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Judicialization of the Administrative Process: Adversarial Risks for Fairness

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JUDICIALIZATION OF THE ADMINISTRATIVE PROCESS: ADVERSARIAL RISKS FOR FAIRNESS

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I. INTRODUCTION

As we approach the half-century celebration of the administrative law process, a general review of its adversarial practices is warranted.[1] Judicial formalization of the administrative process has risen significantly.[2] The phenomenon should invite continuous analytical review of its propriety because of the increasing impact and influence that the administrative process has on institutional America.[3]

The technical application of evidence and constitutional rule theories to the administrative process encourages judicial formalization[4]

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1. *See* Breger, *Administrative Law After Forty Years*, 33 FED. B. NEWS & J. 297 (1986) (reviewing administrative law since the Administrative Procedure Act).

2. *See generally* Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, 1977 DUKE L.J. 389, 393-400; Schwartz, *Administrative Law: The Third Century*, 29 ADMIN. L. REV. 291, 299-309 (1977) (describing judicialization of administrative procedure).

Passage of the Administrative Procedure Act gave minimal endorsement to judicial formalities. *See* Scotland, *After 25 Years: We Come to Praise the APA and Not to Bury It*, 24 ADMIN. L. REV. 261, 265 (1972).

3. Formal adjudication of administrative proceedings has risen significantly. *See generally* Davis, *supra* note 2.

4. *See* Gladstone, *The Adjudicative Process in Administrative Law*, 31 ADMIN. L. REV. 237, 241 (1979) (describing the administrative process as "hobbled in bureaucratic

and does not give the process much flexibility.[5] The traditional theory in administrative proceedings rejects technical application of both evidentiary and constitutional theories to the administrative process. Formalization is, however, a necessary risk that is required to preserve administrative credibility and fairness. Formalization is justified sometimes on the belief that these technical theories apply only to jury trials.[6]

The emergence of modern day jury trials precipitated the development and application of exclusionary rules of evidence.[7] Constitutional exclusionary rule theories, however, do not rest on the existence of a jury for their application.[8]

Common-law commentators viewed the development of evidentiary rules as a method for insulating the unsophisticated jury from reviewing misleading, but perhaps relevant, evidence.[9] Modern evidence codes make no evidentiary distinction between bench or jury trial application.[10] To suggest that technical rules of evidence are exclusively within the operative province of the untrained trier of fact is to raise significant doubt about the propriety of modern evidence codes. This is not a viable thought. Indeed, the judiciary is most active in technical evidence theory application.[11]

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red tape and drowning in a sea of due process").

5. *See id.*

6. *See, e.g.*, 1 J. WIGMORE, EVIDENCE § 4(b) (1983); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 371-72 (1942).

7. *See* C. MCCORMICK, EVIDENCE § 244 (3d ed. 1984).

8. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545-46 (1985) (noting that due process can be satisfied without a full evidentiary hearing); Goldberg v. Kelly, 397 U.S. 254, 266-70 (1970) (procedural due process requirements of notice and opportunity to be heard satisfied without judicial or quasi-judicial trial).

The Supreme Court does not distinguish between jury and nonjury trials when it applies constitutional safeguards. *See, e.g.*, Rochin v. California, 342 U.S. 165, 166-74 (1952) (nonjury trial conviction reversed because evidence was obtained in violation of defendant's due process right against self-incrimination).

9. *See, e.g.*, J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 266, 509 (1898) (evidence law does not aid in finding the truth, but aids the untrained jurors); *see also* 1 J. WIGMORE, EVIDENCE § 4b (1983) (citing Thayer and noting that evidence law is best suited to jury trials).

10. Contrary to common-law doctrine, the Federal Rules of Evidence (FRE) do not distinguish between jury and nonjury trials in terms of their applicability. For a collection of common-law doctrines that have been applied to evidentiary challenges in nonjury trials, see Maguire & Epstein, *Rules of Evidence in Preliminary Controversies as to Admissibility*, 36 YALE L.J. 1101 (1927); Note, *Applicability of Rules of Evidence Where the Judge is the Trier of Facts in an Action At Law*, 42 HARV. L. REV. 258 (1928).

11. *See generally* Allen, *The Explanatory Value of Analyzing Codifications By Reference to Organizing Principles Other Than Those Employed in the Codification*, 79 NW. U.L. REV. 1080, 1085-96 (1985).

Leading common-law commentators were similarly convinced that requiring the application of technical evidentiary rules to administrative proceedings would conflict with the flexible standards inherent in the administrative process.[12] Review of modern codes of evidence refutes such summary analysis.[13]

In keeping with common-law sentiment, Congress enacted the Administrative Procedure Act.[14] This legislation rejected technical application of the rules of evidence to the administrative process.[15] Thus, standards of relevancy became uniquely dispositive over admission claims.[16] This does not guarantee that all relevant evidence will be admitted, but it prevents some evidence from being excluded wrongfully.

While unchallenged adherence to a relevancy admission standard may result in compromised findings, the courts continue to avoid technical rules of evidence in the administrative forum.[17] One justification for avoiding technical rules of evidence is that administrative law judges, by virtue of their training and experience, are uniquely qualified to ignore problematic evidence.[18] The Attorney General's Committee on Administrative Procedure suggested that "[t]he absence of a jury and the technical subject matter with which agencies often deal, all weigh heavily against a requirement that administrative agencies observe what is known as the 'common law' rules of evidence . . . ."[19]

Allowing administrative law judges to ignore judicial rules of evi-

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12. *See, e.g.*, 1 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 4b (1983); *see also* Wigmore, *Administrative Boards and Commissions: Are the Jury Trial Rules of Evidence in Force for Their Inquiries?*, 17 ILL. L. REV. 263 (1922) (discussing the extent to which rules of evidence bind tribunals).

13. Federal Rule of Evidence 102 provides that "[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102. The Federal Rules of Evidence provide the trial court with sufficient powers of flexibility while preserving credibility safeguards against problematic offerings of evidence. *See* B. SCHWARTZ, ADMINISTRATIVE LAW § 7.3 (2d ed. 1984).

14. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344 (1988)).

15. *See* B. SCHWARTZ, ADMINISTRATIVE LAW § 115 (1976).

16. *See* Administrative Procedure Act, § 7(c), 60 Stat. 237, 241 (1946) (codified as amended at 5 U.S.C. § 556(d) (1988)); *see also* Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 690-91 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949) (allowing hearsay evidence to be used in administrative procedure if relevant).

17. *See, e.g.*, Richardson v. Perales, 402 U.S. 389, 402 (1971) (upholding the use of relevant hearsay evidence in a social security disability case by the Secretary of Health, Education, and Welfare).

18. *See generally* Davis, *supra* note 2, at 400-03.

19. ATT'Y GEN.'S COMM. ON ADMIN. PROC., FINAL REPORT 70 (1941), *reprinted in* ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 70 (C. Woltz ed. 1968).

dence because of their expertise cannot be justified. The nation's judiciary deals with equally sophisticated subject-matter, but is bound by institutional rules of evidence.[20] The subject-matter's sophistication should not control the evidence's credibility. Indeed, some states require administrative law judges to comply with judicial rules of evidence to ensure the fairness of the proceedings.[21]

The need for judicial rules of evidence is more urgent in administrative proceedings than in common-law judiciary settings. A lay commissioner often initially reviews the evidence in administrative proceedings.[22] It is possible, therefore, to compromise the credibility of evidence because of the inherent likelihood of disproportionate deference to a problematic administrative trial record. Strict application of the theories of evidentiary law would reduce the potential for these consequences. Administrative law tradition rejects technical compliance, however, even with the most familiar evidentiary and constitutional exclusionary rules.[23]

This Article questions the propriety of the administrative freedom to reject technical compliance with the rules of evidence. To the extent that administrative law proceedings focus on flexibility and fairness, the select application of technical evidentiary and constitutional theories actually promotes respect for the administrative process because the technical rules articulate standards of relevance, credibility, and fairness. Indeed, litigators often invoke these technical rules hoping to direct the administrative law judge toward predetermined patterns of fairness.[24]

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20. The Federal Rules of Evidence were designed to limit judicial power over the admission of evidence. *See generally* Allen, *supra* note 11 (arguing that rules of evidence should clarify the relationship between judge and jury).

21. *See, e.g.*, Johnson v. Department of Health & Rehabilitation Servs., 546 So. 2d 741 (Fla. Dist. Ct. App. 1989); Eastman v. Department of Pub. Aid, 178 Ill. App. 3d 993, 534 N.E.2d 458 (1989); Kade v. Charles H. Hickey School, 80 Md. App. 721, 566 A.2d 148 (Ct. Spec. App. 1989); Sims v. Baer, 732 S.W.2d 916 (Mo. Ct. App. 1987); Anaya v. State Personnel Bd., 107 N.M. 622, 762 P.2d 909 (Ct. App.), *cert. denied*, 107 N.M. 673, 763 P.2d 689 (1988); Philadelphia Elec. Co. v. Commonwealth Unemployment Compensation Bd. of Review, 129 Pa. Commw. 417, 565 A.2d 1246 (1989).

22. *See* Gladstone, *supra* note 4, at 238-40.

23. *See, e.g.*, Richardson v. Perales, 402 U.S. 389, 402 (1971) (admitting a medical report despite its hearsay character); Anderson v. FAA, 827 F.2d 1564 (Fed. Cir. 1987), *cert. denied*, 486 U.S. 1026 (1988) (hearsay documents admissible in administrative proceeding); Carter-Wallace, Inc. v. Gardner, 417 F.2d 1086 (4th Cir. 1969) (noting that hearsay evidence is generally admissible in an administrative proceeding), *cert. denied*, 398 U.S. 938 (1970); Holte v. State Highway Comm'n, 436 N.W.2d 250 (N.D. 1989) (intoxilyzer test results admissible despite having been obtained unconstitutionally).

