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Entrapment—Entrapment Defense is Available in
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Medical Examiners, 9 Cal. 3d 356, 508 P.2d 1121,
107 Cal. Rptr. 473 (1873)

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ADMINISTRATIVE LAW—DEFENSE OF ENTRAPMENT—ENTRAPMENT
DEFENSE IS AVAILABLE IN ADMINISTRATIVE PROCEEDINGS—*Patty v.
Board of Medical Examiners*, 9 Cal. 3d 356, 508 P.2d 1121, 107 Cal.
Rptr. 473 (1973).

In January, 1968, Xavier Suazo, an investigator for the California Board of Medical Examiners, investigated a complaint by the son of an elderly patient that Dr. Frank M. Patty had prescribed narcotics for the patient in excessive dosages. Scrutiny of local, state, and federal narcotics bureau files and of local pharmaceutical records proved the complaint false. Indeed, at that time, Dr. Patty's professional record had been acclaimed as exemplary in every respect. Yet, Suazo persisted, employing a twenty year-old "actress, model and hostess" as a part-time undercover operative. He directed her to pose as a patient and to obtain an illegal drug prescription from Patty.¹ On January 4, 1968, the operative visited Patty's office and requested a prescription for "whites" or "dexies," but added that there was nothing wrong with her. She stated she merely wanted dexies to get high. Unfamiliar with either term, Patty first had to contact a druggist to ascertain just what she wanted before prescribing 100 tablets of amphetamine sulfate, a drug similar to Dexedrine. On January 7, the doctor suffered an acute myocardial infarction, but continued to work despite his doctor's orders. His illness and greatly weakened condition became known to the operatives, yet they nonetheless continued their efforts. On January 10, a second female operative, regularly employed as a deputy sheriff, accompanied the first to Patty's office and obtained prescriptions for amphetamine sulfate and Empirin Compound with codeine. Four more times within the month, the second operative visited the office with a third female, regularly employed as a policewoman, and secured prescriptions for amphetamine sulfate and Empirin. On March 29, Suazo himself was introduced to the doctor by two of the operatives and requested prescriptions for amphetamines and Percoc-

1. *Patty v. Board of Medical Examiners*, 9 Cal. 3d 356, 360, 508 P.2d 1121, 1123, 107 Cal. Rptr. 473, 475 (1973). This was not the first time the Board of Medical Examiners had employed young women to obtain illegally prescribed drugs from elderly male doctors such as Dr. Patty. See *Yakov v. Board of Medical Examiners*, 68 Cal. 2d 67, 69, 435 P.2d 553, 555, 64 Cal. Rptr. 785, 787 (1968) (revocation of physician's license); *Whitlow v. Board of Medical Examiners*, 248 Cal. App. 2d 478, 489-90, 56 Cal. Rptr. 525, 534 (1967) (same).

dan for the stated purpose of "getting some kicks." He was given amphetamines. On April 19, Suazo obtained renewals of his prescription and of those for the second and third operatives as well. On no visit by Suazo or his operatives did the doctor receive more than his standard office call charge of \$10.00.²

Patty was subsequently charged in an administrative disciplinary proceeding with violations of Business and Professions Code section 2399.5³ for his alleged prescription of dangerous drugs without a prior physical examination or medical indication therefor and of Business and Professions Code section 2391.5⁴ for his prescription of narcotics to a person not under treatment for a pathology or condition. The Board of Medical Examiners recommended that Patty's certificate be revoked, but that revocation be stayed pending five years' probation.⁵ He petitioned the superior court via writ of mandate to review the administrative decision⁶ and successfully contended that he had been entrapped by the conduct of the investigator and his three operatives.⁷ The California supreme court, in an opinion authored by Justice Tobriner, af-

2. 9 Cal. 3d at 359-61, 508 P.2d at 1123-24, 107 Cal. Rptr. at 475-76 (1973).

3. "Prescribing dangerous drugs . . . without either a prior examination of the patient or medical indication thereof . . . constitutes unprofessional conduct . . ." CAL. BUS. & PROF. CODE ANN. § 2399.5 (West Supp. 1973).

4. "The violation of any of the statutes of this State regulating narcotics and dangerous drugs, constitutes unprofessional conduct . . ." CAL. BUS. & PROF. CODE ANN. § 2391.5 (West 1962). The specific statute violated was former CAL. HEALTH & SAFETY CODE ANN. § 11163 (West 1964) which stated, "Except in the regular practice of his profession, no person shall prescribe, administer, or furnish, a narcotic to or for any person who is not under his treatment for a pathology or condition other than narcotic addiction . . ."

5. The California supreme court fails to mention this fact, which appears in the now vacated court of appeals opinion. *Patty v. Board of Medical Examiners*, 103 Cal. Rptr. 656, 658 (1972).

6. CAL. CODE CIV. PRO. § 1094.5 (West 1967). An administrative agency's findings of fact are not conclusive if constitutional rights of liberty or property are involved. *Drummey v. State Bd. of Funeral Directors*, 13 Cal. 2d 75, 85, 87 P.2d 848, 853-54 (1939), quoting *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 52 (1936); *Bixby v. Pierno*, 4 Cal. 3d 130, 138, 481 P.2d 242, 247, 93 Cal. Rptr. 234, 239 (1971). It is well established in California that a professional license is a vested property right. *Hewitt v. State Bd. of Medical Examiners*, 148 Cal. 590, 592, 84 P. 39, 40 (1906). Where an application for mandate is made to secure the restoration of a professional license, the trial court may make an *independent judgment* of the facts, as opposed to using a substantial evidence test. *Drummey v. State Bd. of Funeral Directors*, *supra* at 85, 87 P.2d at 854; cf. *Dare v. Board of Medical Examiners*, 21 Cal. 2d 790, 799-801, 136 P.2d 304, 309-10 (1943) (revocation of drugless practitioner's vested right); *Laisne v. California State Bd. of Optometry*, 19 Cal. 2d 831, 840, 123 P.2d 457, 463 (1942) (revocation of optometrist's vested right to practice his profession).

