ARTICLE

THE FALSE PREMISE OF STATE ADMINISTRATIVE ADJUDICATION

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Abstract

As state courts struggle to provide services to high numbers of unrepresented litigants, some access to justice scholars have suggested expanding the availability of administrative hearings for certain matters. Administrative adjudication is portrayed as a less adversarial forum for unrepresented parties. But we actually know very little about the immense variety of structures that make up state administrative adjudication or how unrepresented parties fare in these forums. Nor do we know much about the role that nonlawyer representatives can play in these forums. This Article explores the range of structural and procedural variations between and within states to provide a rough framework for approaching thoughtful study of particular features of administrative adjudication that impact access to justice. This Article then enhances that framework with responses to an original survey of state administrative law judges regarding their perceptions of how well agency adjudication meets access-to-justice goals and where there can be improvement. Through this analysis, certain structural and procedural features in state administrative adjudication emerge as best practices for states to increase access to justice within their administrative tribunals, including a code of ethics that supports an engaged role for ALJs, centralized procedures, and increased roles for nonlawyer representation.

This Article's empirical findings raise profound questions about the role of administrative adjudication in an overall account of access-to-justice innovations. Although administrative adjudication is designed to be user-friendly and accessible for unrepresented people, many administrative law judges say there is not enough legal representation in their hearing rooms. Given this finding, the Article explores the false premise of administrative adjudication's accessibility, adding to literature about the value of legal representation and expanded roles for nonlawyer representation. A deeper understanding of the effects of structural choices between states also offers crucial guidance for federal policymakers in light of recent Supreme Court opinions threatening federal administrative law judge independence.

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I. Introduction

The access to justice movement has played a pivotal role in simplifying court processes and increasing legal aid for people in state courts who cannot afford lawyers. Yet there is still work to do to make our courts and the outcomes they manage truly accessible and equal.[1] A great majority of people who appear in state courtrooms are unrepresented by either trained lawyers or nonlawyer advocates.[2]

Access to justice advocates and scholars have offered many solutions for state courts to provide justice to unrepresented litigants, including: increasing

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[1] Advocates debate whether the problem is better addressed by providing more lawyers ("civil *Gideon*"), providing more unbundled legal services, simplifying court procedures, or changing the nature of the adversarial process entirely to be more amenable to a pro se plaintiff. *See* Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 Conn. L. Rev. 741 (2015) (advocating for "demand side" reform of court procedures and the role of judges to acknowledge and accommodate the prevalence of pro se litigants in state civil court) (quotations omitted).

[2] Legal Servs. Corp., The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans 6 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf [https://perma.cc/28T4-LFJ3]. For purposes of this Article, I will use the term "nonlawyer advocates" although I acknowledge that there are legitimate concerns with such binary terminology.

the number of lawyers available, unbundling lawyer tasks to provide more opportunities for representation, accrediting nonlawyers to provide representation in certain matters, simplifying the legal process, and increasing the judge's role to guide unrepresented people through the system.[3] Policymakers are also beginning to consider the larger justice ecosystem, including administrative agencies and executive branch spaces, as an integral aspect of access-to-justice work.[4] Recent scholarship has gone further—arguing that courts may not be best positioned institutionally to address many of the systemic problems we are asking them to solve.[5] In light of this, some scholars have called for considering an expansion of administrative processes to resolve justice-related issues.[6] Recent theoretical work has also considered the ability of administrative structures generally to shift power in ways that can promote economic equality.[7]

Administrative adjudication, situated in the executive branch, has long been thought to be designed in ways that make it more accessible for people to

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[3] For a range of proposals, see Katherine L.W. Norton, *Avoiding the Great Divide: Assuring Court Technology Lightens the Load of Low-Income Litigants Post-COVID-19*, 88 TENN. L. REV. 771 (2021); Russell Engler, *The Toughest Nut: Handling Cases Pitting Unrepresented Litigants Against Represented Ones*, 62 JUV. & FAM. CT. J. 10 (2011); Steinberg, *supra* note 1; Kathryn A. Sabbeth & Jessica K. Steinberg, *The Gender of* Gideon, 69 UCLA L. REV. 1130 (2023); Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227 (2010).

[4] The Biden Administration has strengthened this work under the reinvigorated Legal Aid Interagency Roundtable. *See, e.g.*, Memorandum from Attorney General Merrick Garland on Access to Justice (May 18, 2021), https://www.justice.gov/d9/pages/attachments/2021/05/18/attorney_general_memorandum_-_access_to_justice_0.pdf [https://perma.cc/9QCQ-4HHE]; *see also* LEGAL AID INTERAGENCY ROUNDTABLE, ACCESS TO JUSTICE THROUGH SIMPLIFICATION (2022), https://www.justice.gov/d9/2023-03/Legal%20Aid%20Interagency%20Roundtable%202022%20Report.pdf [https://perma.cc/W2GW-SXC7]; NEW YORK BAR ASSOCIATION, TASK FORCE ON THE POST-PANDEMIC FUTURE OF THE PROFESSION (2023), https://nysba.org/app/uploads/2023/05/report-Task-Force-on-the-Post-Pandemic-Future-of-the-Profession.pdf [https://perma.cc/T68W-DA7K].

[5] *See* Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Inequality*, 148 DÆDALUS 128, 132 (2019) (using problem-solving courts as an example of the opposite institutional switch from executive to courts) ("The goal of a problem-solving court shifts from punishment and incarceration to treatment of a social problem, like drug addiction or mental illness. Problem-solving courts have been heralded as great successes and proposed as a model for civil courts."). The premise of applying access-to-justice principles to administrative hearings is to reverse that switch and properly align the interventions closer to the root problems of systemic inequality that can be better addressed by the executive branch through its agencies.

[6] Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704 (2022) (proposing an agency model for claims processing in certain substantive areas where top filers make up to one third of all cases filed); *see also* Yonathan A. Arbel, *Adminization: Gatekeeping Consumer Contracts*, 71 VAND. L. REV. 121 (2018) (proposing that an administrative agency with the power to levy large fines screen civil filings for unmeritorious claims against consumers). Both of these scholars have advocated for an administrative process to resolve debt collection cases. *See also* Jessica Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579 (2018) (advocating similar features of problem-solving court processes, including active and engaged judging, for both consumer debt cases and housing cases).

[7] K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315 (2018).

navigate without legal representation.[8] Administrative adjudications already play a large role in enforcing rules that can affect major life outcomes, such as whether a person has access to safe housing, necessary health and other benefits, parental rights, education, and employment. However, many of the same asymmetries that create justice gaps in courtrooms also appear in hearing rooms: lack of representation, complex laws and forms, inconsistent language access, inequitable technology access, and a general legal process and culture that is difficult for an unrepresented person to navigate.[9] A deeper dive into how administrative adjudications are structured and a survey of ALJs working in these spaces reveals that the premise of administrative adjudication as being easier to navigate without representation is false.

The substantive reach of state administrative adjudications has expanded immensely in recent years, and there are calls to expand such processes even further.[10] There are also calls to reform administrative adjudication procedures at both federal and state levels, by changing where matters are heard (centrally or within individual agencies); the independence and finality of the ALJ's decision; who ALJs are and what rules govern their work; and who can appear as representatives for people involved in disputes. Administrative hearings are often the first stop in a wide spectrum of civil disputes, including employment, healthcare, occupational licensing, family, involuntary commitment, disability and other benefits, education, discrimination and human rights claims, tax, environmental and public utilities, zoning, traffic and littering infractions. Even so, state and local administrative adjudication is relatively understudied.[11]

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[8] *See infra* Part II for more on the features of administrative adjudication that give rise to this view.

[9] The Administrative Conference of the United States has been studying and documenting some of these issues in the federal administrative agencies. *See, e.g.*, Daniel J. Sheffner, Adjudication Materials on Agency Websites: Final Report (Apr. 10, 2017) (report to the Administrative Conference of the United States); *see also* Recommendation 2017-1: Adjudication Materials on Agency Websites, 82 Fed. Reg. 31039 (July 5, 2017); *cf.* Agency Use of Video Hearings: Best Practices and Possibilities for Expansion: Final Report (May 10, 2011) (report to the Administrative Conference of the United States); Recommendation 2011-4, Agency Use Of Video Hearings: Best Practices And Possibilities For Expansion, 76 Fed. Reg. 48795 (Aug. 9, 2011).

[10] Nicholas Jackson, *When Is an Agency a Court? A Modified Functional Approach to State Agency Removal Under 28 U.S.C. § 1441*, 49 U. Mich. J.L. Reform 273, 283–84 (2015); *see also* Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 Colum. L. Rev. 1471 (2022); Wilf-Townsend, *supra* note 6. Both call for more social welfare disputes to be handled in state agency tribunals.

[11] *See* Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. Rev. 107 (2018) (arguing that state administration is less transparent and less well-monitored than the federal executive branch and could benefit from increased civil society oversight); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The "Hidden Judiciary": An Empirical Examination of Executive Branch Justice*, 58 Duke L.J. 1477, 1479 (2009) ("The quiet delegation of judicial authority to administrative tribunals is a long-term trend that has arisen more out of necessity than out of a careful assessment of the benefits and costs of judicial specialization.").

There is also immense variation in the structure of these agencies and the procedures followed in various subject matter hearings at the state level.[12] Each state has its own administrative adjudication structure: some states have a centralized structure with one agency devoted to adjudication, while others have decentralized structures with each subject matter agency hearing their own adjudications. Beyond that, there is often discretion among ALJs as to whether to hear the case in-house or refer to a centralized hearing agency if one exists. It is hard to begin analyzing state adjudication as a whole with such variability. Further variations among different agencies in the same state can include, for example, the role of the ALJ, the qualifications of the ALJ, the finality of the decision, the number and length of hearings conducted in a given week, the parties who appear in the hearings, what types of representation are available to them, and the formality of the process.

As with federal administrative adjudication, there is no such thing as a typical state administrative adjudication. Administrative adjudication at the state level can include, for example, a determination of benefits, a forum for a discrimination claim, or a sanction-like suspension of a license. All of these actions might entail an evidentiary hearing, with varying levels of procedural formality. For example, with unemployment benefits, the proceedings might resemble an appellate process where the employee and the employer appear before an ALJ to review the agency determination of benefits.[13] The employer is there because of their financial involvement in the benefits decision, although the agency itself issues the benefits. Such review is often de novo review. In these matters, the ALJ can be heavily involved in developing the factual record through questions to the parties.[14] Other matters, like licensing, often involve a state lawyer (for example, staff from the Division of Licensing) and the person with an occupational licensing issue.[15] In these cases, the (often) unrepresented person appears before the ALJ and against another state representative to decide whether their license will be revoked or suspended.[16] Some agencies, like the New York State Department of Taxation and Finance, have a bifurcated process where a person being assessed or charged can choose a less formal process through the Bureau of Conciliation and Mediation Services or a more formal hearing before an ALJ from the New York State Division of Tax Appeals.[17]

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[12] This variation exists in federal administrative adjudications as well. *See* Emily S. Bremer, *Reckoning with Adjudication's Exceptionalism Norm*, 69 Duke L.J. 1749, 1754 (2020) (arguing that the prevalence of informal adjudication and agency-specific procedures works against transparency, improvement, and individual rights).

[13] *See generally* Shanahan et al., *supra* note 10 (discussing varying levels of procedural formality).

[14] *See id.*

[15] *See, e.g.*, *Office of Administrative Hearings*, N.Y. State Dep't of State, https://dos.ny.gov/administrative-hearings, [https://perma.cc/S8B3-25LG].

[16] *See* Conversation with Ziedah Diata, Chief ALJ, N.Y. Dep't of State (Nov. 30, 2021).

[17] In 1989, the state legislature separated the formal hearings from the agency to provide adjudication of tax matters in a more independent (without policy or revenue pressure) setting.

Beyond the various procedural differences that a person needs to navigate before any particular state agency, there are more structural variations in how the ALJs are chosen, how they operate, who they are accountable to, and who is allowed to represent or otherwise assist someone before the ALJ. These differences often exist within a single state and can even exist within a single agency if the subject matter agency ALJ can choose to retain jurisdiction rather than send a matter to a centralized hearing agency. Before we can evaluate whether agency adjudications provide a more accessible forum for an unrepresented person, we need to understand the range of structural differences within state administrative adjudication.

And there is currently a lack of empirical research as to how these proceedings unfold.[18] For example, few jurisdictions track who appears before them and whether the parties have legal representation.[19] Because the data that exists is not disaggregated, we do not have a clear picture of whether adjudications disproportionately affect some groups over others. There is also no clear data about the outcomes of these proceedings on peoples' lives.

Studying state administrative agency adjudication, and especially whether it indeed offers a better forum than state courts for unrepresented parties, is vital before expanding these systems in response to the justice gap in state court. Understanding the various structures and procedures guiding these adjudications can also offer a new lens for generating and understanding specific access-to-justice reforms that can better support fair outcomes in administrative adjudication, support the work advocates are already doing to increase access to justice in state courts, and restore the public's trust in the rule of law.[20] Deeper understanding of how administrative adjudicatory systems are structured can also offer insight on a central question that court reformers are wrestling with—whether more legal representation, unbundled representation, expanding representation beyond lawyers, simplification of the process for unrepresented people, an entire shift from the adversarial

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See Conversation with Catherine M. Bennett, Retired ALJ, N.Y. Div. of Tax Appeals (Sept. 7, 2022); *see also* Model State Admin. Tax Tribunal Act (Am. Bar Ass'n 2006); Your Right to Challenge Department Decisions (N.Y. Dep't of Tax'n and Fin 2022), https://www.tax.ny.gov/help/taxpayer-education/financial/1-rights-and-responsibilities-3.htm [https://perma.cc/79AK-4JHP].

[18] *See* Anna E. Carpenter, Jessica K. Steinberg, Colleen F. Shanahan & Alyx Mark, *Studying the "New" Civil Judges*, 2018 Wis. L. Rev. 249 (2018); Colleen Shanahan, *The Keys to the Kingdom: Judges, Pre-Hearing Procedure, and Access to Justice*, 2018 Wis. L. Rev. 215 (2018); Christopher B. McNeil, *Executive Branch Adjudications in Public Safety Laws: Assessing the Costs and Identifying the Benefits of ALJ Utilization in Public Safety Legislation*, 38 Ind. L. Rev. 435 (2005).

[19] Of the twenty-seven states surveyed, thirteen responded that their agency collected some data on whether people were represented at hearings. However, only two states make that data public, and, even among the thirteen states reporting some data collection, this varied by specific state agency. No state reported disaggregating the data. Data on file with the author.