24. Cleveland Bd. of Educ. v. Laudermill, 470 U.S. 532 (1983) (due process standard violation alleged at administrative hearing); Cohen v. Perales, 412 F.2d 44 (5th Cir. 1969) (hearsay objection in administrative proceeding), *rev'd sub nom.* Richardson v.

Although courts historically have adhered to administrative restrictions on the use of technical evidence and constitutional rules, recent decisions suggest a willingness to use these rules more freely.[25] The willingness to interject evidentiary and constitutional rules into contested administrative proceedings may be a result of the modern court's desire to ensure institutional fairness. Recent trends in administrative law invite such pragmatic interests.[26] The sophisticated growth of the administrative process suggests that the use of these technical rules should be the norm instead of the exception.[27]

II. THE CONFLICT BETWEEN HEARSAY RULE THEORIES AND ADMINISTRATIVE LAW PRINCIPLES

The hearsay rule began as the foremost technical symbol of exclusionary theories of evidence.[28] The inherent unfairness in the absence of an opportunity to cross-examine the declarant led to the development of the hearsay rule.[29] Today cross-examination remains the fundamental mechanism to evaluate a witness's credibility.[30] The value of questioning a declarant suggests that absent cross-examination, proffered hearsay evidence should not be judicially received. This generalization seriously compromises the theories of hearsay law.

Codified evidentiary law provides for the admission of some types of hearsay despite the absence of a cross-examination of the declar-

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Revales, 402 U.S. 389 (1971); Whitlow v. Board of Medical Examiners, 248 Cal. App. 2d 478, 56 Cal. Rptr. 525 (1967) (hearsay objection in administrative proceeding); Swegle v. State Bd. of Equalization, 125 Cal. App. 2d 432, 270 P.2d 518 (1954) (hearsay objection in administrative proceeding), *overruled*, Kirby v. Alcoholic Beverage Control Appeals Bd., 8 Cal. App. 3d 1009, 87 Cal. Rptr. 908 (1970).

American lawyers embrace the adversarial process and, as a result, common-law dispute traditions dominate their behavioral practices. *See* Allen, *supra* note 11, at 1081.

25. *See, e.g.*, Hancock v. State Dep't of Revenue, 758 P.2d 1372 (Colo. 1988); Wright v. Department of Educ., 523 So. 2d 685 (Fla. Dist. Ct. App. 1988); Feldman v. Board of Appeal, 29 Mass. App. Ct. 296, 559 N.E.2d 1263 (1990) (en banc).

26. *See* Dyson v. State Personnel Bd., 213 Cal. App. 3d 711, 262 Cal. Rptr. 112 (1989); *In re* Arbitration between Minnesota State Troopers Ass'n v. State Dep't of Pub. Safety, 437 N.W.2d 670 (Minn. Ct. App. 1989).

27. *See* Davis, *supra* note 2, at 400; Schwartz, *supra* note 2, at 303. This Article does not focus on the high volume of adjudication in administrative law proceedings. The high volume of claims often provides the justification for the rejection of technical evidentiary and constitutional law theories in administrative proceedings. Pragmatic concerns for the time delays to process administrative claims, however, should not result in the isolation of legitimate evidentiary challenges. *See generally id.* at 303-05.

28. *See generally* C. MCCORMICK, EVIDENCE § 224 (3d ed. 1984) (history of the rule against hearsay).

29. *See id.* § 245.

30. *See id.*

ant.[31] The admission of hearsay when the declarant is not available for cross-examination is limited to narrow exceptions,[32] which were founded on judicial recognition that some circumstances provide a measure of reliability.[33] As a result, the hearsay rule generally enhances the credibility of evidence.[34]

Proponents of a flexible administrative process, however, criticize strict application of evidentiary rules.[35] This criticism is based primarily on the misconception that hearsay evidence doctrines uniquely apply to jury trials.[36] As previously noted, however, modern codes of evidence do not distinguish between jury and nonjury trials.[37]

In *Dallo v. INS*[38] the Sixth Circuit Court of Appeals denied a rehearing request that concerned the evidentiary admission of an affidavit. The court noted the hearsay nature of the proffered affidavit, but stated that the Federal Rules of Evidence do not apply to immigration hearings.[39] The court professed adherence to administrative law tradition.[40] Despite this assertion, the court upheld the admission of evidence that the government made a good faith effort to produce the declarant for cross-examination.[41] Thus, the *Dallo* court, despite its protest to the contrary, selectively applied technical evidentiary rules theories. Implied or expressed application of cross-examination opportunities are central to fundamental principles of fairness in contested administrative matters.[42] The court implicitly recognized that the opportunity for cross-examination is usually required prior to the admission of hearsay, even in administrative proceedings.[43]

In *Baliza v. INS*[44] the Ninth Circuit Court of Appeals vacated a

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31. *See* FED. R. EVID. 803, 804 (providing certain hearsay exceptions when the declarant is unavailable and when availability of the declarant is immaterial).

32. *Id.*

33. *See generally* Falknor, *The Hearsay Rule and Its Exceptions*, 2 UCLA L. REV. 43, 43-45 (1954) (discussing the foundation of the hearsay rule and its exceptions).

34. *See generally* Weinstein, *The Probative Force of Hearsay*, 46 IOWA L. REV. 331, 332-34 (1961) (discussing the nature of the hearsay problem).

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

36. *See, e.g., id.* at 371-74.

37. *See supra* note 10 and accompanying text.

38. 765 F.2d 581 (6th Cir. 1985).

39. *Id.* at 586.

40. *Id.*

41. *Id.*

42. *See id.*; *see also* Greene v. McElroy, 360 U.S. 474 (1959) (federal agency could not deprive an individual of his security clearance for alleged communist sympathies without affording the individual the opportunity to cross-examine witnesses testifying against him).

43. *See* Dallo v. INS, 765 F.2d 581, 586 (6th Cir. 1985).

44. 709 F.2d 1231 (9th Cir. 1983).

deportation order after finding that the government could not proffer an extrajudicious statement without making a reasonable effort to locate and produce the declarant for cross-examination.[45] The factual difference between *Dallo* and *Baliza* is the degree of the government's effort to produce the declarant as a witness. Both courts applied traditional evidentiary theory to the administrative appeals.

Cross-examination opportunities provide the theoretical justification for the admission of extrajudicial utterances. Strict adherence to an admission standard that absolutely requires an opportunity for cross-examination, however, results in probative evidence being excluded from the fact-finding process. Thus, the framers of exclusionary rules of evidence recognize the need for pragmatic exceptions to the cross-examination requirement.[46] Consequently, a number of needed exceptions have been gradually developed and introduced into the common law.[47] These exceptions, which are based on circumstantial reliability of evidence, eliminate the need for strict adherence to the cross-examination requirement.[48] Modern evidentiary codes embrace this common-law development.[49]

Given the importance and extent of institutional record keeping, the business records and the public records exceptions are perhaps the most important exceptions to challenged hearsay evidence. The routine practices surrounding the creation and storage of these records provide the required indicia of reliability to allow admission.[50] Recognizing this, judges have utilized the exceptions in administrative proceedings.

In *Department of Revenue & Taxation v. Hull*[51] the Wyoming Supreme Court upheld the admission of state documentary evidence against hearsay and due process challenges in an administrative proceeding.[52] By rejecting the hearsay challenge, the court recognized that the disputed evidence constituted a public records exception under Wyoming's evidentiary code.[53] Thus, the court considered the evidence to be sufficiently reliable for admission even though the opportunity for cross-examination was not available.[54] The court's holding reflects

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45. *Id.* at 1234.

46. *See, e.g.*, Falknor, *supra* note 33, at 43-45.

47. *See id.* at 49-82.

48. *See generally* Weinstein, *supra* note 34, at 347-48 (explaining Wigmore's rationale for hearsay exceptions).

49. *See* FED. R. EVID. 803 advisory committee's note.

50. *See generally* C. MCCORMICK, EVIDENCE §§ 304, 306, 315 (3d ed. 1984) (discussing the two exceptions); Laughlin, *Business Entries and the Like*, 46 IOWA L. REV. 276, 285-87 (1961) (discussing the requirement that business records be kept regularly).

51. 751 P.2d 351 (Wyo. 1988).

52. *Id.* at 357.

53. *Id.* at 353-55.

54. The Wyoming Code of Evidence provided for admissibility of public records

the pragmatic codification of hearsay exceptions.[55]

The importance of the *Hull* case is its application of technical evidentiary rules to the administrative process. If flexible administrative law principles had been the only means of challenging the evidence in *Hull*, the evidence undoubtedly would have been admitted because it was relevant. If the courts were to allow all relevant evidence to be admitted, however, the evidence verification theory would be compromised. The *Hull* court recognized the importance of both relevant and technical standards to test the credibility of evidence.[56]

In *Snelgrove v. Department of Motor Vehicles*[57] the California Court of Appeals acknowledged that hearsay evidence alone might be sufficient to justify a revocation of a driver's license if the evidence is reliable and trustworthy. The court noted that the challenged offerings of evidence were official reports and, therefore, were admissible under the state's traditional evidentiary code.[58] *Snelgrove* appears to be consistent with traditional evidence law.

In *Wright v. Department of Education*[59] a Florida appellate court upheld the Department of Education's ruling that the appellant was ineligible for vocational rehabilitation services. The court based its denial upon a finding of behavioral problems. On appeal the appellant claimed that the court erroneously admitted the reports, which documented his behaviorial problems because they were hearsay.[60] The court found no merit in this assertion.[61] The court noted that although the disputed reports were hearsay, they were admissible under the business records exception.[62] Social workers and doctors used the reports to render professional judgments on the propriety of assigning vocational rehabilitation services. To the extent the court acknowledged this extrajudicial usage, technical reliance on hearsay rule theories and

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unless the circumstances indicated a lack of trustworthiness. *See id.* at 354.