7. 9 Cal. 3d at 361-62, 508 P.2d at 1124, 107 Cal. Rptr. at 476.

firmed the trial court's determination that the defense of entrapment is available in administrative proceedings at which revocation or suspension of a license to practice a profession or business is at issue.⁸

THE CRIMINAL DEFENSE OF ENTRAPMENT

The defense of entrapment has achieved almost universal acceptance in criminal proceedings in the United States.⁹ All states, with the exception of New York¹⁰ and Tennessee,¹¹ have recognized and maintained its availability as a defense. Similarly, the federal courts have long allowed it, apparently first in *Woo Wai v. United States*,¹² and later the Supreme Court itself firmly established the viability of the entrapment defense in the leading case of *Sorrells v. United States*.¹³ In *Sorrells*, Chief Justice Hughes, writing for the majority, stated that the entrapment defense served to inhibit law enforcement officers from instigating a criminal act by persons "otherwise innocent in order to lure them to its commission and to punish them."¹⁴ In determining

8. *Id.* at 367, 508 P.2d at 1129, 107 Cal. Rptr. at 481 (1973). The California supreme court did not consider Patty's other contentions of alleged errors in the administrative proceedings and of abuse of administrative discretion in the severity and ambiguity of the Board's disciplinary order. *Id.* at 359 n.1, 508 P.2d at 1123 n.1, 107 Cal. Rptr. at 475 n.1.

9. *See, e.g.*, *United States v. Russell*, 411 U.S. 423 (1973); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971); *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970); *People v. Benford*, 53 Cal. 2d 1, 345 P.2d 928 (1959). *See also* Note, *The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942, 943 (1965).

10. *See* *People ex rel. Klein v. Schacher*, 47 N.Y.S.2d 371 (Magis. Ct. 1944).

11. *See* *Warden v. State*, 381 S.W.2d 247 (Tenn. 1964).

12. 223 F. 412 (9th Cir. 1915). In *Woo Wai*, an agent of the United States Immigration Commission investigating violations of immigration laws suspected the plaintiff, a Chinese merchant, of possessing information regarding previous unlawful importations of Chinese women into San Francisco. The agent then employed a detective and utilized Treasury funds in an attempt to induce the plaintiff to violate immigration laws by engaging and assisting in unlawful importation of Chinese. After repeated protests, the plaintiff assented, resulting in a charge of conspiracy to violate the immigration laws. In finding that government officers had entrapped the plaintiff, the court stated:

In the case at bar, the suggestion of the criminal act came from the officers of the government. The whole scheme originated with them [A] case is not within the spirit of the Criminal Code where an officer "originates the . . . intent, and apparently joins the defendant in the criminal act first suggested by the officer, merely to entrap the defendant."

223 F. at 415, quoting *O'Brien v. State*, 6 Tex. App. 665, 668 (1879). It is possible that the first lower federal court case to recognize the entrapment defense was *United States v. Healy*, 202 F. 349 (D. Mont. 1913), a case which preceded *Woo Wai*.

13. 287 U.S. 435 (1932). In *Sorrells*, a federal prohibition agent induced defendant to violate the National Prohibition Act by selling him liquor despite the defendant's initial protests. The court found that defendant had indeed been entrapped.

14. *Id.* at 448. *See also* *United States v. Russell*, 411 U.S. 423, 428-29 (1973).

its availability, the Chief Justice directed his focus toward whether or not the defendant had been predisposed to commit the crime.¹⁵ The Court in *Sherman v. United States*¹⁶ and, more recently, in *United States v. Russell*,¹⁷ has remained strictly committed to this approach.

California shares the belief that the sovereign has no business in fostering crime.¹⁸ In *People v. Benford*,¹⁹ the California supreme court stated that the viability of the entrapment defense in criminal proceedings rests upon broadly stated grounds of "sound public policy" and "good morals."²⁰ Justice Schauer acknowledged the imprecise nature of this public policy, but attempted to describe it by analogy to the rationale provided by the court in *People v. Cahan*²¹ regarding evidence secured in violation of constitutional guaranties. Thus, the *Benford* court stated, "[T]he Court refuses to enable officers of the law to consummate illegal or unjust schemes designed to foster rather than prevent and detect crime."²²

15. 287 U.S. at 451. Justice Roberts concurred in the result in *Sorrells*, but maintained that the availability of the defense turned on whether the government agents instigated the crime, irrespective of intent. See, e.g., *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971) and *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970), which have grounded the entrapment defense on the rationale propounded in Justice Roberts' concurrence. Closely related to this approach is a "non-entrapment" rationale espoused in *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971). There, defendant's conviction was reversed because the government agent involved had participated so completely in the criminal activity that defendant's prosecution became "repugnant to [the] American [system of] criminal justice." *Id.* at 787.

Other rationales advanced for the entrapment defense have been: (1) estoppel where there is evidence of governmental misconduct (*Casey v. United States*, 276 U.S. 413, 425 (1928)), and (2) constitutional concepts of due process (*Raley v. Ohio*, 360 U.S. 423, 437-40 (1959)). See generally *United States v. Chisum*, 312 F. Supp. 1307, 1310 (C.D. Cal. 1970).

16. 356 U.S. 369 (1958).

17. 411 U.S. 423 (1973).

18. 9 Cal. 3d at 363, 508 P.2d at 1125, 107 Cal. Rptr. at 477; cf. *People v. Benford*, 53 Cal. 2d 1, 8-9, 345 P.2d 928, 933-34 (1959).

19. 53 Cal. 2d 1, 345 P.2d 928 (1959).