[20] Access to justice scholars are expanding their focus beyond courtrooms and lawyers. *See, e.g.*, Kathryne M. Young & Katie R. Billings, *An Intersectional Examination of U.S. Civil Justice Problems*, 2023 Utah L. Rev. 487 (2023).

process itself, or some combination of these, will do the most to increase access to justice.[21]

The following framework for understanding administrative adjudication reveals that some core premises about these proceedings might deserve questioning. Those advocating for increased administrative adjudication point to the value of resolving more claims in a setting that was designed to be easy for people to navigate without representation.[22] But given the common perception that administrative adjudication is more friendly to unrepresented people than courts, it is surprising that many ALJs feel that increasing legal or trained nonlawyer representation is the single most important access-to-justice issue affecting people who appear before them. If the premise of a less adversarial adjudication in administrative systems is false, it makes little sense to shift certain subject matters to administrative tribunals as a response to the lack of representation in state courts.[23] The data gathered from a review of various state systems and the responses from ALJs in those states reveals that the design of administrative tribunals indeed creates a decisional setting that is different in kind from courtrooms but these tribunals remain inaccessible to unrepresented people.

This Article proceeds as follows. First, the Article examines why administrative adjudication is different from courts. Next, by gathering and synthesizing state statutes and regulations alongside responses from state administrative law judges on various rules and processes, the Article provides a structural and procedural mapping of the variations between and within jurisdictions. The responses also report the subjective views of the ALJs as to how well various structures and procedures enable access to justice. Together, the data provide a richer understanding of state administrative adjudications' provision of justice, both the premise and the reality. The takeaway is that people navigating administrative adjudications also suffer from lack of representation. The Article concludes by considering which administrative structures and procedures enhance access-to-justice goals and whether a more robust use of nonlawyers in the administrative setting provides promise and opportunity for expanding access to justice.

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[21] A note here on terminology: this article refers to representation in terms of legal and nonlawyer representation. This is a binary classification that implies that there are two levels of representation. While this terminology reflects current legislative and judicial language, current reforms are moving toward a less hierarchical understanding of representation, with lawyers as one of many forms of representation. Part IV of this Article begins to unpack questions of what exactly representation offers and whether certain qualifications change outcomes.

[22] *See, e.g.*, Wilf-Townsend, *supra* note 6 (proposing an agency model for claims processing in certain substantive areas where top filers make up to one third of all cases filed); *see also* Arbel, *supra* note 6 (proposing that an administrative agency with the power to levy large fines screen civil filings for unmeritorious claims against consumers).

[23] *See* Shanahan & Carpenter, *supra* note 5, at 132.

II. Agency Adjudication Differs From Courts

Agency tribunals offer important insights on access to justice interventions because, although they mimic courts, administrative tribunals are executive branch spaces charged with investigating and enforcing executive policy. The institutional positioning of executive branch adjudications allows ALJs to take a more active role in fact-finding and guiding unrepresented people because they are governed by different rules and norms with respect to adjudication.[24] Due to this institutional positioning, administrative tribunals may also allow for greater understanding of why representation matters and provide grounds for expansion of nonlawyer representation.[25]

Administrative adjudication can contain structural features that give the decision-maker more flexibility in order to provide a better outcome for people who are appearing before the agency without representation.[26] These features result from many areas: statutory design, a history of public interest advocacy that specifically focused attention on due process in administrative adjudication, and the institutional location of these tribunals within the executive branch. The executive branch location also connects these tribunals to the policy realm, which offers possibilities for identifying and reducing systemic problems. The combined function of the agency tribunal—the location of the tribunal within the same administration that sets forth policy and the procedural flexibility afforded to ALJs—provides an opportunity for policymaking that addresses recurring burdensome processes and/or the underlying issues of the dispute. Even in centralized panels, there is often final agency review and/or the discretion for an agency to hear matters in-house by choice. Civil courts do not have similar opportunities from their sole perch as dispute resolution forums.[27]

Even though agency adjudications have become increasingly formalized and often look quite similar to their judicial cousins at first glance, the agency

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[24] *See, e.g.*, Michael Asimow, *The Administrative Judiciary: ALJ's in Historical Perspective*, 20 J. Nat'l Ass'n Admin. L. Judges 157 (1999) (discussing how ALJs spawned from the development of the APA sections governing adjudications that were enacted as the price for Congress authorizing combined function agencies).

[25] *Cf.* Darcy Meals & Leah Ritter, *A Prescription for Increased Access to Justice: Lessons from Healthcare*, 2022 U. Ill. L. Rev. Online 45 (2022).

[26] This flexibility is also seen with the "problem-solving court model" in some criminal court innovation, where specialized courts like drug courts are structured to provide interdisciplinary approaches to root causes of the offense. *See* Steinberg, *supra* note 6. These same features that some may see as less procedural and therefore friendlier to unrepresented parties may actually operate negatively as well to subordinate marginalized voices. *See* Bijal Shah, *Administrative Subordination*, U. Chi. L. Rev. (forthcoming 2023).

[27] Steinberg, *supra* note 6, at 1581 (naming three principles applied by problem-solving courts that might offer reform ideas for civil courts: "addressing the underlying social problem . . . [using] an interdisciplinary team approach . . . [and being] are outcome driven, rather than focused on formal procedures").

tribunal remains inherently hybrid in nature.[28] Born from an implementation mission rather than an adversarial one, agency hearings are not merely trials held outside of courtrooms.[29] ALJs, as employees within the administrative state, are steeped in administrative law norms of accountability, participation, and efficiency, and are part of a long tradition of process reform specific to administration. This translates to a culture of decision-making that has internalized (sometimes conflicting) values like guiding unrepresented parties through the process, actively helping to create a factual record, and implementing policies of the executive branch.[30] Because of this positioning, ALJs have much more discretion with evidentiary and procedural rules than state court judges do, including, in some cases, discretion as to who may appear before them as a nonlawyer advocate.[31] The amount of flexibility and discretion afforded to an individual ALJ to guide proceedings is indeed a feature of administrative adjudications and one of the primary distinctions from courtroom judges.[32]

The interaction of ALJs and unrepresented people appearing before them can be analogized to engaged neutrality. Richard Zorza developed the concept of engaged neutrality as part of his overall contribution to increasing access to justice in state civil courts.[33] Focusing on state civil judges, Zorza theorized

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[28] *See* Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1124–25 (1992) ("The process of administrative adjudication superficially resembles litigation in court, but the differences between the systems are fundamental.").

[29] Rather than adversarial by nature, these hearings take a more bureaucratic approach, concerned with structure of the dispute resolution process. *See, e.g.*, James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 Wake Forest L. Rev. 1191 (2006) (explaining a similar concept from federal administrative adjudication); *see also* Asimow, *supra* note 24 (providing a history of how the federal ALJs came to have a quasi-judicial role); Vicki Lens, Astraea Augsberger, Andrea Hughes & Tina Wu, *Choreographing Justice: Administrative Law Judges and the Management of Welfare Disputes*, 40 J.L. & Soc'y 199 (2013) (analyzing "bureaucratic" and "adjudicatory" styles of administrative hearing adjudication).

[30] This culture is captured through the open-ended responses from the survey detailed in Parts IV and V of this Article. Data on file with the author.

[31] *See, e.g.*, Shannon Portillo, *The Adversarial Process of Administrative Claims: The Process of Unemployment Insurance Hearings*, 49 Admin. & Soc'y 257 (2017).

[32] Indeed, the American Bar Association's Model Code for State Administrative Law Judges encourages this type of guidance: "[i]t is not a violation of [Rule 2.2] for an ALJ to make reasonable accommodations to ensure self-represented litigants are afforded the opportunity to have their matters fairly heard." Model Code of Jud. Conduct for State Admin. L. Judges r. 2.2 cmt. 4 (Am. Bar Ass'n 2018); *see also* Model Code of Jud. Conduct for State Admin. L. Judges Canon 3(B)(8) (N.Y. State Bar Ass'n 2021); 48 Rules of N.Y.C. § 103(A)(8); Code of Ethics for Admin. L. Judges Canon 2(B)(6) (Wash. State Off. of Admin. Hearings 2022). These codes even more strongly encourage guidance by ALJs and list specific actions that can be taken.

[33] *See* Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 Geo. J. Legal Ethics 423 (2004) (discussing civil court cases). For an empirical study testing the "effects of organizational independence and statutory protections on the judge's perception of his or her decision making," see Daniel E. Chand, *Protecting Agency Judges in an Era of Politicization: Evaluating Judicial Independence and Decisional Confidence in Administrative Adjudications*, 49 Am. Rev. Pub. Admin. 395 (2019).

that in contemporary state courts where many parties are unrepresented, the judge should be actively engaged in bringing forth all relevant facts.[34] This type of engagement is separate from substantive neutrality which is, and remains, a key judicial value that is present throughout all model codes, civil and administrative alike. While Zorza was advocating for judges to become more engaged while remaining neutral, this concept is already being practiced in state administrative adjudications.

Clearly defining and reinforcing the engaged neutrality role of ALJs is less theorized. Additionally, many state administrative systems lack model codes of conduct specifically meant for the complex institutional posture of an ALJ.[35] Even without clear guidance, however, many ALJs internalize their roles as engaged neutral decisionmakers.[36] A less studied corollary highlights the active role of the ALJ in case management and other pre-hearing procedural decisions and whether that gate-keeping function also contains such an engaged neutrality role.[37] However, it is this premise of the engaged ALJ that leads scholars to propose that increasing the kinds of matters heard before an ALJ could assist unrepresented people toward better outcomes with specific types of civil justice matters that intertwine with administrative and regulatory matters.[38]

The most common substantive area where advocates have called for expansion of administrative adjudication is with consumer debt. The particular premise of the engaged ALJ stands in opposition to Professor Jessica Steinberg's vivid description of the passive judge in debt collection proceedings who, although given broad authority to inquire and interrogate, tends to fall back on more adversarial norms.[39] This passive "referee" stance in civil courtrooms has allowed the proliferation of abuses by repeat plaintiffs in consumer debt cases who have pushed judicial processes to allow illegitimate habits like sewer service and robo-signing.[40] Therefore, some argue, by transferring these cases to an administrative system, the power of the engaged decision-maker could be brought to root out these mass justice abuses.[41]

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[34] *See* Zorza, *supra* note 33.

[35] For similar questions applied to the Canadian administration, see generally Lorne Sossin, *Access to Administrative Justice and Other Worries*, *in* Administrative Law in Context (Colleen Flood & Lorne Sossin, eds., 2013) (describing the active adjudication of administrative judging "as a mid-point between adversarial and inquisitorial models of legal process" and further linking this style of adjudication to access to justice: "[i]f tribunal members are more active to ensure a fair process, the inequalities in representation, and more broadly in power and resources between parties, may be mitigated and access enhanced.").

[36] This is a theme that showed up repeatedly in survey answers. *See infra* Part IV.

[37] *See* Shanahan, *supra* note 18, at 217–18.

[38] *See, e.g.*, Wilf-Townsend, *supra* note 6 (proposing an agency model for claims processing in certain substantive areas where top filers make up to one third of all cases filed); Arbel, *supra* note 6 (proposing that an administrative agency with the power to levy large fines screen civil filings for unmeritorious claims against consumers).

[39] *See* Steinberg, *supra* note 6, at 1584.

[40] *Id.*

[41] *See id.*

But the line between engaged and passive judging is fluid. Empirical studies have shown that ALJs switch between being active problem-solvers and passive judges depending on whether the parties have representation.[42] The lines blur even more at the state and local level, where judges sometimes engage in administrative decision-making too.[43] And although scholars have begun to study the detrimental effects of the power imbalance in state courts when people are unrepresented, the effect of this power imbalance could actually be amplified in certain agency adjudications because people appearing in these hearing rooms without representation are up against the state itself, with the judge working as an arm of that same state apparatus but without the added procedural protections of a traditional court proceeding.[44] The possibility of engagement in some settings might be felt as something less than neutral.

Even so, proponents of expanding administrative systems in areas of debt collection, for example, rely on this institutional difference to re-direct the power of the state toward monitoring and scrutinizing the validity of claims and evidence wielded against diffuse consumers.[45] However, deeper understanding of the variation of state administrative systems illustrates that ALJs might not be able to overcome lopsided representation even with their associated relative flexibility.[46] In other words, even within a system that is designed for more engagement with unrepresented people, the need for representation remains the greatest challenge for access to justice. There may be both structural and procedural reforms that could help ALJs expand access to justice in their hearing rooms. The following Part examines these structural and procedural opportunities.

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[42] Portillo, *supra* note 31; *see also* Guthrie et al., *supra* note 11, at 1479 (finding that even with the structure of greater accountability and feedback, ALJs tend to make intuitive decisions in ways very similar to courtroom judges).

[43] Michael Pollack, *Courts Beyond Judging*, 46 BYU L. Rev. 719 (2021) (pointing out that some state judges also engage in this sort of administrative-type decision-making); *see also* Ethan J. Leib, *Local Judges and Local Government*, 18 N.Y.U. J. Legis. & Pub. Pol'y 707 (2015).

[44] *See, e.g.*, Steinberg, *supra* note 6, at 1582–83 (highlighting the "lopsided representation" where powerful interests like landlords and debt collectors are represented by counsel and tenants and consumers are not); *see also* Malcolm C. Rich & Alison C. Goldstein, Chicago Appleseed Fund for Justice, The Need for a Central Panel Approach to Administrative Adjudication: Pros, Cons, and Selected Practices 25 (2019) ("Illinois Administrative Law Judge Edward Schoenbaum, a leader of the central panel movement, stated, 'many people believe that [ALJs] who are not in a central hearing agency are biased in their adjudicative responsibilities . . . [because the] ALJs are hired, promoted, supervised, and paid by the very agency for whom [they] are [reviewing . . . [t]he public thinks this is unfair.'").

[45] *See* Wilf-Townsend, *supra* note 6 (proposing an agency model for claims processing in certain substantive areas where top filers make up to one third of all cases filed); *see also* Arbel, *supra* note 6 (proposing that an administrative agency with the power to levy large fines screen civil filings for unmeritorious claims against consumers).

[46] Steinberg, *supra* note 6, at 1582–83.

