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Hearing and Believing: What Shall We Tell the Administrative Agencies?

Professor Merrill examines various proposals for evidential reform in administrative adjudication and discusses them in the context of two specific formulations: the "convincing evidence" rule of the original Model State Administrative Procedure Act and the proposed revision of the Model Act, which would impose a "qualified non-jury-trial" rule of admissibility. Professor Merrill proceeds from the premise that the purpose of evidentiary rules is to gain a maximum of useful information for the agency with a minimum of unfairness to the parties. He points out that this goal can be achieved either by qualitative screening of the evidence at the hearing level or by quantitative analysis of the entire record upon judicial review. The author concludes that the latter approach is more likely to serve the ends of efficiency and justice; therefore, he opposes the proposed revision of the Model Act.

Maurice H. Merrill*

Here then the contest begins between the attorneys of the parties; not to elicit the truth, but to shut out the truth by the rejection of testimony by the aid of the arbitrary rules of Courts, and the equally arbitrary and unintelligible law of evidence, which in nine cases out of ten leads to injustice and wrong. Now I ask in all humility, why not let all the testimony without restriction come before the jury, and leave them to judge of the testimony, the facts, and the justice or equity of the case, and under the advisement of the judge, also of the law?¹

* * *

The Anglo-Saxon law of evidence may be compared to a soundly rooted and once symmetrical tree which in the course of years has become lop-sided, full of dry rot and so entangled with vines and creep-

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1. Speech of Delegate Jaques, PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, pp. 459-60 (1942).

ers that it not only obscures the light but it is impossible to tell which are branches and which are parasites.²

* * *

It was very justly observed by a great judge that all questions upon the rules of evidence are of vast importance to all orders and degrees of men: our lives, our liberty, and our property are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded.³

These varying appraisals of the rules devised and applied by the courts to govern the reception and use of evidential material reflect positions each having many adherents among both laymen and lawyers. There are those who would scrap all the rules, letting the trier of fact listen to everything, in the hope that thereby he can get the clearest picture. There are those who believe that some guides are necessary in the interests alike of efficiency and of truth, but who are convinced that many improvements need to be made in our existent practices. Still others consider that the current rules embody as near an approach to perfection as can be made.

The expansion of the use of administrative adjudication in the past century has brought these views to bear upon issues affecting the reception and use of evidence by the tribunals engaged in that adjudication. The relative freedom of rule makers to seek out the bases for policy⁴ renders the problem less acute in that respect.⁵ But for the agencies engaged in adjudicating particular disputes it is essential to have ground rules to be applied to the search for the determinative facts.

What should be the objects of these ground rules? Basically, they should seek to obtain for the agency the information necessary for the application of the statute it is administering to the particular dispute. They should be framed and administered with a view to securing all relevant information, with regard to fairness to the parties, and with care to avoid confusion to the agency.

It is essential to distinguish between two major problems: (1) What evidence may an agency receive and consider? (2) How much evidence will suffice to support an administrative finding of fact? Customarily, courts and writers have been accustomed to deal with both problems under the rubric of "substantial evi-

2. TRAIN, *YANKEE LAWYER* 349 (1944).

3. *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290, 295 (1813) (Marshall, C.J.).

4. See the discussion in 2 DAVIS, *ADMINISTRATIVE LAW* § 15.03 (1958).

5. "When making rules . . . [an agency] may ascertain in any manner it sees fit what rules should be made and it may make such rules without the hearing of any evidence or without regard to the evidence heard." *H. F. Wilcox Oil & Gas Co. v. State*, 162 Okla. 89, 91, 19 P.2d 347, 350 (1933) (Andrews, J.).

dence."⁶ I suggest, however, that we should separate them, in aid both of clarity in analysis and of clear delineation of the policy considerations involved in each.⁷ To borrow from the language of chemistry, the first demands qualitative analysis of the evidence, while the second involves quantitative analysis.

