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Note – Preserving Dignity in Due Process

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Notes

Preserving Dignity in Due Process

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Procedural due process is a guarantee of fairness. Fundamentally, this guarantee requires notice and an opportunity to be heard. Procedural protections from arbitrary state action vary according to the context of each case, and protections in administrative actions are distinct from those provided in formal judicial proceedings. The administrative state developed to address a pressing need: how to govern and regulate when the three branches of government lack the capacity to efficiently and effectively administer an ever-evolving society. But as society has developed and expanded, individuals have more frequently interacted with the administrative state, in turn necessitating the expansion of procedural due process into an area of law that prioritizes efficiency over individual rights.

Both the United States Supreme Court and the California Supreme Court have addressed this tension, but with different emphases. Where the U.S. Supreme Court applies a narrow constitutional threshold for rights implicating procedural protections, the California Supreme Court applies a more expansive threshold, with a particular focus on the dignity of the individual confronted with an adverse state action. Where the U.S. Supreme Court uses a three-factor balancing test for procedural adequacy, the California Supreme Court has articulated a four-factor balancing test that recognizes a person's dignitary interest in procedural protections against the state.

However, California's due process analysis has been applied haphazardly, at best, leading to confusion amongst appellate courts. This Note argues that uneven application of the doctrine stems from unclear guidance from the California Supreme Court in the first instance and, ultimately, demeans the dignitary interest. After outlining the federal and state frameworks and explaining the misapplication of the California due process tests by the state's courts, this Note urges a clearer definition of the due process trigger and more vigorous consideration of the dignitary interest in order to achieve a truer appreciation for and greater protection of an individual's position before a state actor.

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"From its founding, the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."[1]

Introduction

Justice Frankfurter once wrote, "The requirement of 'due process' is not a fair-weather or timid assurance."[2] Due process is one of the most august concepts in American law, enshrined in both the Constitution and the Bill of Rights, and protective of both substantive and procedural rights.[3] It is "compounded of history, reason, the past course of decisions, and stout confidence in the strength of [our] democratic faith . . . ."[4] At

1. Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970).

2. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring).

3. *Id.* at 174 ("Due process is perhaps the most majestic concept in our whole constitutional system.").

4. *Id.* at 162–63.

its core, due process concerns procedural fairness, which serves as a buffer between the people and government action and is "our main assurance that there will be equal justice under law."[5] Due process affirms a person's identity and recognizes her inherent dignity when confronted by the state; it does so by mandating some form of notice and opportunity to be heard prior to being harmed by a state actor.[6] Procedural due process is particularly vital for guarding the individual from arbitrary deprivations by administrative agencies, as these are the sites of most encounters between individuals and the state—and, arguably, where the state actor is least accountable to the individual.

The United States Supreme Court has highlighted the importance of recognizing and protecting an individual's rights and interests in the face of adverse state action by administrative agencies in *Goldberg v. Kelly*,[7] *Board of Regents of State Colleges v. Roth*[8] and *Mathews v. Eldridge*.[9] The California Supreme Court followed suit in the development of its own procedural due process doctrine. The seminal California case, *People v. Ramirez*, focuses on a person's dignitary interest as a central component of the state's procedural due process doctrine.[10] However, the subsequent application of *Ramirez* has become confused and unpredictable, requiring a reexamination of the state's procedural due process tests to ensure that it fulfills the promise of due process protections.

This Note describes ongoing inconsistencies in California procedural due process doctrine and argues that the California due process tests ought to be as vigorous and expansive as the California Supreme Court in *Ramirez* intended them to be. Part I briefly outlines the underlying principles and history of both procedural due process and the administrative state. Part I further sets forth the respective federal and California due process frameworks and highlights the differences between them, concentrating on *Ramirez*'s emphasis on protecting an individual's dignity. Part II examines appellate courts' application of the California frameworks and evaluates the results. Part II ultimately demonstrates that the application of the California due process doctrine is, at best, inconsistent and does not lead to substantially different results than the federal doctrine. It asserts that the incoherent application of the California doctrine shows its ineffectiveness in accomplishing *Ramirez*'s original goal: restoring fundamental tenets of due process to the heart of the due process analysis.

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5. *Id.* at 179 (Douglas, J., concurring).
6. *See id.* at 170 (Frankfurter, J., concurring).
7. 397 U.S. 254 (1970).
8. 408 U.S. 564 (1972).
9. 424 U.S. 319 (1976).
10. 599 P.2d 622, 627 (Cal. 1979).

Finally, Part III analyzes possible solutions to help the California courts achieve the original purpose of *Ramirez*. It proposes two possible solutions to the problem. The California courts could easily continue to apply the federal procedural due process thresholds that were expressly rejected in *Ramirez*. But the California Supreme Court has not yet abandoned this position, and the continued use of the federal test contravenes binding precedent from the state's highest court. Moreover, adopting the federal framework would fail to recognize the inherent dignity of an individual facing a more powerful state actor for the purported benefit of lowering administrative costs and increasing government efficiency. Instead, California courts should rearticulate the state's procedural due process doctrine in order to realize the intent and potential of the *Ramirez* decision.

I. BACKGROUND

Due process is an old, enduring concept.[11] A "guarantee of fair procedure"[12] in administrative and judicial adjudicative contexts,[13] the touchstone of due process has long been protecting individuals against arbitrary state action[14] by providing notice and an opportunity to be heard.[15] "The heart of the matter is that democracy implies respect for

11. PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 768 (10th ed. 2003) (stating that due process was born in thirteenth century England); *see also* Edward L. Rubin, *Due Process and the Administrative State*, 72 CALIF. L. REV. 1044, 1044 (1984) ("By far the oldest of our civil rights, [procedural due process's] content seemed so clear to prior generations that they included the term 'due process' in the fifth and fourteenth amendments virtually without discussion." (footnote omitted)); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 111 (1978).

12. STRAUSS ET AL., *supra* note 11.

13. Hannah v. Larche, 363 U.S. 420, 442 (1960) ("[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication . . . it is not necessary that the full panoply of judicial procedures be used.").

14. Dent v. West Virginia, 129 U.S. 114, 123 (1889) (stating that the requirements of due process, as conceived in England and transported to the United States, are designed to protect individual subjects from arbitrary state action).

15. United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1378 (2010) ("Due process requires notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'" (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950))); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard. And it is to this end, of course, that summons or equivalent notice is employed." (citation omitted)); Louisville & Nashville R.R. Co. v. Schmidt, 177 U.S. 230, 236 (1900) ("[The requirements of] the due process clause of the Fourteenth Amendment . . . are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate

the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness . . . ."[16] Recognition of a person's dignity in the course of an encounter with a state actor is particularly important to procedural fairness, because such recognition respects these elementary rights and affirms that person's membership in society.[17]

The first administrative agencies emerged from the War Department, following Independence and the end of the Revolutionary War.[18] Beginning with the New Deal, as the government struggled to address the impact of the Great Depression, administrative agencies like the Social Security Administration and the National Labor Relations Board became increasingly integral to the operation of the United States.[19] Now, agencies administer nearly every aspect of American life, from dispensing drivers and professional licenses to determining eligibility for disability and welfare benefits; from regulating commercial activities to operating prisons; and from establishing tenure to providing for rehabilitation.[20] Consequently, individuals frequently confront the government through administrative actions that affect some of the most fundamental aspects of their lives.

The Constitution does not explicitly contemplate this method of governance. Article II charges the executive branch with the duty to "take Care that the Laws be faithfully executed."[21] Through the Appointments Clause, the President is further authorized to appoint "Officers of the United States," though Congress retains the power to vest appointment of "inferior" officers in other branches of the government.[22] Likewise, Congress is empowered to pass laws that are "necessary and proper" for executing those powers vested in the United States government "or in any Department or Officer thereof"[23] by the

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opportunity has been afforded him to defend.").

16. Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).

17. *See* Saphire, *supra* note 11, at 124.

18. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1274–76, 1283 (2006).

19. STRAUSS ET AL., *supra* note 11, at 17.

20. *See* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 5 (1990). *See generally* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (tenure); Meachum v. Fano, 427 U.S. 215 (1976) (transfer of prisoners); Mathews v. Eldridge, 424 U.S. 319 (1976) (disability benefits); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits); People v. Ramirez, 599 P.2d 622 (Cal. 1979) (rehabilitation); Smith v. Bd. of Med. Quality Assurance, 248 Cal. Rptr. 704 (Ct. App. 1988) (professional competency).

21. U.S. CONST. art. II, § 3.

22. *Id.* § 2, cl. 2.

23. *Id.* art. 1, § 8, cl. 18.

Constitution. Thus, the Constitution provides for making law, interpreting law, and executing law, but is silent on administering law.[24]

Instead, administration blossomed in the interstitial space between the branches of government.[25] Administrative law developed in response to the burgeoning administrative state, concerned with governmental efficiency, preservation of individual rights, and social well-being.[26] New Deal programs created a "reliance principle: The public came to look upon government as its guarantor against acute economic deprivation."[27] Because government agencies multiplied without a regulatory framework, such as procedural safeguards, Congress passed the Administrative Procedure Act (APA) in 1946.[28] The APA "divide[d] the universe of administrative action into two general decisionmaking categories, rulemaking and adjudication."[29] For adjudications, the statute "set[s] out a fairly elaborate scheme of procedural requirements[, using] the judicial hearing as its decisionmaking model."[30] California's own Administrative Procedure Act[31] predated the federal counterpart and "was a pioneering effort."[32] The administrative state has only expanded since the statutes were enacted: "We now presume the existence of highly institutionalized methods of presidential and congressional control, the impersonality of office, the hierarchical organization of a career civil service and a highly articulated system of judicial review."[33] Despite the statutory constraints on administrative action, this expansion increases the chances of an arbitrary agency action by an administrative agency.[34]

Since the New Deal, courts have struggled to address two central questions of due process in administrative actions: whether or not a

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24. *See* Mashaw, *supra* note 18, at 1266.