55. *See* FED. R. EVID. 803 advisory committee's note (one justification for the codified hearsay exceptions). In Beauchamp v. DeAbadia, 779 F.2d 773 (1st Cir. 1985), the court upheld the administrative admission of hearsay documents against due process challenges for want of cross-examination privileges. The court recognized that relevant hearsay is admissible in administrative proceedings and the right to cross-examine witnesses is not absolute. *Id.* at 775-76. The First Circuit's reasoning is consistent with the reasoning of modern evidentiary law. In fact, the petitioner in *Beauchamp* conceded that most of the challenged hearsay evidence would have been admissible under the Federal Rules of Evidence. *Id.* at 775.

56. *Hull*, 751 P.2d at 356.

57. 194 Cal. App. 3d 1364, 240 Cal. Rptr. 281 (1987).

58. *Id.* at 1374-76, 240 Cal. Rptr. at 287-89.

59. 523 So. 2d 681 (Fla. Dist. Ct. App. 1988).

60. *Id.*

61. *Id.* at 682-83.

62. *Id.* at 682.

principles is evident.[63] Thus, this decision is a technical application of the rules of evidence; it provides a just and fair result and still preserves the traditional means of verifying evidence.

Explicit adherence to the exceptions doctrine as the sole justification for document admission may not be persuasive. Because the drafters of the modern evidentiary codes are concerned with protecting credibility safeguards, business and public records may be judicially excluded on the grounds of credibility, notwithstanding their historic exceptions status.[64]

In *Juste v. Department of Health & Rehabilitative Services*[65] the Florida District Court of Appeals reversed an administrative body's finding that disqualified the petitioner from receiving social services benefits.[66] The petitioner alleged error in the admission of suspect hearsay evidence by the administrative body. The disputed evidence consisted of summary reports from interviews with the government's witnesses. The government argued that the reports were public records and admissible as an exception to the hearsay rule.

Although the proffered reports could have been admitted as an exception to the hearsay rule, the appellate court rejected the government's argument and noted that the challenged evidence contained multilevels of hearsay without proper justification of credibility.[67] Thus, the mere existence of hearsay exceptions does not ensure the admissibility of evidence. The *Juste* court affirmed the principle that suspect hearsay evidence should not be admitted in administrative hearings.[68] This is consistent with codified evidentiary law and with recent administrative trends.[69]

Uniquely problematic to the administrative hearing process is the systematic proffering of agency files. Administrative tradition often allows the admission of these files without applying technical rules of evidence.[70] For example, a Louisiana statute provides that "[a]ll evi-

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63. The Federal Rules of Evidence explicitly codify this observed usage. FED. R. EVID. 703 (allows experts to use inadmissible hearsay to form an opinion if it is of a type typically relied upon by those experts).

64. *See, e.g.*, FED. R. EVID. 803(6) (allowing into evidence business records that are regularly kept in the course of regularly conducted business activity unless the circumstances suggest lack of trustworthiness).

65. 520 So. 2d 69 (Fla. Dist. Ct. App. 1988).

66. *Id.* at 73.

67. *Id.* at 70-73.

68. *Id.*

69. *See supra* note 25 and accompanying text; *see infra* note 97 and accompanying text.

70. *See, e.g.*, Fisher v. Louisiana State Bd. of Medical Examiners, 352 So. 2d 729 (La. Ct. App. 1977) (allowing the use of Drug Enforcement Agency Reports which were relevant and reliable), *writ refused*, 353 So. 2d 1338 (La. 1978)).

dence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record, and all such documentary evidence may be received in the form of copies or excerpts . . . ."[71] These practices raise significant challenges to the reliability of evidence. Thus, fundamental fairness demands that the courts avoid the unrestricted admission of evidence.

In *Hall v. Louisiana State Racing Commission*[72] the Louisiana Court of Appeals rejected unrestricted admission practices. The State Racing Commission unsuccessfully sought to justify the admission into evidence of the entire case file. In support of its position, the Commission advanced the traditional administrative law practice of liberally admitting documents and records.[73] The court rejected the admission of the entire file and noted that implicit in all administrative hearings is the necessity to reach a true disclosure of the facts to prevent arbitrary decisions.[74] It is the ultimate duty of the administrative law judge to make determinations of fact that are supported by sufficient and competent evidence. Consequently, documents contained in an agency's file, although arguably an exception to the hearsay rule, may be inadmissible if the reliability of the evidence is questionable. The *Hall* court noted:

> We do not disagree with the principle that hearsay evidence, which possesses probative value, may be submitted at an administrative hearing, nor do we dispute the fact that the agent's records and reports may be introduced into evidence. However, in the case before us we are concerned with the problem of a trainer being suspended . . . on a finding based only on hearsay documentary evidence. There was no other competent evidence submitted . . . .[75]

The court further recognized the importance of evidentiary theories to due process protection:

> By this holding we do not intend to imply that hearsay evidence is inadmissible, or that documentary evidence is incompetent in an administrative hearing. Certainly they can be used, along with other competent evidence to reach a true factual finding. However, where a finding is based solely on this type of evidence and where an adverse party is not able to inquire into the very basis of that evidence, both substantive and procedural due process is violated. At the very least Hall should have had the opportunity to crossexamine [sic] the only

71. LA. REV. STAT. ANN. § 49:956(2) (West 1987).
72. 505 So. 2d 744 (La. Ct. App. 1987).
73. *Id.* at 745-46.
74. *Id.* at 746.
75. *Id.*

evidence used against him.[76]

Hall reveals that when technical rules of evidence are used appropriately, they promote fundamental fairness.[77]

Interestingly, even courts that uphold the flexibility of the administrative process recognize that credibility risks are inherent in the admission of hearsay evidence.[78] This concern resulted in the judicial formulation of the residuum rule.[79] This rule allows the admission of hearsay evidence, but restricts its dispositive use.[80] The indiscriminate admission of problematic evidence heightens the potential for confusion and abuse, which is contrary to the goal of the administrative process.

Adherence to the residuum rule would require the reversal of an administrative finding that is based solely on hearsay evidence.[81] The per se restriction against dispositive use of hearsay evidence regardless of the reliability of this evidence is a clear oversight. The residuum rule does not suggest that traditionally reliable hearsay evidence could be admissible for dispositive use. Rather, the residuum rule prohibits the dispositive use of all hearsay evidence absent other supporting evidence. Most trial judges would not adopt such a restrictive view.[82]

Some courts are critical of modern evidentiary law principles when they are confronted with the admissibility of hearsay. This was particularly evident in the development of the residuum rule. Consistent

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76. *Id.* at 747.

77. This decision is consistent with the Federal Rules of Evidence. *See, e.g.*, FED. R. EVID. 805.

78. *See, e.g.*, Richardson v. Perales, 402 U.S. 389, 402 (1971).

79. The first announcement of the residuum rule is in Carroll v. Knickerbocker Ice Co., 218 N.Y. 435, 440-41, 113 N.E. 507, 508-09 (1916). The United States Supreme Court implicitly adopted the rule in Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229-30 (1938), in which the court held that mere uncorroborated hearsay cannot support an administrative order because an order must be based on substantial evidence.

80. Under the residuum rule, the trier of fact can rely on hearsay testimony only if some nonhearsay evidence exists on the record. *See, e.g., Carroll*, 218 N.Y. at 440, 113 N.E. at 509 (while administrative inquiry is not limited by the rules of evidence, a residuum of legal evidence must support the claim).

81. *See, e.g., Carroll*, 218 N.Y. 435, 113 N.E. 507 (1916); *see also* Griffin v. Heath, 257 A.2d 488 (D.C. 1969) (affirming order of the Director of Motor Vehicles because hearsay evidence supported the order).

The APA, when drafted, effectively incorporated the original residuum rule. Thus, in application, reliable and probative evidence was uniquely nonhearsay. *See* S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945) (stating that while the exclusionary rules of evidence do not apply to administrative procedures, no finding may be made except on some relevant, reliable, and probative evidence).

82. The Federal Rules of Evidence provide explicitly defined exceptions under which the circumstances of trustworthiness allow the admission of hearsay. *See* FED. R. EVID. 803, 804.

with traditional administrative law principles, the residuum rule was never intended to be an evidentiary rule of exclusion.[83] This is true notwithstanding the reason for the rule's development.[84] The residuum rule unnecessarily encourages the admission of incompetent evidence although it compromises exclusionary discretion in the administrative process. The residuum rule is not a satisfactory solution to the extraneous evidence problem. Although leading commentators criticize the legal residuum rule,[85] the rule is followed in a majority of states.[86]

In *Richardson v. Perales*[87] the United States Supreme Court modified the traditional application of the residuum rule. This modification applies to federal administrative proceedings.[88] In *Richardson* a party challenged the admissibility and dispositive use of physician reports in a social security disability claim hearing.[89] The government advanced these reports as dispositive proof to defeat the merits of the appellant's disability claim.[90] Although the proffered reports are hearsay, the Court affirmed the administrative judge's admission and dispositive use of such evidence.[91] The *Richardson* Court rejected the purity of the residuum rule and allowed the evidence to be admitted based on its reliability and fairness.[92] The Court stated: "Courts 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."[93]

The *Richardson* analysis parallels modern theories of evidence. A Colorado court recently stated: "[T]he use of hearsay evidence . . . does not violate due process guarantees so long as the hearsay evidence 'is sufficiently reliable and trustworthy, and as long as the evidence possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs.' "[94]

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83. *See generally* B. SCHWARTZ, ADMINISTRATIVE LAW § 117 (1976) (arguing that the rule has been misinterpreted occasionally to prohibit the use of evidence in administrative proceedings that would not be admissible under the federal rules).

84. The rule's development in *Carroll* merely precludes a decision from being based *solely* on hearsay or other evidence not admissible under the Federal Rules. *See id.*

85. B. SCHWARTZ, ADMINISTRATIVE LAW § 7.4, at 350 (2d ed. 1984).

86. *Id.* § 7.4, at 356.

