probative value of incompetent evidence arises when a party moves for the administrative equivalent of either an involuntary dismissal or a directed verdict. These are motions which seek an order as a matter of law. They maintain that the insufficiency of the adversary's case makes administrative weighing of the facts unnecessary. The success of these motions depends on

agency's summary determination at that stage.[53] Such a formulation, while it might appear a bit over-sophisticated—perhaps unduly technical—simply indicates that there is a practical difference between the mere acknowledgment of the burden of proof (*i.e.*, mere allegations) and the satisfaction of that burden with legally sufficient evidence. Thus the real problem is determining *when* and *how* that burden is met.

III. SUFFICIENT EVIDENCE

Traditionally, "the common-law 'jury-trial' or 'technical rules' " regarding the admissibility of evidence have not been strictly, if at all, enforced in administrative proceedings.[54] The strict evidentiary procedures of the courtroom have been somewhat relaxed to permit a more liberal application of the rules.[55] Apart from this relaxed tradi-

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whether, as a matter of law, the party against whom the motion is made is directed has presented a prima facie case. At this stage, the problem can be phrased in terms of the extent to which, if at all, the prima facie case may be established by incompetent evidence.

Note, *The Residuum Rule and Appellate Fact Review: Marriage of Necessity*, 13 RUTGERS L. REV. 254-55 (1958) (footnote omitted); *see* note 177 *infra*.

53. *Cf.* text accompanying note 71 *infra*.

54. Englebretson v. Industrial Accident Comm'n, 170 Cal. 793, 797-99, 151 P. 421, 422-23 (1915); Carroll v. Knickerbocker Ice Co., 113 N.E. 507, 508 (N.Y. 1916); COOPER, *supra* note 10, at 379-80; 4 JONES, *supra* note 21, at 331-35; WITKIN, *supra* note 21, at 25. One commentator has noted:

> The reason [why administrative agencies are not bound by the strict rules of evidence] is one of expediency arising from the assumption that it is better to leave such matters to practical experience in the special field of operation, and to common sense and discretion, than to expect an orderly application of evidence rules from commissioners and the like who have no education and training in the law of evidence.

4 Jones, *supra* note 21, at 332. *But see* 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 36 (1940) [hereinafter cited as WIGMORE]. The history and policy of the non-application of evidentiary rules in administrative proceedings can be found at *id.* at 27-43. Professor Kenneth Culp Davis has observed:

> The direction of movement on evidence problems throughout the legal system, in the judicial process as well as in the administrative process, is toward (1) replacing rules with discretion, (2) admitting all evidence that seems to the presiding officer relevant and useful, and (3) relying upon "the kind of evidence on which responsible persons are accustomed to rely in serious affairs."

2 ADMINISTRATIVE LAW TREATISE, *supra* note 21, at 250 (footnote omitted); *see* 1 COOPER, *supra* note 10, at 381. *But see* MCCORMICK, *supra* note 21, at 840. Additionally, it should be noted that

> [s]ince administrative hearings differ so widely in scope and significance, it is impossible to suggest a single standard to govern the admission of all evidence. It is probably still true . . . that the more closely administrative proceedings approach judicial proceedings in formality and in the *nature of the issues to be tried* the greater the degree to which the exclusionary rules will be applied.

Id. at 843 (emphasis added).

55. ADMINISTRATIVE AGENCY PRACTICE, *supra* note 21, at 155-56.

tion, standards of relevancy still remain.[56]

California has adopted the traditional practice to the extent that the provisions of the Evidence Code, unless otherwise provided for, are inapplicable in administrative proceedings.[57] Additionally, California statutory law expressly provides that all agencies affected by the APA are not bound by "the technical rules relating to evidence."[58]

The foregoing practice necessarily permits the *admission* of hearsay evidence. "There [being] no reason for administrative bodies to be more restrictive than courts . . . , evidence competent in judicial proceedings, including hearsay with an exception, is generally held competent in administrative proceedings."[59] Even incompetent hearsay is admissible.[60] The question turns on whether incompetent hearsay,[61] without more, is sufficient to satisfy the moving party's burden and thereby support the agency's findings. In order to avoid confusion, it is important that the "admissibility" issue not be viewed in the same light as the "sufficiency" standard; they are different creatures. Admissibility is not the equivalent of evaluation; the former makes certain concessions in the interest of full and complete discovery while the latter, in the interest of fairness, withholds legal sanction to evidence found not to be trustworthy. Unlike the common practice in judicial

56. *Id.* at 156; 4 JONES, *supra* note 21, at 335-37; WITKIN, *supra* note 21, at 30-31.

57. "The provisions of the code do not apply to administrative proceedings . . . unless some statute so provides or the agency concerned chooses to apply them." CAL. EVID. CODE § 300, Comment (West 1968).

58. CAL. GOV'T CODE ANN. § 11513(c) (West 1975) (emphasis added). Regarding the "technical rules" of evidence, it has been observed:

> A distinction, somewhat vague in its application, is sometimes drawn between rules which are "essential" to justice and those which are merely "technical," and perhaps it is more accurate to say that in administrative hearings the same rules apply as in judicial tribunals but that the agency may "relax" the rules at discretion so long as no party is *seriously hurt* by it . . . .

4 JONES, *supra* note 21, at 334-35 (footnotes omitted and emphasis added). Would the deprivation of a "fundamental-vested right" which affects "the most basic economic needs of impoverished human beings" be sufficiently serious to warrant a "tightening" of the rules? ("[I]t has been held that the hearsay rule is not a mere technical rule but is a basic rule of exclusion to protect the right of cross-examination." *Id.* at 343.)

59. WITKIN, *supra* note 21, at 31 (emphasis deleted). *But see* M. FORKOSCH, A TREATISE ON ADMINISTRATIVE LAW 356-62 (1956); R. PARKER, ADMINISTRATIVE LAW: A TEXT 227-28 (1952).

60. CAL. GOV'T CODE ANN. § 11513(c) (West 1975); ADMINISTRATIVE AGENCY PRACTICE, *supra* note 21, at 158-60; LORCH, *supra* note 1, at 133-37; WITKIN, *supra* note 21, at 31-32. A worthwhile discussion of the distinction between the "admissibility of evidence" and the "evaluation" of such can be found in MCCORMICK, *supra* note 21, at 840-46.

61. Hearsay as used throughout this comment is meant to include only hearsay which would be inadmissible over objection in a civil action.

proceedings, the fact that evidence may be admissible does not therefore guarantee the sufficiency of such evidence to sustain a finding. Consequently, evidence which is deemed *admissible* is generally considered to be "*competent*." On the other hand, evidence once admitted which is *capable of sustaining a finding* will amount to "*sufficient*" evidence. Finally, determining what constitutes sufficient evidence will depend upon the applicable judicial or statutory rule.

A. Decisional Law: The Walker Rule

It inevitably happens that the highest court of a state will render a decision which will be cited to and relied upon extensively for several decades. Unfortunately, notoriety does not favor serious scrutiny and consideration of the facts and holding of such a case. Those decisions affecting administrative tribunals have not been immune from this peculiar occurrence—*Walker v. City of San Gabriel*[62] illustrates this point. Considering the impact of *Walker* on administrative law,[63] the time is long overdue for a critical discussion of the case, even if it means breaking away from tradition.

Walker involved the revocation of a license to operate an auto-wrecking business on the grounds of alleged misconduct in violation of city ordinances.[64] After thirteen years in the business, petitioner (Walker) "received notice that the city council proposed to revoke his license."[65] At the commencement of the hearing, petitioner's attorney

> informed the members of the council that "Mr. Walker stood ready, able, and willing to produce evidence and testimony as to why his license should not be revoked, but should await the evidence of why it should be."[66]

Since this proceeding involved the revocation of a vested interest,[67] Walker's counsel stated his position to the board in order to serve notice of his claim that the city as the moving party had the burden of proof.[68] After the opening remarks, a representative of the city (a

62. 20 Cal. 2d 879, 129 P.2d 349 (1942).

63. It is noted that *Walker* is not, strictly speaking, the precedent ruling in this area of the law. For example, in Laterman v. Board of Medical Examiners, 4 Cal. App. 2d 319, 40 P.2d 913 (1935), the court, in a license revocation case, held that an administrative board could not base its decision on inadmissible hearsay. *Id.* at 321, 40 P.2d at 914; *see* note 81 *infra.*

64. 20 Cal. 2d at 880, 129 P.2d at 350.

65. *Id.*

66. *Id.*

67. See note 26 *supra.*

68. In those cases which involve the deprivation of a vested right or interest, the strategy invoked in *Walker* would be applicable.

police officer) read a letter addressed to the board and "signed by the chief of police of the city."[69] The letter recited several charges against the petitioner to which no defense was offered other than to note

> that until the persons making the complaints were produced, and an opportunity given to cross-examine them, there was *no* evidence before the city council and nothing for the petitioner to refute.[70]

For all practical purposes the proceeding then and there came to an abrupt end.[71] The petitioner's refusal to produce any evidence on his behalf, even though the city offered him a continuance, finally resulted in the city's revocation of Walker's license.[72]

On appeal it was argued that the revocation of the license, since it was based on "hearsay evidence only," amounted to an arbitrary decision and therefore constituted an abuse of the council's discretion.[73] The majority and concurring opinions addressed themselves to the issue of whether or not mere hearsay evidence was sufficient to warrant the board's revocation of the license.[74] Simply stated, the court, in both the majority[75] and concurring opinions,[76] found that such evidence standing alone was insufficient to support the deprivation of the interest threatened. It made no difference to the court that the letter which was read by a police officer was allegedly signed by the chief of police. In this regard, the court held that "[t]he letter was competent only as a *statement* of the charges against the petitioner, but was not competent evidence of the truth of the charges stated therein."[77] The con-

69. 20 Cal. 2d at 880, 129 P.2d at 350.

70. *Id.* (emphasis added).

71. *See* note 45 *supra* and accompanying text. The proceeding ended despite the fact that the city offered a continuance to petitioner. *See* 20 Cal. 2d at 880, 129 P.2d at 350.

72. 20 Cal. 2d at 880, 129 P.2d at 350.

73. *Id.* at 881, 129 P.2d at 350.

74. In addition, the court considered whether certiorari or mandamus is an appropriate remedy to test a board's alleged abuse of discretion, and whether or not uncorroborated hearsay amounted to substantial evidence for the purposes of judicial review. *Id.* at 881-85, 129 P.2d at 350-52.

75. *Id.* at 881, 120 P.2d at 351. Justice Shenk wrote the majority opinion, in which Justices Curtis, Carter, and Peters concurred. On the issue of the adequacy of uncorroborated hearsay there was little or no difference between the majority and concurring opinions.

76. *Id.* at 882, 129 P.2d at 351. Justice Traynor wrote the concurring opinion in which Chief Justice Gibson and Justice Edmonds concurred.

77. *Id.* at 882, 129 P.2d at 351 (emphasis added). It should be noted that it is doubtful that the *Walker* court was using the word "competent" as a term of art. Since hearsay evidence is generally admissible in administrative proceedings (see text accompanying notes 54-60 *supra*), the court's use of the term "competent" should be taken to mean "sufficient." See note 27 *supra*.

curring opinion referred to the letter "as a [mere] *recital* of the charges."[78]

The lesson thus learned from *Walker* is that absent a statute providing otherwise, or the additional inclusion of non-hearsay evidence, uncorroborated hearsay (*i.e.*, hearsay inadmissible in a civil action[79]), at least in revocation proceedings, does not amount to evidence sufficient to sustain a finding. It is also worth noting that the holding found the uncorroborated hearsay in the case to be nothing more than a mere statement or recital of the charges; this the court found insufficient.[80] The court by emphasizing the mere "recital" nature of the charges demonstrated that something *more* was needed to satisfy the burden of proof requirements. What is most novel about the *Walker* case, however, is not so much the general holding,[81] but rather the *context*

78. 20 Cal. 2d at 882, 129 P.2d at 351 (Traynor, J., concurring) (emphasis added).

79. *See* 20 Cal. 2d at 882, 129 P.2d at 351 (Traynor, J., concurring); ADMINISTRATIVE LAW TEXT, *supra* note 1, at 277.

80. 20 Cal. 2d at 882, 129 P.2d at 351.

81. The rule that uncorroborated hearsay is insufficient to support a decision is hardly a new one. A variation of the rule was applied in an early California "Workmen's" Compensation case—Englebretson v. Industrial Accident Comm'n, 170 Cal. 793, 798-99, 151 P. 421, 422-23 (1915). Within less than one year a remarkably similar factual setting produced a similar holding in the New York Court of Appeal's landmark case of Carroll v. Knickerbocker Ice Co., 113 N.E. 507, 509 (N.Y. 1916). Both cases involved *claims* under the "Workmen's" Compensation Law for deaths allegedly caused by injuries within the scope of the deceaseds' employment. Likewise, in both cases there were declarations by the deceaseds immediately prior to their deaths to the effect that the injuries had been job related. On the basis of this evidence standing alone, the respective commissions *awarded* the applied for benefits. The California Supreme Court, interpreting the provisions of a 1913 "Workmen's" Compensation Insurance and Safety Act, held: "There was no legal proof that the injury was accidental and the commission was without the power to award compensation therefor." Englebretson v. Industrial Accident Comm'n, 170 Cal. 793, 799, 151 P. 421, 423 (1915). (A good discussion of *Englebretson* and the development of subsequent case law can be found in State Compensation Ins. Fund v. Industrial Accident Comm'n, 195 Cal. 174, 178-82, 231 P. 996, 998-99 (1924).) There was simply no evidence sufficient to sustain the commission's award. 170 Cal. at 799, 151 P. at 423. The New York court, without citing *Englebretson*, fashioned a rule based on the same principle which has come to be known as the "legal residuum rule." That court held that uncorroborated hearsay was insufficient because "in the end there must be a residuum of legal evidence to support the claim before an award can be made" and "[s]uch hearsay testimony is no evidence." Carroll v. Knickerbocker Ice Co., 113 N.E. 507, 509 (N.Y. 1916).

For the present, it is worth noting that both *Englebretson* and *Carroll* involved *applications* for benefits which arose within the Worker's Compensation setting, which has since developed its own body of law separate and apart from other administrative procedures. *See* notes 122-61 *infra* and accompanying text. A more in depth discussion and analysis of the "legal residuum rule" can be found at pt. IV *infra*. A case history of this rule prior to 1915 can be found in 1 R. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 182 (1942) [hereinafter cited as BENJAMIN].

in which that court ruled as it did, given the practice employed by petitioner's counsel (recall, the petitioner *never* offered any rebuttal evidence[82]).

A few years after *Walker* was decided the California Supreme Court applied the *Walker* rule to several public employee discharge cases. In *Steen v. Board of Civil Service Commissioners*,[83] the court was confronted with the discharge of a civil service employee based upon an uncorroborated hearsay report submitted to the administrative board.[84] The hearsay consisted of an investigative report conducted by a manager of the civil service department who was acting under an order of the agency.[85] The court applied the rule "that in the absence of a special statute an administrative agency cannot . . . make findings of fact supported solely by hearsay evidence."[86] This rule was reaffirmed again by the same court in the case of *La Prade v. Department of Water & Power*.[87]

The case law established by the *Walker, Steen,* and *La Prade* holdings thus preceded most statutory enactments regarding the sufficiency of uncorroborated hearsay in administrative proceedings. These holdings became the general rule in revocation and discharge cases while the extension of the rule to "application" cases was more limited.[88]

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82. 20 Cal. 2d 879, 880, 129 P.2d 349, 350 (1942). *See* text accompanying note 72 *supra.*

83. 26 Cal. 2d 716, 160 P.2d 816 (1945).

84. *Id.* at 725-26, 160 P.2d at 821-22.

85. *Id.*

86. *Id.* at 726-27, 160 P.2d at 822.

87. 27 Cal. 2d 47, 51, 162 P.2d 13, 15-16 (1945) (discharge of civil service employee). An example of the application of this rule in a non-APA setting can be found in Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 324, 313 P.2d 127, 130 (1957) (demolition of private property ordered by municipality on the grounds that it constituted a nuisance).