III. Models of State Administrative Adjudication

Many have written about the "judicialization" of state administrative adjudication, arguing that in recent years these tribunals have become more and more court-like.[47] However, categorizing administrative tribunals as "court-like" is less apt than it might first seem. Legal scholars and courts have wrestled with which factors should be weighed to determine whether an administrative hearing is more like a court or more like something else, with no clear test emerging.[48] The specific types of formal hearing-like functions have been offered as one metric for assessing court-like qualities; another metric is whether an ALJ decision is reviewed by an executive or judicial actor.[49] Decisionmaker flexibility and engagement in directing fact-finding throughout the hearing might be another factor.[50]

States have designed their administrative systems in different ways, ranging from a centralized tribunal for hearing most agencies' matters, to separate tribunals within each agency, including hybrid designs with centralized agencies that have narrow jurisdiction.[51] And large cities often have their own agency system with a structure that might vary from its state. For example, New York State has a decentralized structure where agency adjudications are housed within subject matter agencies while New York City has a centralized tribunal at the Office of Administrative Trials and Hearings ("OATH").[52] Due

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[47] *See, e.g.*, Frederick Davis, *Judicialization of Administrative Law: The Trial-Type Hearing and the Changing Status of the Hearing Officer*, 1977 Duke L.J. 389 (1977); Scott Limbocker, William G. Resh & Jennifer L. Selin, *Anticipated Adjudication: An Analysis of the Judicialization of the US Administrative State*, 32 J. Pub. Admin. Rsch. & Theory 610, 613 (2022) ("Legal scholars have noted the judicialization of governance for some time. . . . [J]udicialization of the administrative state refers to the formalization of procedural justice in the bureaucracy and the expanding use of trial-like procedures when making policy.").

[48] Jackson, *supra* note 10, at 294 (describing the circuit split over whether state administrative adjudications are removable to federal court under the Judiciary Act of 1789 and advocating for the functional test employed by some circuits). "The test should include, as factors, whether the agency performs the following functions: "filing of pleadings;" "taking of depositions;" "issuance of subpoenas;" "contempt powers;" and "powers to act, namely: injunctive, declaratory or compensatory relief." *Id.* This list of functions is non-exhaustive, and courts have frequently applied other factors to decide whether an agency body is sufficiently "court-like." *Id.* (internal citations omitted); *cf.* Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 Calif. L. Rev. 141, 143 (2019) (highlighting that the final decision-making authority being vested in an agency head is a defining feature of administrative adjudication that separates it from judicial courts).

[49] Jackson, *supra* note 10, at 283–84.

[50] Steinberg, *supra* note 6, at 1611–12 (discussing the problem-solving mission of the District of Columbia's Housing Conditions Court); Anna E. Carpenter, *Active Judging and Access to Justice*, 98 Notre Dame L. Rev. 647 (2018); *see also* Edward J. Schoenbaum, *Improving Public Trust and Confidence in Administrative Adjudication: What an Administrative Law Judge Can Do*, 21 J. Nat'l Ass'n Admin. L. Judges 1 (2001).

[51] *See infra* Part III.A.

[52] *Compare Office of Administrative Hearings*, N.Y. State Dep't of State, https://dos.ny.gov/administrative-hearings [https://perma.cc/S8B3-25LG] (governing only administrative hearings regarding regulated occupations), *with About OATH*, N.Y.C. Off. of Admin. Trials & Hearings, https://www.nyc.gov/site/oath/about/about-oath.page [https://perma.cc/

to the variation among jurisdictions, this study first maps out some general hallmarks and rough categories of types of hearing structure and procedure. It then develops a new way to consider centralization that blends both structure and procedure through a focus on factors that correlate with access-to-justice values: equity, preservation of rights, accountability, transparency, and procedural fairness.

There is nuance beyond merely "centralized or hybrid or decentralized" agency structure.[53] A centralized agency may have a very limited statutory jurisdiction, or its discretion might be limited because the individual home agencies can choose whether to hear their own cases or forward them to the centralized agency. And even where the structure is centralized, the procedures may not be. For example, a centralized agency may exist but the ALJs within the centralized panel may be given discretion as to who can appear as a representative. With these various permutations in mind, this Article turns toward mapping a framework of relevant structural and procedural variations beyond merely the existence of a centralized agency.

This Part draws on responses to a survey of ALJs, alongside a literature review, to map out the features that seem to matter most to an idea of centralized versus individualized structures. By categorizing and weighing the structural and procedural features that the ALJs pointed to in their assessments of access to justice—features of administrative design that reflect access-to-justice values of equity, preservation of rights, accountability, transparency, and procedural fairness—this Part creates a method to assess the range of centralization throughout state administrative systems. The features considered below include: whether a centralized hearing agency exists and, if so, its statutory jurisdiction; whether there is a governing ALJ ethics code; the qualifications required to become an ALJ; who can appear as representatives before the ALJ; and the finality of the ALJ's decision.

A. Centralized Hearings Panels

In the 1980s, a wave of reforms swept state administration.[54] One aspect of agency structure that caught the winds of this reform period was the establishment of a central hearing panel. The Model State Administrative Procedure

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AS3D-588C] (stating that OATH governs administrative hearings from any city agency, board, or commission).

[53] Understanding the variation in state administrative structures also has import for the reinvigorated discussions about the need for a centralized panel of ALJs at the federal level. For more on proposals to centralize federal ALJs, see Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 Minn. L. Rev. 39 (2020) (encouraging reconsideration of a federal central panel model and proposing such a panel's institutional design features).

[54] *See* Michael Asimow, *The Fourth Reform: Introduction to the Administrative Law Review Symposium on State Administrative Law*, 53 Admin. L. Rev. 395, 396–99 (2001); *see also* Malcolm C. Rich & Wayne E. Brucar, The Central Panel System for Administrative Law Judges: A Survey of Seven States (1983) (surveying California, Colorado, Florida, Massachusetts, Minnesota, New Jersey, and Tennessee).

Act of 1981 first codified the establishment of a centralized panel.[55] During this period and since, many have lauded centralization, which is most commonly achieved through a centralized tribunal to hear various substantive disputes either through statutory jurisdiction, referral by the specialist agencies, or some combination.[56] Today, over half of states have some form of central hearing panel.[57] These panels usually allow for standardized procedures governing the role and finality of an ALJ's decision and the qualifications of an ALJ.[58] When ALJs are placed on centralized panels outside of the subject matter agency, they gain a level of independence that enables them to respond to due process concerns stemming from executive branch adjudication.[59]

However, the literature often overlooks the degree to which centralization is a spectrum.[60] No state has a truly centralized hearings process.[61] Among the twenty-seven states that participated in the following ALJ survey, the most centralized structure consists of a centralized hearings agency with a broad statutory jurisdiction to hear matters from most agencies.[62] A majority of states with a centralized hearings agency are more precisely categorized as hybrid or discretionary centralized models, however.[63] In these states, the agencies have either a narrower statutory jurisdiction or significant portions of their jurisdiction are left to the discretion of the various subject matter

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[55] *See* Model State Admin. Proc. Act § 4-301 (Unif. L. Comm'rs 1981).

[56] *See* Allen Hoberg, *Administrative Hearings: State Central Panels in the 1990s*, 46 Admin. L. Rev. 75, 75–94 (1994).

[57] Jim Rossi, *Politics, Institutions, and Administrative Procedure: What Exactly Do We Know from the Empirical Study of State Level APAs, and What More Can We Learn?*, 58 Admin. L. Rev. 961, 970 n.27 (2006).

[58] *See* Revised Model State Admin. Proc. Act §§ 414–15, 603 (Nat'l Conf. of Comm'rs on Unif. State L. 2010).

[59] *See* L. Harold Levinson, *The Central Panel System: A Framework that Separates ALJs from Administrative Agencies*, 65 Judicature 236, 236 (1981).

[60] Describing the spectrum of centralization in 2001, the Director of the North Dakota Office of Administrative Hearings described three models: the "Cadillac" model (Maryland) with broad jurisdiction, comprehensive structure, centralized procedures, and heavy national involvement by ALJs; the "middle" (North Dakota) with somewhat broad jurisdiction and centralized procedures; and the "minimal approach" (Texas, at its inception) characterized by restricted jurisdiction, some centralization with ALJ trainings, and less developed centralized procedural rules. Allen C. Hoberg, *Ten Years Later: The Progress of State Central Panels*, 21 J. Nat'l Ass'n Admin. L. Judiciary 235 (2001).

[61] The most recent comprehensive study of central hearing panels reveals that four states have mandatory jurisdiction but only over specified types of cases and/or with varying levels of final decision-making authority. *See* Rich & Goldstein, *supra* note 44, at 59. A similar mix of hybrid jurisdiction or final authority in centralized panel systems is reflected in the twenty-seven states we surveyed here.

[62] Alaska represents this highly centralized model. *See* Alaska Stat. Ann. § 44.64.010.

[63] Louisiana has a central hearing panel with broad jurisdiction but several exceptions. *See* La. Stat. Ann. § 49:992 (2022). The central panel may, however, contract to provide ALJs beyond its statutory mandate. *See* La. Stat. Ann. § 49:999.1. Iowa allows an agency, a member of a multimember agency, or an ALJ from the division of administrative hearings to conduct a proceeding, but a party may request that the presiding officer be an ALJ from the division of administrative hearings. *See* Iowa Code § 17A.11 (2023).

agencies.[64] More data is needed to understand how centralized the resulting adjudications become when subject matter agencies can choose whether to hold hearings themselves or refer them to the centralized agency.

There also remain many states that do not have any centralized hearing agency.[65] In these states, each state agency is responsible for its own hearings and sets its own procedures.[66] This type of administrative structure allows each agency to hear all of their internal matters in-house. The values most often associated with this single agency model include a higher level of expertise that the ALJ can develop and the associated policy-making benefits of a highly specialized corps of ALJs.[67] An obvious trade-off for the specialized ALJ is the procedural variance that occurs when many different agencies make their own policies about ALJ qualifications and even ethical or other internal rules of conduct for these ALJs. Presumably to hedge against such trade-offs, some of these single-agency states, like New York and Virginia, still contain markers of centralization in procedure even though hearings are held within various subject matter agencies.[68]

B. Procedural Features of State Administrative Hearings

The mere presence of a central hearing panel does not always align with how centralized or uniform the specific procedures governing the hearings are.[69] A state might have a hybrid system with a central panel and centralized procedures; a central panel with very limited jurisdiction and decentralized procedures for remaining hearings; a decentralized system with somewhat centralized procedures; or a decentralized system with decentralized procedures. The structure and the procedure must be considered in tandem to understand the level of independence of various state agencies and adjudicatory systems.

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[64] For example, Maryland and New Jersey represent this model. *See* Md. Code Ann., State Gov't §§ 9-1601–10; N.J. Stat. Ann. § 52:14B-1–31.

[65] The most recent tally of centralized state and municipal panels is thirty, and some of these have quite limited jurisdiction. *See* Rich & Goldstein, *supra* note 44, at 13–15.

[66] In a state with no central hearing panel, or with matters excepted from the central hearing panel jurisdiction, the subject matter agency is responsible for adjudications in house. *See id.*

[67] *See id.* at 20.

[68] For example, New York has a history of providing centralized state manuals and codes of behavior for its ALJs even though the ALJs operate within separate agencies. *See, e.g.*, Manual for Administrative Law Judges and Hearing Officers (N.Y. Dep't of Civ. Serv. 2002), https://www.nysalja.org/wp-content/uploads/2011/03/manual4aljs.pdf [https://perma.cc/Y2QL-SQ66]; and Model Code of Judicial Conduct for State Admin. L. Judges Canon 3(B)(8)(a) (N.Y. State Bar Ass'n 2021).

[69] *See* Revised Model State Admin. Proc. Act § 403 cmt. (Nat'l Conf. of Comm'rs on Unif. State L. 2010) ("In many states, individual agencies have lobbied the legislature to remove various requirements of the state Administrative Procedure Act from them. The result in a considerable number of states is a multitude of divergent agency procedures. This lack of procedural uniformity creates problems for litigants, the bar and the reviewing courts."); *see also* John Gedid, *Administrative Procedure for the Twenty-First Century: An Introduction to the 2010 Model State Administrative Procedure Act*, 44 St. Mary's L.J. 241 (2012).

As discussed above, administrative hearings tend to have more flexibility with procedural and evidentiary rules than court proceedings, and administrative hearings can include more proactive factual development by ALJs than their judicial counterparts.[70] These features make administrative adjudication procedurally more flexible than court hearings, although there is a range of procedural formality within administrative adjudications as well. The vast majority of hearings examined in this Article are most like informal hearings under typical federal administrative law categories.[71] Even so, informal administrative hearings can range from quasi-formal hearings that resemble trials to informal interviews or other interactions with very few procedural protections.[72] Most of the ALJs surveyed here presided over a form of hearing with factual development, a record, and a written decision.[73] Beyond those markers, the types of hearings captured in this survey ranged from trial-like adversarial hearings, where proceedings are multi-day, witnesses are called, and the ALJ or hearing officer produces a public written decision, to more informal decisions, with fewer adversarial hallmarks and ALJs that proactively develop facts and the record in a short proceeding that to a casual observer feels more like a conversation with a narrow decision.

Particular procedures that relate to access to justice values and could be centralized in a state are: an enacted code of ethics that specifically addresses how an ALJ can assist an unrepresented person while remaining impartial; a centralized list of qualifications for an ALJ; the level of finality of the ALJ decision; and standards governing nonlawyer representation. Considering each of these factors on their own allows a deeper understanding of what it means to promote independent decision-making and how states can best promote access to justice values of equity, preservation of rights, accountability, transparency, and procedural fairness. The following part examines the variety of legal frameworks for each of these procedures and provides necessary background and institutional framing to evaluate the state variations.[74]

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[70] *See* Revised Model State Admin. Proc. Act § 404 (Nat'l Conf. of Comm'rs on Unif. State L. 2010). This section codifies many relaxed standards of admissibility of evidence.

[71] *See* 5 U.S.C. §§ 554, 556–57; *see also* Michael Asimow, Federal Administrative Adjudication Evidentiary Hearings Outside the Administrative Procedure Act 3–6 (2016), https://www.acus.gov/sites/default/files/documents/Federal%20Administrative%20Adj%20Outside%20the%20APA%20-%20Final.pdf [https://perma.cc/F47J-BHZC].

[72] *See* Walker & Wasserman, *supra* note 48, at 153 (explaining the vast world of agency adjudications that are not "formal" in the strict administrative law sense but contain various procedural safeguards drawn from formal hearings).

