ENTRAPMENT AND THE ENTRAPMENT DEFENSE: DILEMMAS FOR A DEMOCRATIC SOCIETY*

ABSTRACT. Entrapment is defined and distinguished from related law enforcement practices. The subjective test of entrapment formulated by the Supreme Court and the objective test proposed by critics are discussed and evaluated. The argument is advanced that entrapment is a morally unjustifiable practice which is inconsistent with the rights of citizens in a democratic society. Guidelines are proposed for governing police conduct in potential entrapment situations and suggestions made regarding ways these guidelines might be implemented.

Is it ever justifiable for law enforcement officials in a democratic society to entrap someone into committing a crime? If so, what justifies this practice? If not, what limitations should be placed on law enforcement officials to prevent entrapment from occurring? If entrapment does occur, should there be a special defense available to the accused? If such a defense should be available, what tests should the courts employ to determine if entrapment has taken place?

1. DEFINITION OF ENTRAPMENT

Entrapment may be defined for the purpose of this discussion as the practice of law enforcement officials in planning, suggesting, encouraging, or aiding the commission of a particular crime that would not have occurred otherwise in order to make an arrest. As Sagarin and MacNamara have pointed out, entrapment is not the

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same as laying a trap.\textsuperscript{1} Entrapment occurs only if the idea for a crime originates with law enforcement officials or someone working on their behalf. Practices such as the use of radar to detect speeding motorists, one-way mirrors to observe thefts, etc., are, therefore, not instances of entrapment as it is defined here. Situations in which the police create favorable circumstances for the commission of a crime, but do not suggest it to the offender, are also not entrapment as it is understood here. For example, situations in which the police, or people working for them, pose as drunks or the elderly to attract muggers, are not entrapment according to the above definition. Employment of seductively dressed females in areas where prostitutes are known to frequent might or might not be entrapment as the term is being used here, depending on the extent to which the female agents play an active role in encounters with prospective customers.

2. ENTRAPMENT AND THE COURTS

The use of entrapment in this country seems to a great extent the result of two related phenomena that occurred in the early part of this century. These were enactment of statutes making illegal, acts which many people have since called "victimless crimes" (e.g., manufacture, sale and distribution of liquor, narcotics, obscene material, etc.) and the creation of special law enforcement agencies with responsibility to enforce these laws. Since these crimes did not usually result in complaints from victims, new techniques of detection were needed to apprehend offenders — techniques that often amounted to entrapment. The courts have subsequently been faced with a conflict between supporting police efforts to enforce these laws and condoning methods that could violate the rights of citizens in a free society.

\textsuperscript{2} Sorrells v. United States, 287 U.S., 435 (1932).