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The California Dignitary Interest:
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That court best serves the law which recognizes that the rules of
law which grew up in a remote generation may—in the fullness of
experience be found to serve another generation badly, and which
discards the old rule when it finds that another rule of law represents
what should be according to the . . . settled judgment of society.
. . . It is thus great writers upon the common law have discovered
the source and method of its growth, and in its growth found its
health and life. . . . Change of this character should not be left
to the legislature.¹

When an individual is employed by the government, a probationary
period may be required during which evaluation for advancement to
permanent status occurs.² Throughout this probationary period, the
government employer has a generally recognized ability to terminate
the probationary employee without affording the employee a hearing.³
Additionally, the employer is not required to formulate judicially
cognizable good cause in support of the decision to terminate.⁴ The
employer's broad authority to decide when and why the probationary
employee should be terminated is a result of judicial construction of
the due process clauses of the United States Constitution.

Procedural due process under the fourteenth amendment imposes
limitations on the methods used by the government only when depriving
an individual of a protected interest.⁵ An "interest"⁶ is protected under
the fourteenth amendment, in the context of government employment,
under the due process concepts of "liberty" or "property."

². The term "government," as used in this comment, includes state, local, and municipal
   entities.
   Rptr. 440, 443 (1979).
⁴. *See Bogacki v. Board of Supervisors,* 5 Cal. 3d 771, 783, 489 P.2d 537, 545, 97 Cal.
   Rptr. 657, 665 (1971).
⁶. An "interest" includes any benefit, tangible or intangible, conferred or created by
   the government. *See Roth* 408 U.S. at 569-70. Although the United States Supreme Court noted
   in *Roth* that the range of interests protected by procedural due process is not infinite, existence
   of the interest itself is not predicated on classification under traditional notions of due process
   property and liberty. *Id.*
A property interest, sufficient to implicate the due process protections of the fourteenth amendment, is not constitutionally created. The property interest is established when existing rules or regulations, stemming from an independent source such as state law, secure the interest and support a legitimate claim of entitlement to the interest. Under the fourteenth amendment, however, the state may divest the interest of its status as "property." The state may specify, contrary to existing rules or understandings, that application of the interest is subject to the complete discretion of the governmental official in charge of administration. Since the individual has no basis to assert that he has an entitlement to the interest, the protections afforded under the fourteenth amendment are inapplicable.

In the context of government employment, the employee has an interest in continued employment. A legitimate claim of entitlement to continued employment, sufficient to afford the interest the status of due process property, can be created in various ways. The claim may be supported pursuant to an employment contract, a system of tenure, or a clearly implied promise of continued employment. The courts, however, have indicated that the status

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7. See id. at 576-78.
8. See id.
10. See id. at 266, 599 P.2d at 626, 158 Cal. Rptr. at 319.
11. See id.
12. See 408 U.S. at 569-70.
13. See id. at 578.
14. See Weiman v. Updegraff, 344 U.S. 183 (1952). In Weiman, the employees were terminated for failing to take a loyalty oath during the term of their employment contract with the State. While the Court declined to consider whether an abstract right to public employment exists, it did find that constitutional due process protections extend to a public employee where exclusion pursuant to a statute is patently arbitrary or discriminatory. Id. at 192.
15. See Slochower v. Board of Higher Education, 350 U.S. 551 (1956). The employee in Slochower was a teacher with 27 years experience and was entitled to tenure under state law, which limited discharge to actions constituting "cause", and required notice, hearing and appeal. The employee was discharged under a state law which was interpreted to mean that assertion of the privilege against self-incrimination is equivalent to resignation. Dismissal under the provision, considered automatic and therefore granting no right to charges, notice, hearing, or an opportunity to explain, was held to have violated the requirements of due process. Id. at 554-59.
16. See Connell v. Higginbotham, 403 U.S. 207 (1971). In this case, the employee, hired on January 27, 1969, as a substitute classroom teacher, was dismissed on March 18, 1969, for refusing to sign a loyalty oath. The Court found failure to sign insufficient cause to allow summary dismissal from public employment without the hearing or inquiry required by due process. Id. at 208. See also Perry v. Sinderman, 408 U.S. 593 (1972). The employee in Perry had been employed by the state for 10 years under a series of one year contracts. Though no formal tenure system was applicable, a de facto tenure system was alleged as arising from various official employment guidelines promulgated by the employer. The Court, while not specifically ruling on the allegation, held the absence of explicit contractual provisions did not foreclose the possibility of a property interest in continued employment arising from implied
of property which attaches to the permanent employee's interest in continued employment is not applicable to probationary employees. Since California courts have refused to acknowledge a probationary employee's interest in continued employment, termination may occur under the fourteenth amendment without a hearing and in the absence of judicially cognizable good cause.

Separate from the issue of a probationary employee's property interest in continued employment is his constitutionally created liberty interest in the way in which employment termination occurs. Specifically, the probationary employee has a liberty interest in freedom from stigmatization of reputation resulting from the method or reasons for termination. Under the fourteenth amendment, the procedural protections for the probationary employee's liberty interest are not operative, however, until formal termination proceedings are instigated. Additionally, the employer is not required to discuss the reasons for termination except to the extent the reasons may impact upon the allegation of stigmatization. Furthermore, the issue of the validity of termination, substantively as well as procedurally, is not subject to judicial review.

In responding generally to due process analysis under the fourteenth amendment, the California Supreme Court has concluded that the traditional methodology employed by the courts impermissibly fails to protect the values underlying the concept of due process. In People contractual provisions or through an unwritten "commonlaw" that certain employees shall have the equivalent of tenure. The ability to show, from the circumstances of service or other relevant facts, that a legitimate claim of re-employment had been created triggered the requirement of being informed of the grounds for nonretention and to be afforded the opportunity to challenge their sufficiency. Id. at 601-04. Cf. Board of Regents v. Roth, 408 U.S. at 578. In Roth, the employee's alleged "property" interest was created and defined by the terms of his employment. These terms contained a specific termination date, did not provide for contract renewal absent sufficient "cause" or otherwise provide for renewal. The Court found the terms of appointment gave rise to no protectable interest in continued employment. Additionally, the employee could point to no state statute, or a rule or policy of the employer that would support a legitimate claim for reemployment. While the employee was considered to have an abstract concern in being rehired, the Court declined to find a sufficiently protectable interest. Id.

17. See Roth, 408 U.S. at 576-80.
18. See id.
19. See id. at 569-74; infra notes 130-92 and accompanying text.
21. See Roth, 408 U.S. at 573; infra notes 158-64 and accompanying text.
23. See id.
the court held that when the due process clauses of the California Constitution are applied, a separate and specific acknowledgement of the individual's "dignitary" interest must occur. The dignitary interest simply requires that an individual be informed of the nature, grounds, and consequences of the actions of the government and be able to present his position before a responsible government official.

This comment will demonstrate how the California due process approach, as articulated in Ramirez, must be applied to termination of probationary governmental employees. Assuming that greater procedural protections are constitutionally required under the California Constitution, this comment will demonstrate how imposition of additional procedures will have the effect of aligning the substantive nature of probationary status with that of permanent employees. In developing the thesis, the comment will first analyze the meaning of the California due process dignitary interest as identified and articulated in Ramirez. After the general requirements of the dignitary interest are specified, the comment will discuss the current rights of probationary government employees relating to termination procedures. Specifically, the extent of the property and liberty interests enjoyed by probationers will be delineated. After identifying the due process rights of probationary employees under the fourteenth amendment, the requirements of the California dignitary interest will be applied and possible effects examined.

27. See Ramirez, 25 Cal. 3d at 269, 599 P.2d at 627-28, 158 Cal. Rptr. at 321.
28. See id. While the language of the federal and state due process clauses are substantially similar, the California Due Process Clauses:
   . . . are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable. . . . [The California Supreme Court sits] as a court of last resort, subject only to the qualifications that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining the fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.
29. 25 Cal. 3d 260, 599 P.2d 622, 158 Cal. Rptr. 316 (1979); see infra notes 50-69 and accompanying text.
30. See infra notes 50-61 and accompanying text.
31. See infra notes 75-84, 130-52 and accompanying text.
32. Id.
33. See infra notes 85-129, 153-92 and accompanying text.
A BEGINNING: *People v. Ramirez*

In 1970, following adjournment of criminal proceedings and after being adjudged a narcotic addict or in imminent danger of becoming a narcotic addict, Lawrence J. Ramirez was committed for treatment in the California Rehabilitation Center (CRC). In 1974, Ramirez achieved outpatient status. Two years later, after being arrested and pleading guilty to a charge of disturbing the peace, Ramirez was found to be "not a fit subject for confinement or treatment" in the CRC by the Director of Corrections. The trial court, after a hearing on the propriety of the exclusion order, upheld the Director's exercise of discretion. Ramirez's CRC commitment was terminated and the criminal proceedings were resumed.