[73] Although the terminology around formal and informal hearings can be murky in administrative law, all respondents reported providing over hearings with some sort of record and written decision. Data on file with the author.

[74] *See* Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 Admin. L. Rev. 551, 568 (2001).

1. ALJ Code of Conduct

The flexibility associated with administrative hearings, and the evidentiary and procedural flexibility traditionally awarded to ALJs as compared to state civil court judges, has recently drawn the attention of access to justice advocates. The possibilities unleashed by a more inquisitorial role for adjudicative decisionmakers opens the door for interventions including increasing new court models built on active judging and expanding roles for nonlawyers throughout the dispute resolution process. But as with centralized hearing panels, there is vast variation as to how each state formally codifies the evidentiary and procedural flexibility thought to be inherent to administrative hearings.[75]

In 2018, the American Bar Association published a Model Code of Ethics for State Administrative Law Judges. The Model Code addresses the role that an ALJ can play in assisting an unrepresented person without violating their duty of impartiality. In Rule 2.2, the Code states that "[a]n ALJ shall uphold and apply the law and shall perform all duties of office fairly and impartially."[76] A comment to this rule elaborates that "[i]t is not a violation of this Rule for an ALJ to make reasonable accommodations to ensure self-represented litigants are afforded the opportunity to have their matters fairly heard."[77] Some states have enacted similar language guiding an ALJ's interactions with unrepresented people.[78] New York and Washington are notable in that they not only adopted this language but expanded it to include specific examples of assistance that an ALJ may provide to an unrepresented person. Detailed guidance, including access-to-justice best practices like "being attentive to language barriers that may affect parties or witnesses[,] . . . questioning witnesses to elicit general information and to obtain clarification[,] . . . modifying the traditional order of taking evidence[,] . . . [and] minimizing the use of complex legal terms[,]" among other assistance, advance the ability of

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[75] *See, e.g.*, Steven A. Glazer, *Toward a Model Code of Judicial Conduct for Federal Administrative Judges*, 64 Admin. L. Rev. 337 (2012).

[76] Model Code of Jud. Conduct for State Admin. L. Judges r. 2.2 (Am. Bar Ass'n 2018).

[77] *Id.* r. 2.2 cmt. 4. This comment is similar to language in the Model Code of Judicial Conduct. *See* Cynthia Gray, *Pro Se Litigants in the Code of Judicial Conduct*, 36 Jud. Conduct Rep. 1, 6 (2014) (reviewing adoption of the 2007 Model Code of Judicial Conduct comment that judges may make reasonable accommodations for pro se litigants).

[78] *See*, *e.g.*, Colo. Rev. Stat. § 24-30-1003 (2019) (applying the Colorado code of judicial conduct, which lists permissible accommodations, to ALJs); Ga. Comp. R. & Regs. r. 616-1-1-.06 (applying the Georgia Code of Judicial Conduct to ALJs); Admin. L. Judge Code of Pro. Conduct r. 2.2 cmt. 2 (Ill. Dep't of Cent. Mgmt. Servs. Bureau of Admin. Hearings 2017); Code of Judicial Conduct for Admin. L. Judges r. 1.2 cmt. (Md. Office of Admin. Hearings 2015); N.J. Admin. Code § 1:1 app. (2022).

unrepresented people to be fully heard.[79] Other states have remained silent[80] or taken a much more limited view on the proper role for an ALJ when an unrepresented person appears before them.[81]

A centralized code of conduct for ALJs can correlate with access-to-justice values of equity and accountability by making sure that in a particular jurisdiction, the role of an ALJ is codified and institutionalized. A centralized code can also add to values of transparency and accountability while still promoting the ALJ independence and flexibility that further support unrepresented parties. While centralized hearing agencies tend to have adopted a model code,[82] the justice values of equity and accountability that a centralized code offers are not necessarily confined to systems with centralized agencies. A centralized code could apply equally to ALJs scattered across individual subject matter agencies. Moreover, as exemplified by Kansas, it is not enough that a state has any code. For a state to champion access-to-justice values, their ALJ ethics code must adopt, at a minimum, the access to justice language of the Model Code and, preferably, the more detailed guidance seen in states like New York and Washington.[83]

2. ALJ Qualifications

Even in states with centralized agencies, the qualifications required of ALJs can vary within those states. In states that have adopted the Model State Administrative Procedure Act and established a central hearing panel, there is a well-defined list of qualifications for an ALJ.[84] Even so, while centralized qualifications would govern the ALJs employed by the central hearing panel, states with relatively centralized systems can still require different sets of ALJ

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[79] 48 N.Y.C. Rules § 103(A)(8)(a); *see also* Model Code of Judicial Conduct for State Admin. L. Judges Canon 3(B)(8)(a) (N.Y. State Bar Ass'n 2021) (giving further examples); Code of Ethics for Admin. L. Judges Canon 2(B)(6)(a) (Wa. State Off. of Admin. Hearings 2022) (similar).

[80] States participating in the survey without an enacted code of ethics for ALJs include Arkansas, Hawaii, Kentucky, Louisiana, Montana, Nebraska, Pennsylvania, and Wisconsin. Data on file with the author.

[81] For example, Kansas's Office for Administrative Hearings has published Standing Guidelines for Presiding Officers. Kan. Off. of Admin. Hearings, Standing Guidelines for Presiding Officers, http://oah.ks.gov/Home/Guidelines [https://perma.cc/8SPG-EM2M]. Guideline Fifteen states: "Presume that pro se litigants know the law and procedure applicable to their administrative appeal. Do not give preferential treatment to pro se litigants." *Id.*

[82] According to the states surveyed in this Article, only Louisiana and Wisconsin had some form of centralization and no published central code. In contrast, New York and Virginia were the only states without a central panel of some sort but with a central code. Data on file with the author.

[83] *Compare* 48 N.Y.C. Rules § 103(A)(8)(a), *with* Kan. Off. of Admin. Hearings, *supra* note 81.

[84] *See* Revised Model State Admin. Proc. Act § 603(b) (Nat'l Conf. of Comm'rs on Unif. State L. 2010). Note that this section is relevant only to states that have a central hearing panel. For more about these limitations, see *id*. § 402(a) and the accompanying Legislative Note.

qualifications outside of the central hearing panel's jurisdiction.[85] Because no state has a centralized panel that hears all administrative adjudications, subject matter agencies outside the centralized panel's jurisdiction could require different ALJ qualifications.[86] Some agencies require that ALJs be attorneys and have a certain number of years of practice;[87] other agencies allow people with specific industry knowledge to sit as ALJs or hearing officers.[88] This variation creates a situation where not only procedures, but ALJ qualifications, might vary among agencies in a given state.[89] The variation of qualifications creates a less centralized adjudicatory system than the existence of a centralized panel might suggest. Moreover, for people who are navigating these legal spaces without a lawyer and appearing before a decisionmaker who may not be a lawyer, there is a possibility that the only person in the room trained in law might be the lawyer representing the state.[90] The access-to-justice value of equity could be implicated in such a scenario.[91]

3. Agency Review of ALJ Decisions

States with centralized hearing agencies have varying processes for subject matter agency heads to review centralized ALJ decisions, if the ALJ is not given final decisionmaking authority by the state legislature.[92] Agency head review of an ALJ's decision is often by design and is described by some as a

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[85] *See supra* Part III.A.

[86] In some cases, ALJs are not required to have a law degree. For more on lay judging, see Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 Colum. L. Rev. 1287 (2022) (discussing history of lay judging from colonial era to present).

[87] *See, e.g.*, Va. Code Ann. § 2.2-4024 (2022) ("[A]ll hearing officers shall meet the following minimum standards: [a]ctive membership in good standing in the Virginia State Bar[,] [a]ctive practice of law for at least five years[,] and . . . [c]ompletion of a course of training . . . .").

[88] *See, e.g.*, Barbers' License Law, P.L. 589, No. 202 (Pa. 1931) (before license suspension or revocation a barber "shall be given a public hearing before a duly authorized representative of the board").

[89] Rossi, *supra* note 74, at 568; *see also* Moliterno, *supra* note 29, at 1196. However, as noted in Larry J. Craddock, *Final Decision Authority and the Central Panel ALJ*, 33 J. Nat'l Ass'n Admin. L. Judiciary 471, 527 n.184 (2013), individual ALJs have written advocacy pieces making the case for final order authority in the centralized panel ALJ.

[90] *See* Greene & Renberg, *supra* note 86, at 1332–33 (describing results from a study of low-level state court judges without a J.D. and the perceptions of less procedural justice).

[91] *Id.* at 1329 (reviewing literature on how people's perceptions of procedural justice affect the legitimacy of the system of justice). For more on how lawyerless courts and lawyerless law development generally can harm underrepresented people, see, e.g., Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg, & Lauren Sudeall, *Racial Capitalism in Civil Courts*, 122 Colum. L. Rev. 1243 (2022); Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, *Lawyerless Law Development*, 75 Stan. L. Rev. Online 64 (2023).

[92] Giving the subject matter agency head final review keeps state administrative law theory more in line with federal administrative law, which is currently debating agency heads' final decisionmaking authority as support for the policy function of administrative agency theory. *See* Walker & Wasserman, *supra* note 48, at 152 (identifying final decisionmaking authority in agency head as the "standard federal model" of modern federal agency adjudication); *see also* United States v. Arthrex, 141 S. Ct. 1970 (2021) (U.S. Patent and Trademark Office may not give final decision-making authority to ALJs).

feature, not a bug, of administrative adjudication generally.[93] Proponents of agency review place value in the agency being able to unify policy through adjudication, thus reflecting equity across the administration and ensuring electoral accountability.[94] However, agency head review also has its critics. The main criticism currently dominating discussions of ALJs in the federal administrative system is that final agency review of an ALJ decision could threaten the independence of the ALJ in ways that implicate due process concerns.[95] Critics also contend the adjudicator might be prone to favor agency enforcers.[96] Favoritism or even the appearance of favoritism raises an access-to-justice concern, particularly when a person is without any form of representation.[97] Agency head review can also frustrate litigants who invested time and effort into presenting their case before a neutral arbiter only to have their victory reversed by an agency head.[98]

Beyond whether there is final decisionmaking authority or subject matter agency review, there are more nuanced debates about the nature of agency supervision through review and what exactly is reviewable.[99] While the Model State Administrative Procedure Act recommends that agency heads have the ability to review all orders, not all states follow this model.[100] Variations here include details about what types of decisions are reviewable, how different

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[93] *See, e.g.*, Asimow, *supra* note 24 (discussing how ALJs spawned from the development of the APA sections governing adjudications that were enacted as the price for Congress authorizing combined function agencies).

[94] *See* Rich & Goldstein, *supra* note 44, at 36.

[95] *See* Levy & Glicksman, *supra* note 53, at 82–85 (describing the threat to ALJ independence through increased agency and/or executive review as one of improper influence that could increase systemic bias and impeded ALJ morale).

[96] For more on the potential problems with agency head control over administrative adjudication, see Rebecca S. Eisenberg & Nina Mendelson, *The Not-So-Standard Model: Reconsidering Agency-Head Review of Administrative Adjudication*, 75 Admin. L. Rev. 1 (2023) (also challenging recent Supreme Court pronouncements of the ubiquity of such a model throughout the federal system).

[97] For more on this, see Rich & Goldstein, *supra* note 44, at 34 (elaborating on why proponents of central panel final decision-making authority connect that with curbing agency abuse: "This protection from agency abuse is particularly pronounced in the increasing number of administrative law cases involving pro se litigants. These individuals, lacking legal representation, need the protection of an independent administrative process perhaps even more than cases in which parties are represented by legal counsel. This is one of the reasons why some legal aid lawyers to whom we spoke see the central panel as a protector of individual rights . . . .").

[98] For more on the various debates between ALJs and scholars on agency review, see Craddock, *supra* note 89, at 525–32 (citing Robert S. Lorch, *Administrative Court via the Independent Hearing Officer*, 51 Judicature 114, 118 (1967)).

[99] How to structure final decision authority is a longstanding debate that is not fully explored here. However, to date there is little scholarship fully exploring the constitutional developments at the federal level and how, if at all, this matters to state administrative law. State Administrative Procedure Acts vary from the federal Administrative Procedure Act due to the unique constitutional history of administration at the state level. This Article merely flags final decision authority as one factor to consider when assessing centralization of administrative adjudications in states.

[100] *See* Revised Model State Admin. Proc. Act § 413 (Nat'l Conf. of Comm'rs on Unif. State L. 2010).

types of authority can be split, and the standard of review that applies to various decisions made by the ALJ.[101] Some states place a very high standard of review on the agency when assessing an ALJ's findings of fact, for instance.[102]

A centralized hearing agency might improve transparency and accessibility of agency review. An agency might have less control over a centralized panel's finding and, indeed, a centralized panel might neutralize an appearance of bias toward the agency enforcers. However, the electoral accountability of the agency-head review model can provide a level of quality assurance and policy coherence that could translate to an equitable model, if the executive branch is one that prioritizes access to justice.[103] In sum, this procedural design choice is ambiguous with respect to access-to-justice values, but it is included in an overall assessment of centrality of procedures within a state.

4. Nonlawyer Representation

Recent scholarly and policy attention has considered the role of nonlawyer representation in federal agency adjudication.[104] But less is known about the regulatory landscape governing nonlawyer representation in state administrative adjudication.[105] States take different views as to whether the regulation of nonlawyer representatives falls under the judicial branch or the legislative branch.[106] Fewer than half of the twenty-seven states reviewed here

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[101] For an example of split authority where the ALJ has final authority over facts and the agency head retains authority over policy, see Craddock, *supra* note 89, at 479–82 (describing split authority in Texas). For more on what he terms "intra-executive deference," see A. Michael Nolan, *State Agency-Based v. Central Panel Jurisdiction: Is There a Deference?* 29 J. Nat'l Ass'n Admin. L. Judiciary 1 (2009).

[102] Nolan, *supra* note 101, at 2–3 (providing examples of state laws regarding agency review).

[103] State agency heads are usually appointed by the governor, so the electoral accountability runs through the executive branch of a given state.

[104] *See, e.g.*, George M. Cohen, Regulation of Representatives in Agency Adjudicative Proceedings (Dec. 3, 2021) (report to the Administrative Conference of the United States) (examining the varied approaches among federal agencies to nonlawyer representation and recommending more study to uncover how often nonlawyer representatives are used). The role of nonlawyer representation has also been considered at the Department of Justice. *See* 8 C.F.R. § 1292.1(a)(4) (describing accredited representative training program). The VA also has an accredited representative program, and various agencies employ ombuds or public advocates that can provide aspects of representation in certain matters.

