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## Administrative Law

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## I

## ADMINISTRATIVE LAW

*Availability of the Entrapment Defense  
in Disciplinary Proceedings*

*Patty v. Board of Medical Examiners*.<sup>1</sup> The California Supreme Court recognized in this decision that the defense of entrapment is applicable to administrative proceedings involving revocation or suspension of a license to practice a business or profession. The opinion contains the first serious analytical attempt, either in California or other state court decisions, to justify application to a "civil" proceeding of the traditionally "criminal" entrapment defense.<sup>2</sup> Because of the court's marked reliance on the policies underlying the entrapment defense, the *Patty* decision may well have as much impact on the availability of the defense in criminal proceedings as it will have in the administrative context.<sup>3</sup>

The facts of *Patty* are not complicated. Xavier Suazo, an investigator for the State Board of Medical Examiners, received a complaint that Dr. Frank Patty had been prescribing unusually large amounts of narcotics for an elderly patient. Records of narcotic bureau files and local pharmacies showed the complaint to be without substance, but Suazo contacted part-time investigator Patricia Wolf to pursue the possibility that Dr. Patty might commit a narcotics offense.<sup>4</sup>

Dr. Patty had been licensed to practice since 1951, and he served on the staff of several Los Angeles-area hospitals.<sup>5</sup> He became ill in 1967, but continued to see patients.<sup>6</sup> When Wolf visited his office in January, 1968, asking for "whites" or "dexies" so she could "get high," Dr. Patty was so unfamiliar with the vernacular that he had to call a pharmacy for assistance in writing the prescription.<sup>7</sup> In the next two months he gave four persons, all of them board agents, a total of 17 prescriptions<sup>8</sup> for amphetamine sulfate (similar to Dexedrine) and Empirin Compound with codeine.<sup>9</sup>

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1. 9 Cal. 3d 356, 508 P.2d 1121, 107 Cal. Rptr. 473 (1973) (Tobriner, J.) (unanimous decision).

2. Although the entrapment defense has been applied almost exclusively in criminal proceedings, the court points out that its 19th-century roots are said to lie in civil cases. *Id.* at 364 n.6, 508 P.2d at 1126 n.6, 107 Cal. Rptr. at 478 n.6, citing Sorrells v. United States, 287 U.S. 435, 455 (1932) (Roberts, J., concurring).

3. See Part IV *infra*.

4. 9 Cal. 3d at 360, 508 P.2d at 1123, 107 Cal. Rptr. at 475.

5. *Id.* at 359, 508 P.2d at 1123, 107 Cal. Rptr. at 475.

6. *Id.* at 360, 508 P.2d at 1123, 107 Cal. Rptr. at 475.

7. *Id.*

8. *Patty v. Board of Medical Examiners*, 103 Cal. Rptr. 656, 658 (2d Dist. 1972), vacated, 9 Cal. 3d 356, 508 P.2d 1121, 107 Cal. Rptr. 473 (1973).

9. 9 Cal. 3d at 360, 508 P.2d at 1123-24, 107 Cal. Rptr. at 475-76.

Based solely upon the doctor's actions in prescribing drugs for the board investigators, the board initiated disciplinary proceedings to revoke Dr. Patty's license to practice medicine.<sup>10</sup> After unsuccessfully asserting a defense of entrapment before the board, Dr. Patty sought review in the superior court by writ of mandate.<sup>11</sup> Upon conducting an independent review of the evidence, the trial court sustained his challenge to the board's decision, concluding both that the entrapment defense could be raised in administrative disciplinary proceedings and that Dr. Patty had indeed been entrapped.<sup>12</sup> The board appealed, and the court of appeals reversed.<sup>13</sup> The supreme court reversed again, reinstating the decision in favor of Dr. Patty. It considered only two legal issues: Whether entrapment may be asserted as a defense to the administrative sanctions directed against Dr. Patty, and whether the trial court's finding of entrapment was supported by substantial evidence in the record.<sup>14</sup>

This Note will briefly trace, in Section I, the historical development of the entrapment defense. Section II will examine the analytical framework for application of the defense to an administrative proceeding. Section III will evaluate the court's holding that Dr. Patty was entrapped, in light of California's unusual evidentiary safeguards when the defense is invoked.<sup>15</sup> Section IV will explore the implications of *Patty* for the entrapment defense in California, contrasting the reasoning of *Patty* with the recent United States Supreme Court decision in *United States v. Russell*.<sup>16</sup>

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10. *Id.* at 359, 508 P.2d at 1123, 107 Cal. Rptr. at 475. The board's disciplinary sanctions were based on its conclusion that Dr. Patty had violated section 2399.5 of the California Business and Professions Code by prescribing dangerous drugs without prior examination or medical indication and section 2391.5 of that code by prescribing narcotics to persons not under treatment, as proscribed by section 11163 of the Health and Safety Code. *Id.* at 361 n.2, 508 P.2d at 476 n.2, 107 Cal. Rptr. at 1124 n.2.

