Briefcases

A New Drug Crime

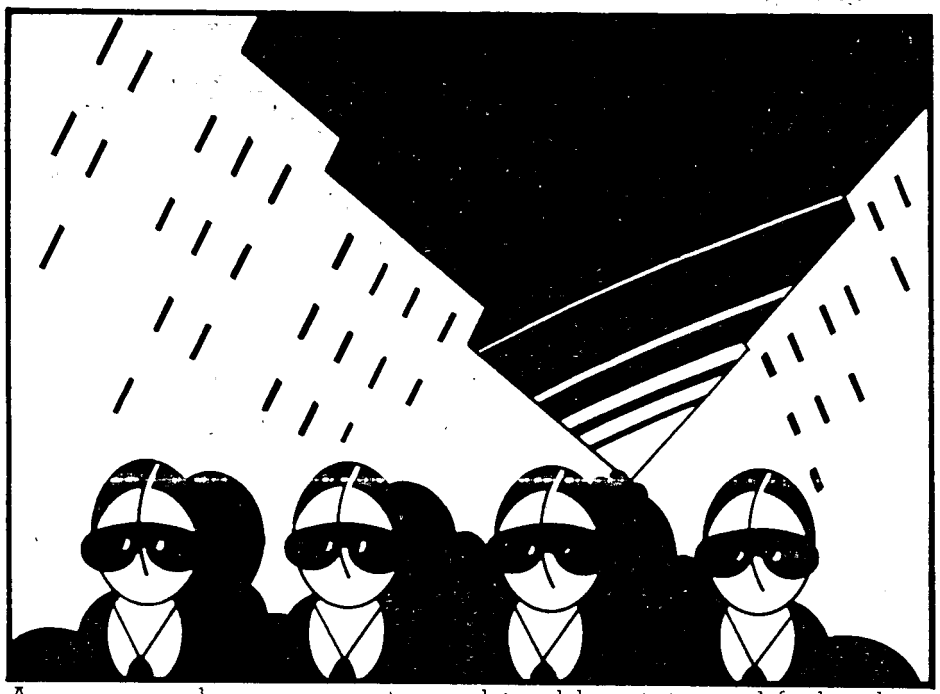
By Harvey Silverglate

Late last month the Supreme Court of the United States took the first step toward making it a crime to think about committing an illegal act — to be, in legal parlance, "predisposed" to break the law.

The case, "Charles Hampton versus the United States," involved a claim by an accused heroin dealer that the heroin he was alleged to have sold to a government agent was supplied to him by a government informer. Hampton argued that he was entitled to an acquittal on the ground he had been "entrapped" by the government. The prosecution responded that it didn't matter whether the informer supplied Hampton with the heroin, and the government acted as the purchaser. As long as the jurors believed Hampton was "predisposed" to be a heroin seller, the government argued he should be guilty of the crime.

Five of the eight Supreme Court Justices deciding the cases (Justice Stevens did not participate) agreed with the prosecutor. If the defendant was of a mind to commit the crime, said the majority, it doesn't matter that the government initiated, set up, orchestrated, and indeed, made possible the crime from its beginning to its end. Justice William J. Brennan, Jr., in a dissent joined in by Thurgood Marshall and Potter Stewart, focused on the outrageous scenario of the government "buying contraband from itself through an intermediary and jailing the intermediary."

The most devastating criticism of the decision was missed by the dissenters. Hampton, nobody bothered pointing out, was convicted for having an inclination to commit a crime that would not have been committed had not the government supplied not only the opportunity, but even the illicit materials.



Renée Klein

As more and more agents are hired by state and federal drug enforcement agencies, more and more drug dealers are needed. If they cannot be found, they will be created.

The defense of "entrapment" has long been a controversial one in the criminal law. Judges and legal scholars have argued over precisely what kind of government involvement or, for that matter, mind set of the defendant, should entitle a person who committed an illegal act to escape conviction. One school of thought has said that a defendant should not be found guilty if he did not initially have an intention to commit the crime, but a government agent came along, prevailed upon him, cajoled him, used repeated pressure tactics, and eventually overcame his resistance. This has been termed the "defendant's predisposition" theory.