87. 402 U.S. 389 (1971).

88. *See* Pierce, *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 8-9 (1987).

89. Richardson v. Perales, 402 U.S. 389, 390 (1971).

90. *Id.* at 392-93.

91. *Id.* at 410.

92. *Id.*

93. *Id.* at 405.

94. Hancock v. State Dep't of Revenue, 758 P.2d 1372, 1377 (Colo. 1988) (quoting

Proponents of the administrative law tradition often argue that the application of the legal theories of hearsay disrupts the administrative process.[95] This viewpoint fails to recognize that hearsay law restraints are not mere technicalities, but are fundamental principles which seek to preserve adversarial due process. "[T]he hearsay rule is not a technical rule of evidence but a basic, vital and fundamental rule of law which ought to be followed by administrative agencies at those points in their hearings when facts crucial to the issue are sought to be placed on the record."[96] The administrative process, though flexible in origin, must not be exempt from hearsay rules. Hearsay rules are necessary to preserve fundamental adversarial fairness. Without them, the credibility of evidence that is offered would be constantly challenged, and unjust speculation would be permitted in an administrative disposition. Recent trends in the administrative law field recognize the importance of adhering to the hearsay rule.[97]

The actual application of the hearsay rule and its exceptions is sometimes challenging. Recognition of the appropriate method of review of evidence in administrative proceedings should be the primary consideration. Application of technical evidentiary law in administrative proceedings is the desirable remedy. The administrative process can no longer use an informal system to review evidence and continue to profess adherence to the adversarial process.

III. THE CONFLICT BETWEEN THE CONSTITUTIONAL EXCLUSIONARY RULE THEORIES AND THE ADMINISTRATIVE PROCESS

The traditional view in administrative procedures opposes application of the constitutional exclusionary rule.[98] This is not surprising given the administrative process's history of rejecting the rules of evi-

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Colorado Dep't of Revenue v. Kirke, 743 P.2d 16, 21 (Colo. 1987)).

95. *See, e.g.*, Davis, *Hearsay in Administrative Hearings*, 32 GEO. WASH. L. REV. 689 (1964) (distinction between hearsay and nonhearsay is detrimental in the administrative process); Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 12-17 (excluding all hearsay prevents the use of some probative evidence).

96. Blue Mountain Area School Dist. v. Commonwealth, 94 Pa. Commw. 485, 488, 503 A.2d 1073, 1075 (1986) (quoting Bleilevens v. State Civil Serv. Comm'n, 11 Pa. Commw. 1, 5, 312 A.2d 109, 111 (1973)).

97. *See, e.g.*, Carlton v. California Dep't of Motor Vehicles, 203 Cal. App. 3d 1428, 1433-34, 250 Cal. Rptr. 809, 811 (Ct. App. 1989); Eastman v. Department of Pub. Aid, 178 Ill. App. 3d 993, 996-97, 534 N.E.2d 458, 460-61 (1989); Midlands Util., Inc. v. South Carolina Dep't of Health and Envtl. Control, 298 S.C. 66, 68-69, 378 S.E.2d 256, 257-58 (1989).

98. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); United States v. Janis, 428 U.S. 433 (1976); Holte v. State Highway Comm'r, 436 N.W.2d 250 (N.D. 1989).

dence.[99] All too often, courts have refused to apply constitutional exclusionary rules to civil-law proceedings[100] because of the exaggerated differences between criminal and civil-law proceedings. In fact, the common thread of the adversarial system provides more similarities than differences.[101]

The application of exclusionary rule theories has long been considered a requirement in criminal proceedings.[102] The theories are intended to serve as a deterrent to challenged police practices.[103] In criminal proceedings, protection against state manipulation of principles of liberty is a primary concern.[104] However, procedural safeguards should not be limited to criminal cases. All judicial proceedings that may infringe on individual rights, whether such proceedings concern property entitlements or criminal proceedings, deserve procedural safeguards.

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99. *See supra* note 95 and accompanying text.

100. *See* cases cited *supra* note 98. The Fourth Amendment to the United States Constitution guards against unreasonable searches and seizures by government officials. Unlike the Fifth Amendment, the Fourth Amendment does not textually preclude the admission of evidence that is in breach of its provisions. Consequently, the judiciary developed the exclusionary rule to preserve the substantive liberties that the Fourth Amendment protects. The Fourth Amendment directly applies to the federal government and is applied to the individual states through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

101. For a long time, the Supreme Court has had a jurisprudential interest in the application of constitutional safeguards to both criminal and civil adversarial proceedings. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Goldberg v. Kelly, 397 U.S. 254 (1970); Greene v. McElroy, 360 U.S. 474 (1959).

This interest has not manifested itself in uniform application of exclusionary rule theories to civil proceedings. *See* Note, *Admissibility of Illegally Seized Evidence in Subsequent Civil Proceedings: Focusing on Motive to Determine Deterrence*, 51 FORDHAM L. REV. 1019 (1983) (explaining various criteria used by different courts to determine the applicability of the exclusionary rule in civil proceedings).

In One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), the Court noted the procedural similarities between civil forfeiture proceedings and criminal actions. *Id.* at 697-702. The Court reasoned that the illegally seized evidence was excludable under Fourth Amendment principles. *Id.* at 702.

102. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 648-49 (1961); Wolf v. Colorado, 338 U.S. 25, 28 (1949); Weeks v. United States, 232 U.S. 383, 385 (1914).

103. *See* cases cited *supra* note 102.

104. *See Mapp*, 367 U.S. at 659.

IV. FOURTH AMENDMENT CHALLENGES

The propriety of applying constitutional exclusionary theories to the administrative process remains a problem.[105] When the government violates an individual's fundamental liberties in evidence production, constitutional theories of exclusion should be applied equally to those authorities who so act, be they civil or criminal. "It is anomalous to enforce opposite rules in administrative and criminal proceedings concerning evidence that is blighted by the same pollution; an unlawful search violates the identical privacy."[106] Fairness demands that the exclusionary rule be applied in administrative proceedings when appropriate, because to do otherwise raises significant doubt about the legitimacy of the adversarial administrative function.[107]

In *Turner v. City of Lawton*[108] the Oklahoma Supreme Court held that suppressed evidence in a criminal action cannot be admitted in a related administrative proceeding.[109] The City of Lawton dismissed the petitioner from public employment when the police found narcotics in his residence.[110] Subsequent to the petitioner's discharge, the criminal charges were dismissed on Fourth Amendment grounds.[111] In the related post-termination administrative hearing, the challenged criminal evidence was found admissible and dispositive.[112]

On appeal the Oklahoma Supreme Court held that the evidence should have been excluded from the administrative action.[113] By doing this, the court intuitively recognized the need to apply exclusionary theories to the administrative process.[114] The court rejected the city's argument that wrongfully obtained evidence should remain admissible in administrative hearings and held that such disputed evidence should be excluded to deter municipal authorities from engaging in unlawful searches and seizures.[115] The court stated:

> Here, we have a city law enforcement officer and a city civil proceeding; thus the deterrence value of applying the exclusionary rule is ob-

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105. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984); Smith Steel Casting Co. v. Brock, 800 F.2d 1329 (5th Cir. 1986); Tirado v. Commissioner, 689 F.2d 307 (2d Cir. 1982), *cert. denied*, 460 U.S. 1014 (1983).

106. B. SCHWARTZ, ADMINISTRATIVE LAW § 7.11 (2d ed. 1984).

107. *See id.*

108. 733 P.2d 375 (Okla. 1986), *cert. denied*, 483 U.S. 1007 (1987).

109. *Id.*

110. *Id.* at 382.

111. *Id.*

112. *Id.*

113. *Id.* at 375.

114. *See id.* at 381-82.

115. *Id.* at 379.

> vious. If on the other hand, the evidence can be used to discharge Turner from his job, even though the criminal charges were dismissed, there would still be a substantial incentive to the city's police officers to engage in further unlawful searches especially when municipal employees are the targets thereof.[116]

By recognizing the importance of applying exclusionary theories to the administrative process, the *Turner* court significantly preserved principles of fundamental fairness. State constitutional principles greatly influenced the technical readings of *Turner*.[117] However, exclusionary rule application in administrative proceedings has not found general acceptance,[118] and holdings like *Turner* are in the distinct minority.[119]

Given modern courts' apparent willingness to strengthen fairness determinations in contested administrative proceedings, the growth of constitutional exclusionary safeguards within these proceedings should become more evident although not without limitations.[120]

In *Sheetz v. Mayor of Baltimore*[121] the Maryland Court of Appeals gave limited approval to the application of exclusionary rules to the administrative process. This approach compromises traditional administrative thinking.[122] The petitioner in *Sheetz* was discharged from his public employment as a result of narcotics possession charges.[123] As in *Turner*, the underlying criminal charges were dismissed on Fourth Amendment grounds.[124] The court found the challenged evidence admissible in the post-termination hearing, however, and the evidence was dispositive of the termination issue.[125] On appeal the *Sheetz* court held that challenged evidence should be suppressed even in administrative actions if the government obtained its evidence by "bad faith" actions.[126] The court held:

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116. *Id.*

117. *See id.* at 380-82.

118. *See* Note, *The Exclusionary Rule in Administrative Proceedings*, 54 GEO. WASH. L. REV. 564, 571-83 (1986).

119. The judicial development of the cost-benefit analysis of the admissibility of evidence has significantly reduced the opportunity to use exclusionary rules during the administrative process. This is detrimental to basic constitutional protections. *See* Schwartz, *Administrative Law Cases During 1988*, 41 ADMIN. L. REV. 131, 141-43 (1989).

120. *See supra* note 119.

121. 315 Md. 208, 553 A.2d 1281 (1989).

122. *See supra* note 118 and accompanying text.