[105] There is very little empirical research on the use of nonlawyer representatives across any forum, and although we know that people are using nonlawyer representatives in limited matters before a variety of state adjudication forums, there is no comprehensive understanding of the practice. For more on this, see Rebecca L. Sandefur, *Legal Advice from Nonlawyers: Consumer Demand, Provider Quality, and Public Harms*, 283 Stan. J. C.R. & C.L. 283, 289 (2020).

[106] *Compare* Hunt v. Maricopa Cnty. Emps. Merit Sys. Comm'n, 619 P.2d 1036 (Ariz. 1980) (allowing nonlawyer representation by union before the Maricopa County Employee Merit System Commission hearing, so long as the amount in controversy is less than $1,000 and the nonlawyer representative does not receive a fee), *with* Unauthorized Prac. of L. Comm. of Sup. Ct. of Col. v. Employers Unity, Inc., 716 P.2d 460 (Col. 1986) (allowing nonlawyer union

had an affirmative codified policy regarding nonlawyer representation.[107] Only a small handful of states have rules that recognize nonlawyer representation beyond the minimum already permitted by specific federal or state statutes.[108] These states tend to grant the presiding ALJ discretion to determine who may appear as a representative.[109] Other states describe specific types of nonlawyer representation that is allowed.[110]

Given this complex legal framework, sources of law governing the role of nonlawyers in administrative adjudication in any given state might be found in state statutes, agency regulations, court opinions, or court rules. In some instances, federal statutes and regulations also govern nonlawyer representation in state administrative adjudication where the state agency is implementing federal laws and regulations.[111] In these cases, there can be differences between federal and state requirements for nonlawyer representatives.[112]

Although advocates have proposed expanding roles for nonlawyers, and state administrative hearings may offer more opportunity than state courts for this expansion, there is still very little descriptive and empirical understanding of this practice among agencies and states.[113] Unauthorized practice of law statutes in many states greatly limit the ability to innovate in these areas.[114] Calls to expand representation can be met with resistance from the organized

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representatives to "practice law" on behalf of union members in hearings in the state Department of Labor and Employment).

[107] The two non-state jurisdictions that responded, New York City and Cook County, Illinois, also have regulations governing specific types of nonlawyer representatives. Data on file with the author.

[108] For example, Hawaii, Iowa, Kansas, Louisiana, New Mexico, and North Dakota all have some form of rule expressly stating that nonlawyer representation is allowed where such representation is expressly allowed by the governing source of law for that hearing. Data on file with the author.

[109] *See, e.g.*, Alaska Admin. Code tit. 2, § 64.160(a); Fla. Admin. Code Ann. r. 28-106.106.

[110] *See, e.g.*, Md. Code Ann., State Gov't § 9-1607.1; N.J. Admin. Code § 1:1–5.4; Nev. Rev. Stat. § 616C.325.

[111] *See, e.g.*, 20 C.F.R. § 404.1705 (2022) (permitting nonlawyer representation for Social Security hearings); 7 C.F.R. § 273.15 (2022) (remarking that in SNAP hearings, a household's case "may be presented by a household member or a representative, such as a legal counsel, a relative, a friend or other spokesperson"). *But see* Arons v. N.J. State Bd. of Educ., 842 F.2d 58, 62 (1988) (reviewing statutory language, legislative history, and court precedent to hold that Congress' use of the phrase "individuals with special knowledge" in the [now repealed] Education for All Handicapped Children Act did not confer a right to nonlawyer representation in administrative hearing).

[112] For example, the United States Department of Homeland Security has a detailed list of qualifications required for a non-attorney to represent someone before the agency. George Cohen reports that DHS interviewees have reported that this sometimes conflicts with state rules that can be more permissive. *See* Cohen, *supra* note 104 (comparing the more permissive non-attorney representation rules in California and Washington with the DHS rules).

[113] *See* Anna Carpenter, Alyx Mark & Colleen Shanahan, *Trial and Error: Lawyers and Nonlawyer Advocates*, 42 L. & Soc. Inquiry 1023 (2017) (assessing findings from lawyer and nonlawyer representation in one administrative tribunal and concluding that nonlawyers are trained by the ALJs through practice and can offer successful outcomes to routine matters but, due to that on-the-job training, these nonlawyer representatives are less suited to challenge law).

[114] Bruce A. Green, *Why State Courts Should Authorize Nonlawyers to Practice Law*, 91 Fordham L. Rev. 1249 (2023).

bar, for many of the same reasons that led to the creation of unauthorized practice of law statutes in the first place.[115]

However, a handful of states have recently experimented with limited licenses for nonlawyer practitioners in particular subject matter areas. Washington developed a pilot program to expand the use of nonlawyer representatives in family law cases; however, Washington ended admission to the program in 2020.[116] Other states, including Arizona, California, Colorado, and Utah have either launched or recommended similar pilot programs.[117] These pilot programs tend to center on expanding roles for nonlawyers in civil state court matters as opposed to focusing on administrative adjudication; California specifically recommended expansion of paraprofessional representatives in certain types of agency hearings, but recently ended this experiment.[118] Arizona also has language referencing administrative law practice through a similar program, but it is too early to know how this is impacting administrative adjudication in the state.[119]

One area in which many states have developed nonlawyer representation in administrative hearings is unemployment insurance.[120] Here, nonlawyer professionals, generally managed by human resources professionals, are hired by employers to manage unemployment claims.[121] Jurisdictions allow this particular form of nonlawyer representation through statutes, regulations, or court rules.[122] Other areas of administrative adjudication have also developed officially recognized nonlawyer representation assistance in particular

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[115] Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer's Monopoly*, 89 Fordham L. Rev. 1315 (2021).

[116] Empirical work analyzing Washington's pilot program shows favorable results for access to justice and points to political reasons for its sunsetting. *See* Jason Solomon & Noelle Smith, Stanford Center on the Legal Profession, The Surprising Success of Washington State's Limited License Legal Technician Program, Stanford Center on the Legal Profession (Apr. 2021), https://law.stanford.edu/wp-content/uploads/2021/04/LLLT-White-Paper-Final-5-4-21.pdf [https://perma.cc/SU7N-XZJE]. For more on Washington's program, as well as some of the other innovative state programs addressing limited license practitioners, see Mary E. McClymont, The Justice Lab at Georgetown University Law Center, Nonlawyer Navigators in State Courts: An Emerging Consensus 9–10 (June 2019), https://www.srln.org/system/files/attachments/Final%20Navigator%20report%20in%20word-6.11.hyperlinks.pdf [https://perma.cc/K3LF-WUFN].

[117] For more on the increase in state programs to deregulate lawyers in civil court settings, see Steinberg et al., *supra* note 115, at 1323–27.

[118] For more on California's program, see State Bar of Cal., California Paraprofessional Program Working Group Report and Recommendations app. A (Sept. 23, 2021), https://www.calbar.ca.gov/Portals/0/documents/publicComment/2021/CPPWG-Report-to-BOT.pdf. [https://perma.cc/DNT3-RUM5].

[119] *How States Are Using Limited License Legal Paraprofessionals to Address the Access to Justice Gap*, Am. Bar Ass'n (Sept. 2, 2022), https://www.americanbar.org/groups/paralegals/blog/how-states-are-using-non-lawyers-to-address-the-access-to-justice-gap/ [https://perma.cc/QA74-ZLNZ] (noting that Arizona has twenty-two licensed legal paraprofessionals now).

[120] Carpenter et al., *supra* note 113, at 1032–33.

[121] *Id.*

[122] *See id.* at 1033 (comparing a District of Columbia Office of Administrative Hearings rule with a similar rule in Wisconsin).

states and specifically include union representatives, superintendents, utility employees, property managers, human resources representatives, other corporate representatives, insurance representatives, government employees, legal service paralegals, and individuals in certain special education and labor matters as possible nonlawyer representatives in specific types of matters.[123]

Given the history of the unauthorized practice of law and the variations in state and federal responses, nonlawyer representation does not entirely correlate with structural and procedural centralization in state agencies. However, some aspects of regulating nonlawyer representation might correlate with such centralization. For instance, a state administrative system with a centralized code of ethics and centralized ALJ qualifications might provide more consistency when nonlawyer representation is up to the ALJ's discretion. As for whether increasing roles for nonlawyers to represent people in administrative adjudication aligns with access-to-justice values, there is a strong connection between expanding representation and the values of fairness, accountability, and equity. Critics do, however, rightly point to the need for regulations to curb predatory practices in this area.[124] Part VI explores further whether an expanded role for nonlawyer representation in administrative adjudication increases access to justice in all cases and highlights questions that need more study to truly understand what representation provides.

C. Implications of Structural and Procedural Choice

Figure 1-1 depicts centralization rankings for the states participating in the survey reported in this Article. The ranking includes both the structural design of a centralized hearings agency and its jurisdiction, as well as the procedural designs most often linked to values of accountability, equity, and fairness: an enacted code of ethics for ALJs, standardized qualifications for ALJs, finality of ALJ decisions, and regulations governing nonlawyer representation.[125] A state received one point for the presence of each of the above factors, so a higher score means that a state has more features of centralization.

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[123] *See, e.g.*, Md. Code Ann., State Gov't § 9-1607.1; N.J. Admin. Code § 1:1-5.4; Nev. Rev. Stat. § 616C.325.

[124] Predatory practices have long been seen with certain immigration matters, particularly through what is termed Notario Fraud. The federal government has seen an uptick in predatory practices in the wake of legislation expanding benefits through the Department of Veterans Affairs and the accredited representative system in that agency. *See, e.g.*, Joshua Friedman & Krystle Good, *WARNO: They Call Themselves "Coaches" or "Consultants" and Advertise Their Ability to Assist You with Your VA Benefits Claim but May Not Be Accredited to Practice Before the VA*, Consumer Fin. Prot. Bureau (Feb. 15, 2023), https://www.consumerfinance.gov/about-us/blog/coaches-consultants-advertise-ability-to-assist-with-va-benefits-claim-but-may-not-be-accredited/ [https://perma.cc/V92U-5UGU].

[125] Scores were: Alaska: 9; New Jersey: 8; Arizona, California, Louisiana, Maryland, North Dakota, New York City, Washington D.C.: 7; Florida, Georgia, Indiana, Iowa, Kansas, New Mexico: 6; Colorado, Cook County, Illinois, Washington, Wisconsin: 5; Nevada: 4; New York, Virginia: 2; Arkansas, Hawaii, Montana, Nebraska, Pennsylvania: 1. Data on file with author.

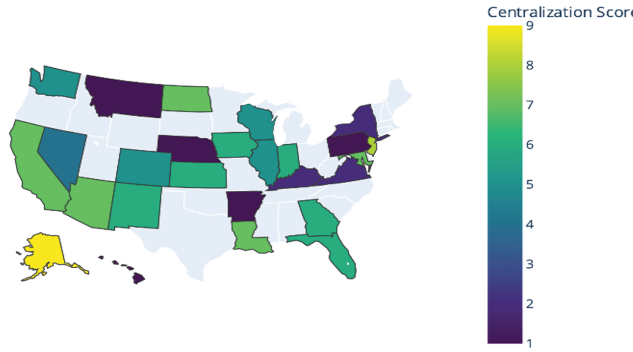

FIGURE 1-1

In order to assess whether state administrative adjudication is indeed more accessible than civil court for people without representation, and/or whether, as a policy matter, advocates should work to expand nonlawyer representation in these settings, we must start by understanding the system itself and the nuances lurking within a centralized or individualized hearing structure.

A holistic account of centralization spurs new questions about whether there are optimum structures and procedures from the perspective of someone navigating an administrative hearing without representation. A foundational question, then, might be: does a certain type of administrative adjudicatory structure correlate with how well a state is doing generally on other measures of access to justice? Is a state with a robust access-to-justice commission—including legal aid or other low-cost and pro-bono lawyers, and a commitment toward best practices in their courthouses to simplify procedures for unrepresented people—more likely to have a centralized administrative adjudicatory system and, by extension, a more judicialized adjudication procedure for administrative matters?

To assess whether there exists a connection between centralization and other measures of access to justice, this Article compares the centralization ranking to other national indicators of access to justice, such as those reported through the Justice Index. The Justice Index tracks state court justice measures and assigns each state a ranking based on the number of best practices used in the state court system.[126] When comparing a centralization ranking against the composite Justice Index results for various state court measures of access to justice, there seems to be no statistical correlation between the two metrics. In other words, states that have highly centralized systems scored both on the high side and on the low side of the Justice Index generally. The values

[126] The Justice Index is published online by the National Center for Access to Justice. For more information on the Justice Index, its methodology, and the rankings, see *Justice Index*, Nat'l Ctr. For Access To Just., https://ncaj.org/state-rankings/justice-index [https://perma.cc/9CD7-PBG8] (last visited Oct. 23, 2023).

espoused by the supporters of centralization appear to both exist and not exist throughout all forms of administrative adjudication structures.

Some individual procedures, however, do stand out as possibly connected to states with robust access to justice practices in state courts. In particular, states that have adopted a centralized code of conduct for ALJs in the state, and particularly states that have adopted language similar to the ABA Model Code for ALJs, scored higher on the Justice Index.[127] This remained true both for states with highly centralized and highly decentralized agency structures.[128] One reason for this might be that these states have increased advocacy networks focused on best practices to boost access to justice in state courts through access-to-justice commissions and other commitments to simplify processes. These networks allow for the kind of communication between institutions that can spur both recognition of systemic problems and experimentation of reforms.[129] It might be that, from the perspective of an unrepresented person in a hearing room, a centralized ALJ ethics code that provides guidance to an ALJ with respect to flexibility and other procedural aspects of the administrative adjudication matters more than whether hearings take place in a centralized agency or various subject matter agencies.[130]

IV. Views from the ALJs

Part III developed a descriptive landscape from which we can better understand the various legal frameworks governing state administrative adjudication. It did so by describing and organizing differences between the states when it comes to agency structure, ALJ qualifications and behavior, finality of ALJ decisions, and standards governing nonlawyer representation. This information is necessary background for any project aiming to grasp the variation among state administrative hearing rooms around the country. Still, very little is known about the dynamics in these hearing rooms on a daily basis.

