The Marginal Utility of Consolidated Agency Hearings in Ohio: A Due Process Analysis from an Economic Perspective

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I. INTRODUCTION AND PREMISES: THE ROLE OF AGENCY ADJUDICATION

One of the inescapable realities of modern state government is that from time to time the executive branch will be obliged to take on roles that are judicial in nature. This is not always a welcome role: executive-branch adjudications can be tedious, expensive, and an enormous drain on limited governmental resources. In addition, the role does not always sit well with executive officers and employees who are more used to executing policy—interpreting, implementing, and enforcing legislative mandates—than they are wrestling with the sometime subtle concerns associated with judging competing claims. The judicial branch, more than the executive branch, is inherently and by design more attuned to the role of adjudication because of its studied emphasis on impartiality and independence, its ambition to protect the rights of all parties, and its dogged determination to provide due process to even the most scurrilous among us.

Why, then, do state agencies take on the responsibilities of judging? In short, because doing so is an efficient means of resolving conflicts between the government and the governed. When compared to the use of judicial-branch structures like trial by jury, an agency adjudication is vastly more efficient: it uses less time and fewer governmental resources, it costs the participants much less, and it reaps an enormous benefit from having adjudicators who are specialists in the field and who actually know the policies contained within the controlling statutes and regulations. The agency becomes an adjudicator and steps into the judicial role; doing so has proven to be very effective in helping to make sure that claims involving property and liberty interests, that is, claims that are entitled to due process protection, are resolved with the least burden to all participants, as well as helping it ensure a fair and impartial decision-making process.

The manner in which agencies adjudicate varies widely and in meaningful ways. For example, a hearing to decide whether an uninsured motorist violated a state’s driver responsibility laws and therefore should lose his or her

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driver’s license might take ten minutes to resolve all relevant issues and still afford the driver due process. The legislature can ensure these cases are promptly disposed of in a number of ways, such as by requiring that the hearing be held shortly after the driver requests administrative review, by requiring the adjudicator to rule within days of holding the hearing, by limiting pre-hearing discovery so that the parties have only a limited opportunity to prepare, or by any combination of these and other structural provisions. On the other hand, in instances where the legislature perceives the liberty or property interests to be more substantial than a driver’s license—such as when setting rates for Medicaid reimbursement based on a provider’s capital or operational costs—then the process due to the participants might indeed be greater, and the parties will be entitled to pre-hearing discovery, longer preparation time, and more detailed analyses from the agency adjudicator.

These variables and others associated with executive-branch adjudication play a significant role in the way we deliver services through state government. If efficient and effective in its structure, agency adjudication can relieve the judicial branch of many time-consuming and resource-depleting duties, thus freeing the judicial-branch courts to focus on broader public issues. Done poorly, however, the agency adjudication process can sap economic resources and threaten public confidence in both judicial- and executive-branch operations. In Ohio, and indeed in all states, administrative agencies hear exponentially more cases than are ever presented in the trial courts. Like it or not, agencies are in the business of adjudicating claims against or through the government. The focus of this article, then, is on how executive-branch adjudication can be both efficient and effective. More specifically, the article will consider the comparative utility—the costs and benefits—of competing adjudicative structures that can be used in state agency adjudications.

II. THE ECONOMICS OF AGENCY ADJUDICATION

A. Marginal Theory and the Costs and Benefits of Agency Reorganization under Ohio S.B. 78

In order to make a useful comparison between competing adjudicative structures in state administrative agencies, consider the economic concept of the margin, which in this context is the “difference in costs or benefits between the existing situation and a proposed change.” 1 This article will examine executive-branch adjudications in Ohio as they are today and as they

1. HENRY N. BUTLER, ECONOMIC ANALYSIS FOR LAWYERS 925 (1998).
might be under legislation currently being considered by the Ohio legislature. Although directly affecting only a small number of agencies, S.B. 78, 128th Gen. Assem. Reg. Sess. (Ohio 2005) proposes structural changes to state agencies that would regulate occupational and professional licenses. In this legislation, nineteen cabinet departments will be reorganized into eight departments in a measure designed to make government more efficient. Within these changes, twenty-seven professional regulatory boards will be transformed from autonomous agencies and will thereafter be part of the Departments of Commerce, Health, or Public Safety. The goal of these changes is to “significantly restrain[] agency spending, . . . realize cost savings, improve accountability, and better align activities within [the] agency. . . .” With these changes, the question arises: What is the marginal utility of changes to the structure of agency adjudication? Can these changes make the cost of the next agency hearing lower than it was prior to reorganization? And in the same question, how are costs to be defined—do they include only the fiscal expense associated with adjudication, or should they include marginal social costs—costs to society as a whole, beyond those costs assessed to the agency or other immediate stakeholders?