25. STRAUSS ET AL., *supra* note 11, at 35.

26. Mashaw, *supra* note 18, at 1264; *see also* Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 614 (1927) ("The control of banking, insurance, public utilities, finance, industry, the professions, health and morals, in sum, the manifold response of government to the forces and needs of modern society, is building up a body of laws not written by legislatures, and of adjudications not made by courts and not subject to their revision. These powers are lodged in a vast congeries of agencies.").

27. STRAUSS ET AL., *supra* note 11, at 16.

28. *See id.*; *see also* Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2006).

29. *See* STRAUSS ET AL., *supra* note 11, at 16–17.

30. *Id.* at 17.

31. CAL. GOV'T CODE §§ 11340–11365 (West 1998).

32. Michael Asimow, *The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act*, 32 TULSA L.J. 297, 298 (1996). The California statute was enacted in 1945. *Id.* One measure adopted by the original Act was independent hearing officers, which "has yet to be adopted by the federal government." *Id.*

33. Mashaw, *supra* note 18, at 1269.

34. EDLEY, *supra* note 20, at 6 ("As the bureaucracy's role has grown, so have the risks and benefits associated with official action."); *see also* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 8 (1990) ("The individual and the social stakes in regulation are high.").

particular state action triggers due process; and, once due process is implicated, what procedures are sufficient to protect an individual from arbitrary government action.[35] For courts, these questions raise a "basic problem [of] translat[ing] a protection developed for judicial trials into the administrative context."[36] State courts have mostly adopted or applied due process tests akin to, or coextensive with, the federal test.[37] However, California is one state that has sought to expand the federal framework.[38] In some respects, the California Supreme Court has been

35. STRAUSS ET AL., *supra* note 11, at 768.

36. Rubin, *supra* note 11, at 1046.

37. There are numerous examples of state courts relying on the federal due process doctrine. *See* City of Dora v. Beavers, 692 So. 2d 808, 811 n.4 (Ala. 1997); Moore v. Watson, 429 So. 2d 1036, 1038 (Ala. 1983); Hilbers v. Municipality of Anchorage, 611 P.2d 31, 36 (Alaska 1980); *In re* MH-2008-000867, 236 P.3d 405, 408–09 (Ariz. 2010); Ark. Dep't of Human Servs. v. A.B., 286 S.W.3d 712, 719 (Ark. 2008); Whiteside v. Smith, 67 P.3d 1240, 1248–49 (Colo. 2003); State v. Harris, 890 A.2d 559, 570 (Conn. 2006); Hughes v. Div. of Family Servs. 836 A.2d 498, 508 & n.26 (Del. 2003); Brown v. United States, 682 A.2d 1131, 1139 (D.C. 1996); N.S.H. v. Fla. Dep't of Children & Family Servs., 843 So. 2d 898, 903 & n.7 (Fla. 2003); Nodvin v. State Bar, 544 S.E.2d 142, 146 (Ga. 2001); Slupecki v. Admin. Dir. of the Courts, 133 P.3d 1199, 1205 (Haw. 2006); *In re* True, 645 P.2d 891, 894 (Idaho 1982); People *ex rel.* Birkett v. Konetski, 909 N.E.2d 783, 796 (Ill. 2009); Wilson v. Bd. of Ind. Emp't Sec. Div., 385 N.E.2d 438, 443–44 (Ind. 1979); Office of Consumer Advocate v. Iowa Utils. Bd., 770 N.W.2d 334, 340 (Iowa 2009); State v. Easterling, 213 P.3d 418, 426 (Kan. 2009); Transp. Cabinet v. Cassity, 912 S.W.2d 48, 51 (Ky. 1995); Arriola v. Orleans Parish Sch. Bd., 809 So. 2d 932, 938–39 (La. 2002); *In re* Amberley D., 775 A.2d 1158, 1163 (Me. 2001); Rhoads v. Sommer, 931 A.2d 508, 525 (Md. 2007); Costa v. Fall River Hous. Auth., 903 N.E.2d 1098, 1109 (Mass. 2009); *In re* Rood, 763 N.W.2d 587, 598 (Mich. 2009); C.O. v. Doe, 757 N.W.2d 343, 350 (Minn. 2008); Hinds Cnty. Sch. Dist. Bd. v. R.B., 10 So. 3d 387, 402 (Miss. 2008); Jamison v. Dep't of Soc. Servs., 218 S.W.3d 399, 405 (Mo. 2007); *In re* Mental Health of E.T., 191 P.3d 470, 474 (Mont. 2008); Kenley v. Neth, 712 N.W.2d 251, 258 (Neb. 2006); J.D. Constr., Inc. v. IBEX Int'l Grp., LLC, 240 P.3d 1033, 1040 (Nev. 2010); *In re* Kilton, 939 A.2d 198, 206 (N.H. 2007); Jamgochian v. N.J. State Parole Bd., 952 A.2d 1060, 1071 (N.J. 2008); Albuquerque Bernalillo Cnty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n, 229 P.3d 494, 507 (N.M. 2010); *In re* K.L., 806 N.E.2d 480, 487 (N.Y. 2004); State v. Thompson, 508 S.E.2d 277, 286 (N.C. 1998); *In re* D.C.S.H.C., 733 N.W.2d 902, 906 (N.D. 2007); State *ex rel.* Haylett v. Ohio Bureau of Workers' Comp., 720 N.E.2d 901, 907–08 (Ohio 1999); *In re* A.M., 13 P.3d 484, 487–88 (Okla. 2000); Stogsdill v. Bd. of Parole, 154 P.3d 91, 94 (Or. 2007); R. v. Dep't of Pub. Welfare, 636 A.2d 142, 147 (Pa. 1994); State v. Germane, 971 A.2d 555, 576–77 (R.I. 2009); S.C. Dep't of Soc. Servs. v. Wilson, 574 S.E.2d 730, 734 (S.C. 2002); State v. $1,010.00 in Am. Currency, 722 N.W.2d 92, 97–98 (S.D. 2006); Bailey v. Blount Cnty. Bd. of Educ., 303 S.W.3d 216, 230–31 (Tenn. 2010); Harrell v. State, 286 S.W.3d 315, 319–20 (Tex. 2009); *In re* Arnovick, 52 P.3d 1246, 1251 (Utah 2002); Gabriel v. Town of Duxbury, 764 A.2d 1224, 1226 (Vt. 2000); Krieger v. Virginia, 567 S.E.2d 557, 564 (Va. Ct. App. 2002); Post v. City of Tacoma, 217 P.3d 1179, 1186 (Wash. 2009); State *ex rel.* Jeanette H. v. Pancake, 529 S.E.2d 865, 874 (W. Va. 2000); *In re* Daniel R.S., 706 N.W.2d 269, 284–85 (Wis. 2005); *In re* CC, 102 P.3d 890, 895 (Wyo. 2004). *But see Jamgochian*, 952 A.2d at 1070 (noting that the New Jersey due process doctrine can provide for greater procedural protection than the federal test).

38. People v. Ramirez, 599 P.2d 622, 626–28 (Cal. 1979). Justice Mosk, author of the *Ramirez* opinion, once said that he hoped that he was able to protect people from "a monstrous society that grows constantly" while he was on the bench. Interview by Germaine LaBerge with Stanley Mosk, Justice, Cal. Supreme Court, in S.F., Cal. 93 (July 22, 1998), *transcript available at* http://www.sos.ca.gov/archives/oral-history/pdf/mosk.pdf. Mosk's opinion in *Ramirez* is emblematic of this approach: Mosk's rationale for rejecting the federal due process doctrine suggests that his core concern was with protecting citizens from arbitrary deprivations in an increasingly bureaucratized society. *See* discussion *infra* Part I.B.

successful in providing greater protections for individuals at the mercy of state action. In others, however, the court has managed to muddy the waters so that the state due process framework no longer fulfills its original promise.

A. The Federal Approach to Procedural Due Process

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."[39] Similarly, the Fourteenth Amendment to the United States Constitution prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law."[40] The U.S. Supreme Court crafted the federal due process framework in its decisions in *Board of Regents of State Colleges v. Roth*[41] and *Mathews v. Eldridge*.[42]

1. Invoking Due Process

Prior to *Roth*, access to due process protections depended on whether an affected individual's interest could be characterized as a right or a privilege: Due process was not constitutionally required if the interest was not a right.[43] For instance, in *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, a short-order cook for a restaurant that served workers at the Naval Gun Factory suddenly and summarily had her security clearance revoked, which prevented her from going to work.[44] The Court reasoned that her private interest in continued employment was not a *right* to continued employment, but was merely a privilege.[45] Indeed, the Navy's decision to revoke her security clearance did nothing to prevent her from finding employment elsewhere.[46] Procedural due process protections were not constitutionally required for privileges—only rights.[47]

By comparison, the central inquiry of the modern approach, set forth in *Roth*, is whether the private interest in question constitutes either a liberty or a property interest as identified by the Fifth or Fourteenth Amendments.[48] The *Roth* plaintiff taught at a state university

39. U.S. Const. amend. V.

40. *Id.* amend. XIV, § 1.

41. 408 U.S. 564 (1972).

42. 424 U.S. 319 (1976).

43. Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Bailey v. Richardson, 182 F.2d 46, 51 (D.C. Cir. 1950).

44. 367 U.S. at 887–88, 894.

45. *Id.* at 896–99.

46. *Id.* at 898–99.

47. *Id.* at 896–99.

48. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569, 571 (1972); *see also* Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (deciding a due process challenge under the Fifth Amendment and

under a one-year contract.[49] At the end of the year, the school declined to rehire him, but gave no reason for its decision.[50] Roth then sued the school for violating his procedural due process rights under the Fourteenth Amendment.[51] In addressing his claims, the Court held that whether due process is required depends on the "*nature* of the interest at stake," as the amendment protects persons from deprivation of life, liberty, or property.[52]

The Court broadly interpreted liberty interests to include "freedom from bodily restraint[,] . . . the right . . . to contract, to engage in any of the common occupations of life," to learn, to marry, to make a home, to raise children, to worship "according to the dictates of [one's] own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[53] Additionally, injuries to reputation could, on occasion, implicate a protected liberty interest.[54]

By contrast, the Court took a narrower approach in defining a protected property interest. The Court stated that the "procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits."[55] Property interests are created and circumscribed by "existing rules or understandings that stem from an independent source such as state law."[56] In order for an individual to have a property interest in a benefit, that individual must have a legitimate claim of entitlement to, not just an "abstract need" or "unilateral expectation" for, the benefit.[57]

Ultimately, Roth had neither a liberty nor a property interest in his continued employment sufficient to trigger due process. While the school did not renew Roth's one-year employment contract, it also did not level any charges against him that would have harmed his reputation or standing in the community or his chances of future employment.[58] Thus,

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citing *Roth*).

