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## **A Full and Fair Hearing: The Role of the ALJ in Assisting the *Pro Se* Litigant**

**By Paris R. Baldacci\***

Most literature regarding the role of adjudicators in assisting *pro se* litigants is directed at trial judges presiding in state and federal courts.<sup>1</sup> That literature and the reforms it envisions are based on a critique of our lawyer-based adversarial litigation regime which is bound – some might say hidebound – by formal rules of evidence and procedure that effectively require representation by lawyers both for access to its promise of a fair and impartial resolution of disputes and

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1. Paris R. Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating Their Cases in New York City's Housing Court*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 659 (2006) (and works cited therein); AMERICAN JUDICATURE SOCIETY, MEETING THE CHALLENGE OF *PRO SE* LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (1998) [hereinafter MEETING THE CHALLENGE]; Russell Engler, *And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987 (1999); RICHARD ZORZA, THE SELF-HELP FRIENDLY COURT: DESIGNED FROM THE GROUND UP TO WORK FOR PEOPLE WITHOUT LAWYERS (2002) [hereinafter SELF-HELP COURT]; Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice*, 40 FAM. CT. REV. 36 (2002) [hereinafter *Litigant's Struggle*].

to be able to navigate its shoals.<sup>2</sup> From the point of view of this critique, these systemic and structural characteristics, exacerbated by the passive role of the judge in such a system, deny *pro se* litigants access to justice and, thus, present fundamental constitutional challenges that must be met by our judicial system.<sup>3</sup> In searching for alternative models to guide judicial reforms, much of this literature looks enviously at the model of the administrative law judge (“ALJ”) who – at least in contrast to trial court judges – appears freed from those elements of the adversary system described above, which most commentators agree frustrate the full participation of *pro se* litigants in our system of civil justice by silencing them in their attempts to articulate legal claims and defenses.<sup>4</sup>

Thus, it is surprising to those of us who have been involved in formulating this critique and in proposing reforms which, in many instances, are based on the administrative law judge model, that ALJs face many of the same challenges that trial court judges face in their attempts to assist *pro se* litigants. An ALJ is also faced with charting an ethical and effective course between a passive (adversarial) and an active (inquisitorial) role, and fashioning formal and informal procedures and techniques for conducting hearings involving *pro se* litigants so that the *pro se* litigant is given a constitutionally adequate full and fair hearing so that all information necessary to make a fully informed decision is before the ALJ. In addition, the ALJ is faced with accomplishing those tasks without prejudging the matter before her and without appearing or, indeed, becoming partisan.

Nevertheless, ALJs are not necessarily more successful than trial

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2. See, e.g., Engler, *supra* note 1, at 2069-70 (“The [evidentiary and procedural] rules of the game were crafted by judges and lawyers. Litigants not only have a right to appear without lawyers, but, in tremendous numbers of cases every day across the country, are forced to appear in court without counsel through no choice of their own. The lawyers and judges who establish the rules of the game have no right to make it impossible or difficult for unrepresented litigants to handle their own cases without forfeiting important rights for reasons unrelated to the merits of the case.”); *Litigant’s Struggle*, *supra* note 1, at 36-42.

3. See, e.g., Baldacci, *supra* note 1, at 667-68; MEETING THE CHALLENGE, *supra* note 1, at 19-24.

4. See, e.g., Baldacci, *supra* note 1, at 688-90 (and works cited therein) (describing inapplicability of evidentiary rules in most administrative hearings and the active role of ALJs in developing the record).

court judges in meeting these challenges.<sup>5</sup> Accordingly, some of the insights and techniques that have been developed in the critique of the civil trial court system's failure to address the needs of the *pro se* litigant may be of value to ALJs as they attempt to assist *pro se* litigants who appear before them. Thus, I have sought to revise my article on the role of New York City Housing Court Judges in assisting *pro se* litigants<sup>6</sup> so that the underlying research, analysis, critique and proposed techniques in the Article might be brought to bear on the particular challenges faced by ALJs at administrative hearings involving *pro se* litigants.

Accordingly, this paper focuses on the problems faced by *pro se* litigants in presenting their claims at administrative hearings and the role of the ALJ in assisting them in meeting these problems. Part I outlines what has become generally recognized to be the underlying problems facing *pro se* litigants in most adjudicatory fora.<sup>7</sup> Part II then sketches a number of models and their theoretical bases by which those problems can be addressed.

## I. THE PROBLEM

At an administrative hearing, as in a trial in civil court, a *pro se* litigant is thrust into the role of litigator within an adjudicatory system that she does not understand, either procedurally or substantively, and that effectively silences her. This dynamic is apparent even in settings which are intended to be nonadversarial and even in settings where the *pro se's* adversary is not present or represented, such as at Social Security disability hearings. This description and the analysis that follows are based on a few working hypotheses which will be elaborated below:

1. *Pro se* litigants usually have only a very generalized understanding regarding both the claims and defenses relevant to

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5. *Id.* at 689 (and cases and works cited therein); *see also*, Phyllis E. Bernard, *The Administrative Law Judge as Bridge between Law and Culture*, 23 J. NAALJ 1, 9-12 (2003)(describing "troubling deficits" regarding the way in which some Social Security ALJs perceived their role as being similar to that of civil trial judges and thereby reached unjust decisions).

6. Baldacci, *supra* note 1.

7. *See, e.g.*, MEETING THE CHALLENGE, *supra* note 1, *passim*.

their cases and regarding how to present those claims or defenses to a trier of fact.<sup>8</sup>

2. The fundamental problem for *pro se* litigants in having their claims or defenses heard is not primarily their lack of information or understanding, but the structural dynamics in the evidentiary hearing process which work to silence the *pro se* litigant even when she has some knowledge regarding her legal claims or defenses.<sup>9</sup>

3. The root cause of this systemic silencing may be, in part, a slavish adherence to what is perceived to be the strictures of the adversarial system, even in ostensibly non-adversarial settings, including the resulting notions of the appropriate role of adjudicators as passive, neutral arbiters in such a system.<sup>10</sup>

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8. See MEETING THE CHALLENGE, *supra* note 1; see also Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533 (1992); Engler, *supra* note 1, at 1987-92; SELF-HELP COURT, *supra* note 1, at 17-18. See generally *Litigant's Struggle*, *supra* note 1. Although there has been less systematic study of the level of understanding of *pro se* litigants at administrative hearings, there is no evidence to suggest that they are any more sophisticated in their knowledge of procedural and substantive law in that forum than their counterparts in trial courts. See, e.g., *Manual for Administrative Law Judges*, 23 J. NAALJ 75-76 (2004) ("The ALJ often needs a high order of skill to deal with the inexperienced *pro se* party, especially in proceedings which structurally are more adversarial than Social Security disability cases. The *pro se* party may never have been in a hearing room or courtroom before. . . . [T]he *pro se* party may have a yen to 'play lawyer,' but is handicapped by misunderstanding, fostered by the distortions of the popular media, about what lawyers do, and how they do it.") [hereinafter *Manual*].

9. Bezdek, *supra* note 8, at 561-62 (finding tenants in Baltimore Rent Court, an informal small claims forum, lost to landlord rent claims even when they had knowledge of or could prove defenses to those claims); see also *id.* at 591 (noting that poor tenants' relationship to law as one of subordination and not rights "renders dubious proposals that information-delivery responses could remedy dysfunctional conditions of the rent court's operation.... In other words, knowledge of rights would not confer power. Our experience in the courthouse suggests as much."); SELF-HELP COURT, *supra* note 1, at 18 ("practitioners report that whatever resources are put into [providing *pro se* litigants with] information, in the end many [*pro se*] litigants cannot be prepared to handle the courtroom with information alone."). But see Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step Towards a Meaningful Right to Be Heard*, 96 YALE L.J. 1641, 1642 (1987) ("Experience has shown that providing general legal information to *pro se* litigants can significantly increase their chances of success both in court and in settlement negotiations.").

10. See, e.g., Bernard, *supra* note 5, at 11 (describing reports "that some

Whatever may be the root causes of this systemic silencing, evidence of it is pervasive. In a seminal study of Baltimore's informal small claims Rent Court, Professor Barbara Bezdek found that even with an understanding of defenses and claims, including having received advice and, in some instances, papers prepared by attorneys to assist them, *pro se* litigants were systematically silenced in that court.<sup>11</sup> Professor Bezdek identifies one element as key in

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[Social Security] ALJs – a distinct minority – have attempted to preside over non-adversarial adjudications as if they were standard court room litigation where the neutral could stand passively on the sidelines and still justice would be done.”); *Litigant's Struggle*, *supra* note 1, at 41:

[Despite the modern trend toward a more active role for judges,] adversary theory requires the judge to remain *passive* until the conclusion of the advocates' presentations. He is not free to conduct an independent inquiry or otherwise accelerate the pace of the proceedings . . . [this passivity is] to ensure that the trier will remain neutral until he renders his decision . . . [and neutrality is to ensure] the integrity of adversarial deliberations.

(quoting STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND A DEFENSE* 34 (1984)) (emphasis added); *see also* Engler, *supra* note 1, at 2022-23:

The traditional notions of who should be giving legal advice, and what it means to be impartial, were developed within the framework of the adversarial system. The adversarial system presumes that both sides will be represented by counsel . . . . The adversarial system purports to promote fairness and justice. Yet, the rules currently operate as barriers preventing unrepresented litigants from participating meaningfully in the legal system and thereby frustrate the goal of dispensing fairness and justice. . . . One important barrier is the narrow conception of impartiality that typically permeates the discussions of the various roles [of the players in the system, including judges].

11. Bezdek, *supra* note 8. It should be noted that although Professor Bezdek's documentation and analysis focuses on Baltimore's small claims Rent Court, the structural and systemic features she finds there that silence *pro se* litigants are present in most evidentiary hearings and, thus, her conclusions, with some modification, are applicable to other adjudicatory settings as well. *Id.* at 533. *See* Engler, *supra* note 1, at 2047-69 (finding similar features in Family and Bankruptcy courts, and in Boston and New York City housing courts); Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 *BYU J. PUB. L.* 123, 124-27 (1993) (showing the same is true in Family court); William M. O'Barr & John M. Conley, *Litigant Satisfaction Versus Legal Adequacy in Small Claims Narratives*, 19 *LAW & SOC'Y REV.* 661 (1985) (finding same impediments in informal small claims courts).

understanding this dynamic: the judicial process in most tribunals, even in relatively informal settings such as small claims courts and administrative hearings, rejects both the form and substance of the inevitable manner in which *pro se* litigants speak, i.e., narrative. Indeed, it is obvious that narrative is the way in which most people, except perhaps lawyers and judges, speak and communicate.

In our observations, when invited [to say why they are in court], . . . many tenants offer the court an explanation for their nonpayment. The judge either waits through the story or interrupts it, but at either point, tells the tenant that her remarks are irrelevant, and orders judgment for the landlord. This is the clash between the conventions for talking about troubles in noninstitutional settings and the law's conventions for speech within legal institutions, which the judge learned through formal education in law school and observation of other legal professionals' courtroom behavior. . . .

. . . My point is that the judge is structuring the discourse by leading the tenant into expression and then dismissing that which the judge elicited. Doing so in this way is both misleading and destructive.

It is misleading, because the rule-oriented court talk expected and privileged by judges in low-level courts bears little or no relation to people's natural narratives. The rules of courtroom discourse are seldom explained to those witnesses expected to conform to them. . . . Rules of evidence disallow the ordinary discourse rules used when people talk as they ordinarily do. . . . Judges, however, expect parties to present their own case and abjure "acting as a party's advocate" by frankly eliciting storylines. . . . As structured, [the judge's approach] excludes virtually all tenants from meaningful participation in the conversation. This makes the legal process a charade. This is destructive of more than tenant's statutory rights. For most tenants, such a court offers a stern lesson that formal rights are for somebody else and

not for them.<sup>12</sup>

But why is narrative rejected as an appropriate way of speaking in our judicial system, either in testimony or in oral argument? Primarily, as Professor Bezdek's analysis demonstrates, because narrative is viewed as being an uneconomic, rambling mode of communication, and as an inappropriate means for raising or demonstrating cognizable legal claims on which legal relief may be given. Thus, the *pro se* litigant is continuously interrupted during that narrative, often by the trier of fact's insisting that much of the narrative is "irrelevant" to the present case or claim, or not

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12. Bezdek, *supra* note 8, at 586-89 (citing O'Barr & Conley, *supra* note 11):  
In studies of self-represented litigants in small claims courts, Conley and O'Barr discovered two contrasting modes of organizing and presenting accounts of the dispute to the judge: rule-oriented and relation-oriented accounts. . . . A rule-oriented account is directed to legal rules. A relational account is oriented with respect to social rules. The impact of the two story-presenting modes on small claims judges is significant. The courts typically treat relational accounts dismissively and regard their content as irrelevant and inappropriate . . . .