88. Desert Turf Club v. Board of Supervisors, 141 Cal. App. 2d 446, 455, 296 P.2d 882, 888 (1956) (denial of a permit to use land); Kinney v. Sacramento City Employees Retirement Sys., 77 Cal. App. 2d 779, 782, 176 P.2d 775, 777 (1947) (application for retirement allowance); *see* ADMINISTRATIVE AGENCY PRACTICE, *supra* note 21, at 161. *See generally* Bixby v. Pierno, 4 Cal. 3d 130, 152, 481 P.2d 242, 258, 93 Cal. Rptr. 234, (1971). This same principle was enunciated in Richardson v. Perales, 402 U.S. 389, 406 (1971). What this means is that the non-moving party *can* rebut the applicant's evidence with uncorroborated hearsay. It does not, however, mean that the applicant can establish his or her case with such evidence. Why should the non-moving party, when the burden shifts to it, be able to meet that burden with uncorroborated hearsay evidence? Despite the nature of the right involved, if the credibility of the evidence and the non-availability of cross-examination are really the cornerstones of the rule, then, the rule should apply with *somewhat* equal force to application cases.

By way of a brief digression from California law, it is worth noting that the case law in New York parallels that followed by this state under the *Walker* rule. The New York

B. *Statutory Provisions: The California Administrative Procedure Act*

Several months after the *Steen* ruling was handed down, the legislature enacted California Government Code section 11513(c)[89] which provided specific evidentiary procedures applicable in certain adminis-

policy enunciated as early as 1916 (see note 81 *supra*) developed such that by 1942 (the same year as *Walker*) it had become the general rule of law. The major case was Stammer v. Board of Regents, 39 N.E.2d 913 (N.Y. 1942). The threatened suspension of a physician's license was based on mere hearsay evidence. The Board's reliance upon such evidence was held to be "arbitrary and baseless" where the applicable statute required the ruling to be "founded upon sufficient legal evidence." *Id.* at 915. Thus, by 1966, the court in Leogrande v. State Liquor Authority, 268 N.Y.S.2d 433 (App. Div. 1966), *rev'd on other grounds*, 277 N.E.2d 302, 280 N.Y.S.2d 381 (1967), a license revocation case, declared:

> It is well established in this State that while hearsay evidence is admissible in an administrative proceeding there must be some legal or competent evidence to sustain the determination.

268 N.Y.S.2d at 438. This general rule has continued to win support in the courts. *See* Del Valle v. Sugarman, 353 N.Y.S.2d 215 (App. Div. 1974); Sabatini v. Kirwan, 348 N.Y.S.2d 379 (App. Div. 1973); Schwartz, *Administrative Law*, 26 SYRACUSE L. REV. 1, 4-5 (1975). Somewhat recently, the New York courts have extended this rule to other agencies not traditionally affected by its mandate. For example, in Griffith v. Wyman, 333 N.Y.S.2d 703 (App. Div. 1972), the court considered hearsay statements offered by the county in support of a reduction of AFDC grants to the petitioner. There the *recipient* had been charged with having received, endorsed, and cashed certain checks after giving allegedly false statements that the original checks had been stolen, lost, or undelivered. At the hearing an agency official testified that the county's handwriting expert had determined that the endorsements on the lost checks were the signatures of the petitioner. *Id.* at 705. Regarding the probative value of the uncorroborated hearsay evidence, the *Griffith* court stated: "Here, the hearsay evidence had such a harmful and unfair effect as to vitiate the fairness of the hearing." *Id.*

The *Griffith* rationale was again invoked in the 1973 case of Martinez v. Sugarman, 345 N.Y.S.2d 63 (Sup. Ct. 1973) (*see* Schwartz, *Administrative Law*, 25 SYRACUSE L. REV. 1, 8 (1974)). *Martinez* involved a petition to review the *termination* of AFDC grants. At the "fair hearing," the state commissioner ruled that the petitioner failed to explain the source of various monies received and spent. The only evidence introduced by the New York City Department of Social Services was an "abstract" which stated the allegations outlined in the county's case. This practice employed by the Department of Social Services is not only a commonplace one, but, and more importantly, it is a practice which lends itself to precisely the criticism that the supreme court levied against the city in *Walker*. See notes 76-78 *supra* and accompanying text. (Something *more* than an absence of a "residuum of legal evidence" is involved where there is only a "statement," "recital," "abstract," or "outline" of the moving party's allegations.) On review the court analyzed the probative value of the abstract: "[T]ermination should not be allowed when it is based largely on an abstract. Due process requires that the determination be supported by more than hearsay evidence." 345 N.Y.S.2d at 64.

The *Griffith* and *Martinez* holdings exemplify the logical extension of the California rule in license revocation and employee suspension-discharge cases. These cases bear an essential identity to the case law which has evolved from *Walker*, except for the fact that they involved public assistance grants.

89. Ch. 867, § 1, [1945] Cal. Stat. 1632.

trative proceedings.[90] The traditional rule of liberal admissibility[91] was subject only to the limitation that the evidence be of the kind upon "which responsible persons are accustomed to rely in the conduct of serious affairs . . . ."[92] While the technical rules of evidence did not apply, the statute specifically restricted the use of hearsay evidence. The Code provides: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding . . . ."[93] The 1945 statutory enactment was essentially a restatement of the major tenets of the *Walker* rule.[94] The Code's provision that uncorroborated hearsay is insufficient "*unless it would be admissible over objection in civil actions*"[95] in effect parallels the *Walker* mandate.[96]

Most of the early appellate cases which interpreted section 11513(c) involved instances where hearsay evidence was used to supplement other non-hearsay evidence. Thus, in *Cooper v. State Board of Public Health*,[97] a hearsay transcript was sufficient to revoke the license of a clinical laboratory technologist where such evidence was used merely to support findings based upon petitioner's own statements before the board.[98] Similar license revocation cases,[99] including instances where a hearsay report was adopted and vouched for at the hearing by the declarant, have been held to be sufficient under section 11513(c).[100] On the other hand, other courts have narrowly applied the Code provisions. For example, it has been held that the revocation of a physician's license, even when based upon numerous uncorroborated hear-

90. CAL. GOV'T CODE ANN. § 11501 (West 1966). See note 41 *supra*.

91. *See* notes 59-60 *supra* and accompanying text.

92. CAL. GOV'T CODE ANN. § 11513(c) (West Supp. 1975) (emphasis added); *see* Note, *Hearsay Under The Administrative Procedure Act*, 15 HASTINGS L.J. 369 (1964).

93. CAL. GOV'T CODE ANN. § 11513(c) (West. Supp. 1975).

94. Where *Walker* held that "hearsay evidence alone" was "insufficient," section 11513(c) likewise provides that such evidence is not "sufficient in itself to support a finding . . . ." *Id.*

95. *Id.* (emphasis added).

96. *See* 20 Cal. 2d at 879, 881-82, 129 P.2d at 350-51.

97. 102 Cal. App. 2d 926, 229 P.2d 27 (1951).

98. *Id.* at 932-33, 229 P.2d at 31.

99. Nardoni v. McConnell, 48 Cal. 2d 500, 504-05, 310 P.2d 644, 647 (1957) (license-disciplinary proceeding wherein testimony of "numerous witnesses" used in addition to hearsay evidence); Harris v. Alcoholic Beverage Control Appeals Bd., 212 Cal. App. 2d 106, 122-23, 28 Cal. Rptr. 74, 84 (1963) (direct evidence given by officers used to supplement hearsay compilation); Dyer v. Watson, 121 Cal. App. 2d 84, 92, 262 P.2d 873, 877-78 (1953) (appellant's own testimony supplemented by hearsay statements of third parties).

100. Simpson v. City of Santa Monica, 145 Cal. App. 2d 386, 388-89, 302 P.2d 455, 456 (1956) (revocation of permit to operate a massage parlor).

say statements by several different persons, is insufficient to support certain charges of "unprofessional conduct" in violation of a state statute.[101] This same standard of evaluation has also been invoked in employee dismissal cases. Findings of the State Personnel Board have been held to be based upon insufficient evidence despite the fact that the uncorroborated hearsay testimony was that of a state corrections officer and was supported by the written report of another officer.[102]

The specific procedures provided for in California Government Code section 11513(c) have, for the most part, resulted in the general application of the *Walker* holding to the administrative agencies affected by Government Code section 11501. The *Walker* rule applies with equal force to agencies not governed by section 11513(c) unless otherwise specifically provided for by statute.[103] Consequently, where there is no evidence sufficient to sustain a finding, the agency lacks the requisite *jurisdiction* to thereafter proceed with the matter.[104]

C. *The Objection and Subpoena Issues*

The *Walker* rule and Government Code section 11513(c) substantially limit certain agencies in making a finding based on uncorroborated hearsay; nevertheless, only in the case of a judicial proceeding will a ruling be upheld for a failure to *object* to incompetent hearsay.[105] Section 11513(c), while it permits the *admission* of any "relevant evidence," even "over objection," specifically limits the *use* of

101. Sunseri v. Board of Medical Examiners, 224 Cal. App. 2d 309, 316-18, 36 Cal. Rptr. 553, 558 (1964).

102. Martin v. State Personnel Bd., 26 Cal. App. 3d 573, 577-79, 103 Cal. Rptr. 306, 308-10 (1972). A brief but interesting discussion of the "evidentiary logic" used in these settings can be found in Stearns v. Fair Employment Practice Comm'n, 6 Cal. 3d 205, 210 n.2, 490 P.2d 1155, 1158 n.2, 98 Cal. Rptr. 467, 470 n.2 (1971).

103. *Compare* CAL. WELF. & INST'NS CODE ANN. § 10955 (West 1972), *with* CAL. LABOR CODE ANN. § 5703 (West 1971). Regarding the applicability of the APA, see WITKIN, *supra* note 21, at 33-34; Note, *Hearsay Under the Administrative Procedure Act*, 15 HASTINGS L.J. 369-70 n.6 (1964). For all agencies are governed by the APA. See CAL. GOV'T CODE ANN. § 11501 (West Supp. 1975). The excluded agencies have their own administrative procedures. *See, e.g.*, CAL. BUS. & PROF. CODE ANN. § 6001 (West 1974); CAL. WELF. & INST'NS CODE ANN. § 10955 (West 1972); note 123 *infra*.

104. Swars v. Council of the City of Vallejo, 64 Cal. App. 2d 858, 864, 149 P.2d 397, 400 (1944), *cited approvingly in* La Prade v. Department of Water & Power, 27 Cal. 2d 847, 851, 162 P.2d 13, 16 (1945).

105. WITKIN, *supra* note 21, at 32, 1207-10. In this respect Witkin notes:

> In judicial proceedings the rule is well established that incompetent hearsay admitted *without objection* is sufficient to sustain a finding or judgment. . . . But this is not true under the Administrative Procedure Act.

Id. at 32. *Cf.* Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 380-81, 390-93 (1942). *But see* note 110 *infra*.

hearsay evidence to "supplementing or explaining other evidence." Since the Code makes no allowance for hearsay objections to the admission of evidence, the general rule has developed in administrative law that the failure to object will not bar a reversal of an agency's decision based upon uncorroborated hearsay.[106] "[T]his limitation on the effect of hearsay evidence in proceedings to which section 11513 is applicable . . . is [thus] not dependent upon whether or not an objection is made to its admission."[107] The holding in *Martin v. State Personnel Board*[108] (an employee dismissal case) has firmly re-established the rule that "the limitation on hearsay as expressed in . . . 11513(c) is not waived by a failure to object."[109] The court explained:

> If evidence (here, by statute) has insufficient probative value to sustain the proposition for which it is offered, the want of objection adds nothing to its worth and it will not support a finding.[110]

The same rule would most likely be applicable to non-APA cases affected by the *Walker* rule since the court's holding apparently provided for the admissibility of hearsay evidence even over objection.[111]

106. While this body of the law was still in its early stages of development, Robert Benjamin, in his report on administrative adjudication in New York, observed:

> Since legally incompetent evidence is admissible in a quasi-judicial hearing, I can see no logical basis for requiring an objection to its admission on technical grounds, as a prerequisite to asserting the legal residuum rule . . . .

BENJAMIN, *supra* note 81, at 188.

107. Swegle v. State Bd. of Equalization, 125 Cal. App. 2d 432, 439, 270 P.2d 518, 522 (1954) (Dooling, J., concurring).

108. 26 Cal. App. 3d 573, 103 Cal. Rptr. 306 (1972); *see* notes 159-61 *infra* and accompanying text.

109. ADMINISTRATIVE MANDAMUS, *supra* note 21, 29 (Supp. 1975).

110. Martin v. State Personnel Bd., 26 Cal. App. 3d 573, 583, 103 Cal. Rptr. 306, 312 (1972). Something of the same rationale of the *Martin* rule can be found in the dissent of then Chief Justice Gibson, joined by Justice Traynor, in Allen v. Los Angeles County Dist. Council of Carpenters, 51 Cal. 2d 805, 337 P.2d 457 (1959):

> Moreover, all the evidence offered against plaintiff at the union hearing was hearsay not falling within any applicable exception to the hearsay rule, and a person cannot properly be expelled *solely* on the basis of such evidence. . . . This difficulty is not obviated by the fact that plaintiff did not object when the evidence was received. . . . [A] failure to object in an informal proceeding where technical rules are inapplicable should not be given the same effect as where a court trial is involved. Accordingly, plaintiff cannot be held to have waived his right to complain that the expulsion was based entirely on hearsay evidence.

Id. at 818, 337 P.2d at 465 (Gibson, C.J., dissenting).

While the *Martin* court never referred to the majority rule established in *Allen*, the cases are nevertheless readily distinguishable. *Allen*, unlike *Martin*, involved a disciplinary hearing which was not governed by section 11513(c) or by "the legal rules of evidence but by the terms of its own constitution and by-laws." 51 Cal. 2d at 811, 337 P.2d at 460. Under the applicable laws in *Allen*, an objection was statutorily required in order to attack a board's findings. *Id.* Suffice it to note that the traditional procedural rules in union hearings differ from those under section 11513(c) and the like.

111. Walker v. City of San Gabriel, 20 Cal. 2d 879, 881, 129 P.2d 349, 351 (1942).

The objection issue raises still another and perhaps more fundamental question—a question necessarily germane to the application of the *Walker* rule. What effect, if any, does the availability of the subpoena power[112] in administrative proceedings have on the sufficiency of uncorroborated hearsay to sustain a finding or judgment? Does the failure to subpoena the declarant of potential hearsay testimony amount to a waiver of the right to later object to the sufficiency of the evidence?

These questions were raised in the federal case of *Richardson v. Perales*,[113] decided by the United States Supreme Court in 1971. *Perales* involved a disability *claimant* who was denied insurance benefits under the Social Security Act[114] on the basis of adverse hearsay medical reports.[115] Additionally, the claimant was statutorily entitled to subpoena witnesses[116]—an opportunity to which no resort was ever made.[117] The *Perales* Court held that the uncorroborated hearsay was sufficient as rebuttal evidence "when the claimant has not exercised his right to subpoena the [hearsay declarant] and thereby provide himself with the opportunity for cross-examination . . . ."[118]

This requirement in a *Perales*-like application context seems reasonable in that the claimant is the moving party upon whom the burden of proof rests.[119] This is not the case, however, where a *recipient* (the nonmoving party) is affected. The burden of proof is simply not on that party. To require a party threatened with the deprivation of a fundamental vested right to subpoena the moving party's adverse witnesses amounts to an unwarranted shifting of the respective burdens.[120] In effect, it compels the party adversely affected to assist the moving party in divesting the former of otherwise protected entitlements. Additionally, the *Perales* applicant-subpoena requirement, when invoked

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See also id. at 882, 129 P.2d at 351 (Traynor, J., concurring). *But see* Allen v. Los Angeles County Dist. Council of Carpenters, 51 Cal. 2d 805, 337 P.2d 457 (1959).

112. CAL. GOV'T CODE ANN. § 11190 (West 1966).

113. 402 U.S. 389 (1971).

114. *Id.* at 390.

115. *Id.* at 396.

116. *Id.* at 397.

117. *Id.*

118. *Id.* at 402. *But see* note 48 *supra*. The significance of the passage cited for purposes of the residuum rule in the federal courts is discussed in ADMINISTRATIVE LAW TEXT, *supra* note 1, at 281-82.

119. *See* notes 10 & 29 *supra*.

120. *See* notes 44-45 *supra* and accompanying text.

in the deprivation context, raises due process issues with ramifications extending beyond the judicially created *Walker* doctrine.[121]

D. Worker's Compensation Proceedings[122]

The applicable provisions of the California Worker's Compensation Act provide that neither the appeals board nor a referee are bound by the "common law or statutory rules of evidence and procedure."[123] Nevertheless, the burden of proof "rests upon the party holding the affirmative of the issue."[124] To that extent, Worker's Com-

121. For an additional discussion of the due process implications, see pt. V *infra*. Even in the application context due process problems are likely to arise. Regarding the subpoena issue discussed in *Perales*, it has been noted:

> . . . *Kelly* was more significant in the analysis it applied, stating that "[t]he opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." It is in this respect that *Perales* is most inconsistent with *Kelly*, for the Court relied upon the claimant's theoretical right to subpoena witnesses without asking whether that right was effectively available to most claimants. In fact, it may not be; most claimants are not represented by counsel and neither the notice of hearing nor the booklet given . . . informs them of the right.