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[127] Maryland, California, New York, Illinois, and New Jersey rank in the top ten on the Justice Index, and each has language about accommodation for unrepresented litigants in its ALJ code of conduct. *See id.* However, Hawaii, which ranks sixth on the Justice Index, has no code of conduct for presiding officers. *Id.*

[128] Maryland, California, Illinois, and New Jersey have centralized systems, but New York relies on discrete agencies. *Id.*

[129] States will sometimes commission a review of their administrative adjudication processes. These reports, often spurred by access-to-justice-focused commissions, tend to focus on centralizing ALJ qualifications, providing accountability and consistency through internal agency design of a centralized hearing panel and institutionalization of the ALJ role. *See, e.g.*, Administrative Justice in the District of Columbia: Recommendations to Improve DC's Office of Administrative Hearings, The Council for Court Excellence (Sept. 7, 2016), http://www.courtexcellence.org/uploads/publications/OAH_Final_Report_20160908_1.pdf [https://perma.cc/E4DJ-QZWY].

[130] This finding and attendant discussion tracks similar findings at the federal level. *See* Bremer, *supra* note 12, at 1792–94.

To respond to and begin to fill that information gap, the survey reported here relies on information from the judges and hearing officers themselves. Those that preside over these hearings have a unique perspective to assess how current access-to-justice interventions are working and whether gaps remain for those who appear before them. This Part explains the survey process, and then organizes responses into separate areas. First, the Article reports what ALJs and agencies are doing with respect to simplifying the process and minimizing administrative burdens for those who are adjudicating matters with the state. Next, the Article examines who is represented, how representation works, and how representation might expand beyond lawyers. Finally, the Article turns to the more open-ended survey responses that report the ALJs' views on how well their agencies provide access to justice.

A. Survey Methodology

The survey framework and questions were developed in consultation with an expert focus group of active and retired state and city administrative law judges.[131] The survey was designed to work through various areas of concern with access-to-justice reform: process simplification; access to and interactions during pre-hearing conferences and hearings; representation; ALJ training availability; and overall views on access-to-justice policies and practices in the specific jurisdiction.

Many of the questions asked about the presence or absence of specific practices at the ALJ's agency. A smaller group of questions asked ALJs to describe their individual impressions about whether particular policies worked well and whether there remained areas that needed attention in order to provide an optimum level of justice to all. Questions were a mix of multiple choice, open text, and ranked choice. Respondents could choose not to answer any given question and continue the survey. Jurisdictional information was recorded so that responses could be disaggregated by jurisdiction and weighted accordingly.

The survey link was disseminated through the National Association of Administrative Law Judiciary ("NAALJ"). The total membership of NAALJ consists of both state and federal ALJs and hearing officers, but the survey was open only to the 415 ALJs and hearing officer members from state or local jurisdictions.[132]

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[131] The survey was developed in Qualtrics and was approved through the Rutgers University Institutional Review Board. Questions were developed with input from the Equal Justice Committee of the New York Association of Administrative Law Judges, including members Ziedah Diata, Cathy Bennett, Ray Kramer, Aiesha Hudson, and Joan Saltzman.

[132] The survey link was sent to roughly 400 members, representing only the state or local jurisdiction members.

B. Survey Results

In the three weeks that the survey remained open, 125 ALJs, representing 27 states and 2 cities, responded.[133] Of these 125 responses, 93 contained complete jurisdictional information.[134] The following sections describe the responses, including anonymous quotes from open-text responses to particular questions for the set of 93 responses that were attributable to a particular jurisdiction. Respondents represented jurisdictions with all varieties of structural systems, and therefore responses reflect ALJs from both centralized hearing agencies and from various subject-specific agencies.[135]

Although the ALJs characterized their hearings as anywhere from formal to hybrid to informal, all respondents reported hearings on the record with a written decision. The subject matters varied, which also means that the docket level varied quite a bit among respondents. For example, an ALJ attending to matters involving unemployment insurance or other public benefits might have multiple hearings daily, while an ALJ with matters involving public utilities might have only one hearing a month. Many survey respondents juggled a variety of both high volume and low volume case types.

The survey responses are grouped around particular interventions that hold promise for expanding access: process simplification, structural choices that provide guidance for unrepresented people, access to lawyers, access to nonlawyers, and innovations in ADR. The responses offer more data to help advocates understand how these various access interventions are used among various state administrative adjudications. Further, the responses offer insights from the ALJs as to whether these interventions increase outcomes for people involved in administrative adjudication processes. In some cases, the flexibility inherent in administrative hearings could open space for a robust expansion of access interventions. The understandings generated from the ALJs' responses here could also offer support for advocates interested in expanding such interventions to state civil courts or federal agencies.

1. Process Simplification

Many administrative adjudication systems do not follow best practices for simplifying the process of administrative adjudication. Overly complex

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[133] This includes Washington, D.C. (here counted as a state) and New York City and Cook County (local jurisdictions with their own administrative structures).

[134] The ninety-three responses with complete jurisdictional information were the only responses analyzed because the individuality of each response could be ascertained with these responses only. Within this group there were responses from the following state and local jurisdictions: Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Pennsylvania, Virginia, Washington, Washington, D.C., Wisconsin, New York City, and Cook County.

[135] *See supra* Figure 1-1.

and exclusionary practices exacerbate the administrative burdens felt by those who need the administrative apparatus for their health, safety, economic security, and other critical life needs.[136] Administrative burdens can increase the amount of time needed to claim benefits under the law, as well as affect the overall outcomes for those who engage with various administrative benefits adjudications.[137] Seemingly small burdens can have large effects. In recognition of how these administrative burdens might create or exacerbate justice gaps, access-to-justice scholars have advocated for simplification of the process, such as plain language reforms throughout the justice system, enhanced court websites that inform citizens of the process and allow for downloadable forms, and robust best practices to increase language and disability access. Process simplification does not itself guarantee the right to be heard.[138] The goal with simplification is to increase the likelihood that an unrepresented person confronted with an adjudicatory hearing has a chance to fairly navigate the process by providing clear information and access to all required forms and steps in multiple languages.

Language accessibility in administrative adjudication is similar to the level reported in our state courts, with a majority of agencies reporting various initiatives to increase language justice.[139] Respondents overwhelmingly report that their agencies provide free language interpreters, although outliers remain.[140] Fewer respondents indicated their agency had a designated staff

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[136] The federal government has recently explored the unique challenges that federal agencies encounter with simplification beyond adjudication. Much of the same is true in state agencies. *See, e.g.*, Legal Aid Interagency Roundtable, Access to Justice Through Simplification 4 (2022) ("Federal agencies serve diverse communities across this country through a wide array of programs, funding, benefits, and more. However, too often the public struggles to access those resources because of complex forms or processes—especially those who need assistance most. The American public spends approximately 11.5 billion hours a year responding to information requests from federal agencies. Additionally, complicated language, forms, and processes can result in mistakes and wasted time resulting in unnecessary applications, corrections, or appeals.").

[137] *See* Pamela Herd & Don Moynihan, Administrative Burdens: Policymaking by Other Means 3–5 (2019); *see also* U.S. Off. of Mgmt. & Budget, Study to Identify Methods to Assess Equity: Report to the President (July 2021); Exec. Order No. 14,058, 86 Fed. Reg. 71357 (Dec. 2021).

[138] *See* Rebecca Kunkel, *Rationing Justice in the 21st Century: Technocracy and Technology in the Access to Justice Movement*, 18 U. Md. L.J. Race, Religion, Gender & Class 366, 368 (2018).

[139] On standards of service delivery, a majority of state courts provide free translators for court users with limited English proficiency and provide a dedicated office to facilitate language access. *See Language Access*, Nat'l Ctr. for Access to Just. (2020), https://ncaj.org/state-rankings/2020/language-access [https://perma.cc/DDY3-NF3J].

[140] A Nevada ALJ who conducts insurance hearings reported that interpreters are not provided, while a Nevada Department of Motor Vehicles ALJ reported that interpreters are provided. A New Jersey ALJ in the Office of Administrative Law stated that interpreters are not provided; this is confirmed by the Office of Administrative Law website. *Interpreter/Intérprete*, State of New Jersey Office of Administrative Law, https://www.state.nj.us/oal/hearings/interpret/ [https://perma.cc/YCB9-YL3L] ("The OAL does not provide interpretation, except in the case of hearing-impaired parties."). A respondent from New Mexico, who conducts environmental hearings for an agency, reported that their agency does provide interpreters. However, the

position to manage language access[141] and/or a language access plan.[142] One respondent noted that the shift to remote hearings during COVID-19 made language translation much more difficult. A recent task force report in New York studying lessons from COVID-19 on access to justice agreed.[143] Overall, more needs to be done at the state administrative level to better understand and respond to language needs and to how language access interacts with the rise of remote processes post-COVID-19.

Access to justice advocates have long championed the use of plain language in legal documents and forms, particularly those that are used frequently by people without legal representation.[144] Plain language initiatives are reported to be widely incorporated throughout the agencies.[145] Survey respondents cited the following examples of plain language incorporation in their respective agencies: agency guidance on plain language, plain language training for ALJs and other agency staff, use of plain language in templates and forms, and in some cases specific plain language requirements. For example, a respondent from California wrote that the hearing division of their agency reviews documents for plain language in proceedings where a party is unrepresented.[146] Generally, respondents overwhelmingly felt confident that their websites offered information about hearings and provided easy access to all necessary forms.[147] However, most respondents were not aware of whether their agency has a dedicated technology unit that manages the website.

The survey then asked a series of questions about how parties are notified about hearings. When asked whether the notice of hearing or other direct communication to self-represented people adequately conveys the formality of the hearing, a majority of respondents (fifty-four percent) felt that the notice

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New Mexico Administrative Hearings Office does not. N.M. Code R. § 22.600.1.23 (LexisNexis 2022).

[141] In seventeen of the twenty-nine jurisdictions responding, or fifty-nine percent, at least one ALJ reported that their agency had a designated staff position for managing language access.

[142] In twenty-two of the twenty-nine jurisdictions responding, or seventy-six percent, at least one ALJ reported that their agency had a language access plan.

[143] N.Y. State Bar Ass'n, Report and Recommendations of the Task Force on the Post-Pandemic Future of the Profession 79 (June 2023) (recommending that administrative "[h]earings involving individuals with limited English proficiency should be presumptively in person, with the option to opt-in to a telephone or video hearing").

[144] Federal agencies have long mandated plain language. *See, e.g.*, 5 U.S.C § 301 (Plain Writing Act of 2010). According to the most recent statistics from the Justice Index, about half of state courts reported use of plain language in forms. *See, e.g.*, *Self-Representation*, Nat'l Ctr. for Access to Just. (2020) (Questions 14–24), https://ncaj.org/state-rankings/justice-index/self-representation [https://perma.cc/8VT5-QSCA].

[145] In sixteen of the twenty-nine jurisdictions reporting, or fifty-five percent, at least one ALJ reported that their agency supported plain language initiatives.

[146] The respondent, an ALJ with a public utilities commission, also noted that their agency issues plain language guidance and conducts plain language trainings for agency employees.

[147] Seventy-nine percent of respondents rated the level of necessary information conveyed by their agencies' websites as "detailed" or "adequate." Eighty-one percent of respondents responded in the affirmative when asked if necessary forms were easily accessible either in hard copy or online.

definitely conveyed the formality of the hearing, and an additional thirty-five percent felt that the notice somewhat conveyed the formality of the hearing.

Another simplification practice that was specifically addressed was the communication to parties about available no-cost or low-cost legal representation for those who might qualify. While forty-one percent of respondents reported that their agency does publish or otherwise provide a list of no-cost or low-cost attorneys or advocacy groups that can connect a person to representation, this did not seem to be common practice. When they occurred, such communications were either attached to the notice of hearing, available on the website, or available from the judge. For agencies that provide such a list, the available representation is culled from legal aid, other non-profits, pro bono through bar association, and law school clinics (in ranked order).

2. Structural Choices That Increase Guidance for Unrepresented People

Other best practices for courts and agencies holding adjudications with unrepresented people include structural changes such as staffing self-help centers and increasing ombuds and public advocate positions to assist in aspects of representation.[148] State administrative structural design has much work to do in this area. For example, most respondents report that their tribunal does not staff a self-help center.[149] While this may be partly a historical result of administrative tribunals originally designed to be simple forums, survey results show that this goal is not always met. Where an employee or office is dedicated to assist people for any portion of the proceedings, such positions tend to be limited by the subject matter—for example, claims regarding patients' bill of rights, rental housing, and injured workers were specifically cited. Overall, however, significant disagreement within states, and sometimes within agencies, as to whether such resources were available suggests that better training for ALJs as to any available resources for unrepresented parties is a key recommendation.

Justice interventions that guide people through the process, by simplifying the process, staffing support, or providing assistance for unrepresented people, create positive interactions with the state and "can increase citizen confidence and knowledge of opportunities, and allow them to develop

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[148] *Self-Representation*, Nat'l Ctr. for Access to Just. (2020), https://ncaj.org/state-rankings/2020/self-representation [https://perma.cc/8VT5-QSCA]. On public advocates and ombuds, see Admin. Conf. of the U.S., Recommendation 2016-5: The Use of Ombuds in Federal Agencies, 81 Fed. Reg. 94316 (Dec. 13, 2016). But for discussion of the limits on assistance from agency staff, see, e.g., Michael Asimow, *Contested Issues in Contested Cases: Adjudication Under the 2010 Model State Administrative Procedure Act*, 20 Widener L.J. 707, 731 (2011).

[149] Survey responses showed that only six out of twenty-nine jurisdictions (twenty-one percent) reported a staffed self-help center. There was significant disagreement within states about this, sometimes attributable to specific agencies that seemed to have a self-help center, other times unclear.

participatory skills."[150] Another area that might help create a positive interaction with the state includes expanding alternative dispute resolution opportunities. Innovating the types of processes available to resolve disputes might be easier to do within the variation of state administrative hearings. For example, one dispute resolution innovation in New York City involves restorative justice circles in resolving administrative citations.[151] More research should be done to encourage continued development of innovative alternative dispute resolution processes in administrative hearings.

Finally, these sorts of structural changes to increase guidance and support for unrepresented people relate to a larger problem of chronic understaffing issues in state agencies. Even in centralized systems, an understaffed hearing agency can have trouble managing caseloads.[152] In this situation, efficiency needs can create norms that hinder access to justice. Although this survey did not ask detailed questions about case management, answers to questions about caseload generally reflected that many ALJs felt their caseload had increased. Some responses linked the staffing issues to access-to-justice problems. One respondent pointed to training that recommends using defaults to manage caseload. Such training creates a disconnect with an overall agency mission to reduce burdens and increase access to justice.

