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The Defense of Entrapment in Administrative Proceedings

Jan Mark Dudman

The Defense of Entrapment in Administrative Proceedings

In April, 1973 the California Supreme Court reversed the appellate court and affirmed the trial court decision by holding 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.[1] By so ruling, the court expanded the classic criminal defense of entrapment by making that defense available in certain administrative proceedings. This decision is a recognition of the overwhelming power of administrative agencies, and the holding provides an important protection from the broad discretionary power exercised by these departments.

Pursuant to a complaint lodged against the plaintiff, Dr. Frank M. Patty, the Department of Professional and Vocational Standards (the investigative and enforcement arm of the Board of Medical Examiners) conducted an investigation. The complaint maintained that Dr. Patty had prescribed narcotics in excessive amounts to one patient. Investigator Xavier Suazo conducted the inquiry by contacting the State Bureau of Narcotics to determine the number of prescriptions written by the plaintiff in the recent past. Suazo then checked to determine if Dr. Patty had any past criminal drug violations. He also surveyed neighborhood pharmacies to ascertain if plaintiff had perhaps written a large number of narcotics and dangerous drug prescriptions. The outcome of such inquiry proved fruitless.

Investigator Suazo decided to utilize Patricia Wolf, an attractive female model who had worked in the past for the Department to aid in his investigation. She was instructed by Suazo to become a patient of Dr. Patty in order to obtain prescriptions for narcotics and dangerous drugs from him. On January 4, 1968 Miss Wolf first visited Dr. Patty and requested a prescription for "whites" for the purpose of "getting high". Patty, not being familiar with the term "whites", was told by Miss Wolf she meant "dexies".

1. Patty v. Board of Medical Examiners, 9 Cal. 3d 356, 508 P.2d 1121, 107 Cal. Rptr. 473 (1973) hereinafter referred to as *Patty* II. The appellate level decision, Patty v. Board of Medical Examiners, 27 Cal. App. 3d 360, 103 Cal. Rptr. 656 (1972) will be hereinafter referred to as *Patty* I. (*Patty* I was not certified for publication).

After looking up the term in a reference work, Dr. Patty wrote a prescription for one-hundred tablets of amphetamine sulfate, a drug similar to dexidrene. He did not examine the "patient".

A few days after this visit Dr. Patty suffered an acute myrocardial infraction but he continued to work contrary to his doctor's orders. On January 10 a second female agent accompanied Miss Wolf to the plaintiff's office. The second agent, a deputy sheriff, was introduced to Dr. Patty by agent Wolf. She asked for and received, without an examination, one-hundred amphetamine tablets and one-hundred tablets of Empirin compound with codeine. On the same occasion Miss Wolf asked for one-hundred dexedrine tablet and one-hundred tablets of Empirin compound with codeine. She also received these prescriptions without an examination.

As a result of his illness Dr. Patty was hospitalized from January 13 to February 2, 1968. He returned to work again in March contrary to his doctor's wishes. On March 7 the second agent visited Dr. Patty's office accompanied by a third woman agent, who was regularly employed as a police woman by the City of Glendale. Although both agents knew that petitioner had been ill, they requested and received prescriptions for dexedrine and Empirin with codeine. These two agents returned on the 13th, 19th, 26th, and 29th of March, and each received the same prescriptions again. On March 29, at the request of agent two and agent three, investigator Suazo was admitted into the office where he requested amphetamines and Percodan for the purpose of "getting some kicks". Dr. Patty wrote Suazo a prescription for one-hundred amphetamines and one-hundred Empirin with codeine. On April 9, the investigator returned and obtained a renewal of the two prescriptions written for him on March 29. Suazo also requested and received renewals of the prescriptions written for agents two and three.

Thereafter, Dr. Patty was charged by the Board of Medical Examiners with unprofessional conduct for prescribing dangerous drugs without a prior physical examination or medical indication therefor[2] and for prescribing narcotics to persons not under treatment for a pathology or condition.[3] At the administrative pro-

2. Cal. Bus. and Prof. Code § 2399.5 (West 1962).
3. CAL. HEALTH AND SAFETY CODE § 11163 (West 1964). The wording of this code section has been repealed—CAL. HEALTH AND SAFETY CODE § 11163 (West Supp. 1972).

ceeding the hearing officer found violations and recommended the revocation of Dr. Patty's certificate subject to a stay pending a five year probation. Petitioner then took the case to the Superior Court which recognized the defense of entrapment and held for Dr. Patty. The Board of Medical Examiners then took the case to the California Court of Appeals which reversed the Superior Court and sustained the administrative hearing officer's decision.