Professor Bezdek also argues that the court's rejection of the mode of discourse of the *pro se* tenant is exacerbated by (or perhaps even rooted in) the tenant's economic and often race- and gender-based position of subordination vis-à-vis the economically dominant, represented party and the court as an enforcer of that party's rights. *Id.* at 565-75, 583-85; see also Lucie E. White, *Subordination, Rhetorical Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 4 (1990), demonstrating that mere access to formal adjudicatory rituals at an administrative hearing before an ALJ does not comport with due process if it does not provide a forum in which one can actually speak and be heard:

Familiar cultural images and long-established legal norms construct the subjectivity and speech of socially subordinated persons as inherently inferior to the speech and personhood of dominant groups. Social subordination itself can lead disfavored groups to deploy verbal strategies that mark their speech as deviant when measured against dominant stylistic norms. These conditions . . . undermine the capacity of many persons in our society to use the procedural rituals that are formally available to them. Furthermore, bureaucratic institutions disable *all* citizens – especially from subordinated social groups—from meaningful participation in their own political lives (emphasis in original);

Bernard, *supra* note 5, at 11 (noting potential race-based determinations in Social Security hearings).



appropriate.<sup>13</sup>

Indeed, Professor Bezdek's observations and conclusions are confirmed in my own work with *pro se* litigants in New York's Housing Court and in observing ALJs at Social Security disability hearings, New York City Housing Authority administrative hearings, and New York City public assistance hearings. I have observed *pro se* litigants in Housing Court be reduced to silence or at best incoherence even after I had given them detailed advice, and in some instances "*pro se* papers," with the advice or papers completely ignored and, thus, rendered ineffective. Even at administrative hearings where I was representing the claimant and had prepared her for the hearing, the ALJ's "direct" and "cross examinations" frequently had the effect of silencing the claimant, rather than assisting her in developing the factual record in the only way she knew how, i.e. in narrative form. This effect was even more apparent where I have taken cases at the appeal level and reviewed the administrative hearing transcripts, which document *pro se* claimants being continuously interrupted by the ALJ with leading or even adversarial questions as they attempt to tell their stories. This silencing occurs even in the face of the laudable attempts of individual ALJs to "hear" the *pro se* narrative and to do "justice" in the brief time available for each case. Indeed, success in eliciting *pro se* narratives, when it occurs, is particularly laudable given the fact that ALJs receive little or no training, guidelines, administrative support or peer assistance regarding how to assist *pro se* litigants by, among other things, eliciting narrative.<sup>14</sup> The techniques for assisting

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13. In its extraordinarily brief subsection dealing with an unrepresented party at administrative hearings, the *Manual for Administrative Law Judges* focuses almost exclusively on the "the simple fact that the unrepresented party may be difficult to control" or prone to "intemperate outbursts." *Manual, supra* note 8, at 76. *But see* White, *supra* note 12, at 4 ("Social subordination itself can lead disfavored groups to deploy verbal strategies that mark their speech as deviant when measured against dominant stylistic norms.").

14. The *Manual for Administrative Judges* contains no techniques or guidelines regarding how to elicit facts through narrative, particularly from the *pro se* litigant. *Manual, supra* note 8, at 75. Indeed, the only use of the term "narrative" in the *Manual* is where it discusses allowing written narrative testimony (*id.* at 53, 170) or written narrative explanation of the content or sources of information in exhibits. *Id.* at 53, 226.

*pro se* litigants in this way do not come naturally and may even be counterintuitive.

Even those within the system who observe this silencing and recognize something is amiss often feel powerless to intervene because of: (1) perceived constraints of role (e.g., “As an ALJ, I cannot be perceived to be partisan or to be an advocate for one side.”);<sup>15</sup> (2) the crush of the numbers of cases and the resulting limitations of time, energy and resources; or (3) a sense that the problems underlying the *pro se* litigant’s inability to articulate her claim are social, educational or economic and, thus, outside the system’s ability to address.<sup>16</sup>

However, a *pro se* litigant’s constitutional right to be heard and to have access to justice will ring hollow, indeed, if the administrative hearing does not function as it was intended to.

The agency adjudication was intended to provide the public with a user-friendly process that bridged, or mediated the objective and subjective needs of all participants. The first generation of adjudicators attempted to bridge the objective formalities of a civil trial structure with the lay public’s subjective, intuitive sense of fairness. ALJs aspired to offer the lay public their last, best hope that justice will be done.

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15. In addition to the strictures of role which will be more fully developed below in Part II, the ALJ may refuse to adjust her usual method for conducting hearings on the theory that the *pro se* has chosen to proceed *pro se* and, thus, is not entitled to any accommodation. *But see* Cynthia Gray, *Reaching out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAALJ 97, 108-09 (2007) (“[T]he inability to obtain affordable legal representation is one of the primary reasons many *pro se* litigants appear without a lawyer. . . . Although some litigants do choose to appear without an attorney for reasons other than necessity and economic reality, forbidding latitude for all self-represented litigants because some have made the ‘wrong’ choice is unfair to the most vulnerable individuals in the courtroom. . . . A judge’s ethical obligations do not vary depending on whether the judge believes a litigant has made wise choices.”).

16. *See, e.g.*, Engler, *supra* note 1, at 2011-21, 2063-69; *see also* MEETING THE CHALLENGE, *supra* note 1, at 52-62, and Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?* 82 JUDICATURE 13, 17-20 (1998) (summarizing results of surveys of judges regarding the difficulties involved in dealing with *pro se* litigants) [hereinafter *Handling Pro Se Litigants*].

Laypersons could walk away from the agency with a sense that neither tricks nor technicalities stood between themselves and a fair hearing[,] . . . [that] they, nevertheless, had the opportunity “to look their government in the eye” and say what needed to be said, and what they had to say would be heard.<sup>17</sup>

It cannot be gainsaid that this right to be “heard” before administrative agencies and in our courts is a fundamental constitutional right, whether the litigant is represented or not. “Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process *must be given a meaningful opportunity to be heard*. . . . ‘[D]ue process of law signifies *a right to be heard* in one’s defense.’”<sup>18</sup> Indeed, “[t]he opportunity to be heard must be tailored

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17. Bernard, *supra* note 5, at 18 (noting further that in contrast to that original vision, “In many agencies today, administrative litigation is virtually indistinguishable from civil litigation . . . .” *Id.*); see also Michael Asimow, *The Administrative Judiciary: ALJ’s in Historical Perspective*, 19 J. NAALJ 25, 33 (1999) (describing ALJs as “the face of justice for the vast array of private citizens embroiled in administrative disputes with state or federal agencies.”).

18. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (emphasis added, citations omitted), citing *Goldberg v. Kelly*, 397 U.S. 254 (1970). A detailed examination of this constitutional point is beyond the scope of this Article. Regarding the constitutional right to be heard before administrative agencies, see Bernard, *supra* note 5, at 6 n.11, citing Hon. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PENN. L. REV. 1267 (1975). Regarding the constitutional right to access to the courts, see Baldacci, *supra* note 1, at 667-68; MEETING THE CHALLENGE, *supra* note 1, at 19-24; for a comprehensive analysis of the problem of access to justice, especially for persons without lawyers, see DEBORAH L. RHODE, ACCESS TO JUSTICE (2004). On the constitutional, statutory and ethical duty of adjudicators to assist *pro se* litigants, see Gray, *supra* note 15, at 101-107 (describing tension between holding the *pro se* litigant to the same standard as attorneys and the need to accommodate their lack of legal training and knowledge in order to avoid injustice); *Handling Pro Se Litigants*, *supra* note 16, at 15-17; Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 JUDGE’S J. 16, 17-23, 42-45 (2003) (same, noting that “The law must produce a consistent outcome for all litigants, regardless of their legal representation, based on the law and facts of their case.”). *Id.* at 44.

to the capacities and circumstances of those who are to be heard.”<sup>19</sup>

Accordingly, we must develop methodologies so that *pro se* litigants are not merely thrown into adversarial or quasi-adversarial arenas, but are assisted by the various players in our administrative systems – most importantly by the ALJs presiding over their cases – so they can be meaningfully heard, and have a full and fair due process hearing. To that end, we must develop procedures and techniques that are tailored to *pro se* litigants’ abilities to tell their stories in a way that will reveal whether those stories are legally sufficient to support their claims or defenses.

## II. MODELS FOR ADDRESSING THE PROBLEM

As daunting as the problems faced by *pro se* litigants may be, they are not insoluble. Models exist which can at least mitigate the most serious and constitutionally infirm consequences of appearing *pro se*. I do not propose any one of these models as ideal solutions. Each of them presents problems, both theoretical and practical. Nor do I suggest that the following is an exhaustive list of all possible models. However, those included here suggest strategies regarding how the problem of assisting *pro se* litigants might be addressed by ALJs.

### A. *A More Active Role for ALJs Within the Strictures of the Present System*

Studies have consistently shown that some adjudicators are “better” than others in mitigating the problems faced by *pro se* litigants appearing before them.<sup>20</sup> A more systematic survey of the

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19. *Goldberg*, 397 U.S. at 268-69 (holding that limiting indigent litigants to written submissions was constitutionally impermissible since they “lack[ed] the educational attainment necessary to write effectively.”). *Id.* at 269.

20. Such studies have proven to be invaluable in developing strategies for meeting the challenge of *pro se* litigants. *See, e.g.*, MEETING THE CHALLENGE, *supra* note 1, at 52-56 (surveying practices of trial judges); *see also Handling Pro Se Litigants*, *supra* note 16, at 17-20 (surveying practices of judges and court managers) (and other studies cited there); *see also* Kenneth Nicolai, *Strengthening the Skills of Administrative Law Judges*, 20 J. NAALJ 263, at n.1 (2000) (citing studies of the performance of ALJs).

successful strategies and interventions used by ALJs would provide invaluable ideas about addressing those issues. At a minimum, such a study should look at what assistance ALJs currently provide *pro se* litigants at hearings. It should evaluate whether such interventions are successful or ineffective. Of course, the criteria for determining “successful” or “ineffective” would have to be carefully articulated. The primary criterion of “successful,” however, must be the extent to which the intervention assists the *pro se* litigant in being able to articulate her claims and defenses, and to understand the nature and the significance of the proceeding in which she is involved.<sup>21</sup>

In addition, this survey should make some evaluation regarding whether such interventions are appropriate to the role of the ALJ as understood in our current administrative adjudication system, both adversarial and nonadversarial. If the answer to these questions is in the affirmative, recommendations for system-wide adoption should be made. If the answer is in the negative<sup>22</sup> and the intervention

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21. See Engler, *supra* note 1, at 2022-31; see also *Litigant's Struggle*, *supra* note 1, at 36-37; Albrecht, *supra* note 18, at 44 (“The law must produce a consistent outcome for all litigants, regardless of their legal representation, based on the law and facts of their case.”).

22. Although ethical rules applicable to ALJs attempt to account for the differences in role and responsibility between ALJs and judges, they generally do not diverge from the requirement of “impartiality” which is often noted as the basis for the passive role adopted by judges. For a discussion of the perceived ethical limitations under the rubric of “impartiality” placed on the role of the judge in assisting *pro se* litigants, see Albrecht, *supra* note 18, at 17-23, 42-43 (surveying applicable Canons of Judicial Ethics and case law). See also Russell Engler and Stephen Gillers, *Background Memo on Judicial Ethics: The Role of Judges in Settlement and Trial in Cases Involving Unrepresented Litigants*, New York County Lawyers Association (2006), available at [www.nycla.org/siteFiles/Publications/Publications517\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications517_0.pdf), at Appendix A.; Engler, *supra* note 1, at 2012-13, 2022-23; Gray, *supra* note 15, at 104-107; KERRY HILL, AMERICAN JUDICATURE SOCIETY, MEETING THE CHALLENGE OF THE *PRO SE* LITIGANT: AN UPDATE OF LEGAL AND ETHICAL ISSUES (2002), available at [http://www.ajs.org/prose/pro\\_legal\\_ethical.asp](http://www.ajs.org/prose/pro_legal_ethical.asp); *Litigant's Struggle*, *supra* note 1, at 39-42 (locating origin of limitations on judicial role in assisting *pro se* litigants in the history of the common law adversarial system). Regarding similar ethical rules applicable to ALJs, see Ronnie A. Yoder, *Model Code of Judicial Conduct for Federal Administrative Law Judges*, 10 J. NAALJ 131 (1989); *Model Code of Judicial Conduct for State Administrative Law Judges*, 14 J. NAALJ 279 (1994); Ronnie A. Yoder, *The Role of the Administrative Law Judge*, 22 J. NAALJ 321 (2002) (describing the implications of ethical rules for defining the role of the

strategy is still deemed to be highly successful, then statutory, administrative or ethical reforms should be proposed to allow such modalities of intervention.