20. *Id.* at 8-9, 345 P.2d at 933-34.

21. 44 Cal. 2d 434, 282 P.2d 905 (1955).

22. 53 Cal. 2d at 9, 345 P.2d at 933. As in *Sorrells*, *Sherman*, and *Russell*, the availability of entrapment as a defense depends on whether the intent to commit the crime originates in the mind of the defendant or in the mind of the officer. *People v. Benford*, 53 Cal. 2d 1, 10, 345 P.2d 928, 934 (1959); *People v. Nunn*, 46 Cal. 2d 460, 471, 296 P.2d 813, 819-20 (1956). However, while California concurs with the general federal rationale of the defense and with the test which determines its availability, there is one material difference. California has expressly refused to admit evidence that the "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," while the federal rule permits such a prosecutorial response to

CIVIL APPLICABILITY OF THE ENTRAPMENT RATIONALE

A significant number of jurisdictions have further recognized that the defense, while originating in the criminal law field, is equally applicable to administrative proceedings where revocation or suspension of a license to practice a profession, trade, or business is at issue.²³ On the other hand, prior to *Patty v. Board of Medical Examiners*, California occupied a distinct minority,²⁴ uncertain whether or not to bridge the separation between proceedings which are criminal in nature and those deemed administrative. Indeed, three appellate courts had stated that the availability of entrapment in administrative proceedings was open to question, while only one had assumed its applicability.

*United Liquors v. Department of Alcoholic Beverage Control*²⁵ was the first major case which confronted the issue of an entrapment defense in an administrative disciplinary proceeding. The court of appeals declared that such hearings are not penal in nature and thus are not governed by theories developed in the field of criminal law.²⁶ Yet

rebut the defense. *Compare* *People v. Benford*, 53 Cal. 2d 1, 11, 345 P.2d 928, 935 (1959); *People v. Roberts*, 40 Cal. 2d 483, 490, 254 P.2d 501, 505 (1953); *People v. Makovsky*, 3 Cal. 2d 366, 370-71, 44 P.2d 536, 538 (1935); CAL. EVID. CODE §§ 352, 1101(b) (West 1968), with *Sherman v. United States*, 356 U.S. 369, 373 (1958); *Sorrells v. United States*, 287 U.S. 435, 451 (1932).

23. *See, e.g.*, *Jones v. Dental Comm'n*, 145 A. 570, 571 (Conn. 1929) (revocation of dental technician's license); *Peters v. Brown*, 55 So. 2d 334, 336 (Fla. 1951) (injunction against unlawful practice of dentistry); *Florida Bd. of Pharmacy v. Hall*, 157 So. 2d 824, 826-28 (Fla. Ct. App. 1963) (revocation of pharmacist's license); *In re Horwitz*, 196 N.E. 208, 213-14 (Ill. 1935) (disbarment of attorney); *Roberts v. Illinois Liquor Control Comm'n*, 206 N.E.2d 799 (Ill. 1965) (revocation of liquor license); *In re Davidson*, 186 P.2d 354, 357 (Nev. 1947) (disbarment of attorney); *Langdon v. Board of Liquor Control*, 130 N.E.2d 430, 432 (Ohio 1954) (revocation of liquor license); *Ray v. Board of Liquor Control*, 154 N.E.2d 89 (Ohio Ct. App. 1957) (suspension of liquor license); *Game Comm'n v. Wargo*, 46 Luz. Leg. Reg. Rep. 36 (Pa. County Ct. 1956) (revocation of hunting license); *In re Feeko's Liquor License*, 45 Luz. Leg. Reg. Rep. 243, 245-46 (Pa. County Ct. 1955) (revocation of liquor license); *In re Revocation of Liquor License of Bayer*, 38 Luz. Leg. Reg. Rep. 68 (Pa. County Ct. 1944) (revocation of liquor license); *In re Najaka*, 35 Luz. Leg. Reg. Rep. 17 (Pa. County Ct. 1940) (revocation of liquor license). *But cf.* *Knight v. Louisiana State Bd. of Medical Examiners*, 211 So. 2d 433, 438 (La. Ct. App. 1968) (dictum that court is "inclined" not to permit defense of entrapment in medical license revocation proceeding).

24. 9 Cal. 3d at 362-63, 508 P.2d at 1125, 107 Cal. Rptr. at 477.

25. 218 Cal. App. 2d 450, 32 Cal. Rptr. 603 (1963). In *United Liquors*, an enforcement agent sought and obtained an illegal discount in the purchase of liquor. Ultimately, the owner's liquor license was revoked.

26. *Id.* at 454, 32 Cal. Rptr. at 606. *United Liquors* cited *Webster v. Board of Dental Examiners*, 17 Cal. 2d 534, 110 P.2d 992 (1941), the leading case for the proposition asserted. *See* notes 56-60 *infra* and accompanying text. Query whether the court

the court did not hold the defense to be unavailable. Using criminal cases as a basis,²⁷ the court found that the evidence would have been insufficient to sustain the defense under the test applied in *People v. Sweeney*:²⁸

[E]ntrapment [is] shown as a matter of law only where the evidence establishe[s] that the accused was induced by the officer to commit a crime which he would not otherwise have committed and where there [is] no substantial evidence that the criminal intent to commit the particular offense originated in the mind of the accused.²⁹

Thus, the insufficiency of the evidence prevented the court from reaching the actual issue of the defense's availability, and *United Liquors* "at least [left] open to question whether entrapment was a proper defense" in administrative proceedings.³⁰

United Liquors caused confusion in the cases which followed. In *Harris v. Alcoholic Beverage Appeals Board*,³¹ the court again declined to definitively state whether the defense of entrapment had been or should be incorporated into the field of administrative law, holding, as had *United Liquors*, that the evidence fell short of establishing entrapment as a matter of law.³² Still again, in *Whitlow v. Board of*

in *Patty* has recognized the availability of the entrapment defense in administrative proceedings as an exception to the *Webster* rule. See notes 56-57 *infra* and accompanying text.