11. 9 Cal. 3d at 358, 508 P.2d at 1122, 107 Cal. Rptr. at 474.

12. *Id.*

13. *Patty v. Board of Medical Examiners*, 103 Cal. Rptr. 656, 658 (2d Dist. 1972), *vacated*, 9 Cal. 3d 356, 508 P.2d 1121, 107 Cal. Rptr. 473 (1973).

14. The availability and scope of judicial review were not at issue in *Patty*. In assessing the validity of a disciplinary proceeding of a statewide agency which results in revocation or suspension of a business or professional license—an administrative decision that will substantially affect vested, fundamental rights—it is now well established in California that the trial court must exercise its independent judgment upon the facts. *See, e.g.*, the seminal California case, *Drummey v. State Bd. of Funeral Directors*, 13 Cal. 2d 75, 87 P.2d 838 (1939), and the analytical recapitulation in *Bixby v. Pierno*, 4 Cal. 3d 130, 137-47, 481 P.2d 242, 246-54, 93 Cal. Rptr. 234, 238-46 (1971). *See also* CAL. CODE CIV. PRO. § 1094.5 (West 1972) (procedure for administrative mandamus). The appellate court must sustain the trial court's findings of fact so long as those findings are supported by substantial evidence. *Moran v. State Bd. of Medical Examiners*, 32 Cal. 2d 301, 308, 196 P.2d 20, 25 (1948).

15. *See* text accompanying notes 45-50 *infra*.

16. 411 U.S. 423 (1973).

## I. GROWTH OF THE DEFENSE OF ENTRAPMENT

Historically, the defense of entrapment is "a purely American anomaly, and a recent one."<sup>17</sup> Until late in the nineteenth century, the concept of entrapment was considered irrelevant to questions of guilt or innocence. Instead, courts followed the example found in the Bible,<sup>18</sup> in which Eve's defense of temptation by the serpent "was overruled by the great Lawgiver, and . . . this plea has never since availed to shield crime or give indemnity to the culprit . . ."<sup>19</sup> Despite its Biblical rejection, the defense of entrapment gradually achieved recognition in the United States, first in the state courts,<sup>20</sup> then in the federal system.<sup>21</sup> Its rise as a defense has paralleled the burgeoning growth of regulatory crimes, consensual crimes, sumptuary crimes, and other offenses that are not easily discovered in a law-enforcement system which relies heavily on private complaint.<sup>22</sup>

Entrapment was first recognized by the United States Supreme Court in *Sorrells v. United States*.<sup>23</sup> In that case a federal prohibition agent, posing as a tourist, overcame strong resistance and finally prevailed upon the defendant to buy him some liquor. Although eight justices agreed that Sorrells had been entrapped,<sup>24</sup> they were sharply divided as to the policies underlying the entrapment defense. This division of opinion on the Court has continued to the present, with concurring or dissenting opinions being filed each time an entrapment case has been heard.<sup>25</sup> The opinion of the five-justice *Sorrells* majority was authored by Chief Justice Hughes, who asserted that the defense

17. DeFeo, *Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application*, 1 U.S.F. L. Rev. 243, 244 (1967). A negative attitude toward the entrapment defense is still the rule in Great Britain. *Id.* at 245.

18. "And the Lord God said unto the woman, What is this that thou hast done? And the woman said, The serpent beguiled me, and I did eat." *Genesis* 3:13 (King James).

19. *Board of Comm'rs v. Backus*, 29 How. Pr. 33, 42 (N.Y. Sup. Ct. 1864).

20. *E.g.*, *Saunders v. People*, 38 Mich. 218 (1878); *O'Brien v. State*, 6 Tex. Crim. 665 (1879).

21. The first entrapment case to reach the circuit court level was *Woo Wai v. United States*, 223 F. 412 (9th Cir. 1915); its favorable reception there marked the beginning of widespread judicial acceptance of the new doctrine. DeFeo, *supra* note 17, at 249.

22. See generally DeFeo, *supra* note 17; Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 YALE L.J. 1091 (1951); Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. OF PA. L. REV. 245 (1942); Rotenberg, *The Police Detection Practice of Encouragement*, 49 VA. L. REV. 871, 889-903 (1963); Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 FORD. L. REV. 399 (1959).

23. 287 U.S. 435 (1932).