49. *Id.* at 566.

50. *Id.*

51. *Id.* at 569.

52. *Id.* at 571.

53. *Id.* at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)) (internal quotation marks omitted).

54. *See* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."). *But see* Siegert v. Gilley, 500 U.S. 226, 233–34 (1991) (defamation does not implicate a protected liberty interest); Paul v. Davis, 424 U.S. 693, 701–02 (1976) (same).

55. *Roth*, 408 U.S. at 576.

56. *Id.* at 577.

57. *Id.*

58. *Id.* at 573–74.

there was no liberty interest at stake.[59] Furthermore, he did not have tenure, which would have implicated a protected property interest by entitling him to continued employment.[60]

Subsequently, part of the analysis of whether or not a protected interest is created focuses on the extent to which an agency's discretion is restricted by statutes, rules, or regulations, because those restrictions condition claims of entitlement and set ascertainable standards for state action.[61] As articulated in *Roth*, Wisconsin state law did not contain any eligibility requirements for continued employment other than tenure: "State law thus clearly leaves the decision whether to rehire a nontenured teacher for another year to the unfettered discretion of university officials."[62] Consequently, no protected property interest was created. Similarly, in *Meachum v. Fano*, a later case addressing liberty interests of prisoners, the Court stated, "Whatever expectation the prisoner may have in remaining at a particular prison . . . is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all."[63] If the prison officials could transfer prisoners only for cause or for certain reasons specified by a statute or regulation, then perhaps a protected liberty interest would have been implicated, triggering due process.[64] As described below, the California Supreme Court took particular exception to the Supreme Court's reliance on state legislatures to establish protected interests.[65]

2. Procedural Sufficiency

While the essence of adequate due process is notice and an opportunity to be heard,[66] the amount and type of procedure required varies according to the circumstances of a particular case.[67] Due process

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59. *Id.* at 575.

60. *Id.* at 567, 569.

61. *See, e.g.*, Meachum v. Fano, 427 U.S. 215, 228 (1976); *Roth*, 408 U.S. at 577 (stating that property interests are created by "independent source[s] . . . that support claims of entitlement to . . . benefits"); People v. Ramirez, 599 P.2d 622, 625 (Cal. 1979) ("When the asserted interest is derived exclusively from state law, it will be recognized as within the scope of due process liberty if the state statute protects the interest by permitting its forfeiture only on the happening of specified conditions.").

62. *Roth*, 408 U.S. at 567.

63. 427 U.S. at 228.

64. *See id.* This analysis of liberty interests is notably more restrictive than the *Roth* analysis. However, *Meachum* concerned the liberty interest of individuals already deprived of liberty, and, as a result, addressed that interest in an already-restricted context. Additionally, *Meachum* was decided post-*Roth*, and in *Roth*, the Court in fact noted that there were "boundaries" to the terms "liberty" and "property" in the Fourteenth Amendment. *Roth*, 408 U.S. at 572.

65. *See* discussion *infra* Part I.B.1.

66. *See* authorities cited *supra* note 15.

67. *E.g.*, Gilbert v. Homar, 520 U.S. 924, 930 (1997); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[N]ot all situations calling for procedural safeguards call for the same kind of procedure.");

is a flexible concept,[68] and courts examine procedural sufficiency in light of the facts before them.[69] Hence, what procedures are due ranges from formal trial-like proceedings to allowing for a single written response.[70] In *Eldridge*, the Supreme Court articulated a balancing test to evaluate the adequacy of existing procedures.[71] There, the Court instructed that reviewing courts consider three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[72]

The Court then balanced the petitioner's interests in having a hearing prior to the termination of his disability benefits with the government's interest in conserving resources by providing less procedure than a full judicial hearing.[73] On balance, the petitioner was not entitled to an evidentiary hearing prior to the local Social Security office's decision to terminate his disability benefits, because existing procedures satisfied procedural due process.[74] Those procedures included an initial notice that stated the reasons for an adverse preliminary determination and provided an opportunity to respond prior to termination, a second notice upon termination that advised the petitioner of his right to seek the agency's reconsideration, and a nonadversarial evidentiary hearing if the termination of petitioner's benefits remained in effect after reconsideration.[75] Accordingly, the risk in the existing procedures of erroneously ending petitioner's benefits was relatively low, and additional procedures would have only increased costs without enhancing the accuracy of the determination.[76] As an additional safeguard, the petitioner would have been entitled to retroactive payments if, at any time, the termination was found to be in error.[77]

Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Oberholzer v. Comm'n on Judicial Performance, 975 P.2d 663, 675–76 (Cal. 1999); Cal. Ass'n of PSES v. State Dep't of Educ., 45 Cal. Rptr. 3d 888, 896 (Ct. App. 2006).

68. *Morrissey*, 408 U.S. at 481 ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

69. *Id.*

70. People v. Ramirez, 599 P.2d 622, 627 (Cal. 1979). Sometimes, simply the availability of a damages suit after injury can be sufficient procedural protection. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 677–79 & nn.45–47 (1977) (holding the same).

71. Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

72. *Id.* at 335.

73. *Id.* at 348.

74. *Id.*

75. *Id.* at 337–39, 349.

76. *See id.* at 342–45.

77. *Id.* at 339.

In short, as a threshold matter for due process protections in the administrative context, a person subject to an agency action can invoke procedural due process protections if the state action implicates a liberty or property interest encompassed by the Fifth or Fourteenth Amendments. Once due process is implicated, the sufficiency of the available procedures is evaluated based on a balance of three factors: (1) the private interest in question, (2) the risk of erroneous deprivation under existing procedures and the probable value of additional procedures, and (3) the government's interest in the action and proceeding.[78] As Part I.B. describes below, California built upon the federal analysis in establishing its own doctrine for procedural due process in the administrative context.

B. California's Approach to Procedural Due Process

Like the United States Constitution, the California Constitution provides that "[a] person may not be deprived of life, liberty, or property without due process of law."[79] Despite the similarities between the constitutional provisions, the development of California's procedural due process doctrine mirrors the development of the federal counterpart in some ways, but rejects it in others. In 1979, the California Supreme Court expressly critiqued the Supreme Court's approach in *Roth* and set forth a new framework for procedural due process in California in *People v. Ramirez*.[80]

In *Ramirez*, the appellant had previously been convicted of drug possession and was committed to the California Rehabilitation Center ("CRC") for addiction treatment.[81] He was later granted outpatient status pursuant to section 3151 of the California Welfare and Institutions Code,[82] was subsequently arrested for disturbing the peace and resisting arrest, and then was determined to be "'not a fit subject for confinement or treatment' in the CRC."[83] Ramirez challenged his exclusion from the treatment center, arguing that the agency's decisionmaking procedures denied him due process.[84] The California Supreme Court agreed, and redrew the framework for both the trigger for due process protections and the test for procedural sufficiency. The court took issue with two aspects of the federal approach in particular. First, the court objected to the state's ability under

78. *Id.* at 335.

79. Cal. Const. art. I, § 7(a). The California Constitution has a similar, though separately enumerated, due process clause for criminal cases: "Persons may not . . . be deprived of life, liberty, or property without due process of law." *Id.* § 15.

80. *See* 599 P.2d 622, 625–28 (Cal. 1979).

81. *Id.* at 624.

82. Cal. Welf. & Inst. Code § 3151 (West 2008).

83. *Ramirez*, 599 P.2d at 624 (quoting the Director of Corrections).

84. *Id.* at 625.

the federal framework to write a protected interest out of a statute by providing the agency with unlimited discretion.[85] Specifically, when the legislature does so, it effectively eliminates the trigger for due process under the United States Constitution.[86] Second, the court felt that the balancing test for procedural safeguards failed to account for the values underlying due process.[87] The *Ramirez* tests purportedly address these concerns. But, in fact, the language of the due process trigger is easily subject to multiple interpretations, and the test for procedural sufficiency is unevenly applied. Consequently, California's due process doctrine has been muddled ever since *Ramirez*.

1. Invoking Due Process

In *Ramirez*, the California Supreme Court focused on the U.S. Supreme Court's requirement that a liberty or property interest, as defined by state law or other independent, nonconstitutional source of law, be implicated in order to trigger any due process right.[88] Writing for the majority, Justice Mosk criticized this requirement, stating,

> Its effect is that as long as the interest is *not* one that would otherwise fall within the scope of constitutional concepts of liberty, the state may "define it out" of the due process clause by specifying that it is subject to the unconditional discretion of the person in charge of its administration.[89]

Additionally, "the state may apparently limit the scope of the clause . . . irrespective of the extent to which 'grievous loss' or 'substantial adverse impact' results."[90]

According to the court, requiring statutory constraints on agency power in order to trigger due process did not sufficiently account for the importance of "promoting accuracy and reasonable predictability in governmental decision making when individuals are subject to deprivatory action."[91] The court maintained that if the principal purpose of due process is to minimize abuses of government discretion, then courts "must evaluate the extent to which procedural protections can be tailored to promote more accurate and reliable administrative decisions," instead of evaluating "whether or not the state limits administrative control over a statutory benefit or deprivation by the occurrence of specified conditions . . . ."[92]

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85. *Id.* at 626.
86. *Id.*
87. *Id.*
88. *Id.* at 625.
89. *Id.* at 626.
90. *Id.* (quoting Meachum v. Fano, 427 U.S. 215, 224 (1976); Montanye v. Haymes, 427 U.S. 236 242 (1976)).
91. *Id.*
92. *Id.*

In other words, if one of the purposes of due process is to protect individuals from arbitrary government action, then relying on the legislature to create a protectable liberty or property interest defeats that very purpose. Indeed, the more discretion an agency has, the greater the risk that an agency action will arbitrarily harm an individual.[93] "[I]f agencies or officials administering entitlement programs fail to devise, adopt or implement processes for deprivatory action that respond to inherent dignitary values, it seems highly unlikely that such processes will be imposed upon them through nonjudicial means."[94] Essentially the court's point was that a state legislature could write a legitimate liberty or property interest out of a statute by declining to limit an agency's discretion. An agency with unlimited discretion is, of course, unlikely to voluntarily limit its exercise of that power. And, an individual at the mercy of the agency is more likely to be subjected to an arbitrary government action with neither adequate procedural protections nor recourse to obtain them, because the statute at issue created no trigger. Thus, the federal trigger fails to minimize abuses of government discretion.