Prior to a comprehensive survey of actual practices among ALJs, the reports and recommendations of courts, organizations, and scholars suggest some strategies of assistance that should be implemented by ALJs. Although these reports and recommendations were generated in the context of civil trials, I would submit that the techniques and practices they propose are appropriate interventions for ALJs to use in assisting the *pro se* litigant in developing the record in the less formal setting of an administrative hearing. In a recent article published in this Journal, Cynthia Gray summarizes a number of protocols adopted by various jurisdictions for assisting *pro se* litigants and appends a Proposed Best Practices for Cases Involving Self-Represented Litigants based on those protocols.<sup>23</sup> For example, a protocol developed by the *Pro se* Implementation Committee of the Minnesota Conference of Judges<sup>24</sup> and a similar draft protocol of the Idaho Committee to Increase Access to the Courts<sup>25</sup> urge that adjudicators, among other things, explain:

1. The order and protocols of an evidentiary hearing in detail at the beginning of the hearing;
2. The elements of claims or defenses that each side will need to demonstrate in order to get the relief they are seeking;
3. That the party bringing the proceeding has the burden of proof;
4. The consequences of not demonstrating a necessary

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ALJ); Patricia E. Salkin, *Judging Ethics for Administrative Law Judges: Adoption of a Uniform Code of Conduct for the Administrative Judiciary*, 11 WIDENER J. PUB. L. 7 (2002) (describing various ethical codes and rules applicable to state ALJs and arguing for a uniform code); Karen S. Lewis, *Administrative Law Judges and the Code of Judicial Conduct: A Need for a Regulated Ethics*, 94 DICK. L. REV. 929 (1990) (arguing for adoption of an ALJ ethics code and identifying independence from agency dominance as the primary threat to ALJ impartiality).

23. Gray, *supra* note 15, at 111-68.

24. *Pro Se* Implementation Committee of the Minnesota Conference of Judges, Protocol to be Used by Judicial Officers During Hearings Involving *Pro Se* Litigants (2002) [hereinafter Protocol].

25. Idaho Committee to Increase Access to the Courts, Proposed Protocol to be Used by Idaho Judges During Hearings Involving Self-Represented Litigants (2002) [hereinafter Proposed Protocol].

element or bearing ones burden of proof; and

5. The kind of evidence that may or may not be presented and considered.

These committees also urge adjudicators to question the *pro se* litigant to obtain general information about the litigant's claims or defenses.<sup>26</sup>

What is particularly important about these and other similar protocols is that they provide specific and detailed examples of how an ALJ can formulate explanations and pose questions within the context of specific case types in ways that the *pro se* litigant can understand, retain, and act on.<sup>27</sup> Thus, these proposed interventions are more detailed and situation appropriate than the general type of stock explanation that many ALJs make at the beginning of a hearing that merely outlines the structure of the hearing and states in shorthand form the issue to be resolved.

In its survey of judges, the American Judicature Society has identified a number of similar strategies that appear to be effective in assisting *pro se* litigants; for example:

1. Conducting on-the-record preliminary conferences "to discuss procedure, deadlines" and "how to do things at trial;"<sup>28</sup>
2. Using forms and notices that particularize the issues to be presented, which party bears the burden, what the standard of proof will be at the hearing, and the consequences of not appearing or meeting one's burden;<sup>29</sup>
3. Giving "detailed explanations of trial procedures, as time permits;" and
4. "[A]llowing narrative testimony" and "actively asking questions and making objections."<sup>30</sup>

Regarding evidentiary matters, the Society notes that some judges explain to the *pro se* litigant:

26. Protocol, *supra* note 24; Proposed Protocol, *supra* note 25.

27. Protocol, *supra* note 24; Proposed Protocol, *supra* note 25; Gray, *supra* note 15, 111-59; Protocols and Best Practices for Housing Court Judges for Motions and Trials/Hearings Involving Pro Se Litigants, New York County Lawyers Association (2006), available at [www.nycla.org/siteFiles/Publications/Publications517\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications517_0.pdf), at 25-41.

28. MEETING THE CHALLENGE, *supra* note 1, at 56.

29. *Id.* at 56-57.

30. *Id.* at 57.

1. How to identify evidence relevant to prevailing on or defeating claims;
2. Procedures for obtaining such evidence;
3. The form that evidence may take;
4. What facts must be demonstrated to make that evidence admissible (i.e., foundation);
5. The main objections to admissibility (hearsay, best evidence, etc.);
6. The consequences of not having such evidence;
7. Providing for a reasonable opportunity to obtain such evidence; and
8. Assisting the *pro se* litigant at trial in establishing the necessary foundational elements for admitting such evidence and in how to testify regarding the substance of such evidence.<sup>31</sup>

It is this last form of active judicial intervention which causes the greatest concerns regarding conduct that is deemed inappropriate to the impartial role of the trier of fact and which gives rise to fears that the adjudicator will appear partisan or as an advocate for one side.<sup>32</sup> Although these concerns would appear to be less significant in administrative hearings (as distinct from the concerns raised in civil trials, especially in jury trials), it is obvious that an appearance of partisanship could arise even there. However, as demonstrated above,<sup>33</sup> given the constitutional dimensions of the problem, it is necessary to find some form of intervention that can be implemented without the appearance of partiality. This implementation, of course, will require heightened awareness by the ALJ of the danger of such an appearance, and clear indications on the record regarding why

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31. *Id.* at 57-58; see also *Handling Pro Se Litigants*, *supra* note 16, at 19-20; SELF-HELP COURT, *supra* note 1, at 75-84.

32. See *supra* note 22; see also Allen E. Schoenberger, *The Active Administrative Judge: Is There Harm in an ALJ Asking?*, 18 J. NAALJ 399, 404 (1998) (describing examples where ALJ questioning evidenced partiality); Jeffrey S. Wolfe & Lisa B. Proszek, *Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer*, 33 Tulsa L.J. 293, 301-307 (1997) (arguing that the active ALJ in a Social Security hearing becomes deeply involved in the law suit, straining her passivity and neutrality, and perhaps undermining the due process right to a full and fair hearing itself).

33. See *supra* notes 18 and 19, and accompanying text.



such interventions are being made.<sup>34</sup>

Although the American Judicature Society acknowledged such concerns about an appearance of partiality, it nevertheless adopted as a policy recommendation that “judges should assure that self-represented litigants in the courtroom have the opportunity to *meaningfully* present their case.”<sup>35</sup> The Society also recommended that “[j]udges should have the authority to insure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented litigants.”<sup>36</sup> Indeed, the ABA recently revised its Model Code of Judicial Conduct by adding a new Comment 4 to Rule 2.2. That Rule requires that “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”<sup>37</sup> Nevertheless, Comment 4 makes clear that “It is not a violation of this Rule for a judge to make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard.”<sup>38</sup>

Since the ethical norms applicable to ALJs are modeled on the Model Code of Judicial Conduct, the proposals described above could be implemented within the ethical strictures of the current system for ALJs and do not require statutory authorization.<sup>39</sup> Thus, these proposals should be explored and particularized regarding the appropriate modalities for incorporation into the current structure and procedures in administrative hearings, both adversarial and nonadversarial, taking into consideration concerns about the

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34. Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When the Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423 (2004) (arguing that a judge’s neutrality—in fact and in appearance—can be preserved if she explains on the record the reasons for and modalities of her assisting a *pro se* litigant by, among other things, asking questions) [hereinafter *Disconnect*].

35. AMERICAN JUDICATURE SOCIETY, REVISED *PRO SE* POLICY RECOMMENDATIONS 4 (2002) (emphasis added).

36. *Id.* See also Albrecht, *supra* note 18, at 45-48 (discussing the general principles that should guide a judge in assisting the *pro se* litigant).

37. ABA Model Code of Judicial Conduct, Rule 2.2 (February 2007).

38. *Id.*, Comment 4. For a more detailed discussion regarding the underlying rationale for and reasonable accommodations arguably permissible under this provision, see Gray, *supra* note 15, at 101-10, 116-27, 130-48.

39. See *supra* notes 22 and 34.

appearance of partiality.

However, the protocols described above may not be sufficient in themselves to prevent unjust results in cases involving *pro se* litigants. Thus, some commentators have urged reforms that would significantly enhance the role of the judge well beyond the parameters suggested by the proposals noted above.<sup>40</sup> For example, it has been proposed that

Judges should *freely ask questions* of unrepresented parties and their witnesses. When judges make clear to the parties at the beginning of the hearing that they will ask questions—and explain why (to make sure they have the information they need to make a decision)—chances are minimal that their apparent impartiality could be impaired.<sup>41</sup>

While such a proposal would not place an affirmative duty on the ALJ to develop the factual record unless otherwise required to do so by law, it would authorize the ALJ to develop the record more actively than many do at present because of concerns about an appearance of partiality or simply because they are not familiar with the techniques by which to do so.<sup>42</sup> Thus, the ALJ would be required

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40. See, e.g., Engler, *supra* note 1 (arguing that such changes should be adopted even if they require administrative, statutory or constitutional amendments). *But see Litigant's Struggle*, *supra* note 1, at 45 (arguing that such proposals “do not radically alter the adversarial system or the traditional role of the judge. Nor do they make the judge the feared gatherer of evidence who may unfairly side with the party whose theory of the case is consistent with his or her investigation . . .”).

41. Albrecht, *supra* note 18, at 46 (emphasis added); see also *Disconnect*, *supra* note 34. *Compare Manual*, *supra* note 8, at 84 (arguing that ALJ questioning should be “rare,” although allowing that questioning is appropriate to prevent reversible error, to protect the record against the inclusion of seriously misleading, obfuscating or confusing testimony, to avoid serious waste of time, to clarify any confusing or ambiguous testimony, to develop additional facts, or “when for some other reason assistance is needed to assure orderly development of the subject matter.”). *Id.*; Bernard, *supra* note 5, at 11 and 18 (noting that many ALJs preside over administrative hearings as though they were passive bystanders so that many hearings are indistinguishable from adversarial trials).

42. See discussion *infra* Part II.B and C.

to ask questions to assure that she would have the facts necessary to do justice in the matter submitted to her for adjudication.<sup>43</sup> Similarly, Professor Goldschmidt proposes that:

The judicial role should be expanded by explicit rules authorizing judges to provide *a reasonable degree of assistance to pro se* litigants in presenting their claim or defense. . . . [T]he court should assist by making sure all evidence the *pro se* litigant wishes to introduce is properly offered and admitted (unless found to be inadmissible due to privilege, irrelevance, immateriality, or redundancy. . . .). It is common knowledge that judges often assist attorneys by suggesting the correct form of a question, a certain line of inquiry not being pursued, or the manner of properly offering a document or other item into evidence. This proposal would, therefore, authorize similar assistance to *pro se* litigants. It may seem to radically change the traditionally passive role of the adversarial judge, but it is really only a modest expansion of that role.<sup>44</sup>

It is clear that the proposals described above would go a long way in meeting the challenge of the *pro se* litigant. Under those proposals, an ALJ would be expected, indeed required, to provide a reasonable degree of assistance to the *pro se* litigant in articulating her claims or defenses. However, since these proposals for reforms within civil trial courts “do not radically alter the adversarial system or the traditional role of the judge”<sup>45</sup> they do not address the root cause of the problem faced by the *pro se* litigant, i.e.,

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43. See, e.g., Gray, *supra* note 15, at 139-44; compare Schoenberger, *supra* note 32, at 404 (“In general, however, ALJ questioning is permissible, just as is similar questioning by judges. Problems most frequently arise when questioning becomes overly extensive or overly aggressive but modest questioning presents no difficulty.”).

44. *Litigant’s Struggle*, *supra* note 1, at 48 (emphasis added). As noted above, the ABA has adopted this position. See *supra* notes 37 and 38, and accompanying text.

45. *Litigant’s Struggle*, *supra* note 1, at 45.

being thrust into an adversarial system that presumes representation by a zealous advocate skilled in the technicalities of evidentiary and substantive law. I would suggest that this same critique is applicable even to fora which are less formal and arguably less adversarial and lawyer-centric than trial courts, including small claims courts and some administrative hearings, where judges and ALJs frequently fail to intervene to assist *pro se* litigants in presenting their claims and defenses, and in some instances transform the supposed nonadversarial administrative hearing into an adversarial trial.<sup>46</sup>

Thus, we must consider more radical, comprehensive and systemic reforms, even if they significantly change (1) the nature of our administrative adjudication systems which, although informal in appearance, are in practice becoming more like adversarial civil trials and (2) the role of ALJs in those systems which, although offering the possibility or, indeed, the promise of active assistance, is nevertheless unduly circumscribed by notions of ALJ impartiality and passivity.<sup>47</sup> The next two subsections will discuss such proposals.

*B. ALJs Should Take Full Advantage of the Implications of a System that is Not Completely Circumscribed by Formal Evidentiary Rules.*

There is general agreement that “[w]hat many describe as the ‘technicalities’ of the law of evidence present a major barrier to

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46. See *supra* note 5; see also *infra* note 106. Indeed, the intervention of some ALJs in supposedly nonadversarial fora not only fails to assist the *pro se* litigant, but is itself adversarial, with the ALJ adopting the world and case view of the agency, and subjecting the *pro se* litigant to a series of questions that are not designed to elicit facts, but are instead focused on exposing supposed weaknesses in the *pro se*'s case. See Bernard, *supra* note 5, at 16-17 (demonstrating that the ALJ's adopting the agency viewpoint may “leave the decider without a sufficiently panoramic view of the possibilities.” *Id.* at 17 (citation omitted)); Schoenberger, *supra* note 32, at 404-05 (describing ALJ questioning that can be misleading or confusing, and that inappropriately approximates adversarial cross examination and attempts to discredit testimony); Wolfe, *supra* note 32, at 305-06, 333 (describing the danger of an ALJ's questioning becoming an adversarial cross examination that seeks to destroy the witness' credibility).