The only procedural protections Ramirez received before exclusion were those required by the CRC regulations. These limited procedures included the right to receive a copy of the regional administrator's letter recommending exclusion and to be informed of the right to appeal the recommendation through direct correspondence to the regional administrator.

The California Supreme Court viewed the question presented as a determination of the procedural protections that are mandated by the due process clauses of the California Constitution. In analyzing this question, the court held that the procedures utilized were constitu-

34. See *Ramirez*, 25 Cal. 3d at 264, 599 P.2d at 624, 158 Cal. Rptr. at 318. This action, occurring after Ramirez was convicted of burglary and possession of heroin arose pursuant to Cal. Welf. & Inst. Code Section 3051 which states: "... upon conviction of a defendant ... and upon imposition of sentence, if it appears to the judge that the defendant may be addicted ... the judge shall suspend execution of the sentence and order the district attorney to file a petition for commitment of the defendant to the Director of Corrections for confinement in the ... [C.R.C.]. ..."

35. See id. at 264, 599 P.2d at 624, 158 Cal. Rptr. at 318.

36. See id. Ramirez's termination occurred when the Director of Corrections exercised his discretion under Cal. Welf. & Inst. Code Section 3053(a): "If at any time ... the Director of Corrections concludes that the person, because of excessive criminality or for other relevant reason, is not a fit subject for confinement or treatment ... he shall return the person to the court ... for such ... further proceedings on the criminal charges ..." (emphasis added). *Id.*

37. See *Ramirez*, 25 Cal. 2d at 264, 599 P.2d at 624, 158 Cal. Rptr. at 318.

38. See id.

39. See id. at 276, 599 P.2d at 632-33, 158 Cal. Rptr. at 326.

40. Though Ramirez had the right to these procedures under the CRC regulations, the CRC failed to inform him of his right to appeal so he could take advantage of these limited protections. Additionally, Ramirez was not granted access to information considered by the Director in making the exclusion order, nor was he afforded the opportunity to respond orally before a responsible governmental official. See id.

41. The case reached the California Supreme Court on appeal from an order granting probation and from a judgment and exclusion order entered in the trial court. See id. at 264-65, 599 P.2d at 624-25, 158 Cal. Rptr. at 318.

42. See CAL. CONST. art. I, §§7(a), 15. As opposed to the Due Process Clauses of the United States Constitution (5th and 14th amendments), the California Due Process Clauses
tionally insufficient. 43 As a result, the court firmly established the separate identity of procedural due process under the California Constitution.

Procedural due process, though an elastic concept, incorporates certain recognized principles. 44 Accordingly, the United States Supreme Court has acknowledged that protection against arbitrary governmental action is the "touchstone of due process." 45 Included within the fundamental values underlying due process is the promotion of accuracy and reasonable predictability in governmental decision making. 46 Under the approach taken by the United States Supreme Court, "interests" derived from nonconstitutional sources such as state law are not always considered to be within the scope of due process protections. 47 When the source of the "interest" is not constitutional, due process under the United States Constitution is mandatory only when the government has imposed specific limitations on how or why deprivation of the "interest" may occur. 48 Alternatively, when deprivation of the "interest" is subject to the uncontrolled discretion of the government, fourteenth amendment due process protections are considered inapplicable. 49

Although the approach followed by the United States Supreme Court in interpreting the federal due process clause was used as a basis for analysis, the California Supreme Court in Ramirez declined to adopt that approach and its underlying reasoning. 50 In the opinion of the

relate specifically to civil proceedings [Art. I, §7 (a)] and criminal proceedings (Art. I, § 15). The California Supreme Court, however, based its analysis on both clauses. In so doing, the court, by clear implication, held the mandates of both due process clauses equal at least insofar as the procedural protections arising under the clauses are concerned. See Ramirez, 25 Cal. 3d at 263-64, 599 P.2d at 624, 158 Cal. Rptr. at 318.
43. See Ramirez, 25 Cal. 3d at 263-64, 599 P.2d at 624, 158 Cal. Rptr. at 318.
44. See id.
45. Wolff v. McDonnell, 418 U.S. 539, 558 (1974); Cf. Gontales v. Freeman, 334 F.2d 570, 574 (D.C. Cir. 1964). Chief Justice (then Judge) Burger, in discussing how determination of a "right" may resolve the question of justiciability, stated: "... of course there is no right; but that does not mean the government can act arbitrarily, either substantively or procedurally, against a person, or that such person is not entitled to challenge the processes..."
46. See Ramirez, 25 Cal. 3d at 267, 599 P.2d at 626, 158 Cal. Rptr. at 320.
47. In Ramirez, the California Supreme Court found the language of Welf. & Inst. Code Section 3053 to impose some limitations on the exercise of discretion. Because the circumstances under which exclusion could occur are conditioned by the terms of the statute, under the fourteenth amendment the patient-inmate's interest is considered within the scope of due process liberty and is thus subject to some degree of procedural protections. See id. at 265-66, 599 P.2d at 626, 158 Cal. Rptr. at 319.
48. See id. at 265-66, 599 P.2d at 626, 158 Cal. Rptr. at 319.
49. See id. at 266, 599 P.2d at 626, 158 Cal. Rptr. at 119-20. The court noted further that the ability of the state to foreclose applications of due process protections under the fourteenth amendment is determined irrespective of the extent of grievous loss or substantial adverse impact. Id. [citing Meachum v. Fano, 427 U.S. 215, 224 (1976) and Montanye v. Haymes, 427 U.S. 236, 242 (1976)].
50. The California Supreme Court focused its analysis on statutorily created liberty in-
Ramirez court, the approach used by the United States Supreme Court fails to fully effectuate procedural due process values. In addition to the need for reliability in governmental decision-making, the court identified an "... important due process interest in recognizing the dignity and worth of the individual by treating him as an equal, fully participating and responsible member of society." To the California Supreme Court, this dignitary interest must be recognized under the California Constitution because of the lack of acknowledgement that interest is accorded under the fourteenth amendment.

The ramifications of the dignitary interest are separate and distinct from the interests created by statute. The dignitary interest arises independently from the California Constitution. Analysis of the dignitary interest occurs in the context that freedom from arbitrary adjudicative procedures is a substantive element of an individual's liberty. An additional presumption follows recognition of the dignitary interest. The individual always is presumed to have a due process interest in fair and unprejudiced decision-making and in being treated with respect and dignity. Regardless of the "interest" subjected to deprivatory action, the language used by the Ramirez court establishes an independent basis for due process protections triggered whenever the government becomes involved.

...
Recognition of the dignitary interest requires that application of procedural protections be determined in the context of the individual's due process interest in freedom from arbitrary adjudicative practices. The dignitary interest analysis does not start with an attempt to classify the "interest" as within the concepts of "liberty" or "property." Instead, constitutionally required procedural protections are assessed in the context of whatever governmental and private interests are at stake.

Incorporation of the dignitary interest into a due process analysis creates a substantial difference between the approaches under the California and United States Constitutions. The California approach presupposes that procedural due process safeguards will be operative when deprivatory governmental action is threatened, and focuses on the procedures that are necessary under the particular circumstances. Under the United States Constitution, an inquiry into the nature of the procedural protections that are required is irrelevant prior to a determination that procedural protections are in fact applicable.

The distinction between the two approaches is reflected in the considerations specified by the Ramirez court for use when identifying the dictates of due process. Contrary to the approach under the actions even where there is no other recognized private interest historically subject to procedural protections:

\[E]ven in cases in which the decision making procedure will not alter the outcome of governmental action, due process may nevertheless require that certain procedural protections be granted the individual in order to protect important dignitary values, or, in other words, 'to insure that the method of interaction itself is fair in terms of what are perceived as minimum standards of political accountability - of modes of interaction which express a collective judgment that human beings are important in their own right, and that they must be treated with understanding, respect, and even compassion'. Id. (emphasis added).

