The United States and Woo Wai

The most captivating subject of study in the curriculum of a law school novice is Criminal Law. The element of human interest is so strong that the normal, healthy youth whose hair splitting proclivities are yet undeveloped foresees a spectacular career in a law practice offering the inducements of fame, fortune, thrill and mystery.

After a few semesters spent in arguing upon principle and demolishing the reasoning of mere jurists presented in decisions of legal problems, no matter how abstruse, there comes a change. This academic sport—an iconoclastic debauch, leaving scattered on the wayside the fragments of judicial monuments—generally ousts the ambition first engendered in favor of the anticipated joy of counselling great industries and driving twin-sixes through the loop-holes left open by legislatures of lesser mentality.

The first plunge into practical experience, however, leaves nothing in the breast of the explorer of digests but the fervent hope that whether the subject in hand sound in tort or contract, somewhere there may be a case in point. His constant prayer is that chance may guide his numb fingers to the key-number where, behind a syllabus, his quarry is concealed.

It would come as a taste of earlier joys to find a real, live case arise, presenting a question which was the subject of discussion in many meetings of the class in Crimes and perhaps a bone of fierce contention in a session of the moot court. Such is the case of Woo Wai.

Zealous government officials into whose keeping the administration of criminal statutes is confided frequently run to extremes. So it happened that a federal committee of inquiry into the Immigration Department of the United States, suspecting that Woo Wai, a Chinese merchant in San Francisco, had knowledge of internal irregularities at that port, conceived the plan of inducing him to commit crime and then using the offense as a means to compel him to divulge his information. The committee employed a detective; they chose their man well. Posing as the genial restaurateur of Van Ness Avenue, when that thoroughfare enjoyed its brief after-the-fire popularity, he had become the
confidant of the city fathers. Under his hospitable roof the bribe-money had passed, thereby laying the foundation for the famous graft prosecutions.

So the detective became a jeweler in the oriental end of Kearny Street. Through a leading Chinese editor and free-mason he procured an introduction to Woo Wai. Soon their families became closely acquainted, holiday gifts were exchanged, and the Chinese merchant of thirty years good standing in the community felt that he had made a staunch and sincere friend.

It is not surprising, then, that the suggestion that Woo Wai accompany him to San Diego on a matter of business was instantly accepted. The nature of the enterprise was not disclosed, but its certainty to produce large returns was assured. The theater of action was cleverly chosen. Assuming Woo Wai's acquaintance with questionable practices at San Francisco, it would never have done to stage the play there. So with government money Woo Wai was conducted south, entertained at Los Angeles, and then at San Diego. Here he was introduced to the immigration inspectors in charge of the Mexican border and the purpose of the journey was explained. It was proposed that Woo Wai should procure the introduction of Chinese coolies from Mexico, and that the inspectors would facilitate their entry for a consideration of fifty dollars per head. Woo Wai was disposed to reject the proposition, but was reassured by the statement of the officials that they were in absolute control and that neither detection nor arrest need be feared from other sources.

Any casual student of the political history of China is at once impressed with the custom there prevailing that the government official is the government itself—a custom of such long standing that it has become a tradition and is, of course, profoundly reflected in the intelligence and conscience of the Chinese race. So Woo Wai promised to consider the matter. After two years of constant prodding by the detective and the government inspector, both in person and by correspondence, arrangements were made by Woo Wai and his friends for the importation of Chinese. A small party was started from Ensenada under convoy of Mexican guides. The scene was set; the officers were ready to apprehend the contrabands. The play descended into farce; for when the inspectors sought to swoop down upon their prey the Chinese, having pursued a devious route, could not be found.
It was nervous business. Woo Wai was disposed to stop. He journeyed to San Diego to pay the price. His expenses had been larger than contemplated and the inspectors with magnanimity relinquished a portion of their fee. The pieces of gold which they received were later wrapped in paper, sealed, and afterward produced at the trial in the original package.

The inspectors used the occasion to stimulate Woo Wai'swaning enthusiasm in the enterprise, so that he was induced to import a second group. This time the officers were more circumspect. The coolies were caught and Woo Wai and his partners were soon after indicted upon various counts for smuggling, bribery, and conspiracy against the laws of the United States.

It is not known whether Woo Wai refused to yield the desired information or knew nothing of value. At any rate, one of the indictments was brought on for trial in the United States District Court at Los Angeles. In the language of the inspector who testified for the government, the purpose was "to get a hold on Woo Wai in order to obtain information." As a member of the committee of inquiry wrote from the Fairmont Hotel to the inspector referring to Woo Wai, "Use him yourself for all he is worth."

The defendants took the stand in their own behalf. With a few exceptions, their story coincided with that related by the officers. The trial judge instructed the jury that the conduct of the government officials was no defense. The verdict accordingly was "guilty." Upon writ of error in the Circuit Court of Appeals the judgment was reversed.¹ The court, speaking through Circuit Judge Gilbert, held:

"We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case, taking the testimony of the defendants to be true, and that a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes. Some of the courts have gone far in sustaining convictions of crimes induced by detectives and by state officers. This is notably so in the decision in People v. Mills, 178 N. Y. 274 . . . . But it is to be said by way of distinguishing such cases from the case at bar, that in all of those cases the criminal intention to commit the offense had its origin in the mind of the defendant. Thus in People v. Mills, it was the defendant who made the first suggestion looking toward the

commission of the criminal act, and for the commission of that act the district attorney furnished him opportunity and lent him aid. In the case at bar, the suggestion of criminal act came from the officers of the government. The whole scheme originated with them."