47. See, e.g., Bernard, *supra* note 5, at 9-12, 18; Engler, *supra* note 1, at 1990-92, 2011-26, 2028-31.

making court processes open to all. They not only intimidate the parties, but also create significant barriers to the presentation of evidence to the fact finder.”<sup>48</sup> Indeed, even many trial judges view the strict application of the rules of evidence in hearings involving *pro se* litigants as impeding a judge’s ability to do justice in such cases.<sup>49</sup> One court has succinctly summarized the practical impact of the application of evidentiary rules on the ability of *pro se* litigants to present their cases to a judge:

It is simply unrealistic to expect lay litigants to understand and abide by the formal rules of evidence. How is a lay plaintiff to be made to understand that the bill for services which he presents to show the repair costs for his damaged property must be authenticated as a business record? Or that the police report of an accident proves nothing in the eyes of the law? . . . In the case of inexperienced *pro se* litigants, it is better to err on the side of admitting an ore-heap

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48. SELF-HELP COURT, *supra* note 1, at 81.

49. *See, e.g., Handling Pro Se Litigants, supra* note 16, at 18:

Surprisingly, some judges feel the rules of evidence become a hindrance in certain cases, as do the attorneys themselves. Several judges suggested a “need to relax the rules so that justice can be done.” Sometimes, “the lawyer whines and complains that the other side doesn’t follow the [evidentiary] rules. That is true to a point, but the [evidentiary] rule often gets in the way of the ‘truth.’” One judge explained, “It’s amazing how much evidence can be presented without attorneys. Much more effective. Lawyers try to hide evidence much of the time.”

*See also* John Sheldon & Peter Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-Jury Trials*, 86 JUDICATURE 227, 228 (2003) (“When [a *pro se*] litigant faces a party represented by counsel in a jury-waived proceeding, rules of admissibility become more than superfluous: They become weapons that the lawyer can use to gain an advantage that has nothing to do with the merits of the case.”). Thus, in order to facilitate the admission of clearly relevant and important facts, judges sometimes relax strict evidentiary requirements, even when the party is represented by counsel. *See, e.g., MEETING THE CHALLENGE, supra* note 1, at 57-58; *Litigant’s Struggle, supra* note 1, at 48 (“It is common knowledge that judges often assist attorneys by suggesting the correct form of a question, a certain line of inquiry not being pursued, or the manner of properly offering a document or other item into evidence.”).

of evidence in the belief that nuggets of truth may be found amidst the dross, rather than to confine the parties to presenting assayed and refined matter which qualifies as pure gold under the rules of evidence.<sup>50</sup>

As demonstrated above in Part I, the primary reason why evidentiary rules frustrate and, indeed, silence *pro se* litigants in presenting their claims and defenses is our adversarial common law system's rejection of narrative as an appropriate modality for the introduction of evidence.<sup>51</sup> As we also saw above in Part I, the mere imparting of legal information to a *pro se* litigant, including regarding the rules of evidence, is generally insufficient to overcome the silencing effect of the imposition of the strictures of our formal adversarial system, including evidentiary rules, which presumes representation by a trained zealous advocate.<sup>52</sup>

This same debate regarding the problems of imposing evidentiary rules on *pro se* litigants at administrative hearings has been given voice in this and other journals. Even though most administrative hearings are to some degree freed from the strictures of formal

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50. *Houghtaling v. Superior Court*, 21 Cal. Rptr. 2d 855, 859-60 (Ct. App. 4th 1993).

51. *See also* O'Barr & Conley, *supra* note 11, at 666-67:

Our analysis of our earlier data repeatedly confirmed the intuition that lay witnesses come to formal courts with a repertoire of narrative customs and strategies that are often frustrated, directly or indirectly, by the operation of the law of evidence. . . . These restrictions and prohibitions are supported by the statutory or common law of evidence or by unwritten custom widely followed in formal courts. Yet reflection on how we ordinarily speak suggests that each [evidentiarily] forbidden practice is common, *if not essential, in everyday narration* (emphasis added).

52. *See supra* note 9 and accompanying text; *see also* O'Barr & Conley, *supra* note 11, at 672:

Witnesses' reactions to [evidentiary] objection sequences suggest that they have little understanding of the nature of this conflict [between the epistemological assumptions of the law of evidence and those of ordinary narrative speech] and that *the explanations offered by the courts do little to enlighten them about why the law deems their narratives unacceptable*. (emphasis added).

evidentiary rules,<sup>53</sup> the allure of the rules of evidence to ALJs trained in our adversary system is tempting even in the context of administrative hearings.<sup>54</sup> Obviously, where evidentiary rules are not imposed by law, ALJs should assure that their hearing practices do not have the unintended result of importing such evidentiary obstacles.

Where the rules of evidence are imposed on ALJs to some degree by law, the recommendations of a number of commentators that evidentiary rules be relaxed, or indeed, be jettisoned completely in cases involving *pro se* litigants, using the model of Small Claims courts and non-adversarial administrative hearings as a guide for such a reform,<sup>55</sup> should be adopted. However, to the extent that rules of evidence remain operative in some hearings, their impact on *pro*

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53. See *Manual*, *supra* note 8, at 85-90 (describing general concept “that strict common law rules of evidence do not apply, by their own force, to administrative proceedings,” *id.* at 85, but noting that some agencies and jurisdictions require the following of rules of evidence “so far as practicable.” *Id.* at 86; see more generally Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1 (1987).

54. See, e.g., Christine McKenna Moore, *Evidence for Administrative Law Judges*, 15 J. NAALJ 201 (1995) (arguing that the rules of evidence should be imposed at all administrative hearings, although granting that “I am perfectly content with the notion that the formal rules can and should be adapted, to the particular caseload of an agency and within the context of a particular case.”) *Id.* at 207. Indeed, one of Moore’s reasons for her proposal to impose formal evidentiary rules is that ALJs are lawyers “who have actually tried cases in the real world and know litigation, rather than agency attorneys and program people.” *Id.* at 201. See also *Manual*, *supra* note 8, at 87-88 (arguing that although evidentiary rules are not applicable in administrative hearings unless imposed by statute or agency rule, “It is worthwhile, however for the ALJ to be familiar with these rules. They can furnish guidance and insights which can help resolve evidentiary problems.” *Id.* at 88). Apparently following that admonition, it has been noted that “In many agencies today, administrative litigation is virtually indistinguishable from civil litigation . . . .” Bernard, *supra* note 5, at 18. But see Pierce, *supra* note 53, at 25-26 (“Agencies also should refrain from imposing on ALJs the straightjacket of the FRE. Instead, agencies should provide as much guidance as possible, including adoption of the weighted balancing test of FRE 403, to enable ALJs to perform their important case management function.”); Bernard, *supra* note 5, at 7 (arguing that ALJs should follow evidentiary principles without imposing complex evidentiary rules).

55. See Engler, *supra* note 1, at 2028; see also *Litigant’s Struggle*, *supra* note 1, at 51-53; SELF-HELP COURT, *supra* note 1, at 81-83.

*se* litigants can be mitigated. In order to avoid either interrupting the *pro se* litigant's narrative or the apparent anomaly of the represented party's attorney objecting to the ALJ's own questions, one proposal urges the ALJ to insist on conducting the hearing in a more informal manner, particularly regarding the application of the rules of evidence.<sup>56</sup> Indeed, ALJs within systems that impose evidentiary rules have even greater discretion than trial judges to overrule evidentiary objections given that most systems provide escape clauses regarding the imposition of evidentiary rules, such as imposing them only in "so far as practicable," or imposing the rules only as guidelines, or providing that the rules may be relaxed in order to avoid injustice.<sup>57</sup> It has also been recommended that the adjudicator require the attorney to include in his objection sufficient understandable information so the *pro se* litigant can cure the defect and that the judge refuse to uphold objections merely on the grounds of the form of a question or testimony.<sup>58</sup>

One might also consider a modified application of Small Claims courts procedures. For example, one could relax the rules of evidence only where the unrepresented party bears the burden of proof, or only where both sides are unrepresented, or where the represented party consents to the relaxation.<sup>59</sup> One might also consider whether evidentiary rules should be relaxed only for the *pro se* litigant or also for the represented party. However, such shifting rules would appear to place an unnecessary burden on an ALJ to determine which rules should apply in the matter before the ALJ and could lead to confusing and inconsistent or indeed arbitrary application. Thus, I would propose that a uniform approach be adopted in all cases where at least one party is *pro se* in which the

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56. Albrecht, *supra* note 18, at 47-48.

57. *Manual*, *supra* note 8, at 85-86; *see also* Albrecht, *supra* note 18, at 47 (recommending that the judge "convince the attorney of the benefits of proceeding informally," by, among other things, overruling an evidentiary objection "on the grounds that it would be a waste of judicial resources to proceed in formal compliance with the rules of evidence.").

58. *Id.*, at 47-48; *see also* SELF-HELP COURT, *supra* note 1, at 81-84.

59. Some commentators have suggested strategies by which a court might "convince the attorney of the benefits of proceeding informally." Albrecht, *supra* note 18, at 47 (emphasis added); *see also* SELF-HELP COURT, *supra* note 1, at 81-83.



same evidentiary rules apply to both parties, whether they are represented or not.<sup>60</sup> However, within such a uniform system, one could jettison either in whole or in part only those evidentiary rules which might have a greater likelihood of excluding otherwise reliable evidence, e.g., hearsay or documentary foundations.<sup>61</sup>

Because administrative hearings are judge trials rather than jury trials, the ALJ's ability to disregard facts that might be inadmissible in hearings where evidentiary rules are applied ameliorates concerns about the adjudicator's having such facts before her.<sup>62</sup> The primary

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60. See Albrecht, *supra* note 18, at 18 (recommending that the same protocols be applied whether the other party is represented or not).

61. See Sheldon, *supra* note 49, at 231; see also MCCORMICK ON EVIDENCE, 1, § 327 (John William Strong ed., 4th ed. 1992). Indeed, the ALJ has even greater discretion than trial judges to limit the application of evidentiary rules. See *supra* note 57. In any event, even in administrative hearings where the rules of evidence apply, the issue of exclusion generally does not arise unless the represented party raises an evidentiary objection. See SELF-HELP COURT, *supra* note 1, at 81 ("In theory then, in most jurisdictions, in the absence of objection, most evidence comes in and may be given what weight the fact finder finds appropriate."), citing MCCORMICK, *supra*, § 52 ("The general approach, accordingly, is that a failure to object to an offer of evidence at the time the offer is made, assigning the grounds, is a waiver upon appeal of any ground of complaint against its admission.").

62. Sheldon, *supra* note 49, at 228:

When judges sit without juries, however, there is no point either in trying to screen evidence or in issuing limiting instructions. Screening is impossible, because the person who does the screening is the very person from whom the evidence is supposed to be screened, and it makes no sense to ask judges to instruct themselves.

See also MCCORMICK, *supra* note 61, § 60 ("[J]udges possess professional experience in valuing evidence greatly lessening the need for exclusionary rules."). But see Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information?*, 153 U. PA. L. REV. 1251, 1251-52 (2005) (arguing that "judges are generally unable to avoid being influenced by relevant but inadmissible information of which they are aware."). Nevertheless, even though a trial judge is required to strictly apply the rules of evidence under our current system,

[appellate] courts have said that in reviewing a case tried without a jury the admission of inadmissible evidence [even] over objection will not ordinarily be a ground for reversal if there was admissible evidence sufficient to support the findings. The judge will be presumed to have disregarded the inadmissible and relied on the admissible evidence.

focus of the system would be to allow the *pro se* litigant's narrative to unfold with minimal interruptions or objections. Perhaps objections, to the extent that the ALJ permits them, could be reserved or raised in short hand form or be agreed to prior to the hearing. Accordingly, the goals of this approach would be to avoid interrupting the narrative with objections and to find other ways of preserving technical evidentiary objections on the record to the extent that they are required by law in particular administrative fora.<sup>63</sup>

In any event, the relaxing of the rules of evidence and procedure, which appear to be two significant determinants in silencing *pro se* litigants, will go a long way to address the problems identified above in Part I of this paper. However, adopting a model free from the rules of evidence is not a guarantee that *pro se* litigants will be able to fully and adequately articulate their narrative before the ALJ. As noted above, Professor Bezdek observed systemic silencing of *pro se* litigants in Baltimore's Rent Court, which is based on the Small Claims model with relaxed rules of evidence.<sup>64</sup> In addition, similar

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*Id.*; see also RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 1-103 (1995). Of course, a finding of plain error, where the substantial rights of a party are affected by admitting inadmissible evidence, can result in reversal. MCCORMICK, *supra* note 61, § 52. For a summary of the arguments for abolishing the rules of evidence in all non-jury trials, whether or not they involve *pro se* litigants, see Sheldon, *supra* note 49 (noting that in other common law countries "the common law of admissibility of evidence . . . has little practical impact in civil trials before judges. In England, the admissibility of most forms of evidence in civil cases is left to the trial justice's sound discretion.") *Id.* at 229; see also FRANKLIN STRIER, RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM 157-58 (1994) (proposing the elimination of exclusionary rules, particularly the hearsay rule, even in jury trials); but see Jeremy A. Blumenthal, *Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective*, 13 PACE INT'L L. REV. 93 (2001) (arguing that evidentiary rules are essential to our common law adversarial system); Moore, *supra* note 54, at 201 (same "whether the dispute takes place in a court of general jurisdiction or an administrative tribunal, before a jury or a judge.").

