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WHISKEY AND THE WIRES: THE INADVISABLE APPLICATION OF THE WIRE FRAUD STATUTE TO ALCOHOL SMUGGLING AND FOREIGN TAX EVASION

I. INTRODUCTION

In *Pasquantino v. United States*,[1] the Supreme Court held that a scheme to defraud a foreign government of tax revenue violates the wire fraud statute.[2] The Court further held that the common law revenue rule does not preclude prosecutions for wire fraud violations arising from such a scheme.[3] In reaching these conclusions, the Court affirmed the convictions of three men who had been prosecuted under the wire fraud statute[4] for a scheme to evade Canadian excise taxes by smuggling alcohol into Canada from the United States.[5] The Supreme Court's decision is correct to the extent that it asserts that the wire fraud statute does not derogate from any well-established revenue rule principle barring prosecution for a scheme to evade foreign taxes.[6] However, the Court's ruling is, ultimately, erroneous because a scheme to evade foreign taxes does not properly fall within the scope of the wire fraud statute.

This Note examines several reasons why wire fraud prosecutions arising from a scheme to evade foreign taxes are not barred by the common law revenue rule. First, the rule only prohibits domestic courts from direct enforcement of a foreign sovereign's tax judgments or unadjudicated tax claims. Within American revenue rule jurisprudence, no well-established principle bars prosecution for domestic criminal conduct when it may also result in the indirect enforcement of foreign revenue laws.[7] Second, the traditional rationales underlying the revenue rule—national sovereignty,

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[1] 125 S. Ct. 1766, 1770 (2005).
[2] *Id.*
[3] *Id.*
[4] 18 U.S.C. § 1343 (2000).
[5] *Pasquantino*, 125 S. Ct. at 1770, 1781.
[6] *Id.* at 1774.
[7] *See* discussion *infra* Parts VI.A.1-3.

separation of powers, and judicial competency—do not suggest that wire fraud prosecutions for a scheme to evade foreign taxes should be barred.[8] Finally, the revenue rule is discretionary in nature and does not sweep so broadly as to establish an absolute prohibition upon prosecutions involving *any degree* of recognition of foreign revenue laws.[9]

This Note also argues that the Supreme Court's decision is wrong because it misinterprets the boundaries of the wire fraud statute and, in turn, gives it extraterritorial effect not clearly intended by Congress. At first glance, a scheme to evade foreign taxes appears to meet the statute's literal terms.[10] Yet, the statute's literal terms cannot be evaluated in a vacuum. Therefore, these terms must be assessed within a broader frame of reference that includes the statute's legislative history, principles of statutory construction, and related congressional enactments.[11] The legislative history weighs against the Court's ruling since the statute was drafted with a focus on domestic schemes, and concomitant domestic injuries resulting from misuse of United States wires.[12] Moreover, the decision runs afoul of the Court's long-held presumption that Congress ordinarily intends for its statutes to have only domestic, and not extraterritorial, application.[13] Prison sentences and restitution awards resulting from wire fraud convictions for smuggling schemes are calculated based on the combined impact of the domestic and extraterritorial conduct.[14] Absent a clearer directive from Congress, the Court's decision grants an unwarranted extension of the reach of federal criminal law to prosecute and punish strongly intertwined domestic and foreign conduct.

II. BACKGROUND

A. THE FEDERAL WIRE FRAUD STATUTE

The Federal Communications Commission championed the adoption of a federal wire fraud statute out of concern that "the rapid growth of interstate communication facilities . . . had given rise to a variety of

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[8] *Pasquantino*, 125 S. Ct. at 1774, 1779-81; *see* discussion *infra* Parts VI.A.4.a-c.

[9] *See* discussion *infra* Part VI.A.3.

[10] *See* discussion *infra* Parts VI.B.1-2.

[11] *See* discussion *infra* Parts VI.C.1-4.

[12] *See* discussion *infra* Part VI.C.2.

[13] *Pasquantino*, 125 S. Ct. at 1782 (Ginsburg, J., dissenting); *see* discussion *infra* Part VI.C.1.