Justice Clark, writing for the appellate court, in the first *Patty v. Board of Medical Examiners* case[4] maintained: (1) that California and other jurisdictions had not adequately resolved whether the defense of entrapment applied to administrative proceedings; (2) that, consequently, the defense of entrapment should not be extended to administrative hearings to determine the alleged malfeasance of a medical doctor; and (3) the use of such a defense cannot be invoked to justify misconduct in the practice of medicine where considerable responsibility is demanded toward the public.

The appellate opinion cited three cases to expose the inconsistency of California law as to the propriety of allowing the defense of entrapment in administrative proceedings. In *Whitlow v. Board of Medical Examiners*,[5] whose factual situation is strikingly parallel to the *Patty* case, the court held that entrapment did not exist. However, in dicta the decision noted that the court would have been justified in sustaining the defense of entrapment had it existed. In *United Liquors v. Department of Alcoholic Beverage Control*,[6] the court expressed greater disfavor toward the defense than it did in the *Whitlow* case:

> Since administrative hearings are not penal in nature . . . and are not governed by the theories developed in the field of criminal law, it is at least open to question whether entrapment was a proper defense to the instant proceeding.[7]

In *Shakin v. Board of Medical Examiners*[8] the court again raised doubts as to the use of the entrapment defense by stating " . . . the application of this doctrine to the field of administrative law remains in doubt."[9] The court in *Patty* I further noted that other jurisdictions had not adequately resolved the issue but either had assumed the defense applied or had employed it for the same reason it is used in the other areas of the law.[10]

4. 27 Cal. App. 3d 207, 103 Cal. Rptr. 656 (1972).
5. 248 Cal. App. 2d 478, 56 Cal. Rptr. 525 (1967).
6. 218 Cal. App. 2d 450, 32 Cal. Rptr. 603 (1963).
7. *Id.* at 454, 32 Cal. Rptr. at 606.
8. 254 Cal. App. 2d 102, 62 Cal. Rptr. 274 (1967).
9. *Id.* at 109, 62 Cal. Rptr. at 281.
10. 103 Cal. Rptr. 656, 659 (1972).

Finally, Justice Clark concluded that for public policy reasons, the defense of entrapment should not be extended to administrative proceedings:

> The high calling of medical practice demands that its members remain above the temptations to which Dr. Patty succumbed, even though the acts would not have been committed but for the planning and persuasion of the investigator.[11]

But Justice Clark warned that this type of investigation must be avoided except to "safeguard vital interests from serious threat of harm."[12]

The outstanding dissent by Justice Thompson in *Patty* I served as the basis for reversal by the California Supreme Court.[13] The dissent vehemently contradicted the majority opinion by contending that (1) most jurisdictions support the use of entrapment in administrative proceedings, (2) the trend in California law was moving in this same direction, and (3) the weight of public policy considerations clearly side with Dr. Patty.

At least six states have, in some manner, recognized the applicability of the entrapment defense in administrative proceedings. In *Jones v. Dental Commission of Connecticut*[14] an unlicensed assistant dentist was caught by a private detective performing unauthorized work. The court discussed the issue of entrapment only to conclude that it did not exist implying, however, that the court would have dismissed the case had entrapment been shown. The *Peters v. Brown* case[15] involved an attempt by the Florida State Board of Dental Examiners to enjoin Peters from practicing dentistry. The Board hired two witnesses to solicit dental work from Peters in an attempt to procure a violation of the code. The court said:

> It is contrary to law and public policy for an officer or member of an administrative board to induce the commission of a wrong or a crime for the purpose of securing a pretext to punish it.[16]

The *Peters* court, citing *Newman v. U.S.*,[17] stated that decoys

11. *Id.* at 659.
12. *Id.* at 659.
13. 9 Cal. 3d 356, 508 P.2d 1121, 107 Cal. Rptr. 473 (1973).
14. 109 Conn. 73, 145 A. 570 (1929).
15. 55 So. 2d 334 (Fla. Sup. Ct. 1951).
16. *Id.* at 336.
17. 299 F. 128 (4th Cir. 1924).

" . . . are not permissible to ensnare the innocent and law abiding into commission of a crime."[18] The Illinois court in a disbarment proceeding,[19] citing the classic entrapment case, *Sorrell v. U.S.*,[20] held that an attorney had been entrapped in an extraordinary set of circumstances whereby he was deceived into believing his client had actually experienced injuries due to an automobile accident. In a Nevada disbarment proceeding[21] the court recognized the applicability of the defense but held entrapment had not occurred. Two other state courts,[22] in liquor license revocation cases, held entrapment could be employed in these types of cases.