24. Justice McReynolds dissented without opinion. *Id.* at 453.

25. *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958); *Masciale v. United States*, 356 U.S. 386 (1958). See text accompanying notes 100-110 *infra*.

was available because of an implied exception in the prohibition statute. He reasoned that Congress did not intend for courts to convict a defendant "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute."<sup>26</sup> Thus, the majority's formulation is based on a policy of protecting innocent persons from being lured into crime by an agent of the state. This protection, however, was never meant to extend to a defendant who was predisposed to commit a particular crime. "A line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal," wrote Chief Justice Warren for the majority in *Sherman v. United States*.<sup>27</sup> For the former, the defense of entrapment would be available; for the latter, apparently, no amount of overreaching on the part of the police would bring the defense into play.<sup>28</sup>

This formulation of the entrapment defense (the "majority position") has significant procedural implications. Under its subjective approach, the critical issue is the defendant's state of mind. The accused must undergo "appropriate and searching inquiry into his own conduct and predisposition"<sup>29</sup> toward crime for his defense to be sustained. Traditionally, evidence that would otherwise be inadmissible, such as arrests without conviction and prior criminal reputation, has been admitted in rebuttal of entrapment.<sup>30</sup> In his concurring opinion in *Sherman*, Mr. Justice Frankfurter spelled out the accused's double bind:

The defendant must either forego the claim of entrapment or run the substantial risk that, in spite of instructions, the jury will allow a criminal record or bad reputation to weigh in its determination of guilt of the specific offense of which he stands charged.<sup>31</sup>

The minority formulation of entrapment, on the other hand, is based on considerations of policy rather than statutory construction. In *Sorrells*, Mr. Justice Roberts followed an important dissenting opinion of Mr. Justice Brandeis<sup>32</sup> in arguing that the defense of entrapment was necessary to protect the purity of the judicial process.<sup>33</sup> In *Sher-*

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26. *Sorrells v. United States*, 287 U.S. 435, 442 (1932).

27. 356 U.S. 369, 372 (1958).

28. In *United States v. Russell*, 411 U.S. 423, 431-32 (1973), the justices taking a majority position did observe that a case might arise in which the behavior of the government agents would be so outrageous as to constitute a denial of due process.

29. *Sherman v. United States*, 356 U.S. 369, 372 (1958).

30. See DeFeo, *supra* note 17, at 261.

31. 356 U.S. 369, 382 (1958).

32. *Casey v. United States*, 276 U.S. 413, 421 (1928).

33. 287 U.S. 435, 457 (1932). The justices taking the minority position in *Sorrells* did not argue that allowing an entrapment defense is constitutionally required. Such arguments have since been made by the commentators. For an interesting discussion of three possible constitutional bases for the entrapment defense see Note, *The*

*man*, the minority emphasized the need to discipline the police and to improve law-enforcement procedures.<sup>34</sup> As Mr. Justice Frankfurter put it, "The crucial question . . . is whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power."<sup>35</sup> Under this view, the defendant's inclination to commit the crime is irrelevant, for it is the behavior of the police that controls the availability of the entrapment defense.<sup>36</sup> The judge decides the entrapment question, focusing not on the predisposition of the particular defendant, but rather on the methods used by the state agents and "the likelihood, objectively considered, that [they] would entrap only those ready and willing to commit crime."<sup>37</sup>

The California Supreme Court, beginning with *People v. Benford*,<sup>38</sup> has taken something of a middle ground in its formulation of the entrapment defense. The California view is in full accord with neither the majority position's subjective test nor the objective test urged by the minority. *Benford* confirmed earlier state court recognition<sup>39</sup> of the entrapment defense on the grounds of "sound public policy" and "good morals."<sup>40</sup> As reiterated in *Patty*, the California version of the defense rests "on the simple proposition that the state has no business fostering crime."<sup>41</sup> In addition, however, California has retained the "origin of intent" test, which requires the finder of fact to determine whether the intention to commit the crime originated in the mind of the defendant or the state agent. "It is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career by its officers . . . ." <sup>42</sup> Thus, California courts "place at least as much emphasis on the susceptibility of the defendant as on the propriety of the methods of the police."<sup>43</sup>

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*Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965).

34. This does not mean that the police may not act so as to detect those engaged in criminal conduct and ready and willing to commit further crimes should the occasion arise. Such indeed is their obligation. It does mean . . . that . . . they should act in such a manner as is likely to induce to the commission of crime only these persons and not others . . . .

*Sherman v. United States*, 356 U.S. 369, 383-84 (1958).

35. *Id.* at 382.

36. *Id.* at 383.

37. *Id.* at 384.

38. 53 Cal. 2d 1, 345 P.2d 928 (1959).

39. *E.g.*, *People v. Makovsky*, 3 Cal. 2d 366, 44 P.2d 536 (1935); *People v. Gallagher*, 107 Cal. App. 425, 290 P. 504 (1st Dist. 1930).

40. *People v. Benford*, 53 Cal. 2d 1, 9, 345 P.2d 928, 933 (1959).

41. 9 Cal. 3d at 363, 508 P.2d at 1125, 107 Cal. Rptr. at 477.