In short, although the *Ramirez* court might have ultimately agreed with the outcome under the federal due process analysis,[95] it explicitly rejected the federal framework in determining whether the Director of Corrections's decision to change the defendant's status in the CRC's program implicated procedural due process.[96] The court stated,

> [W]hen a person is deprived of a *statutorily conferred benefit*, due process analysis must start not with a[n] . . . attempt to decide whether the statute has created an "entitlement" that can be defined as 'liberty' or "property," but with an assessment of what procedural protections are constitutionally required in light of the governmental and private interests at stake.[97]

The court went on to hold that "due process *safeguards* required for protection of an individual's *statutory interests* must be analyzed in the context of the principle that freedom from arbitrary adjudicative procedures is a substantive element of one's liberty."[98]

As might be expected, the language of the opinion naturally leads to multiple interpretations of the appropriate due process trigger. The application of *Ramirez* in the lower courts amply demonstrates the confusion Mosk's opinion and its newly-announced principles engendered.[99] On the one hand, in light of the court's concerns with the amount of deference to state legislatures, the reference to a statutorily

93. *See id.* at 625–26.
94. Saphire, *supra* note 11, at 143.
95. *See Ramirez*, 599 P.2d at 625–26.
96. *Id.*
97. *Id.* at 624 (emphasis added).
98. *Id.* at 627 (emphasis added).
99. *See* discussion *infra* Part II.

conferred benefit or interest implies a natural due process trigger created by statute, regardless of the amount or degree of statutory limitations on an administering agency's discretion. Procedural sufficiency would then be analyzed by balancing the competing private and government interests against the principle of freedom from arbitrary government action. In light of the court's grave concern with the ability of a state legislature to write in or deliberately omit a trigger for procedural protections, it is also unclear whether the court intended for the presence of a statutorily conferred benefit to serve as part of a trigger, or if it is mentioned simply because Ramirez was granted outpatient status pursuant to provisions of the California Welfare and Institutions Code. Indeed, another interpretation of the opinion is that the tests set forth in *Ramirez* only apply in those circumstances where the legislature happens to have specifically provided a benefit; another due process trigger—though undefined in *Ramirez*—would be implicated where no statutorily conferred benefit existed.[100]

On the other hand, *Ramirez* also appears to state that the appropriate inquiry for *triggering* due process is whether procedural protections are constitutionally required based on a balance of the private and governmental interests, rather than on the statutory creation of a benefit or interest. In other words, the balance of the interests is "separate and independent" from the terms of a statute—not based simply on the interests identified in the Fifth and Fourteenth Amendments.[101] If this is accurate, then the California Supreme Court apparently tried to revisit the due process trigger set forth in *Cafeteria & Restaurant Workers*—where procedural due process was required when a private interest could be characterized as a right, rather than a privilege[102]—except that the *Ramirez* court did not expressly return to the rights-versus-privilege dichotomy. Indeed, the court appears to have applied the balancing test as the trigger

100. At least one appellate court has adopted this interpretation. *See* Schultz v. Regents of the Univ. of Cal., 206 Cal. Rptr. 910, 911–12 (Ct. App. 1984) ("We also conclude that *People v. Ramirez*, which sets forth a test for invocation of procedural due process rights under the state Constitution (where a statutory interest is subject to deprivation), should not be extended to this case, which implicates no statutory interest. Rather, we conclude *Skelly v. State Personnel Bd.* continues to define the circumstances in which procedural protections of due process will be afforded employees of public entities who can show no statutory interest subject to deprivation." (citations omitted)). *See generally* discussion *infra* Part II.A.

101. *See, e.g.*, Van Atta v. Scott, 613 P.2d 210, 214 (Cal. 1980) ("In [*Ramirez*], this court held that the extent to which procedural due process relief is available under the California Constitution depends on a careful weighing of the private and governmental interests involved." (internal citations omitted)). The court specifically differentiated between the federal test and the state test on the grounds that the federal test required a finding of a protected interest. *Id.* at 214 n.6; *see also* Hernandez v. Dep't of Motor Vehicles, 634 P.2d 917, 923 n.12 (Cal. 1981) ("[O]ur court recognized that under the California Constitution 'freedom from arbitrary adjudicative procedures is a substantive element of one's liberty' so that 'when an individual is subjected to deprivatory governmental action, he always has a due process liberty interest both in fair and unprejudiced decision-making and in being treated with respect and dignity.'" (quoting *Ramirez*, 599 P.2d at 622)).

102. 367 U.S. 886, 895 (1961).

in *Ramirez*: The opinion describes and weighs the interests at stake before concluding that due process was implicated and greater procedural protections were required.[103]

The foregoing interpretations result in broader, more inclusive due process triggers than are possible under the federal framework, if for no other reason than because they abandon the restrictive categories of Fourteenth Amendment liberty and property interests. But, competing interpretations provide murky guidance to lower appellate courts. The degree of ambiguity in the *Ramirez* test is evident in opinions from these courts, where confusion about which methodology to apply is rampant. As Part II.A describes below, some courts have adhered to the view that procedural due process is implicated on a balance of the interests involved and in light of the principle of protecting people from arbitrary actions. Others have relied on the phrase "statutorily conferred benefit" to limit the scope of the due process trigger.[104] Especially given its departure from an already-established test, the court's failure to clearly define its own due process trigger is extremely problematic for establishing and maintaining vigorous procedural protections for individuals facing the administrative state: It is unclear when a person's rights will be affected such that she must receive due process protections. Though due process is a flexible concept, the *Ramirez* court's trigger analysis is overly elastic. Perhaps ironically, critical questions of fairness are raised when individuals—let alone agencies, the state legislature, and the courts—are unclear about when procedural protections are due because the court has failed to delineate the trigger clearly. Moreover, the lack of clarity induces chaos in the lower courts. Faced with mixed signals, lower courts increasingly fall back on the more definite federal due process trigger, which the California Supreme Court has expressly rejected.

2. Procedural Sufficiency

In addition to its concern about the federal trigger for due process, the *Ramirez* court objected to the balancing test articulated in *Eldridge*. Specifically, the court opined that the federal trigger failed to recognize "the dignity and worth of the individual by treating [her] as an equal, fully participating and responsible member of society."[105] The harm caused by a government treating an individual as a "nonperson"[106] is so grave that,

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103. *Ramirez*, 599 P.2d at 631–32. Ramirez had interests in receiving notice of (including the reasons for) the termination of his outpatient status, in ensuring that the determination was based on accurate information, and in having an opportunity to make his case to the Director. *Id.* at 631–32. The government's interests were in maintaining the safety and progress of the other participants, as well as evaluating the probabilities of successful rehabilitation. *Id.* at 630.

104. *See* discussion *infra* Part II.A.

105. *See Ramirez*, 599 P.2d at 626.

106. *Id.* (quoting Kenneth L. Karst, *Equal Citizenship Under the Fourteenth Amendment*, 91 HARV.

even where additional procedure would not change the agency determination, "due process may nevertheless require that certain procedural protections be granted . . . in order to protect important dignitary values" and to affirm an individual's personhood.[107]

In light of these concerns, the California Supreme Court recast the test for determining the safeguards required by procedural due process. Returning to the "touchstone of due process,"[108] the court held that the procedure due must be viewed in light of the underlying precept that "freedom from arbitrary adjudicative procedures is a substantive element of one's liberty."[109] As with the federal test, the extent and nature of the procedure due depends on a balancing of interests at stake in each context.[110] In addition to the *Eldridge* factors, California courts were directed to consider a "dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official."[111]

In *Ramirez*, the court ultimately held that the defendant was entitled to additional procedural safeguards when the CRC ordered his exclusion from the rehabilitation program,[112] with little procedural protection beyond subsequent judicial review.[113] Ramirez was entitled to an opportunity to respond to the grounds for exclusion prior to the final decision; such an opportunity was meaningful if Ramirez received a written statement of the reasons for exclusion, access to the information considered in making the determination, "notice of [his] right to respond," and a chance to respond orally.[114]

Overall, both of these California due process analyses differ from their federal counterparts. First, where the federal analysis of procedural due process focuses on interests encompassed by the protections of the Fourteenth Amendment, the California approach focuses on a broader protection of individual interests and benefits. Specifically, the California procedural due process trigger appears to require either that a person's private interests outweigh those of the government such that due process is necessary to guard against arbitrary state action, or that an individual be

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L. REV. 1, 30 (1977)).

107. *Id.* at 626–27.

108. Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

109. *Ramirez*, 599 P.2d at 627.

110. *Id.*

111. *Id.* at 628.

112. *Id.* at 625.

113. *Id.* at 631.

114. *Id.* at 631–32. Ultimately, the court vacated the judgment below because the defendant was no longer "in custody under the judgments from which he appeal[ed]" and, consequently, remanding for a new exclusion hearing would have been inappropriate. *Id.* at 633.

deprived of a statutorily conferred interest.[115] Second, the sufficiency of process depends on consideration of an additional factor in the balancing test—namely, the dignitary interest of providing notice and a hearing.[116] The next Part discusses the application of these two tests by California appellate courts.