A number of states, however, hold that the defense of entrapment cannot be employed in administrative proceedings. *Knight v. Louisiana State Board of Medical Examiners*[23] is the only case which does not involve an alcoholic beverage controversy. Here the court felt inclined to view entrapment as being available only in criminal cases. However, another line of cases, most notably expressed by *Kerns v. Aragon*,[24] disallows the defense specifically in administrative proceedings to revoke a liquor license. In *Kerns* the court held:

> To constitute entrapment the criminal intent must originate in the mind of the entrapper, and since *no intent* is necessary to violate liquor laws, an essential element of entrapment is absent.[25] (Emphasis added)

Other states adhere to the rationale outlined by the *Kerns* case.[26] California had not followed this dichotomy between liquor regulation cases and other administrative matters.[27] In *Patty* II the court noted that in other jurisdictions the denial of entrapment as a defense in administrative proceedings generally involved only liquor regulation matters,[28] but the court refused to apply this rule in California.

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18. 55 So. 2d 334, 336.
19. *In re* Horowitz, 360 Ill. 313, 196 N.E. 208 (1935).
20. 287 U.S. 435 (1932).
21. *In re* Davidson, 64 Nev. 514, 186 P.2d 354 (1947).
22. Langdon v. Board of Liquor Control, 98 Ohio App. 535, 130 N.E.2d 430 (1954) and *In re* Najeka, 35 Luz. Liq. Reg. Rep. 17 (Pa. 1940).
23. 211 So. 2d 433 (La. App. Div. 1968).
24. 65 N.M. 119, 333 P.2d 607 (1958).
25. *Id.* at 124, 333 P.2d at 610.
26. State v. Broaddus, 315 Mo. 1279, 289 S.W. 792 (1926); State v. Varnon, 174 S.W.2d 146 (Mo. Sup. Ct. 1943); State v. Driscoll, 119 Kan. 473, 239 P. 1105 (1925); State v. Merlinger, 180 Kan. 283, 303 P.2d 152 (1956); Bauer v. Commonwealth, 135 Va. 463, 115 S.E. 514 (1923); French v. State, 149 Miss. 684, 115 So. 705 (1928).
27. United Liquors Inc. v. Department of Alcoholic Bev. Cont., 218 Cal. App. 2d 450, 32 Cal. Rptr. 603 (1963).
28. 9 Cal. 3d 356, 362, 508 P.2d 1121, 1125, 107 Cal. Rptr. 473, 477 (1973).

The trend in California law has moved away from a rigid civil-criminal dichotomy. Consequently, the notion that entrapment is solely a defense in criminal matters is incorrect. In a California automobile forfeiture case,[29] the state contended that the exclusionary rule should not be applied because the matter was not a criminal case. However, the court stated that " . . . the same exclusionary rules should apply to improper state conduct whether the proceeding contemplates the deprivation of one's liberty or property."[30] The *Shakin* and *United Liquor* cases,[31] which expressed doubt as to the application of entrapment in administrative matters, were both based on the notion that the entrapment defense is suspect solely on the basis that the proceedings were not criminal. In *Parrish v. Civil Service Commission of County of Alameda*[32] the court also rejected the civil-criminal dichotomy. By relying on *Frank v. Maryland*[33] the court in *Parrish* said that searches directed at securing evidence in aid of a forfeiture shall be treated in the same manner as a search for evidence of a crime. Justice Thompson utilized the *Parrish* case in his dissent, even though *Frank v. Maryland,* which *Parrish* relied on, has been overruled by the United States Supreme Court.[34]

In *Patty* II the court did not mention the *Parrish* case but rather emphasized *Redner v. Workman's Compensation Appeals Board.*[35] In *Redner* a private investigator induced the petitioner into becoming intoxicated and then encouraged him to go horseback riding in order to obtain a film of his activity. The film was then used to demonstrate that applicant's injuries were not as extensive as he had alleged. The *Redner* court maintained that the evidence was elicited by fraud and deceit in violation of the rights of petitioner. The Court stated:

> We therefore conclude that the Board may not rely on evidence obtained . . . by deceitful inducement of an applicant to engage in