3. Representation Challenges

While the previous parts examined survey responses about interventions that could simplify the process and increase opportunities for guidance for an unrepresented person, this Part turns to ALJs' views on increasing representation. The cumulative burdens experienced by an unrepresented person navigating administrative systems can be overwhelming. At times, lack of representation could lead to someone not receiving benefits to which they are legally entitled. Administrative claimants may have trouble accessing certain files or individual data without representation, or they may not include documentation that is essential evidence needed for their claim. An ALJ might be

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[150] Herd & Moynihan, *supra* note 137, at 29.

[151] For more on this project, see Off. of the Mayor of N.Y. City, Exec. Order No. 63, Establishing the Center for Creative Conflict Resolution and Promoting Restorative Justice Principles (Feb. 18, 2021); *Welcome to the Center for Creative Conflict Resolution at OATH*, NYC Off. of Admin. Trials & Hearings, https://www1.nyc.gov/site/oath/conflict-resolution/conflict-resolution.page [https://perma.cc/P4Q3-S4MS] (last visited Oct. 23, 2023).

[152] For more on this, see Nicholas R. Bednar, *The Public Administration of Justice*, Cardozo L. Rev. (forthcoming 2023) (arguing that in some cases the administrative adjudication caseloads mean that adjudicatory agencies lack capacity to provide sufficiently accurate adjudication to satisfy the Due Process Clause). *See also* C.P. v. N.J. Dep't of Educ., No. 19-12807, 2022 WL 3572815, at *1 (D.N.J. Aug. 19, 2022) (granting class certification for plaintiffs alleging that delays in New Jersey's special education hearing system violate the Individuals with Disabilities Education Act).

able to assist in this sort of fact-development, but ALJs repeatedly voiced that more representation would help the process.

ALJs' assessment of the percentage of unrepresented people varied widely by subject matter, with some subject matters, like utilities and tax, tending to have near universal representation, while other areas mimic the crisis in our state courts where 70–95% of people are unrepresented.[153] Removing the specific subject matters with high representation due to regulated industry parties, the response is an average of roughly 60–70% of hearings having at least one unrepresented party.[154] Respondents singled out public benefits and child support cases as tending toward a much higher percentage of unrepresented people.[155]

The timing of any communication about available representation is important. A great majority of ALJs hold pre-hearing conferences to organize matters, refine claims, and solve problems. Overwhelmingly, ALJs report that even where jurisdictions do provide contact information for no-cost or low-cost representation, parties are not given such information at or before pre-hearing conferences. Respondents reported that even in agencies where a list of representation is available, parties are not always given this list before pre-hearing conferences. The most often cited reason for adjournment/continuance is to allow parties time to find representation.[156]

This timing matters because represented parties can move more quickly through some of these pre-hearing steps, which can have concrete effects on a party's well-being. Without representation at pre-hearing, the matter is more likely to be delayed, and this can affect a party's access to family, healthcare, education, employment, and other vital life outcomes.[157] As one

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[153] One area of reform that generally affects access to representation and is similarly reflected in administrative hearings is the presence of a fee-shifting statute. These statutes might function as a burden-reduction mechanism. *See* Herd & Moynihan, *supra* note 137. However, fee-shifting statutes don't always live up to their potential. The "false promise of fee-shifting statutes" was well-documented in Joanna C. Schwartz, *Civil Rights Without Representation*, 64 Wm. & Mary L. Rev. 641, 653–57 (2023).

[154] ALJ perception is all that is available in many agencies, as a majority of ALJs report their tribunal does not collect data on the number of unrepresented people at hearings and, of the agencies that do, such information is not always made public. Survey research only reflects the particular perceptions of the person answering the survey. This limitation reminds the reader to draw appropriate inferences from the results reported in this section.

[155] This is particularly concerning as we know from federal benefits disputes that legal representation has a clear connection to outcomes in similar areas. A 2022 study by the National Bureau of Economic Research concluded that "legal representation in the initial stage leads to earlier disability awards to individuals who would otherwise be awarded benefits only on appeal. Furthermore, by securing earlier awards and discouraging unsupported appeals, representation reduces total case processing time by nearly one year." *See* Hilary W. Hoynes, Nicole Maestas & Alexander Strand, *Legal Representation in Disability Claims* (Nat'l Bureau of Econ. Rsch., Working Paper No. 29871).

[156] The second most common reason for adjournment or continuance is due to childcare, transportation, or work conflicts with scheduling.

[157] *See, e.g.*, Shanahan, *supra* note 18 (offering empirical data from administrative agency tribunal on outcomes of these pre-hearing procedures with unrepresented people).

ALJ described, delays at the pre-hearing stage can have serious life impacts because, for example, a delay in a licensing case means that the person is unable to work until the hearing. A delay of a few months is an immense loss of income. The ALJ describing this situation relayed that having representation at the pre-hearing stage can speed the timeline up and allow someone to get back to work faster.

As mentioned above, some jurisdictions employ an ombuds or a public advocate. However, these programs remain rare. When they exist, the ombuds and their offices tend to give information only.[158] They rarely appear on behalf of parties or give legal advice. When asked whether their agency employs an ombuds or public counsel for any portion of the proceedings, very few respondents reported such public assistance. The scope of assistance can vary greatly between merely providing information and forms to citizens, to providing testimony and reports on behalf of citizens, and to actually appearing on behalf of someone as counsel. Some ombuds are embedded in subject matter agencies to field or otherwise investigate complaints from the public in advance of any particular hearing. There are different levels of guidance and advice in between those two points, and each program is structured to provide a particular level. In addition, most ombuds and advocate programs are statutorily limited by subject matter. For example, a California program provides an "independent consumer advocate at the California Public Utilities Commission . . . to advocate for the lowest possible bills for customers of California's regulated utilities . . . ."[159]

Even understanding the scope of the problem of lack of representation is challenging. One example of noise in the survey responses is seen with responses about whether the COVID-19 pandemic seems to have had an effect on the number of unrepresented people in state administrative adjudications. While the overwhelming response was "no change," there were also interesting outliers. ALJs from the same state, and sometimes the same agency, experienced opposite effects from COVID-19. In one state, while two ALJs agreed that fewer people were unrepresented during COVID-19, one attributed this to the availability of video hearings, which made representation more available. The other ALJ in the same state wrote that more people were represented because the nature of the case types had changed. In a different state, two different ALJs agreed that more people were without representation during COVID-19. Each had a different explanation, however, with one writing that

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[158] For example, an ALJ from the Virginia Workers' Compensation Commission noted that an ombuds gives information and guidance, but not legal advice or representation, to unrepresented persons. A Washington, D.C. ALJ mentioned assistance with rental housing hearings, and Maryland ALJs discussed public defenders representing litigants in involuntary hospital admission cases.

[159] For more on this office, see *The Public Advocates Office*, Cal. Pub. Utils. Comm'n, https://www.publicadvocates.cpuc.ca.gov/-/media/cal-advocates-website/files/careers/230213-public-advocates-office-recruitment.pdf [https://perma.cc/AA4J-RYKH] (last visited Oct. 29, 2023).

"people have mentioned it is hard to find representation due to [COVID-19]." The other ALJ from the same state with the same overall perception wrote that "multiple appellants have stated that they cannot afford an attorney right now due to [COVID-19]-based unemployment."

4. Expanding Nonlawyer Representation

States have historically lacked a uniform approach to nonlawyer representation.[160] As such, we know very little about how often such nonlawyer representation occurs and the outcomes of hearings where nonlawyer representation is employed.[161] Nonlawyer representation is more widely practiced in state administrative hearings than in state courts, but significant barriers to a robust use of the practice remain. These barriers include inconsistency and lack of clarity within states as to how nonlawyer representation is regulated and which subject matters even allow for nonlawyer representation.[162] The vast majority of allowances for nonlawyer representation stipulate that the nonlawyer representative must not accept a fee for their work. This is an area in great flux as states and advocates are currently debating the parameters of unauthorized practice of law, and states are experimenting with different types of nonlawyer assistance.[163]

However, nonlawyer representation does seem to be a fairly common occurrence in at least some types of state administrative adjudications. A majority of ALJs reported that their agency allowed for some form of nonlawyer representation. While responses here were variable, much of the information was corroborated by the sources of legal authority that place parameters on who is qualified to represent people in administrative adjudication. These sources range from federal and state statutes, state and local regulations, and

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[160] *See* Gregory Stevens, *The Proper Scope of Nonlawyer Representation in State Administrative Proceedings: A State-Specific Balancing Approach*, 43 Vand. L. Rev. 245, 246 (1990) (describing the variety of state approaches, using Tennessee law to point out the tension between statutorily allowing nonlawyer representation in quasi-judicial tribunals with other state laws regarding unauthorized practice of law).

[161] We know very little about this at the federal level as well. One set of data comes from the Social Security Administration ("SSA") and shows attorney representation in hearings before SSA is on an upward trend, averaging roughly sixty-five percent in 2015. Nonlawyer representation at the same agency was on a downward trend in 2015, with an average of fifteen percent. Cohen, *supra* note 104 (report to the Administrative Conference of the United States).

[162] Stevens, *supra* note 160, at 246.

[163] For a review of state innovations in this area, *see supra* Part III.B.4 and accompanying notes. *See also Approaching the Bar*, The Practice, July–Aug. 2018, https://clp.law.harvard.edu/knowledge-hub/magazine/issues/emerging-models-of-legal-professionals/approaching-the-bar/ [https://perma.cc/KHM6-BB27]. For discussions among access to justice advocates, see, e.g., Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 Wash. U. L. Rev. 297 (2019); Richard Zorza and David Udell, *New Roles for Non-Lawyers to Increase Access to Justice*, 41 Fordham Urb. L.J. 1259 (2014). For a historical view of the role of nonlawyers, see, e.g., Kelsea A. Jeon, *Legal Aid Without Lawyers: How Boston's Nonlawyers Delivered and Shaped Justice for the Poor, 1879–1921*, 92429 Geo. J. Poverty L. & Pol'y 121 (2022).

court rules.[164] Notably, ALJs repeatedly referenced that nonlawyer representatives were subject to all of the same rules and standards as legal representatives.

Most responses referenced laws and regulations governing who is qualified to act as a representative and particular statutes or regulations governing nonlawyer representation in certain subject matters.[165] Some ALJs referenced that it is up to an ALJ's discretion whether to allow nonlawyer representation. Many responses mentioned that nonlawyer representation must be uncompensated or, if charging a fee, must be supervised by a lawyer. Particular examples of nonlawyers who might appear included: family members, property managers, superintendents, utility officers, union directors, and law students. Some responses mentioned that any nonlawyer representative must be authorized or otherwise licensed per regulations. One particularly noteworthy response stated that "nonlawyer representatives were rarely used in their agency because attorneys' fees are available to the prevailing claimant."[166]

5. Access to Justice

While much of the survey reported so far has been based on ALJs' impressions, these impressions were often supported by policy or practice. For this final Part, ALJs offered their personal subjective views as to what works and what does not in terms of providing access to justice. ALJs want to provide fair hearings, so it is reasonable to expect that the answers will reflect positively on the adjudication experience. In many cases, they did; but not always. It is important to listen to where ALJs noted people were struggling. This Article does not purport to reflect the experience of people who enter these adjudications without representation; it merely begins the conversation by opening the doors to the hearing rooms as seen by ALJs.[167]

When asked to rate access to justice on a scale from one to five—a score of five represents a perception of "excellent" access to justice—for people who appear before their agency without representation, the mean response was 3.82. This translates to somewhere between "basic" and "above average," erring on the "above average" side. A few responses elaborated that an unrepresented person's experience is very ALJ-dependent, as their jurisdiction has very few formal rules and a lot of flexibility governing ALJ interactions with

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[164] *See supra* Part III.B.4 and accompanying notes (describing the various legal constraints on nonlawyer representation in administrative adjudication).

[165] *See supra* Part III.B.4.

[166] This is noteworthy because it speaks to the market forces that are at play between legal and nonlawyer representation. Expanding attorneys' fees may be a possible statutory response to chronically underrepresented areas of administrative adjudication.

[167] The author and a research assistant did attempt to observe administrative adjudications while conducting the survey, but due to COVID-19 policies it was only possible to observe a handful of hearings from one state. There is a great need for more observational studies in this area, as well as expansion of user research to better understand how people interact with agencies in adjudicative settings.

unrepresented people. However, a majority (sixty-one percent) of ALJs felt that unrepresented parties appearing before their agencies received "excellent" or "above average" access to justice. In support of this view, they cited the detailed and comprehensive training provided to ALJs; the strong history and tradition of the ALJs' commitment to assisting unrepresented parties navigating complex claims and procedures; and the expansion of technological innovations such as remote hearings.

Those who felt that access to justice in the tribunal was merely "basic" or "below average" or "very poor" mentioned particular areas of law that are complex and disadvantage unrepresented people more, such as discrimination claims and workers' compensation specifically. Lower access to justice responses repeatedly focused on the lack of representation, mentioning specific areas of law where lawyers just do not tend to appear at all, for example forced psychotropic medication cases and other cases dealing with mental illness.

A next set of questions asked ALJs to respond to open text questions about what they see as priorities to increase access to justice. Overall, ALJ respondents felt that the top priority for increasing access to justice in administrative tribunals was to address the lack of available representation. Two other priorities that were mentioned repeatedly (and are related to the lack of representation) were to decrease the complexity of the process and to address language and cultural differences which, without assistance, can make the process even more difficult to understand and navigate. And, of course, all of the above require increased funding.