II. THE APPLICATION OF *RAMIREZ* BY THE CALIFORNIA APPELLATE COURTS

Once the California Supreme Court split from the U.S. Supreme Court's jurisprudence, the state's lower courts were left to determine the contours of these new tests. As this Part demonstrates, California courts applied the *Ramirez* due process trigger to encompass a wider range of interests and benefits than covered by the Fourteenth Amendment, but failed to interpret the trigger uniformly. Furthermore, the four-factor balancing test for procedural sufficiency has, by and large, proven to be neither more expansive nor more accommodating to a person's dignity than the federal three-factor balancing test.

A. INVOKING DUE PROCESS

Unlike the federal test, neither a property nor a liberty interest covered by the Fourteenth Amendment is a prerequisite for due process protections under *Ramirez*.[117] Left unsettled, however, is what the prerequisites actually are. In the fifteen years after *Ramirez*, the test was applied primarily in criminal, juvenile, and mental health cases, as well as in a few employment cases.[118] By 1984, the California Supreme Court had yet to apply *Ramirez* to a situation where no statutorily conferred benefit or interest existed—but it had made broad statements regarding the applicability of the test.[119]

Since *Ramirez*, some courts have interpreted the California procedural trigger solely based on balancing private and governmental interests, and on considerations of arbitrariness in existing procedures. For example, in *Saleeby v. State Bar*, the California legislature had authorized the creation of the Client Security Fund ("CSF") in section 6140.5 of the Business and Professions Code;[120] the State Bar established the fund and

115. *See id.* at 627; *see also* Saleeby v. State Bar, 702 P.2d 525, 534–35 (Cal. 1985).

116. *Ramirez*, 599 P. 2d at 627–28.

117. *See* Schultz v. Regents of the Univ. of Cal., 206 Cal. Rptr. 910, 922 (Ct. App. 1984).

118. *Id.* at 918 n.7.

119. *Id.* at 919 (discussing the California Supreme Court's use of *Ramirez* in *Hernandez v. Department of Motor Vehicles*, 634 P.2d 917 (Cal. 1981), and *Van Atta v. Scott*, 613 P.2d 210 (Cal. 1980)); *see also Saleeby*, 702 P.2d at 534–35 (holding that plaintiff was entitled to due process where plaintiff's interest was statutory but not necessarily a liberty or property interest); Las Lomas Land Co. v. City of Los Angeles, 99 Cal. Rptr. 3d 503, 518 (Ct. App. 2009); Ryan v. Cal. Interscholastic Fed'n, 114 Cal. Rptr. 2d 798, 816–17 (Ct. App. 2001).

120. CAL. BUS. & PROF. CODE § 6140.5 (West 2008).

created rules and regulations for its administration.[121] The petitioner sought reimbursement from the CSF, but only received partial compensation.[122] Under the federal approach, the petitioner would not have been entitled to procedural due process, because the Bar's discretion in disbursing money from the CSF was not restricted by the statute; Saleeby thus had no right to, or property interest in, an award from the CSF.[123] However, the petitioner had a right to procedure under the California approach where "the announced grounds [of the agency's decision were] patently arbitrary or discriminatory."[124] The court held that procedural due process was triggered, in part because the petitioner did not have a chance to respond to assertions made in the course of the reimbursement determination.[125] He was also not provided with the reasons for the determination.[126] Thus, the determination was ultimately arbitrary, and due process protections were required.

However, many lower courts applying the trigger for due process articulated in *Ramirez* interpreted the test narrowly to require a statutorily conferred benefit or interest.[127] The language of the *Ramirez* opinion seems to support this interpretation in its reference to deprivation of a statutorily conferred benefit.[128] For example, in *In re Thomas*, a doctor jailed on drug-related charges applied to participate in a work furlough program and was denied.[129] He challenged the decision as a violation of procedural due process.[130] The court acknowledged the creation of a benefit under section 1208 of the California Penal Code[131] in the work furlough program and proceeded to examine the procedures afforded.[132] The doctor would not have been entitled to procedural due process under the federal analysis, because the statute gave the program administrator

121. 702 P.2d at 528–29.

122. *Id.* at 527.

123. *Id.* at 536.

124. *Id.*

125. *Id.* at 535–36.

126. *Id.*

127. *See, e.g.*, Schultz v. Regents of the Univ. of Cal., 206 Cal. Rptr. 910, 918 (Ct. App. 1984) ("One key unsettled question is whether *Ramirez*' analysis will be applied to situations . . . where no *statutory* right is at issue."). Another example is *Smith v. Board of Medical Quality Assurance*, where a doctor who was ordered to undergo a professional competency exam did not have a protected liberty or property interest that would trigger due process under the federal framework. 248 Cal. Rptr. 704, 709–10 (Ct. App. 1988). However, his procedural due process rights were implicated under the California framework, because he had a statutorily conferred benefit or interest. *Id.* at 710–11; *see also* San Jose Police Officers Ass'n v. City of San Jose, 245 Cal. Rptr. 728, 731–32 (Ct. App. 1988).

128. *See* People v. Ramirez, 599 P.2d 622, 624 (Cal. 1979).

129. 206 Cal. Rptr. 719, 720–22 (Ct. App. 1984).

130. *Id.* at 722.

131. CAL. PENAL. CODE § 1208 (West 2010).

132. 206 Cal. Rptr. at 723.

unfettered discretion and thus did not create a liberty or property interest under the Fourteenth Amendment.[133]

Likewise, the court in *Schultz v. Regents of the University of California* maintained that due process was triggered by a statutorily conferred benefit or interest; otherwise, an individual would have to identify an interest covered by the Fourteenth Amendment.[134] In that case, the plaintiff contended that the procedures used to reclassify his job violated due process.[135] The court disagreed, maintaining that neither a statutorily conferred benefit nor an interest encompassed by the Fourteenth Amendment was implicated to trigger due process.[136]

Similarly, the court in *Ryan v. California Interscholastic Federation* required a statutorily conferred benefit in order to trigger California procedural due process protections.[137] In that case, the plaintiff challenged a decision that deemed him ineligible to play on a high school football team.[138] The plaintiff's due process rights were not triggered, because he did not identify a statutorily conferred benefit or interest in his participation.[139]

Finally, the court in *Gresher v. Anderson* ruled that the existence of a statutorily conferred benefit or interest was a threshold matter for due process protections.[140] There, the plaintiff sued the Department of Social Services for procedural due process violations.[141] The agency had developed procedures for exempting certain community care facility employees from a ban against hiring individuals with certain criminal convictions.[142] The availability of an exemption for these individuals was a statutorily conferred benefit; hence due process was triggered under *Ramirez*.[143]

These interpretations of the *Ramirez* due process trigger undermine the precise goal that the California Supreme Court sought to achieve, which is more explicitly articulated in the balancing test: recognition of an

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133. *Id.* at 724.

134. 206 Cal. Rptr. 910, 919 (Ct. App. 1984) (citing Skelly v. State Pers. Bd., 539 P.2d 774, 782–83 (Cal. 1975)).

135. *Id.* at 911–13.

136. *Id.* at 922.

137. 114 Cal. Rptr. 2d 798, 816 (Ct. App. 2001).

138. *Id.* at 803–04.

139. *Id.* at 817.

140. 25 Cal. Rptr. 3d 408, 418–19 (Ct. App. 2005).

141. *Id.* at 411.

142. *Id.* at 411–13.

143. *See id.* at 418–19. Arguably, the interest in continued employment was a property interest protected by the Fourteenth Amendment, but the court addressed this only in passing. *Id.* at 419 ("The Department denies that any private interest cognizable under the federal or state due process clauses is affected by the 'exemption needed' letters. However it is beyond dispute that both these clauses 'protect[] the pursuit of one's profession from abridgment by arbitrary state action.'" (alteration in original) (quoting Endler v. Schutzbank, 436 P.2d 297, 302 (1968))).

individual's dignity in administrative adjudications. Paradoxically, differing interpretations in the appellate courts deprive affected parties of notice, because it is unclear which interpretation a court will apply and find due process implicated. The opacity of the language in *Ramirez* leads appellate courts to choose these different paths, and the *Ramirez* trigger therefore prevents courts from reaching the objective of *Ramirez*. Although the poor guidance from the California Supreme Court is troubling and leads to unpredictable results, procedural due process is still triggered in California where it would not be under the federal framework of circumscribed liberty and property interests.[144] But, the question remains as to what extent the balancing test expands on the federal base.

B. Procedural Sufficiency

In requiring courts to consider a dignitary interest, the California Supreme Court addressed one of its central concerns with the federal balancing test—that the approach undervalued the importance of treating an individual "as an equal, fully participating and responsible member of society."[145] The dignitary interest factor implicates the quality and sufficiency of the two core components of due process: notice and an opportunity to be heard.[146] In refocusing the due process test on the dignity of the individual affected by the governmental action, the California Supreme Court acknowledged that due process may require greater procedures, even where the outcome of a decision would be the same, in order to value a person's dignitary interest.[147] For example, in *Ramirez*, the dignitary factor led the court to require the Director of the CRC to provide an excluded prisoner with a "right to respond orally" to the agency's decision.[148]

However, California courts unevenly apply the *Ramirez* test for procedural sufficiency—particularly the dignitary interest factor—under the best circumstances. The opinions fall into three categories: decisions that continue to apply the federal test without mentioning *Ramirez*,[149] decisions that mention *Ramirez* but either conflate it with the federal test or apply only the federal test,[150] and decisions that apply *Ramirez*.[151] With respect to the last category, the dignitary interest appears to be most discussed in those cases where the plaintiff is deprived of benefits and interests, such as employment, due to a criminal record. Even in these

144. *See, e.g.*, Saleeby v. State Bar, 702 P.2d 525, 534 (Cal. 1985); *Ryan*, 114 Cal. Rptr. 2d at 814.
145. People v. Ramirez, 599 P.2d 622, 626–27 (Cal. 1979).
146. *See* authorities cited *supra* note 15.
147. *Ramirez*, 599 P.2d at 626–27.
148. *Id.* at 631.
149. *See* discussion *infra* Part II.B.1.
150. *See* discussion *infra* Part II.B.2.
151. *See* discussion *infra* Part II.B.3.

cases, courts perhaps invoke the dignitary factor more often because the facts more easily lend to such a consideration, rather than because the courts feel compelled to do so in light of *Ramirez*.