63. See *supra* notes 56-57 and accompanying text; see also *Litigant's Struggle*, *supra* note 1, at 48.

64. See *supra* notes 8-12 and accompanying text; see also Bezdek, *supra* note 8, at 588 ("In small claims courts, where many such evidentiary constraints are relatively relaxed, we might expect there to be more tolerance for ordinary speech," finding that such is not the case); O'Barr & Conley, *supra* note 11 (documenting the factors in Small Claims courts which limit the legal adequacy of *pro se* narratives); *Litigant's Struggle*, *supra* note 1, at 42 (and works cited therein).

limitations have been documented even in nonadversarial administrative hearings not encumbered by the rules of evidence.<sup>65</sup> The silencing and distorting effect of the rules of evidence, even when not applicable to the administrative hearing, is starkly described in Professor White's retelling of Mrs. G's welfare hearing:

At the fair hearing, it was Mrs. G's *voice*, rather than her behavior, which was compelled to assent to the bureaucratized – and arguably also gendered – logic of welfare. The law of evidence – doctrines of relevancy and materiality – commanded her to keep her speech within the categories that the legislative/administrative process had generated. Even though the technicalities of evidence law did not apply to her case, the hearing officer would only attend to the narrow issues that the AFDC regulations charged him to decide. . . . Discrete responses to those questions – that was the measure of “participation” that the hearing gave Mrs. G. She best not “fight the questions” if she wanted her voice to be heard at all. Rather, she had to speak her need as an accounting of how she had spent a few hundred dollars. Within these constraints, her speech might be worth that sum if she won; it would have no other consequence.<sup>66</sup>

Thus, the mere relaxing or inapplicability of evidentiary rules in administrative hearings does not in and of itself assure that the *pro se* litigant's narrative will be elicited and heard in any constitutionally meaningful sense.<sup>67</sup> Rather, the ALJ must also take full advantage of

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65. See *supra* note 5; see *infra* note 106.

66. White, *supra* note 12, at 43-4 (emphasis in original).

67. See, e.g., Engler, *supra* note 1, at 2044 (“rule changes alone are unlikely to eliminate problems facing the unrepresented poor . . .”) (citing Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 46 OHIO ST. L.J. 243, 245, 268 (1985)); see also John M. Conley & William M. O’Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 66 N.C. L. REV. 467, 506 (1988):

Informal justice is also a process created to protect individual rights. Small claims courts were conceived in part to enable

her freedom from the constraints of evidentiary rules by addressing two additional factors which contribute to the *pro se* litigant's silencing even without the strictures of formal evidentiary rules of exclusion.<sup>68</sup>

First, an ALJ should not be seduced into believing that the mere relaxing or inapplicability of evidentiary rules, in and of itself, remedies the power imbalance between a *pro se* and a represented party or a governmental agency. As noted above, the economic and often racial and gender status of the *pro se* party places her in a position of subordination within the legal system, and profoundly affects her ability to speak or to have her voice heard in any meaningful or persuasive way by the ALJ.<sup>69</sup> This power imbalance is further exacerbated by the advantage resulting from the usual case of the dominant party's being represented by a zealous advocate, skilled in both substantive and procedural law, and familiar with the culture and practices of the administrative forum in which he or she practices on a regular basis.<sup>70</sup> This power imbalance is evident even where the governmental agency is not represented, since the *pro se* is battling a negative decision by what she may perceive to be an all-powerful

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consumers, tenants, and others with limited power to assert rights inexpensively and expeditiously. As our data demonstrate, however, there is no such thing as *the* process of informal justice. It is, rather, a broad range of different processes, with the differences deriving in significant part from the role perceptions of those [i.e., judges] who administer it.... We can only reiterate our concern about the discrepancy between the ideal of a system of informal justice designed to help certain types of litigants and the reality of many systems, each of which meets some needs but may ignore others. We are troubled that this variation is effectively concealed from litigants and beyond their control. (emphasis added).

68. The concerns and techniques set forth below are also applicable even under the more modest proposals described above in Part II.A.

69. See *supra* notes 11-12 and accompanying text.

70. See Engler, *supra* note 1, at 2068-69; see also Gray, *supra* note 15, at 117-18 (describing appearance of bias arising from judge's apparent familiarity with attorney for represented party); Bernard, *supra* note 5, at 16-18 (observing the danger of the "degree and quality of interaction" between the ALJ and agency staff).

government agent.<sup>71</sup> “Worse yet, the ALJ may have wholly adopted the agency’s world view without realizing it has happened. The process of inculcation may occur primarily through the informal daily interactions whereby the ALJ hears mostly only one side of a controversy: namely, the agency’s.”<sup>72</sup> Accordingly, the ALJ must consistently and systematically “[r]emain alert to imbalances of power.”<sup>73</sup>

Techniques for addressing this imbalance have been suggested by commentators. For example, an ALJ needs to be sure to inquire about the *pro se* litigant’s views on the issues before her at each stage of the proceeding.<sup>74</sup> The ALJ should also resist the temptation of allowing the attorney or the governmental representative, who may be more facile in using the terminology and categories familiar to the ALJ, to define the factual and legal issues before her.<sup>75</sup> This is

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71. Bernard, *supra* note 5, at 18 (describing an administrative hearing as a place where a party “look[s] their government in the eye,” no doubt a daunting experience for an unrepresented party); White, *supra* note 12, at 35-37 (describing the silencing effect of a claimant’s fear of retaliation by the welfare office if she challenges its determination by seeking legal assistance or asking for a hearing).

72. Bernard, *supra* note 5, at 17; *see also* Lewis, *supra* note 22, at 956-57 (describing ALJ’s relationship to the governmental agency and the ALJ’s resulting susceptibility to undue influence as a primary threat to ALJ impartiality).

73. Albrecht, *supra* note 18, at 47; *see also supra* note 72; Beatrice A. Moulton, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969) (describing effects of power imbalance in spite of the Small Claims judge’s statutory power to conduct an informal hearing, raise objections or defenses for a party, conduct independent investigation of facts, disregard technical rules of evidence, and exercise equitable powers).

74. Albrecht, *supra* note 18, at 47; *see also* Disconnect, *supra* note 34, at 439 (“Judicial inquiry of the parties as to whether they understand what is expected of them, what the judge is doing, what has been decided, and the consequences of that decision . . . serve[ ] justice by making it possible to obtain more information when misunderstanding has led to lack of information, and serve[ ] the appearance of justice by showing the interest of the judge in justice.”).

75. Bezdek, *supra* note 8, at 569-70 (describing how even unrepresented landlords are often allowed to establish the terms of the court’s inquiry of the *pro se* litigant); Bernard, *supra* note 5, at 17 (describing how this dynamic can occur even prior to the hearing by the ALJ’s adopting the agency’s world or case view). The issue here is not essentially one of chronology, i.e., who speaks first. Rather, the primary issue is one of dominance by the represented party or the governmental agency, and the ALJ’s deference to or reliance on that party’s presentation of the

particularly important where the *pro se* litigant bears the burdens of proof or persuasion. Accordingly, by employing techniques which signal to the *pro se* litigant that her view of the facts or the law is not being discounted simply because of her economic, racial, gender, or *pro se* status, but indeed is welcome and valued, the ALJ will in some measure mitigate the silencing effects of such status-based subordination.

Second, an ALJ must construct appropriate modalities of intervention to assist the *pro se* litigant in telling her story or narrative.<sup>76</sup> However, if the ALJ merely invites the *pro se* litigant to “tell your story” or “explain why you think the agency’s decision is

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issues as the *sole* lens through which the evidentiary hearing is seen.

Invariably, the judge starts the hearing with the landlord’s claim . . . So the tenant starts her comments with [that claim]. Most often, only [the landlord’s claim] has been spoken of when the judge dismisses the tenant’s speech and rules for the landlord. As structured, it excludes virtually all tenants from meaningful participation in the conversation. This makes the legal process a charade.

Bezdek, *supra* note 8, at 589.

76. The notion that narrative testimony is prohibited in trial courts and, by extension, should be prohibited in administrative hearings, is overstated. FRE section 611(a) provides that, “The court shall exercise reasonable control over *the mode* and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.” (emphasis added). This discretionary power includes “let[ting] a witness testify in narrative form.” CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, 3 FEDERAL EVIDENCE §. 293 (2d ed. 1994), citing *N. Pac.R.R. Co. v. Charless*, 51 F. 562 (9th Cir. 1892) (affirming the trial court’s ruling that narrative was “the best way of getting at what [the plaintiff] knew or could state.” 51 F. at 570, *rev’d on other grounds*, 162 U.S. 359 (1896). *See also* *Goings v. United States*, 377 F.2d 753, 762-63 (8th Cir. 1967) (“Ritualistic formality in presenting evidence should not deter untrained witnesses from telling their story in their own words. We hold here, it is only when evidence which is traditionally considered untrustworthy or unreliable, assumes the stature of undue significance that we must recognize error.”); *People v. Dickman*, 253 N.E.2d 546, 547-48 (Ill. App. Ct. 1969) (“The trial court has the discretion to allow the narrative form of testimony, particularly if it is best suited to the characteristics of the particular witness.”). Compare *State v. Joyner*, 848 P.2d 769 (Wash. Ct. App. 1993) (holding it was not an abuse of discretion for the trial court to disallow narrative testimony where defendant signaled his intent to refer to excluded evidence during his proposed narrative testimony).

wrong” or “tell me why you think you are disabled,” the resulting narrative, free from evidentiary constraints but unassisted by ALJ intervention, will generally be factually incomplete and probably legally insufficient.<sup>77</sup> Thus, intervention by the ALJ is essential. O’Barr and Conley have catalogued some of the indicia in unassisted *pro se* narratives which signal the *pro se*’s quandary regarding the sufficiency of her story and her need for such intervention.<sup>78</sup> For example, *pro se* litigants will frequently ask where to begin or end the narrative, or otherwise indicate that they do not know the “relevant” time periods. They will also continue the narrative, with segments linked with “ands” or pauses until they think they’ve told “enough.” They frequently use “rising intonation” at the end of segments, which signals a request for “acknowledgment and understanding.”<sup>79</sup>

Without assistance from the ALJ, the *pro se* litigant will simply continue her narrative until she thinks what she has said is sufficient to defeat the agency’s position or support her request for relief.<sup>80</sup> However, she will generally not have structured the narrative in a deductive manner, based on a theory of the case, which directly refutes the government’s or other adversary’s position in a manner that is cognizable under the applicable law or which supports her claim.<sup>81</sup> Accordingly, unassisted, the *pro se* litigant’s narrative will

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77. O’Barr & Conley, *supra* note 11, at 676-77 (describing how *pro se* litigants in small claims courts “invariably responded [to such invitations] not by answering the questions in a narrow sense but by commencing a chronological narrative of the dispute as they perceived it. The scope of these narratives often went far beyond the facts that the court was empowered to adjudicate.” *Id.* at 677); *see also id.* at 662 (“*unassisted* lay witnesses seldom impart to their narratives the deductive, hypothesis-testing structure with which judges are most familiar and often fail to assess responsibility for events in question the way that the law requires.”) (emphasis added); Bezdek, *supra* note 8, at 588 (describing how by asking the *pro se* litigant “Is there anything you want to tell me?,” the judge “is structuring the discourse by leading the tenant into expression and then dismissing that which the judge elicited. Doing so in this way is both misleading and destructive.”).

78. O’Barr & Conley, *supra* note 11, at 681-83.

79. *Id.* at 683.

80. *Id.* at 685 (“When [the *pro se* litigant] concludes, he apparently believes that he has given the court an adequate basis for finding against [the other party].”).