59. See id. at 263-64, 599 P.2d at 624, 158 Cal. Rptr. at 318.
60. See id.
61. See id.
62. See id.

63. See Roth, 408 U.S. at 571: . . . the requirements of procedural due process apply only to the deprivation of interests encompassed by the fourteenth amendment's protection of liberty and property . . . [A] weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must not look to the "weight" but to the nature of the interest at stake. We must look to see if the interest is within the fourteenth amendment's protection of liberty and property. Id. (emphasis added).

64. See Ramirez, 25 Cal. 3d at 269, 599 P.2d at 627-28, 158 Cal. Rptr. at 321. By identifying the need to establish the extent to which due process relief will be available, the court recognized that due process safeguards cannot be established with any substantial degree of rigidity. Id. See also Morrissey v. Brewer, 408 U.S. 471, 481 (1972), " . . . due process is flexible and calls for such procedural protections as the particular situation demands."; and Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 13 (1979):

The function of legal process, as that concept is embodied in the Constitution, and
United States Constitution, the individual's dignitary interest in being informed of the nature, grounds, and consequences of governmental actions is explicitly protected. Additionally, the government must recognize the individual's interest in responding to the governmental assertions before a responsible and impartial official.

Aside from the specific identification and inclusion of the dignitary interest, the considerations that comprise the "tests" for determining due process requirements under the California and United States Constitutions are identical. Separate and distinct recognition of the individual's dignitary interest, however, requires some procedural protections in every case. Only by balancing the individual's specific dignitary interest against the other articulated considerations can the proper determination of procedural requirements be made.

A determination of procedural due process requirements in a given situation is only necessary, however, when an individual is deprived

in the realm of factfinding, is to minimize the risk of erroneous decisions. Because of the broad spectrum of concerns to which the term must apply, flexibility is necessary to gear the process to the particular need; the quantum and quality of the process due in a particular situation depends upon the need to serve the purpose of minimizing the risk of error.

*Id.* Cf. Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970): "The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." *Id.*

65. See Ramirez, 25 Cal. 3d at 269, 599 P.2d at 627-28, 158 Cal. Rptr. at 321.

66. See *id.*


68. As opposed to the procedural concerns that the dignitary interest represents, the private and governmental interests are shaped by the circumstances of the particular situation. Alternatively, those circumstances will effect what procedures are necessary to fulfill the requirements of the dignitary interest, rather than shaping the interest itself. See Ramirez, 25 Cal. 3d at 269, 599 P.2d at 627-28, 158 Cal. Rptr. at 320.

69. See *id.* Subsequent California decisions have not been consistent in recognizing the impact of Ramirez or even the identification of the dignitary interest. The California Supreme Court has specifically utilized the Ramirez framework, and more particularly application of the dignitary interest, in reviewing the constitutional sufficiency of procedures used to administer existing statutory schemes. See In Re Winnetka, 28 Cal. 3d 587, 592-94, 620 P.2d 163, 168, 169 Cal. Rptr. 713, 717-18 (1980): Communications ... made without formal opportunity for response ... raise the danger that inaccuracies may affect the decision to rehear. The right to respond enables the minor to point up flaws in the prosecutor's arguments, emphasize favorable portions of the record, and suggest why discretion should be exercised in favor of leaving the referee's decision untouched. ... Recognition of the right promotes an appearance of fairness and supports the important dignitary values underlying due process.

*Id.* See also Van Atta v. Scott, 27 Cal. 3d 424, 434-46 613 P.2d 210, 214-22 166 Cal. Rptr. 149, 153-61 (1980). Some lower courts, in applying the Ramirez test, have also specifically utilized the dignitary interest as a specific factor. See Inmates of Sybil Brand Inst. v. County of L.A., 130 Cal. App. 3d 89, 106-09, 181 Cal. Rptr. 599, 608-09 (1982): "Implementation of the procedures ... will undoubtedly place some greater administrative burdens on respondent than they concede is the existing procedure. However, this factor does not outweigh the dignitary interest. ..." *Id.* See also In Re Albright, 129 Cal. App. 3d 504, 510-11, 181 Cal. Rptr. 84, 88 (1982). Other lower courts, while citing to Ramirez and purporting to apply its test, have failed to recognize the independent nature of the dignitary interest. See e.g., People v. Superior Court of Mono, 110 Cal. App. 3d 396, 401-03, 168 Cal. Rptr. 21, 24 (1980). Pur-
of "life, liberty or property."

70 Since an individual does not have a recognized "right" to governmental employment, procedural due process guarantees were at one time considered inapplicable.71 This position has been almost completely abandoned by the United States Supreme Court.72 The status of a probationary governmental employee, when compared with that of a permanent employee, is still not recognized as giving rise to the protections identified by the Ramirez court as necessary to protect an individual's dignitary interest.74 The following discussion will examine the status of probationary governmental employment, and through application of Ramirez, demonstrate how the nature of probationary status in California should change.

PROCEDURAL DUE PROCESS AND THE PROBATIONARY EMPLOYEE

Procedural due process guarantees are not an established factor in determining the way in which many governmental employment actions must be structured.75 Application of due process protections is neither uniform nor static.76 Differing standards govern the type of

thermore, there are decisions which, in discussing what type of procedures are required under the California Due Process Clauses, utilized the federal approach and disregarded the California approach articulated in Ramirez. See Boussard v. Regents of University of California, 131 Cal. App. 3d 636, 638-42, 184 Cal. Rptr. 460, 461-62 (1982).

70. U.S. ConSt. amend. V, XIV; CA. ConSt. art. I, §§7(a), 15.

71. "Governmental employment" as used in this comment refers to state, local, and municipal employees.

72. See Bailey v. Richardson, 182 F. 2d 46, 61 (D.C. Cir. 1950), aff'd by an equally divided court, 341 U.S. 118 (1951). The District Court specifically refuted the notion of governmental employment as "property," and could not perceive how employment could be construed as "liberty." Id. at 57. See also Barsky v. Board of Regents, 347 U.S. 442, 451 (1954); Adler v. Board of Education, 342 U.S. 485, 492 (1952). This historical determination found the status of "public employee" was one that had been granted by the government as a matter of "grace" and could therefore be withdrawn at the pleasure of the states absent statutory restrictions. Compare Arnett v. Kennedy, 416 U.S. 134, 149-56 (1974) (where the United States Supreme Court traced the history of federal employment from a system of patronage through enactment of subsequent civil service legislation) with Skelly v. State Personnel Board, 15 Cal. 3d 194, 539 P.2d 774, 124 Cal. Rptr. 14, 19-22 (1975) (where the California Supreme Court described the California system of civil service employment).

73. See Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972); see also Graham v. Richardson, 403 U.S. 365, 374 (1970). The United States Supreme Court rejected the concept that existence of constitutional rights turn upon whether the governmental benefit in question can be characterized as a "right" or "privilege." Rejection of this distinction stems from Goldberg v. Kelly, 397 U.S. 254, 262 (1970), where the Court declined to answer a constitutional challenge to the termination of governmental benefits by classifying the benefit as a "privilege" and not a "right." Recognizing the traditional common law concepts of property are inadequate to encompass the existing forms of "rights," the Court found that to view welfare entitlements as "property" rather than a "gratuity" was more realistic. Id.

74. See infra notes 78-84 and accompanying text.


procedures necessary, depending on the type of due process interest involved. In the context of governmental employment, the due process interest involved may be either a "liberty" or "property" interest."