29. People v. Reulman; One 1960 Cadillac, 62 Cal. 2d 92, 396 P.2d 706, 41 Cal. Rptr. 290 (1964).
30. *Id.* at 96, 396 P.2d at 709, 41 Cal. Rptr. at 293.
31. Shaker v. Board of Med. Exam., 254 Cal. App. 2d 102, 62 Cal. Rptr. 274 (1967); United Liquors Inc. v. Department of Alcoholic Bev. Cont., 218 Cal. App. 2d 450, 32 Cal. Rptr. 603 (1963).
32. 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967).
33. 359 U.S. 360 (1959).
34. Camara v. Municipal Ct. of the City and Cnty. of San Francisco, 387 U.S. 523 (1967); See v. City of Seattle, 287 U.S. 541 (1967).
35. 5 Cal. 3d 83, 485 P.2d 799, 95 Cal. Rptr. 447 (1971).

activities which he would not otherwise have taken.[36]

The court in *Patty* II felt that the *Redner* case was excellent authority for allowing the defense of entrapment in non-criminal cases like the administrative proceeding involving Dr. Patty.

The opinion, which utilizes public policy considerations, probably expresses the best argument for allowing the defense of entrapment in administrative proceedings. Justice Thompson's dissenting opinion in *Patty* I employes the policy considerations surrounding the exclusionary rule to support his position. He says:

> There is a stronger reason to apply the rule of entrapment in an administrative proceeding than there is to apply the rule of exclusion of illegally obtained evidence in either a criminal or administrative action. Both the exclusionary rule and the doctrine of entrapment exist to deter "ignoble" executive conduct—in the case of the exclusionary rule, violations of rights of privacy; and in the case of entrapment, "unjust [executive] schemes designed to foster rather than prevent and detect crime."[37]

The exclusionary rule as initially outlined by *Mapp v. Ohio*,[38] however, is based on more than just the right of privacy. The *Mapp* court based its decision, in part, on the analogy between seizure of illegally obtained evidence and confessions obtained by unlawful coercion:

> We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an "intimate relation" in their perpetuation of "principles of humanity and civil liberty . . . ."[39]

Furthermore, since the Fourth and Fifth Amendments have been applied to states through the Due Process Clause of the Fourteenth Amendment, the defense of entrapment, theoretically, could also be based on due process. Consequently, the denial of the doctrine of entrapment in administrative proceedings may be a violation of due process. Even though the exclusionary rule has been limited in administrative matters in the California and federal courts,[40] there is no doubt that if one accepts the analogy, then the defense of en-

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36. *Id.* at 95, 485 P.2d at 807, 95 Cal. Rptr. at 455.
37. 103 Cal. Rptr. 656, 662.
38. 367 U.S. 643 (1961).
39. *Id.* at 656-57.
40. *Federal Court*—Camara v. Municipal Ct. of the City and Cnty. of San Francisco, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).
    California Court—Elder v. Board of Med. Exam., 241 Cal. App. 2d 246, 50 Cal. Rptr. 304 (1966); the exclusionary rule is applied to a case in which the proceedings contemplate the deprivation of a license which is recognized as a property right.

trapment would have to be applied to some extent in administrative proceedings.

The classic law review article on entrapment[41] sets out three theoretical bases for the defense: (1) the exclusionary rule analogy, (2) due process violation, and (3) coerced confessions analogy.[42] California, which had an exclusionary rule before *Mapp v. Ohio*,[43] seems not to base its rule upon due process notions, but rather upon the court's "regard for its own dignity as an agency of justice and custodian of liberty . . . ."[44] Therefore, California would seem to be reluctant to accept the legal theory heretofore set forth, that the doctrine of entrapment could be based on the Due Process Clause of the Fourteenth Amendment. This reluctance is further manifest in the fact that in neither *Patty* I, nor *Patty* II do the courts mention due process in relation to entrapment. However, in the United States Supreme Court case of *Raley v. Ohio*[45] the majority and concurring opinions speak of entrapment in due process terms.[46]

A further discussion of the application of entrapment to administrative proceedings must focus, *first*, on the notion that good morals, fairness, and justice are violated by denying the defense in administrative proceedings.

> In essence the courts have concluded that recognition of the defense of entrapment is crucial to the fair administration of justice. If this is true for proceedings before trial courts, it is no less true for proceedings before administrative agencies.[47]

The Board of Medical Examiners in the *Patty* II case contended that, in the limited area of drug trafficking involving physicians who have access to such drugs, the defense of entrapment should not apply. But the court noted that "this premise mistakenly equates seduction of the innocent with apprehension of the guilty. 'The law seeks justice, not victims'."[48]

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41. Comment, *The Serpent Beguiled Me and I Did Eat—The Constitutional Status of the Entrapment Defense*, 74 YALE L.J. 942 (1965).
42. *Id.* at 952.
43. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955).
44. *Id.* at 445, 282 P.2d at 912.
45. 360 U.S. 423 (1959).
46. *Id.* at 444-45.
47. 9 Cal. 3d 356, 364, 508 P.2d 1121, 1126, 107 Cal. Rptr. 473, 478.
48. *Id.* at 367, 508 P.2d at 1128, 107 Cal. Rptr. at 480.