42. *People v. Benford*, 53 Cal. 2d 1, 10, 345 P.2d 928, 934 (1959), quoting *People v. Schwartz*, 109 Cal. App. 2d 450, 455, 240 P.2d 1024, 1027 (2d Dist. 1952), approved in *People v. Roberts*, 40 Cal. 2d 483, 489, 254 P.2d 501, 504 (1953).

43. *People v. Benford*, 53 Cal. 2d 1, 9-10, 345 P.2d 928, 934 (1959).

This position appears to accept what one scholar has called "the sinister sophism that the end, when dealing with known criminals of the 'criminal classes,' justifies the employment of illegal means."<sup>44</sup> California does, however, provide safeguards which severely limit the admissibility of evidence from which the predisposition of the defendant to commit the offense may be inferred. Unlike the federal system, in which otherwise inadmissible evidence has traditionally been admitted in rebuttal of entrapment,<sup>45</sup> California excludes "evidence that defendant had previously committed similar crimes or had the reputation of being engaged in the commission of such crimes or was suspected by the police of criminal activities."<sup>46</sup> Instead, the origin of intent must be inferred by the triers of fact from the details of the transaction itself. Pre-existing intent on the part of the defendant has been inferred from the readiness with which he committed the crime charged,<sup>47</sup> from his own testimony or extrajudicial admissions,<sup>48</sup> from his familiarity with criminal activity,<sup>49</sup> or from the trial court's view that "the offense is one of a kind habitually committed."<sup>50</sup>

## II. ENTRAPMENT AS A DEFENSE TO AN ADMINISTRATIVE PROCEEDING

Before *Patty*, several California courts of appeal had considered the availability of the entrapment defense in administrative disciplinary proceedings, with mixed results. In *Whitlow v. Board of Medical Examiners*,<sup>51</sup> the court assumed that the defense was available but found it had not been established. In *Shakin v. Board of Medical Examiners*,<sup>52</sup> the court also found that the facts of entrapment were not established, but observed that the availability of the defense in an administrative proceeding "remains in doubt."<sup>53</sup> *Shakin* relied on *United Liquors v. Department of Alcoholic Beverage Control*,<sup>54</sup> which declared the applicability of the entrapment defense "at least open to question"<sup>55</sup>

44. Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 YALE L.J. 1091, 1111 (1951).

45. See text accompanying notes 29-31 *supra*.

46. *People v. Benford*, 53 Cal. 2d 1, 11, 345 P.2d 928, 935 (1959), *citing* *People v. Roberts*, 40 Cal. 2d 483, 490, 254 P.2d 501, 504 (1953); *People v. Makovsky*, 3 Cal. 2d 366, 370, 44 P.2d 536, 538 (1935).

47. *E.g.*, *People v. Ramos*, 146 Cal. App. 2d 110, 303 P.2d 783 (2d Dist. 1956).

48. *E.g.*, *People v. Raffington*, 98 Cal. App. 2d 455, 220 P.2d 967 (2d Dist. 1950).

49. *E.g.*, *People v. Moreno*, 237 Cal. App. 2d 602, 47 Cal. Rptr. 287 (2d Dist. 1965).

50. *People v. Schwartz*, 109 Cal. App. 2d 450, 240 P.2d 1024 (2d Dist. 1952).

51. 248 Cal. App. 2d 478, 56 Cal. Rptr. 525 (2d Dist. 1967).

52. 254 Cal. App. 2d 102, 62 Cal. Rptr. 274 (2d Dist. 1967).

53. *Id.* at 109, 62 Cal. Rptr. at 281.

54. 218 Cal. App. 2d 450, 454, 32 Cal. Rptr. 603, 606 (1st Dist. 1963). *United Liquors* was followed without analysis in *Harris v. Alcoholic Beverage Control Appeals Bd.*, 245 Cal. App. 2d 919, 54 Cal. Rptr. 346 (4th Dist. 1966).

55. 218 Cal. App. 2d 450, 454, 32 Cal. Rptr. 603, 606 (1st Dist. 1963).

in administrative hearings, since the proceedings are not penal in nature and are not governed by the rules of criminal law.<sup>56</sup> Thus the availability of the defense in California was not settled until the decision in *Patty*.

The supreme court began its opinion in *Patty* by noting that the majority of decisions in other states have recognized entrapment as a defense to an administrative proceeding involving revocation or suspension of a license to practice a profession, trade, or business.<sup>57</sup> It cited a dozen cases to support this observation,<sup>58</sup> this, however, is virtually the entire case law on the subject. Few courts have considered the issue, and fewer still have given it more than cursory analysis. Typically, the decisions assume that entrapment is an available defense, but hold that it was not established on the facts before the court.<sup>59</sup> Three state courts have declined to extend the entrapment defense to administrative proceedings.<sup>60</sup>

The court began its own analysis by stressing the strong public policy basis for the defense of entrapment in criminal proceedings. Quoting *Benford*, it reiterated that recognition of the defense in California vindicates interests similar to those which led the court, in *People v. Cahan*,<sup>61</sup> to adopt the rule that evidence obtained in violation of what are now constitutional guarantees<sup>62</sup> is not admissible:

[O]ut of regard for its own dignity, and in the exercise of its power and the performance of its duty to formulate and apply proper standards for judicial enforcement of the criminal law, the court refuses to enable officers of the law to consummate illegal or unjust schemes designed to foster rather than prevent and detect crime.<sup>63</sup>

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56. *But see* *Shively v. Stewart*, 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1960). See text accompanying note 69 *infra*. *But cf.* *Parrish v. Civil Service Comm'n*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967) (acts argued to be of only civil consequence could also form basis of criminal charge).