27. See, e.g., *People v. Sweeney*, 55 Cal. 2d 27, 49, 357 P.2d 1049, 1061, 9 Cal. Rptr. 793, 805-06 (1960) (accused must be induced to commit the crime); *People v. Benford*, 53 Cal. 2d 1, 10, 345 P.2d 928, 934 (1959) (intent must not originate in the mind of defendant); *People v. Makovsky*, 3 Cal. 2d 366, 369-70, 44 P.2d 536, 537 (1935) (evidence must show some persuasion or inducement beyond ordinary transaction between willing buyer and seller); *People v. Neal*, 120 Cal. App. 2d 329, 332-33, 261 P.2d 13, 15 (1953) (mere furnishing of an opportunity to commit the offense does not constitute entrapment); *People v. Norcross*, 71 Cal. App. 2, 8, 234 P. 438, 441 (1925) (not important that purchasers of illegal merchandise are in employ of law enforcement agency and use money obtained from that source).

28. 55 Cal. 2d 27, 49, 357 P.2d 1049, 1061, 9 Cal. Rptr. 793, 805 (1960).

29. 218 Cal. App. 2d at 455, 32 Cal. Rptr. at 606; cf. Note, *The Defense of Entrapment in California*, 19 HASTINGS L.J. 825 (1968).

30. 218 Cal. App. 2d at 450, 32 Cal. Rptr. at 603.

31. 245 Cal. App. 2d 919, 923-25, 54 Cal. Rptr. 346, 349-51 (1966). In *Harris*, special investigators for the Department of Alcoholic Beverage Control purchased alcoholic beverages on three occasions for a female employee in petitioner's bar. Because she was permitted to use and consume the drinks on his premises, petitioner was charged with violating Title 4, § 143, California Administrative Code, and his on-sale general license was suspended.

32. *Id.* at 925, 54 Cal. Rptr. at 351. The court did suggest:

The policy of [the] Department as how best to enforce observance of its licensing regulations is for [the] Department to decide. If such enforcement procedures should violate a recognized public policy, no doubt the departmental policy must

Medical Examiners,³³ a case with facts strikingly similar to those of *Patty*, the court could not accept as a matter of law that the defendant had been entrapped in the legal sense of the term.³⁴ However, the *Whitlow* court affirmatively stated in dictum that it would have sustained the defense's availability in the administrative proceeding had there been sufficient facts to support a finding of entrapment.³⁵ Later, *Shakin v. Board of Medical Examiners*,³⁶ a proceeding for the revocation of a doctor's license, made a generally accurate description of the situation by stating that the doctrine's applicability to the field of administrative law remained in doubt, citing the aforementioned cases.³⁷

*Patty*³⁸ finally resolved the uncertain status of the entrapment defense in administrative proceedings. The *Patty* court determined that the state's interest in the "preservation of the dignity of the legal process and of public confidence in it"³⁹ far outweighed its interest in weeding out medical practitioners guilty of malfeasance.⁴⁰ Consequently, Justice Tobriner, for a unanimous court, held the defense of entrapment available in those proceedings which contemplate revocation or suspension of a license to practice a profession, trade, or business, stating that there was no less a need for the defense in such administrative proceedings than in criminal prosecutions.⁴¹

yield. But public policy in this field will not be more exacting than it is in condemning entrapment as a basis for criminal prosecutions.

Id.

33. 248 Cal. App. 2d 478, 56 Cal. Rptr. 525 (1967). The petitioner in *Whitlow*, like Dr. Patty, was a physician charged with unprofessional conduct under Business and Professions Code § 2399.5 for the issuance of prescriptions for dangerous drugs "without either prior examination of the patient or medical indication thereof." The patients who induced his issuance of prescriptions were investigators for the Board of Medical Examiners. *Id.* at 480-81, 56 Cal. Rptr. at 528-29.

34. *Id.* at 493, 56 Cal. Rptr. at 536.

35. *Id.* at 489-90, 56 Cal. Rptr. at 534.

36. 254 Cal. App. 2d 102, 62 Cal. Rptr. 274 (1967).

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

38. 9 Cal. 3d 356, 508 P.2d 1121, 107 Cal. Rptr. 473 (1973).

39. *Id.* at 359, 364, 508 P.2d at 1122, 1126, 107 Cal. Rptr. at 474, 478; *cf.* *Sherman v. United States*, 356 U.S. 369, 380 (1958).

40. Query what weight has been accorded a breach of the Hippocratic Oath, "To please no one will I prescribe a deadly drug If I keep this oath faithfully, may I enjoy my life and practice my art, respected by all men and in all times; but if I swerve from it or violate it, may the reverse be my lot." WASMUTH, LAW FOR THE PHYSICIAN 18 (1966).