While not as clearly defined as it might be, a distinction has been created by the authorities in the law of entrapment. Crime is in itself naturally clandestine, and it is therefore necessary, in order to detect the criminal in the act of wrong-doing, that decoys be laid, or even that government officers pretend to participate in the transaction. While there is some authority to the effect that in such a case a conviction will not be permitted, it seems that the weight of judicial decision is to the contrary. Among the latter are the numerous cases in the federal courts where, for example, crimes against the postal laws have been committed in response to decoy letters. On the other hand, where there is no criminal activity which calls forth the effort to detect by means of decoy and where the conduct of the official goes farther than a mere inquiry to determine whether the suspect is ready and willing to break the law—where, in fine, the representative of the government approaches a person innocent of crime or criminal intention and by persistent effort and tempting promises undermines the integrity of the victim and ultimately procures him to commit a crime—the conduct of the official is abhorrent to the sense of decency and justice, and the government which has conferred the authority so viciously abused by the agent should not be, and is not, permitted to disavow the agency and to obtain a conviction. This is the radical distinction. Where one private individual induces another to commit a crime, this affords no defense to the criminal. This same theory underlies many decisions involving the entrapment of a suspected criminal where the detective does not disclose his official capacity and the suspect does not act under the assurance that the participation of the government's representative will afford security. It is difficult enough for the human conscience, unaffected by such influences as those brought to bear upon these Chinamen, accurately to distinguish between the confines of right and wrong. So it seems just and proper that the defendants in the instant case should not have been branded as felons because they were not strong enough to withstand the attractive, though nefarious, partnership which the entire Department of Immigration held out to them. The branch of the executive function of the government known as

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the Department of Justice was not permitted to disavow the conduct of another branch known as the Department of Commerce and Labor and to secure the conviction of men who, theretofore innocent of wrong, were induced by the latter's initial suggestion and frank co-operation to offend against the law.

The opinion of the court does not distinguish between a case of the kind at hand and those of burglary and larceny where the inducement or co-operation of the owner of the property stolen is frequently held to deprive the act of criminal taint. The decision in the instant case is, however, in accord with the great weight of authority.²

In both the Grimm and Goldman cases, convictions were upheld, but in the former it was said:

"It does not appear that it was the purpose of the post office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business." And in the Goldman case it was stated:

"If these officials adopted and pursued this course upon reasonable grounds to suspect Goldman of misusing the mails, their conduct was, under well-settled principles, justifiable, and the offense was committed; if no such grounds existed, neither their course nor the conviction can be sanctioned.

"The evidence tends to justify the course taken by the post office officials; in other words, it seems to have been an effort to detect, and not to induce commission of a crime."

There is one feature of the instant case which the court does not discuss, and in which the situation presented bears resemblance to cases of larceny and burglary where the owner has consented to the taking. The government wanted to get a hold on Woo Wai. This was a governmental purpose which did not alone concern the making of a criminal. For the principal motive was to obtain information which the government believed could be elicited from this Chinaman. The matter thus concerned one of its administrative departments. To induce Woo Wai apparently

to break the law was a means to a governmental end—a link in
the devious chain which it saw fit to forge as a proper method
of checking up the efficiency and integrity of the Immigration
Department. The law which the United States procured Woo
Wai to break was a mere administrative regulation. No
criminality was inherent in the act itself; there was no *malum
in se*. The theories underlying the exclusion of one class of
Chinese and the admission of another may be ethically unsound and
unjust. Nevertheless, the United States government had de-
termined that it should be so and that determination was final.
But it designated certain men whose sole office was to maintain
this arbitrary regulation, to prevent violations and to apprehend
violators. These men ranked from the cabinet officer to the inspec-
tor. Their conduct in the premises was, regardless of the
motive that impelled it, an administration of the law of the United
States and the convictions which induced their action were con-
cclusive in the matter. When the government seeks to obtain a
conviction upon these facts should it not be held to be concluded
by the conduct of its agents? Should it be permitted to disavow
the activity of its officials in making criminals of these Chinese
and nevertheless obtain a conviction upon the basis of the testi-
mony of these same officials who went upon the witness stand
not as conspirators—this suggestion was vehemently repudiated
by counsel for the government—but as inspectors still pursuing their
employment as such in an effort to make felons of the men whose
apparent offense they had already induced?

The conviction was held improper for another reason which bids
fair seriously to trammel the normal activity of the United States
secret service. It was held:

“First, the facts as testified to by the defendants, and as
supplemented by the evidence for the United States, fell
short of showing that there was in fact a conspiracy to com-
mitt a criminal act within the meaning of section 5440. It was
the intention of the officers who induced Woo Wai and his
associates to attempt to bring Chinese across the Mexican
border that the law should not be violated. They intended
to prevent the consummation of the offense which they lured
the defendants to undertake. Their purpose was to intercept
the Chinese so brought across the border, and return them
to the country whence they came. Woo Wai and his as-
associates, therefore, although they were not aware of the fact,
were engaged in an act which was not to result in an ac-
accomplished offense against the laws of the United States.”
In every case in which detectives, learning of a contemplated crime, participate in the proceeding they intend that no actual breach of the law shall be effected. It will therefore be interesting to see how far this court will be ready to extend the principle so announced and whether it will be given application in a case in which the criminal purpose originated in the mind of the accused and his guilt is otherwise plain.

It is worthy of note that upon application by the United States attorney for the district in which the indictment was found the Attorney General refused to petition the Supreme Court of the United States for a writ of certiorari. Thereupon the Departments of Justice and of Immigration recommended a dismissal of all the pending indictments against the Chinese. Such proceeding was accordingly taken.

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