With respect to the question of admissibility, the views of the courts have varied widely. Some judges have considered that the rules applicable in suits at common law, "matured by the wisdom of the ages,"⁸ necessarily must be followed in administrative adjudications,⁹ even to the point of requiring reversal simply because evidence incompetent by the common law was received, regardless of indication of harm to the complaining party.¹⁰ Other courts, probably more numerous, permit the administrators to admit and to consider evidence which would not be allowed by the common-law rules to go before a jury,¹¹ subject only to the qualification that it should be "convincing"¹² or "the kind of evidence on which responsible persons are accustomed to rely in serious affairs."¹³ Still others apply what Dean Wigmore called the "pseudo-liberal rule"¹⁴ that there is no error in admitting evidence outside the common-law categories of competence¹⁵ and that such evidence may be considered in arriving at a decision,¹⁶ but that,

6. *Washington, Virginia & Maryland Coach Co. v. NLRB*, 301 U.S. 142, 147 (1937). See Stason, "Substantial Evidence" in *Administrative Law*, 89 U. PA. L. REV. 1026 (1941).

7. Compare Greenleaf's statement of the point: "Questions respecting the competency and admissibility of evidence, are entirely distinct from those which respect its sufficiency or effect . . ." 1 GREENLEAF, EVIDENCE 4-5 (11th ed. 1863).

8. See *Queen v. Hepburn*, 11 U.S. (7 Cranch) 290 (1813).

9. *Chicago & N.W. Ry. v. Illinois Commerce Comm'n*, 326 Ill. 625, 158 N.E. 376 (1927); *Spiegel's House Furnishing Co. v. Industrial Comm'n*, 288 Ill. 422, 123 N.E. 606 (1919); *Chiordi v. Jernigan*, 46 N.M. 396, 129 P.2d 640 (1942).

10. *In re Trustees of Westminster*, 108 Vt. 352, 187 Atl. 519 (1936).

11. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952); *Bockman v. Arkansas State Medical Bd.*, 229 Ark. 143, 313 S.W.2d 826 (1958); *Bennett's Restaurant v. Industrial Comm'n*, 127 Colo. 271, 256 P.2d 891 (1953); *Indianapolis & So. Motor Express v. Public Service Comm'n*, 232 Ind. 377, 112 N.E.2d 864 (1953); *Western Union Tel. Co. v. Dodge County*, 80 Neb. 18, 113 N.W. 805 (1907).

12. *IAM v. NLRB*, 110 F.2d 29, 35 (D.C. Cir. 1939).

13. *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 873 (2d Cir. 1938). Compare with this the description given by our first great American scholar on evidence, for what he termed "satisfactory" or "sufficient" evidence—that is, that it should be such as "to satisfy the mind and conscience of a common man; and so to convince him, that he would venture to act upon that conviction, in matters of the highest concern and importance to his own interests." 1 GREENLEAF, EVIDENCE 4 (11th ed. 1863).

14. See 1 WIGMORE, EVIDENCE 83 (3d ed. 1940).

15. *North Alabama Motor Express v. Rookis*, 244 Ala. 137, 12 So. 2d 183 (1943).

16. *Froman v. Banquet Barbecue, Inc.*, 284 Mich. 44, 278 N.W. 758

standing alone and unaided by a "residuum of legal evidence,"¹⁷ it may not be used to sustain the finding of an essential fact.¹⁸ Despite Wigmore's strictures, the residuum rule does tend to liberalize the reception and the use of evidence by administrative agencies. But the whimsical differences in result arising from the fortuitous variances in the testimony available from case to case do not commend the rule as an aid to the consistent administration of justice.¹⁹

Inevitably, the unsatisfactory variance in the case law concerning the subject led to essays at providing statutory guides. These have been varied²⁰ and they are not at all satisfactory in operation.²¹ The federal Administrative Procedure Act states a broadly catholic rule: "Any oral or documentary evidence may be received . . ." ²² However, this is followed by a requirement that decisions must be "supported by and in accordance with the reliable, probative, and substantial evidence."²³ Coupled with the provision for judicial setting aside of orders "unsupported by substantial evidence,"²⁴ it seems to open the door to the wide exercise of administrative discretion. But there remains some uncertainty as to whether it does perchance prescribe the residuum rule.²⁵

In the realm of state procedural reform, the original *Model State Administrative Procedure Act* prescribed the "convincing evidence" rule for admissibility.²⁶ While there has been a sugges-

(1938); *Maley v. Thomasville Furniture Co.*, 214 N.C. 589, 200 S.E. 438 (1939); *Ogden Iron Works v. Industrial Comm'n*, 102 Utah 492, 132 P.2d 376 (1942). *But cf.* *Mailman v. Record Foundry & Mach. Co.*, 118 Me. 172, 106 Atl. 606 (1919).