The value of examining the potential impact of S.B. 78—or more globally the impact of any significant reorganization of executive departments—becomes clear when one considers the role of occupational and professional license boards not only in Ohio but throughout the nation. Common to all such boards is the ability to grant, restrict or deny a license by which the holder makes a living. Not all agency adjudications implicate either a property or liberty interest, i.e., an interest giving rise to due process rights. But once granted, the right or opportunity to make a living through a license issued by an occupational or professional board is almost certainly a protected interest. The process by which an agency takes action with respect to such a license is determined in large measure by a balancing of costs and benefits; hence, when the agency structure changes, the potential for changes to adjudication structures inevitably arises. Can the reorganized entity provide hearings to license holders in a more efficient manner than its predecessor? Are there adjudication structures available that might capture the four stated goals of this proposed reorganization—of restraining agency spending, realizing cost savings, improving agency accountability, and aligning activities

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3. See id.
5. See id.
6. BUTLER, supra note 1, at 926.
within the agency? Should changes in the adjudication system of the constituent agencies be considered part of the reorganization?

B. Balancing Interests under a Due Process Analysis

The reason economic analysis makes sense here is that courts measure the constitutional adequacy of the procedural protections given in executive-branch adjudications (indeed, in all adjudications) by using a cost/benefit analysis. In short, the amount of procedural protections a party is entitled to in executive-branch adjudications is not static; it depends on relative values attributed to an array of procedural protections—that is, it depends on the marginal value of additional process. Not every claimant or respondent is entitled to every possible procedural safeguard. As a result, agencies are entitled and expected to tailor the amount of process afforded to those who use their adjudicative forums. The driver without proof of insurance, for example, likely will see much less process than will the Medicaid-funded nursing home seeking to recapture its construction costs when seeking per diem reimbursements for care provided to its residents. In both cases, an occupational or professional license is on the line, but between the two, the nursing home likely will be afforded substantially more procedural rights in the administrative review.

1. The Significance of Reorganization

If in the process of reorganizing the government the status quo of agency adjudication is likewise reorganized, a due process analysis using economic concepts might help reach the four stated goals of this reorganization, at least with respect to occupational and professional license adjudications. In Ohio, for example, the consolidation of occupational and professional licensing boards envisioned by S.B. 78 could significantly alter the status quo of the procedures used to adjudicate governmental licensing claims. Consolidation could mean that previously autonomous regulatory boards would now use investigative and adjudicative procedures developed by the Departments of Commerce, Health, or Public Safety. Further, hearing examiners conceivably could be appointed not by the regulatory boards but instead by the Departments by using procedural structures designed not by the boards but by the Departments. An economic analysis of these changes addressing the marginal utility of changing certain key structures is therefore in order.

2. Marginal Benefits of Agency Adjudication

The thesis of this article, then, is that reorganization of executive-branch agencies carries with it the potential for improving both the effectiveness and efficiency of agency adjudication. Access to a fair hearing, one that both
appears to be fair and structurally is fair, is (or at least should be) a preeminent goal of agency adjudicators. Agencies have a vested interest in protecting the public against license-holders whose activities fall below professional standards, just as they have an interest in fostering public trust and confidence in their own decision-making. While such a consolidation might well be regarded with caution or mistrust by the subordinated boards and commissions, a reorganization of agencies holds the potential for benefiting both the agency and the umbrella department. Efficiently established departmental structures can, if created with care, improve public trust and confidence in agency adjudications and at the same time bring about the economic benefits that drive legislative efforts like S.B. 78.


In order to better understand why an economic analysis of adjudication variables makes sense in executive-branch hearings, consider the case of drivers in the city of Chicago circa 1990. That was the year Chicago decriminalized parking violations, turning what had been a criminal offense into a civil one and creating an administrative forum for drivers seeking to contest parking tickets. This change, from criminal to civil, limited the risk drivers took when they parked illegally in such a way that there was no longer the threat of jail and the maximum fine was reduced from $200 to $100 per offense. Ada Van Harken was one such driver, and he, along with a class of plaintiffs, challenged the change in part because they claimed the process created for adjudicating appeals violated due process rights under the Illinois and federal constitutions. The challenge, and the court’s response to the challenge, illustrates the role of cost-benefit analysis in resolving federal due process claims in agency adjudications.

When Mr. Van Harken received his ticket, the citation itself was prima facie evidence of a parking violation. He could choose to pay it or challenge it, and if he challenged it the challenge would be considered not by a judicial-branch judge but instead by a private lawyer hired by the City as a part-time administrative hearing officer. Under the new system, unless specifically subpoenaed for the hearing, the officer who wrote the ticket would not appear

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7. See Van Harken v. City of Chicago, 103 F.3d 1346 (7th Cir. 1997).
8. Id. at 1350.
9. Id.
10. Id. at 1351.
11. See id. at 1351.
12. Van Harken, 103 F.3d at 1350.
13. Id.
at the hearing, and the citation would serve as an affidavit in support of the charge.\textsuperscript{14} Typically, the driver would be the only person appearing at the hearing. The hearing officers had written instructions to “conduct a searching cross-examination” of any driver who challenged the officer’s affidavit.\textsuperscript{15} The hearing was tape-recorded, and in those cases where the hearing officer found a violation, the driver could appeal to the Circuit Court of Cook County.\textsuperscript{16}