A. The Property Interest

Compared with permanent employees, probationary employees78 historically have been afforded lesser protection both statutorily and under due process analysis.79 This difference in treatment results from a refusal by the courts to recognize in the probationer the due process property interest in continued employment that is vested in permanent employees.80 Unless the terms of employment specify otherwise, a probationary employee therefore is considered subject to removal without a hearing or judicially cognizable good cause.81

The judiciary is reluctant to support any inference that creates a probationer's property interest in continued employment.82 The govern-

77. See Roth, 408 U.S. at 572-79.
78. "Probation" is defined as the action of subjecting an individual to a period of testing so as to be able to ascertain the individual's fitness or lack of fitness for a particular job. See Webster's Third New International Dictionary, 1806 (1976). A probationary employee, as opposed to a temporary employee or employee at will, is generally governed by a civil service statutory scheme. See Bell v. Duffy, 111 Cal. App. 3d 643, 649-50, 168 Cal. Rptr. 753, 756-57 (1980). Under civil service statutory schemes, successful completion of the probationary period results in achieving permanent employment status. Id. While the focus of the comment is the procedural due process rights of probationary public employees, the principles are applicable to temporary employees, employees at will, and administrative level employees; accord Comment, Due Process for Public School Administrators? 9 Pac. L.J. 921 (1978):

While the need for agency discretion in maintaining promotional-level personnel in positions requiring group cooperation and concerted action [exists] . . . , there is no discernible state interest in denying the administrator a right to an orderly, fundamentally fair exercise of that discretion. On the other hand, the interests of the individual employee are clearly threatened, as a practical matter, by unexplained terminations of his . . . promotional level status. The legislative introduction of procedural safeguards . . . will foster both the interest of the individual in maintaining some control over his . . . professional life free from arbitrary state interference, and the interest of the state. . . . Id. at 947.

79. See Bogacki v. Board of Supervisors, 5 Cal. 3d 771, 489 P.2d 537, 97 Cal. Rptr. 657 (1971); see also Kestler v. City of Los Angeles, 81 Cal. App. 3d 62, 146 Cal. Rptr. 61 (1978). Essentially, a probationary employee is considered on "trial" for the duration of his probationary period. The trial period serves the purpose of disclosing an employee's attributes which are not ascertainable at the time of initial employment. "Observation of an employee during that period may disclose things about his character, personality, and efficiency not discoverable at the time of original employment." Id. at 65, 146 Cal. Rptr. at 63. These attributes are distinguishable from objectively provable acts of misconduct, and are considered to require expert evaluation by the employee's supervisors. As a result, the essentials of probationary evaluation, the right and power to weigh not only proven acts of misconduct but more subtle matters of character and judgment, and the discretion to act on presumed expertise in deciding whether the probationary employee should obtain the status of permanent employee, are vested in the administrative official. Id.
80. See Roth, 408 U.S. at 575-80.
81. See id.
82. See id.
ment, as an employer, must have broad discretion in determining which employees will be retained.\textsuperscript{83} Citing considerations of "comity" and "administrative efficiency," courts have refrained from attempting to substitute their judgment for that of the responsible governmental official.\textsuperscript{84} While the fourteenth amendment imposes no limitations on dismissals of probationers without cause under a "property" interest analysis, the California due process clause, as interpreted in Ramirez, requires a different method of analysis.

1. The Probationer, Property, and Dignity

Under the California Constitution, when a person is deprived of

\textsuperscript{83} See id.

\textsuperscript{84} See Rosenfield v. Malcolm, 65 Cal. 559, 562-63, 421 P.2d 697, 699, 55 Cal. Rptr. 505, 507 (1967); see also Kestler v. City of Los Angeles, 81 Cal. App. 3d 62, 146 Cal. Rptr. 61 (1978). The courts have acknowledged, in the area of the probationary employee's competence, the employer's use of "expert evaluation." \textit{id.} at 66, 146 Cal. Rptr. at 63. \textit{Accord} Bojacki v. Board of Supervisors, 5 Cal. 3d 771, 489 P.2d 537, 97 Cal. Rptr. 657 (1971). The court indicated the employer's power to remove for cause satisfactory to himself would become chimerical if he would be required to accept as an employee one whom he personally considered incompetent solely because the trial court disagreed with him. \textit{id.} at 782 n.12, 489 P.2d at 545, n.12, 97 Cal. Rptr. at 665 n.12. Absence of a protectable property interest does not mean the requirements and protections of due process are inapplicable. Even though the courts have allowed the employer to take disciplinary action without requiring judicially cognizable good cause, the employer is still precluded from acting on the "wrong" cause. \textit{See generally} Healdsburg P.O.A. v. City of Healdsburg, 57 Cal. App. 3d 444, 129, Cal. Rptr. 216 (1976); Bekiaris v. Board of Education, 6 Cal. 3d 575, 493 P.2d 480, 100 Cal. Rptr. 16 (1972). An employee may not be discharged for validly exercising organizational or representational rights, whether stemming from a statute affording public employees the right to join labor organizations, or arising from the first and fourteenth amendments. \textit{Compare} Perry v. Sindermann, 408 U.S. 593, 597-98 (1972) \textit{with} Rosenfield v. Malcolm, 65 Cal. 2d at 562, 421 P.2d at 699, 55 Cal. Rptr. at 507. The employer is precluded from basing the employment action on an employee's political activities, or attitude toward a political movement, unless the activities impermissibly interfere with the employee's work. \textit{Cf.} Hollon v. Pierce, 257 Cal. App. 468, 64 Cal. Rptr. 808 (1967). An investigation of competence will not be tolerated when it cloaks a prohibited inquiry into unorthodox beliefs or an act of religious bias. Alternatively, a non-discriminatory regulation of conduct for a proper public objective not forbidden by the guarantee of free belief even though the regulation indirectly affects religious activities. \textit{id.} at 477, 64 Cal. Rptr. at 814. These limitations are some evidence of the reluctance of the court to vest total and unsupervised discretion in the employer. These constraints are viewed narrowly to arise when constitutional, or specific statutory rights, are involved. Various commentators, however, have asserted a less dramatic rationale for affording nonpermanent employees greater protections.

Justice Marshall, dissenting in Roth, expressed his view that every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying employment. This is the "property" right that the Justice believes to be protected by the fourteenth amendment. \textit{See Roth}, 408 U.S. at 588.

In Kestler, Judge Jefferson vigorously dissented from the majority opinion. While conceding that probationaries do not have the same rights as permanent employees, he stressed that this does not mean the probationary employee has no right against an arbitrary, capricious, and unreasonable ground for termination. The Judge, by requiring termination to occur in good faith with an absence of purely arbitrary and capricious action, and after balancing the probationary employee's sterling record against one act of negligence occurring off duty, would have held the termination was an abuse of the employer's discretion. \textit{See Kestler}, 81 Cal. App. 3d at 67-69, 146 Cal. Rptr. at 64-65.
a statutorily conferred benefit, due process analysis starts with an
assessment of the procedural protections required in light of the private
and governmental interests at stake.\textsuperscript{85} All employees, permanent and
probationary, have a "private" interest in continued employment.\textsuperscript{86}
The probationer's interest in continued employment, however, is not
viewed as a due process "property" interest.\textsuperscript{87} Nevertheless, the pro-
bationer is not completely without due process protections when
deprived of governmental employment. When the probationer is depriv-
ed of his employment position, his dignitary interest becomes
involved.\textsuperscript{88} Separate from the probationer's interest in the fact of
employment, is his dignitary interest in freedom from arbitrary ad-
judicative procedures, fair and unprejudiced decision-making, and
in being treated with respect and dignity.\textsuperscript{89}

When deprivation of employment occurs, failure to require a state-
ment establishing judicially cognizable good cause\textsuperscript{90} or a meaningful
hearing is the essence of arbitrary adjudicative practice.\textsuperscript{91} The lack
of procedural requirements before termination also tends to erode the
settled proposition that a person cannot be removed from public
employment for exercising constitutional rights unless the government
can point to a compelling reason for termination.\textsuperscript{92} To protect the

85. See Ramirez, 25 Cal. 3d at 263-64, 599 P.2d at 624, 158 Cal. Rptr. at 318.
86. See Roth, 408 U.S. at 577-78.
87. See id.
88. See id.
89. See id.
90. See id. at 276, 599 P.2d at 632, 158 Cal. Rptr. at 326. (citing Rabin, Job Security
and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement, 44
U.Chi. L. Rev. 60, 77-78 (1976):
Fundamental to the concept of procedural due process is the right to reasoned ex-
planation of governmental conduct that is contrary to the expectations the govern-
ment has created by conferring a special status upon the individual. The very essence
of arbitrariness is to have one's status redefined by the state without an adequate
explanation of its reasons for doing so. . . . [T]he respect for individual autonomy
that is at the foundation of procedural due process imposes a distinct obligation
upon the government to explain fully its adverse status decision." Id.
91. While the opportunity for oral participation may not be required in every hearing,
. . . oral participation may be useful in resolving conflicting information and in the
introduction of subjective factors into the decision making process that might other-
wise not be considered; it thereby may often tend to enhance the accuracy and reliability
of the . . . decision. And even in cases in which such participation is unlikely to
affect the outcome of the decision, it nevertheless promotes imporant due process
dignitary values that underlie due process. See Ramirez, 25 Cal. 3d at 275, 599 P.2d
at 631-32, 158 Cal. Rptr. at 325 (emphasis added).
92. By allowing the employer the unfettered discretion to dismiss an employee, the possibility
that such discretion will be utilized to cloak a discharge based on unconstitutional grounds
becomes apparent. Additionally, without a requirement on the employer to furnish reasons
for termination, the employee faces an intolerable task to establish what actually motivated
the employer who may terminate for no reason at all. See Bogacki, 5 Cal. 3d at 798, 489
P.2d at 556, 97 Cal. Rptr. at 676. (Tobriner, J., dissenting).
probationary employee’s dignitary interest, current doctrine should be modified to acknowledge and implement the requirements of a hearing and a statement of the reasons for termination.