57. 9 Cal. 3d at 362, 508 P.2d at 1125, 107 Cal. Rptr. at 477.

58. *Id.* n.3.

59. *E.g.*, *Roberts v. Illinois Liquor Control Comm'n*, 58 Ill. App. 2d 171, 206 N.E.2d 799 (1st Dist. 1965); *In re Davidson*, 64 Nev. 514, 186 P.2d 354 (1947); *Langdon v. Board of Liquor Control*, 98 Ohio App. 535, 130 N.E.2d 430, 58 Ohio Ops. 75 (1954).

60. *Kearns v. Aragon*, 65 N.M. 119, 333 P.2d 607 (1958); *cf.* *Knight v. Louisiana State Bd. of Medical Examiners*, 211 So. 2d 433, 438 (La. App. 1968) (dictum) (court is "inclined" not to permit defense of entrapment); *State v. Ward*, 361 Mo. 1236, 1247-48, 239 S.W.2d 313, 320 (1951).

61. 44 Cal. 2d 434, 282 P.2d 905 (1955).

62. Although the exclusionary rule had long been recognized as dictated by the fourth amendment in federal court criminal trials, *Weeks v. United States*, 232 U.S. 383 (1914), not until six years after *Cahan* did the Supreme Court hold that the fourteenth amendment required exclusion of illegally seized evidence in state court criminal proceedings. *Mapp v. Ohio*, 367 U.S. 643 (1961).

63. 9 Cal. 3d at 363, 282 P.2d at 1125, 107 Cal. Rptr. at 477, quoting *People v. Benford*, 53 Cal. 2d 1, 9, 345 P.2d 928, 933 (1959).

At first blush, drawing an analogy between the exclusionary rule and the entrapment defense in the administrative context may lead to denial of the defense. The fourth amendment's protection against unreasonable searches and seizures, which led to formulation of the exclusionary rule in the context of criminal trials,<sup>64</sup> has received short shrift in the area of administrative investigations.<sup>65</sup> Moreover, the rationale advanced for relaxing the exclusionary rule and other evidentiary rules<sup>66</sup> in administrative proceedings is the same rationale that has led some courts to question the availability of the entrapment defense in that setting: The agency which is being asked to predicate action on the basis of the state's behavior is not a court and does not wholly share a court's dedication to a position of strict neutrality between the individual and the state. Many of the procedural safeguards afforded a defendant in a criminal trial are characterized as unnecessary in "supervisory" proceedings; administrative boards and hearing officers are allowed more discretion in large part because their judgments are considered regulatory, rather than punitive, in nature.<sup>67</sup>

After further consideration, however, the soundness of the analogy can be perceived. The license to practice a "dignified calling" has always been regarded as a right, and in recent years the idea that a license to pursue any business is a "privilege," which the state can cav-

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64. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914). There is another flaw in the court's analogy between the exclusionary rule and the entrapment defense, for while the former is required by the fourth amendment, the latter has yet to achieve constitutional status. See notes 28 and 33 *supra*.

65. The investigatory powers of administrative bodies are expansive; Professor Davis likens the administrative quest for facts to an irresistible force, before which many apparently immovable constitutional principles have crumbled. K. DAVIS, *ADMINISTRATIVE LAW TEXT* § 3.01 (3d ed. 1972). For example, in *United States v. Morton Salt Co.*, 338 U.S. 632 (1950), the United States Supreme Court approved an extremely broad administrative subpoena for books and records, observing that:

Even if one were to regard the request . . . as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

*Id.* at 652. In the realm of individual rather than corporate privacy, the Court has held that, absent consent, fire and sanitation officers cannot make searches of homes and business premises without search warrants; at the same time, however, it approved a "reasonableness" test for issuing a warrant that falls short of the "probable cause" standard associated with criminal law. *Camara v. Municipal Court*, 387 U.S. 523, 538-39 (1967); *See v. Seattle*, 387 U.S. 541 (1967).

66. For example, hearsay evidence may be presented at hearings of the California State Board of Medical Examiners:

Hearsay evidence may be used for purposes of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

CAL. GOV'T CODE § 11513 (West 1966).