17. *Carroll v. Knickerbocker Ice Co.*, 218 N.Y. 435, 440, 113 N.E. 507, 509 (1916).

18. *Swim v. Central Iowa Fuel Co.*, 204 Iowa 546, 215 N.W. 603 (1927); *Jackson v. Curtiss-Wright Airplane Co.*, 334 Mo. 805, 68 S.W.2d 715 (1933); *Andricsak v. National Fireproofing Corp.*, 3 N.J. 466, 70 A.2d 750 (1950); *Glass v. State Board of Public Roads*, 44 R.I. 54, 115 Atl. 244 (1921).

19. See COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 192 (1951).

20. For a partial collection, see MERRILL, CASES ON ADMINISTRATIVE LAW 320-22 (1954).

21. *Cf.* 2 DAVIS, ADMINISTRATIVE LAW § 14.06 (1958).

22. 60 Stat. 241 (1946), 5 U.S.C. § 1006(c) (1958).

23. 60 Stat. 241 (1946), 5 U.S.C. § 1006(c) (1958).

24. 60 Stat. 244 (1946), 5 U.S.C. § 1009(e) (1958).

25. See discussion in DAVIS, *op. cit. supra* note 21, § 14.11.

26. The term "convincing evidence" is not contained in the *Model Act*, but has been used as a convenient analogue of the more cumbersome statutory language. The rule as stated in the *Model Act* is as follows: "Agencies may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs." MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 9(1).

The "convincing evidence" terminology seems to have originated with *Mr. Justice Rutledge*. See *National Ass'n of Machinists v. NLRB*, 110 F.2d 29, 35 (D.C. Cir. 1939), *aff'd*, 311 U.S. 72 (1940).

tion that the provision for judicial setting aside of findings "un-supported by *competent*, material, and substantial evidence in view of the entire record as submitted"²⁷ commands observance of the residuum rule,²⁸ I am unable to follow the reasoning which leads to that result. The term "competent," as applied to evidence, means no more than that the evidence is fit to be admitted and to receive consideration by the trier of fact in the determination of the case which is before him.²⁹ Since the *Model Act* already has stated that "convincing evidence" may be admitted and may be given probative effect, it must be that such evidence is "competent" within the meaning of the standard for judicial review. What might be "competent" for a jury to hear and to consider has no relevance whatever with respect to this problem.

Another proposal for reform put forward in recent years is that the standard for admissibility be set as the equivalent of that prevailing in the courts for the trial of non-jury cases.³⁰ The last version of a proposed revision of the *Model Act* contained a combination of the two rules.³¹ Thus there are crystallizing two major proposals for the phrasing of rules to govern the reception and use of evidence by the agencies. Both agree that there should be some departure from the jury-trial rules. Which solution is the better?

With respect to the standard of "rules . . . as applied in [non-jury] . . . cases,"³² the first thing that occurs to me is that, in most jurisdictions, this is no standard at all. The modern authorities on evidence tell us that they know of no distinction between the rules governing jury cases and those governing non-jury cases.³³ The *Uniform Rules of Evidence*, proposed by the National Conference of Commissioners on Uniform State Laws, were de-

27. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 12(7)(e). (Emphasis added.)

28. See DAVIS, *op. cit. supra* note 21, § 14.06.

29. *United States v. DeLucia*, 256 F.2d 487 (7th Cir. 1958).

30. See 2 DAVIS, *op. cit. supra* note 21, § 14.04; Harris, *Administrative Practice and Procedure: Comparative State Legislation*, 6 OKLA. L. REV. 29, 47 (1953); Hazard, *The Oregon Administrative Procedure Act: Status and Prospects*, 39 ORE. L. REV. 97, 104 (1960); Note, 1 WILL. L.J. 272, 283-84 (1960).

31.

So far as practicable, the rules of evidence as applied in [non-jury] civil cases in the [District] courts of this State shall be followed. However, when necessary to ascertain facts affecting the substantial rights of the parties to the proceedings (except where precluded by statute) evidence not admissible under such rules may be admitted if it is of a type commonly accorded probative value by reasonably prudent men in the conduct of their affairs.

MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 10(i) (Revision, Tent. Draft No. 3, 1960).