The full implications of protecting a probationary employee’s due process dignitary interest may be far greater than the mere imposition of additional procedural safeguards. The employer is required to formulate and articulate with some degree of specificity the grounds for termination. The probationer becomes justified in believing his employment will continue absent the existence of specific grounds for termination. Over a period of time, reasons underlying the prior terminations will become implied terms of employment. The employer may not substantially deviate from his previously articulated reasons for termination without “breaching” the implied terms of employment. Since the probationer will have a legitimate expectation that his position will continue in the absence of the established reasons for termination, a due process property interest in continued employment is created.

Protection of a probationary employee’s dignitary interest requires substantially similar procedures to those necessary for the protection of a permanent employee’s due process property interest. As opposed to situations involving a property interest, however, the focus of the “principle that freedom from arbitrary adjudicative procedures is a substantive element of one’s liberty” is solely a determination of procedural protections. Only after a property interest has been created by complying with the requirements of the dignitary interest is the outcome, or substance, of the employer’s decision affected. Recognizing a property interest does not, however, entitle the employee to continued employment.

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93. See Ramirez, 25 Cal. 3d at 269, 599 P.2d at 627-28, 158 Cal. Rptr. at 321.
94. See Perry, 408 U.S. at 600-02.
95. See id.
96. See id.
97. See id.
98. See Ramirez, 25 Cal. 3d at 268, 599 P.2d at 627, 158 Cal. Rptr. at 320.
99. See Van Atta v. Scott, 27 Cal. 3d at 434 n.7, 613 P.2d at 214 n.7, 166 Cal. Rptr. at 153 n.7.
100. See Perry, 408 U.S. at 603.
101. As previously indicated, due process analysis under the California Constitution requires an assessment in light of the governmental as well as private interests at stake. See Ramirez, 25 Cal. 3d at 268, 599 P.2d at 627, 158 Cal. Rptr. at 320. The governmental interest encompasses the need to regulate the work force as well as fiscal and administrative burdens that additional or substitute requirements entail. See Rosenfield v. Malcolm, 65 Cal. 2d 559, 562-63, 421 P.2d 697, 699, 55 Cal. Rptr. 505, 507 (1967); Mathews v. Eldridge, 424 U.S. 319, 334-35 (1975). For the rationale underlying the nature of probationary status to be effectuated, the employer’s broad exercise of discretionary authority must be recognized. See supra note 79. While the type of evaluation necessary may not be so readily adaptable to procedural due
grounds for termination merely allows the probationary employee some input into the ultimate determination of his employment status. Furthermore, creating a property interest in continued employment while the employee is a probationer does not nullify the difference between “permanent” and “probationary” status. The reasons for termination necessary to comport with the standard of judicially cognizable good cause do not have to be identical for both classifications. The historical “bright line” separating permanent and probationary employees is substantially blurred, however, after application of the requirements of the dignitary interest.

The change in the historical meaning of probationary status arises from requirements of the dignitary interest as found in the California Constitution. Generally, fulfillment of the constitutional requirements involves notice of the employee’s actions and underlying reasons for termination, as well as some type of a hearing. Express enactments within a legislative scheme can satisfy the purposes behind acknowledgement of the dignitary interest by the Ramirez court. When an express procedural provision does not exist, the requirements underlying the dignitary interest must be incorporated into the legislative scheme by implication.

2. Necessity of a Dignitary Interest When Statutory Protections Exist

Not all probationary governmental employees are subject to dismissal without the procedural protections of a hearing or the requirement of judicially cognizable good cause. Some statutory schemes require process safeguards as decisions that turn on specific factual questions, whenever an employee is discharged there should be some reason for the decision. Since it is not procedurally burdensome to give reasons when reasons exist, a requirement that the reason be communicated to the person most directly affected by the governmental decision logically follows. See Roth, 408 U.S. at 591-92. (Marshall, J., dissenting). Even though the requirement of specifying reasons for termination or conducting a hearing may not in itself alter the probationer’s traditional status, and therefore the outcome of the governmental action, compliance with these general procedural requirements will at least provide protection against arbitrary action. Id. 102. See Perry, 408 U.S. at 602-03.

103. The key to the dignitary interest is to protect the individual against unexplained governmental action. See supra notes 52-58 and accompanying text. In determining whether the reasons for termination will constitute judicially cognizable good cause, the purpose of the probationary period should not be abandoned. See supra notes 79-81 and accompanying text. Procedural requirements entail utilization of limited governmental resources, and at some point the benefit to the individual arising from a higher standard or additional safeguards is outweighed by the cost of providing such protection. See Friendly, Some Kind of Hearing, 123 U. PA. L. REV. 1267, 1276-77 (1975).

104. See Ramirez, 25 Cal. 3d at 268, 599 P.2d at 627-28, 158 Cal. Rptr. at 321.

105. See infra notes 106-08 and accompanying text.
that extensive and specific procedures be utilized.\textsuperscript{106} In other job classifications, the probationary employee may request an investigation of the reasons underlying termination\textsuperscript{107} or may have a right to an "administrative appeal" when punitive action is taken by the public agency.\textsuperscript{108} If the statutory scheme imposes specific requirements before termination may occur, such as defining the grounds upon which the employer's decision must be based, a "legitimate claim of entitlement" to the government position has been created.\textsuperscript{109} Therefore, the probationary employee's interest can be viewed as a "property" interest substantially similar to those attached to permanent employees, and therefore, requiring the procedural protections of the fourteenth amendment.

Enactment of statutory protections does not render separate acknowledgement of the individual's dignitary interest meaningless. The dignitary interest is not a product of statutory construction.\textsuperscript{110} The probationary employee's interest in being treated with respect and dignity arises under the California Constitution.\textsuperscript{111} The rationale behind special identification of this constitutionally based interest is derived from the major flaw of the approach under the fourteenth amendment.\textsuperscript{112}

The approach under the fourteenth amendment allows the state to decide whether procedural due process is applicable any time the "interest" is not constitutionally created.\textsuperscript{113} The state may render the "interest" unprotected through complete and uncontrolled delegation of administration of the interest to a governmental official.\textsuperscript{114} The extent to which procedures are to be followed when the state deals with its citizens in effect, is free from constitutional restrictions.\textsuperscript{115}

The ability of the state to choose to deal with its citizens without

\textsuperscript{106} See CAL. EDUC. CODE § 44948. "Governing boards of school districts shall dismiss probationary employees during the school year for cause only, as in the case of permanent employees." Id. (emphasis added). See also §44949. This section requires, in part, the board to give the probationary employee notice that his services will not be required for the ensuing year. This notice must be tendered by a certain date and the reasons contained therein must remain confidential unless a hearing is requested by the probationer. Id. §44949a. If a hearing is requested various procedures are specified including a decision which contains a determination of the sufficiency of the cause for termination. Id. §44949c. Failure by the board to comply with the provisions contained within this section may result in the employee's reemployment. Id.

\textsuperscript{107} See CAL. GOV'T. CODE §§19173, 19175.

\textsuperscript{108} See CAL. GOV'T. CODE §3304(b).

\textsuperscript{109} See Roth, 408 U.S. at 576-77.

\textsuperscript{110} See Ramirez, 25 Cal. 3d at 268, 599 P.2d at 627, 158 Cal. Rptr. at 320.

\textsuperscript{111} See id. at 268, 599 P.2d at 627, 158 Cal. Rptr. at 320.

\textsuperscript{112} See id. at 267, 599 P.2d at 627, 158 Cal. Rptr. at 320.