123. Sheetz v. Mayor of Baltimore, 315 Md. 208, 211, 553 A.2d 1281, 1282 (1989).

124. *Id.* at 210, 553 A.2d at 1282.

125. *Id.* at 211, 553 A.2d at 1282-83.

126. *Id.* at 210, 553 A.2d at 1282. The purpose of the exclusionary rule has been debated since its development. Some have viewed this rule as a personal Fourth Amendment constitutional right, while others have opined that the rule is merely a judicial

> We note that the hearing officer below, in his thorough review of the case, touched on many of these issues. However he seemed to conclude that illegally obtained evidence is always admissible in civil discharge proceedings. Because such evidence, where properly challenged, is inadmissible upon a finding of bad faith, we must remand for a new hearing in accordance with this opinion.[127]

In reaching this conclusion, the court stated that in the absence of such a holding, due process protections would necessarily be compromised.[128] The court reasoned that, although no actions may occur as police attempt to find sufficient evidence to support criminal proceedings against an individual, the police are not necessarily concerned with employment regulations in termination proceedings and, thus, are not tempted to violate Fourth Amendment rights to obtain evidence to support such proceedings.[129] The court felt that under these circumstances, the exclusionary rule offers only minimal deterrent benefits and should not necessarily be applied to administrative proceedings.[130]

These arguments are specious and unconvincing. A suggestion that the police are somehow tempted to violate Fourth Amendment rights because of the nature of the proceeding calls into question the veracity of our institutional systems. This type of thinking is stirred by the

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deterrent against suspect government conduct. *See* Yarborough, *The Flexible Exclusionary Rule and the Crime Rate*, 6 AM. J. CRIM. L. 1 (1978); Note, *Admissibility of Illegally Seized Evidence in Subsequent Civil Proceedings; Focusing on Motive to Determine Deterrence*, 51 FORDHAM L. REV. 1019 (1983). This academic discourse was ended by the Supreme Court in United States v. Calandra, 414 U.S. 338 (1974). In *Calandra* the Supreme Court held that the deterrent function was the primary purpose of the exclusionary rule. *Id.* at 347. This holding presupposes a balancing test for judicial evaluation of deterrence benefits against the societal costs of excluding evidence. Since *Calandra* the Supreme Court has employed balancing principles when it determines the admissibility of illegally seized evidence. This is particularly evident in civil litigation disputes. *See* United States v. Jones, 428 U.S. 433, 455-58 (1976); Dripps, *Living With Leon*, 95 YALE L.J. 906 (1986). Given the Court's acceptance of the deterrence theory, the development of the good faith exception to application of the exclusionary rule arguably remains plausible. However, this conclusion is not without critics. Proponents of the good faith exception argue that the application of the exclusionary rule to criminal law proceedings results in freedom for wrongdoers. These arguments are simplistic at a minimum, and inconclusive as fact. *See* LaFave, *"The Seductive Call of Expediency"*: United States v. Leon, *Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895, 904. However, recent Supreme Court decisions have accepted such notions. *See* United States v. Leon, 468 U.S. 897 (1984); Nix v. Williams, 467 U.S. 431 (1984). Thus, the Court replaced the rationale of judicial integrity with pragmatic concerns for deterrence. *See* Note, *supra* note 118, at 367-68 (opponents of the exclusionary rule have long sought to weaken the judicial integrity rationale by advancing deterrence as the primary concern of the rule).

127. *Sheetz*, 315 Md. at 217, 553 A.2d at 1085 (footnote omitted).

128. *Id.* at 213, 553 A.2d at 1283.

129. *Id.* at 215, 553 A.2d at 1284.

130. *Id.*

meaningless attempt to justify application of the exclusionary rule on the basis of deterrence.[131] The unfortunate result of this analysis is the weighing of individual fundamental freedoms against hypothetical theories of social economics. Freedoms should not be assigned monetary values.[132]

The deterrent effect alone should not necessarily be dispositive of the application of the exclusionary rule within the administrative process. Instead, the exclusionary rule should find acceptability as a remedial safeguard against Fourth Amendment abuses. The *Sheetz* court's holding apparently agrees with this conclusion. The court stated:

> As a matter of administrative law, we are unwilling to hold that such evidence is always admissible. Although discharge proceedings are not usually designed to be punitive and therefore do not fall within the scope of primary police interest, they may be manipulated to serve punishment purposes. In this context, the police deterrent gained from barring the admission of illegally obtained evidence is needed. We therefore hold that such evidence is inadmissible in civil administrative discharge proceedings where the defendant establishes that the police were improperly motivated to illegally seize evidence to benefit civil proceedings.[133]

Minnesota recently faced similar constitutional challenges. In *Minnesota State Patrol Troopers Association v. State Department of Public Safety*[134] the Minnesota Court of Appeals upheld the application of exclusionary rules to state arbitration proceedings.[135] The petitioner in this case was a public employee who was discharged from his work for conduct unbecoming a public servant.[136] In post-termination arbitration proceedings, the arbitrator found admissible evidence that had been challenged on Fourth Amendment grounds. This evidence was dispositive on the issue of the petitioner's dismissal.[137] Specifically, objections were filed alleging that petitioner's residence had been subject to an improper search and seizure by the government.[138] Consistent with traditional administrative thought, an arbitrator found the challenges to be meritless.[139] The petitioner agreed that the challenged

131. *See supra* note 126.

132. *See* Note, *supra* note 118, at 570-71.

133. Sheetz v. Mayor of Baltimore, 315 Md. 208, 215-16, 553 A.2d 1281, 1284-85 (1989).

134. 437 N.W.2d 670 (Minn. Ct. App. 1989).

135. *Id.* at 676.

136. *Id.* at 672-73.

137. *Id.* at 674.

138. *Id.* at 674-75.

139. *Id.* at 674.

search was conducted pursuant to an outstanding search warrant.[140] His challenge was based on a claim of insufficient probable cause to support the issuance of the search warrant.[141] The state district court affirmed the decision of the arbitrator and held that the arbitrator properly admitted the evidence because it was obtained under an existing search warrant.[142]

The Minnesota Court of Appeals rejected the argument that the requirement of probable cause is irrelevant in a civil action about a labor dispute and reversed the district court.[143] The court held that evidence seized pursuant to a defective search warrant must be suppressed.[144] The court specifically indicated that its suppression rule was not conditional and could be applied in proceedings other than criminal proceedings.[145]

> Because we find that the search warrant lacked probable cause and we declined to adopt a good-faith exception, we hold that evidence seized in the search should have been suppressed at the arbitration hearing. The primary purpose, if not the sole purpose, of the exclusionary rule is to deter future unlawful police conduct. To give effect to this deterrent function, we cannot allow one government agency to use the fruits of unlawful conduct by another branch of the same agency to obtain an employee's dismissal.[146]

The Minnesota Court of Appeals obviously recognized the importance of preserving fundamental principles of due process in administrative proceedings. Due process principles should apply to criminal proceedings, and they should not neglect the protective safeguards that Fourth Amendment principles are designed to preserve. "It would seem wholly at odds with our tradition to allow the admission of evidence illegally seized by Government agents in discharge proceedings, which the Court has analogized to proceedings that involve the imposition of criminal sanctions . . . ."[147]

Administrative tribunals should be applying constitutional exclusionary theories technically to the administrative process. Leading commentators acknowledge the importance of the development of the exclusionary rule in safeguarding Fourth Amendment principles,[148]

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140. *Id.* at 675-76.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 676.
145. *See id.* (Minnesota declined to adopt the good faith exception to the exclusionary rule which was announced in United States v. Leon, 468 U.S. 897 (1984)). *Id.*
146. *Id.* (citations omitted).
147. *Id.* at 676 (quoting Powell v. Zuckert, 366 F.2d 634, 640 (D.C. Cir. 1966)).
148. *See* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Princi-*

notwithstanding the ever-present criticism.[149] The focus of this criticism lies in the rule's limited application within criminal proceedings.[150] Limited application should be expected, however, because of the developmental origins of the exclusionary rule. A limitation on application, therefore, does not reflect a total conceptual rejection.

Unfortunately, the Supreme Court has accepted, with limitation, some of the critics' arguments[151] by developing and applying exceptions to the exclusionary rule within the criminal process.[152] For the moment, constitutional exclusionary rule theories generally remain the law, although these theories have been modified.[153] This modification should find limited acceptance, if any, in criminal proceedings.[154] Thus, the current criticism against exclusionary rule usage should not prevent application of the rule in alternative dispute forums. Indeed, traditional administrative thinking rejects application of the exclusionary rule and, thus, weakens the importance of the debate about its exceptions.[155]

Although the Supreme Court generally continues to sanction ex-

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ples Basis" Rather Than on "an Empirical Proposition?," 16 CREIGHTON L. REV. 565 (1983); LaFave, *supra* note 126; Morris, *The Exclusionary Rule, Deterrence and Posner's Economic Analysis of Law*, 57 WASH. L. REV. 647 (1982).

149. *See supra* note 126.

150. The United States Attorney General's Task Force on Violent Crime recommended that courts should not exclude evidence from consideration at trial if the officer acted reasonably in good faith. *See* ATTORNEY GEN.'S TASK FORCE ON VIOLENT CRIME, UNITED STATES DEPARTMENT OF JUSTICE FINAL REPORT 55 (1981).

At the judicial level, retired Chief Justice Warren Burger long advanced the abolition of the exclusionary rule. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-24 (1971) (Burger, C.J., dissenting).

151. *See* United States v. Leon, 468 U.S. 897 (1984) (refusing to exclude evidence obtained by the use of a search warrant ultimately found to be invalid); Nix v. Williams, 467 U.S. 431 (1984) (refusing to exclude evidence pertaining to the discovery and condition of the victim's body on grounds that the body ultimately would have been discovered is not a constitutional breach).

152. *See* cases cited *supra* note 151.