41. 9 Cal. 3d at 359, 364, 508 P.2d at 1122, 1126, 107 Cal. Rptr. at 474, 478. The *Patty* court had little difficulty finding entrapment by state agents. Dr. Patty demonstrated that his own professional record had been exemplary prior to any solicitation by operatives connected with the investigative arm of the Board of Medical Examiners and that this had been confirmed by the Board's own initial investigation. The fact

The rationale for the court's decision was grounded in a variety of sources. First, the court borrowed the *Benford*⁴² rationale for recognition of the defense in criminal prosecutions. In analogizing the reasons set down by *Cahan*⁴³ to support the proposition that evidence obtained in violation of constitutional guarantees is inadmissible, the *Benford* court had stated:

[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 detect crime.⁴⁴

Secondly, the *Patty* court recognized that the roots of the entrapment doctrine could be found in civil cases. Thus, it referred to Justice Roberts' concurring opinion in *Sorrells v. United States*,⁴⁵ where he had stated:

Always the courts refuse their aid in civil cases to the perpetration and consummation of an illegal scheme. Invariably they hold a civil action must be abated if its basis is violation of the decencies of life, disregard of the rules, statutory or common law, which formulate the ethics of men's relations to each other. Neither courts of equity nor those administering legal remedies tolerate the use of their process to consummate a wrong. *The doctrine of entrapment in criminal law is the analogue of the same rule applied in civil proceedings.*⁴⁶

Thirdly, the court adhered to its somewhat similar holding in the recent case of *Redner v. Workmen's Compensation Appeals Board*⁴⁷ where the court had held that evidence obtained by fraud or deceit

that he was ignorant of the names commonly employed to describe restricted drugs was held to justify an additional inference that he lacked prior intent. The evidence showed that the Board's agents did not merely investigate whether or not the doctor would prescribe drugs illegally, but, according to instructions, virtually "worked" Patty to get illegal prescriptions. Thus, the court determined there was substantial evidence from which the trial court could infer that Patty harbored no pre-existing intent, but was induced to commit the crime by deceit on the part of state agents.

The California supreme court was bound to affirm the trial court result on appeal as long as its findings were supported by substantial evidence. *Bekiaris v. Board of Educ.*, 6 Cal. 3d 575, 587, 493 P.2d 480, 487, 100 Cal. Rptr. 16, 23 (1972); *Yakov v. Board of Medical Examiners*, 68 Cal. 2d 67, 71-73, 435 P.2d 553, 556-57, 64 Cal. Rptr. 785, 788-89 (1968).

42. *People v. Benford*, 53 Cal. 2d 1, 8-9, 345 P.2d 928, 933 (1959).

43. 44 Cal. 2d 434, 445, 282 P.2d 905, 912 (1955).

44. 53 Cal. 2d at 9, 345 P.2d at 933.

45. 287 U.S. 435 (1932) (Roberts, J., concurring, joined by Brandeis and Stone, JJ.). See note 15 *supra*.

46. 287 U.S. at 455 (emphasis added and citations omitted).

47. 5 Cal. 3d 83, 485 P.2d 799, 95 Cal. Rptr. 447 (1971).

must be rejected by an administrative agency in order to maintain the "dignity of its proceedings and the fair administration of justice."⁴⁸ By thus applying the same rationale as had Justice Roberts in *Sorrells*,⁴⁹ the California supreme court had appeared to equate both fraud and deceit with entrapment.⁵⁰

Finally, the *Patty* court recognized that when an administrative agency, such as the Board of Medical Examiners, possesses both investigatory and adjudicatory powers, it is manifest that such enormous power invites even greater dangers of abuse and discrimination than when the administrative body is purely adjudicative in nature.⁵¹ The court was clearly expressing its concern, as it had said in *Bixby v. Pierno*,⁵² that the "burgeoning [administrative] bureaucracy [might] endanger the prevailing concepts of individual rights."⁵³

PECULIARITIES OF CALIFORNIA ADMINISTRATIVE LAW

By acknowledging the availability of the entrapment defense in administrative proceedings, the *Patty* court committed California to the approach taken by a majority of those states which have confronted the issue.⁵⁴ But it has long been a rule of law in California that administrative disciplinary proceedings which contemplate revocation or suspension of a professional license may not use theories developed in the field of criminal law.⁵⁵

48. *Id.* at 95, 485 P.2d at 807, 95 Cal. Rptr. at 455. See 9 Cal. 3d at 364, 508 P.2d at 1127, 107 Cal. Rptr. at 479.

49. 287 U.S. at 455. See note 15 *supra*; *cf.* *Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring); *Patty v. Board of Medical Examiners*, 9 Cal. 3d 356, 364-65, 508 P.2d 1121, 1127, 107 Cal. Rptr. 473, 479 (1973); *People v. Benford*, 53 Cal. 2d 1, 9, 345 P.2d 928, 933 (1959).

50. The court could have further augmented its position by citing *Elder v. Board of Medical Examiners*, 241 Cal. App. 2d 246, 50 Cal. Rptr. 304 (1966), which assumed in dictum that an administrative agency must reject evidence illegally seized per the rationale in *People v. Cahan*, 44 Cal. 2d 434, 445-46, 282 P.2d 905, 912 (1955). See notes 78-79 *infra* and accompanying text.

51. While addressing itself to agencies which combine both investigative and adjudicative powers, the court did not foreclose application of the entrapment defense in other administrative proceedings. 9 Cal. 3d at 365, 508 P.2d at 1127, 107 Cal. Rptr. at 479.

52. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

53. *Id.* at 142, 481 P.2d at 250, 93 Cal. Rptr. at 242; *cf.* *United States v. Butler*, 297 U.S. 1 (1936).

54. 9 Cal. 3d at 362-63, 508 P.2d at 1125, 107 Cal. Rptr. at 477. See note 23 *supra* and accompanying text.