32. See note 31 *supra*.

33. See McCORMICK, *EVIDENCE* 137 (1954); TRACY, *HANDBOOK OF THE LAW OF EVIDENCE* 7 (1952); 1 WIGMORE, *EVIDENCE* 15 (3d ed. 1940).

signed to be applicable "in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced."³⁴ Evidently the able lawyers who participated in the drafting of these rules did not consider that there was, or should be, any difference between judges sitting with juries and judges sitting without juries in this respect. It follows that the result of prescribing that the rules of evidence applicable in non-jury cases be used in administrative hearings is, in effect, to prescribe the use of jury-trial rules by the agencies.

It is true, as we know, that there are ways in which the trial judges are permitted to escape from the more serious handicaps of the jury-trial bonds in their handling of evidence in cases tried to them. Thus there is the pious fiction that the judge, having admitted and listened to prohibited testimony or having read incompetent documents, has thrown them out of his mind when he arrives at the time for decision.³⁵ Some courts have applied a very tenuous variant of the residuum rule, to the effect that, even if the trial judge considered the incompetent evidence, his decision will be sustained if "the remaining evidence is without conflict and is sufficient to support the judgment."³⁶ Other cases seem to speak in terms substantially equivalent to the residuum rule, affirming if upon disregarding the incompetent evidence there remains sufficient proof to sustain the judgment.³⁷ There are judicial statements broadly asserting a wider discretion in the trial court if there is no jury,³⁸ even verging to the extreme of seeming to say that there are no restrictions enforceable on appeal.³⁹ But one encounters more conservative attitudes also. Sometimes the affirmance is based on the fact that the record does not indicate reliance by the judge below upon the incompetent testimony, pregnant with the inference that reversal would be the fate of the judgment if such reliance did appear.⁴⁰ Courts which have proclaimed

34. UNIFORM RULES OF EVIDENCE § 2.

35. *Kellner v. Whaley*, 148 Neb. 259, 27 N.W.2d 183 (1947); *Green v. Henderson*, 66 Nev. 314, 208 P.2d 1058 (1949); *State ex rel. Halvorson v. Simpson*, 78 N.D. 440, 49 N.W.2d 790 (1951); *First State Bank v. McKiddy*, 206 Okla. 57, 240 P.2d 1103 (1952); *Farley v. Farley*, 136 W.Va. 598, 68 S.E.2d 353 (1951).

36. *Bessemer Theatres v. City of Bessemer*, 261 Ala. 632, 636, 75 So. 2d 651, 655 (1954).

37. *American Eagle Fire Ins. Co. v. Van Denburgh*, 76 Ariz. 1, 257 P.2d 856 (1953); *Bennett v. Barber*, 46 Del. 132, 79 A.2d 363 (1951).

38. *Rosenblatt v. Clements*, 314 Ky. 450, 236 S.W.2d 261 (1951); *Pump-It, Inc. v. Alexander*, 230 Minn. 564, 42 N.W.2d 337 (1950); *Board of Managers v. City of Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953).

39. "Complaint is made of certain rulings on the admission of testimony. These are not available, since the cause was tried without the intervention of a jury." *Bell v. Walker*, 54 Neb. 222, 226, 74 N.W. 617, 619 (1898).

40. *City of Stuttgart v. Elms*, 220 Ark. 722, 249 S.W.2d 829 (1952).

that wide discretion is bestowed upon the trial judge have stated also that it is error for him to act upon the incompetent evidence that he admits.⁴¹ And there is authority to the effect that, if the evidence is conflicting, the appellate court will reverse on the presumption that the incompetent evidence *was* considered.⁴² In this light, the trial judge is deemed no better at appraising evidential values than is the most untrained and inexperienced juror.

No comprehensive study of the treatment of the rules of evidence has been attempted by this writer. The sampling is sufficient, however, to establish that there is no consistent or generally followed rule for the amelioration of the rigors of the jury-trial code of evidence in matters tried to the courts. Still less should we expect to find a general lenience in the review of administrative agencies, often manned by laymen. If the statute says "follow the rules applicable to the courts," how many judges will say, with respect to such tribunals, what Mr. Justice Helm of Kentucky said of Judge William H. Field:

The court overruled the objection, saying that he would apply the rules of evidence in his own mind. . . . The finding of the court in this case must be regarded as a verdict of a properly instructed jury.⁴³