153. *Id.*

154. Exceptions to the exclusionary rule are an unjust judicial compromise of Fourth Amendment safeguards. *See, e.g.*, Dripps, *supra* note 126, at 947-48. Illegally seized evidence should not be admissible in either criminal or civil proceedings. If it is admissible, it unjustifiably rejects judicial integrity. As Justice Brandeis observed:

> Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

155. *See supra* note 105.

clusionary rule policies, administrative application of these policies has not received general acceptance by the Court.[156] For example, in *INS v. Lopez-Mendoza*[157] the Court held that constitutional exclusionary rules are not applicable to administrative deportation proceedings.[158] In *INS* the police arrested Lopez-Mendoz and Sandoval-Sanchez, both foreign nationals, summoned them to individual immigration hearings, and thereafter, deported them from the United States.[159] Each respondent was arrested at his employer's premises without the benefit of a search or arrest warrant.[160] At their respective deportation hearings, the INS presented evidence obtained during the allegedly unlawful arrests.[161] Based on the evidence presented, the immigration judges decided to deport the respondents.[162] In an administrative appeal to the Board of Immigration Appeals (BIA), the respondents' counsel raised Fourth Amendment challenges and sought to apply the exclusionary rule.[163] Consistent with traditional administrative thinking, the BIA denied the Fourth Amendment challenges.[164]

On appeal, the United States Supreme Court affirmed the precedent that constitutional exclusionary rules generally only apply to criminal law proceedings.[165] In its decision, the Court acknowledged that certain decisional frameworks exist for determining the applicability of exclusionary rules in noncriminal proceedings.[166] Specifically, the Court identified a cost-benefit analysis which may be used to determine the admissibility of unlawfully seized evidence in a civil deportation hearing.[167] The Court's analysis unnecessarily invites the problem-

156. *See* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).
157. 468 U.S. 1032 (1984).
158. *Id.* at 1050-51.
159. *Id.* at 1034.
160. *Id.* at 1035-37.
161. *Id.* at 1036-38.
162. *Id.*
163. *Id.*
164. *Id.* at 1038.
165. *See id.* at 1041.
166. *Id.* (citing United States v. Janis, 428 U.S. 433 (1976) as the Court's decision that established a framework for determining the applicability of the exclusionary rule).
167. *See id.* The increased attention to the cost-benefit analysis may be attributed to the unique role of deterrence as the justification for application of the exclusionary rule. Such an analytical disposition, however, remains controversial. Some commentators critically note the disproportionate ease in which courts find overwhelming societal costs when weighed against a defendant's expectant constitutional benefits. *See* Schwartz, *Cost-Benefit Analysis in Administrative Law: Does It Make Priceless Procedural Rights Worthless?*, 37 ADMIN. L. REV. 1, 14 (1985). Thus, balancing continues to raise concerns about the integrity of judicial interests in upholding constitutional safeguards. Dripps, *supra* note 126, at 948.

atic justification for reducing exclusionary rule protections.[168]

Although deterrence is an important function, it should not necessarily be the exclusive rationale for evidence suppression. The Court alluded to the weakness of the deterrence function when it noted that "INS's attention to Fourth Amendment interests cannot guarantee that constitutional violations will not occur, but it does reduce the likely deterrent value of the exclusionary rule. Deterrence must be measured at the margin."[169]

It is interesting to note that while the *Lopez-Mendoza* Court condemned the Fourth Amendment violations that may have occurred during the respondents' arrest, it accepted the cost-benefit approach and found the exclusionary rule inapplicable to deportation proceedings.[170] Application of Fourth Amendment constitutional protections should not depend, however, on the type of litigation. The Fourth Amendment was designed to protect and ensure principles of fundamental fairness.

The Supreme Court in *Lopez-Mendoza* expressly left open the question whether exclusion of evidence might be appropriate if the evidence was obtained by egregious violations of the Fourth Amendment.[171] The Ninth Circuit Court of Appeals in *Arguelles-Vasquez v. INS*[172] partially answered the question of what constitutes egregious violations. In that case, the police detained, arrested, questioned, summoned to an immigration hearing, and later deported the respondent, a

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168. Using cost-benefit analysis standards, the *Lopez* Court rejected the use of the exclusionary rule in administrative proceedings. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1041-50 (1984). The Court concluded that the exclusionary rule added little additional protection to Fourth Amendment rights in civil deportation proceedings and that the costs of applying the rule outweighed the benefits. *Id.* at 1050. In an attempt to justify its static conclusions, the Court suggested that exclusion of evidence challenged under the Fourth Amendment would require courts to ignore continuing violations of the law and would unreasonably complicate the administrative process. *Id.* at 1046-49.

The Court's rationale is without constitutional credibility. The continued reliance on the deterrence function for application of the exclusionary rule contributes to this suspect analysis. The deterrence standard necessarily requires a balance between the conduct of a government agent and the respondent's constitutional rights. Justices Brennan and Marshall, in dissent, each argued that the exclusionary rule is derived substantively from the textual requirements of the Fourth Amendment. *Id.* at 1051, 1060. Thus, a litigant's constitutional rights should not be the subject of a pragmatic balance. *Id.* at 1050-51, 1060-61. Both Justices Brennan and Marshall would have precluded the admission of the challenged evidence. *Id.*

169. *Id.* at 1045.

170. *See id.* at 1050.

171. *Id.*

172. 786 F.2d 1433 (9th Cir. 1986), *vacated*, 844 F.2d 700 (9th Cir. 1988) (opinion vacated because petitioner's status changed pursuant to Immigration Reform and Control Act).

foreign national, from the United States.[173] No magistrate issued a warrant prior to the respondent's apprehension and detention.[174] While in detention, the respondent made incriminating statements about his citizenship.[175]

At the deportation hearing, the respondent claimed that he had been seized solely because of his Hispanic ethnicity. The respondent then moved to suppress all evidence obtained in derogation of his Fourth Amendment rights.[176] The respondent requested that the immigration judge call for cross-examination of the arresting officer to explore the legality of the respondent's arrest.[177] The judge denied the respondent's request and refused to apply the exclusionary rule to the administrative process.[178]

On appeal the court held that the refusal of the lower court to apply the exclusionary rule constituted egregious constitutional error.[179]

> An officer who detains an individual based solely on Hispanic appearance in order to inquire about the legality of the individual's presence in this country flouts the well-established pronouncement . . . that Hispanic appearance alone is insufficient to justify a stop. . . . such official conduct constitutes an egregious violation of the fourth amendment requiring suppression of any evidence obtained through the stop.[180]

An egregious misconduct standard for the application of exclusionary rule theories in the administrative process is too narrow. This standard invites judicial complicity when constitutionally defective evidence is presented to the court.

> Sufficient reason for excluding from civil deportation proceedings evidence obtained in violation of the Fourth Amendment is that there is no other way to achieve "the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."[181]

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173. *Id.*
174. *Id.*
175. *Id.* (Respondent stated he was a citizen of Mexico and had entered the United States without an immigration inspection).
176. *Id.* at 1434.
177. *Id.*
178. *Id.*
179. *Id.* at 1436.
180. *Id.* at 1435.
181. INS v. Lopez-Mendoza, 468 U.S. 1032, 1060-61 (1984) (Marshall, J., dissenting)

Interestingly, the *Arguelles-Vasquez* court avoided all references to the cost-benefit deterrence analysis. Instead, the court focused on Fourth Amendment limitations on governmental privacy encroachments.[182] These holdings are consistent with principles of fundamental fairness.

Thus, when appropriate, the exclusionary rule should be applied within the administrative setting.

> Certainly nothing in the language or history of the Fourth Amendment suggests that a recognition of this evidentiary link between the police and the courts was meant to be foreclosed. It is difficult to give any meaning at all to the limitations imposed by the Amendment if they are read to proscribe only certain conduct by the police but to allow other agents of the same government to take advantage of evidence secured by the police in violation of its requirements. The Amendment therefore must be read to condemn not only the initial unconstitutional invasion of privacy—which is done, after all, for the purpose of securing evidence—but also the subsequent use of any evidence so obtained. . . . Such a conception of the rights secured by the Fourth Amendment was unquestionably the original basis of what has come to be called the exclusionary rule . . . .[183]

Application of the Fourth Amendment exclusionary rule should not be predicated on theories of deterrence alone. Application predicated solely on deterrence theories permits courts to speculate unreasonably about the admission of constitutionally challenged evidence. Improper speculation results from courts' continued insistence on using cost-benefit analyses to determine the admissibility of challenged evidence.

Use of cost-benefit analyses to determine the admissibility of evidence necessarily invites courts to engage in different calculation methods. In so doing, the possibility exists for arbitrary standards of admission evaluation. For understandable reasons, courts should abandon the use of cost-benefit analyses as the principle method for determining the applicability of the exclusionary rule. A return to textual constitutional analysis when Fourth Amendment claims are present would reinstate adversarial integrity to the judicial system and retire pragmatic solutions of constitutional compromise.[184]

(quoting United States v. Calandra, 414 U.S. 338, 357 (1976) (Brennan, J., dissenting)).

182. *See* Arguelles-Vasquez v. INS, 786 F.2d 1433, 1435 (9th Cir. 1986), *vacated*, 844 F.2d 700 (9th Cir. 1988).

183. United States v. Leon, 468 U.S. 897, 933-35 (1984) (Brennan, J., dissenting).

184. *See* Nigro, *The Exclusionary Rule in Administrative Proceedings*, 54 GEO. WASH. L. REV. 564, 587-89 (1986).

V. FIFTH AMENDMENT CHALLENGES

The courts similarly have been reluctant to acknowledge Fifth Amendment defenses in administrative proceedings.[185] This is not surprising given the general understandings of Fifth Amendment development.[186] The growth of Fifth Amendment challenges to evidence was precipitated by the interrogation practices within the criminal law process.[187] The first rules governing the admissibility of these challenged responses were developed in the eighteenth and nineteenth centuries.[188] The goal then, as it is now, was to deny the admission of responses which had been coerced by the government.