The Supreme Court, 1970 Term, 85 HARV. L. REV. 326, 332-33 (1971) (footnotes omitted). A further discussion of still other issues in the *Perales* case can also be found at pt. V *infra*.

One final aspect of the *Perales* case merits comment. This factor concerns the imposition of costly additional administrative burdens upon the agency as a result of more rigid adjudicative procedures. *See* 402 U.S. at 406. This, stated Justice Blackmun, "is an additional and pragmatic factor which, although *not* controlling, deserves mention." *Id.* (emphasis added). What *is* controlling, as stated by the majority in Goldberg v. Kelly, 397 U.S. 254 (1970) (*see* note 205 *infra*), is that the recipient's interests in survival outweigh the interests of "conserving fiscal and administrative resources." *Id.* at 265. Certainly, there is a peculiar irony in attacking the burdensome cost of requiring the presence of all adverse hearsay declarants while at the same time acknowledging the "right," 402 U.S. at 402 (later referred to as an "opportunity," *id.* at 404), of the party adversely affected to subpoena those same declarants at the government's expense. On the other hand, if there does exist a statutory or judicial entitlement to subpoena witnesses, then the waiver "penalty" is non-applicable. Accordingly, conservation of "fiscal and administrative resources" cannot be seriously jeopardized once such a right is already granted. (The only way—the most likely way— an agency could save money in light of the right acknowledged in *Perales* is by employing inadequate notice procedures.) The expense of exercising that right should not be the controlling factor—once given, the right should be made secure.

122. *See* CAL. CONST. art. 20, § 21 (1975).

A practical, if somewhat dated, overview of this general area can be found in Bancroft, *Some Procedural Aspects of the California Workmen's Compensation Law*, 40 CALIF. L. REV. 378 (1952).

123. CAL. LABOR CODE ANN. §§ 5708-09 (West 1971). Government Code section 11513 is inapplicable to these proceedings since the Division of Industrial Accidents is not one of the agencies enumerated under Government Code section 11501. Labor Code sections 5700-10 set out the procedures to be followed in Worker's Compensation hearings.

124. CAL. LABOR CODE ANN. § 5705 (West 1971). In these proceedings, absent the "affirmative defenses" provided for in section 5705, the burden of proof is upon the

pensation hearing procedures follow the general administrative law practice. However, the Labor Code provides for two separate standards of admissibility. First, section 5708 provides that evidence "which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions" of the applicable laws is admissible.[125] Second, section 5703 specifically enunciates certain kinds of hearsay which shall be admissible.[126] While this statutory pro-

claimant. *See* Lundberg v. Workmen's Compensation Appeals Bd., 69 Cal. 2d 436, 439, 445 P.2d 300, 301, 71 Cal. Rptr. 684, 685 (1968); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 19 Cal. 2d 622, 628, 122 P.2d 570, 573 (1942); O'Hare v. Industrial Accident Comm'n, 44 Cal. App. 2d 629, 633, 112 P.2d 915 (1941). Likewise, once compensation has issued and the insurer thereafter seeks a reduction in grant allotments, the burden is upon the party opting for a change in the status quo. *See* Contractors Indem. Exch. v. Industrial Accident Comm'n, 72 Cal. App. 350, 353, 237 P. 404, 405 (1925).

125. CAL. LABOR CODE ANN. § 5708 (West 1971). The code provides in relevant parts:

> All hearings . . . before the appeals board or a referee *are governed by this division* and by the rules of practice and procedures adopted by the appeals board. . . . [T]hey shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of the division . . . .

Id. (emphasis added).

To the extent that section 5703 *governs* other classes of evidence within "this division," it permits the *automatic* admission of certain kinds of evidence. On the other hand section 5703 does not make all other kinds of evidence likewise admissible. In the case of the latter, section 5708 affords the applicable standard. Of course, Labor Code section 5709 provides in relevant part:

> No order, decision, award, or rule shall be invalidated because of the admission into the record . . . of any evidence not admissible under the common law or statutory rules of evidence and procedure.

CAL. LABOR CODE ANN. § 5709 (West 1971). Section 5709 thus reiterates, but with greater force, the "shall not be bound by the common law or statutory rules of evidence" provision of section 5708. Since section 5708 places certain limitations, however minimal, on the procedures to be adopted, section 5709 cannot be reasonably interpreted to permit a *carte blanche* admission of all evidence. It is suggested that section 5709 accomplishes two ends. First, it assures that evidence admissible under section 5703 will not later be invalidated. Second, section 5709 suggests that when hearsay evidence is found admissible for the purposes of 5708, the fact that such evidence would otherwise be inadmissible shall not compel the reviewing court to overturn the agency's ruling.

126. CAL. LABOR CODE ANN. § 5703 (West 1971) provides:

> The appeals board may receive as evidence . . . the following matters, in addition to sworn testimony presented in open hearing:
>
> (a) Reports of attending or examining physicians.
>
> (b) Reports of special investigators appointed by the appeals board or a referee to investigate and report upon any scientific or medical question.
>
> (c) Reports of employers, containing copies of time sheets, book accounts, reports, and other records properly authenticated.
>
> (d) Properly authenticated copies of hospital records of the case of the injured employee.
>
> (e) All publications of the Division of Industrial Accidents.
>
> (f) All official publications of state and United States governments.

vision is somewhat tailored to meet the needs of the class of litigants affected, the logic behind the Code relies upon broader rules of evidentiary procedure. The class of evidence designated as admissible suggests that certain kinds of hearsay evidence are more inherently reliable than others, that particular kinds of evidence can be "intrinsically trustworthy,"[127] and that, given the nature of the hearsay offered, it may be of the kind "likely to be reliable."[128] (This is true despite the fact that some of the statutory provisions do not fall within the traditional hearsay exceptions.) Section 5703 thus intimates the sufficiency of the particular kinds of hearsay deemed admissible. As to those kinds of hearsay evidence specifically enunciated, the Code provides for the "use" of such evidence "as proof of any fact in dispute."[129]

The admissibility of evidence thus depends upon the *kind* of evidence presented. If the hearsay is of that kind specifically enunciated in one of the provisions of Labor Code section 5703, then it is *automatically* admissible. All remaining hearsay evidence is evaluated under the standard provided for in Labor Code section 5708 and is thus *not* automatically admissible.[130] While section 5703 guarantees the *admissibility* of certain kinds of hearsay evidence, section 5708 requires an administrative *evaluation* of the evidence. Hearsay evidence standing alone which is not admissible under either section 5703 or section 5708 prevents the offering party from meeting the requisite burden of proof. Since the standard of admissibility under section 5708 is a low one, the better portion of all hearsay will be admissible in these proceedings. The admissibility of such evidence, though, will not *always* ensure its sufficiency.

Under Labor Code section 5703, certain kinds of hearsay evidence may be "use[d] as proof of any fact in dispute." The Code is silent as to whether or not uncorroborated hearsay, even if it is of the class of admissible evidence, is sufficient to support a finding. To the extent

(g) Excerpts from expert testimony received by the appeals board upon similar issues of scientific fact in other cases and the prior decisions of the appeals board upon such issues.

A general discussion of the admissibility of evidence in these hearings can be found in Cooper, *The Admissibility of Hearsay Before Workmen's Compensation Commissions*, 31 DICTA 423 (1954).

127. *See* McCormick, *supra* note 21, at 844-45.

128. *See* Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 19.

129. CAL. LABOR CODE ANN. § 5703 (West 1971).

130. *See* Pacific Employees Ins. Co. v. Industrial Accident Comm'n, 47 Cal. App. 2d 494, 499, 118 P.2d 334, 338 (1941).

that section 5703 provides for the admission of only those kinds of hearsay which are "intrinsically trustworthy" and therefore "likely to be reliable,"[131] "use" will be tantamount to "sufficiency." However, while section 5703 goes just about that far, its words demonstrate a cautious retreat from an absolute position.[132] The problem is that while the general class of hearsay evidence deemed admissible under the Code will more often than not be reliable, it does not necessarily follow that it will be so in all cases. The Code seems to take this into account by providing only for the "use" of such evidence. In those few instances where section 5703 hearsay, though admissible, seems unreliable, other provisions written into the Labor Code come into play.[133]

The standard for evaluating the overall sufficiency of hearsay evidence (including section 5703 hearsay) is quite flexible. Section 5708 requires that the evidence be such that it is "calculated to ascertain the substantial rights of the parties." Additionally, this section requires the referee to "carry out justly the spirit and provisions"[134] of the applicable laws. This standard, if it is a standard at all, in effect defers the sufficiency of the hearsay determination to the discretion of the administrative agency, subject only to final judicial review. Accordingly, early decisional law in this area carved out a rule that certain kinds of uncorroborated hearsay were insufficient to sustain an award.[135] Relying on the "legal residuum" rule[136] in order to interpret the provisions of section 5708, the court in *Pacific Employers Insurance Co. v. Industrial Accident Commission*[137] held that "[a] material finding

131. See notes 127-28 *supra* and accompanying text.

132. Note that Labor Code section 5709's prohibition against invalidating certain agency rulings likewise limits itself to the "use" designation. That a decision may not be invalidated because the agency permitted the "use" of hearsay evidence is not the equivalent of saying that such a decision cannot be overturned because the referee relied entirely on uncorroborated hearsay.

133. See CAL. LABOR CODE ANN. §§ 5704 & 5708 (West 1971).

134. *Id.* § 5708.

135. Connolly v. Industrial Accident Comm'n, 173 Cal. 405, 408, 160 P. 239, 240 (1916) (hearsay testimony of deceased's spouse that he had the status of an employee for the purposes of "Workmen's" Compensation); Englebretson v. Industrial Accident Comm'n, 170 Cal. 793, 798-99, 151 P. 421, 422-23 (1915) (hearsay testimony of decedent and physician who examined him held insufficient to sustain an award); *see* Continental Casualty Co. v. Industrial Accident Comm'n, 195 Cal. 533, 541, 234 P. 317, 320 (1925) (although not expressly sustaining the sufficiency of the hearsay evidence, the court upheld the referee's decision due to the petitioner's failure to object to the evidence).

136. Carroll v. Knickerbocker Ice Co., 113 N.E. 507, 509 (N.Y. 1916). It is noteworthy that the "legal residuum" rule won notoriety in a Worker's Compensation case.

137. 47 Cal. App. 2d 494, 118 P.2d 334 (1941) (hearsay testimony of applicant that medical condition was caused by a work related injury).

based entirely upon hearsay testimony of an incompetent witness is insufficient. It has no probative force and is not calculated to ascertain the substantial rights of the parties."[138] The fact that the witness lacked the requisite expertise to testify to the matters asserted,[139] permitted the *Pacific Employers* court to rule as it did; the hearsay matter seemed secondary. Nevertheless, the court did not drop the hearsay issue until it had offered a few guidelines of its own. It pointed out that the hearsay evidence must be of a "substantial character from which the commission may deduce a reasonable inference."[140] Other courts have held that the uncorroborated hearsay evidence must be such that it is "not manifestly absurd and inherently improbable."[141] Where the uncorroborated hearsay evidence meets the aforesaid threshold of trustworthiness, it *may* be sufficient evidence upon which to base an award.[142] Accordingly, the California Supreme Court in *Sada v. Industrial Accident Commission*[143] had earlier ruled that mere hearsay "may be sufficient" to the extent that it carries "convincing force."[144] What the *Sada* rule implied (and what the other cases demonstrated) is that the reviewing court will quite often require a stricter standard of evaluation where only uncorroborated hearsay is offered;[145] however, it will not go so far as to require that there always exist a legal residuum of evidence.[146] Although the various requirements certainly appear to be "catch all" phrases, nevertheless, their application can serve to limit the worth placed upon mere hearsay evidence to not only a legal preference for certain kinds of hearsay over others, but also a judicial tendency to look to the loss suffered on the

138. *Id.* at 499, 118 P.2d at 338; *see* City & County of San Francisco v. Industrial Accident Comm'n, 117 Cal. App. 2d 455, 459, 256 P.2d 81, 83 (1953) (non-expert hearsay testimony); 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW 1082-83 (8th ed. 1973).

139. 47 Cal. App. 2d at 499, 118 P.2d at 338.

140. *Id.* at 500, 118 P.2d at 338.

141. Hendricks v. Industrial Accident Comm'n, 25 Cal. App. 2d 534, 537, 78 P.2d 189, 190 (1938) (secondhand hearsay which conflicted with prior statements of the witness).

142. *See* Sada v. Industrial Accident Comm'n, 11 Cal. 2d 263, 78 P.2d 1127 (1938).

143. 11 Cal. 2d 263, 78 P.2d 1127 (1938).

144. *Id.* at 268, 78 P.2d at 1129.

145. The *Sada* case, while it did not find the uncorroborated hearsay evidence (third party testimony that the "decedent was injured in the course of his employment by petitioners") insufficient to sustain the agency's finding, did, nevertheless, remand the case for "further proceedings before the commission." *Id.* at 269, 78 P.2d at 1129-30.

146. London Guar. & Accident Co. v. Industrial Accident Comm'n, 203 Cal. 12, 14-15, 263 P. 196, 197 (1927). *Cf.* Pacific Employees Ins. Co. v. Industrial Accident Comm'n, 47 Cal. App. 2d 494, 499, 118 P.2d 334, 338 (1941).

basis of the evidence offered. Perhaps that is all that can be said for the present state of law; the "convincing force" test to the extent that it is the standard of evaluation,[147] can mean no more than what has here been suggested.

E. The Right to Cross-Examine Adverse Witnesses

Despite the lack of any *practical* limitations on the sufficiency of mere hearsay evidence, other factors come into play which involve additional or alternative considerations. Thus Professor Cooper notes:

> The general theory is clear—the agency is not to be permitted to base its ruling on evidence which is devoid of evidential value, and the respondent must be given a fair opportunity to demonstrate the unreliability of the proffered proof.[148]

This demonstration is quite often best facilitated by oral cross-examination. In this respect, Mr. Witkin, noted commentator on California law, has correctly observed that Labor Code sections 5703 and 5704 require "an opportunity to *cross examine* the author of a report, if he is available."[149] Thus in the oft quoted case of *Massachusetts Bonding Insurance Co. v. Industrial Accident Commission*,[150] the court declared: "The deprival of due process lies not in the concealment of the evidence but in the lack of opportunity for cross-examination and rebuttal which results from the concealment."[151] The magnitude of this rule suggests that where cross-examination of an adverse witness is *requested*, any subsequent denial of that opportunity could amount to a deprivation of due process and therefore may constitute reversible error.[152] Subsequent case law has upheld the *Massachusetts Bonding*

147. The court in McAllister v. Workmen's Comp. Appeals Bd., 69 Cal. 2d 408, 455 P.2d 313, 71 Cal. Rptr. 697 (1968), held that "the *applicant* need only establish the *reasonable probability* of industrial causation." 69 Cal. 2d at 413, 455 P.2d at 315, 71 Cal. Rptr. at 699 (emphasis added). This language would seem to lower the requisite standard of evaluation enunciated in *Sada* at least in application cases.

148. 1 COOPER, *supra* note 10, at 372. *See generally id.* at 371-79.

149. WITKIN, *supra* note 21, at 34-35. For the text of Labor Code 5703, see note 133 *supra*. Labor Code section 5704 provides:

> Transcripts of all testimony taken without notice and copies of all reports and other matters added to the record, otherwise than during the course of an open hearing, shall be served upon the parties to the proceeding, and an opportunity shall be given to produce evidence in explanation or rebuttal thereof before decision is rendered.

CAL. LABOR CODE ANN. § 5704 (West 1971).

150. 74 Cal. App. 2d 911, 170 P.2d 36 (1946).

151. *Id.* at 916, 170 P.2d at 39. The court went on to add: "There is no magic in the mere disclosure of the evidence where the adverse party is denied all right to test or countervail it." *Id.*; *see* note 215 *infra*.

152. The scope of the rule likewise makes it applicable to section 5708.

rule.[153] The requirement that the party adversely affected have an opportunity to cross-examine the declarant of the hearsay is precisely what prompted the court in *Walker* to rule that the board's decision amounted to an abuse of discretion.[154] While "the general tendency in state court decisions is to insist that the right of cross-examination be afforded whenever there is substantial reason to believe that denial thereof might impede the discovery of truth,"[155] sections 5703 and 5704 seem to fashion a broader rule to the extent that only the availability of the declarant is determinative of whether or not the right shall issue.