81. *Id.* at 685-86 (“It may be significant that in his narrative, the [*pro se* litigant] proceeded as if the facts would speak for themselves. . . . He does not lay

generally be seen to be legally inadequate,<sup>82</sup> in spite of the fact that it will often contain all of the elements which, if marshaled by a lawyer, would be legally adequate.<sup>83</sup>

Thus, the ALJ must assist the *pro se* litigant in structuring and developing her narrative so that its legal adequacy can be articulated and evaluated. O'Barr and Conley have documented the efficacy of judicial interventions in informal Small Claims courts which guide the *pro se* litigant in: (1) identifying narrative beginning and end points;<sup>84</sup> (2) emphasizing facts which are more probative than others regarding the primary legal issues before the ALJ; (3) specifying the harm suffered or the relief sought; (4) identifying corroborative facts; (5) constructing facts according to the legal elements required for relief; and (6) responding to the government's or other adversary's factual and legal claims or defenses.<sup>85</sup> Accordingly, even in a system freed from the strictures of evidentiary rules, the role of the ALJ must be expanded to include "facilitating the unrepresented litigant's presentation of his or her own case—as the litigant has conceived it. .

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out a theory of the case for testing. Rather, he presents the facts he considers relevant and expects them to lead to a conclusion.”).

82. *Id.* at 684 (“The most significant problems faced by small claims litigants relates to the legal adequacy of their narratives. . . . Legally inadequate narratives are for our purposes narratives that differ substantially in form and content from the accounts judges are accustomed to dealing with by training and experience.”).

83. *Id.* at 678:

The narrator provides three types of evidence within his account. First, he produces *documents* that support his story. Second, he calls ‘*witnesses*’ by performing their parts. Third, he introduces *physical evidence*. . . . In an everyday account, some of these might not have been included. Their inclusion in the [*pro se*’s] testimony hints at his conception of legal adequacy. . . . Analyzed in this manner, relatively unconstrained narratives offered as evidence to the court reveal lay models of the kinds of accounts that are appropriate and sufficient to prove a [claim or defense]. (emphasis in original).

*Id.*

84. *Id.* at 683.

85. *Id.* at 693-94 (describing a *pro se* litigant who “had the benefit of a referee who was willing and able to develop a theory of [the case], frame the case in deductive terms, and then test the hypothesis developed against the evidence.”); see *id.* at 696 (describing magistrates who “intervene sometimes to restructure testimony for the apparent benefit of the witness and sometimes to resolve an issue that the witness seems determined to avoid.”).



..<sup>86</sup>

The techniques by which an ALJ can obtain information from a witness in a non-leading, “non-suggestive” manner are well-documented in the literature on client and witness interviewing.<sup>87</sup> One commentator describes how the person asking questions can assist the witness in reinstating the context in which the events took place and by urging the witness to tell all of the facts, not those which she believes to be “relevant,” and by assisting the witness in remembering events in different orders and from different perspectives.<sup>88</sup> He further describes the stages of such an interview, i.e., first inviting an open-ended narration; then probing for details by directing the witness’s attention back to each significant topic, beginning with open-ended questions, followed-up with narrower questions for each topic; and then reviewing with the witness all of what is judged to be relevant information culled during the prior stages.<sup>89</sup>

This expansion of the active role of the ALJ is perhaps a judge’s most daunting challenge in dealing with *pro se* litigants. First, little or no training is currently in place for ALJs regarding these interventions and techniques. Thus, it is not surprising that the

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86. Albrecht, *supra* note 18, at 44 (noting that such assistance does not transform the judge into an advocate, but simply a facilitator); *Litigant’s Struggle*, *supra* note 1, at 48-51 (describing the court’s role in facilitating admission of evidence and “bringing out facts”); Hon. Gerald Lebovits, *Small Claims Courts Offer Prompt Adjudication Based on Substantive Law*, 70 N.Y. ST. B.J. 6, 10 (1998) (“Judges and arbitrators [in small claims courts] have nearly unfettered discretion, subject to due process concerns, in ‘taking active charge of the proceedings and examining witnesses.’”) (citation omitted).

87. See, e.g., Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 41-52 (1995) (describing the “simple” techniques of “cognitive interviewing” which help the witness remember and narrate the full facts of her narrative); see also *Disconnect*, *supra* note 34, at 443-45 (describing techniques for assisting a *pro se* litigant during direct examination and in making out a *prima facie* case).

88. Wydick, *supra* note 87, at 45-48.

89. *Id.* at 48-50; see also DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* 167-180(2004) (describing the “T-Funnel” question pattern of first using open-ended non-leading questions to maximize information gathering before resorting to closed questions to fill in gaps or to get more specific information).

modality of asking questions used by some ALJs, schooled as they are in the adversary system, often consists of narrow, leading types of questions that elicit only limited information and may become adversarial cross examination in form and intent.<sup>90</sup> The use of less leading questions such as “who,” “what,” “where,” “why,” “when” and “how” may add incrementally to the facts before the ALJ, but they do not provide the type of probing and directed questioning which research has shown to be necessary to elicit the full story from *pro se* litigants.<sup>91</sup> Accordingly, judicial training and continuing legal education must include exposure to and an opportunity to practice more appropriate and productive techniques of questioning *pro se* litigants and of otherwise assisting them in telling their stories.

Second, this expansion of the active role of the ALJ may also challenge the ALJ’s deeply-held notion of the appropriate judicial role as being one of a relatively passive trier of facts even when the ALJ is under a duty to actively develop the record.<sup>92</sup> It also requires an ALJ to acknowledge that her notion of her role significantly affects and, to some degree, determines the extent and nature of the interventions she is prepared to make to assist a *pro se* litigant. There is no question that most ALJs have some general notion of what they believe to be role-appropriate interventions based on their understanding of current legal and ethical norms,<sup>93</sup> as well as their own practices.<sup>94</sup> However, in an empirical study of more than eighty Small Claims cases in Colorado and North Carolina, Conley and O’Barr have documented five distinctive judicial role-types and their

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90. See *supra* note 46.

91. See *supra* notes 77 – 85 and accompanying text.

92. See *supra* notes 10, 16, 22, 23; see also Bernard, *supra* note 5, at 11 (describing some Social Security ALJs as having adopted a passive role more usually associated with trial judges); STRIER, *supra* note 62, at 84, (“[T]he Anglo-American judge’s image and functions as those of a mere moderator of a contest . . . have left this seemingly powerful figure (and with him the parties) at the mercy of the professional combatants.”) (quoting ALBERT EHRENZWEIG, *PSYCHOANALYTIC JURISPRUDENCE* 265 (1971)).

93. See *supra* note 22.

94. See *supra* notes 28-32 and accompanying text; see also Manual, *supra* note 8, at 74-76, 84; Wolfe, *supra* note 32, at 346-47 (noting the dissonance experienced by “the [administrative law] judge, trained and experienced in the adversarial system of justice” and the active role required of many ALJs.).

significant impact on each type's hearing practices and decisions.<sup>95</sup>

Judges applying the same substantive and procedural law—and sometimes sitting in adjacent courtrooms—dispense justice in radically different ways. . . . Our examination of what judges say in rendering on-the-spot judgments suggests that this behavioral variation derives from divergent conceptions of the judge's role and the nature of legal decision-making. Thus, the law interpreter (Judge A), who rarely deviates from the straightforward application of legal rules, speaks of a process in which she is at the mercy of unyielding principles, even when she is disturbed by the results they produce. The law maker (Judge B), who adapts or even invents rules of law in pursuit of justice as she sees it, expresses herself in terms which suggest that the law is there to serve her ends, and not vice versa. The mediator (Judge C), who treats the adjudicative process as simply an opportunity to work out a compromise, puts similar emphasis on her central and highly discretionary role in the system. The authoritarian (Judge D), who renders definitive legal judgments and often involves himself in the personal affairs of the litigants, speaks in extraordinarily personal terms in exercising his authority. Finally, the proceduralist (Judge E), defined by his close, sometimes obsessive attention to procedural details, paints a verbal picture of a legal decision maker who is armed with discretionary power, yet protected from direct interaction with the litigants by several layers of legal formality. In each instance, there is a clear parallel between the judge's attitude as revealed in his unrehearsed speech and the individual's behavior on

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95. Conley & O'Barr, *supra* note 66, at 481-504 (describing conclusions of their study of more than eighty small claims proceedings, which included observation of each proceeding, review of transcripts, and conversations with the judges involved).

the bench.<sup>96</sup>

Accordingly, ALJs must reflect on whether their concept of judicial role-type, perhaps using the above typology as a guide, limits their ability to implement the interventions proposed in this section as necessary to assure *pro se* litigants' equal access to justice.<sup>97</sup> As has been argued throughout this paper and by other commentators, an ALJ's individual concept of role must give way to assuring equal access to justice for the *pro se* litigant.<sup>98</sup> This admonition is particularly apt where an ALJ inappropriately imports notions of judicial passivity from our adversarial, formal civil justice system. Absent such a refocusing and reformulating of the role of the ALJ, "the effectiveness of changes such as [those proposed in this section],

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96. *Id.* at 504.

97. There are, of course, considerations other than that of "role" that may deter an ALJ from assisting a *pro se* litigant. Related to considerations of "role" is the ALJ's concern about an appearance of partiality described *supra* note 22. See also Engler, *supra* note 1, at 2011-21; Schoenberger, *supra* note 31, 404-406; see also *Litigant's Struggle*, *supra* note 1, at 48-49 (noting that "assistance [to *pro se* litigants] is only perceived as unfair by the represented litigant who already has an unfair advantage over the *pro se* litigant."); *Disconnect*, *supra* note 34, at 437.

If what happens [during trial] is analyzed only in moment to moment terms it may seem non-neutral, when, for example, a judge asks a question of one party. But if that question is established as part of a process in which all [witnesses] are asked questions when needed for the judge to understand what happened, then a process that is seen to be neutral *in an overall sense* has been created . . . even if it may help more those who need to be helped because they lack counsel or education or both. (emphasis added).

*Id.*

98. Engler, *supra* note 1, at 2022-23.

The adversarial system purports to promote fairness and justice. Yet, the rules currently operate as barriers preventing unrepresented litigants from participating meaningfully in the legal system and thereby frustrate the goal of dispensing fairness and justice. Given a choice between clinging to the rules at the expense of the goal, or modifying the rules to further the goal, *the rule must be modified* (emphasis added).

*Id.* *Litigant's Struggle*, *supra* note 1, at 51 ("Both rules of court and judicial ethics must be modified accordingly to free judges to engage in these activities [i.e., asking questions, calling witnesses, and conducting limited independent investigations] and determine the 'truth' in every case.").

will be limited, if not undercut. . . .”<sup>99</sup>

*C. Adopting an Inquisitorial Model in Which the ALJ Bears an Affirmative Duty to Develop the Factual Record and Identify Controlling Law*

Both of the proposals described above in Parts A and B envision an enhanced role for an ALJ in assisting the *pro se* litigant in articulating her theory of the case and in introducing evidence in support of that theory.<sup>100</sup> However, my concern in this section is whether those proposals are sufficient to assure *pro se* litigants a full and fair hearing and, thus, equal access to justice. Unfortunately, I submit that the answer to that question must be in the negative. The studies and commentaries referred to above suggest that even with enhanced judicial assistance, the fundamental power imbalance between represented and unrepresented parties or between an unrepresented party and a governmental agency, coupled with the disempowering effect of the *pro se* litigant’s lack of familiarity and facility with legal categories, even in nonadversarial hearings, will not be redressed solely by those measures. Accordingly, some commentators have proposed that triers of fact should be given an affirmative duty to develop the factual record and to identify and apply controlling law, following the model of ALJs in some nonadversarial administrative hearings, such as Social Security disability hearings, and in the inquisitorial model used in some jurisdictions.<sup>101</sup>

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99. Engler, *supra* note 1, at 2069.

100. It has been suggested that such an expansion of role is appropriate even for trial judges operating within the strictures of our adversarial system. *Litigant’s Struggle*, *supra* note 1, at 45 (arguing that such proposals “do not radically alter the adversarial system or the traditional role of the judge. Nor do they make the judge the feared gatherer of evidence who may unfairly side with the party whose theory of the case is consistent with his or her investigation . . .”). However, even Goldschmidt acknowledges that some of his proposals may require some statutory or administrative reforms. *See id.* at 51.

101. *See* Engler, *supra* note 1, at 2017-18, 2028-31; *Litigant’s Struggle*, *supra* note 1, at 51; Russell G. Pearce, *Redressing Inequality in the Market for Justice: Why Access to Lawyers Will Never Solve the Problem and Why Rethinking the Role of Judges Will Help*, 73 *FORDHAM L. REV.* 969, 975-80 (2004); Joan L. Dwyer, *Fair Play the Inquisitorial Way: A Review of the Administrative Appeals Tribunal’s Use*

An ALJ in some federal, state, and municipal administrative fora already “has an affirmative duty to assist a *pro se* claimant in developing his case.”<sup>102</sup> This duty to assist requires that the ALJ “probe into . . . and explore for all the relevant facts.”<sup>103</sup> Consideration should be given to the implications of imposing this same duty on ALJs in all administrative hearings involving *pro se* litigants. Such an imposition would directly address *pro se* litigants’ inability to develop factual records and to present the facts in a way that demonstrates the legal sufficiency of their cases.<sup>104</sup>

However, merely imposing this duty on an ALJ by a rule change is no guarantee that the *pro se* litigant will receive the assistance she is promised by such a rule change.<sup>105</sup> ALJs who are currently bound by this duty frequently fail to fulfill their obligation to develop the

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*of Inquisitorial Procedures*, 22 J. NAALJ 81 (2002); see also STRIER, *supra* note 62, at 283-84 (proposing incorporating aspects of the inquisitorial model even where both parties are represented and even in jury trials). *But see* Wolfe, *supra* note 32, at 345-47 (arguing that a Social Security ALJ should be “return[ed] to her jurisprudentially passive role” in order to avoid what is seen as the jurisprudential errors arising from the combination of an inquisitorial ALJ and a single party system.) *Id.* at 347.