The survey allowed ALJs to list examples of current policies or practices that made a difference to their perception of access to justice for unrepresented people, and then a companion question asked about policies and practices they would like to see in the future. Beyond the above-mentioned need for increasing representation, other responses tended to elaborate on current policies or practices with concrete steps to further increase access to justice gains, for example: providing more clearly written guidance regarding hearing procedures; expanding simplified guides to particular legal claims; and advocating that the original sources of law (e.g., statutes and regulations), as well as the agency forms, need to be drafted in plain English. While a handful of responses advocated for further development of technology that could ease the burden on people to travel to hearings, there were mixed feelings about whether video hearings and other remote options helped or hindered unrepresented people, particularly those who might not have access to computers or require language or other assistance while appearing remotely.[168]

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[168] Scholars are still assessing data as to how well remote hearings work for unrepresented people in our state civil courts. For some early results, see Katherine L.W. Norton, *Accessing Justice in Hybrid Courts: Addressing the Needs of Low-Income Litigants in Blended in-Person and Virtual Proceedings*, 30 Geo J. Poverty L. & Pol'y 499, 519–33 (2023); Tom Infield, *Courts Shifted Online During the Pandemic*, PEW Charitable Trusts (May 27, 2022), https://

A majority of ALJs felt much more could be accomplished with expansion of mediation and alternative forms of conflict resolution. Roughly half of respondents report that their agency requires or encourages parties to "meet and confer" for the purposes of settlement before appearing before the agency. Roughly half of respondents felt that matters could be settled more quickly if some sort of alternative dispute resolution preceded the hearing. One respondent pointed to the "very strong ombuds and ADR programs within the agency" as the single most important policy that has increased access to justice. When asked to estimate a percentage of cases that might be resolved more quickly with expanded mediation or alternative dispute resolution, answers averaged around thirty percent. One respondent simply stated that "many cases could be settled without a hearing if parties were represented and requested an informal meeting with the opposing side."

A wide variety of training is available to ALJs, with the most often cited required training centering on implicit bias and best practices for communicating with unrepresented parties. Even so, many of the comments cite a real need for more training in these categories. The least available trainings are in areas of restorative justice, conflict reform, navigating resistance in the hearing room, empathy, and burnout. When asked about specific practices that increased access to justice, many respondents pointed to the value of training opportunities. One respondent pointed specifically to training that assists judges "in understanding how the unrepresented party might feel and to be aware of using legal jargon when someone may already be in a very unfamiliar situation." Another mentioned specifically "training in how to provide a truly meaningful hearing regardless of gender, race, ethnicity, or . . . income."

Finally, lack of resources was mentioned by some respondents as having access to justice effects.[169] Respondents mentioned that, unlike civil courts, there is very little to no funding for training, especially since staff turnover requires time to train. These resource issues impede compliance with statutory timelines, which has serious consequences for access to justice. As just one example, federal education laws require administrative resolution of special education claims within forty-five days. There is currently a class action lawsuit pending in New Jersey on behalf of claimants who have been subject to delays of a year or longer.[170]

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www.pewtrusts.org/en/trust/archive/spring-2022/courts-shifted-online-during-the-pandemic [https://perma.cc/2CQU-ZNHR].

[169] Bednar, *supra* note 152 (examining similar resource issues in federal administrative adjudication and arguing for the imposition of law clerks to help ease backlog).

[170] "[S]ome of our cases take too long to be decided and in that respect, we're not complying with the spirit [of the law]." C.P. v. N.J. Dep't of Educ., No. 19-12807, 2022 WL 3998700, at *8 (D.N.J. Sept. 1, 2022) (alteration in original) (citations omitted). The court also noted a 2014 memo in which the Office of Administrative Law identified that it was struggling to meet the forty-five day rule, in part due to understaffing. *Id.*

V. Assessing the Premise of the Inquisitorial ALJ Model

The starting point for this project was to uncover how state administrative adjudications are faring on issues of access to justice. Specifically, how well do state administrative structures and procedures reflect values of equity and accountability? This assessment was spurred in response to proposals to increase administrative adjudication systems for particular areas of state law where people already struggle to find legal representation in state courts. Those proposals argue that administrative adjudication provides a form of engagement and interaction with unrepresented people that differs from state civil courts. On this view, people without legal representation in state courts in matters like debt collection might fare better under an administrative regime. The results explored in this Article complicate this argument.

As reported above, a majority of ALJs surveyed felt that more legal representation would increase access to justice in administrative hearings. But the ALJs also felt that they did a good job assisting unrepresented respondents and that people who appear before their agencies received "excellent" or "above average" access to justice. And there is some research that corroborates that administrative tribunals do provide less adversarial and more problem-solving judges. So what, exactly, does representation add in these settings?

The ALJs' responses point to the enhanced clarity provided by representation. That is, people who are unrepresented can have trouble understanding the legal claims and their various elements. This, in turn, means that unrepresented people can have trouble organizing their arguments and their evidence in a way that best supports their points. ALJs can and do take a more active role in assisting unrepresented people by explaining the claims at issue and asking them questions that might prompt the introduction of relevant evidence. ALJs can also cross-examine both parties to help build and clarify the record. Even so, the ALJs felt that the burdens on an unrepresented person were at times overwhelming, especially with more complex claims or language differences. A number of ALJs elaborated that unrepresented people were at a disadvantage because of a lack of legal understanding and a resulting lack of clarity in their presentations:

> "In certain classes of cases, the legal issues that we are hearing are somewhat technical in nature and self-represented litigants simply do not have the ability to properly present cases that they are likely to win."
>
> "The alienness of the administrative hearing process for [unrepresented litigants] . . . [is the largest access to justice issue facing administrative adjudication]."

Moreover, multiple ALJs reported that unrepresented litigants sought remedies that do not always align with the governing statutory provisions. Consequently, ALJs are not always authorized to issue the remedies necessary

to realize a party's view of what constitutes "justice" in their matter. The following are a representative sample of quotes:

> "The statutes themselves control the decision. [Unrepresented people] are often taken by the name of the Board and often seek 'justice' broadly defined."
>
> "The unrepresented person does not understand what the issue will be at the hearing."
>
> "Misunderstanding what we do and parties being unprepared or not understanding what will happen [is a remaining barrier to access to justice in state administrative adjudications]."

Survey responses focused on the role of representation in clarifying presentation of evidence and focusing on the legal claims and remedies before the ALJs. With clarity comes efficiency. Timely resolution of matters can have real life implications for people who are unable to work while awaiting a license. Clarifying claims and necessary evidence can focus pre-hearing conferences and hearings on producing a timely resolution.[171]

Certain substantive matters tended to have more representation than others. For example, ALJs report, and the literature supports, that rates of representation are higher in matters involving regulated utilities and taxes. ALJs that preside over hearings in these areas tended to report that lack of representation was less of, or not at all, an issue. On the other hand, certain substantive areas were notable in that respondents almost never had representation. For example, one ALJ explained:

> "People who appear before me in forced psychotropic medication hearings have a right to representation but have to arrange it themselves. They are seldom successful—none of the public legal assistance or pro bono assistance organizations will assign counsel. So they have to represent themselves."

While greater procedural protections in administrative adjudication have long been thought important for due process, there can be unintended consequences to expanding administrative procedures.[172] At least one ALJ alluded to the role of procedures in creating a stronger need for lawyers. In more formal, adversarial hearings, representation was key to success:

> "Unrepresented litigants with minimal education have major trouble in hearings modeled on adversarial courtroom procedure."

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[171] *See supra* Part IV.B.5.

[172] For more on how making our administrative system overly legalistic may not always advance other democratic principles, see generally Nicholas Bagley, *The Procedure Fetish*, 118 Mich. L. Rev. 345 (2019).

Of course, the system lacks capacity. The system does not have enough lawyers to represent everyone, and the lack of accessible legal representation is felt most by already marginalized populations. Identifying and prioritizing areas of administrative adjudication in which representation is most necessary can help advocates develop and professionalize nonlawyer representation. Such a triage process could provide advocates with a map of where to focus on programs that increase nonlawyer representation. These areas can then be further refined by assessing outcomes.

> "[Access to justice] varies with the kind of case. In a littering case a self-represented party has good access. In a workers' compensation case, poor access."

We need greater understanding as to whether legal representation adds value beyond clarity to a person's experience or overall outcome.[173] Then we need to better understand whether nonlawyer representation offers similar value.[174] As to equity, scholars have developed theories about the role of lawyers in developing law, functioning as system watchdogs, and amplifying people's identification of rights and justice in areas beyond the hearing rooms.[175] Can nonlawyer representation offer similar benefits?

Applying this understanding to administrative adjudication leads to further questions of whether the different institutional posture of ALJs affects our consideration of expanding nonlawyer representation. Does law development unfold in administrative hearing rooms in the same way as in our common law civil courts? Most administrative law decisions do not create binding precedent in the same way that our common law courts do.[176] We lack data on appeals from administrative decisions rendered to unrepresented parties. And are there other democratic values present in administrative adjudications that operate differently from courts in terms of law development? In other words, could more clarity aid agencies in understanding recurring policy issues that may need to be addressed through rulemaking or other policy levers accessible to

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[173] *See* Carpenter et al., *supra* note 113 (studying differences between lawyers and nonlawyer representatives in unemployment insurance hearings in the Washington, D.C. Office of Administrative Hearings); *see also* Emily S. Taylor Poppe & Jeffrey Rachlinski, *Do Lawyers Matter? The Effect of Legal Representation in Civil Disputes*, 43 Pepp. L. Rev. 881, 911–12 (2016) (finding that empirical studies assessing the role of legal representation in outcomes of administrative hearings at both the federal and state level mostly pointed to positive outcomes, but a few studies noted that legal representation can cause delay, which can have negative outcomes for the beneficiary).

[174] *See* McClymont, *supra* note 116, at 9–10.

[175] Sabbeth & Steinberg, *supra* note 3; *see also* Shanahan et al., *supra* note 91.

[176] For more on administrative hearing precedents, see Michael Douglas Jacobs, *Illuminating a Bureaucratic Shadow World: Precedent Decisions Under California's Revised Administrative Procedure Act*, 21 J. Nat'l Ass'n Admin. L. Judges 247 (2001). For a recent study of precedent in federal agency decision-making, see Christopher J. Walker, Melissa F. Wasserman & Matthew Wiener, Precedential Decision Making in Agency Adjudication (October 17, 2022) (draft report to the Administrative Conference of the United States).

the agency?[177] On this question, more study is needed as to how the structural design of state administration might affect this development. For example, does it matter to law development whether the system uses a centralized hearing panel, or do individual agency hearing panels offer more expertise and focus in terms of law development within an agency?[178]

There are other societal values that lawyers bring to the justice system beyond law development. These values include safeguarding the rule of law through lawyers functioning as an accountability measure against overzealous or punitive state enforcement. Moreover, the psychological benefit of being represented could function to expand a sense of procedural justice that could build trust in administrative systems. On this front, nonlawyer representatives might offer a similar value, especially if the nonlawyer representatives can be professionalized and trained for such a role, and therefore bring a certain level of accountability to the hearing room. It is possible to imagine a professionalized nonlawyer corps that can function as a system watchdog and symbol of justice. The assistance provided by any form of representation lessens the psychological burden associated with complex administrative processes.[179]

But without expansion of representation overall, through more lawyers or nonlawyer representatives, it is hard to conclude that an ALJ's institutional positioning alone offers enough support for unrepresented parties to justify expanding administrative systems in lieu of state courts for certain matters. This is especially true with the immense variation between and among states as to how ALJs are assigned and what they are trained to do. However, state administrative systems can offer a rich area of innovation for nonlawyer representation pilot programs.

VI. Conclusion

There are too many unrepresented people navigating complex legal systems, whether in courts or administrative tribunals. Administrative agencies and their adjudicatory apparatuses were developed to provide a less adversarial form of resolution for certain types of decision-making regarding regulated matters that can protect individual rights without the need for representation. But closer scrutiny of the actual structural and procedural variations between

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[177] *See* Rahman, *supra* note 7.

[178] *See* Rossi, *supra* note 74, at 570–72. For a discussion of the policymaking potential of ALJs, see Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 Ala. L. Rev. 693 (2005); *cf.* Admin. Conf. of the U.S. Recommendation 1992–7, *The Federal Administrative Judiciary*, 57 Fed. Reg. 61763 (Dec. 10, 1992) ("[W]here the agency has made its policies known in an appropriate fashion, ALJs and AJs are bound to apply them in individual cases. Policymaking is the realm of the agency, and the ALJ's (or AJ's) role is to apply such policies to the facts that the judge finds in an individual case.")

[179] *See* Herd & Moynihan, *supra* note 137.

agencies alongside reporting from the ALJs themselves highlights that this is not actually the case.

Simplifying the process, providing more forms of limited guidance, unbundling certain legal tasks, and moving toward an active judging model are all common-sense solutions that help increase access to justice in all decision-making fora. Moreover, certain structural and procedural choices may amplify access to justice in state administrative adjudications.

Ultimately, even with these innovations, representation matters. As scholars begin to consider what can be learned from state administrative adjudications, the data presented here remind us that where people's rights are at issue—in any forum—a professional advocate can promote the values of equity, transparency, and accountability. These values translate to positive outcomes for people adjudicating within state administrative systems. Less is known about whether nonlawyers can provide those values in equal measure as lawyers, and whether other values will continue to go unsupported without lawyers in the room. However, given the lack of understanding to date as to how people experience administrative hearings, and given what we are hearing from ALJs on the front lines, it is clear that transferring claims from state courts to administrative tribunals will not increase access to justice if respondents remain overwhelmingly unrepresented.

Instead, the history and setting of administrative tribunals create a decisional environment that is different in kind from courtrooms. This Article has begun to map out how these differences can provide promise and opportunity for access to justice in administrative hearing spaces. In particular, a focus on centralized procedures including, and perhaps most important, a centralized code of ethics for ALJs and a more uniform set of ALJ qualifications in a given state seems to align with stronger access to justice protections throughout state administrative adjudication. A code of ethics with the strongest language governing how ALJs should approach or assist an unrepresented party, including specific procedures like those provided in New York, Washington, and New York City codes, provides the greatest guidance to ALJs. Additionally, stronger training for ALJs as to best practices for navigating procedures with unrepresented people, including understanding the resources provided by their agency, will help to realize the stated goal of providing fair and impartial justice for all. And serious attention to administrative capacity in the types of matters that repeatedly see both high caseloads and low levels of representation will allow ALJs the time needed to provide the inquisitorial style that separates administrative adjudication from its more adversarial civil court cousins. Developing off-ramps for guided settlement also holds promise as a caseload management tool.

Beyond the types of best practices above, the larger legal system, including our civil courts, has lessons to learn from administrative tribunals. These lessons encompass supporting the "engaged neutrality" of the decisionmaker, recognizing innovations in alternative dispute resolution, and mirroring the increased opportunities for nonlawyers. However, perhaps the main lesson to

be learned from studying administrative tribunals is the importance of access to representation regardless of other reforms. In other words, even though ALJs are steeped in a tradition of active participation in developing facts and the record, there is still a need for representatives to assist with clarity and accountability. We need more agency-specific research focusing on increasing representation, including nonlawyer representation pilot programs. Such research may help us better understand the dynamics and outcomes associated with nonlawyer representation in administrative adjudication.