55. *Webster v. Board of Dental Examiners*, 17 Cal. 2d 534, 537-38, 110 P.2d 992, 995 (1941). See also, *e.g.*, *Small v. Smith*, 16 Cal. App. 3d 450, 457, 94 Cal. Rptr. 136, 140 (1971) (revocation of real estate broker's license); *Borror v. Department*

The landmark case of *Webster v. Board of Dental Examiners*⁵⁶ was the first definitive pronouncement in California that such proceedings are not quasi-criminal in nature.⁵⁷ The crux of this purported distinction is that the proceedings are not intended to punish misconduct, but to afford protection to the public.⁵⁸ As later explained in *Meade v. State Collection Agency Board*:⁵⁹

[T]he purpose of the proceeding is to determine the fitness of the licensee to continue in that capacity and thus to protect society by removing, either temporarily or permanently, from the licensed business or profession, a licensee whose methods of conducting his business indicate a lack of those qualities which the law demands.⁶⁰

This "distinction in purpose" has been the rationale utilized by California courts to justify their continued refusal to apply criminal theories to administrative disciplinary proceedings.⁶¹ In the overwhelming majority of earlier cases, such an analysis was utilized with respect to the applicability of *Miranda* or *Dorado* warnings,⁶² criminal burden of

of Inv., 15 Cal. App. 3d 531, 540, 92 Cal. Rptr. 525, 529 (1971) (revocation of real estate salesman's license); *Savoy Club v. Board of Supervisors*, 12 Cal. App. 3d 1034, 1039, 91 Cal. Rptr. 198, 201 (1970) (revocation of corporation's license to conduct a card club).

56. 17 Cal. 2d 534, 110 P.2d 992 (1941). See also *Suckow v. Alderson*, 182 Cal. 247, 181 P. 965 (1920); *Lanterman v. Anderson*, 36 Cal. App. 472, 172 P. 625 (1918).

57. *Webster* disapproved *Messner v. Board of Dental Examiners*, 87 Cal. App. 199, 205, 262 P. 58, 60 (1927), which stated in dictum that a proceeding to suspend or revoke a license is quasi-criminal. 17 Cal. 2d at 539, 110 P.2d at 995.

58. See, e.g., *Webster v. Board of Dental Examiners*, 17 Cal. 2d 534, 110 P.2d 992 (1941); *Meade v. State Collection Agency Bd.*, 181 Cal. App. 2d 774, 777, 5 Cal. Rptr. 486, 487 (1960); *West Coast Co. v. Contractor's Bd.*, 72 Cal. App. 2d 287, 301, 164 P.2d 811, 818-19 (1945).

59. 181 Cal. App. 2d 774, 5 Cal. Rptr. 486 (1960).

60. *Id.* at 777, 5 Cal. Rptr. at 487. See also *In re Winne*, 208 Cal. 35, 41, 280 P. 113, 115 (1929); *West Coast Co. v. Contractor's Bd.*, 72 Cal. App. 2d 287, 301, 164 P.2d 811, 818-19 (1945).

61. See, e.g., *Small v. Smith*, 16 Cal. App. 3d 450, 457, 94 Cal. Rptr. 136, 140 (1971) (revocation of real estate broker's license); *Ready v. Grady*, 243 Cal. App. 2d 113, 116, 52 Cal. Rptr. 303, 305-06 (1966) (revocation of insurance agent's license).

62. See *Mumford v. Department of Alcoholic Beverage Control*, 258 Cal. App. 2d 49, 51, 65 Cal. Rptr. 495, 496-97 (1968) (*Miranda* warnings inapplicable in proceeding for revocation of an on-sale general license); *In re Acuna*, 245 Cal. App. 2d 388, 392, 53 Cal. Rptr. 884, 886 (1966) (*Miranda* warnings not required in juvenile proceedings because such proceedings are not criminal in nature); *In re Castro*, 243 Cal. App. 2d 402, 409, 52 Cal. Rptr. 469, 473 (1966) (same). A query has been raised whether the holding in *Acuna* has been modified in light of *In re Gault*, 387 U.S. 1 (1966), which applied the *Miranda* doctrine to juvenile court proceedings. *Molinari, California Administrative Process: A Synthesis Updated*, 10 SANTA CLARA LAW. 274, 282 (1969) [hereinafter cited as *Molinari*]. If so, it is because *Gault* perceives the close identity between the process in this particular type of administrative proceeding and

proof,⁶³ right to counsel,⁶⁴ search and seizure,⁶⁵ privilege against self-

the aims and objectives of criminal law enforcement. 387 U.S. at 49. See *Borror v. Department of Inv.*, 15 Cal. App. 3d 531, 542, 92 Cal. Rptr. 525, 531; cf. *People v. One 1960 Cadillac Coupe*, 62 Cal. 2d 92, 96-97, 396 P.2d 706, 709, 41 Cal. Rptr. 290, 293 (1964) (fourth amendment exclusionary rule made applicable to forfeiture proceedings).

The law in California is substantially uncertain as to when statements in administrative proceedings may be used in subsequent criminal proceedings. *Gerace v. County of Los Angeles*, 24 Cal. App. 3d 350, 358, 100 Cal. Rptr. 917, 923, cert. denied, 409 U.S. 1012 (1972), came closest to addressing the problem as it exists in California. It held that failure to comply with constitutional warnings is not fatal to the use, in a discharge hearing, of statements obtained in an administrative investigation where the person being investigated is granted immunity from use of the statements in any criminal prosecution. Cf. *United States ex rel. Catena v. Elias*, 465 F.2d 765, 769-70 n.19 (3d Cir. 1972); *United States v. Prudden*, 424 F.2d 1021, 1028 (5th Cir. 1970). *Prudden* recognized that a criminal charge might result every time a government official confronted a citizen. The court expressly declined to require the imposition of *Miranda* requirements because the warning would become too commonplace to remain effective.

The ultimate answer may lie in *Miranda's* own distinction between the investigative and accusatory states. *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1965). Thus, *Shively v. Stewart*, 65 Cal. 2d 475, 480, 421 P.2d 65, 68, 55 Cal. Rptr. 217, 219 (1966), holding prehearing discovery in the criminal context applicable to administrative proceedings, noted that disciplinary proceedings have a punitive character because the agency can prohibit the accused from practicing his profession. Cf. CAL. GOV'T CODE ANN. § 11503 (West 1966). Arguably, such a proceeding is thus raised to the accusatory stage, mandating the constitutionally required warnings.