67. Another reason for the discretion accorded administrative bodies is the absence of a jury, which might have difficulty reaching a fair decision without procedural safeguards.

alierly revoke or suspend under the guise of regulation, has been largely discredited.<sup>68</sup> Moreover, in *Shively v. Stewart*,<sup>69</sup> a case which foreshadowed the *Patty* result, the California Supreme Court recognized that a disciplinary hearing has a punitive character. As a result, it made available the equivalent of criminal discovery in a license-revocation proceeding. In addition, the court has extended the exclusionary rule beyond its original criminal context. *People v. One 1960 Cadillac Coupe*<sup>70</sup> arose after criminal prosecution of the car's driver failed because there was no probable cause for a search which turned up contraband; the court held that the illegal search was also fatal to the civil forfeiture action stemming from the same arrest. "On policy," it wrote, "the same exclusionary rules should apply to improper state conduct whether the proceeding contemplates the deprivation of one's liberty or property."<sup>71</sup> Because of the evidentiary discretion traditionally accorded administrative bodies, it is a longer step from protecting the property of a defendant in a civil proceeding to protecting the license of a party called before an administrative board. A California court has yet to rule that all illegally obtained evidence is inadmissible in an administrative proceeding. Nevertheless, relying on the strong public policy behind the exclusionary rule, in *Elder v. Board of Medical Examiners* a court of appeal indicated in an important dictum that a license to practice medicine could not be revoked if "all or a substantial part of the evidence which was introduced was the fruit of an illegal search and seizure."<sup>72</sup>

This belief that there are limits on the extent to which any tribunal—criminal, civil, or administrative—can use improperly obtained evidence to deprive the affected party of important rights or benefits received emphatic support in *Redner v. Workmen's Compensation Appeals Board*.<sup>73</sup> In that case, the California Supreme Court refused to allow the board to consider filmed evidence relating to the permanence of an applicant's physical disability, because the film was obtained by the fraudulent inducement of private investigators. As the court in *Patty* expressed it, *Redner* "confirmed that an administrative agency must reject evidence inconsistent with the dignity of its proceedings and the fair administration of justice."<sup>74</sup> Thus, although agency discretion in admitting and relying upon irregularly-obtained evidence has not yet been curtailed to the same degree as in criminal proceedings,

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68. K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.13 (3d ed. 1972).

69. 65 Cal. 2d 475, 421 P.2d 65, 55 Cal. Rptr. 217 (1966).

70. 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964).

71. *Id.* at 96-97, 396 P.2d at 709, 41 Cal. Rptr. at 293.

72. 241 Cal. App. 2d 246, 267, 50 Cal. Rptr. 304, 320 (1st Dist. 1966), *cert. denied*, 385 U.S. 1001 (1967).

73. 5 Cal. 3d 83, 485 P.2d 799, 95 Cal. Rptr. 447 (1971).

74. 9 Cal. 3d at 364, 508 P.2d at 1127, 107 Cal. Rptr. at 479.

some broad boundaries have been established in California. The court in *Patty*, relying upon the same sense of administrative propriety which dictated its decision in *Redner*, further delimited the scope of agency power by holding the defense of entrapment available in an administrative disciplinary proceeding.<sup>75</sup>

The court concluded its analysis of the availability of the entrapment defense by observing that the defense is particularly important when "a single agency combines both investigative and adjudicative powers."<sup>76</sup> The danger of the agency's integrity being compromised is great when its decision is substantially based upon evidence obtained illegally by the police, or when it accepts evidence fraudulently obtained by private investigators, as in *Redner*. The danger is significantly magnified, however, when the agency does not simply rely on the deceptive activity of other entities but itself engages in unsavory practices. As the court stated, "Public confidence in the administration of justice by such an agency cannot be sustained . . . ."<sup>77</sup>

Moreover, it is not just the image of the administrative agency which is endangered.

[T]he availability of entrapment tactics [opens] the possibility that an agency will discriminatorily *select* a practitioner, seek out his human weaknesses, and by persuasion and inducement condemn him for professional execution. Such an abuse of governmental power provides the unconventional practitioner with little protection from the "likely prejudices of a professional licensing body."<sup>78</sup>

Thus, even though the court recognized that an agency must at times use undercover decoys in the performance of its investigative duties,<sup>79</sup> it found that "activity which seeks to induce the [perpetration] of a crime for the sake of punishment"<sup>80</sup> was an unwarranted abuse of administrative power.

### III. THE ENTRAPMENT OF DR. PATTY

Having held the defense applicable to the board's proceedings, the court affirmed the trial judge's finding that Dr. Patty was in fact entrapped.<sup>81</sup> In emphasizing the board's shabby tactics and the doc-

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75. Although the court carefully limits its holding to situations involving revocation or suspension of a license to practice a business or profession, it implies that the defense may find application in other administrative proceedings. *Id.* at 365, 508 P.2d at 1127, 107 Cal. Rptr. at 479.