Second, for policy reasons, an agency must not be allowed to promote crime. The state goal of discovering doctors who are involved in illegal drug transactions is not furthered by entrapping those physicians who otherwise would not have committed any illegal acts.

> If such an agency rejects entrapment as a defense, it in effect, authorizes its investigators to entrap and encourages a shift of resources from detection of illegal acts to the promotion of such acts.[49]

Third, because an administrative agency combines an investigative and judicial function with wide discretion in the supervision and enforcement of the laws, disallowance of the defense enables the agency to select its victim and pounce upon him assuring his guilt.[50] Therefore, to give an administrative agency the power of entrapment is to invite the danger of abuse and discrimination.

> The application of the doctrine of entrapment tends to prevent instances of discriminatory enforcement by administrative agencies which are essentially political bodies working with no real supervision or responsibility to any other branch of government.[51]

The California Supreme Court, in upholding the trial court's decision, incidentally ruled that there was substantial evidence to support the finding that Dr. Patty had been entrapped. The high court based this finding on the fact that (1) Dr. Patty lacked the knowledge of what "whites" and "dexies" were, (2) he had an unblemished and superlative record as a physician, (3) plaintiff had been ill in 1967 and again during the period in which he was "investigated", and (4) the agents who "investigated" Dr. Patty were instructed to "work doctors" to obtain prescriptions for narcotics or dangerous drugs.

The decision by the Supreme Court in California allowing entrapment as a valid defense in an administrative proceeding involving revocation or suspension of a license to practice a profession or business, was long in coming and a welcomed addition to administrative law. However, one must understand that the rule is limited to the situations enumerated by the court.

Underlying the California Supreme Court's decision was the realization that the incident involving Dr. Patty was not an isolated occurrence by the Board of Medical Examiners. In at least four other cases, the Board utilized investigator-agents to obtain evidence of drug trafficking on the part of medical doctors.[52] Fur-

49. *Id.* at 365, 508 P.2d at 1127, 107 Cal. Rptr. at 479.
50. *Id.*
51. 103 Cal. Rptr. 656, 663.
52. Yakov v. Board of Med. Exam., 68 Cal. 2d 67, 64 Cal. Rptr. 785

thermore, the court was perplexed by the thought that entrapment might be used against their colleagues in disbarment proceedings. The same fear was manifest by an Illinois court in an extraordinary entrapment case involving an attorney.[53]

> The lawyer must deal with exaggerations, fraud, and actual perjury day after day, and occasionally these things come from his own clients without his knowledge or consent. His path is hazardous at best, and if he can so far avoid its natural pitfalls as to maintain and be able to prove a good reputation, it should be sufficient to protect him against plots and scheme.[54]

Justice Brandeis made a profound statement in his dissent in *Olmstead v. U.S.*,[55] which was also quoted by Mr. Justice Clark in *Mapp v. Ohio*:

> Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[56]

In these times of moral insecurity due to governmental illegalities at the highest levels, the public is becoming increasingly aware of improprieties camouflaged as official conduct. The use of entrapment by hired agent-operatives is, perhaps, the most perverted form of governmental impropriety because it combines invasion of privacy, illegal search and seizure, self-incrimination, and denial of due process into one irrational objective: to stop the commission of illicit activity by engaging in conduct which only serves to compel such activity.

JAN MARK DUDMAN

(1968); Whitlow v. Board of Med. Exam., 248 Cal. App. 2d 478, 56 Cal. Rptr. 525 (1967); Shakin v. Board of Med. Exam., 254 Cal. App. 2d 102, 62 Cal. Rptr. 274 (1967); Collins v. Board of Med. Exam., 29 Cal. App. 3d 445, 105 Cal. Rptr. 634 (1972).

53. *In re* Horowitz, 360 Ill. 313, 196 N.E. 208 (1935).
54. *Id.* at 328, 196 N.E. at 214.
55. 277 U.S. 438 (1928).
56. 367 U.S. 643, 659 (1961); 277 U.S. 438, 485 (1928).