63. *Furman v. State Bar*, 12 Cal. 2d 212, 229, 83 P.2d 12, 21 (1938) (quantum of proof in administrative proceedings is convincing proof to a reasonable certainty); *Small v. Smith*, 16 Cal. App. 3d 450, 457, 94 Cal. Rptr. 136, 140 (1971) (same); *Cornell v. Reilly*, 127 Cal. App. 2d 178, 183-84, 273 P.2d 572, 576 (1954) (same).

The nature of disbarment hearings is *sui generis* when compared to other administrative disciplinary proceedings, although both claim to apply the same standards as to burden of proof. Whereas the latter proceedings support the view in *Webster* that administrative proceedings are not quasi-criminal in nature, disbarment proceedings have always been considered quasi-criminal. Cf. *In re Haymond*, 121 Cal. 385, 53 P. 899 (1898). *Brotsky v. State Bar*, 57 Cal. 2d 287, 368 P.2d 697, 19 Cal. Rptr. 153 (1962), explains, "[The State Bar] is not an administrative board in the ordinary sense of the phrase. It is *sui generis*. In disciplinary matters (and in many other of its other functions) it proceeds as an arm of this court." *Id.* at 300, 68 P.2d at 703, 19 Cal. Rptr. at 159. See also *Romero v. Hern*, 276 Cal. App. 2d 787, 790, 81 Cal. Rptr. 281, 284 (1969).

64. *Borror v. Department of Inv.*, 15 Cal. App. 3d 531, 543, 92 Cal. Rptr. 525, 531 (1971) (licensee may retain counsel of his own choice in administrative disciplinary proceedings, but he bears that burden himself, even if he is indigent); *Staley v. California Unemployment Ins. Appeals Bd.*, 6 Cal. App. 3d 675, 678-79, 86 Cal. Rptr. 294, 295 (1970) (no constitutional right to counsel in administrative proceedings); cf. California Administrative Procedure Act § 11509; *Steen v. Board of Civil Serv. Comm'rs*, 26 Cal. 2d 716, 727, 160 P.2d 816, 822 (1945) (party to administrative proceeding may retain counsel where proceeding is of such a nature that the party's interest might be prejudiced if he is denied the right to be so represented).

Staley, *supra* at 678, 86 Cal. Rptr. at 295, refused to extend the constitutional

incrimination,⁶⁶ and cruel and unusual punishment.⁶⁷ It is not surprising, then, that substantial equivocation arose when it was argued that the defense of entrapment should be available in administrative proceedings.

At least one commentator has suggested that there has been a recent appellate court trend in California tending to erode this now-traditional "distinction" between administrative proceedings and criminal prosecutions.⁶⁸ The cases comprising the "trend" appear to deal with the type of situation where there has been a deprivation of liberty,⁶⁹ property,⁷⁰ or property rights,⁷¹ and where the proceeding's aims and objectives bear a close identity to those of criminal law enforcement.⁷² Early "trend" cases were apparently ratified by, and subsequent cases based upon, *People v. One 1960 Cadillac Coupe*⁷³

right to counsel to administrative proceedings when a valuable property right is at stake. *Cf. Elder v. Board of Medical Examiners*, 241 Cal. App. 2d 246, 260, 50 Cal. Rptr. 304, 315 (1966). But query whether there is a constitutional right to counsel when the aims and objectives of the administrative proceeding approximate those of a criminal prosecution. *Cf. In re Gault*, 387 U.S. 1, 41 (1967) (constitutional right to counsel in juvenile court proceedings); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (constitutional right to counsel in parole revocation hearings).

65. *Cooley v. State Bd. of Funeral Directors and Embalmers*, 141 Cal. App. 2d 293, 298, 296 P.2d 588, 591 (1956) (fourth amendment exclusionary rule held inapplicable to administrative hearings, at least where there was some governmental right to inspect and investigate licensee's business).

66. *West Coast Co. v. Contractor's Bd.*, 72 Cal. App. 2d 287, 301, 164 P.2d 811, 818-19 (1945) (revocation of contractor's license). *See also Savoy Club v. Board of Supervisors*, 12 Cal. App. 3d 1034, 1040, 91 Cal. Rptr. 198, 200-01 (1970) (revocation of corporation's license to conduct a card club).

67. *Koop v. Structural Pest Control Bd.*, 276 Cal. App. 2d 249, 253, 81 Cal. Rptr. 154, 157 (1969). The *Webster* rule has been applied to other issues. *See, e.g., Marlo v. State Bd. of Medical Examiners*, 112 Cal. App. 2d 276, 282, 246 P.2d 69, 72-73 (1952) (uncorroborated testimony of an accomplice), and *Meade v. State Collection Agency Bd.*, 181 Cal. App. 2d 774, 776-77, 5 Cal. Rptr. 486, 487-88 (1960) (doctrine of included offenses).

68. *Molinari, supra* note 62; *cf. Borrer v. Department of Inv.*, 15 Cal. App. 3d 531, 92 Cal. Rptr. 525 (1971).

69. *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P.2d 905, 912 (1955) (fourth amendment exclusionary rule held applicable to deter illegal search and seizure in criminal prosecutions).

70. *People v. One 1960 Cadillac Coupe*, 62 Cal. 2d 92, 96-97, 396 P.2d 706, 709, 41 Cal. Rptr. 290, 293 (1964) (fourth amendment exclusionary rule applicable to forfeiture proceedings).

71. *Elder v. Board of Medical Examiners*, 241 Cal. App. 2d 246, 260, 50 Cal. Rptr. 304, 315 (1966) (dictum that exclusionary rule is applicable to administrative proceedings). *See notes 78-80 infra* and accompanying text.

72. *In re Gault*, 387 U.S. 1, 30, 36, 41, 49 (1967) (constitutional right to counsel in juvenile proceedings).