The Gordian knot in this area of a right to cross-examine is the doctrine of waiver. Early case law had held that unobjected-to hearsay evidence was sufficient to sustain a finding.[156] That same era of the law, however, fashioned the rule that in order for there to be a waiver of a right, there must be knowledge of the existence of the right combined with the requisite intent to forfeit it.[157] Where doubt exists the rule operates "against a waiver."[158] Thus there must exist a "clear showing of an intent to relinquish such right,"[159] and a waiver will not be presumed absent a showing of prejudice.[160] The above maxims apply only where there is an *entitlement* to object. Such an entitlement cannot be said to exist where a statute like section 5703 makes certain kinds of hearsay automatically admissible. (Objections are not made

153. Other cases have followed the *Massachusetts Bonding* rule. *E.g.*, Hegglin v. Workmen's Compensation Appeals Bd., 4 Cal. 3d 162, 175, 480 P.2d 967, 975, 93 Cal. Rptr. 15, 23 (1971); Caesar's Restaurant v. Industrial Accident Comm'n, 175 Cal. App. 2d 850, 854-55, 1 Cal. Rptr. 97, 100-01 (1959); Columbia-Geneva Steel Division, United States Steel Co. v. Industrial Accident Comm'n, 115 Cal. App. 2d 862, 865, 253 P.2d 45, 47 (1953).

154. Walker v. City of San Gabriel, 20 Cal. 2d 879, 881-82, 129 P.2d 349, 351 (1942).

155. 1 COOPER, *supra* note 10, at 374; *see* BENJAMIN, *supra* note 81, at 196.

156. Continental Cas. Co. v. Industrial Accident Comm'n, 195 Cal. 533, 541-42, 234 P. 317, 320 (1925).

157. Craig v. White, 187 Cal. 489, 498-99, 202 P. 648, 652 (1921).

158. Robertson v. Industrial Accident Comm'n, 146 Cal. App. 2d 627, 629, 304 P.2d 202, 203 (1956); Grenenger v. Fisher, 81 Cal. App. 2d 549, 554, 184 P.2d 694, 697 (1947).

159. Caesar's Restaurant v. Industrial Accident Comm'n, 175 Cal. App. 2d 850, 856, 1 Cal. Rptr. 97, 101 (1959), *quoting* Greninger v. Fisher, 81 Cal. App. 2d 549, 554, 184 P.2d 694, 697 (1947).

Many persons appear before administrative agencies without the benefit of counsel. This raises the question whether there has been a knowing and intelligent waiver.

160. Caesar's Restaurant v. Industrial Accident Comm'n, 175 Cal. App. 2d 850, 856, 1 Cal. Rptr. 97, 101 (1959), *quoting* Craig v. White, 187 Cal. 489, 98, 202 P. 648, 652 (1921); *see* notes 108-11 *supra* and accompanying text.

to that which is deemed permissible.) This is the same non-waiver principle that was considered earlier in the APA context.[161]

IV. THE "LEGAL RESIDUUM" RULE: A FEW HARSH WORDS

The preceding discussion has for the most part hinged upon what has traditionally been referred to as the "legal residuum" rule. Its origin in administrative law traces back more than a half century.[162] The nature of the rule as well as its tenured status in the law has made it a prime target for sharp criticism.[163] A full discussion of this prescript and its development in the body of administrative law would more than exhaust the limited scope of this Comment. Accordingly, this examination will confine itself to only a general statement of the rule—taking due account of what has already been presented—

161. See notes 104-11 *supra* and accompanying text.

162. See note 81 *supra*.

163. The rule has been discussed or criticized in the following: BENJAMIN, *supra* note 81, at 181-94; COOPER, *supra* note 10, at 389-93, 406-11; ADMINISTRATIVE LAW TEXT, *supra* note 1, at 277-85; ADMINISTRATIVE LAW TREATISE, *supra* note 21, at 291-323; *id.* at 487-95, 499-505 (Supp. 1970); K. DAVIS, HANDBOOK ON ADMINISTRATIVE LAW 458-66 (1951); K. DAVIS, ADMINISTRATIVE LAW: CASES—TEXT—PROBLEMS 390-401 (1973); M. FORKOSCH, A TREATISE ON ADMINISTRATIVE LAW 431-33 (1956); E. GELLHORN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 190-92 (1972); W. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 100-15 (1941); W. GELLHORN & C. BYSE, ADMINISTRATIVE LAW: CASES AND COMMENTS 923-34 (4th ed. 1960); L. JAFFE & N. NATHANSON, ADMINISTRATIVE LAW: CASES AND MATERIALS 424-34 (3d ed. 1968); MCCORMICK, *supra* note 21, at 847-48; B. SCHWARTZ, AN INTRODUCTION TO AMERICAN ADMINISTRATIVE LAW 136-37 (2d ed. 1962); H. STEPHENS, ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE 59-67 (1933); 1 WIGMORE, *supra* note 54, at 39-42, 79-92; *id.* at 17-35 (1975 Supp.); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 374-76, 390-93 (1942); Davis, *An Approach to Rules of Evidence for Nonjury Cases*, 50 A.B.A.J. 723, 725 (1964); Davis, *Evidence Reform: The Administrative Process Leads the Way*, 34 MINN. L. REV. 581, 592-600 (1950); Davis, *Hearsay in Administrative Hearings*, 32 GEO. WASH. L. REV. 689, 695-700 (1964); Davis, *The Residuum Rule in Administrative Law*, 28 ROCKY MT. L. REV. 1 (1955) [hereinafter cited as *Residuum Rule*]; Davis, *Evidence*, 30 N.Y.U.L. REV. 1309, 1330-36, 1339-41 (1955); Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 22-26; Lewis, *Administrative Law*, 8 RUTGERS L. REV. 45, 59-62 (1953); Merrill, *Rules of Evidence in Administrative Proceedings*, 14 OKLA. B.A.J. 1934, 1940 (1943); Schwartz, *A Decade of Administrative Law: 1942-1951*, 51 MICH. L. REV. 775, 815-18 (1953); Vanderbilt, *The Technique of Proof Before Administrative Bodies*, 24 IOWA L. REV. 465 (1939); Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 346-50 (1961); Wigmore, *Administrative Boards and Commissions: Are the Jury-Trial Rules of Evidence in Force for Their Inquiries?*, 17 ILL. L. REV. 263, 278-79 (1922); Note, *The Weight to be Given Hearsay Evidence By Administrative Agencies: The "Legal Residuum" Rule*, 26 BROOKLYN L. REV. 265 (1960); Note, *The Residuum Rule and Appellate Fact Review: Marriage of Necessity*, 13 RUTGERS L. REV. 254 (1958).

along with a presentation of some of the more renown and insightful criticisms of the rule.

In 1914 a peculiar death occurred which provided the catalyst for a then even more peculiar rule in the history of administrative law. The incident involved an accident in which a "300 pound cake of ice" was said to have accidentally fallen on the deceased.[164] The story of this alleged work-related accident was told by the deceased to his wife, along with several other persons, prior to his death.[165] These hearsay statements were found by the administrative commission to be sufficient to support a "Workmen's" Compensation award, despite eye-witness testimony to the contrary. When the case of *Carroll v. Knickerbocker Ice Co.*[166] came before the New York Court of Appeals, the court split with four justices constituting the majority,[167] one justice concurring in the result,[168] and the remaining two justices dissenting.[169] Given this setting, Justice Cuddeback writing for the majority, although acknowledging the commission's discretionary powers and independence from the technical rules of evidence, nevertheless issued the following prophetic words which came to be the legal "open sesame". "[I]n the end there must be a residuum of legal evidence to support the claim before an award can be made."[170] In short, the majority did not believe that the hearsay evidence in *that* case—hearsay otherwise inadmissible over objection in a civil court—was sufficiently probative to support a finding.[171] That is, there existed no *residue* of legal evi-

164. Carroll v. Knickerbocker Ice Co., 113 N.E. 507, 508 (N.Y. 1916).

165. *Id.*

166. *Id.*

167. Justice Cuddeback wrote the majority opinion in which Justices Collin, Hiscock and Hogan joined.

168. Chief Justice Bartlett wrote a separate concurring opinion.

169. Justices Seabury and Pound provided the dissenting opinions, each of whom concurred in the opinion of the other.

170. 113 N.E. at 509. The court in establishing this rule cited with approval the Appellate Division dissenting opinion of Justice Woodward:

> There must be in the record some evidence of a sound, competent, and recognizedly probative character to sustain the findings and award made, else the findings and award must in fairness be set aside by (the) court.

Id., quoting 155 N.Y.S. 1, 8 (Sup. Ct. 1915) (Woodward, J., dissenting).

"Legal evidence" includes hearsay admissible over objection in a civil action.

171. A careful reading of *Carroll* reveals that perhaps the court did not establish as broad a rule as that which it has come to be credited. Consider the following statements:

> The only substantial evidence before the workmen's compensation commission was to the effect that no cake of ice slipped and struck the decedent, and there were no bruises or marks upon his body which indicated that he had been so injured. The findings to the contrary rest solely on the decedent's statement made at a time when he was confessedly in a highly nervous state, which ended in his death from delirium tremens. *Such* hearsay testimony is no evidence.

dence upon which to sustain a ruling. The rule operates so as to require "a reviewing court to set aside an administrative finding unless the finding is supported by evidence which would be admissible in a jury trial."[172]

The *Walker* rule that "hearsay evidence alone is insufficient to support [a decision]"[173] and the California statutory mandate that such evidence "shall not be sufficient in itself to support a finding unless . . . admissible over objection"[174] appear to be but a restatement of the *Carroll* requirement that there must exist at a bare minimum a "residuum of legal evidence."[175] Despite any differences[176] that these

Id. at 509 (emphasis added). Whether or not the term "[s]uch" refers to the particular hearsay in the case or hearsay generally is perhaps somewhat ambiguous within the context of the passage quoted. However, this ambiguity can be resolved by an examination of the preceding language which framed the issue: "The question is presented whether *this* hearsay testimony is sufficient under the *circumstances of the case* to sustain the finding of the commission." *Id.* at 508 (emphasis added). The court's language might then be interpreted to indicate a concern with the particular *kind* of hearsay under review, rather than as a blanket rule regarding the *sufficiency* of all hearsay. Does a more conservative—a more accurate—reading of the *Carroll* rule in its own particular setting imply a more middle of the road approach and/or a prelude of things to come? *See* text accompanying notes 95 & 96 *supra* and 216, 217, 235 & 257 *infra.*

Chief Justice Bartlett's concurring opinion starts off from a somewhat different perspective. Rather than focusing on the credibility of the hearsay evidence in itself, the Chief Justice concurred in the result on the basis of the substantial amount of direct evidence which contradicted the former. *Id.* at 509. Thereafter he adds: "This view accords with the liberal spirit of the enactment without giving to *hearsay evidence* a sanction which I cannot believe the legislature intended to give it." *Id.* (emphasis added). Note the general nature of the Chief Justice's interpretation of the majority rule. No qualifiers (*i.e.*, "this hearsay testimony") are found in his statement of the rule. The rule as suggested in the concurring opinion is *broader* in scope than what the holding states or even implies. Perhaps several generations of law as well as a multitude of commentaries are based not on the limited scope of the *Carroll* holding, but rather, on the statements in the concurring opinion, and maybe the dissents as well. *See id.* at 509, 511 (Seabury, J. & Pound, J., dissenting).

172. ADMINISTRATIVE LAW TEXT, *supra* note 1, at 277.

173. Walker v. City of San Gabriel, 20 Cal. 2d 879, 881, 129 P.2d 349, 351 (1942).

174. CAL. GOV'T CODE ANN. § 11513(c) (West Supp. 1975).

175. Carroll v. Knickerbocker Ice Co., 113 N.E. 507, 509 (N.Y. 1916).

176. The differences between the *Walker* facts and those in *Carroll* are noteworthy. First, *Walker* was a termination case, while *Carroll* involved an application. As discussed in notes 10, 26, 29 & 31 *supra* and accompanying text, this difference affects the burden of proof issue as well as the subpoena requirement (see notes 111-21 *supra* and accompanying text). Second, *Carroll* was a "Workmen's" Compensation case, while *Walker* involved a license revocation matter. The history and rules of the former have traditionally differed from those of the latter. Third, the *Walker* court established a *general* rule as to the probative value of uncorroborated hearsay, while *Carroll* can be interpreted to be more limited in its scope. See note 171 *supra.* Fourth, *Walker* emphasized the mere "recital" character of the hearsay evidence upon which a license revocation was ordered. See notes 77-78 *supra* and accompanying text. The recital issue

three rules may have in principle or application, this Comment will address itself to the traditional criticisms of the general rule.[177] Since

is technically separate from the legal residuum requirement in that the former is concerned with the *existence* of proof to support an allegation, whereas the latter pertains to the *evaluation* of evidence already presented. (In *Walker* there was only a hearsay *statement* of the violations charged.) Fifth, the caliber of evidence in *Walker* (letter regarding alleged violations signed by the chief of police) seems to be more trustworthy than the hearsay statements in *Carroll* which were rebutted by strong direct evidence. It is unlikely from the recital of the facts in *Walker* that the petitioner's counsel in fact ever attempted to *subpoena* the hearsay declarants; he merely "replied that until such persons . . . were produced . . . there was . . . nothing for the petitioner to refute." 20 Cal. 2d at 880, 129 P.2d at 350. Should the results have been any different if Walker's counsel had not so "replied"? After all, with or without such a "reply" or even a "request," the "opportunity to cross-examine" the declarant is necessarily "denied" whenever hearsay evidence is relied upon. Finally, how does the "availability" of the declarant fit into these considerations? Since the right to cross-examine is always absent here, should the evaluation of the hearsay evidence depend upon the availability of the declarant? For example, if a social worker's report constitutes the sole basis for termination of a welfare recipient's aid, should the social worker always be present to be cross-examined under threat to the agency that failure to do so will result in a decision in favor of the recipient? What if such declarants were more often than not "readily available"? To the extent that hearsay evidence standing alone can sustain a finding, the major concern must always be with the *kind* of evidence relied upon. Can reasonable minds believe that the "peculiar" hearsay (self-serving in nature) in *Carroll* was more reliable than the evidence relied upon in *Walker*? Consider Professor Davis' brief comment on *Walker*—one of the few statements by Davis about the case—in *The Residuum Rule, supra* note 163, at 26 n.117 (1955). The differences between the two cases might well determine the respective scope of each rule as well as its proper application.

177. The majority of discussions of the "legal residuum rule" tend to ignore any consideration of either the nature of the hearsay in question or its relationship, if any, to other nonhearsay evidence. A much needed presentation of just such consideration was sketched in Note, *The Residuum Rule and Appellate Fact Review: Marriage of Necessity*, 13 RUTGERS L. REV. 254, 255-56 (1958). That note emphasized the factors to be considered in determining the probative value of particular classes of evidence. One of the factors for consideration relates to the purpose for which the evidence is offered, that is, "whether it is offered in support of the prima facie case or in support of the ultimate determination." *Id.* at 255. Another factor concerns the reliance of hearsay evidence upon nonhearsay evidence and whether the former standing alone is sufficiently probative "to prove a given fact or proposition." *Id.* Based on these two considerations, the Note proceeds to offer four variations of the "legal residuum rule":

> 1. *The restrictive residuum rule.* Under this rule, incompetent evidence may not be considered for the purpose of establishing the prima facie case *or* for the purpose of supporting the ultimate determination. Agency action must rest solely on legally competent evidence.
>
> 2. *The pure residuum rule.* Although this rule precludes the use of incompetent evidence to establish the prima facie case, if it is considered relevant and reliable, it may be used as a factor, in combination with competent evidence, to support the ultimate determination, either directly or as a basis for inference drawing.
>
> 3. *The liberal residuum rule.* Here, if relevant and reliable, incompetent evidence, when combined with competent evidence, may be used both to establish the prima facie case and to support the ultimate determination.
>
> 4. *The reliability rule.* This rule allows the use of incompetent evidence, if relevant and reliable, both as the *sole* basis for establishing the prima facie case and

the maxim of the "legal residuum" requirement, as it has come to be understood,[178] is an integral part of the California policy,[179] the following statements will, at the very least, afford a critical evaluation of the general concept upon which all of the related rules rely.