1. The Application of the Federal Test

A number of courts continue to apply solely the federal test. For instance, the California Court of Appeal for the Second Appellate District applied the *Eldridge* balancing test to decide that due process was satisfied in *Mohilef v. Janovici*, where the city made a determination affecting a couple's use of their own land.[152] Similarly, in *Holmes v. Hallinan*, the California Court of Appeal for the First Appellate District applied the *Eldridge* test without even mentioning the *Ramirez* test.[153] In that case, the court held that due process was unquestionably satisfied where a fired police officer was provided a hearing, which was necessary to resolve factual disputes and credibility determinations, and which he chose not to attend despite his opportunity to do so.[154] Practically speaking, these protections may be the full panoply of procedure available under any test, and it is unclear what, if any, additional protections the police officer could have received had the court applied some iteration of *Ramirez*. Likewise, in *Marvin Lieblein, Inc. v. Shewry*, the Court of Appeal for the Third Appellate District held that, under the *Eldridge* test, due process did not require that the plaintiff, a pharmacist whose re-enrollment as a Medi-Cal provider was denied, be afforded live testimony and an evidentiary hearing.[155] The court held that the reasons the U.S. Supreme Court put forth in *Eldridge* for declining to require additional procedures "appl[ied] with equal force"[156] to the case at hand. Those reasons were, namely, that the evidence was objective, the plaintiff received notice of the evidence and the agency's reasoning for its decision, the plaintiff was entitled to counsel and to present his case when challenging an adverse decision, the costs and burdens on the agency of providing these additional procedures would be significant, and little benefit would be incurred by adding procedures.[157]

The rationale behind the application of the federal test in some cases appears to be a belief that the scope and protections of procedural due process in California are coextensive with the scope and protections provided by the federal approach.[158] At least one court has expressly

152. 58 Cal. Rptr. 2d 721, 731 n.18 (Ct. App. 1996).
153. 81 Cal. Rptr. 2d 174, 179 (Ct. App. 1998).
154. *Id.* at 180.
155. 40 Cal. Rptr. 3d 547, 560–61 (Ct. App. 2006).
156. *Id.* at 561.
157. *Id.*
158. *See, e.g.*, Sandrini Bros. v. Voss, 9 Cal. Rptr. 2d 763, 767 n.2 (Ct. App. 1992) ("The state [due process] provision has been considered to be co-extensive with the federal, and the two provisions

limited the application of the *Ramirez* test, because it believed it to be too broad.[159] Courts also appear to apply the federal test where there is some indication that the result would be the same under either analysis.[160]

2. The Application of Both Tests

Then there are those opinions that explicitly refer to the *Ramirez* factors for examining the sufficiency of the procedures provided but do not directly apply them,[161] or, instead, conflate them with the *Eldridge* factors. For example, in *Brown v. City of Los Angeles*, the Court of Appeal for the Second Appellate District considered the processes due to a police officer whose pay grade was reduced by the Los Angeles Police Department.[162] Brown successfully challenged the procedures the police department provided for contesting a pay grade determination.[163] The court mentioned both the *Eldridge* and *Ramirez* tests, listing the factors weighed in each,[164] but it applied only the *Eldridge* factors and made no further mention of a dignitary interest.[165]

Other justices in that court took the same approach in *American Liberty Bail Bonds, Inc. v. Garamendi*.[166] There, the California Insurance Commissioner suspended the plaintiff's license to act as a bail agent after a felony criminal complaint was filed against him.[167] The plaintiff filed a petition for writ of mandate on the ground that the immediate suspension of the license violated due process because, among other claims, the statute did not permit a pre-deprivation hearing and allowed the suspension to be based solely on a criminal complaint.[168] Although the court mentioned both *Ramirez* and *Eldridge*, it explicitly applied the *Eldridge* balancing test.[169] Perhaps the court found the case similar to two U.S. Supreme Court cases applying the federal test, namely, *Gilbert v. Homar* and *FDIC v. Mallen*.[170] On the other hand, while the court listed

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have been held to have the same scope and purpose."(internal citation omitted)). However, the Court of Appeal for the Fifth Appellate District cited two pre-*Ramirez* cases to support the proposition. *See id.* (citing Kruger v. Wells Fargo Bank, 521 P.2d 441, 449–50 (Cal. 1974); Russell v. Carleson, 111 Cal. Rptr. 497, 502 (Ct. App. 1973)).

159. Schultz v. Regents of the Univ. of Cal., 206 Cal. Rptr. 910, 919 (Ct. App. 1984).

160. *See* Mohilef v. Janovici, 58 Cal. Rptr. 2d 721, 731 n.18 (Ct. App. 1996).

161. *See, e.g.*, *id.*

162. 125 Cal. Rptr. 2d 474, 477 (Ct. App. 2002).

163. *Id.* at 491.

164. *Id.* at 487–88.

165. *Id.* at 491.

166. 46 Cal. Rptr. 3d 541 (Ct. App. 2006). Interestingly, a different panel of three appellate justices overturned the same trial judge's rulings in both cases.

167. *Id.* at 544–45.

168. *Id.* at 545.

169. *Id.* at 550.

170. *See id.* at 550–52 (applying *Gilbert v. Homar*, 520 U.S. 924 (1997), and *FDIC v. Mallen*, 486 U.S. 230 (1988)).

the *Ramirez* factors, it did so in an explanatory parenthetical and failed to note any distinction between the two tests.[171] This strongly suggests that the court either conflated the two tests or discerned no difference between them, despite the additional dignitary interest factor.

Interestingly, in *Conservatorship of Tian L.*, a civil commitment case with facts particularly amenable to a discussion of the dignitary interest, the California Court of Appeal for the Fourth Appellate District also commingled the federal and California due process approaches with little discussion of the dignitary interest.[172] While the court described both tests,[173] it only applied the federal balancing test.[174] It could be argued that the court considered the dignitary interest factor as part of its discussion of the private interests involved. In that portion of the opinion, the court acknowledged that "civil commitment to a mental hospital, despite its civil label, threatens a person's liberty and dignity on as massive a scale as that traditionally associated with criminal prosecutions."[175] However, the dignitary interest factor tends to support more robust notice and hearing procedures, requirements that the court discussed within the context of existing safeguards instead of a person's inherent dignity.[176] Moreover, the court did not address the dignitary interest as a separate component of the test.[177] Thus, the court neither seriously accounted for nor applied a dignitary interest in rendering its decision.

3. The Application of Ramirez *and the Dignitary Interest Factor*

A number of other courts have applied or incorporated the dignitary interest into their analyses. For instance, in *San Jose Police Officers Ass'n v. City of San Jose*, the California Court of Appeal for the Sixth Appellate District reasoned that the plaintiff's dignitary interest was sufficiently recognized, because he had the chance to ask questions, give his opinion, produce evidence, and "attempt to change the decision-maker's mind."[178] The plaintiff was a retired police officer who had been

171. *See id.* at 550.

172. 57 Cal. Rptr. 3d 382, 385–88 (Ct. App. 2007).

173. *Id.* at 385.

174. *See id.* at 385–88.

175. *Id.* at 385 (quoting Conservatorship of Christopher A., 43 Cal. Rptr. 3d 427, 431 (Ct. App. 2006)) (internal quotations marks omitted).

176. *See id.* at 386–87.

177. *See id.* at 385–89.

178. 245 Cal. Rptr. 728, 736 (Ct. App. 1988). Incidentally, the concurring justice wrote:

> I must cry out in protest whenever occasion arises against . . . the endeavor of the California Supreme Court to infuse different meaning into language of the California Constitution which is essentially identical to that of its federal counterpart, and thereby to accord certain Californians greater rights and others correspondingly less protection than are guaranteed by the United States Constitution.

Id. at 737 (Brauer, J., concurring).

denied a certificate to carry a weapon in his retirement.[179] Due process requirements were satisfied under the California approach in this case, but were not even triggered under the federal framework.[180] Even more summarily than the *San Jose Police Officers Ass'n* court, the Court of Appeal for the Fourth Appellate District determined in *Laird v. Workers' Compensation Appeals Board* that the dignitary interest of an employee whose rehabilitation benefits were terminated favored a pre-termination hearing.[181] Without elaborating, the court stated, "[A]n employee whose rehabilitation benefits are terminated by internal administrative action without the opportunity to personally appear and explain his rehabilitation efforts and needs surely loses at least a modicum of dignity."[182]

California courts have also applied the *Ramirez* test in the context of public schools. In *Ryan*, the court for the Fourth Appellate District applied both the federal and state tests.[183] The court found that the student, who had sued the California Interscholastic Federation for denying him eligibility to participate in after-school sports, did not have a constitutionally protected interest in that activity.[184] Similarly, the student's ability to participate in a high school football program was not a statutorily conferred benefit triggering due process under *Ramirez*.[185] Despite the absence of a trigger under either test, the court completed the *Ramirez* analysis of the adequacy of the procedures already provided.[186] The court concluded that the procedures were sufficient and stated simply that the dignitary interest under *Ramirez* was satisfied by adequate notice to the parties.[187]

One area where the courts particularly focus on the dignitary interest is when an individual's prior criminal conviction prevents or denies her an opportunity to do something. For instance, in *Gresher v. Anderson*, the plaintiff challenged the California Department of Social Services's procedures for exempting certain community care facility employees from a ban against employing individuals with criminal records.[188] In that opinion, the Court of Appeal for the First Appellate District conducted a full analysis under *Ramirez* of the adequacy of the

179. *Id.* at 729–30 (majority opinion).

180. *Id.* at 731 ("Indeed, it is doubtful whether appellants would have a due process claim under the federal Constitution.").

181. 195 Cal. Rptr. 44, 47–48 (Ct. App. 1983).

182. *Id.*

183. Ryan v. Cal. Interscholastic Fed'n, 114 Cal. Rptr. 2d 798, 805–20 (Ct. App. 2001).

184. *Id.* at 803–04, 810.

185. *Id.* at 817.

186. *See id.* at 817–18.

187. *Id.* at 820.