Although Fifth Amendment challenges grew out of response to a criminal law problem, this should not prevent the protection's application in administrative proceedings.[189] Because the text of the Fifth Amendment refers to its application in "any criminal case," however, application of the Fifth Amendment to the administrative process remains judicially more circumspect than application of Fourth Amendment protections.[190] The government's use of interrogation in criminal

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185. Though Fifth Amendment privileges have found select administrative acceptance, courts are reluctant to invite general use of such constitutional defenses in administrative proceedings. This reluctance may be due to the textual limitations of the amendment. *See* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (deportation proceedings); Smith v. United States, 337 U.S. 137 (1949) (administrative investigation proceedings); United States v. White, 322 U.S. 694 (1944) (constitutional regulatory proceedings).

186. The Fifth Amendment privilege first developed as a primary defense against the sometimes unfair government practice of compulsory witness interrogation within the criminal law process. *See* Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932), *reprinted in* 73 MICH. L. REV. 39 (1974).

187. *Id.*

188. *See* C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 120 (1954); 8 J. WIGMORE, EVIDENCE § 2250 (3d ed. 1961).

189. This is strengthened by the recognition that certain administrative actions may encourage investigatory and privilege limiting practices. A litigant's self-incrimination defense should and must become paramount for administrative protection. *See* Lefkowitz v. Turley, 414 U.S. 70 (1973).

190. The Fifth Amendment provides in part "nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . . ." U.S. CONST. amend. V. The due process clause of the Fourteenth Amendment has made this portion of the Fifth Amendment applicable to the states. Garrity v. New Jersey, 385 U.S. 493 (1967); Malloy v. Hogan, 378 U.S. 1 (1964).

This Article argues that the primary reason to apply the Fourth Amendment's exclusionary rule should be to achieve the due process standard of judicial integrity, rather than to accomplish the functional goal of deterrence. This is true even though the courts have decided otherwise. Thus, application of the Fourth Amendment appears more likely than the use of Fifth Amendment principles in administrative proceedings. The textual

proceedings enhances such thinking. However, in theory, Fifth Amendment protections are not exclusively within the domain of criminal law.[191]

Application of Fifth Amendment challenges in administrative proceedings remains conditional. To successfully invoke a Fifth Amendment privilege in an administrative proceeding, a witness must show that he probably will be involved in a subsequent criminal prosecution in which the challenged evidence may be dispositive.[192] This is the rule despite the possibility that the government may use the testimony in a later proceeding other than a criminal prosecution.

The ability of administrative bodies to affect individual action may invite questionable civil interrogation. To prevent such potential abuse, Fifth Amendment protections should be applied unconditionally in all administrative proceedings.[193] Failure to do so encourages the compromise of basic human liberties.[194]

> Penalizing a person for asserting the self-incrimination privilege in effect defeats the privilege. Therefore, the constitutional provision creating the privilege must protect an individual not only from punishment for refusing to answer an incriminating question but also from punishment for invoking the privilege . . . . A condition which requires a surrender of a constitutional right, however, may be an unconstitutional condition. It has been held in a variety of situations that a state cannot abrogate a constitutional right by making the forbearance of that right a condition of carrying on a lawful activity and that a person is not bound to relinquish the privilege of carrying on the activity upon failure to comply with such a condition.[195]

Given these procedural reservations, officials in administrative proceedings should recognize Fifth Amendment privileges without prior condition, and this preserves the Fifth Amendment safeguards.

The effect of Fifth Amendment claims on the introduction of evi-

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language of the Fifth Amendment may continually restrict its use. However, the language should be irrelevant. The focus of the Fifth Amendment is on the evidence rather than on the reasonableness of the securing officer's conduct. As a result, Fifth Amendment protections should be applied more frequently than Fourth Amendment safeguards.

191. *See supra* note 189 and accompanying text.

192. Marchetti v. United States, 390 U.S. 39, 50 (1968); Estate of Fisher v. Commissioner, 905 F.2d 645, 649 (2d Cir. 1990); United States v. Jones, 703 F.2d 473, 476 (10th Cir. 1983).

193. *See* Baxter v. Palmigiano, 425 U.S. 308, 334 (1976) (Brennan, J., concurring in part and dissenting in part).

194. *See* United States v. Spector, 343 U.S. 169, 177-78 (1952) (Jackson, J., dissenting).

195. Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. CHI. L. REV. 472, 495 (1957) (footnotes omitted).

dence differs significantly between civil and criminal proceedings. The primary difference is that an adverse inference may be drawn from a witness's silence in a civil proceeding.[196] Allowing a negative inference to be drawn from a witness's silence in a civil proceeding arguably compromises Fifth Amendment privileges. This is particularly true when a party advances Fifth Amendment claims in proceedings that appear to have overlapping civil and criminal law functions.[197] Because of their regulatory demands, administrative law proceedings are proceedings of this type.

> In a civil suit involving only private parties, no party brings to the battle the awesome powers of the government, and therefore to permit an adverse inference to be drawn from exercise of the privilege does not implicate the policy considerations underlying the privilege. But where the government "deliberately seeks" the answers to incriminatory questions, allowing it to benefit from the exercise of the privilege aids, indeed encourages, governmental circumvention of our adversary system.[198]

The administrative process should not allow adverse inferences to be drawn from a witness's silence, which clearly compromises the witness's civil liberties. The administrative process, despite this conclusion, remains traditional and selective in its application of Fifth Amendment protections. For this, recent administrative decisions deserve criticism.

In *Roach v. National Transportation Safety Board*[199] the Tenth Circuit Court of Appeals upheld the administrative denial of Fifth Amendment witness challenges.[200] The appellant in *Roach* argued that his compelled testimony in an administrative proceeding compromised his Fifth Amendment right against self-incrimination.[201] The court, noting that the Fifth Amendment has two distinct protections, rejected this claim. The court held that (1) a defendant in a criminal trial has an absolute right not to be compelled to testify; and (2) any witness, including a defendant, in any governmental proceeding, formal or informal, has the constitutional right not to answer questions that may incriminate him.[202]

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196. *Id.* at 475-76.

197. *See id.* at 493-511 (discussing discharge of public employees for asserting Fifth Amendment privilege).

198. Baxter v. Palmigiano, 425 U.S. 308, 335 (1976) (Brennan, J., concurring in part and dissenting in part).

199. 804 F.2d 1147 (10th Cir. 1986), *cert. denied*, 486 U.S. 1006 (1988).

200. *Id.* at 1151.

201. *Id.*

202. *Id.* Unlike the arguments advanced against conditional Fifth Amendment civil application, fear of imminent criminal prosecution is the traditional standard of civil

The *Roach* court's decision hinged on whether the proceedings were to be considered civil or criminal in nature; the nature of the proceeding was the dispositive issue.[203] The appellant contended that the administrative proceedings were quasi-criminal and, therefore, absolute immunity prevailed.[204] The court found Congressional intent to be contrary to this policy and rejected the claim that the proceeding was criminal in nature.[205] Based on this holding, the court upheld the lower court's refusal to apply the Fifth Amendment to the administrative proceeding. By doing this, the court rejected appellant's general claim of Fifth Amendment violations.[206] The *Roach* court held that for an administrative claimant to protect his privilege against self-incrimination, he must make specific and timely objections to each question that the government poses.[207] The record in *Roach* is devoid of such objections.[208] Perhaps the issue in *Roach* is best explained by suggesting that counsel inappropriately objected to the proffered evidence, and the court justifiably responded by reference to the most technical of evidentiary theories.[209] Potential compromises of due process protections should not be overridden by technical evidentiary rules.

The *Roach* court utilized a traditional approach by differentiating between criminal and civil proceedings. The court's adherence to traditional administrative law theories resulted in a compromised verdict in which the court denied the defendant a valid privilege by government regulators. As a result of the court's action, it found fault within the appellant's own testimony. This comment is made without passing judgment on the merit of the *Roach* court's statutory findings.[210] The court should have used a less limiting definition of Fifth Amendment

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incrimination claims. Such claims must show legitimate apprehension of danger from direct governmental inquiry. *See* United States v. Jones, 703 F.2d 473 (10th Cir. 1983). In the absence of immunity, a civil litigant may experience adverse inferences from their chosen privilege of silence.

203. Roach v. National Transp. Safety Bd., 804 F.2d 1147, 1152-53 (10th Cir. 1986), *cert. denied*, 486 U.S. 1006 (1988).

204. *Id.* at 1150-52.

205. *Id.* at 1153.

206. *Id.* at 1154.

207. *Id.* at 1152 n.5.

208. *Id.*

209. *See* FED. R. EVID. 103(a). The rule provides in part:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and, in case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.

Id.

210. *See* Roach v. National Transp. Safety Bd., 804 F.2d 1147, 1153 (10th Cir. 1986), *cert. denied*, 486 U.S. 1006 (1988).

privilege.