The first criticism of the legal residuum rule in administrative proceedings was stated in Justice Pound's dissent in *Carroll*:

> I think this case should not be disposed of by deciding that *all* evidence held to be objectionable as hearsay in the courts of this state is without probative force. Our law of evidence is largely a product of the jury system. The purpose of its exclusionary rules is to keep from the jury, not only all that is irrelevant, but also much that, although relevant, is remote, or collateral, or nonprobative, and, therefore, tends to mislead or confuse.[180]

Justice Pound looked to the particular proceeding and found it different in nature from judicial proceedings, since the applicable law of the latter was grounded in large part on the presence of a jury. Administrative proceedings, on the other hand, are conducted without the aid of a jury and since the ruling agency has greater expertise in deciding the factual matters it is called upon to hear, Justice Pound concluded that a more relaxed standard should be permitted.[181]

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as the *sole* basis, either directly or inferentially, for reaching the ultimate conclusion.

Id. at 255-56 (footnotes omitted). Note, here the term "competency" refers to sufficiency rather than to admissibility. See text accompanying note 102 *supra.*

The mandate of the first rule—that only "legally competent" evidence may be considered—pertains to the sufficiency of certain kinds of evidence. The reasonable application of this rule—the *Carroll* rule—would suggest that a finding could be based on admissible hearsay evidence falling within a given hearsay exception. (However, it is not altogether clear that the rule would so operate.) The second rule makes certain evidentiary concessions for the use of relevant hearsay evidence when it is supported by competent evidence which tends toward the "ultimate determination" of the case. In this instance, hearsay evidence could come to the rescue of competent evidence *after* a prima facie case had been established. The third rule is more general in that it requires only a showing of relevancy to sustain a finding provided that the hearsay is *combined* with competent evidence. Finally, the fourth rule disregards the need of any competent evidence and instead focuses on the relevancy and *reliability* of the hearsay offered. Here the yardstick for evaluation of hearsay evidence will be the *extent* to which the evidence is the kind upon which "responsible persons are accustomed to rely in serious affairs."

178. See note 171 *supra* and accompanying text.

179. This policy does not include those agencies affected by Labor Code section 5703 or other applicable statutory law.

180. Carroll v. Knickerbocker Ice Co., 113 N.E. 507, 511 (N.Y. 1916) (emphasis added); *see* note 171 *supra.*

181. The ascertainment of truth rather than the integrity of the rules being the foremost consideration, we find that when the jury is absent the rules are less strictly enforced; it being assumed that the court will not be easily confused or misled by that which is irrelevant and inconclusive.

113 N.E. at 511.

The late Professor John Wigmore expressed two major criticisms of the rule. First, since the rule "still virtually requires the tribunal to test its proceedings by the jury-trial rules," the very function of administrative law is hampered by procedures not compatible with the body of the work undertaken.[182] Second, he argued that there is a certain fallacy in the logic of the rule since it automatically equates "legal evidence" with the "truth of the finding," while ignoring the possibility that "illegal" evidence may be equally probative and perhaps closer to the truth.[183]

> [T]he rule for a "residuum of legal evidence" rests on the assumption that the "legal" evidence is *always* credible and sufficient, while the "illegal" evidence is *never* credible nor sufficient.[184]

After all, Wigmore maintained, "jury-trial rules merely determine what evidence may be considered; they tell us nothing as to the mental process of weighing it."[185]

In a well known 1942 report on administrative adjudication presented to the governor of New York, Robert Benjamin, like Wigmore before him, raised the issue of the specific nexus between the evidence relied upon and the decision rendered.[186] In addition, Benjamin con-

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182. 1 WIGMORE, *supra* note 54, at 40-41. Thus Wigmore observes:

> The very instant that the old rules of evidence are invoked, the informal character of the hearing disappears, and the rigid, formal rules of procedure and all the technicalities incident to the practice of the law will grow up around the commission, hampering and delaying it, working inconvenience and hardship upon the claimants, and defeating the intent of the law.

Id., citing Carroll v. Knickerbocker Ice Co., 155 N.Y.S. 1, 3 (App. Div. 1915) (unofficial report incorrectly cited in Wigmore).

183. 1 WIGMORE, *supra* note 54, at 41.

184. *Id.* at 41-42. Additionally, he notes: "Both may be true; both may be false; it depends in each case. But it does *not* depend on the one being 'legal' and the other being 'illegal', tested by the jury-trial rules of Evidence." *Id.* at 41.

185. *Id.* at 42. Wigmore's criticism is that the rule operates to deny the worth of any and all illegal evidence no matter how credible it may prove to be. It simply fails to recognize that illegal evidence can be a means to discover the truth of a given matter. As Robert Benjamin noted:

> In discussing the doctrine that the exclusionary rules of evidence are not legally binding in quasi-judicial hearings, I have emphasized one of the reasons supporting that doctrine—that utilization by an administrative tribunal of legally incompetent evidence will often assist the tribunal to reach a correct result.

BENJAMIN, *supra* note 81, at 184.

186. [The rule] ignores the circumstance that the residuum of legal evidence which is required to support a finding may in fact have played little or no part in the actual decision under review,—that decision may in fact have been based largely or wholly on other logically probative but technically incompetent evidence. To make the validity of the decision depend on the existence or non-existence of some bit of competent evidence is to attribute to mere legal competency more weight, as an assurance of trustworthiness, than it deserves.

Id. at 192.

tended that there were also other practical difficulties which hinder the smooth working order of the rule. For example, where the "hearing officer is not an expert in the rules of evidence, or where the parties are not represented by counsel," determinations as to the *legal* sufficiency of the evidence offered will be difficult if not impossible to make.[187] In addition, the absence of the "objection" requirement[188] results in a more difficult determination of legal competency due to the absence of any evidentiary challenges made at the time when the evidence was initially introduced.[189]

Much of this same thought has been expressed by Professor Kenneth Culp Davis.[190] In a relentless attack on the rule, an attack which has lasted for at least a quarter of a century, Professor Davis rightfully merits credit as the most outspoken and authoritative critic of the rule. In a 1955 law review article, Professor Davis enunciated four reasons for the rejection of the legal residuum rule:

> 1. Incompetent evidence admitted without objection may be given "its natural probative effect" . . . .
> 2. The . . . rule is . . . inconsistent with the principle that expert opinion is admissible even when it is based upon inadmissible hearsay. . . .
> 3. [T]he strongest argument against the residuum rule is the lack of correlation between reliability of evidence and the exclusionary rules of evidence. . . .
> 4. Reliability of evidence must be judged in particular circumstances, not in the abstract.[191]

The first criticism relies on the argument that the residuum rule is illogical because it makes the "palpably false assumption that evidence which would be excluded in a jury case is without probative effect."[192] This criticism is similar to Wigmore's contention that the rule treats "illegal evidence" as if it were "*never* credible nor sufficient."[193] Davis' second criticism demonstrates the illogical consequences which can arise from a *carte blanche* application of the rule. This is borne out

187. *Id.* at 191.

188. See notes 105-11 *supra* and accompanying text.

189. *Id.*

190. The history of the Davis theory traces back over twenty years. See K. DAVIS, ADMINISTRATIVE LAW 458-66 (1951); *Residuum Rule, supra* note 163; 2 ADMINISTRATIVE LAW TREATISE, *supra* note 21, at 291-303; ADMINISTRATIVE LAW TEXT, *supra* note 1, at 277-81; K. DAVIS, ADMINISTRATIVE LAW: CASES-TEXT-PROBLEMS 390-401 (1973).

191. *Residuum Rule, supra* note 163, at 2-5. No significant difference is to be found between the 1955 statement of the criticisms and those criticisms enunciated in later works. See note 190 *supra*.

192. *Residuum Rule, supra* note 163, at 3.

193. 1 WIGMORE, *supra* note 54, at 42.

by the fact that "an administrative decision may be based upon hearsay which is appraised by an expert who testifies, but not upon hearsay which is appraised by an expert who decides!"[194] The third criticism which attacks the position that there necessarily exists a nexus between the credibility of evidence and the exclusionary rules as mechanically applied, is a more refined statement of Wigmore's criticism that the exclusionary rules only determine the type of evidence to be considered and not the process for evaluating it.[195] Finally, the fourth criticism (really a suggestion), like the third, attacks the "mechanical prohibition" of the rule and therefore suggests a rule more tailored in application. Thus, the mechanical operation of the rule "assures that the findings will be at variance with the truth more often than they would be if the reliability were judged in light of all the circumstances."[196]

These, then, are the major criticisms of the legal residuum rule. To some extent, they all point toward a more relative and less absolute method of evaluating uncorroborated hearsay. The question remains, however, just how flexible can the rules become without upsetting the desired balance between protection of individual interests on the one hand and administrative efficiency on the other?

V. Due Process: The Constitutional Dimension

The antecedent remarks have for the most part centered around the state of the law mandated by judicial fiat or statutory prescription. Here, the Constitution is the touchstone. Stepping outside the confines of judicial pronouncements and statutory ambiguities can prove beneficial, if for no other reason than to provide an overview of the more

194. *Residuum Rule, supra* note 163, at 4. Wasn't it precisely that "incongruous result" that the Court in Richardson v. Perales, 402 U.S. 389 (1971), refused to sanction when it held that the written reports of the physicians who examined the claimant were sufficiently credible to sustain a finding? Since this *kind* of evidence is *usually* more trustworthy than other kinds, "[c]ourts have recognized the reliability and probative worth of written medical reports even in formal trials and, while acknowledging their hearsay character, have admitted them as an exception to the hearsay rule." *Id.* at 405. Of course, this factor in conjunction with others (*see id.* at 402-04, 406-09) produced the rule handed down in *Perales.*

195. See note 185 *supra.* Like Wigmore before him, Professor Davis' analysis suggests a more moderate—more reasoned—approach.

> Those who reject the residuum rule would permit the agency and the reviewing court to exercise a discretionary power to determine where the particular evidence falls in the scale from the highest reliability to utter worthlessness. The residuum rule is based upon the assumption that that determination can be made in a wholesale fashion without consideration of circumstances of particular cases.

Residuum Rule, supra note 163, at 4-5. Another statement of the same criticism can be found in McCormick, *supra* note 21, at 848.

196. *Residuum Rule, supra* note 163, at 5.

fundamental issues involved. Since constitutional principles may be operative here, the standards they establish must to a large extent develop the drift of the law in California. While state laws may add to the list of rights guaranteed by the *federal* constitution,[197] they cannot subtract from them. Accordingly, the general scope of the standard or degree of procedural fairness called for will quite often depend upon the constitutional dimension of the particular problem.

The analytical method invoked in this segment of the Comment requires a discussion of certain broad due process issues in order to establish the proper foundation for a *constitutional* inquiry into the hearsay question. Essentially, the ultimate constitutional issue relates to the legal status of an entitlement, if any, to a hearing in the first instance; thereafter, upon the evidentiary breadth of the procedures constitutionally required; and finally, upon the specific nexus between the due process mandate as it relates to the issue of uncorroborated hearsay.

A. The Emergence of a New Constitutional Trend

The Supreme Court's 1970 decision in *Goldberg v. Kelly*[198] is unquestionably one of the most significant civil cases in recent years. The precedents it established have formed the basis of a host of significant due process cases since decided by the high court.[199] The impact

197. *Cf.* Skelly v. State Personnel Bd., 15 Cal. 3d 194, — P.2d —, — Cal. Rptr. — (1975); People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975). The scope of this Comment does not permit an analysis of the applicable California constitutional mandates nor the holdings of the state courts interpreting the federal constitutional requirements. *See* generally note 200 *infra*.

198. 397 U.S. 254 (1970).

199. *See, e.g.*, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975) (garnishment procedures); Goss v. Lopez, 419 U.S. 565 (1975) (ten-day student suspension); Wolff v. McDonnell, 418 U.S. 539 (1974) (prison disciplinary proceeding); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974) (sequestration procedures); Arnett v. Kennedy, 416 U.S. 134 (1974) (government employee dismissal); Perry v. Sindermann, 408 U.S. 593 (1972) (nonrenewal of a nontenured state teacher's contract); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation procedures); Fuentes v. Shevin, 407 U.S. 67 (1972) (replevin procedures); Richardson v. Wright, 405 U.S. 208 (1972) (Social Security benefits suspension and termination); Bell v. Burson, 402 U.S. 535 (1971) (motor vehicle registration and driver's license suspension); Richardson v. Perales, 402 U.S. 389 (1971) (application procedures for Social Security benefits); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (posting laws and liquor sale prohibition); Wheeler v. Montgomery, 397 U.S. 280 (1970) (state welfare termination provisions) (companion case of *Goldberg*). See O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 S. CT. REV. 161; Rogge, *An Overview of Administrative Due Process* (pts. 1-2), 19 VILL. L. REV. 1-81, 197-276 (1973); Note, *Due Process and Statutory Limitations on AFDC Recoupment*

of *Goldberg* has likewise had its effect on California decisional law.[200]

Goldberg v. Kelly involved the due process requirements that come into play in the welfare termination context. In *Goldberg*, the applicable state and federal laws required prior notice[201] as well as a post-termination hearing[202] which permitted the recipient to "confront and cross-examine the witnesses against him."[203] Despite these procedural protections, the Court held that the deprivation of the appellees' statutory entitlements—whether labeled as a privilege or a right[204]—re-

Procedures, 74 COLUM. L. REV. 1464, 1466-69 (1974). See generally Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267 *passim* (1975) [hereinafter cited as Friendly].

200. Some of the more prominent cases include: Skelly v. State Personnel Bd., 15 Cal. 194, — P.2d —, — Cal. Rptr. — (1975) (civil service employee reward practice held violative of due process); Beaudreau v. Sup. Ct., 14 Cal. 3d 448, 454-65, 121 Cal. Rptr. 585, 588-96, 535 P.2d 713, 716-24 (1975) (statute requiring plaintiffs to file a written undertaking prior to any hearing as to the merits of plaintiffs' action held unconstitutional); Guerrero v. Carleson, 9 Cal. 3d 808, 810-11, 512 P.2d 833, 834, 109 Cal. Rptr. 201, 202 (1973) (Tobriner, J., dissenting) (*Goldberg* requires that welfare reduction or termination notices be written in Spanish for those recipients known to be literate primarily in that language); Rios v. Cozens, 7 Cal. 3d 792, 799-800, 499 P.2d 979, 984, 103 Cal. Rptr. 299, 304 (1972), *vacated and remanded sub nom.* Department of Motor Vehicles v. Rios, 410 U.S. 425 (1973) (automobile licensee held entitled to a hearing prior to suspension of license); Blair v. Pitchess, 5 Cal. 3d 258, 280-81, 486 P.2d 1242, 1258, 96 Cal. Rptr. 42, 58 (1971) (claim and delivery procedures held violative of due process requirements); Mooney v. Pickett, 4 Cal. 3d 669, 675, 483 P.2d 1231, 1234-35, 94 Cal. Rptr. 279, 282-83 (1971) (applicant challenge of General Assistance eligibility policy); McCullough v. Terzian, 2 Cal. 3d 647, 653-56, 470 P.2d 4, 7-10, 87 Cal. Rptr. 195, 199-201 (1970) (Application of due process standards in welfare termination proceeding). Valenzuele v. Board of Civil Serv. Comm'rs, 40 Cal. App. 3d 557, 563-64, 115 Cal. Rptr. 105, 106-07 (1974) (determination of the proper standard of review where Civil Service employee was threatened with loss of employment); *In re* Castaneda, 34 Cal. App. 3d 825, 832, 110 Cal. Rptr. 385, 389 (1973) (preliminary hearing on parole revocation required).

201. 397 U.S. 254, 257-58 (1970).

202. *Id.* at 259.

203. *Id.* at 260. The recipient was also entitled to a personal appearance, an offer of oral evidence, and a record of the hearing. *Id.*

204. *Id.* at 262. The "rights-privilege" distinction is no longer of constitutional significance in this area of the law. *See* Arnett v. Kennedy, 416 U.S. 134, 148-52 (1974) (Powell, J., concurring in part and concurring in the result); Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972); Morrissey v. Brewer, 408 U.S. 471, 482 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971); ADMINISTRATIVE LAW TEXT, *supra* note 1, at 180-86; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). *But see* Arnett v. Kennedy, 416 U.S. 134, 211 (1974) (Marshall, J., dissenting). *See also* Skelly v. State Personnel Bd., 15 Cal. 3d 194, — P.2d —, — Cal. Rptr. — (1975). Of course, the "rights" question necessarily raises still other more fundamental questions—questions which are perhaps better suited for the political scientist to consider. *See generally* Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 273 & n.72 (1974).

quired a due process hearing prior to termination.[205]

The next phase of Justice Brennan's majority opinion centered around consideration of the "minimum procedural safeguards" demanded by "rudimentary due process."[206] While the Court noted that "the pre-termination hearing need not take the form of a judicial or quasi-judicial trial,"[207] it nevertheless proceeded to enunciate, and thereby require, almost every "essential element of a 'trial.' "[208] The ten procedural safeguards[209] that the *Goldberg* Court required indi-

205. 397 U.S. at 264-66. This rule applies with almost equal force to vested interests which are "discontinued or suspended." *See* Wheeler v. Montgomery, 397 U.S. 254, 282 (1970); O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 S. CT. REV. 161, 177.