Another school of thought preferred to look only at the nature of the government's conduct. If the government played an "ignoble" part in the generation of criminal activity under the guise of enforcing the law, the defendant should be acquitted even if he was of a mind to commit the crime from the start.

In recent years, the "defendant's predisposition" theory was winning out over the "government misconduct" theory. But as recently as 1973, the Supreme Court still said there was some government misconduct sufficiently serious so that it should result in the acquittal of a predisposed defendant.

The entrapment debate is rooted in an older legal doctrine in Anglo-American criminal law. In order to convict an individual for committing a crime, usually it has to be proved not only that he committed an act that was against the law, but also that he intended to do what he did. This union of act and intention created a criminal.

In the Hampton case, what happened can hardly be called an illegal act. How can it be said to be against the law to traffic in the government's own dope? After the decision, if you are sold drugs by a government informer, the informer would go free, while you could be busted for possession of those drugs. The government can now transform into criminals people who under normal circumstances would refrain from committing a crime because it is too risky, too difficult, or too remote a possibility to even contemplate initiating.

By approaching a potential defendant and offering to set up the criminal plan, even to supply the dope, the money, and the customer, the government informer is manufacturing crime where it would not otherwise exist. While the defendant might

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indeed be "predisposed" to commit the crime (many people might be "weak" enough not to mind making a lot of money in a short time for little effort) chances are he would go through life seeing himself as "an honest jerk," too scared to make it quick and easy the illegal way. Under the Hampton doctrine, the government makes it all happen.

What Charles Hampton *was* being punished for was being sufficiently weak to succumb to a temptation that, but for the government, might never have arisen in his life. How many other victims of overzealous narcotics agents and their omnipresent informers will start out as truly unwary innocents and end up in prison?

It has long been the hallmark of a free society that one is not punished just for having bad thoughts or evil intentions, or for the mere utterance of words (there are, of course, some limited exceptions such as Justice Oliver Wendell Holmes' old saw about not being allowed to yell "fire" in a crowded theater). In the Hampton case, the Supreme Court put that tradition in jeopardy.

The Hampton decision will doubtless be "effective" from the point of view of law enforcement, and especially drug agents. As more and more agents are hired by state and federal drug enforcement agencies, more and more drug dealers must be busted in order to justify the existence of the gigantic bureaucracies and fiefdoms created to wage the "war on drugs." Thus, more and more drug dealers are needed, and if they cannot be found, they will be created.

No public policy is served by creating a crime in order to then "solve" it. There is enough crime on the streets to keep all of the agents busy without manufacturing more. If the purpose of the criminal law is to deter people from committing crime, there is no point in having government agents attempt to break down a citizen's resistance by playing on his weaknesses and making the crime as easy as it is profitable.

Soliah's Acquittal

The acquittal of Stephen Soliah on bank robbery charges — despite his not having available Patty Hearst's defense of being kidnapped before the crime was committed — prove, among other things, the advantages of conducting a low-key and craftsmanlike defense even in potentially celebrated cases.

While Hearst's lawyers were holding almost daily press conferences prior to and during her trial, attempting to fashion headline-grabbing, pseudoscientific theories of defense (see "How Bailey Blew the Hearst Case," *The Real Paper*, March 31), Soliah's counsel carefully and methodically prepared his defense by raising appropriate issues before and during his trial. It was not, in fact, until Soliah's attorneys won a pretrial motion to suppress the use of certain seized evidence at trial that Hearst's lawyers bothered to file a similar motion. And her trial had already begun.

Now that criminal trials have become major media events, defense lawyers and prosecutors have to resist the temptation to become superstars at the expense of their clients. Even Hearst prosecutor James Browning has taken to the lecture circuit, talking about how he beat F. Lee Bailey.

The problem is not that something is wrong with Bailey's flamboyant image, and his maintaining his name as a household word. Nor is there anything wrong with Browning's reported desire to be appointed to a federal judgeship.

The real problem is that the fame and fortune of the lawyers should not be fostered at the expense of defendants who have to serve the time in the end. Soliah had neither money nor a famous name. The court appointed for him an unknown, conscientious lawyer. The man who prosecuted Soliah, whether or not he had higher ambitions, has not been giving lectures around the country.

The best thing Soliah had going for him, it seems, was that no one saw an opportunity to gain fame at his expense. ■