76. 9 Cal. 3d at 365, 508 P.2d at 1127, 107 Cal. Rptr. at 479.

77. *Id.*

78. *Id.* at 366, 508 P.2d at 1128, 107 Cal. Rptr. at 480, quoting L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 191-92 (1965).

79. 9 Cal. 3d at 366-67, 508 P.2d at 1128, 107 Cal. Rptr. at 480.

80. *Id.* at 366, 508 P.2d at 1128, 107 Cal. Rptr. at 480.

81. *Id.* at 370, 508 P.2d at 1130, 107 Cal. Rptr. at 482.

tor's previously pristine reputation, it may well be that the court viewed Dr. Patty, 59 years old and the first black graduate of his medical school,<sup>82</sup> as the archetypal "unconventional practitioner"<sup>83</sup> whom the system may seek out and attempt to destroy.<sup>84</sup>

In stating its holding, the California court did not use the implied statutory exception rationale of the majority in *Sorrells* and *Sherman*, but instead confirmed earlier state court recognition of a public policy basis for the entrapment defense. As the court observed in *Benford*, "Entrapment is a defense not because the defendant is innocent but because, as stated by Justice Holmes, 'it is a less evil that some criminals should escape than that the Government should play an ignoble part.'"<sup>85</sup> In applying the "origin of intent" aspect of the California approach to the entrapment defense, the court viewed Dr. Patty's apparent unfamiliarity with the argot of the pill-popper as support for the trial judge's conclusion that he had no pre-existing intent to engage in unprofessional conduct.<sup>86</sup> The readiness with which Dr. Patty succumbed to the agents' requests was recognized by the court as one factor to be considered in determining pre-existing intent,<sup>87</sup> but it approved an observation by the court of appeal that even "hair trigger susceptibility . . . standing alone, does not negative entrapment as a matter of law."<sup>88</sup> Since "it normally lies with the trier of fact to determine what inference, if any, should be drawn from an individual's seemingly 'ready compliance' with solicitation to illegal conduct,"<sup>89</sup> and since the trial judge drew from the circumstances no inference of pre-existing intent on Dr. Patty's part, the trial court's finding of entrapment was sustained.

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82. *Id.* at 359-60, 508 P.2d at 1122-23, 107 Cal. Rptr. at 474-75.

83. *Id.* at 366, 508 P.2d at 1128, 107 Cal. Rptr. at 480.

84. In addition to noting Dr. Patty's race and his record of good works, the court emphasized his illness which coincided with the board's investigation. Dr. Patty suffered an acute myocardial infarction on January 7, 1967, but continued to see patients, including Wolf and one of her roommates on January 10. He was hospitalized on January 13 and returned to his office in March, when he was promptly visited by Wolf's roommate and another part-time operative. *Id.* at 360, 508 P.2d at 1123, 107 Cal. Rptr. at 475.

85. *People v. Benford*, 53 Cal. 2d 1, 9, 345 P.2d 928, 934 (1959), quoting *Sherman v. United States*, 356 U.S. 369, 380 (1958) (concurring opinion). The original source of the quoted language is the dissenting opinion of Justice Holmes in *Olmstead v. United States*, 277 U.S. 438, 470 (1928).

86. 9 Cal. 3d at 369, 508 P.2d at 1130, 107 Cal. Rptr. at 482. As the court pointed out, these facts contrast sharply with such cases as *People v. Estrada*, 211 Cal. App. 2d 722, 726-27, 27 Cal. Rptr. 605, 607 (4th Dist. 1965), where the defendant's pre-existing intent could be inferred from his familiarity with the going price of a narcotic.

87. 9 Cal. 3d at 368, 508 P.2d at 1129, 107 Cal. Rptr. at 481.

88. *Id.* at 369, 508 P.2d at 1130, 107 Cal. Rptr. at 482, quoting *People v. Goree*, 240 Cal. App. 2d 304, 310-11, 49 Cal. Rptr. 392, 395 (2d Dist. 1966).

89. 9 Cal. 3d at 368, 508 P.2d at 1130, 107 Cal. Rptr. at 482.

However, the court found additional support for the trial judge's determination. First, it emphasized Dr. Patty's "unblemished" professional reputation.<sup>90</sup> This emphasis, of course, is misplaced, since any evidence of prior transgressions or suspected misconduct would not have been properly admitted by the trial judge.<sup>91</sup> As the court observed in *Benford*, "[T]he absence of [evidence of the defendant's prior criminality] here does not in and of itself have the significance which it had under federal law . . . ."<sup>92</sup> Arguably, the court's stress on Dr. Patty's good reputation could indicate a tendency to conform to the subjective test for the entrapment defense. But the court's obvious distaste for board investigative methods—illustrated by its observation "that the employment of young women to obtain illegally prescribed drugs from elderly male doctors is not a new tactic to agents of the Board"<sup>93</sup>—indicates that the court is moving further and further away from a purely subjective inquiry into the defendant's predisposition toward crime. Agent Suazo's instructions to his operatives that they should "work" doctors to "obtain" illegal prescriptions were characterized by the court as "almost a directive to entrap."<sup>94</sup> This seems to be another way of saying that "the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power."<sup>95</sup> Indeed, these policy considerations apparently form the primary basis for the court's extension of the entrapment defense to an administrative disciplinary proceeding, and for its conclusion that Dr. Patty was indeed entrapped.