Central to the Court's decision to grant a pre-termination hearing was its reliance on a *balancing* of interests formula. The Court, relying on Justice Frankfurter's statement in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) declared:

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss" . . . .

397 U.S. at 262-63; *see* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). Coupled with the preceding factor, the Court considered "whether the recipient's interest in avoiding [the threatened] loss outweigh[ed] the governmental interest in summary adjudication." 397 U.S. at 263. The Court also added:

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

Id., *quoting* Cafeteria & Restaurant Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961).

After applying those standards of evaluation, the Court concluded that the recipient's need of daily subsistence (see 397 U.S. at 264) outweighed the "governmental interests in conserving fiscal and administrative resources." *Id.* at 265-66; *see* Kelly v. Wyman, 294 F. Supp. 893, 901 (S.D.N.Y. 1968). Even Justice Black in his dissent observed:

> I would be surprised if the weighing process did not compel the conclusion that termination without full judicial review would be unconscionable. After all, at each step . . . the issue is only one of weighing the government's pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual.

397 U.S. at 278. *But see* Goss v. Lopez, 419 U.S. 565, 583-84 (1975). Accordingly, here due process was held to require a hearing prior to the termination of any benefits.

206. 397 U.S. at 266-71.

207. *Id.* at 266.

208. ADMINISTRATIVE LAW TEXT, *supra* note 1, at 170. Professor Davis' comments on *Goldberg* merit repeating:

> How can an "evidentiary hearing" "not take the form of a judicial or quasi-judicial trial"? By the rest of its opinion the Court seemed to demonstrate that it cannot, for the procedural rights it required include[d] [almost all of the essential elements of a trial.] . . . Do not the items the Court required add up to the opposite of its statement that the hearing "need not take the form of a judicial or quasi-judicial trial"? What can be the meaning of a "trial" if not essentially the sum of the items the Court required?

Id. at 169-70. See also K. DAVIS, ADMINISTRATIVE LAW: CASES - TEXT - PROBLEMS 288 (1973).

209. 397 U.S. at 267-71; *see* Comment, *California Welfare Fair Hearings: An*

cated what it believed to be the essential elements of a "meaningful" hearing.[210] Accordingly, it held that "a recipient [must] have . . . an *effective* opportunity to defend by *confronting* any adverse witnesses . . . ."[211] Later in the opinion, Justice Brennan reiterated: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to *confront and cross-examine* adverse witnesses."[212]

What has been said suggests a rule applicable to the sufficiency of uncorroborated hearsay in *certain* administrative proceedings. A reasonable application of the *Goldberg* requirements would suggest that since uncorroborated hearsay necessarily denies the party threatened the "opportunity to confront and cross-examine adverse witnesses," it therefore deprives that party of the constitutional protection to which he or she is entitled. Thus the Court observed:

> [W]here *credibility* and *veracity* are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision.[213]

This last observation suggests the inadequacy of hearsay,[214] and particularly, of uncorroborated hearsay,[215] to sustain a finding—at least in *Goldberg*-like situations. Some pre-*Goldberg* California cases have expressly held just that.[216] Of course, such an interpretation corre-

Adequate Remedy?, 5 U.C.D.L. REV. 542 (1972).

210. The Court noted that "[t]he hearing must be 'at a meaningful time and in a meaningful manner.' " 397 U.S. at 267, *quoting* Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

211. 397 U.S. at 267-68 (emphasis added); see Wheeler v. Montgomery, 397 U.S. 280, 281-82 (1970). Where a party adversely affected is denied an "effective opportunity" to confront adverse witnesses, such an omission, coupled with the denial of the right to present oral evidence, is "fatal to the constitutional adequacy of the procedures." 397 U.S. at 268.

212. 397 U.S. at 269 (emphasis added); *see id.* at 270.

213. *Id.* (emphasis added).

214. Such may not be the case where a hearsay exception is present. This seems consistent with the Court's statement that

> the pre-termination hearing has one function only—to produce an initial determination of the validity of the . . . grounds for discontinuance of payments in order *to protect a recipient against an erroneous termination of his benefits.*

Id. at 267 (emphasis added); *see* note 271 *infra*. To the extent that the particular hearsay evidence falls into one of the hearsay exceptions, its evidentiary value is likely to be credible enough to satisfy *Goldberg's* due process requirements.

215. *But see* Peters v. United States, 408 F.2d 719 (Ct. Cl. 1969). An analysis of the *Peters* case can be found in 48 N.C.L. REV. 608 (1970).

216. Armistead v. City of Los Angeles, 152 Cal. App. 2d 319, 313 P.2d 127 (1957). "[A]n order of an administrative board based upon incompetent hearsay evidence contravenes due process and cannot stand." *Id.* at 324, 313 P.2d at 130; Dyer v. Watson, 121 Cal. App. 2d 84, 92, 262 P.2d 873, 877 (1953); see text accompanying notes 151-54 *supra.*

lates the right to "confront and cross-examine adverse witnesses" with the inadequacy of mere hearsay evidence to sustain a finding. Certainly, where "credibility and veracity are at issue" mere hearsay will be insufficient. But what if they're not? That is, what about uncorroborated hearsay which would be admissible over objection in a civil proceeding? In those instances, the Court's pronouncements[217] additionally suggest that due process may not require confrontation and cross-examination where the hearsay offered is found to be trustworthy.

In fairness to the Court's attempt to fashion a rule in a difficult area of the law, it is important to recall the particular context in which the Court formulated the rules that it did. These rules should not be taken to be absolute maxims applicable to every administrative proceeding. After all, the procedure to be applied in each case will stand or fall depending on the extent to which it protects the party adversely affected against the erroneous deprivation[218] of important rights.[219] Certainly, some procedural safeguards will always be mandatory; others depend on the particular right involved and the procedures fashioned to protect that right.

Not long after the *Goldberg* decision, the Supreme Court, in *Richardson v. Perales*,[220] availed itself of the opportunity of deciding "what procedural due process requires with respect to examining physicians' reports in a social security disability *claim* hearing."[221] Statutory provisions entitled the claimant to an informal hearing where any evidence could be received, despite the fact that it would be inadmissible under courtroom rules of evidence.[222] The conflict arose when the hearsay medical reports of four physicians were introduced over objection and thereafter were relied upon as the basis for denying the applicant's claim.[223] These facts were significant because, to a large extent, they determined what minimum procedural safeguards the Court would re-

217. See text accompanying note 213 *supra*.

218. Consider the informal procedures that won judicial approval in Goss v. Lopez, 419 U.S. 565, 582-84 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600, 616-20 (1974); Arnett v. Kennedy, 416 U.S. 134, 150-55 (1974). *But see id.* at 166-67 (Powell, J., concurring in part and concurring in the result in part).

219. See note 204 *supra*.

220. 402 U.S. 389 (1971). An insightful discussion and analysis of the *Perales* case can be found in ADMINISTRATIVE LAW TEXT, *supra* note 1, at 281-84.

221. 402 U.S. at 402 (emphasis added).

222. *Id.* at 400.

223. *Id.* at 395.

quire. Thus Justice Blackmun's majority opinion emphasized the importance of the *kind of case* before the Court when he stated:

> Perales relies heavily on the Court's holding and statements in *Goldberg v. Kelly* . . . particularly the comment that due process requires notice "and an effective opportunity to defend by confronting any adverse witnesses . . . ." *Kelly*, however, had to do with *termination* of AFDC benefits . . . . It also concerned a situation . . . "where credibility and veracity are at issue, as they must be in many termination proceedings."
>
> *The Perales proceeding is not the same.*[224]

Obviously, then, the "application-termination" distinction played no small role in the outcome of the case. The net effect of this distinction is that "stricter procedural protections [will] be required in proceedings for the *termination* rather than the *initiation* of benefits."[225]

The *kind of evidence* that was offered against the claimant was also instrumental in the formulation of the rule established in *Perales*. This evidence consisted of medical reports[226] which as a class of evidence are generally held to be fairly trustworthy.[227] In addition, the reports were essentially consistent with each other in their general findings.[228] Unlike *Goldberg*, the specter of questionable credibility and veracity was not present.[229] It has thus been observed:

> Insofar as the chief purpose of cross-examination is to assure reliability, it would make sense not to extend the right of confrontation in administrative proceedings to the point of preventing use of evidence which is generally highly reliable.[230]

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224. *Id.* at 406-07 (citations omitted and emphasis added). Those who laud the *Perales* holding as establishing a new general rule applicable to all kinds of administrative proceedings seldom take note of the significance of the "application-termination" distinction.

225. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 330 (1971) (emphasis added). It was also noted that:

> Reliance interests are often greater when a change is sought in the status quo. Yet the needs of the claimant may often be just as great in initiation proceedings, particularly where subsistence benefits are at issue. Moreover, the *Kelly* Court seemed to indicate that the procedural requirements it set out as part of "rudimentary due process" were the minimum level of procedural safeguards tolerable when "statutory entitlement" was at issue.

Id. (footnote omitted); *cf.* Bixby v. Pierno, 4 Cal. 3d 130, 131, 161, 481 P.2d 242, 264, 93 Cal. Rptr. 234, 256 (1971) (Mosk, J., concurring).

226. 402 U.S. at 395.

227. *But see The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 330 n.31 (1971). *See generally* Haviland & Glomb, *The Disability Insurance Benefits Program and Low Income Claimants in Appalachia*, 73 W. VA. L. REV. 109, 117-37 (1971).

228. 402 U.S. at 404.

229. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 330 n.31 (1971).

230. *Id.* at 331.

That is precisely where the *Perales* Court drew the line.

Finally, and by way of reiteration,[231] the *Perales* decision emphasized the Court's willingness to consider certain kinds of uncorroborated hearsay as sufficient evidence whenever the claimant fails to exercise a right to subpoena witnesses.[232] The fact that this option was available and the petitioner failed to exercise it likewise had its effect on the outcome of the case. This factor, more than any other perhaps, permitted the Court to sustain the board's decision. As one noted commentator has remarked:

> The Court's reasoning emphasized that the claimant's failure to request subpenas precluded him from complaining that he was denied the rights of confrontation and cross-examination.[233]

This emphasis on the significance of the subpoena opportunity served another more important purpose. It demonstrated the Court's *un*willingness to reject the legal residuum rule.[234] Given the other factors stressed herein, it is important to note that the *Perales* Court limited its decision. The law applied to *that* context indicates what due process guarantees the Court found necessary in order to assure a "meaningful" hearing.

The application-termination distinction is thus crucial because of the effect it has on the subpoena issue. Since the claimant is the "moving party," the burden of proof is on that person. It requires the claimant to invoke the subpoena power in order to later attack the sufficiency of the evidence introduced by the non-moving party. However, it is not clear, even under *Perales*, that the failure to exercise this power would not vitiate a petitioner's attack upon the sufficiency of uncorroborated hearsay in a *termination* or *suspension* proceeding since the burden does not rest on that party. In such proceedings due process would seem to compel the moving party to come forth with non-hearsay evidence in order to assure the party threatened the "opportunity to cross-examine adverse witnesses." The fact that such would seem to be the case—and that it logically should be so—does not guarantee that the Court will acknowledge its soundness in the future. In this respect, it should be noted that the *Perales* Court rather than emphasizing the nature of the threatened harm as did *Goldberg*, emphasized instead the kind of evidence presented. To that extent, then, *Perales* built upon

231. See text accompanying notes 113-21 *supra*.
232. 402 U.S. at 402.
233. ADMINISTRATIVE LAW TEXT, *supra* note 1, at 281 (footnote omitted).
234. *Id.* at 281-82.

Goldberg's pronouncements regarding the trustworthiness of certain kinds of hearsay evidence.[235]

If anything, the *Goldberg* and *Perales* holdings strongly suggest several relevant guidelines: one, that while the legal residuum rule has not been rejected,[236] the Court is not likely to follow blanket or mechanical rules; two, the nature of the proceeding will often determine the standard of due process to be employed; three, the agency's ability to fashion rules which will adequately protect a person's right will be a significant factor upon review; four, the kind of hearsay evidence offered must be evaluated in terms of its trustworthiness, particularly so when there is no corroborating evidence; five, the denial of the right of cross-examination is not likely to win judicial approval unless the moving party has knowingly refused to exercise the right to subpoena adverse witnesses.

Collectively, these two cases indicate that neither absolute rules which deny the possible sufficiency of certain hearsay evidence nor token procedural niceties which effectively deny a party a fair and meaningful hearing, are likely to satisfy the due process requirements. A procedure must be fashioned which is sufficiently flexible and just to satisfy the requisite needs of all of the parties involved; these protections cannot exist in a vacuum.

B. The Evolving Due Process Doctrine

Although the *Perales* holding did not, strictly speaking, *depart* from the rules enunciated in *Goldberg*, it did serve notice that the Court was still undecided as to what specific procedural requirements the due process clause mandated—indecision that was to manifest itself in later cases.[237] Within less than one month after *Perales* was decided, the Supreme Court rendered its decision in *Bell v. Burson*[238]—the

235. See text following note 216 *supra*.

236. It should be noted, however, that the "legal evidence" requirement of this rule is quite tenuous in the context of Supreme Court adjudication since "legal evidence" is essentially anything the Court says it is. The rule is qualified by the Court's willingness to acknowledge the sufficiency of hearsay evidence found to be trustworthy.

237. *See, e.g.*, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Arnett v. Kennedy, 416 U.S. 134 (1974).

238. 402 U.S. 535 (1971). The case involved the summary (*see* Freedman, *Summary Action By Administrative Agencies*, 40 U. CHI. L. REV. 1, 4, 25 (1972)) license suspension of an uninsured motorist who was involved in an automobile accident and thereafter failed to post the statutory security deposit. 402 U.S. at 536-37 n.1. The state's "irrebutable presumption" (*see* Comment, *The Irrebuttable Presumption Doctrine In The*

driver's license suspension case. At first glance, the rule fashioned by the Court *seemed* to follow the same procedural pattern enunciated in *Goldberg*. Justice Brennan, the author of *Goldberg*, reiterated in his majority opinion that "due process need not take the form of a full adjudication,"[239] but that, nevertheless, the "hearing required by the Due Process Clause must be 'meaningful.' "[240] The end result was a constitutionally mandated hearing which included "meaningful" procedural guarantees short of full adjudication. *Burson*, unlike *Goldberg*, did not bother to elaborate which aspects of a full hearing due process required.[241] Yet lurking in the Court's silence was the implication that full adjudication, including the opportunity to cross-examine adverse witnesses, "need not be provided in every case where a pretermination hearing of some kind is required . . . ."[242]

Throughout the 1971 Term—and with a handicapped tribunal[243]—the Supreme Court struggled to carve out new rules from the broad outline holdings of earlier cases. Initial attempts to extend *Goldberg* were temporarily stifled.[244] By the summer of 1972, the Court handed down *Fuentes v. Shevin*[245]—one of the forerunners of a string of summary prejudgment seizure cases[246] which applied the *Goldberg* prior hearing doctrine to prejudgment replevin cases.[247] The Court's opinion offered little in the way of any new elaboration upon specific procedural requirements; it noted only that

[s]ince the essential reason for the requirement of a prior hearing is

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Supreme Court, 87 HARV. L. REV. 1535 (1974)) denied the licensee the opportunity to prove his "innocence." 402 U.S. at 536-37.

239. 402 U.S. at 540; see notes 210-11 *supra*.

240. 402 U.S. at 541-42, *quoting* Armstrong v. Manzo, 380 U.S. 545, 552 (1965); see note 207 *supra*.

241. 402 U.S. at 542.

242. Arnett v. Kennedy, 416 U.S. 134, 200-01 (1974) (White, J., concurring in part and dissenting in part).

243. The untimely deaths of Justices Hugo Black and John Harlan required the Court to proceed with a seven-man tribunal for a certain portion of the 1971 term. On the significance of the absent votes, *see* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 615-19 (1975) (Blackmun, J., dissenting).

244. *See* Richardson v. Wright, 405 U.S. 208, 209 (1972) (Social Security termination action where the Court in a per curiam decision refused to rule on the merits of the case due to the absence of a case or controversy); K. DAVIS, ADMINISTRATIVE LAW: CASES - TEXT - PROBLEMS 289 (1973); Neyerhoff & Mishkin, *Application of Goldberg v. Kelly Hearing Requirements to Termination of Social Security Benefits*, 26 STAN. L. REV. 549 (1974).