In *Thomas v. Bible*[211] the United States District Court for the District of Nevada rejected the plaintiff's claim that his Fifth Amendment rights were violated when he refused to testify before the State Gaming Commission and, as a result, the plaintiff was denied the return of his state gaming license.[212] The plaintiff was appealing the Commission's revocation of his state gaming license due to his alleged association with organized crime.[213] The plaintiff, asserting Fifth Amendment defenses, refused to participate in the administrative investigation of the matter.[214] He refused to cooperate with the administrative investigation because he feared having to incriminate others while simultaneously encouraging the discovery of additional evidence that could be used against him in subsequent criminal proceedings.[215] Such strategic thinking has not received judicial approval for preserving Fifth Amendment challenges within the administrative process. Instead, courts have recognized that self-incrimination claims within the administrative process are only preserved by timely objections to specific inquiries by the government.[216]

In rejecting the plaintiff's Fifth Amendment challenges, the *Bible* court returned to the familiar theme that the administrative hearing is not criminal in scope, but is a civil and administrative inquiry.[217] As a result, the court dismissed all claims of absolute immunity.[218] Furthermore, responding to the plaintiff's self-incrimination arguments, the court noted that speculative fears of criminal prosecution are insufficient to invoke Fifth Amendment protections.[219]

> To properly invoke the privilege against compulsory self-incrimination, a defendant must be faced with "substantial hazards of self-incrimination," that are "real and appreciable" and not merely "imaginary and unsubstantial." Moreover, the defendant must have "reasonable cause to apprehend [such] danger from a direct answer" to questions posed to him.[220]

The court likewise rejected the plaintiff's arguments that the potential incrimination of others justifies extending Fifth Amendment

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211. 694 F. Supp. 750 (D. Nev. 1988), *aff'd*, 896 F.2d 555 (9th Cir. 1990).
212. *Id.* at 755, 768.
213. *Id.* at 754.
214. *Id.* at 765.
215. *Id.*
216. *See id.* at 764.
217. *Id.*
218. *Id.* at 766.
219. *See id.* at 764.
220. *Id.* (citations omitted).

protections.[221] The court held that this type of injury was too remote to invoke Fifth Amendment protections.[222]

Perhaps this case turns on the issue of specificity of proof rather than being a theoretical rejection of applying the Fifth Amendment to the administrative process. If so, then the court's actions are persuasive. A critical review of the *Bible* court's rationale suggests, however, an indifference to Fifth Amendment protections. The court supports this interpretation in its holding that application of the Fifth Amendment in administrative proceedings is accepted against refusals to a direct inquiry, but rejected when applied to claims of coerced cooperation in investigatory proceedings by the government.[223]

Such efforts at distinction are incomplete and are not persuasive. Constitutional compromises of Fifth Amendment protections can occur under either of the controlled situations.

> Compulsive violati[on of] the privilege is present in any proceeding, criminal or civil, where *a government official* puts questions to an individual with the knowledge that the answers might tend to incriminate him. Such a distinction is mandated by one of the fundamental purposes of the Fifth Amendment: to preserve our adversary system of criminal justice by preventing *the government* from circumventing that system by abusing its powers.[224]

Administrative tribunals must readily embrace Fifth Amendment protections without forum restrictions. Governmental threats to compel interrogation of a witness should be the focus of the standard. A finding of these intrusions should result in the exclusion of the evidence as a matter of procedural integrity. Guarantees of administrative fairness demand no less. "As a general rule the exclusionary rule does not attach to civil or administrative proceedings. However, . . . the right to invoke the exclusionary rule at an administrative proceeding would carry a reassuring aura of fairness . . . ."[225]

Admittedly, neither historic nor administrative advocacy permits absolute application of the Fifth Amendment privilege.[226]

In *Ciccone v. Secretary of the Department of Health & Human Services*[227] the court upheld the denial of Fifth Amendment witness

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221. *Id.* at 765.

222. *Id.*

223. *Id.*

224. Baxter v. Palmigiano, 425 U.S. 308, 344 (1976) (emphasis added) (Brennan, J., concurring in part and dissenting in part) (citations omitted).

225. *In re* Establishment Inspection of Hern Iron Works, Inc., 881 F.2d 722, 729 (9th Cir. 1989) (citations omitted).

226. *See* California v. Byers, 402 U.S. 424 (1971).

227. 861 F.2d 14 (2d Cir. 1988).

challenges in an administrative proceeding.[228] In *Ciccone* the petitioner, who was self-employed, filed for old-age insurance benefits under the Social Security Act. The petitioner alleged that he had retired as of a certain date, but the petitioner refused to supply proof of his actual retirement date. Based on the petitioner's refusal, the secretary denied the requested benefits pending further proof of the petitioner's retirement. The petitioner refused to comply with the government's requests for additional information regarding his occupation and asserted claims that compliance would violate his Fifth Amendment right. Without this necessary information, the secretary felt compelled to deny petitioner's request for retirement benefits.[229]

The court rejected, as frivolous, the petitioner's Fifth Amendment challenges.[230]

> Thus, simply because the government provides benefits to those who qualify and who comply with its regulations, does not mean that it must give benefits to all those who apply regardless of their compliance with those regulations. Nor does it mean that one who has relied on the promise of benefits to come is compelled to file for them upon retirement. Mr. Ciccone fails to meet the first test for claiming the protection of the privilege of the Fifth Amendment: his application was not compelled.[231]

The administrative denial of petitioner's Fifth Amendment argument in the *Ciccone* case was proper and reasonable as a matter of law. In the absence of the requisite compulsory interrogation threats, Fifth Amendment defenses are without cause.

Given the courts' concerns about application of the exclusionary rule, indiscriminate use of the Fifth Amendment's defenses may encourage restrictive constitutional application. This should be avoided by administrative litigants. Notably, the court in *Ciccone* did not reject application of Fifth Amendment privileges based on criminal or civil dichotomies nor on forum descriptions. The court demonstrated judicial foresight and rejected the application of both these traditional theories.

In *Esposito v. Adams*[232] the United States District Court for the District of Illinois affirmed the rejection of Fifth Amendment constitutional challenges in an administrative proceeding.[233] The plaintiff in *Esposito* argued that investigatory questioning conducted prior to his

228. *Id.* at 18.
229. *Id.* at 15.
230. *Id.* at 18.
231. *Id.* at 17.
232. 700 F. Supp. 1470 (N.D. Ill. 1988).
233. *Id.* at 1478.

extradition hearing breached his Fifth Amendment protections.[234] In particular, the plaintiff claimed that the inquiry was made even though he expressly desired to see an attorney.[235] The plaintiff argued that the alleged breaches were self-incriminating.[236]

In rejecting the plaintiff's constitutional challenges, the *Esposito* court held that the Fifth Amendment's guarantees against self-incrimination are not applicable to extradition proceedings.[237] The court's decision was based on its finding that extradition proceedings are neither criminal nor adversarial.[238] The absence of rational selectivity makes the court's decision a questionable one. Furthermore, the court's insistence on reviewing Fifth Amendment challenges on a forum definition standard is troubling. Though the court took a very traditional approach in its decision, it should not have given judicial approval to this type of abuse, regardless of the nature of the proceeding.

Further review of the *Esposito* decision demonstrates a rejection of the Sixth Amendment.[239] The rhetorical discussion of Sixth Amendment challenges presumably emanated from the plaintiff's claims that he had been interrogated in the absence of any counsel in violation of his right to counsel.[240] In dicta the *Esposito* court implied that Sixth Amendment protections apply only in criminal proceedings.[241] This determination is constitutionally doubtful.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. . . . We have formalized these protections in requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment . . . . This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, but also in all types of cases where administrative and regulatory actions were under scrutiny.[242]

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234. *Id.* at 1477.

235. *Id.*

236. *Id.* at 1478.

237. *Id.* at 1477. The *Esposito* court in part sought to defend its rationale on the factual basis that the challenged inquiry was not significantly intruding. It did not argue that it excluded the Fifth Amendment privileges because of the nature of the proceedings. *See id.* at 1478. Judicial preservation of constitutional rights, however, should not depend on the degree of the claimed intrusion.

238. *Id.*

239. *See id.*

240. *Id.* at 1477.

241. *Id.* at 1478.

242. *See* Greene v. McElroy, 360 U.S. 474, 496-97 (1959). Congress enacted the Ad-

Though application of Fifth Amendment privileges to the administrative process remains traditional and selective, litigants deserve more. These constitutional protections should be complied with uniformly regardless of the government forum. Inherent in our adversarial process is the protection of individual liberties. The administrative process must promote these values.

VI. CONCLUSION

The application of technical evidence and constitutional law principles assures fairness of process to the administrative litigant.

> Perhaps the most salient implication of this development is its recognition of the interaction and interdependence of the mechanisms and processes for dispute resolution. The time for insularity and isolation of our judicial and administrative instrumentalities is over. If access to justice is to become realistically available to all Americans, we must learn to select and apply systematically the strengths of each of our mechanisms of redress and resolution.[243]

The administrative application of technical evidence and constitutional law theories increases the formalization of the administrative process. However, this should not invite rejection of the theories. Traditionalists continue to object to such formalization and believe that the process compromises the founding administrative principles of dispatch and flexibility. A universal reminder must be advanced to these observers that the adversarial process, by definition, should provide exclusionary safeguards against problematic evidentiary offerings. Such formalization is fundamental to the adversarial process and must be preserved.

Blinded by past pronouncements, traditional administrative theorists argue that the administrative application of evidence and constitutional law theories inappropriately masks the administrative process in favor of historic advocacy. These observations seek to raise significant doubt about the propriety for such judicial limits.

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and

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ministrative Procedure Act to safeguard right to counsel protections. The administrative process has accepted this right as a fundamental right for some time. Administrative Procedure Act, ch. 24, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344 (1988)).

243. Rosenblum, *Chairman's Message, a New Twist to Exhaustion of Remedies?*, 30 ADMIN. L. REV. v, vii (1978).

the rule simply persists from blind imitation of the past.[244]

The passage of years since the inception of the administrative process has gradually seen institutional changes that warrant more adversarial structure. Recent judicial trends selectively invite such jurisprudential progressions. Because of the inherent limitations of legal commentators to influence institutional reform, the impetus for such change continues to lie with the courts and legislatures of this nation.[245]

244. O.W. HOLMES, *The Path of the Law* in COLLECTED LEGAL PAPERS 187 (1920).

245. The United States Department of Labor recently reviewed its interest in the application of the Federal Rules of Evidence to administrative proceedings. Although the Department recommended many rule revisions, the technical application of the codified hearsay rule remains operative. *See* 29 C.F.R. § 18 (1990).