Would it, then, be wise to saddle the administrators with the common-law rules? All the authorities seem to agree that they often are technical and obstructive of justice even in the courts⁴⁴ and that their exclusion of many matters relevant and probative is due solely to doubt that the casual and inexperienced members of the jury will be able to make the proper relative evaluation of relevance and weight.⁴⁵ Judges, professionally experienced in receiving and weighing evidence and learned in the law, safely may be permitted wide discretion.⁴⁶ Administrators may be lacking in le-

41. *Reid v. Johnston*, 241 N.C. 201, 85 S.E.2d 114 (1954); *Menefee v. Blitz*, 181 Ore. 100, 179 P.2d 550 (1947).

42. *In re Conner's Estate*, 240 Iowa 479, 36 N.W.2d 833 (1949).

43. *Rosenblatt v. Clements*, 314 Ky. 450, 453, 236 S.W.2d 261, 262 (1951).

44. Thayer, *Observations on the Law of Evidence*, 13 MICH. L. REV. 355 *passim* (1915); Thelen, *The Railroad Commission as a Model for Judicial Reform*, 2 MINN. L. REV. 479, 486 (1918).

45. See Baldwin, *The Artificiality of Our Law of Evidence*, 21 YALE L.J., 105 (1917); Sunderland, *The Inefficiency of the American Jury*, 13 MICH. L. REV. 302, 314 (1915).

46.

In Scotland, and most of the Continental States, the Judges determine upon the facts in dispute as well as upon the law; and they think there is no danger in their listening to evidence of hearsay, because when they come to consider of their judgment on the merits of the case, they can trust themselves entirely to disregard the hearsay evidence, or to give it any little weight which it may seem to deserve. But in England, where the jury are the sole judges of the fact, hearsay evi-

gal lore, but their experience in evaluation will be sharpened by speciality in subject. With adequate opportunity for judicial correction of egregious error on their part, they should be allowed to receive and appraise the valuable assistance frequently available from substantial hearsay,⁴⁷ affidavits,⁴⁸ reliable letters,⁴⁹ opinion surveys,⁵⁰ secondary copies of documents,⁵¹ newspaper accounts,⁵² standard reference works,⁵³ financial statements,⁵⁴ summaries,⁵⁵ and so on down the list of sources of information upon which serious men frequently arrive at important decisions despite the fact that no judge would think of letting it go to a jury. There is the additional consideration that if the agency is acting through laymen, it will be faced with an impossible task in applying the cabala of the lawyers.⁵⁶ We shall have reversal after reversal on grounds which have no relationship to the substantial rights of parties before the tribunals.

No doubt it will be urged that the objections which I have raised are met by the qualifications contained in the proposed revision of the *Model Act*:

So far as practicable [non-jury-trial rules of evidence shall be followed]. . . . [W]hen necessary to ascertain facts affecting the substantial rights of the parties to the proceedings, except where precluded by statute, evidence not admissible under such rules may be admitted if it is of a type commonly accorded probative value by reasonably prudent men in the conduct of their affairs.⁵⁷

With all respect, I must differ. In the first place, it amounts to no more than what Judge Joseph Hutcheson so neatly and so sensibly calls "beyonding."⁵⁸ Either we set up a new standard or we

dence is properly excluded, because no man can tell what effect it might have upon their minds.

Berkeley's Case, 4 Camp. 401, 415, 171 Eng. Rep. 128, 135 (1811) (Mansfield, C.J.).

47. Altschuller v. Bressler, 289 N.Y. 463, 46 N.E.2d 886 (1943).

48. Bockman v. Arkansas State Medical Bd., 229 Ark. 143, 313 S.W.2d 826 (1958).

49. The Washington, 19 F. Supp. 719 (S.D.N.Y. 1937).

50. Public Utilities Comm'n v. Pollak, 343 U.S. 451 (1952).

51. Schuykill Ry. v. Public Service Comm'n, 268 Pa. 430, 112 Atl. 5 (1920).

52. United States *ex rel.* Gegiow v. Uhl, 215 Fed. 573 (2d Cir. 1914).

53. Western Union Tel. Co. v. Dodge County, 80 Neb. 18, 113 N.W. 805 (1907).

54. Indianapolis & So. Motor Express v. Public Service Comm'n, 232 Ind. 377, 112 N.E.2d 864 (1953).

55. Chicago Board of Trade v. United States, 223 F.2d 348 (D.C. Cir. 1955).

56. Bockman v. Arkansas State Medical Bd., 229 Ark. 143, 313 S.W.2d 826 (1958).

57. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 10(1) (Revision, Tent. Draft No. 3, 1960).