In their challenge to the constitutionality of this process, Mr. Van Harken and the other drivers focused on key components of the process: the absence of the officer which deprived the driver of the opportunity for cross-examination, the City’s direction requiring the hearing officer to conduct a “searching cross-examination” of the driver, and the use of a hearing officer who is hired on a part-time contract basis who can be fired at will by the City’s Director of Revenue.\textsuperscript{17} These concerns should come as no surprise: here Mr. Van Harken no doubt would have cause to be skeptical about such a process, because he would have no ability to confront his accuser and he would be subject to possible hostile questioning by the person who was sitting in judgment of his case and who conceivably would risk the loss of his or her contract with the City if he or she ruled in favor of the drivers in too many cases.\textsuperscript{18}

4. Applying a Due Process Standard—\textit{Mathews v. Eldrige}

The court nevertheless upheld these procedures, at least with respect to due process protections afforded under the federal constitution.\textsuperscript{19} To reach this conclusion, Judge Posner, writing for the Seventh Circuit Court of Appeals, applied what has become the standard test for determining whether process afforded in a governmental adjudication comports with Fifth and Fourteenth Amendment due process protections which was originally articulated by the United States Supreme Court in the case of \textit{Mathews v. Eldrige}.\textsuperscript{20} \textit{Mathews} held that procedural safeguards are to be evaluated using

\begin{itemize}
\item \textsuperscript{14} \textit{Id.}
\item \textsuperscript{15} \textit{Id.}
\item \textsuperscript{16} \textit{Id.}
\item \textsuperscript{17} Van Harken, 103 F.3d at 1352.
\item \textsuperscript{18} See id.
\item \textsuperscript{19} \textit{Id.} at 1353-54. The Cook County Court of Appeals likewise found these procedures comported with state due process protections, although that court did so after distancing itself from Judge Posner’s cost-benefit analysis: “in contrast to the reasoning set forth in \textit{Van Harken}, 103 F.3d at 1351-52, we do not believe that due process is totally a matter of economic efficiency. Rather, the essence of due process is based on the concept of fundamental fairness. Illinois courts have consistently held that, under due process of law, a person is entitled to receive a fair hearing before a fair tribunal.” Van Harken v. City of Chicago, 713 N.E.2d 754, 762 (Ill. App. Ct. 1999).
\item \textsuperscript{20} Mathews v. Eldrige, 424 U.S. 319, 335 (1976), \textit{cited in Van Harken}, 103 F.3d at 1351.
\end{itemize}
a three-part test: (1) the nature of the private interest to be affected by the
government action; (2) the risk of erroneous deprivation and the effect of
additional safeguards; and (3) the governmental interests involved, including
the fiscal and administrative burdens of additional process.  

The "nature of the private interests" affected by the City is pretty
straightforward: drivers who parked illegally were fined a maximum of
$100.00.  Consider then the second of these tests: upon a claim that due
process was denied in a given administrative hearing, the reviewing court is
to note the risk of erroneous deprivation—here a parking ticket issued to the
wrong person or for no good reason—and the potential effect of sought-after
additional safeguards. Additional safeguards suggests a change from the
procedural status quo to something else, presumably something affording
greater procedural protection to the responding party.

Here the drivers wanted a hearing in which the citing officer appeared in
person. This would simultaneously allow for cross-examination by the
drivers and would likely reduce the need for the hearing officer to step into the
more adversarial role called for by the City's requirement that the hearing
officer cross-examine the drivers. The drivers also challenged the use of
hearing officers who are paid on a contract, per-hour basis and who can be
fired by the Revenue Director. It is unstated in the court's opinion, but
presumably the drivers sought to return to the prior process, where judges of
the municipal court heard these cases.

5. Marginal Benefits and Costs—A Due Process Inquiry

Judge Posner recognized the need to address the marginal utility of this
next level of protection: how would greater protections—the ability to cross-
examine the citing officer and the use of a more independent adjudicator—
increase the potential to obtain the sought-after benefits, and at what cost? The
court's task, as Judge Posner explained in terms an economist would
appreciate, is to examine both the predictable costs and the putative benefits
of changing the process:

The costs of procedural safeguards are fairly straightforward, which
is not to say easy to quantify. For example, the cost of requiring the
police officer who writes the ticket to appear in person at every

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   (Jones, J., concurring).
22. Van Harken, 103 F.3d at 1351.
23. See id.
24. See id.
25. See id. at 1352.
26. Id.
hearing at which the ticket is challenged—one of the procedural safeguards that the plaintiffs in this case claim is required by the due process clause—depends on the number and length of hearings, the average time the police officer requires to get to and from the hearing, the reduction in his productivity from the interruption of his normal workday that attendance at such hearings requires, and the expense to the City of hiring additional policemen. We were told at argument without contradiction that the City issues 4 million parking tickets a year, of which 5 percent are challenged (200,000), a third of those in person rather than by mail and thus requiring an oral hearing (67,000). If the ticketing officer were required to attend, the number of hearings requested would undoubtedly be higher, because respondents would think it likely that the officer wouldn’t show up—a frequent occurrence at hearings on moving violations. Suppose the number of hearings would be double what it is under the challenged procedures (that is, would be 134,000), but the police would show up at only half, putting us back to 67,000; and suppose that a hearing at which a police officer showed up cost him on average 2 hours away from his other work. Then this procedural safeguard for which the plaintiffs are contending would cost the City 134,000 police hours a year, the equivalent of 67 full-time police officers at 2,000 hours a year per officer. In addition, more hearing officers would be required, at some additional cost to the City, because each hearing would be longer as a result of the presence of another live witness. And all these are simply the monetary costs. Acquittals of violators due solely to the ticketing officer’s failure to appear would undermine the deterrent efficacy of the parking laws and deprive the City of revenues to which it was entitled as a matter of substantive justice.27