73. 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964).

wherein the California supreme court validated the use of the fourth amendment exclusionary rule in car-forfeiture proceedings. The apparent basis for the court's decision was that the purpose of a forfeiture is deterrent in nature and thus that there is a close identity with the aims and objectives of criminal law enforcement.⁷⁴ A deprivation was also clearly contemplated, although the court preferred not to determine whether of liberty or of property.⁷⁵ The same analysis was apparently utilized in *People v. Moore*⁷⁶ where the exclusionary rule was also held applicable to narcotic addict "civil" commitment proceedings.⁷⁷ It would seem clear, however, that the "trend" could not be extended to those administrative proceedings whose purposes bore no relationship to the aims and objectives of criminal law enforcement under the *Webster-Meade* "distinction in purpose." Yet, in *Elder v. Board of Medical Examiners*,⁷⁸ the appellate court assumed, without deciding, that the exclusionary rule also applied to administrative hearings which, although contemplating the deprivation of a property right,⁷⁹ had the protection of the public as their "sole" objective.⁸⁰

In holding the entrapment defense to be available in administrative

74. *Id.* at 96, 396 P.2d at 709, 41 Cal. Rptr. at 293.

75. *Id.* at 96-97, 396 P.2d at 709, 41 Cal. Rptr. at 293. See *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P.2d 905, 912 (1955).

76. 69 Cal. 2d 674, 446 P.2d 800, 72 Cal. Rptr. 800 (1968).

77. *Id.* at 680-82, 446 P.2d at 803-05, 72 Cal. Rptr. at 803-05. *But cf. In re Martinez*, 1 Cal. 3d 641, 650, 463 P.2d 734, 741, 83 Cal. Rptr. 382, 389 (1970) (exclusionary rule held inapplicable to Adult Authority proceedings because they are sui generis in nature).

78. 241 Cal. App. 2d 246, 260, 50 Cal. Rptr. 304, 315 (1966). In *Elder*, the court never actually passed on the question because no evidence resulting from the search and seizure was actually admitted into evidence at the trial level. *Cf. Pierce v. Board of Nursing Registration*, 255 Cal. App. 2d 463, 466, 63 Cal. Rptr. 107, 109 (1967); *Thorp v. Department of Alcoholic Beverage Control*, 175 Cal. App. 2d 489, 492, 346 P.2d 433, 436 (1959).

79. The right to practice medicine is, like the right to practice any other profession, a valuable property right which is constitutionally protected. *Hewitt v. State Bd. of Medical Examiners*, 148 Cal. 590, 592, 84 P. 39, 41 (1906). See also *Dent v. West Virginia*, 129 U.S. 114 (1888). The *Hewitt* rule has been extended to other professions and businesses subject to licensing. See *Laisne v. California State Bd. of Optometry*, 19 Cal. 2d 831, 835, 123 P.2d 457, 460 (1942) (practice of optometry); *Cassava v. Off.*, 206 Cal. 307, 314-15, 274 P. 523, 526 (1929) (practice of pharmacy); *In re Collins*, 188 Cal. 701, 703-04, 206 P. 990, 991 (1922) (practice of law); *Blinder v. Department of Narcotics Enforcement*, 25 Cal. App. 3d 174, 181, 101 Cal. Rptr. 635, 639 (1972) (practice of medicine); *Slaughter v. Edwards*, 11 Cal. App. 3d 285, 291-92, 90 Cal. Rptr. 144, 149 (1970) (practice of real estate); *Elder v. Board of Medical Examiners*, 241 Cal. App. 2d 246, 260, 50 Cal. Rptr. 304, 315 (1966) (practice of medicine).

80. 241 Cal. App. 2d at 260, 50 Cal. Rptr. at 315.

proceedings, *Patty* did not affirm any erosion of the "distinction in purpose" between administrative proceedings and criminal prosecutions. The *Patty* proceeding's ostensible purpose of public protection bore no close similarity to the aims and objectives of criminal law enforcement, and the court could rely on none of the "exceptions" to *Webster*.⁸¹ Yet the *Webster* doctrine that administrative proceedings are not quasi-criminal was in no way disapproved, nor had it been weakened by the supreme court's prior holding in *Redner* which had applied an exclusionary rule going to fraud and deceit in a proceeding having no similarity of objective with criminal enforcement.⁸² Appellate cases denying the applicability of criminal theories not going to fraud, deceit, or entrapment in public protection administrative actions remain unreversed.⁸³

It would therefore appear that the sole trend affirmed by *Patty* is one firmly establishing "the dignity of the legal process and . . . public confidence in it"⁸⁴ in the administrative area as well as the civil⁸⁵ and the criminal.⁸⁶ The heretofore anomalous *Elder* dictum⁸⁷ has been both ratified and bolstered. *Patty* makes it clear that evidence will be admitted in *no* proceeding when the tactics utilized in its procurement involve fraud or deceit,⁸⁸ illegal search or seizure,⁸⁹ or entrapment.⁹⁰

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81. See notes 68-77 *supra* and accompanying text.

82. *Redner v. Workmen's Compensation Appeals Bd.*, 5 Cal. 3d 83, 485 P.2d 799, 95 Cal. Rptr. 447 (1971). See notes 47-50 *supra* and accompanying text.

83. See notes 61-67 *supra* and accompanying text.

84. 9 Cal. 3d at 364, 508 P.2d at 1126, 107 Cal. Rptr. at 478.

85. See notes 45-46 *supra* and accompanying text.

86. See notes 9-22 *supra* and accompanying text.

87. See notes 78-80 *supra* and accompanying text.

88. See notes 78-80 *supra* and accompanying text; *cf.* notes 47-50 *supra* and accompanying text.

89. See notes 42-44 *supra* and accompanying text.

90. See notes 38-41 *supra* and accompanying text.