\textsuperscript{113} See id.

\textsuperscript{114} See id.

\textsuperscript{115} See id.
regard to due process standards is unacceptable to the California Supreme Court. The government, as an employer, must modify its procedures to comply with the due process guidelines set forth in Ramirez. When the government employer strictly adheres to statutory procedures, the probationary employee's due process dignitary interest may suffer.

The potential meaninglessness of the statutory "protections," rendered insignificant through legislative drafting or judicial construction, is typified by the procedures afforded probationary employees under the Public Safety Officers Procedural Bill of Rights Act. This Act simply provides that "[n]o punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal." Under the statute as defined, regularly employed probationary police officers are entitled to the appeal process. The Act, however, does not indicate what specific procedures are required.

As the Act is interpreted, the probationary employee may establish a formal record of the circumstances surrounding termination. Since the Act is not construed as preventing the governmental entity from terminating probationary employees without cause, the "appeal" to which the probationer is entitled is the antithesis of what may be considered a meaningful procedure. As the probationary employee can be terminated at will, judicial review is considered superfluous. Accordingly, whether evidence exists to support the employer's decision to terminate is immaterial. By declining to impose specific requirements within the statutory framework, the California Legislature

116. See id.
117. See CAL. GOV'T. CODE §§3300-3311.
118. See CAL. GOV'T. CODE § 3304(b). "Punitive action" is defined as "... any action which may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment." Id. §3303. Additionally, use of the phrase "for purposes of punishment" is read in the disjunctive to modify only the term "transfer." As such, any of the aforementioned personnel actions are considered per se disciplinary, punitive in nature so as to give rise to the requirements of §3304(b). White v. County of Sacramento, 31 Cal. 3d 676, 680-83, 646 P.2d 191, 193-95, 183 Cal. Rptr. 520, 522-24 (1982).
119. See Barnes v. Personnel Department, 87 Cal. App. 3d 502, 504, 151 Cal. Rptr. 94, 95-96 (1978); see also Allen v. City of Napa, No. 44228 Napa County Superior Court (1982). Not all courts agree. CAL. GOV'T. CODE §3304(b) (requires some type of hearing in all cases). In Allen, the probationary police officer was not entitled to an administrative appeal hearing since the employer asserted termination was the result of failure to complete the probationary period. Id.
120. See Barnes, 87 Cal. App. 3d at 505-06, 151 Cal. Rptr. at 96.
121. See id.
122. See id. at 505, 151 Cal. Rptr. at 96.
123. See id.
has delegated to the employer, through judicial construction of the Act, the ability to preclude due process protections.

The Act may be viewed as protective of the probationary employee’s dignitary interest in being afforded the opportunity to participate in the governmental decision-making process. Failure to require the employer to inform the probationary employee of the nature and grounds for termination renders participation meaningless, however, and the Act constitutionally insufficient.\textsuperscript{124} Under \textit{Ramirez},

\ldots the extent to which due process relief will be available depends on a careful and clearly articulated balancing of the interests at stake. 

\ldots In some instances this balancing may counsel formal hearing procedures that include the rights of confrontation and cross-examination, as well as a limited right to an attorney. \ldots In others, due process may require only that the administrative agency comply with the statutory limitations on its authority.\textsuperscript{125}

Regardless of the procedures the Legislature considers necessary, every statutory scheme must be analyzed under \textit{Ramirez} for constitutional sufficiency. Only through explicit recognition of the probationer’s dignitary interest can due process values be protected when the state decides whether and to what extent procedures are to be followed when probationary employees are terminated.\textsuperscript{126}

The problems associated with probationary employment and the property interest, such as the ability of the state to nullify due process protections, do not always arise when the probationary employee is terminated. The probationary employee is not limited to asserting an impact upon a due process property interest.\textsuperscript{127} Apart from the effect that recognition of the California dignitary interest has upon procedural requirements, a probationary employee may still demand due process protections because of his fourteenth amendment liberty interests.\textsuperscript{128} Consistent with the current approach to the property interest in continued employment, however, liberty interests arising under the fourteenth amendment have serious limitations.\textsuperscript{129}

\begin{itemize}
\item 124. The possibility exists that informing the probationary employee of the nature and grounds for the adverse employment action is a prerequisite to make the hearing itself constitutionally sufficient. See \textit{supra} notes 54-69 and accompanying text. Without knowledge of why the employer acted, the probationer has an intolerable burden to surmount in his attempt to present a meaningful explanation before the responsible government official. \textit{Cf.} \textit{Kuhn v. C.A.B.}, 183 F.2d 839, 841-43 (D.C. Cir. 1950).
\item 125. \textit{See Ramirez}, 25 Cal. 3d at 269, 599 P.2d at 628, 158 Cal. Rptr. at 321.
\item 126. \textit{See id.}
\item 127. \textit{See infra} notes 130-92 and accompanying text.
\item 128. \textit{See infra} notes 130-52 and accompanying text.
\item 129. \textit{See infra} notes 153-92 and accompanying text.
\end{itemize}
B.  The Liberty Interest

Job termination may impact upon more than an employee's due process property interests. Specific action by the government has been recognized as implicating an employee's fourteenth amendment liberty interests. In the context of employment, suppression of liberty interests may occur when termination is based on charges of misconduct that stigmatize the employee's reputation or seriously impair his opportunity to earn a living. In contrast, with the due process property interest in continued employment, the source of "employment liberty interests" arises by implication from the United States Constitution. The extent to which liberty interests are recognized in the context of employment is helpful to a probationary employee seeking redress from arbitrary governmental action. Without the additional recognition of the probationer's dignitary interest, however, the benefits arising from the current construction of fourteenth amendment liberty are limited.

1. Stigmatization

Stigmatization occurs when the actions of the government detract from an individual's good name, reputation, honor, or integrity. No constitutional basis exists, however, for converting every defamatory statement by a governmental official into a deprivation of due process liberty. Even though governmental defamation may have a drastic effect, freedom from stigmatization of reputation alone is not recognized as within due process liberty. Along with an individual's reputation, some more tangible "interests" must be effected. When stigmatization occurs in the course of employment termination, even though the individual is a probationary employee, a deprivation of liberty may result. The employment action does not have to be as onerous as termination to constitute a more "tangible interest."
Any alteration of the employee's employment status is sufficient when combined with the injury resulting from stigmatization, whether alteration takes the form of termination or merely transfer of assignment.\(^{139}\)

Serious limitations exist, however, on the availability and effectiveness of asserting that the governmental action has had an adverse impact on the employee's liberty interest through stigmatization of reputation. Primarily, before due process affords the employee an opportunity to refute the employer's stigmatizing charge, the employee must assert some factual dispute relating to the circumstances giving rise to the charge.\(^{140}\) The rationale underlying the requirement of a factual dispute is to afford the procedures some meaning other than the satisfaction of mere formalities.\(^{141}\) Predicating due process protections on the requirement of a factual dispute, however, underscores the limited effectiveness of an assertion of stigmatization.

A finding of factual dispute will prevent the courts from rendering due process protections inapplicable.\(^{142}\) Even when the probationary employee has the ability to challenge the substantive truth of the material in question, the procedural protections exist solely to provide the employee with a chance to clear his name.\(^{143}\) A subsequent determination of the adequacy, or even the existence of the employer's reasons for termination, is not considered to raise constitutional concerns.\(^{144}\) Since the probationary employee is viewed as having no property interest in continued employment, the purpose of judicial review is solely to ascertain whether false and defamatory impressions relating to the employment action were created.\(^{145}\)

When the adverse employment action has occurred before the probationary employee has had an opportunity to refute the properly

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139. See id. at 708-09; see also Stewart v. Pearce, 484 F.2d 1031 (1973). In Stewart, an order to report for psychiatric examination and subsequent transfer of assignment implied there existed both reasonable grounds for the order as well as mental unfitness for the job. The implication arising from the order created a significant stigma or official branding to be invalid absent the procedural protections of notice of the action and reasons therefore, as well as a proper hearing. Id. at 1034.