58. See Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274, 280 (1929).

don't. It doesn't make sense to tell the administrators that they are to follow the courtroom rules of evidence and then say to them, "if these rules stand in the way of justice, use the rules commonly accepted by reasonably prudent men in the conduct of their affairs." If we really mean that this last admonishment is the standard we want applied when we are in search of justice, why not announce it as the general standard for admissibility, as is the case with the present draft of the *Model Act*? Presumably, justice always is our objective. The existent "convincing evidence" standard will exclude nothing admissible under courtroom standards, and it will admit all that ought to be admitted to achieve justice. Why, then, introduce a two-step form of statement that really adds nothing?

In the second place, this form of statement, with its shifting and turning language, is ideally suited to confuse our lay administrators. Indeed, it well could confuse a Philadelphia lawyer. We must remember that even the lawyers who sit on agency benches all too frequently are substantially below the traditionally Philadelphian standard of acumen. These hearing officers and agency members, then, are apt to have serious difficulties in determining what they are called upon to accept or to reject. The decisions under the "convincing evidence" standard of admissibility do afford a reasonably adequate concept of the sort of evidence that may be admitted and considered. The alternative phraseology which has been proposed blurs the image decidedly. It will be most difficult for the presiding officers to decide what ruling to make if the reception of evidence is challenged. As a result, the conduct of hearings will be greatly complicated.

Finally, the task of judicial review at best will be deranged. At worst it may revert to the strait-jacketing of the administrative process in vogue a few decades ago. How is the reviewing court to judge whether it was or was not necessary to relax the courtroom rules for the purpose of ascertaining facts "affecting the substantial rights of the parties to the proceedings"? What are substantial rights, under the statute administered by the particular agency and within the context of the controversy *sub judice*? What is affectation, within the meaning of this provision? And in determining whether "substantial rights of the parties" have been affected, if the definition of "party", as proposed in the first section of the draft is applied to the interpretation of this provision as to evidence, what is the role of the public interest in the efficient administration of a statutory standard, as an element in determining the need to depart from courtroom rules in order to achieve justice? I should think that this would be an important factor in arriving at such a determination. However, the definition of "party"

does not seem broad enough to include representation of the public interest by the agency. " 'Party' means," we are told, "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, to any court or agency proceeding."⁵⁹ This does not seem to embrace the public as an entity, and it is by no means certain that the agency as a party, is proprietor of the public interest. At least, there are extant decisions in related areas of the law which lend themselves to the support of the view that the "substantial rights" of the agency would not be affected by an exclusion which merely handicapped the achievement of the public policy of the statute under administration.⁶⁰ For this reason, I fear that many judges would be led to deny to the agency the authority to depart from courtroom rules of evidence in the interest of efficient achievement of statutory objectives. These uncertain problems appear at first blush to lurk in the proposal for relegating to an alternative and subordinate role the "convincing evidence" rule for admissibility. Closer study, particularly by ingenious counsel defending the interests of their clients, probably will reveal many other bases for litigation. Then, too, there is the unfortunate invitation to hunt for obscure phrases in other sections of the enacted law, extended by the parenthetical "except where precluded by statute."⁶¹ This will present knotty problems in many states. The proposed revision is unfortunate from another aspect, as well. It destroys the uniformity as to practice which should be the desideratum of a general procedural statute. The far better choice would be to enact a rule of general applicability.

So much for the alternative phrasing of the test for admissibility in its least troublesome aspects. If we look at its worst possibilities, the picture becomes dark indeed. In the hands of a judge who considers that the common-law rules constitute the "universally recognized criteria of truth,"⁶² or that the hearsay rule in every one of its manifestations "is not to be considered as one of the technical rules of evidence,"⁶³ this statute would be a vehicle for overturning every relaxation of the common law of evidence.

59. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 1(3) (Revision, Tent. Draft No. 3, 1960).