188. 25 Cal. Rptr. 3d 408, 411 (Ct. App. 2005).

procedures afforded by the agency.[189] The agency's protocol for notifying community care facility workers that they needed an exemption from the ban in order to be employed was to send a form letter "stating merely that the [agency] had 'received criminal history' . . . from the Department of Justice."[190] Without specifying the conviction, the form letter also asked for an explanation of the conviction and informed the recipient that they could get a copy of their criminal record from the Department of Justice.[191] The *Gresher* court strongly objected to this form of notice. Relying on *Ramirez* to support the proposition that even where greater procedure would not change the ultimate outcome, more procedure may nonetheless be required to validate an individual's dignitary interests,[192] the court reiterated that "[n]otice sufficient to enable a meaningful response is an indispensable element of due process."[193] Due to the lack of specificity in the notice, affected individuals were not provided with sufficient information to make a meaningful response. The court stated that "significant dignitary concerns are raised by a procedure in which the state informs persons only that it has received unspecified 'criminal history' about them and then requires a detailed explanation of each conviction as a condition of considering an exemption request."[194]

Similarly, in *Doe v. Saenz*, different justices from the same appellate district as in *Gresher* analyzed the procedures for notifying potential employees at community care facilities that they could not apply for an exemption from the ban because of the nature of their past convictions.[195] Under the statutory scheme, the Director of the Department of Social Services "could grant a criminal record exemption for convictions of certain crimes," but had no discretion to grant exemptions for certain other, generally more violent, criminal convictions.[196] When the Department notified individuals that they would be ineligible for an exemption, the notice contained no information about the nature of the nonexempt offense, leaving the individual to seek information from the Department of Justice.[197] The court found *Gresher* to be controlling[198] and decided that due process was not satisfied.[199] With respect to the dignitary interest, the court stated, "A notice vaguely referring to a criminal conviction that permanently bars an individual from working in

189. *Id.* at 418–22.
190. *Id.* at 417.
191. *Id.*
192. *Id.* at 421 (citing *Ramirez*).
193. *Id.*
194. *Id.*
195. 45 Cal. Rptr. 3d 126, 129–30 (Ct. App. 2006).
196. *Id.* at 131.
197. *Id.* at 132–33.
198. *Id.* at 147.
199. *Id.* at 149–50.

community care facilities violates the dignitary interest one has in understanding the nature, grounds, and consequences of governmental action."[200] The concerns raised in *Gresher* were even graver in *Saenz*, where inadequate notice was provided to individuals convicted of offenses that the Department, in its discretion, deemed nonexemptible.[201] A notice reflecting a purely discretionary decision, and providing no rationale or basis provided, is a clear example of an apparently arbitrary agency decision. There is no meaningful opportunity to respond, because there is no meaningful basis for a response. Thus, not only does this procedure implicate the dignitary interest in being treated as a responsible human being, but it also offends the touchstone of due process.[202]

Given that *People v. Ramirez* has been applied most often to cases with similar underlying facts, namely, those in which a criminal defendant is excluded from a government program, this may suggest that *Ramirez* has been limited to its facts. Shortly after the *Ramirez* decision, the Second Appellate District addressed the question of whether due process required pre-exclusion procedures where the petitioner's application for work furlough status was denied on the basis of his prior convictions for narcotics offenses.[203] The court evaluated the procedures due solely under *Ramirez*[204] and conceptually linked the dignitary interest that would be served by greater procedures to the risk of error inherent in the existing procedures.[205] Specifically, the court criticized the fact that, prior to the interview for the work furlough status, the applicant had not been informed of the criteria for approval or that "a potential ground for exclusion existed."[206] Moreover, the applicant was never "informed of *why* the nature of his conviction might exclude him from the program."[207] Additionally, the applicant was not given the opportunity "to present additional witnesses or documents to address the [agency's] concerns."[208] Greater procedural protections would not only have decreased the risk of error in decisions to exclude, but would also have "serv[ed] the vital dignity interest" by clearly demonstrating that the applicant continues to be a valued member of society.[209]

200. *Id.* at 149.
201. *Id.*
202. *See* Wolff v. McDonnell, 418 U.S. 539, 558 (1974); People v. Ramirez, 599 P.2d 622, 626 (Cal. 1979).
203. *In re* Thomas, 206 Cal. Rptr. 719, 721–23 (Ct. App. 1984).
204. *See id.* at 723.
205. *See id.* at 725–26.
206. *Id.* at 726.
207. *Id.*
208. *Id.*
209. *Id.*

Nevertheless, the dignitary interest factor did not require a court to permit an individual to represent himself when facing involuntary civil commitment under the Sexually Violent Predators Act.[210] That statute provided for the right to counsel; the "right to have access to relevant medical and psychological reports and records; the right to retain experts to perform an examination; the right to a probable cause hearing; [] the right to a jury trial; and the right to be present at the hearing."[211] The Sixth Appellate District decided that these procedures sufficiently protected the applicant's dignitary interest, and that due process did not provide for a right to self-representation in those proceedings.[212]

4. The Impact of the Dignitary Interest Factor

As the preceding discussion demonstrates, while the trigger for due process in California is, in fact, broader and more inclusive than the federal trigger, the dignitary interest factor in testing what procedures are due appears, thus far, to have little, if any, effect on the sufficiency of procedural protections. Only a few courts have required enhanced procedures: For example, the *Ramirez* court required an oral hearing, in part to validate the dignitary interest.[213] Likewise, in the community care facility cases, courts required more specific and descriptive notice for individuals affected by the ban on employing people with certain criminal convictions. By contrast, many courts have required greater procedural protections for reasons other than a dignitary interest. These other factors, such as inadequate notice and insufficient response time, have been more compelling in the balance of interests than a dignitary interest in certain kinds of cases. For instance, the government's actions in the community care facilities cases carried a high risk of erroneous deprivation.[214] Although courts in those cases invoked the dignitary interest factor, it is far from clear that they required greater procedure based on that factor alone. The same can be said for the conservatorship cases.[215] There, the courts mentioned the *Ramirez* factors but ultimately applied the federal due process framework and, in doing so, focused on the high risk of erroneous deprivation in particular.[216]

Even as compared to cases in other state courts with similar sets of facts, the outcomes under the *Ramirez* balancing test appear to be no different than under the federal test. For instance, in *People v. Beckler*,

210. People v. Fraser, 42 Cal. Rptr. 3d 424, 437 (Ct. App. 2006). For California's Sexually Violent Predator Act, see CAL. WELF. & INST. CODE §§ 6600–6609.3 (West 2008).

211. *Fraser*, 42 Cal. Rptr. 3d at 437 (internal citations omitted).

212. *Id.*

213. *Ramirez*, 599 P.2d at 631–32.

214. *E.g.*, Gresher v. Anderson, 25 Cal. Rptr. 3d 408, 419–20 (Ct. App. 2005).

215. *E.g.*, Conservatorship of Tian L., 57 Cal. Rptr. 3d 382, 385–89 (Ct. App. 2007).

216. *See id.* at 388–89.

the Illinois Supreme Court applied both the federal trigger and the federal balancing test to conclude that the defendant had not been afforded proper procedures.[217] The defendant, who had previously pleaded guilty to burglary, was placed in supervised rehabilitation for treatment of a drug problem.[218] He was subsequently deemed to be unlikely to be rehabilitated and his participation in the program was terminated without a hearing.[219] The California Supreme Court reached the same conclusion in *Ramirez*, applying the then-new test.[220] Similarly, in *In re True*, a civil commitment case, the Idaho Supreme Court used the federal rationale and framework in holding that a mental health patient was not afforded due process when her conditional release status was revoked, as the patient was provided neither notice nor a hearing.[221] Given that the Idaho court reached this result under the federal test, without the additional factor, the *Ramirez* court likely would also find that the patient was not afforded due process—though its rationale would likely focus on the dignitary interest of the mental health patient.

The *Ramirez* court criticized the *Eldridge* Court for glossing over the fundamental tenets of due process—particularly the validation of an individual's dignity in the face of arbitrary exercises of state power—and for creating a circular approach to due process.[222] However, if "the [U.S. Supreme] Court . . . fashioned an approach to assess[] the validity of governmental action that . . . essentially drained due process of its basic function as a limitation on the exercise of governmental power[,]"[223] the California Supreme Court did no better in its attempt to address those due process values. The California high court's focus on individual dignity has not made the ad hoc application of due process analyses any more coherent, or, more importantly, any more expansive or robust, despite its promise to do so.[224] California courts should seek to breathe life into the state's procedural due process doctrine in order to achieve *Ramirez*'s initial promise. Thus, Part III proposes and evaluates a few options for the California courts to adopt in order to preserve dignity in due process.

III. New Directions for the California Courts

In light of the incoherent definition and application of the California due process tests, California courts could pursue one of two paths: First,

217. 459 N.E.2d 672, 676 (Ill. App. Ct. 1984).
218. *Id.* at 673.
219. *Id.* at 673–74.
220. *See* discussion *supra* Part I.B.
221. 645 P.2d 891, 894 (Idaho 1982).
222. *See* People v. Ramirez, 599 P.2d 622, 626 (Cal. 1979).
223. Saphire, *supra* note 11, at 113.
224. *See Ramirez*, 599 P.2d at 626–27.

the courts could abandon the dignitary interest in the balancing test; second, courts could apply some force and meaning to the dignitary interest factor. This Part addresses each avenue in turn. In the end, giving force to the dignitary interest is not only more faithful to the purpose and vision of *Ramirez*, but it also serves to protect individuals from state action against which they would otherwise be defenseless.

A. Disregarding Dignity

Given the largely consistent application of the federal due process test, the inconsistent application of the California test, and the similarity of results under both tests, one could argue that attempting to breathe life into the dignitary interest factor would be an exercise in futility. However, in addition to contravening California Supreme Court precedent, this argument is highly problematic in light of the precepts underlying procedural due process.