#### IV. IMPLICATIONS OF *Patty* FOR THE ENTRAPMENT DEFENSE IN CALIFORNIA

Extension of the entrapment defense to a California administrative disciplinary proceeding seems warranted by the public policy foundation of this heretofore criminal defense. Just as the state has no business fostering crime, it has no business inducing unprofessional conduct for the purpose of revoking or suspending a doctor's license to practice medicine. Moreover, the interest of the public in being protected against improper prescription of drugs by physicians is not served by inducing a physician "who has avoided the pitfalls of illicit conduct"<sup>96</sup> to perform a criminal act. *Patty* should help prevent this abuse of

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90. *Id.* at 369, 508 P.2d at 1130, 107 Cal. Rptr. at 482.

91. See text accompanying notes 45-50 *supra*.

92. *People v. Benford*, 53 Cal. 2d 1, 12, 345 P.2d 928, 936 (1959).

93. 9 Cal. 3d at 369, 508 P.2d at 1130, 107 Cal. Rptr. at 482. Investigator Wolf was a 20-year-old "sometime 'actress, model and hostess.'" *Id.* at 360, 508 P.2d at 1123, 107 Cal. Rptr. at 475.

94. *Id.*

95. *Sherman v. United States*, 356 U.S. 369, 382 (1958) (concurring opinion).

96. 9 Cal. 3d at 370, 508 P.2d at 1131, 107 Cal. Rptr. at 483.

administrative power, although the paucity of case law in states which have held the defense available may indicate that administrative entrapment is not as big a problem as the California Supreme Court seems to fear.<sup>97</sup>

For the California defense of entrapment generally, *Patty* seems to represent a move toward a purely objective test that would focus on the nature of governmental activity rather than the predisposition of the defendant. Although the court in *Patty* continued to pay lip service to its "origin of intent" formulation of the entrapment defense,<sup>98</sup> its emphasis was clearly on the board's behavior rather than Dr. Patty's.<sup>99</sup>

An intriguing contrast to this gradual shift of the California court is the recent United States Supreme Court case on entrapment, *United States v. Russell*.<sup>100</sup> Decided just five days after *Patty*, *Russell* clung to the view of entrapment expressed by the majority in *Sorrells*<sup>101</sup> and in *Sherman*.<sup>102</sup> A sharply divided court<sup>103</sup> declined to rest the defense on constitutional grounds.<sup>104</sup> It also refused to broaden the nonconstitutional entrapment defense by adopting the purely objective test posited by the minority in *Sorrells* and *Sherman*.<sup>105</sup>

Russell was involved in the manufacture of methamphetamine ("speed") in Washington State. An undercover narcotics agent approached him and his co-defendants and offered to supply them with phenyl-2-propanone, an essential ingredient of the drug, in return for one-half of the speed produced. Although legal to possess, phenyl-2-propanone was difficult to obtain. The agent supplied the chemical and observed the defendants prepare two batches of speed. He was given his half, and he bought part of the remainder from Russell. Later he returned with a warrant.<sup>106</sup>

After a jury trial, in which Russell's sole defense was entrapment, he was convicted on all three counts with which he had been charged. Russell conceded on appeal that he may have harbored a predisposition toward committing the narcotics violations, putting him clearly outside

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97. *Id.* at 365-66, 508 P.2d at 1127, 107 Cal. Rptr. at 479.

98. *Id.* at 368, 508 P.2d at 1129, 107 Cal. Rptr. at 481.

99. For an example of language in which the emphasis is reversed, see *Whitlow v. Board of Medical Examiners*, 248 Cal. App. 2d 478, 489-93, 56 Cal. Rptr. 525, 534-35 (2d Dist. 1967).

100. 411 U.S. 423 (1973).

101. *Sorrells v. United States*, 287 U.S. 435 (1932).

102. *Sherman v. United States*, 356 U.S. 369 (1958).

103. Justice Rehnquist delivered the majority opinion, while dissenting opinions were filed by Justice Douglas joined by Justice Brennan and by Justice Stewart in which Justices Brennan and Marshall joined. 411 U.S. 423 (1973).

104. *Id.* at 431. See notes 28 and 33 *supra*.

105. *Id.* at 433.

106. *Id.* at 425-26.