245. 407 U.S. 67 (1972).

246. *See* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

247. 407 U.S. at 96-97. A "narrow" 4-3 decision. *See* note 243 *supra*.

> to prevent unfair and mistaken deprivations of property, however, it is axiomatic that the hearing must provide a real test.[248]

While extending the prior hearing doctrine, the *Fuentes* Court chose to speak in generalities when it came to procedural safeguards; the opinion itself never disclosed just what the limits of the "real test" were.

The first post-*Goldberg* case to go beyond the general language of the preceding cases was *Morrissey v. Brewer*.[249] Addressing itself to parole revocation procedures,[250] Chief Justice Burger's opinion held that, after balancing the respective interests,[251] there must be an opportunity for a hearing prior to the final decision or revocation;[252] and that the hearing must include, among other requirements[253] the "right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)."[254]

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248. 407 U.S. at 97; see note 62 *supra*.

249. 408 U.S. 471 (1972); *see* Cassou, *The Morrissey Maelstrom: Recent Developments in California Parole and Probation Revocations*, 9 U.S.F.L. REV. 43 (1974); Tobriner & Cohen, *How Much Process is "Due"? Paroles and Prisoners*, 25 HASTINGS L.J. 801 (1974); Note, *An Endorsement of Due Process Reform in Parole Revocation: Morrissey v. Brewer*, 6 LOY. L.A.L. REV. 157 (1973); Note, *Morrissey v. Brewer: Procedural Due Process Rights at Parole Revocation Hearings*, 1 WEST. ST. U.L. REV. 230 (1973).

250. While the Court permitted more informal procedures at the preliminary hearing stage, 408 U.S. at 483-87, it nevertheless held that,

> on request of the parolee, persons who have given adverse information on which parole revocation is to be based *are to be made available for questioning in his presence*. However, if the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.

Id. at 487 (emphasis added).

251. *Id.* at 481-84.

252. *Id.* at 487-88.

253. *See id.* at 489.

254. *Id.* Regarding the "good cause" requirement necessary for denial of cross-examination, see note 250 *supra*. Moreover, in Wolff v. McDonnell, 418 U.S. 539, 560 (1974), the Court noted:

> If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls.

Id. at 567. Such due process rights, said Justice White, "are not . . . universally applicable to all hearings." *Id. But see id.* at 584-85 (Marshall, J., dissenting in part). That qualification is particularly applicable to prison disciplinary proceedings where "[c]onfrontation and cross-examination present [dangerous] hazards to institutional interests." *Id.* at 567 (footnote omitted); *id.* at 562, 568-69. Yet the *McDonnell* holding is a lone one—the particular circumstances of the case and the "balance" to be struck therein required, in the Court's estimation, limitation of the respective due process safeguards. The opinion therefore emphasizes the unique nature of the case then before the Court:

> Viewed in this light it is immediately apparent that one cannot automatically apply *procedural rules designed for free citizens in an open society*, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison.

Despite the strong language of the opinion, the Court emphasized that its requirements were not to be equated with those of a criminal proceeding[255] and that "the process should be flexible enough to *consider* evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."[256] Given the Court's explicit acknowledgement of the right to confront and cross-examine adverse witnesses, its latter statements can be interpreted to mean that, while hearsay evidence may be admissible, it can only sustain a finding where it is used to *support* non-hearsay testimony pertaining to the same factual issue.[257] However, such an interpretation might unduly strain the meaning of the Court's pronouncements. A better explanation would suggest the Court's willingness to accept hearsay evidence of an inherently reliable nature even if it is the only evidence offered

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Id. at 560 (emphasis added). Additionally, the Court noted:

> In striking the balance that the Due Process Clause demands, however, we think the major consideration militating against adopting the full range of procedures suggested by *Morrissey* for alleged parole violations is the very different stake the State has in the structure and content of the prison disciplinary hearing.

Id. at 561.

Clearly, then, the holding in *McDonnell* is one of "very" limited application. Nevertheless, even that holding may have to give way to future due process challenges: "As the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection of this Court." *Id.* at 572. See also *id.* at 568. Even so, the majority opinion seems analytically deficient even under the present circumstances. *See id.* at 582-90 (Marshall, J., dissenting in part). If the Court were so inclined, procedures *could* be fashioned which would insure a more equitable constitutional "balance." See *id.* at 590 (Marshall, J., dissenting in part); *id.* at 595 (Douglas, J., dissenting in part, concurring in the result in part); Friendly, *supra* note 199, at 1286 n.101.

Given the restrictive character of the *McDonnell* holding, it is somewhat surprising that Judge Friendly should remark: "The absolutes of *Greene v. McElroy* and of *Goldberg v. Kelly* with respect to confrontation arguably have now been ended by *Wolff v. McDonnell.*" Friendly, *supra* note 199, at 1285 (footnotes omitted). To the extent the *Goldberg* Court recognized a balancing of interests standard (397 U.S. at 262-63), its holding is not necessarily, if at all, inconsistent with *McDonnell.* The fact that the full panorama of rights guaranteed under *Goldberg* did not extend to *McDonnell* is owing to the different nature of the latter case. *See* Friendly, *supra* note 199, at 1282 n.80. The confrontation requirement is only "absolute" where the "balance" favors the party adversely affected or threatened. Despite his rather sweeping remarks to the contrary (*see id.* at 1285-86), Judge Friendly concedes that "prison cases are doubtless the *strongest* ones for dispensing with an absolute requirement of confrontation and cross-examination . . . ." *Id.* at 1286 (emphasis added). In what respect, then, does *McDonnell* even "arguably" call to an end the rule fashioned in *Goldberg*? At best the question as to what adjudicative entitlements due process requires beyond mere "rudimentary procedures" is unresolved by the Court. *See id.* at 1282 n.80.

255. 408 U.S. at 489.

256. *Id.* (emphasis added).

257. *Cf.* text accompanying note 93 *supra.*

by the moving party. Such an interpretation is in accord with the pronouncements of *Goldberg* and *Perales* discussed earlier.[258] Additionally, the due process standard as interpreted here provides a flexible procedure similar to that of California Government Code section 11513(c) and unlike the rigid character of the pure residuum rule.[259]

Prior to April of 1974, then, a constitutional doctrine was emerging which provided that once an interest was found to be within the fourteenth amendment's liberty or property clause,[260] due process required a hearing at some time. Additionally, if, on balance, the interest adversely threatened proved paramount, the holder of that interest was entitled to a pre-deprivation hearing.[261] Where the interest was found to be *substantially* important, an evidentiary hearing, which included the right to cross-examination, would be provided.[262] This last right, as earlier noted, is guaranteed where "credibility and veracity are at issue."[263]

Recently, the Court—or at least three of its members—has signaled its willingness to retreat from the pre-hearing doctrine enunciated in *Goldberg*.[264] Should this practice become the trend, the constitutional

258. See text accompanying notes 216, 217 & 235 *supra.*

259. See text accompanying notes 95 & 96 *supra*; *cf.* note 171 *supra.*

260. *See* Perry v. Sindermann, 408 U.S. 593, 599-603 (1972); Board of Regents v. Roth, 408 U.S. 564, 576-78 (1972); Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1719-22 (1975).

261. Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971).

262. Morrissey v. Brewer, 408 U.S. 471 (1972); Wheeler v. Montgomery, 397 U.S. 280 (1970); Goldberg v. Kelly, 397 U.S. 254 (1970).

263. See text accompanying notes 216, 217, 235 & 257 *supra.*

264. With the advent of Arnett v. Kennedy, 416 U.S. 134 (1974), the "Nixon Court" (see L. LEVY, AGAINST THE LAW 32, 48 (1974), *quoting* N.Y. Times, Sept. 24, 1972, at 20, col. 3. *See also* LEVY, *supra* at 441) demonstrated its willingness to retreat from the principles established in *Goldberg.* The dismissal, for "cause" of a nonprobationary federal employee, provided the catalyst for a departure from earlier precedents. *See* Perry v. Sidermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972); Fuentes v. Shevin, 407 U.S. 67 (1972); Bell v. Burson, 402 U.S. 535 (1971); Wheeler v. Montgomery, 397 U.S. 280 (1970); Goldberg v. Kelly, 397 U.S. 254 (1970). Pending his appeal to the Civil Service Commission (see 5 U.S.C. § 7701 (1970); 5 C.F.R. § 771.101-.226 (1974)), the employee was discharged without pay. 416 U.S. at 141. The governing statute, while providing for prior notice and an opportunity to respond in writing to the charges, did not mandate a pre-discharge hearing. The statute provides in relevant part:

> (b) An individual in the competitive service whose removal or suspension without pay is sought is entitled to reasons in writing and to—
>
> (1) notice of the action sought and of any charges preferred against him;
>
> (2) a copy of the charges;
>
> (3) a reasonable time for filing a written answer to the charges, with affidavits; and
>
> (4) a written decision on the answer at the earliest practicable date.
>
> Examination of witnesses, trial, or hearing is not required but may be provided

dimension of the hearsay issue would most likely fade with it. A more favorable omen has surfaced in the most recent due process case, *Goss*

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in the discretion of the individual directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for and the order of removal or suspension without pay, and also the reasons for reduction in grade or pay, shall be made a part of the records of the employing agency, and, on request, shall be furnished to the individual affected and to the Civil Service Commission.

5 U.S.C. § 7501 (1970). An evidentiary trial-type hearing ripened into a statutory entitlement only at the appellate stage of the proceeding. 416 U.S. at 145-48 nn.14-18. Should the employee be reinstated on appeal, provision was made for certain back pay allotments. *Id.* at 146-48 n.16.

The Court rendered five separate opinions. (The plurality opinion was written by Justice Rehnquist with Chief Justice Burger and Justice Stewart concurring. Justice Powell filed an opinion concurring in part and concurring in the result in part, in which Justice Blackmun joined. Justice White followed with an opinion concurring in part and dissenting in part. Not surprisingly, Justice Douglas filed a dissenting opinion. Finally, Justice Marshall filed a dissenting opinion, in which Justices Douglas and Brennan joined.) The plurality opinion in a somewhat novel—perhaps even suspect—fashion held: "Here the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest." *Id.* at 155. The Court had stated earlier that

> where the grant of a substantive right is inextricably intertwined with the limitations of the procedures which are to be employed in determining that right, a litigant in the position of the appellee must take the bitter with the sweet.

Id. at 153-54. Justices Rehnquist, Burger and Stewart were evidently content with limiting all due process protections to statutory provisions—apparently the Constitution was not to be considered as paramount.

That Justice Stewart did concur in the plurality opinion might seem odd to some. Nevertheless, as one commentator has pointed out:

> Stewart [Justice] was deeply mistrustful of judicially imposed limitations that cut into government powers and was even reluctant to read the Bill of Rights as a set of restraints on government except in the clearest cases.

L. LEVY, AGAINST THE LAW 40 (1974); *see* 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 2921, 2929-30 (L. Friedman & F. Israel eds. 1969). In this respect, it is well to remember that:

> Those . . . who controvert the principle, that the constitution is to be considered in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803).

It is not even altogether apparent from Justice Rehnquist's opinion whether or not "the requisites of due process could equally have been satisfied had the law dispensed with any hearing at all, whether pre-termination or post-termination." 416 U.S. at 178 (White, J., concurring in part and dissenting in part). *But see* Fuentes v. Shevin, 407 U.S. 67, 87 n.18 (1972). This judicial threesome had indeed drifted a long way from the principles enunciated in *Goldberg*.

The alarm generated by the plurality opinion was tempered by the fact that *six* members of the Court held that the appellee's entitlement could not be conditioned on a statutory limitation of procedural due process protections. *Id.* at 166-67 (Powell, J., concurring in part and concurring in the result in part); *id.* at 185 (White, J., concurring in part and dissenting in part); *id.* at 211 (Marshall, J., dissenting). The balancing of interests criteria thus remained the judicial test. *See id.* at 167-69 (Powell, J., concurring in part and concurring in the result in part); *id.* at 193-96 (White, J., concurring in part and dissenting in part); *id.* at 217-26 (Marshall, J., dissenting). Nevertheless, only the

v. Lopez,[265] where a majority of the Court extended[266] the hearing doctrine to a ten-day suspension of a public school student—a deprivation[267] not generally thought of as amounting to a "grievous loss" in the *Goldberg* or *Morrissey* sense.[268] However, the Court stopped short of requiring a full evidentiary hearing consisting of an opportunity to cross-examine adverse witnesses;[269] it expressly limited its holding:

> We should also make it clear that we have addressed ourselves *solely* to the short suspension, not exceeding 10 days. Longer suspensions or expulsions . . . . may require more *formal* procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.[270]

Implicit in the Court's language was the suggestion that given a situation where the deprivation was more substantial, more formal procedures, including the right to cross-examine adverse witnesses, would be constitutionally required.

What emerges from the preceding examination are various due process doctrines that the Court may invoke, depending upon the particu-

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three dissenting justices held that due process required a *full* prior hearing. *See id.* at 226-27 (Marshall, J., dissenting).

At best, it is difficult to predict the precise impact that *Arnett* will have on future cases. The tenor of the opinion suggests that only in the most compelling property or liberty deprivation cases (*e.g.*, Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970)) is due process likely to require a prior evidentiary hearing with an opportunity to confront and cross-examine adverse witnesses. While the Court seemingly distinguished the governmental employee case from earlier deprivation cases (416 U.S. at 155; *id.* at 169 (Powell, J., concurring in part and concurring in the result in part); *id.* at 190-93 (White, J., concurring in part and dissenting in part)), the implication was that the *Goldberg* rationale was no longer operative.

Most recently, the California Supreme Court, in a unanimous opinion, rejected the plurality approach in *Arnett*. *See* Skelly v. State Personnel Bd., 15 Cal. 3d 194, 211-12, — P.2d —, — Cal. Rptr. — (1975).

265. 419 U.S. 565 (1975).

266. *Id.* at 581.

267. *Id.* at 567-69.

268. See *id.* at 587-89 (Powell, J., dissenting).

269. *Id.* at 583.

270. *Id.* at 584 (emphasis added). Writing for the court in Skelly v. State Personnel Bd., 15 Cal. 3d 194, — P.2d —, — Cal. Rptr. — (1975). Justice Sullivan stated:

> It is clear that due process does not require the state to provide [a "permanent civil service"] employee with a full trial-type evidentiary hearing *prior* to the initial taking of punitive action.

Id. at 209 (emphasis added). Nevertheless, he added, certain "preremoval safeguards" must be afforded. *Id.* Despite the *Skelly* court's partial retreat from a full evidentiary hearing prior to the "taking of punitive action," the court did, like *Goss*, acknowledge that due process may, in certain instances, require "more formal proceedings." *See id.* at 209; note 272 *infra*.

lar case before the bar. Application of any one or combination of these standards, will, in large part, depend upon the following four factors: one, the substantiality and gravity of the threatened loss; two, the nature of the applicable statutory provisions and the extent to which they minimize the risk of erroneous deprivation;[271] three, the particular kind of case before the Court; and four, the kind of evidence offered. Given a particular set or combination of these factors, the opportunity to confront and cross-examine adverse witnesses may or may not be constitutionally mandated. The more the factual setting resembles *Goldberg*-like situations,[272] the greater the likelihood that due process will require more formal procedures, which would in turn have an impact on the role of hearsay evidence in administrative proceedings.

VI. SUGGESTED CONSIDERATIONS: METHODS OF EVALUATION

In any area with as many possible factual variables and procedural considerations as this one, the task of formulating just and practical guidelines seems somewhat "Promethean" in scope.[273] The object is to fashion a cure which is better than the ailment. Quite often lofty formulae, "even good ones," must succumb to the workings of the real world—*verbum sapienti sat est.*

Professor Kenneth Culp Davis—a "Titan" in his own era—has perhaps more than others pioneered the way in this area of the law. While others have made their respective contributions as well as suggested approaches to this administrative problem,[274] the most comprehensive proposals usually bear the Davis name.

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271. See Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Catz & Robinson, *Due Process and Creditor's Remedies: From Sniadach and Fuentes to Mitchell, North Georgia and Beyond,* 28 RUTGERS L. REV. 541, 563-64 (1975); Comment, *The Evolving Doctrine of Due Process In Debtor-Creditor Relations: From Sniadach to North Georgia Finishing,* 8 LOY. L.A.L. REV. 339, 347-50 (1975).