One argument for disregarding the dignitary interest factor could be that the California test already expands upon the federal threshold by virtue of the more inclusive trigger, in spite of the confusion about its parameters,[225] and therefore by default, provides for greater procedural protection. In that regard, the dignitary interest is simply an extra factor with minimal impact on procedural sufficiency, because procedures are so readily available once due process is triggered. This objection, however, ignores the purpose of the dignitary interest: to affirm an individual's personhood vis-à-vis the state. Expansion of available procedures may occur as a result of applying the factor, but that is not the principally intended effect of the dignitary interest factor: guarding individual rights from arbitrary actions by providing a person with the chance to be heard by the individual responsible for her fate.[226] The most significant problem with this counterargument rests on the confusion over *when* due process is actually triggered. Dismissing the confusion over the trigger and ultimately relying on a poorly-defined test significantly devalues principles of procedural due process, not to mention rendering the availability of broader protections unpredictable.

Another argument may be that the dignitary interest can simply be, and already is, subsumed under or recognized as part of one of the other

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225. *See* discussion *supra* Part II.A.

226. In weighing what procedures ought to be added, courts consider the cost of adding such protections to an agency's adjudicatory process. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *Ramirez*, 599 P.2d at 628. For example, in *Ramirez*, the court required an oral hearing but did not require the CRC to allow more formal hearing rights, such as confrontation and cross-examination. 599 P.2d at 631–32. Empirical data on the costs and benefits of applying the dignitary interest factor to compel greater procedures might shed additional light on the utility of the factor. Indeed, allowing a full, trial-like hearing may be prohibitively expensive in many cases, even so much as to outweigh the benefits of acknowledging human dignity. Such an inquiry is outside the scope of this Note, which addresses solely the focus that California's due process inquiries ought to take.

factors in the balancing test, such as the private interest or the risk of erroneous deprivation. This also contradicts the California Supreme Court's intent and purpose when it expressly disapproved of the federal rationale and attempted to reframe the balancing test.[227] Indeed, in *Ramirez*, the court specifically identified the importance of recognizing a person as a responsible member of society and, hence, her inherent dignity as one of the core values of due process.[228] Subsuming the dignitary interest under another factor fosters confusion amongst the lower courts, disregards California precedent, and diminishes the value of a person's dignity when faced with administrative decisions.

Finally, one could argue that greater procedures than are constitutionally required burden an already-overburdened administrative state with little appreciable benefit for the private individual. However, protecting individuals against arbitrary actions is, after all, the touchstone of due process.[229] This principle ought to tip the delicate balance between efficiency and economy of government within the administrative state on the one hand, and the protection of individuals against state actions on the other, in favor of the individual. The state should bear the burden of its actions against its citizens, even though providing for more procedure would not necessarily result in a different outcome.

B. Preserving Dignity

In short, California courts should give full meaning to the dignitary interest factor. A test that is rarely applied fails to achieve the California Supreme Court's intended focus on acknowledging and protecting dignity, and fails to recognize individuals as responsible and valued members of society. When confronted with a heightened possibility of arbitrary deprivation, an individual's interest in maintaining her personhood is of paramount importance. Thus, the test should be redesigned to preserve dignity in due process. This could be achieved in one of two ways: using the dignitary interest to require oral procedures,

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227. Justice Mosk was known for his socially liberal perspective on the bench, *see In Memoriam: Honorable Stanley Mosk (1912–2001)*, Cal. Supreme Court Historical Soc'y, http://www.cschs.org/02_history/images_c/02_c_mosk.html (last visited Mar. 31, 2011), as well as for interpreting or basing opinions on the state constitution rather than on the federal counterpart. Interview by Germaine LaBerge with Stanley Mosk, Justice, Cal. Supreme Court, in S.F., Cal. 40–41 (Mar. 11, 1998), *transcript available at* http://www.sos.ca.gov/archives/oral-history/pdf/mosk.pdf. His judicial philosophy was that the state constitution is the governing body of law; consequently, he was "able to prevail on a number of issues using . . . state law primarily." Interview by Germaine LaBerge with Stanley Mosk, Justice, *supra*, at 40. One such example is his position on limitations on an attorney's right to exercise peremptory challenges in jury selection. *Id.* at 40–41 (discussing *Swain v. Alabama*, 380 U.S. 202 (1965), *People v. Wheeler*, 583 P.2d 748 (Cal. 1978), and *Batson v. Kentucky*, 476 U.S. 79 (1986)).

228. *Ramirez*, 599 P.2d at 626.

229. Dent v. West Virginia, 129 U.S. 114, 123 (1889).

or rearticulating a new balancing test that prominently features the dignitary interest.

First, the courts could interpret *Ramirez* as creating a presumption that oral proceedings are required in administrative adjudications. This of course interferes with the efficiency of the administrative state, but that is not necessarily too high a price to pay for more respectful government action. The most obvious argument is that oral proceedings, because they would not increase the accuracy of an administrative decision, while certainly increasing costs, are not always warranted. But, a presumption favoring oral proceedings could be rebutted in cases where such a procedure might be unduly burdensome—for example, in drivers license determinations. And, accuracy is a cold counterpoint to the simple act of being able to state one's case and having the opportunity to receive answers. For instance, in cases like *Ramirez* or the civil commitment cases, oral proceedings affirm the individual's dignitary interest. The same would be true in cases with less dramatic facts, as indicated by the *Ramirez* court's statement that the dignitary interest could, on occasion, command greater procedures—such as oral proceedings—even though due process would have been otherwise satisfied in a given case:[230] "[W]hen the concern is with inherent values [such as dignity], a right to oral participation seems essential."[231] Although such holdings are rare, the best example would likely be *Ramirez* itself, as the court required oral hearings in part to address the dignitary concern.[232]

If the *Ramirez* test is to operate as the balancing test for all due process questions under the California analysis, then there are a number of settings where greater procedures could be required, even though the existing ones may be sufficient. Adverse employment decisions and public education are two such contexts. For instance, a court could hold that an employee who was fired or demoted by an agency must be provided with a chance to respond orally to the reasons for the decision. Doing so would affirm the employee's status as a valued member of society. A court could also require that a student or a teacher facing school discipline have a chance to respond orally to the possibility of disciplinary action. Such protection would not only afford greater acknowledgement of the individual as a person, but would also enhance the individual's opportunity to be heard.

Second, the courts could more closely associate the dignitary interest with one of the first two factors in the balancing test. In other words, instead of subsuming the dignitary interest under either the

230. *Ramirez*, 599 P.2d at 626–27.
231. Saphire, *supra*, note 11, at 164.
232. *Ramirez*, 599 P.2d at 631.

private interest affected by the government action or the risk of erroneous deprivation factors, the balancing test could be rearticulated with the dignitary interest as one of three factors instead of one of four. For instance, the dignitary interest could replace the private interest as the first factor of the balancing test. Conceptually, this is possible because the private interest at stake is often the same as the trigger—the continued interest in employment or the benefit of being a patient at a rehabilitation facility—and is often related to a person's sense of being a valued member of society. If the California Supreme Court had done so in *Ramirez*, its discussion of the private interest factor would have included not only a discussion of Ramirez's interest in treatment, but also his private, dignitary interest in being afforded an opportunity to respond orally to the agency's concerns about his status.[233] His private interest in being heard is comparable to his dignitary interest in being treated with respect by the state.

The dignitary interest could also replace the second factor, risk of error, as both relate to the accuracy and adequacy of the notice and hearing procedures provided prior to the deprivation. At least one lower court has done so, though perhaps not expressly. In *Gresher v. Anderson*, the court discussed the problems with the existing due process protections, focusing particularly on the quality of notice given to the affected individual.[234] Vague notice led to an inadequate opportunity to respond.[235] The court could also have framed its discussion of the high risk of erroneous deprivation as offending the individual's dignitary interest. Put another way, the court could easily have argued that the vague and inadequate notice failed to account fully for the individual's right to be treated and respected as a person—in addition to increasing the risk of error in the action—without applying both factors separately and independently. Either method of reforming the California balancing test appears more likely to focus successfully on the dignitary interest of the affected individual than the current method. Doing so would restore the import of a person's dignity in the due process analysis. Moreover, as a three-factor test can be more facile in its application, changing the test in one of these manners would have the added benefit of bringing some coherence and legitimacy to California's expansive due process approach.

233. *See id.*

234. 25 Cal. Rptr. 3d 408, 421 (Ct. App. 2005).

235. *Id.* at 421–22; *see also* Doe v. Saenz, 45 Cal. Rptr. 3d 126, 148–49 (Ct. App. 2006); *In re* Thomas, 206 Cal. Rptr. 719, 725–26 (Ct. App. 1984).

CONCLUSION

Ensuring that due process is afforded to individuals who are subjected to adverse state action is especially difficult in the administrative context. Administrative agencies were created to delegate governing responsibility to another, albeit associated, branch of the government in the name of efficiency. Despite the benefits of such a system—and there are many—the risks to the individuals who rely on that system are great, because agencies are not fully democratically accountable. Due process, therefore, is especially important in the administrative context, because the chance of arbitrary state action increases as government agencies become less accountable. In balancing the purposes of due process and the needs of a modern administrative state, federal and California courts have reached two different conclusions on the scope and protection of due process. Although the California approach purports to be more inclusive, it is only partially so. While the trigger for procedural protections is more sensitive, it is also confounding. California appellate courts have struggled to interpret the *Ramirez* trigger for procedural due process. At least three different interpretations are viable, and though courts appear to apply one more commonly than the others, the ease with which courts reach these different interpretations raises significant concerns about whether fundamental precepts of due process—namely, dignity—are being fulfilled. Likewise, the test for determining procedural sufficiency acknowledges an individual's personhood in a cursory fashion, if at all, because the high court has failed to delineate clearly the parameters and application of *Ramirez*. Given the risks of being subject to arbitrary state action in administrative contexts, the California Supreme Court's attempt to focus the state test on a person's dignity is valuable and ought to be pursued. One such way to accomplish this is to interpret *Ramirez*, the seminal case, as creating a presumption in favor of oral proceedings. Another, perhaps more effective, way would be to rearticulate the test with the dignitary factor as one of three factors instead of as a lost factor in a set of four. Either solution would enhance the coherence of the California due process test without disregarding either the state's highest court or the dignitary interest of its residents.