60. *Miles v. McKinney*, 174 Md. 551, 199 Atl. 540 (1938); *A. DiCillo & Sons v. Chester Zoning Board of Appeals*, 158 Ohio St. 302, 109 N.E.2d 8 (1952); *Board of Review v. Coddling*, 199 Okla. 281, 185 P.2d 702 (1947); *Department of Labor & Industry v. Unemployment Compensation Bd. of Review*, 362 Pa. 342, 67 A.2d 114 (1949).

61. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 10(1) (Revision, Tent. Draft No. 3, 1960).

62. See Sherman, *Evidence in Proof under Workmen's Compensation Laws*, 68 U. PA. L. REV. 203, 214 (1920).

63. *Englebretson v. Industrial Acc. Comm'n*, 170 Cal. 793, 799, 151 Pac. 421, 423 (1915).

Thus would be restored a complete judicial supersession of the administrative judgment whenever it was desired. Each departure from the norm—so far from being “necessary” to sustain substantial rights—would be a clear derogation from those rights, warranting reversal. Since the corrective action usually would be in the hands of *nisi prius* judges, there is reason to apprehend that it would not be administered as judiciously as the best appellate opinions might indicate should be the rule.

These defects do not make a conclusive case against the imposition of the courtroom rules of evidence upon administrative agencies, whether outright or in the unfortunate alternative guise currently proposed. If there were no other way of affording safeguards against administrative aberration, it might well be that we should accept the proposed solution. Agencies do some weird and wonderful things in the name of freedom from technicality, as the reports clearly show.⁶⁴ However, the imposition of an unduly high qualitative standard for the admissibility of evidence in administrative proceedings is not the effective way to safeguard the individual from administrative whim or prejudice.

The really efficacious method of protection comes at the stage of quantitative analysis of the evidence in judicial review of the proceedings. This safeguard is afforded by the requirement that the administrative findings of essential fact, to be upheld, must be supported by “substantial evidence in view of the entire record,” as the present *Model Act* phrases it,⁶⁵ or by providing for setting the order aside, on judicial review, if it is “clearly erroneous, in view of the reliable, probative and substantial evidence on the whole record,” as the new tentative draft proposes.⁶⁶ Under either form, we will have superseded the type of review that looks simply to see whether the “evidence in the record tending to support the order entered,”⁶⁷ standing alone meets the test of substantiality. In its stead we will have a review in which the court, without substituting its judgment for that of the agency on reasonably disputable propositions, does examine the entire record to see whether the evidence against the agency’s finding so clearly overwhelms that which supports the finding that the latter becomes arbitrary,

64. *Bascom v. Industrial Acc. Comm'n*, 25 Cal. App. 2d 334, 77 P.2d 305 (1938); *Wadell v. Board of Zoning Appeals*, 136 Conn. 1, 68 A.2d 152 (1949); *Oklahoma Tax Comm'n v. First Nat'l Bank & Trust Co.*, 178 Okla. 260, 62 P.2d 1220 (1936); *Tulsa St. Ry. Co. v. Shoemaker*, 106 Okla. 99, 233 Pac. 182 (1925).

65. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 12(7)(e).

66. MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 14(7)(e) (Revision, Tent. Draft No. 3, 1960).

67. See *Pannell v. Farmers' Union Co-op. Gin Ass'n*, 192 Okla. 652, 654, 138 P.2d 817, 819 (1943).

whimsical, or "clearly erroneous."⁶⁸ This type of review provision gives the courts full power to correct arbitrary applications of the evidence which the agencies are permitted to admit. At the same time, it does not open the door to uncertainties and to fanciful and technical reversals of agency guesses as to when it was or was not necessary to relax the court room rules "in order to ascertain facts affecting the substantial rights of the parties." It precludes reversals based solely on agency error in disregarding jury-trial rules of admissibility. It reduces the likelihood of that substitution of the judicial view on policy for the views of the legislature and its administrative agency which has been the cause of much criticism of the working of judicial review over administrative determinations.

For these reasons, I suggest that it will be well to leave unchanged the statements of the present *Model State Administrative Procedure Act* concerning the admissibility of evidence. The judicial review provisions will permit the courts to give all needed relief against whimsical action based on figmental evidence.

68. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1935); *Wood v. Wagner Elec. Corp.*, 355 Mo. 670, 197 S.W.2d 647 (1946); *Motor Transport Co. v. Public Service Comm'n.*, 263 Wis. 31, 56 N.W.2d 548 (1953).