Thus, the court is deeply engaged in examining likely dollars-and-cents charges that would arise if Van Harken and the other drivers got their way.28 It did so apparently drawing data not from the evidentiary record but instead from responses given by the lawyers to the court’s questions during oral argument on appeal.29 The court not only considered salary and resource allocation costs, but it also noted a social cost: if there were more acquittals due to the citing officers’ failure to appear, the City would get less money, money which Judge Posner found it was entitled to “as a matter of substantive justice.”30

27.  *Van Harken*, 103 F.3d at 1351.
28.  *See id.*
29.  *See id.*
30.  *Id.*
The court continued its economic analysis as it examined the likely benefits of adopting Van Harken's request:

The benefits of a procedural safeguard are even trickier to estimate than the costs. The benefits depend on the harm that the safeguard will avert in cases in which it prevents an erroneous result and the likelihood that it will prevent an erroneous result. We know the harm here to the innocent car owner found "guilty" and forced to pay a fine: it is the fine, and it can be anywhere from $10 to $100, for an average of $55. We must ask how likely it is that error would be averted if the ticketing officer were present at the hearing and therefore subject to cross-examination. Suppose that in his absence the probability of an erroneous determination that the respondent really did commit a parking violation is 5 percent, and the officer's presence would cut that probability in half, to 2.5 percent. Then the average saving to the innocent respondent from this additional procedural safeguard would be only $1.38 ($55 x .025)—a trivial amount.  

While the court acknowledged that these calculations "[were] inexact, to say the least," the use of this approach to due process analysis is worth noting. Under Mathews, courts are required to engage in this kind of analysis in order to identify "the risk of an erroneous deprivation . . . and the [effect] . . . of additional or substitute procedural safeguards. . . ."  

Also significant is the final test set forth in Mathews, which requires that the court consider the governmental interests involved, including the fiscal and administrative burdens of additional process. Well-prepared agencies need little reminding of the need to evaluate the costs associated with additional procedural protection. The first thing that comes to a department head or board officer is likely to be: "just think of how much these procedures cost already, and how much more they will cost if we give additional protection to the respondent licensees!" How much would it cost to send agency charging notices by certified mail instead of first class mail? How much would it cost to have all of the agency adjudicators be licensed to practice law (see, for example, the non-lawyer examiners used by the Ohio Department of Job and Family Services in resolving denial of welfare benefits claims)? Apart from the fiscal burden, agencies should also be prepared to identify administrative burdens associated with the next-level procedural

31. Id. at 1351-52.
32. Van Harken, 103 F.3d at 1352.
33. Mathews, 424 U.S. at 335.
34. Id.
protections sought by respondents: is it reasonable, for example, to allow for pretrial discovery if doing so delays by years the time it takes to present an agency matter for an evidentiary hearing? And as Judge Posner notes, there is a social cost—the dismissal of cases predicated upon the agency's failure to anticipate the need for these additional procedural protections.\textsuperscript{15}

6. Practical Due Process Applications in Agency Proceedings

The point here is that courts are being remarkably practical in this approach. Resolving due process issues using a cost-benefit analysis makes it possible to vary the level of process depending on the nature of the stakes at issue. As Judge Posner put it, "[t]he due process clause is not a straitjacket, preventing state governments from experimenting with more efficient methods of delivering governmental services . . . ."\textsuperscript{36} Instead, legislators and executives should be aware of the economic impact of procedural structures, both those that exist at the present and those that might be under consideration for future use. "The use of cost-benefit analysis to determine due process is not to every constitutional scholar's or judge's taste, but it is the analysis prescribed by the Supreme Court and followed by the lower courts including our own."\textsuperscript{37}

III. APPLYING ECONOMIC THEORY TO THE PROCESS DUE IN AGENCY ADJUDICATIONS

If agencies can vary the process afforded to responding parties, what factors should be taken into account while anticipating the cost-benefit analysis required under Mathews? Here it may be useful to think in terms of marginal levels of risk: in this context, the risk to be avoided is the erroneous deprivation of a protected liberty or property interest. Stated in a concrete context, the question is, for example: as a society, how tolerant are we that a driver might erroneously be required to pay a parking fine, given the adjudication process as it is, and how might that level of risk change by either adding to or taking away procedural protections?