102. See, e.g., *Shaw v. Chater*, 221 F.3d 126, 134 (2d Cir. 2000) (“[T]he rule in our circuit [is] that ‘the ALJ, unlike a judge in a trial, must [her]self affirmatively develop the record’ in light of ‘the essentially non-adversarial nature of a benefits proceeding . . . .’ [E]ven when, as here, claimant is represented by counsel.”) (quoting *Pratts v. Chater*, 94 F.3d 34, 37 (2d Cir. 1996)) (quoting *Echevarria v. Sec’y of Health & Human Serv.*, 685 F.2d 751, 755 (2d Cir. 1982); see also *Manual*, *supra* note 8, at 6-8 (describing ALJ’s duty to develop an accurate and complete record).

103. *Echeverria*, 685 F.2d at 755:

Where, as here, the claimant is unrepresented by counsel, the ALJ is under a heightened duty to scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts. A reviewing court must determine whether the ALJ adequately protect[ed] the rights of [a] *pro se* litigant by ensuring that all of the relevant facts [are] sufficiently developed and considered.

(quoting *Hankerson v. Harriss*, 636 F.2d 893, 895 (2d Cir. 1980), quoting *Gold v. Sec’y of Health, Educ. & Welfare*, 463 F.2d 38, 43 (2d Cir. 1972) (internal quotations omitted)).

104. See *supra* notes 77-83 and accompanying text.

105. See *supra* note 67.

factual record.<sup>106</sup> Accordingly, the interventions described in the preceding section<sup>107</sup> would have to be imported here as a mandated component of the ALJ's duty to develop the factual record.

Similarly, judicial techniques used by judges in the inquisitorial model followed in most jurisdictions outside of the United States, Great Britain, and other countries that have adopted the English common law system could provide guidance for ALJs in devising methods and interventions by which to fully develop the record.<sup>108</sup> Of course, adopting aspects of a judicial model that is largely unknown to most of us trained in the Anglo-American system is

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106. See, e.g., *supra* notes 102-103 and cases cited there; see also Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679, 704-09 (2002) (documenting reversal rates of more than 50% for Social Security administrative law judge disability determinations, but arguing that this reversal rate is in part explainable by courts engaging in a too close review of the factual record under a substantial evidence standard of review); Wolfe, *supra* note 32, at 346 ("Adversarial courts sitting in review of those acting within the unique paradigm of the administrative judiciary may be tempted to judge too quickly, either attributing negative consequences to judicial activity, or, conversely, having accepted the 'active' role of the administrative law judge, criticize unduly a perceived lack of sufficient activity."). But see Anthony Taibi, *Politics and Due Process: The Rhetoric of Social Security Disability Law*, 1990 DUKE L.J. 913 (1990) (arguing that judicial timidity restrains judges from identifying and rectifying underlying systemic flaws which result in wrong decisions and injury to personal dignity and autonomy). Regulatory changes promulgated by the SSA in 2006 may address some of the concerns raised by Verkuil and Wolfe, but they in no way address the failure of ALJs to develop the record for *pro se* litigants. Frank S. Bloch, Jeffrey S. Lubbers & Paul R. Verkuil, *The Social Security Administration's New Disability Adjudication Rules: A Significant and Promising Reform*, 92 CORNELL L. REV. 235 (2007) (describing terms of new regulations).

107. See *supra* notes 73-85 and accompanying text.

108. See, e.g., *Litigant's Struggle*, *supra* note 1, at 41:

In this [inquisitorial] system, the professionally trained judge takes an activist role and ensures a solution based on the merits of the case by calling witnesses, asking most of the questions, and conducting hearings . . . . Narrative testimony is invited and, with some exceptions, most evidence offered by the parties is admitted . . . . With greater judicial involvement in fact finding, "the threat of one-sided distortions of misinformation appears less immediate, and the need to subject means of proof to testing becomes less compelling." (citation omitted).

STRIER, *supra* note 6, at 16 ("[T]he judge controls and conducts the court's investigation, calling witnesses and establishing the scope of the inquiry.").

unacceptable to some commentators, even as applied to ALJs, including to Social Security ALJs.<sup>109</sup> Nevertheless, defenses of the Anglo-American approach against incursions of inquisitorial-based reforms are rooted in the adversarial system's presumption or at least a preference that a zealous lawyer will represent each party, even at administrative hearings. Indeed, the Goldberg Court, although not finding that legal representation at an administrative hearing was constitutionally required, nevertheless acknowledged that "The right to be heard would be, in many case, of little avail if it did not comprehend the right to be heard by counsel. . . . Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient."<sup>110</sup>

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109. See, e.g., *Litigant's Struggle*, *supra* note 1, at 53 ("[W]e would be sacrificing some important elements of popular control over the legal system.") (quoting DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 103 (1988) [hereinafter LUBAN]); see also LUBAN, *supra*, at 98 (noting that "despite its numerous attractions, the German [inquisitorial] procedure requires other changes in the legal system and the nexus of values enveloping it that would make the trade-off unacceptable"); Wolfe, *supra* note 32, at 332-45 (arguing that the current inquisitorial role of the Social Security ALJ in that system's single party hearings encourages the ALJ to become an advocate for a position contrary to the claimant's and affects the ALJ's objectivity). See also Dwyer, *supra* note 101, *passim* (describing opposition to an inquisitorial approach at administrative hearings).

110. *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (internal quotations and citations omitted). See also Wolfe, *supra* note 32, at 346-47 (presuming that the problem for the active ALJ is "How . . . the [administrative law] judge, trained and experienced in the adversarial system of justice, perceive[s] her active role? How does she maintain the requisite jurisprudential distance necessary to independent decision making *when required to respond to an adversarial lawyer*, unchecked by an opposing party?" *Id.* (emphasis added)). See more generally LUBAN, *supra* note 109, at 239-41 (arguing that access to the adversary system and the rules by which that system functions presume representation by an attorney). Professor Luban, although a staunch defender of the adversarial system against inquisitorial-based reforms, further notes that our adversarial system not only presumes representation by a lawyer, but is constructed to require such representation.

The design of a legal system that cannot be operated by laypeople is surely the result of state decisions, indeed, of the accretion of hundreds of millions of state decisions. Moreover, the inability of poor people to afford lawyers is also the result of choices made by the state, both formalistically as a matter of law and also as a matter of plain fact. . . .



However, a significant number of litigants appearing in administrative hearings are and will be *pro se* and, thus, will not have such help in presenting their cases. Accordingly, the incorporation of at least some aspects of the inquisitorial model, primarily by enhancing the role of the ALJ in developing the factual record in an orderly manner, and in delineating the issues to be resolved at the hearing, and in identifying and applying controlling law, is essential if the *pro se* litigant is to be afforded a full and fair due process hearing.

In the French civil (and criminal) systems, the judge has the responsibility for fact gathering, including developing facts pre-trial and at trial by questioning witnesses.<sup>111</sup> As in most administrative proceedings, discovery by the parties in the French system is extremely limited. Rather, the judge directs the development of the factual and legal issues in the case, and fixes time limits.<sup>112</sup>

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[T]he selective exclusion of the poor from the legal system does not simply fail to confer an advantage on them—it actively injures them.

*Id.* at 246-47. Professor Luban's solution to this constitutional infirmity is limited to the deregulation of some routine legal services, mandatory *pro bono* representation, and funding of legal services, all of which preserve the lawyer-centric and resulting judicial passivity models of our judicial system, and provide little relief for those who, in spite of these reforms, will appear at administrative hearings and trials without attorneys.

111. I am deeply indebted in this section to a paper by Professor Anne Moynihan, *The French Judiciary* (1996) (prepared for the Housing Court Committee, Association of the Bar of the City of New York, describing that system's inquisitorial model and discussing its applicability to the United States civil system and New York City's Housing Court in particular). Professor Moynihan, a respected clinical professor at Fordham Law School, recently met an untimely death. In 1987, she hired me right out of law school as a trial attorney for the Legal Aid Society and profoundly affected my development as a lawyer and a teacher. I dedicate this section of this Article to her memory. *See also* Nicolas Marie Kublicki, *An Overview of the French Legal System from an American Perspective*, 12 B.U. INT'L L.J. 57 (1994); C.N. Ngwasiri, *The Role of the Judge in French Civil Proceedings*, CIV. JUST. Q. 169 (April 1990); Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do The French Do It, How Can We Find Out, and Why Should We Care?* 78 CAL. L. REV. 539 (1990); James Beardsley, *Proof of Fact in French Civil Procedure*, 34 AM. J. COMP. L. 459 (1986); Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131 (1983).

112. Moynihan, *supra* note 111. For a summary of similar elements in the

Obviously, the whole cloth importation of such a civil code-based inquisitorial approach raises significant statutory, administrative and ethical issues.<sup>113</sup> In addition, such an importation could give rise to practical considerations, since, for example, the French system relies on fairly well-developed *dossiers* to educate the judge regarding the factual and legal issues that she is expected to develop and on which she must rule. There are also theoretical considerations of such an importation given, for example, the almost exclusive reliance in the French system on documentary evidence due to a fundamental devaluation of the trustworthiness of testimony.<sup>114</sup> Nevertheless, some familiarity with a judicial system in which the judge plays a

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German system, see LUBAN, *supra* note 109, at 94-97; see also STRIER, *supra* note 62, at 213-18 (comparing the French and German systems). Compare Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. OF COMP. L. 839, 841-44 (1997) (describing the limits on the inquisitorial judge's fact finding powers, but noting that those powers exceed those of the Anglo-American judge, particularly the former's "monopoly of witness' examination."). *Id.* at 843-44.

113. Moynihan, *supra* note 111, at 2; see also LUBAN, *supra* note 109. Professor Damaska succinctly and compellingly outlines the problems of grafting whole cloth the active role of the inquisitorial judge onto our adversarial system. See *supra* note 112, at 841-42. However, her concerns about importing aspects of the inquisitorial judge model presume the continuing dominance of adversarial attorneys. "[N]o matter how momentous this reform appears at first blush, it would fail to put an end to the decisive role partisan counsel play in the tapping of information sources. Without further changes, the reform would only make the examination of evidence less efficient than it is under the present arrangements." *Id.* at 849-50. Whatever the merit of such concerns regarding adversarial trials and hearings involving attorneys, Damaska's concerns are of less moment to the *pro se* litigant who has only the ALJ to assist her in presenting her facts and identifying the legal issues to be determined in order to be assured her due process right to a full and fair hearing.

114. Beardsley, *supra* note 111, at 467, 469-70, 480 (claiming that the French system's almost exclusive reliance on documentary evidence results in "fact avoidance," i.e., the failure of the judge to use the full range of powers and methods available to her to develop the factual record). In fact, an over reliance on documentary evidence might severely prejudice a *pro se* litigant at an administrative hearing. Thus, that aspect of the French system may be not only theoretically, but also practically unsuitable both to the American system in general, but also to the goal of assisting the *pro se* litigant in presenting her narrative evidence at an administrative hearing, unless the ALJ fulfills her duty to develop the record and obtain all necessary documentary evidence on the *pro se*'s behalf.

significant fact development role, particularly during the phase of the trial called the *enquête*,<sup>115</sup> may counter a reflexive rejection of such a judicial role simply because Anglo-American ALJs and advocates have little knowledge of or exposure to systems other than our own adversarial-based one.<sup>116</sup>

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115. *Id.* at 478-79:

In the *enquête* the witness is asked by the magistrate to state *discursively* what he knows about the case. He will be interrupted from time to time by the magistrate either so that specific questions may be put or to enable the magistrate to dictate to his clerk (*greffier*) a summary of what the witness has said. . . . During this exercise the lawyers are seated in the back of the room, out of the line of sight of the witness, and are only asked at the end of the *enquête* if there are other questions which they would like to have the investigating magistrate [not the lawyer] put to the witness. The magistrate may decide not to restate the question; he may simply ask the witness to respond or to clarify his earlier statements. There is, however, none of the psychological pressure associated with cross-examination as practiced in common law procedure. Immediately upon the end of the interrogation, the magistrate's summary is handed to the witness for review and signature. (emphasis added).

See also Ngwasiri, *supra* note 111, at 176-85.