272. See Eldridge v. Weinberger, 493 F.2d 1230 (4th Cir. 1974) *cert. granted,* 419 U.S. 1104 (1975) (Social Security medical disability benefits termination without prior evidentiary hearing). See additionally the District Court opinion in Eldridge v. Weinberger, 361 F. Supp. 520, 525-28 (W.D. Va. 1973).

273. *See* Davis, *An Approach to Problems of Evidence in the Administrative Process,* 55 HARV. L. REV. 364 (1942).

274. Of course, the contributions of Robert Benjamin should not be overlooked. In 1942 he observed that:

> In some circumstances the denial of an opportunity to cross-examine the author of a hearsay statement may vitiate a quasi-judicial determination. What those circumstances will be it is impossible to forecast with certainty. Wisely, I think, the courts have refrained from generalization; and, moreover, the cases are few in which the courts have reversed a quasi-judicial determination for lack of opportunity to cross-

Two decades ago Davis propounded five factors to be considered in determining the sufficiency of hearsay evidence.[275] While each factor merits consideration in its own right, it is important to remember the *collective* significance of the several factors in order to properly evaluate the merit of the suggestions presented. The following factors, then, both in their independent and collective capacities, are relevant

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examine a witness not present in person. While generalization from the decided cases is thus impossible, it seems to me reasonable to expect that a quasi-judicial determination will be reversed on this ground only if it appears that production for cross-examination of the author of a hearsay statement would have been reasonably practicable, and that in all the circumstances the refusal to produce him, or to allow a reasonable opportunity for the party adversely affected to subpoena him, was *clearly unfair*, and, probably, only if it appears further that the hearsay statement in question has played a *substantial* part in the quasi-judicial determination.

BENJAMIN, *supra* note 81, at 198 (emphasis added and footnotes omitted). Perhaps implicit in Mr. Benjamin's remarks — yet difficult to be quite certain of — is the suggestion that the severity of the loss be considered alongside an evaluation of the probable credibility of the hearsay evidence. He concludes:

> [E]xcept where the affirmative considerations that I have just discussed are inapplicable or where there are serious practical difficulties, the normal practice should be for the agency to produce for cross-examination, at least upon request, the author of a report, certificate or other written statement received in evidence; and this whether or not the statement in question is legally competent within the exception to the hearsay rule.

Id. at 202 (footnote omitted). These suggestions have, among others, won Professor Cooper's approval. 1 COOPER, *supra* note 10, at 374-79. Cooper has also expressed his favor for the Revised Model State Act. *Id.* at 384. He thus remarks:

> [The Act] bespeaks this ideal: the general practice in administrative proceedings should be to follow the rules of evidence (withal applying them in the liberal way that judges do when no jury is present). At the same time, the Revised Model Act avoids any possibility that truth may be kept from the record, by *permitting departure from the general rule where such departure is necessary*. This compromise should go far toward eliminating any practice of basing findings on distortions and half-truths—a danger which is always inherent in relying on letters and affidavits, and which unhappily is sometimes encountered.

Id. at 387 (emphasis added).

In general accord is Professor Morris Forkosch's observation:

> What must therefore be done is to classify hearsay into, say, "persuasive hearsay," and "nonpersuasive hearsay," or some terms having like connotations, and see how they fit into the totality of the picture . . . .

M. FORKOSCH, A TREATISE ON ADMINISTRATIVE LAW 356 (1956) (footnote omitted). Continuing with his analysis, Forkosch raises the question: "[A]re there any exceptions to the hearsay evidence rule which, *per se*, are sufficient to support agency findings of fact?" *Id.* at 357. His reply, which takes into account both "necessity" and the "circumstantial guarantees of trustworthiness," is a qualified—but assuring—yes. *Id.* 357-59, 383-433. The difficulty with Professor Forkosch's proposal is that it risks bringing the evidentiary complexities of the courtroom into the quarters of informal administrative hearings. On the other hand, his concern for establishing categories of hearsay based on their respective persuasiveness is a point well taken. The question is, how is it to be done? Assuming that the evidentiary debate could generally be taken out of the hearing room, and that fairly specific regulatory categories could be formulated, then Professor Forkosch's suggestions could prove quite beneficial. *See generally* H. STEPHENS, ADMINISTRATIVE TRIBUNALS AND THE RULES OF EVIDENCE (1933).

275. *Residuum Rule, supra* note 163, at 5-11.

in determining when to find hearsay legally sufficient. These factors include:

(a) the alternative to reliance on the incompetent evidence, if any;
(b) the state of the supporting and opposing evidence;
(c) the policy of the program being administered and the consequences of a decision either way;
(d) [the] importance or unimportance of the subject matter and considerations of economy of government;
(e) the degree of efficacy of cross-examination with respect to particular hearsay declarations.[276]

It is suggested that the use of these factors as a procedural yardstick will permit the trier of fact to determine "whether or not [the] particular evidence should be relied upon."[277]

The first factor amounts to a "what is in the basket" determination. If better evidence is available, then it might well be unreasonable to rely on mere hearsay. If on the other hand, no outside evidence is obtainable, then hearsay may suffice.[278] However, this formula in some respects begs the question, since a determination of what constitutes so called "better evidence" will quite often depend upon a *full* recital of *all* the evidence. Likewise, some hearsay may seem competent until compared with live testimony. The availability or non-availability of the hearsay declarant does not itself assure the credibility or noncredibility of the evidence presented; it merely substitutes the ex-

276. 2 ADMINISTRATIVE LAW TREATISE, *supra* note 21, at 296. Professor Gellhorn has adopted an approach which is quite similar — almost identical — to that of Professor Davis'. See Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 19-22. Gellhorn's criteria include:

[1] What is the "nature" of the hearsay evidence . . . ?
[2] Is better evidence available? . . .
[3] How important [or unimportant] is the subject matter in relation to the cost of acquiring "better" evidence? . . .
[4] How precise does the agency's factfinding need to be? . . .
[5] What is the administrative policy behind the statute being enforced? . . .

Id. The categories match up as follows:

Davis	Gellhorn
1	2
2	1
3	5
4	3
5	—
—	4

Gellhorn thus excludes Davis' cross-examination category while Davis excludes Gellhorn's agency factfinding consideration.

277. It should be noted that Davis refers to those factors as "[*s*]*ome* of the circumstances that *often need* to be taken into account . . . ." *Residuum Rule, supra* note 163, at 5 (emphasis added). He thereby leaves open the possibility that there may be *other* circumstances which may influence any given determination.

278. *Id.*

pediency concern for the credibility one. As an independent criterion of evaluation, this factor is inadequate, although as a factor for consideration among others it could prove to be helpful.

The second factor involves consideration of the "whole circumstantial setting," including the "*quantity* and *quality* of supporting and opposing evidence."[279] Although this particular method of evaluation seems reasonable enough, it might prove difficult to apply. In considering this factor, it should be recalled that the residuum rule necessarily operates when non-hearsay "supporting evidence" is not present[280]—the reason why some courts require a residuum of legal evidence.[281] If the supporting evidence is hearsay, its credibility is also open to challenge, especially where the hearsay builds upon hearsay. Nevertheless, the quantity of the hearsay may lend credence to the report given, so long as one hearsay report is not tainted by another. So much for "supporting evidence," but what about the significance of "opposing evidence"? Assuming that the requisite burden of proof has been met by an offer of competent evidence, a failure to offer any rebuttal evidence, or only "weak" evidence, perhaps should carry some weight in determining whether or not the moving party's hearsay testimony should be relied upon. The only problem is that too much may have to be assumed, that is, the uncorroborated hearsay might not be sufficient to satisfy the moving party's burden of proof. Where such is the case, so called "opposing evidence" need not always be considered. (That is precisely what happened in *Walker*.[282]) Where the "opposing evidence" is considered it tends to confuse "quantum of evidence" evaluations with "weight of evidence" determinations where the latter is required. In either case, consideration of the opposing evidence as an evaluation factor may prove difficult. The foregoing comments should not, however, dispel confidence in the valid premise that "quantity and quality" determinations are crucial here. What these comments attempt to point out is that a "comparison evaluation" of the evidence could raise other unforeseen problems.

The next factor considers the ends of operative program and the potential impact of a given decision on the party's interest placed in jeopardy. This factor operates "to take into account the extreme variability of factfinding functions."[283] Thus, "[i]n granting a license an agency may sometimes appropriately rely on evidence which would not

279. *Id.* at 7 (emphasis added).
280. See text accompanying note 170 *supra*.
281. *Id.*
282. See text accompanying note 81 *supra*.
283. *Residuum Rule, supra* note 163, at 9.

be considered as a basis for the revocation of the license."[284] In addition, procedural standards necessarily vary depending upon the functions and goals of the agency involved.[285] The only thing that can be said about this factor is that it is quite often ignored—that it should be so explains why agencies and courts are inclined to err so sublimely.

The fourth circumstantial consideration cuts both ways; that is, it has its merits as well as its faults. First its merits should be considered. On those fact-finding issues where "precision is not required, the most practical method of proof may often be reliance on hearsay."[286] The same may be said of hearsay which is not adverse to the party-interest threatened as well as those instances where, absent burden of proof problems, both parties offer mere hearsay evidence. Somewhere along the line the procedural practices must be kept in harmony with the overall program budget. However, the last point raises a problem often encountered; namely, should procedural guarantees give way to economic considerations? Obviously the answer must depend upon the importance of the particular procedure and whether or not its denial will substantially jeopardize the interest (or right) threatened. Of course, where economic urgencies are not present, liberal procedures might be resorted to with greater frequency. However, conservation of "fiscal and administrative resources" does not give an agency license to ignore procedural due process; the governmental interests are quite often not overriding.[287] What is important is that "pragmatic considerations" do not substantially interfere with the rights of the class of persons the particular agency was meant to serve.[288] To that extent, the "economy of government" considerations should prevail.

The final consideration looks to the rationale of the hearsay rule in order to determine whether the evidence should be deemed competent. It recognizes that "untested" assertions may prove erroneous on cross-examination[289] since such assertions are generally inaccurate due to " 'faults in perception and memory.' "[290] Professor Davis thus reasons that where the facts are complicated and the probability of deficient perception is "great, the lack of opportunity to cross-examine may often be the key to the whole case."[291] However, one might question

284. *Id.* at 7.
285. *Id.*
286. *Id.* at 10.
287. Goldberg v. Kelly, 397 U.S. 254, 266 (1970); *id.* at 278 (Black, J., dissenting).
288. See note 121 *supra.*
289. *Residuum Rule, supra* note 163, at 11.
290. *Id., quoting* Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 186, 188 (1948).
291. *Residuum Rule, supra* note 163, at 11.

whether the accuracy of an assertion relies exclusively upon the assumed complexity of a given set of facts. Might it not be asserted that there are some facts which standing alone are per se complicated? Likewise, does the probability of the existence of a deficient perception have to be "great" or merely "questionable" before it is necessary to require cross-examination? The respective worth of the tests employed will, to some extent, be revealed by the answers they provide to these questions.

Each of the five considerations, then, offer some reasonable criterion of evaluation. Collectively, they seem to offer that "middle ground" which neither statutory nor decisional law has been able to discover.

VII. Some Concluding Thoughts

Throughout the course of this Comment considerable attention has been allotted to the various California procedures invoked in administrative hearings.[292] Certain criticisms of the legal residuum rule have been offered[293] along with a few suggested considerations.[294] Additionally, several due process issues have been entertained.[295] A question still remains, however, as to what is the best course of action to follow as among the possible (and practical) alternatives. In making this determination, one must be duly mindful of the considerations heretofore presented.[296] Essentially, the following proposal sets out to establish a point of procedural equilibrium whereby the interests of the party adversely affected can be *fairly* balanced against the economic and ministerial needs of the various agencies. Of course, this balancing of interests formula operates within the broader context of a protective presumption in favor of the party-interest so jeopardized.

It is suggested that the major flaw with the legal residuum rule as it operates within the *Walker* and California statutory context is that it introduces an over technical standard of evidentiary evaluation into administrative proceedings. This it does despite the obvious absence of a jury of laypersons.[297] The problem encountered by introducing

292. See pts. II & III *supra.*

293. See pt. IV *supra.*

294. See pt. VI *supra.*

295. See pt. V *supra.*

296. See text accompanying notes 105-12 & 162-96 *supra*; text immediately following notes 234 & 270 *supra*; note 274 *supra*; note 276 *supra* and accompanying text.

297. *See* Administrative Law Text, *supra* note 1, at 277. Nevertheless, until such time as an practical and equitable alternative is fashioned by the legislature, the courts, or administrative agencies, the *Walker* rule may well be the only way to protect indi-

the rules of evidence into *administrative* proceedings is that they tend to burden unduly the very structure of the hearing by transforming it into a *judicial* proceeding.[298] The same basic criticism applies with equal force to the invocation of the objection requirement.[299] Additionally, the supplemental aspect of California Government Code section 11513(c),[300] although appealing on its face, nevertheless, permits otherwise weak direct evidence to be supported or supplemented by potentially untrustworthy evidence. In such instances, the respective worth of hearsay evidence does not become sufficient merely because it is offered in conjunction with just any direct evidence no matter how credible. The Code in effect recognizes the logic of the preceding contention by providing for the sufficiency of *uncorroborated* hearsay if "it would be admissible over objection in civil actions."[301] Finally, the "calculated to ascertain the substantial rights of the parties" test provided for in California Labor Code section 5708[302] allots too much unnecessary discretion to administrative fiat. Its method of evaluation hardly affords any reasonable standard to appraise the credibility of the particular hearsay evidence relied upon.

In light of all of the foregoing remarks, it is proposed that a procedure be introduced which provides for: (1) the general admissibility of all hearsay evidence; (2) an enunciation of specific classes of uncorroborated hearsay evidence[303] which would be presumed to be sufficient to sustain a finding unless overcome by contrary evidence sufficient to create a reasonable doubt about the trustworthiness of the evidence relied upon; (3) a presumption against the sufficiency of uncorroborated hearsay not otherwise specifically enunciated as sufficient unless the party offering such evidence overcomes the presumption by introducing contrary evidence to assure the substantial trustworthiness of the evidence offered.[304] Such a proposal would apply with equal

viduals against possible erroneous deprivations of vested rights. *See* text accompanying notes 303-07 *infra*.

298. Of course, this criticism might not be applicable to those administrative proceedings conducted by lawyers acting as referees and counsel. *But see* note 159 *supra*.

299. See text accompanying notes 105-11 *supra*.

300. See text accompanying notes 93 & 95 *supra*.

301. See text accompanying note 93 *supra*.

302. See note 125 *supra*.

303. See, e.g., note 126 *supra*.

304. The enforcement of this proposal should be influenced by the factors provided for earlier. See text accompanying notes 105-12 & 162-96 *supra*; text immediately following notes 235 & 270 *supra*; note 274 *supra*; note 276 *supra* and accompanying text.

Although it is beyond the scope of this Comment, it is suggested that the proposal

force to the use of *all* uncorroborated hearsay.[305] Regardless of whether the presumption operates in favor or against the evidence presented, full and adequate notice should be given to the party against whom such evidence is introduced in order to put them on notice of the possible consequences of reliance on such evidence and to afford them an opportunity to obtain counsel in order to challenge the applicable presumption. Unless specifically mandated by statutory or judicial decree,[306] the invocation of any subpoena powers would not be a prerequisite to challenging the sufficiency of uncorroborated hearsay evidence otherwise presumed to be insufficient to sustain a finding.[307] Where, however, a party could overcome the presumption favoring specified classes of uncorroborated hearsay evidence, in those instances, a right to subpoena and thereafter cross-examine the adverse hearsay declarant should issue.

Given the traditional tendency of lawmakers to fashion categorical imperatives, along with the modern preoccupation with expediency, the comments and proposals set forth above attempt to introduce into administrative hearings the optimum degree of flexibility compatible with the fair adjudication of party interests. Implicit in this formulation is the recognition that no single rule can be absolute and equitable at the same time, and that the "rights of the citizen" can be made "plain" only where the overall tenor of the law lends itself to the particular needs of the persons who stand before it.[308]

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herein offered apply with equal force to hearsay evidence which is used in a supportive or supplementary capacity. See text accompanying note 93 *supra.*

305. See, e.g., note 88 *supra* and accompanying text.

306. See note 116 *supra* and accompanying text.

307. Compare notes 112-21 *supra* and accompanying text. Of course, all subpoena powers provided for by statute would be retained. *See, e.g.,* CAL. GOV. CODE ANN. § 11190 (West 1966); CAL. WELF. & INST'NS CODE ANN. § 10954 (1972).

308. *See generally* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 161, 166 (1960); A. CORBIN, CORBIN ON CONTRACTS ' 1163-64 (1952); J. DICKENSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 2 (1927); J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 190-221 (1963).