\textit{A. Marginal Risks in Agency Hearings—Applying the Hand Formula}

Evaluating marginal levels of risk in executive-branch adjudications appears to be a new concept—at least no such association surfaced in a recent search of the literature. Economists concerned with judicial systems have, however, long been guided by what appears to be a useful paradigm, one that examines risk not in the context of agency adjudications, but instead in the

\textsuperscript{15} See Van Harken, 103 F.3d at 1351.
\textsuperscript{36} Id. at 1351.
\textsuperscript{37} Id.
context of tort law. Judge Learned Hand’s “Formula of Liability for Negligence” expresses in economic terms an “efficient level of precaution” that a putative tortfeasor should take in order to avoid liability for injuries caused to an injured party.\(^{38}\) The value of the Hand formula is not in doubt: first articulated by Judge Hand in *United States v. Carroll Towing Co.*,\(^{39}\) the formula has been widely cited and applied and is the basis for the entry of the Restatement (Second) of Torts § 291 which states that “[w]here an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.”\(^{40}\) What would happen if this doctrine were applied as an aid to governmental agencies seeking to comply with due process protections in executive-branch adjudications? The result, it seems, would be a tool designed to maximize efficient use of agency resources while providing litigants with an appropriate amount of procedural protection.

It is beyond the scope of this article (and indeed beyond the author’s fledgling competence in economics) to fully articulate the theory behind the Hand formula.\(^{41}\) For the purposes intended here, however, the formula is useful in a fairly straightforward way. The goal of tort liability theory is analogous to the due process analysis articulated in *Mathews* in that both are concerned about measuring the risk of harm and steps that can be taken to avoid that harm.\(^{42}\) In the tort context, harm takes the form of personal injuries, damage to property, and the like. In due process analysis for agency adjudication, harm occurs when the government erroneously and adversely affects a liberty or property interest in the course of administrative action.\(^{43}\) The agency’s goal, therefore, is to provide a meaningful opportunity for the respondent to be heard before the government’s action is final and to do so in as efficient and effective manner as possible.

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41. For discussions on the theory behind the Hand formula, see COOTER & ULEN, supra note 38, at 333-36; BUTLER, supra note 1, at 608-16; RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 167-72 (6th ed. 2003).
42. See Mathews, 424 U.S. at 334.
43. “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” Id. at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).
B. The Utility of the Hand Formula in Evaluating the Sufficiency of Agency Process

The Hand formula can be useful in a due process analysis because it offers a way to study marginal costs and benefits. It offers a template for courts to use when deciding whether an administrative agency’s process adequately guards against the respondent’s loss of a liberty or property interest by specifically examining the benefits of sought-after enhancements to the existing process and the costs associated with those benefits, and by contrasting the costs and benefits of existing process with the costs and benefits of more comprehensive procedural protections. The agency’s existing process violates the Due Process Clause if a predictable risk of harm to a respondent—e.g., being ordered to pay a parking ticket that had been issued in error—is the kind of risk that is “of such a magnitude as to outweigh what the law regards as the utility of the act . . .” in our example the expedited review of challenges to the parking ticket under the decriminalized administrative process, “or of the particular manner in which it is done”—the use of affidavits, for example, instead of live testimony by the citing officer, and the use of executive branch adjudicators who are paid by the hour and who can be fired by the Director of Revenue.

Consider this explanation of the Hand formula: “our basic decision rule for individuals, firms, or government regulators is that it is optimal to engage in an activity up to the point where the marginal benefit equals the marginal cost.” The formula seeks to describe “an efficient standard of care,” i.e., that point where “[a]ny additional investments in care mean that the marginal cost is greater than the marginal benefit. Fewer investments in care indicate that the reduced marginal benefit from reducing care is greater than the marginal costs that are saved from reducing the care.” Invest in safeguards below this point and the injurer is held liable as being negligent; otherwise there is no liability. Applied to the agency, a similar rule applies: provide sufficient procedural protections to afford each respondent an opportunity to be heard at a meaningful time and in a meaningful manner and nothing more is required; fall short of this, and the judicial branch will invalidate the agency action as violative of the respondent’s due process rights.

44. See Van Harken, 103 F.3d at 1351-52.
45. RESTATEMENT (SECOND) OF TORTS § 291.
46. Id.
47. BUTLER, supra note 1, at 612.
48. Id.
49. Id.
C. Calculating the Need for Procedural Safeguards

It is this threshold—where investment in care is said to be sufficient to meet the standards required by society—that Hand sought to and Judge Posner actually succeeded in putting into economic terms.50 A similar calculus can be applied to the amount of care—i.e., procedural safeguard—that an administrative adjudication scheme provides to respondents challenging the proposed agency action. Should the agency fall below the minimum based on an economic assessment of marginal (i.e., anticipated) costs and benefits of additional procedural protection, then its structure falls short, the agency action will be voided, and additional protections will be ordered by the court. If, upon examination of the costs and benefits of the additional procedural protection, the “efficient standard of care” is exceeded, then the additional procedural protections will not be warranted, and the court will find no violation of due process rights.

