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Trapping the Law

The recent Supreme Court decision upholding a conviction for selling narcotics even though undercover agents were both providers and purchasers of the drug raises two questions about the criminal law. First, does such conduct by law enforcement personnel meet acceptable standards of decency and fairness; second, is any rational law enforcement purpose served by such conduct? We think the answer to both questions is "no."

The defendant had argued that his conviction resulted from "entrapment" since the police had made the entire transaction possible by both supplying and purchasing the contraband. In rejecting this argument, the Court's majority held that since the defendant was "predisposed" to commit a crime, the government's misconduct could not bar the conviction. Three Justices went so far as to say that no amount of government misconduct could bar the conviction of one who was so predisposed.

Such reasoning seems to stand the law of entrapment on its head. In cases where entrapment is urged as a defense, the questions traditionally asked examine the nature of police conduct, not the psychology or the criminal history of the defendant. By ignoring the impact of police behavior on the transaction, the Court avoided the crucial question whether a crime would have been committed had there been no police involvement. Without such a finding, the Supreme Court, in essence, permits lower courts to convict persons of the nebulous offense of predisposition toward whatever criminal conspiracy local police can lure them into committing.

The general purpose of the criminal law is to prevent murder, burglary or traffic in drugs from occurring and to punish those who willfully commit such offenses. When the government supplies the means and a substantial part of the will required to accomplish a criminal conspiracy, it is creating rather than obstructing crime.

Ignoring the lessons of Watergate and of lawbreaking by intelligence agencies, the ruling, in effect, appears to condone governmental misconduct and abuse of power.