116. Indeed, Professor Luban's rejection of inquisitorial-based reforms is premised primarily on what he calls "a pragmatic argument: if a social institution does a reasonable enough job of its sort that the costs of replacing it outweigh the benefits, and if we need that sort of job done, we should stay with what we have." LUBAN, *supra* note 109, at 92. However, as Professor Luban acknowledges, the system we have "cannot be operated by laypeople." *Id.* at 246. Thus, even on a pragmatic analysis, the present system does not do "a reasonable enough job" for *pro se* litigants and should be changed accordingly. As Professor Strier has noted, "What is prevalent is not necessarily what is functional or fair. We must be chary of a misplaced complacency that our trial procedures are optimal, and therefore inviolable. The adversary system is not sacrosanct. By eschewing labels, we can bring to our table the option to adopt the best features of foreign systems." STRIER, *supra* note 62, at 287. Indeed, one commentator has concluded that "Adversarial ideology has failed. The adversary system is transforming itself into a more inquisitorial, less individualistic methodology even as apologists debate the various justifications for adversarial adjudication. The transformation seems to be bringing about a system that is more effective at fairly complex fact-finding, socially significant rule-making, and behavior-modifying litigation. The less individualistic, more communitarian ethic that is reflected in the transformation should be recognized and encouraged. That recognition may entail abandoning adversarial ideology, but a focus on our goals and values is more helpful in

These preliminary explorations suggest that a more comprehensive investigation of such systems beyond the brief summary provided here may suggest additional means by which the role of the ALJ can be enhanced to meet the challenge of *pro se* litigants in administrative hearings.<sup>117</sup> One should investigate and evaluate the importation of at least some aspects of such a fully developed inquisitorial role for an ALJ.<sup>118</sup> For example, Professor Strier has proposed a “middle ground” approach to expanding the inquisitorial role of judges even during trials involving attorneys in terms familiar to those versed in the adversarial model:

To gain the benefits of independent, judicial questioning during trial, we need not replace purely adversarial evidence gathering with the judge-dominated model of the inquisitorial system. An acceptable middle ground could be the same allocation of interrogating power employed during our

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evaluating and modifying our adjudicatory system than any rigid ideology could be.” Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 355 (1989).

117. “An understanding of the inquisitorial system trial is essential to a broader appreciation of the adversary system. Each system puts the other in context, setting a baseline for comparison and contrast of the representative features.” STRIER, *supra* note 62, at 16.

118. As Strier has explained:

I do not suggest wholesale adoption of the inquisitorial philosophy that a trial is a vehicle for the implementation of state policy. Instead, I prescribe a departure from our self-imposed enslavement to the principle that (except for the relatively rare jury nullification) procedure is all-important in trial and outcome is irrelevant. We will not compromise the integrity of our trial system if we occasionally drop the blindfold of Justice to avert gross inequities. If we do not, if we continue to abide by a blind, quasi-religious faith in adversary procedure, then the means to justice will have swallowed the ends.

*Id.* at 283

Dwyer, *supra* note 101, at (“the [inquisitorial] procedure I adopt must be fair and give both parties natural justice. A course which will allow the [administrative] Tribunal to be better informed as to relevant facts . . . does not conflict with the principles of fairness or natural justice.”). *But see* Damaska, *supra* note 112 (describing the unintended negative consequences that could result from such a piecemeal or pastiche approach).

*voir dire*. . . . [T]he judge might conduct the initial interrogation, after which the attorneys would be free to probe for additional details. But the judge could always ask supplemental questions which an incompetent or marginally competent attorney neglects to pose. The occasional need for this judicial “safety net” protection escapes few who are familiar with adversary system trials.<sup>119</sup>

Adapting this more active role to hearings involving *pro se* litigants could significantly assist the *pro se* litigant in developing the factual record.

In addition to problems in developing the factual record, *pro se* litigants also face a daunting challenge in articulating a legal framework or theory of the case in which the merits of their claim or defense can be evaluated.<sup>120</sup> Thus, it could be productive to adapt the approach in German civil actions in which the “court’s duty to discover the truth is matched by a *cognate responsibility to ascertain and apply the law without prompting from the parties*. In essence, the court seeks to ensure a decision based on the merits of the case.”<sup>121</sup> Although this approach may seem at odds with the judge’s role within the adversary system,<sup>122</sup> it is not unlike the role played by a judge in Small Claims court, who must not only apply substantive law to the facts presented by the *pro se* parties, but must also identify the substantive law to be applied to the facts since a Small Claims judge does not have the benefit of lawyers to brief the law.<sup>123</sup> Similarly, ALJs regularly explain for attorneys and *pro se* litigants

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119. STRIER, *supra* note 62, at 265.

120. *See supra* notes 77, 82, and 85.

121. STRIER, *supra* note 62, at 217 (emphasis added).

122. *Id.* (noting that “A contrary dynamic obtains in the adversary system. The general premise of adversary procedure is that the court has no independent knowledge of the law and must therefore be informed of it by argument.”).

123. *See Lebovits, supra* note 86, at 9 (establishing that small claims judge is required to adhere strictly to the requirements of substantive law and may not merely speculate or compromise under the guise of doing substantial justice).

“what the case is about and the procedures to be followed.”<sup>124</sup> Thus, the reforms proposed here are related in kind to the duty that many ALJs already have to develop the record, especially for *pro se* litigants.

However, given the difficulty that ALJs schooled in the adversary model have in implementing such an active judicial role, I proposed in Part II.B that ALJs take much fuller advantage of the freedom they have from evidentiary rules and from the traditional passive role of a judge in our system, and suggested techniques by which they might actualize those freedoms in assisting *pro se* litigants. What I am proposing in this section is that ALJs who already have a duty to develop the record do so in a more comprehensive and systematic way, adopting and adapting the techniques of an inquisitorial model of adjudication. In order to effectuate this more comprehensive and systematic inquisitorial approach, the active role of the ALJ must be viewed as extending beyond merely asking a few more questions of the *pro se* litigant.<sup>125</sup> Rather, an inquisitorial approach involves a thoroughgoing re-imaging of the role of the ALJ throughout (and, indeed, even before) the hearing as the active seeker of truth and the doer of justice in the matter before her.<sup>126</sup>

In an article in this Journal, Senior Member Dwyer provides both a rationale for using such an inquisitorial model in administrative hearings, particularly where unrepresented litigants are involved, and extrapolates from her own first hand experience how such a role would translate into specific, concrete techniques for ALJs to use both in developing the factual record for *pro se* litigants and in ascertaining and applying the law relevant to the claims raised by those facts.<sup>127</sup> “[W]here . . . a matter proceeds to a hearing . . . the Court or Tribunal should, in order to do justice between the parties, see the ascertainment of truth as its aim in making findings of

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124. *Manual*, *supra* note 8, at 71; Dwyer, *supra* note 101, at 115 (“Both courts and tribunals today recognize their duty to assist unrepresented litigants by explaining to them the issues as to which they will need to call evidence . . .”).

125. *See, e.g.*, Schoenberger, *supra* note 32 (describing an active ALJ as one who asks questions, but emphasizing that questioning must be limited); *see also supra* notes 41, 43 and 46 (same).

126. *See supra* notes 17-19 and accompanying text.

127. Dwyer, *supra* note 101.

contested facts . . . in so far as I suggest the use of inquisitorial procedures I do so because I believe they will assist at the aim of getting at the truth.”<sup>128</sup> To that end, Dwyer describes in detail and with specific reference to cases over which she has presided the following interventions and techniques which, I submit, can be adapted to U.S. administrative hearings: (1) the ALJ should help formulate the legal issues which must or should be resolved, even if the parties fail to raise them or if they stipulate a resolution contrary to controlling law;<sup>129</sup> (2) the ALJ should determine whether (additional) witnesses should be called in order to fully develop the record;<sup>130</sup> (3) the ALJ should identify for the parties what necessary information is lacking in the record and instruct them to obtain such information and assist them in doing so if necessary or, in appropriate cases, obtain the information herself;<sup>131</sup> (4) the ALJ should assist and question unrepresented litigants.<sup>132</sup> Dwyer argues that by using these inquisitorial techniques, the administrative decision maker will have before her all of the information necessary on which to make a fair and just decision, concluding that “Good administration requires no less.”<sup>133</sup> I propose that careful reflection on Senior Member Dwyer’s analysis and examples might be a fruitful place for ALJ’s to begin as they grapple with the inclusion of more inquisitorial methods into their hearing practices in order to assist *pro se* litigants.

Finally, it should be repeated that contrary to the concerns expressed by some commentators, adopting the more active, inquisitorial role for ALJs proposed here need not compromise judicial impartiality and fairness.<sup>134</sup> Judges in inquisitorial systems

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128. *Id.* at 89-90 (citation omitted).

129. *Id.* at 97-102.

130. *Id.* at 103-105.

131. *Id.* at 105-115.

132. *Id.* at 115-20.

133. *Id.* at 137.

134. See Engler, *supra* note 1, at 2023-24 (summarizing concerns about appearance of partiality if a judge assists a *pro se* litigant); see also *Litigant’s Struggle*, *supra* note 6, at 42-44; see also STRIER, *supra* note 62, at 37 (summarizing impartiality concerns arising from a judge’s taking a more active role in fact finding); Wolfe, *supra* note 32, at 301-07 (same regarding Social Security ALJs).

engage in a mandated active role without a loss of impartiality.<sup>135</sup> Social Security ALJs, who also develop the factual record and determine which law is applicable to the cases before them, can do so without any loss of an appearance of fairness.<sup>136</sup> As described above, techniques of questioning and explanation exist by which ALJs can take a more active role in assisting *pro se* litigants without giving rise to concerns about an appearance or, indeed, the reality of partiality.<sup>137</sup>

### III. CONCLUSION

The proposals set forth above challenge our received traditions of judicial passivity and impartiality, narrowly understood. These

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135. STRIER, *supra* note 62, at 83-84, 266-67; *but see* LUBAN, *supra* note 109, at 99 (describing the dominance of prosecutors over the examining magistrate in the pre-trial phase in the French criminal system) (citing Tomlinson, *supra* note 111, at 150-64).

136. Engler, *supra* note 3, at 2018:

The precedents from small claims courts and administrative agencies serve as an important reminder that impartiality does not require judges to be passive. Like other judges, small claims judges must remain impartial. ALJs in Social Security, welfare, and unemployment benefits cases must also remain impartial. Judges may therefore be active in assisting unrepresented litigants without compromising their impartiality. (citations omitted).

STRIER, *supra* note 62, at 84:

Even within the United States, the trial judge's passivity is unique among those serving in formal dispute resolution roles. In administrative hearings . . . arbitrators play an active role without the loss of impartiality. In collective bargaining, federal mediators rescue legions of sessions from stalemate. And at the local and private sector levels, conciliators of all kind successfully function as neutral but active third-party facilitators in quasi-judicial roles. Clearly, impartiality and passivity are not necessarily corollaries.

Dwyer, *supra* note 101, at 97 ("An [inquisitorial] course which will allow the Tribunal to be better informed as to relevant facts, while allowing the parties to cross-examine any additional witnesses or make submissions about additional material does not conflict with the principles of fairness and natural justice.") *But see* Wolfe, *supra* note 32, at 301-07 (arguing that the Social Security ALJ's duty to develop the record undermines impartiality).

137. *See supra* notes 80-91 and accompanying text.



traditions dramatically limit the role played by many ALJs in assuring access to justice for *pro se* litigants, even in settings that are purportedly nonadversarial and not bound the rules of evidence, and even where the ALJ is under a duty to develop the record. The consequences of this circumscription are devastating for a *pro se* litigant. Although the ALJ may try to explain procedures, relax evidentiary rules if they are applicable, or even allow to a limited degree testimony in narrative form, the *pro se* litigant is left to figure out on her own when she has said enough to meet a legal standard regarding which she is largely ignorant.

Accordingly, I have proposed, as have other commentators, a more active, inquisitorial-based role for ALJs. I submit that most of the models of such judicial intervention outlined above can be incorporated to some extent into the present system. However, the constitutional infirmity of the present system, which denies a full and fair hearing and, thus, equal access to justice to many *pro se* litigants, requires that we consider more far-reaching departures from the received construction of judicial role. Thus, I submit that at least three additional reforms, which may require statutory, administrative or ethical reforms, are required: (1) jettisoning, in whole or in part, evidentiary rules in administrative fora where they are currently imposed either by rule or in practice, and (2) placing an affirmative duty on all ALJs to develop the factual record, as is currently the rule in Social Security disability hearings, and to determine and apply relevant substantive law. In addition, I submit that both of those approaches will have little effect unless (3) the ALJ is required to employ at least some of the inquisitorial approaches and techniques for assisting and questioning *pro se* litigants described above in Part II.B and C.

In spite of the efforts of dedicated and well-intentioned ALJs and administrators, the current system can hardly be called a law-based system for *pro se* litigants. The proposals developed in this paper attempt to find interventions by which an ALJ can assist the *pro se* litigant in presenting both the nature of the legal conflict and the facts needed to adjudicate that conflict based on applicable substantive law. In that way, an ALJ can more truly be said to be a person who is presiding over a system ruled by law and not by the accidents of status or legal representation. Thus, the ALJ will have gone a long way in making the administrative adjudicatory system respond to its

fundamental constitutional and judicial task of providing full and fair hearings for *pro se* litigants, thus assuring them equal access to justice.