140. See Codd v. Velger, 429 U.S. 624, 627 (1977). In Codd, the employee failed to affirmatively assert that the report on which the employment action was based was substantially false. Without this allegation the Court, in a per curiam decision, found it unnecessary to consider whether the report was of a stigmatizing nature, and if so whether the circumstances of dissemination implicated liberty interests. Id. at 626. Compare Lubey v. City and County of San Francisco, 98 Cal. App. 3d 340, 344, 159 Cal. Rptr. 440, 442-43 (1979) (hearing required where charges denied with Kestler v. City of Los Angeles, 81 Cal. App. 3d 62, 66, 146 Cal. Rptr. 61, 63 (1978). "If he does not challenge the substantial truth of the material in questions, no hearing. . . ." Id.

141. See supra note 139 and accompanying text.

142. See Codd, 429 U.S. at 627-29.

143. See id.

144. See Lubey, 98 Cal. App. 3d at 349, 159 Cal. Rptr. at 445-46.

145. See id.
disputed charges, the employee must be reinstated to his previous position.\textsuperscript{146} To further protect the employee’s abused due process rights, evaluations during the remaining probationary period must be made without consideration of the proceedings or related findings which preceded the prior employment action.\textsuperscript{147}

As a remedy, the right to reinstatement is of qualified benefit to the probationary employee. After reinstatement, the employer is in no way precluded from “properly” inquiring into the employee’s qualifications and taking subsequent action to terminate the position.\textsuperscript{148}

Since the employer has the ability to act upon “… subtle matters of character and judgment …,”\textsuperscript{149} subsequent disciplinary action may occur even though based on improper grounds. Because termination is not recognized as impacting upon a probationary employee’s property interest, as long as the employer acts in a manner to preclude public disclosure of the reasons for discharge, the probationer’s due process challenge will be rejected.\textsuperscript{150}

The limitations of due process liberty under the fourteenth amendment as applied in the context of governmental employment, have been consistently applied to California governmental employees.\textsuperscript{151} To effectuate the dignitary interest values, the probationary employee’s interest in being treated with respect and dignity must be applied to termination based on charges of misconduct that operate to stigmatize the probationer’s reputation.\textsuperscript{152} When situations involving stigmatization are analyzed under the dignitary interest rationale, the current due process requirements are modified not only in the manner of application, but also in the breadth of application.

2. Stigmatization and the Dignitary Interest

As the United States Supreme Court has stated, mere stigmatization of an individual, whether by branding him disloyal or otherwise, is insufficient to invoke the procedural guarantees of due process absent a more tangible interest such as loss of governmental employment.\textsuperscript{153} To constitute a more “tangible” interest, apart from those arising from the Bill of Rights or other constitutional sources, the interest must have been initially recognized and protected by state
Once created, alteration or extinguishment of the interest is sufficient to invoke the procedural guarantees contained in the Due Process Clause of the United States Constitution. Under the rationale of the United States Supreme Court, due process protections are not required each time the state in its capacity as an employer might be considered responsible for a statement defaming a probationary employee who continued to remain employed. When analyzing under Ramirez, the result changes.

Under Ramirez, the probationary employee's dignitary interest in fair and unprejudiced decision-making is operative anytime the employee is subjected to deprivatory governmental action. Since charges of misconduct are generally accumulated by the employer, protection of the probationary employee's dignitary interest should not be predicated on the formal instigation of termination. Not all charges of misconduct are subject to immediate disciplinary action or are objectively provable. Complaints against the probationary employee, whether or not substantiated, may be registered over a period of time. All charges are entered into "evidence" in the employer's evaluation during the probationary employee's "trial" period. Absent timely notice of the charges as they occur, the probationary employee is unduly hindered in any attempt to establish a rebuttal based on information obtainable when the alleged incidents were fresh in the minds of the participants or spectators. The probationary employee should be informed of all charges and complaints when made or included in his personnel file. Since the employer needs only to notify the probationer of the addition to his personnel file and allow the probationer access to the file, the burden on the employer would be negligible.

Informing the probationary employee of the charges as they occur

154. See id. at 710.
155. See id.
156. See id.
157. See supra notes 50-61 and accompanying text.
158. See supra note 79 and accompanying text. This is merely a part of the employer's considered right and power to weigh not only proven acts of misconduct, but also those subtle matters involving more than objective provable acts. Id.
159. See Lilly, An Introduction To The Law of Evidence 79-83, 231-34 (1978). The time between filing of a complaint and a hearing on the subsequent employment action may be extensive. When a witness evidences an inability to remember, his memory may be revived through the production of a document intended to induce recollection. Alternatively, when the witness's memory cannot be revived satisfactorily by an earlier writing, authorized or previously verified by the witness, the writing may in many cases be offered in lieu of his present testimony. The ability of the probationer to utilize either of the aforementioned evidentiary procedures is, however, predicated on the witness's ability to testify that he made or adopted the document when the matter was fresh in his memory. Id.
and affording the probationer a chance to attach an opposing or clarifying statement, will effectuate the dignitary interest in California.\textsuperscript{160} The probationary employee’s ability to contest the allegations not only will prevent arbitrary governmental action, but will secure the probationer’s sense of meaningful participation. Since the goals of the dignitary interest constitute the “tangible” interest required by the United States Supreme Court,\textsuperscript{161} both federal and California due process protections are triggered whenever stigmatizing charges are leveled by the governmental employer.\textsuperscript{162} Apart from the question of whether stigmatizing charges alone are sufficient to implicate due process protections, however, the courts have required an inquiry into the truth of the charges.\textsuperscript{163} Without a determination that the charges are false as well as defamatory, the question of the procedures required does not arise.\textsuperscript{164}

3. Requirement of Refutation

Originally, mere instigation of charges against an employee that might damage the employee’s standing and associations in the community, when coupled with adverse employment action, would require imposition of the essential elements of due process protections: notice and an opportunity to be heard.\textsuperscript{165} The United States Supreme court has departed substantially from this original position.\textsuperscript{166} In \textit{Codd v. Velger},\textsuperscript{167} due process was construed to require a hearing only if the impression created by the employer in connection with the probationer’s termination was false as well as defamatory.\textsuperscript{168} California courts consistently have followed the standard articulated in \textit{Codd}.\textsuperscript{169}

The underlying rationale for affording a probationary employee an opportunity to refute the charges of misconduct is to provide the employee with a chance to clear his name.\textsuperscript{170} The courts have held that the only way the desired result can be achieved is by challenging the

\textsuperscript{160} See supra notes 50-61 and accompanying text.
\textsuperscript{161} See supra notes 133-93 and accompanying text.
\textsuperscript{162} See id.
\textsuperscript{163} See infra notes 167-69 and accompanying text.
\textsuperscript{164} Id.
\textsuperscript{165} See Roth, 408 U.S. at 573. Whether the charges involve allegations such as dishonesty or immorality is inconsequential as long as the individual’s good name, reputation, honor or integrity is at stake because of the actions of the government. \textit{Id.} In \textit{Roth}, the court found no suggestion of such an occurrence. \textit{Id.} at 573.
\textsuperscript{167} See id.
\textsuperscript{168} See id. at 627-28.
\textsuperscript{169} See Lubey, 98 Cal. App. 3d at 346, 159 Cal. Rptr. at 443-44.
\textsuperscript{170} See Roth, 408 U.S. at 573 n.12.
truth of the charges. The current judicial position fails to acknowledge that termination is part of the stigmatization against which the employee is entitled to defend. Not only can the release of unfavorable, although perhaps true, information injure the employee's reputation, but the determination that the employee is unfit also can create a significant stigmatization. The employer can still terminate the employee if subsequently determined to be "unfit." By allowing the probationary employee an opportunity to tender an explanation or contest the adequacy of the grounds for termination, however, the employee's personnel record can reflect the viewpoints of both the employee and the employer. Since a more complete record will allow subsequent employers to examine a record balanced between employer and probationer, a stigmatization resulting from termination could be substantially reduced.

Further considerations, apart from the impact upon the employee's reputation, are involved when the employee is refused a chance to explain the circumstances surrounding an otherwise undisputed incident. The probationary employee is precluded from establishing for the record matters which the employer may take into consideration when exercising the discretion to terminate. Alteration of the decision-making procedures may not alter the outcome of the employer's decision. The form of the final decision, however, is not dispositive of the need to allow input by the probationer. Whether the goal of allowing the employee to participate is to reduce stigmatization or to show

171. See supra note 140 and accompanying text.
172. See id. at 587-90 (Marshall, J., dissenting).
173. See Codd, 429 U.S. at 632-34. (Stevens, J., dissenting): The discharge itself is part of the deprivation of liberty against which the employee is entitled to defend. Release of unfavorable information can damage an employee's reputation and employment prospects, but far greater injury is caused by an official determination, based on such information that the employee is unfit for public employment.