1. The Hand Formula—Tort Application

Hand’s formula—the tort model—is expressed in this manner (shown below in Figure 1):

The horizontal axis indicates units of care in terms of risk avoidance activity. The B [curve] starts low at low units of care and rises rapidly taking on an upward sloping shape because it is assumed that costs of reducing accidents or reducing the damages associated with accidents goes up as the likelihood of accidents or the cost of accidents is reduced—that is, on the margin, the costs of further reductions in risk increase as the units of care increase. The PL curve is downward sloping based on the notion that as more units of care are incurred, either P will be reducing because of a lower probability of accidents or L will be reducing in the sense that the damage that will be caused when more units of care are invested is likely to be less. B can be thought of as a marginal cost curve which increases with the number of units of care. The PL curve is a marginal benefit curve which suggests that the marginal benefit of additional units of care declines as more and more units of care are used. The marginal benefit and marginal cost of investing in care are equal at C* units of care. That is the efficient standard of care. Any additional investments in care mean that the marginal cost is greater than the marginal benefit. Fewer investments in care indicate that the reduced marginal benefit from reducing care is greater than the marginal costs that are saved.

50. See Mathews, 424 U.S. at 334-45; POSNER, supra note 41, at 167-68.
from reducing the care. Under this marginal formulation of the Hand formula, an individual should be held negligent if they failed to invest C* units of care. That is, to the left of C*, B<PL and they should be held liable under the Hand negligence standard. Firms or individuals who invest more than C* are operating in the range where B>PL, and they should not be held liable under this negligence standard. Thus, the negligence standard is expected to induce the efficient amount of accident avoidance expenditures.51

**Figure IX-6**

**The Hand Formula**

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**Figure 1 - Source: Economic Analysis for Lawyers 613**

2. The Hand Formula—Agency Application

This same model, one demonstrating the marginal value of additional procedural safeguards and using the same diagram, could be explained this way:

The horizontal axis indicates units of protection against erroneous deprivation of property or liberty rights stated in terms of agency procedural devices such as reliance on rules of evidence, use or

51. BUTLER, supra note 1, at 612-13.
exclusion of certain forms of hearsay, the opportunity to confront witnesses, and the like. The vertical axis represents costs to the agency (and, by extension, to society). The B curve is the "cost of precaution,"\textsuperscript{52} and it starts low—protections at the driver's license level, for example, are minimal—and rises rapidly taking on the same kind of upward sloping shape as in the tort model because it is (and should be) assumed that cost of avoiding an erroneous deprivation of protected interests goes up as the likelihood of such an erroneous deprivation is reduced. Judge Posner's inventory of the costs associated with additional procedural safeguards in \textit{Van Harken} demonstrates this point nicely.\textsuperscript{53} As is the case with interests protected by tort law, on the margin, the costs of further reductions in risk increase as the units of care increase. It costs more to provide a police officer in person during an evidentiary hearing than it does to permit the officer to file an affidavit in lieu of appearance.

The PL (probability and loss) curve represents the probability and the magnitude of the loss—in the tort context the loss refers to injury or damage,\textsuperscript{54} and in agency proceedings it is the loss attendant to an erroneous deprivation by the government of a protected liberty or property interest. The PL curve slopes downward: in the tort context, this reflects "the notion that as more units of care are incurred, either \( P \) will be reducing because of a lower probability of accidents or \( L \) will be reducing in the sense that the damage that will be caused when more units of care are invested is likely to be less."\textsuperscript{55} In the agency setting, the likelihood and degree of erroneous deprivation is reduced as the agency increases access to traditional tools of forensic examination, thereby improving the quality of the adjudicative process and reducing the risk of erroneous outcomes.

\( B \) is the "marginal cost curve which increases with the number of units of care."\textsuperscript{56} In the tort context, "\( B \) [is the] cost of the precaution . . . [and] a potential injurer is negligent if but only if \( B < PL \ldots \)."\textsuperscript{57} Applied to the administrative process, the agency (as the potential injurer) fails to provide due process only if the costs of providing the desired process are less than the costs attributed to the erroneous deprivation of a liberty or property right. As Judge Posner put it, if the benefit of the additional procedural safeguards sought by \textit{Van Harken} and the other drivers was "trivial" when compared to

\textsuperscript{52} \textit{Posner}, supra note 41, at 168.

\textsuperscript{53} \textit{Van Harken}, 103 F.3d at 1351.

\textsuperscript{54} \textit{Posner}, supra note 41, at 167.

\textsuperscript{55} \textit{Butler}, supra note 1, at 612.

\textsuperscript{56} Id.

\textsuperscript{57} \textit{Posner}, supra note 41, at 168.
the costs of manpower and loss of revenues, there is no due process violation. 58

D. The Benefits of Agency Application of the Hand Formula

As is the case in the tort application, the agency should look to matching the costs and the benefits of procedural protections; beyond that, the agency affords more process than is due, losing its efficiency. As Prof. Butler explains, the "PL curve is a marginal benefit curve which suggests that the marginal benefit of additional units of care declines as more and more units of care are used. The marginal benefit and marginal cost of investing in care are equal at C* units of care." 59 In the tort model, investing in measures of protection falling to the left of C* exposes the injurer to liability, because the injurer fails to take precautions sufficient to meet the predictable harm. In the administrative model, the agency that fails to afford respondents with sufficient measures designed to guard against an erroneous deprivation of a property or liberty interest will have its process invalidated by the courts, and held for naught. The overarching goal of the agency should be to implement procedures aimed at "the efficient standard of care," designated as point C*. 60

It should be hastily added that the Hand model, even when applied wholly in the tort context, is not regarded as flawless. One factor not included in the model is the notion of risk aversion attributed to the injurer. 61 The Hand model both in the tort application and as suggested herein "assumes risk neutrality:" that the potential injurer is neutral about risk levels. 62 We know, however, that people have different levels of risk aversion, which is certainly true of governmental administrators. As proxy to the chief executive officer, the agency head has a political and an economic agenda. The agenda, however, can weigh on either side of the C* line: in tight budgetary times, the agency might need to accept a level of risk that its process might erroneously deprive some participants of protected liberty or property interests, whereas when an election draws near, there might be a conscious effort to ensure that citizen's rights are not erroneously threatened.

Another more broadly stated objection to the model is that its focus is too narrow and that it overlooks broader benefits associated with avoiding the injury. As one reference notes, "[i]n applying the Hand rule, the court must balance the injurer's burden against the full benefit of precaution. The full

58. See Van Harken, 103 F.3d at 1351-52.
59. BUTLER, supra note 1, at 612.
60. Id.
61. POSNER, supra note 41, at 168-69.
62. Id. at 168.
benefit includes the reduction in risk to plaintiff (‘risk to others’) and reduction in risk to injurer (‘risk to self’).”63 The point is made thus:

To illustrate, assume the bank robber injures a bank’s customer during the robbery of an unguarded bank. The customer sues the bank alleging that the bank should have had a guard at the bank to deter robberies. If the court applies the Hand rule to determine whether the bank was negligent, the court must compare the cost of hiring a guard with the expected reduction in harm. The expected reduction in harm includes protecting customers from getting hurt (‘risk to others’) and protecting the bank from getting robbed (‘risk to self’). The court will leave out more than half of the benefit of having a guard if it fails to consider the reduction in the bank’s risk.64

So too with the agency: maintaining some procedural devices, even those not warranted by a cost-benefit analysis, avoids some of the “risk to self” that occurs when an agency embarks upon a course of action against a regulated entity. Agencies all have a statutory agenda: they exist to protect the environment, provide safe streets, guard against unprofessional conduct, and the list goes on. While truncating an evidentiary proceeding might achieve the efficiencies represented by C*, there might be very important “risks to self” that the agency can avoid by implementing procedural schemes that exceed constitutional minimums represented by C*.

IV. COST-BENEFIT ANALYSIS OF AGENCY ADJUDICATIONS UNDER S.B. 78

If one were to propose an application of the Hand formula in the context of agency adjudication, the ideal circumstance might be one where existing agency adjudicative systems are in transition. For example, if an agency was about to take on new adjudicative responsibilities (e.g., monitoring the use of fraudulent identification cards in driver license application cases because of post 9/11 homeland security-type legislation), then lawmakers would have the opportunity to decide what kind of adjudication is required and how much procedural protection is warranted. Another excellent opportunity to use the formula exists when multiple agencies are merged into a few umbrella departments, making it likely that competing procedural structures will be amended; that is the potential created by S.B. 78, Ohio’s legislation to consolidate its occupational and professional licensing boards and place the

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63. COOTER & ULEN, supra note 38, at 335.
64. Id.
regulatory functions into the existing departments of Commerce, Health, and Public Safety.\textsuperscript{65}

Consider the four goals of this legislation: significantly restrain agency spending, realize cost savings, improve accountability, and better align activities within the agency.\textsuperscript{66} Approaching this proposed reorganization from a cost-benefit perspective could open a number of alternatives to the \textit{status quo} in agency adjudication in regards to more than just occupational and professional licensing boards. Under the umbrella of a department head, each of these professional and occupational licensing boards would still be required to investigate and prosecute alleged professional and occupational license violations. The question then becomes, how will the new administrative process work? Would the adjudicator be familiar with the policies of the former regulatory board? Would the adjudicator even be an attorney, or would he or she instead be a non-lawyer policy expert chosen not based on legal credentials but instead on familiarity with the policies of the umbrella department? Would the adjudicator report to the department or, as currently is the case, would he or she be chosen by the occupational or professional licensing board? Would the procedures used in the hearings change by allowing or denying discovery, for example? Would the decision rendered by the administrative adjudicator be a final decision or, as is the case now in most agency adjudications, would it be merely a recommendation? If so, would the final decision-maker be the head of the department, or, as is the case now, would the decision maker be the members of the occupational or professional board?

Existing state law, typically expressed in the state’s Administrative Procedure Act, might provide answers to questions like these, but in states like Ohio where the APA has remained largely unchanged since the early 1980s (when the last model APA was introduced), there are no state-wide standards addressing these points. As a result, the procedural structures that have evolved among the many state agencies vary widely in the nature and degree of procedural protections extended to parties in an administrative adjudication. Part of the benefit of consolidation like that envisioned by S.B. 78, then, would be the potential to reduce inter-agency conflicts in procedures and gain the benefit of more uniform procedural safeguards.