Id. at 633 (emphasis added). But see Kestler v, 81 Cal. App. 3d at 66, 146 Cal. Rptr. at 63: . . . the hearing required where a nontenured employee has been stigmatized in the course of a decision to terminate his employment is solely to provide the person an opportunity to clear his name. If he does not challenge the substantial truth of the material in question, no hearing would afford a promise of achieving that result for him. [If the employer has not challenged the truth of the charge] . . . that fact would follow him no matter how many hearings he was afforded.

Id.
174. See Lubey, 98 Cal. App. 3d at 349, 159 Cal. Rptr. at 445.
175. See infra notes 176-80 and accompanying text.
176. See Codd, 429 U.S. at 632-33 (Stevens, J., dissenting).
177. See Ramirez, 25 Cal. 3d at 275, 599 P.2d at 631, 158 Cal. Rptr. at 325. The Ramirez court found of particular importance the individual's interest in ensuring that the government official did not base his decision on erroneous or irrelevant facts. Id. Accord Kestler 81 Cal. App. 3d at 67-69, 146 Cal. Rptr. at 64-65. (Jefferson, J., dissenting). (Failure to take mitigating factors into consideration, whether through refusal or advertence, is an arbitrary and capricious method of termination.) Id.
that the charges do not warrant discharge, the method of interaction must take into consideration the need to engender governmental accountability and the importance of recognizing the needs of the individual.\textsuperscript{178} Only by allowing the probationary employee to be a participant along with the governmental official can these values be significantly effectuated.\textsuperscript{179} Failure to afford the probationary employee a hearing, whether or not the charges are disputed or subsequent termination is justified, is a deprivation of procedural due process rights. The procedures, separate and distinct from the underlying substantive interest in freedom from stigmatization of continued employment, are themselves a constitutional right which the courts must protect.\textsuperscript{180}

Besides the judicially imposed requirement that the employee be allowed to refute the charges, an assertion of due process deprivation will be rejected when no public disclosure is made of the reasons for termination.\textsuperscript{181} The “public disclosure” rule not only places a premium on governmental secrecy, but also fails to recognize the practical difficulties that the government faces when attempting to foreclose dissemination.

4. Disgrace Through Dissemination

In \textit{Lubey v. City and County of San Francisco},\textsuperscript{182} various charges of misconduct were tendered by citizens against two probationary employees.\textsuperscript{183} The employer investigated the charges and terminated the employees.\textsuperscript{184} The reasons for termination were communicated to the Civil Service Commission.\textsuperscript{185} While the confidential nature of the probationary employees' personnel files had been retained, the California Supreme Court held that to assume overall confidentiality had

\textsuperscript{178} See Ramirez, 25 Cal. 3d at 267-68, 599 P.2d at 627, 158 Cal. Rptr. at 320.

\textsuperscript{179} See id. But cf. supra notes 93-104 and accompanying text. For the possible effect on probationary employee's "property" interest, see also \textit{Codd}, 429 U.S. at 632-36 (Stevens, J., dissenting): "[s]ince allowing the employee to keep his job would eliminate, or at least lessen, the loss of liberty, due process requires that the hearing include the issue whether the facts warrant discharge." \textit{Id.} at 634.

\textsuperscript{180} Specific identification of the individual's dignitary interest in making a presentation before a responsible government official is required when determining what procedures are constitutionally required. See supra note 66 and accompanying text.

\textsuperscript{181} See \textit{Lubey}, 98 Cal. App. 3d at 349, 159 Cal. Rptr. at 445; see also \textit{Bishop v. Wood}, 426 U.S. 341 (1973). The reasons forming the basis for termination in \textit{Bishop} were orally communicated in private to the employee. Since the communication was not made public, the Court found the reasons could not properly form the basis for a claim of impairment of reputation. See \textit{id.} at 348.


\textsuperscript{183} See \textit{id.} at 347, 159 Cal. Rptr. at 444.

\textsuperscript{184} See \textit{id.}

\textsuperscript{185} See \textit{id.}
been retained would be unrealistic. The Lubey decision highlights the practical difficulties involved in preventing dissemination, regardless of the employer's good faith attempts to avoid public disclosure. The decision also can be interpreted as encouraging secrecy. The less an employer investigates, creates documentation, or informs the employee of the reasons for his actions, the greater the likelihood that dissemination will decrease.

The employer possesses an acknowledged ability to act on his expertise in deciding whether the probationary employee is competent and should attain permanent status. An established element of the employer's ability to terminate is his authority to so do without justification. To preclude dissemination, the employer need only discharge the employee during probationary status on the ground of "failure to complete the probationary period." In the discharged employee's future employment applications, however, inquiry will be made into prior employment experience and the reasons for termination. At that point, the withholding of the reasons behind the employee's termination is of little help to the discharged employee. Refusal to reveal the reasons behind termination carries the negative connotation of specific, although unspecified grounds, for finding the employee unsuitable for continued employment. In light of the prior employer's silence in connection with termination, the employee's subsequent explanations are rendered meaningless.

Allowing the probationary employee to include explanatory material in his personnel file when he is informed of the specific reasons for termination reduces the burden on the government to maintain absolute secrecy regarding employment actions. While the employer may not unreasonably disseminate the reasons for termination when no legitimate governmental objective is involved, allowing the employee to tender some explanation can prevent the prejudicial effect of inadvertent disclosures made in the process of termination. Addition-
ally, by removing the incentive of the government to act with secrecy, the
probationer's dignitary interest in being treated as a fully participating
and responsible member of society can be achieved.

**Conclusion**

The extent to which probationary employees enjoy due process rights
is considered a settled issue. While commentators have periodically
questioned the difference in the due process analysis between proba-
tionary and permanent employees, the standard established under the
fourteenth amendment and adopted by the California courts has not
been disturbed. This comment has re-examined the appropriateness
of denying a probationary employee the procedural due process pro-
tections of a hearing or the requirement of judicially cognizable good
cause for termination. The inquiry has become especially pertinent
in light of the California due process dignitary interest as established
by the California Supreme Court in *People v. Ramirez*. The Califor-
nia dignitary interest is a constitutional concept of the broadest scope
and application. In specifying the requirements of the dignitary in-
terest, the California Supreme Court made clear that applicability of
the due process safeguards is not predicated on judicial construction
of the fourteenth amendment.

This comment has demonstrated that under a dignitary interest
analysis, a probationary employee is not without procedural due pro-
cess protections. Even though the employer must be afforded broad
discretion in deciding which employees will achieve the status of per-
manent employees, that discretion must not be exercised arbitrarily. To
protect against arbitrary action, and to preserve the probationary
employee's dignitary interest, some type of hearing must occur before
termination. During the hearing, the employer must support his deci-
sion to terminate with judicially cognizable good cause. In order to
create within the probationary employee a meaningful sense of par-
ticipation and to prevent stigmatization of reputation, the probationary
employee must be given an opportunity to refute the employer's reasons
for termination.

This comment has shown how imposition of the dignitary interest
as a constitutional requirement of procedural protection will have the
effect of opening up the employer's substantive termination decision
for judicial review. In suggesting how procedural due process rights

the employee could include something as administratively unburdensome as a written addition
to the personnel file explaining the situation may render any inadvertent disclosure by the employer
de minimus. See *supra* note 103 and accompanying text.
are effected, this author has not offered a proposal which seeks to balance the competing interests of society and the individual. The dignitary interest is now an established principle of California constitutional law. By applying the dignitary interest to the specific setting of probationary governmental employment, the present rights of probationary employees must be brought to the level of existing constitutional standards.

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193. The procedures necessary to satisfy the requirements of the due process dignitary interest are not limited in application to public employment. See generally Ezekial v. Winkley, 20 Cal. 3d 267, 572 P.2d 32, 142 Cal. Rptr. 418 (1977). Under the common law right of "fair procedure," a doctrine formulated to fill the void when due process is inapplicable for lack of state action, private employers may be forced to reevaluate their employment practices regarding probationary employees. Id. See also Comment, Recognizing the Employee's Interest in Continued Employment - The California Cause of Action for Unjust Dismissal, 12 Pac. L.J. 69 (1981). (application of tort principles to the context of employment termination)