\textit{A. Significant Variables in Agency Adjudication}

Variations in the way agencies approach adjudication are substantial: there is a wide array of agency adjudicative structures, many of which might


\textsuperscript{66} Id.
be useful to consider in the event that there is a consolidation of the agencies as proposed by S.B. 78. If a combination of these structures can be developed to achieve the goals of greater cost control, increased accountability, and better alignment of activities with agencies, and if those structures comport with due process, then now might be an ideal time to examine those structures both in terms of economics and due process.

B. The Central Panel Model

The most widely-implemented and most thoroughly-examined innovation in agency adjudication in the last quarter century is the central panel of agency adjudicators—the office of administrative hearings. Through a central panel, the governor appoints a chief administrative law judge who is invested with the authority to direct a cadre of administrative hearing examiners or administrative law judges. The Chief ALJ is responsible for supplying state agencies with adjudicators on a case-by-case basis and is expected to ensure the adjudicator is familiar with both the agency’s policies and the state’s due process doctrine. When contrasted with a decentralized system (like the one presently in place in Ohio) where each board, commission, agency, and department creates its own set of procedures and uses its own staff (or hires outside attorneys to serve as ad hoc adjudicators), the differences can be substantial.

Consider the impact of such a change viewed from the perspective of the main stakeholders in agency adjudication: i.e., the governor, the agency, the responding parties, and the public. From the governor’s perspective, there is the benefit that comes with the appointment of any statewide department head: the governor can turn to one appointee rather than dozens, possibly hundreds of board and committee members when it becomes necessary to examine costs and benefits associated with executive adjudication. The governor’s ability to appoint this Chief ALJ (typically with the advice of one or both houses of


68. See, e.g., Tomlinson, supra note 67, at 211-12 (describing the role of the Chief ALJ in contested cases in Maryland).

the state legislature) advances one of the four stated goals of the reorganization in S.B. 78: that of increasing agency accountability. There are disadvantages as well: while serving a term of years (typically six years), the Chief ALJ may be removed only for cause. This is a limited disadvantage, however, offset perhaps by the increased public trust and confidence in a system where the adjudicator is no longer directly hired or appointed by the agency whose case is being adjudicated.

Indeed this separation of adjudicator from the agency is perhaps the most significant facet of central panel systems. Under most decentralized schemes, the agency determines who will preside over the evidence-gathering part of the administrative process. Under a central panel approach, the agency notifies the Chief ALJ of the need for an adjudicator and steps back from that point forward, relegating to the office of administrative hearings the bureaucratic and procedural responsibilities for each new adjudication.70 In exchange for this loss of autonomy, the agency is entitled to expect professional, well-organized adjudication procedures, well-written and competently reasoned reports, adjudicators who are highly trained not only in agency policy but also in the law of evidence and due process, and an adjudicative product that will withstand appellate review.

From the perspective of the participants, changing from a decentralized administrative process to one using a central panel can be either a blessing or a significant step backward, depending on how comfortable the participant is in the status quo. A novice entering the arena for the first time will generally appreciate the fact that there is less of a home-town advantage to the state’s attorney than is the case where the state’s attorney helped the agency select the adjudicator. The participants who know the adjudicators—particularly the state’s attorneys who might have helped hire the adjudicators and institutional lawyers representing a large group of litigants (unions, for example, in worker compensation cases)—might prefer the status quo rather than to take a chance with a revolving pool of potential hearing examiners or ALJs.

The public, too, has a stake in how agency adjudications take place. Perhaps the public’s concern was expressed by the Ohio Budget Director when he pointed to the need for significantly restraining agency spending, looking for cost savings, improving agency accountability, and aligning activities within agencies. When the opportunity to change a decentralized and possibly inefficient administrative adjudication system arises along with

70. See John Hardwicke & Thomas E. Ewing, The Central Panel: A Response to Critics, 241 NAT'L ASS'N ADMIN. L. JUDGES 231, 231 (2004) (“No central panel is created without a champion - it may be the governor or other elected official, legislature, private bar, or citizen organizations. But there is also resistance, often white-hot. The objections are the same: cost, loss of agency expertise, judicialization of administrative hearings, and creation of yet another state bureaucracy.”).
the chance to create a centralized or semi-centralized system to take its place, there is at least a real potential for achieving these goals.

It is beyond the scope of this article to advance too far into the realm of possible schemes for achieving the potential economies of time, human resources, and money in creating a new executive adjudication scheme. Instead, the thesis of this article has been to bring forward some of the more well-hidden attributes of executive branch adjudication. The overarching concern—for agencies, governors, responding parties, and the public—is and should be that when an agency adjudicates in a way that might adversely affect protected liberty or property rights, it must do so in a manner that is both effective and efficient. An effective system will leave the participants confident that their interests have been fairly heard so as to allow for a just result. An efficient system will get as close to Judge Hand’s "efficient standard of care" for agency adjudication as conditions permit. The application of Judge Hand's model is at best imperfect, but it allows for an important evolution in agency adjudication. If lawmakers are poised to bring about changes in the way agencies operate, then the opportunity might exist to bring agency adjudications closer to C*, to everyone's benefit.