[14] *Id.* at 1783-84 (Ginsburg, J., dissenting).

fraudulent activities . . . which were not within the range of existing law."[15] Enacted in 1952, the federal wire fraud statute reads as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.[16]

Thus, to convict a person for a wire fraud violation, the government must show that there was: (1) a scheme or artifice to defraud; (2) money or property was the object of the scheme or artifice; and (3) use of the wires in furtherance of the scheme or artifice.[17] Also, the government must prove that the defendant possessed specific intent to defraud, which in turn requires a showing that the defendant meant for some harm to result from his deceit.[18] It is unnecessary to prove that the intended victim of the fraud was, in fact, harmed.[19] Rather, it is sufficient to show that the defendant contemplated doing actual harm; something more than merely deceiving the victim.[20] Finally, "although use of the wires is required, its role in the offense is merely perfunctory because the crux of the offense is the fraudulent conduct."[21]

Also, the mail[22] and wire fraud statutes operate in a very similar fashion.[23] Scholars note that these statutes have been construed "to cover virtually any form of deceitful activity" involving the mail or wires.[24]

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[15] S. REP. No. 84-1873, at 1 (1956).

[16] 18 U.S.C. § 1343 (2000).

[17] *Id.* § 1343 & 1343 n.31; Fountain v. United States, 357 F.3d 250, 255 (2d Cir. 2004); United States v. Loney, 959 F.2d 1332, 1337 (5th Cir. 1992); United States v. Drake, 932 F.2d 861, 863 (10th Cir. 1991).

[18] *Loney*, 959 F.2d at 1337 (citing United States v. St. Gelais, 952 F.2d 90, 95 (5th Cir. 1992)).

[19] United States v. Von Barta, 635 F.2d 999, 1005-06 n.14 (2d Cir. 1980) ("Government need not show that the scheme's victims were in fact defrauded . . . [but only] that some actual harm or injury was at least contemplated.") (citation omitted); United States v. Curtis, 537 F.2d 1091, 1095 (10th Cir. 1976) ("[I]t is not necessary to show that any person was in fact defrauded.").

[20] United States v. Schwartz, 924 F.2d 410, 420 (2d Cir. 1991).

[21] Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 231 (1992).

[22] 18 U.S.C. § 1341 (2000).

[23] Podgor, *supra* note 21, at 231.

[24] Brad D. Brian, et al., *Mail Fraud, Wire Fraud, and Securities Fraud as Predicate Acts in Civil RICO Actions*, 155 PRACTISING L. INST. LITIG. & ADMIN. PRAC.: CRIM. L. & URB. PROBS. 59, 86 (1990).

Further, the elements of both statutes are, in relevant part, the same, and cases construing mail fraud apply equally to wire fraud.[25]

B. THE COMMON LAW REVENUE RULE

1. The Birth of the Revenue Rule: English Origins & Lord Mansfield's Dicta

Originally, the revenue rule was meant to promote commerce, and it stood for the general principle that courts will refrain from enforcing the revenue laws of another sovereign nation.[26] The rule developed in the English courts in the context of cases in which the defendant pointed to foreign export, customs, or stamp laws as a defense against the alleged validity of a contract.[27] At the time in which the early English cases were decided, nations commonly imposed such measures to promote commercial convenience and advance their mercantile interests.[28]

The roots of the revenue rule are typically traced to Lord Mansfield's oft-quoted dictum[29] in *Holman v. Johnson* that "no country ever takes notice of the revenue laws of another."[30] In *Holman*, a French citizen sought payment for tea that he had sold to Johnson, an Englishman.[31] Johnson purchased the tea with the intention of smuggling it into England

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[25] Pasquantino v. United States, 125 S. Ct. 1766, 1771 n.2 (2005) ("[W]e have construed identical language in the wire and mail fraud statutes *in pari materia*."); Carpenter v. United States, 484 U.S. 19, 25 n.6 (1987) (stating that "[t]he mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses . . . ."); *see also* Brian, *supra* note 24, at 67-68.

[26] William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT'L L.J. 161, 170 (2002).

[27] *Id.*

[28] European Cmty. v. RJR Nabisco, Inc., 150 F. Supp. 2d 456, 479 (E.D.N.Y. 2001), *aff'd*, 355 F.3d 123 (2d Cir. 2004) (citing State *ex rel.* Okla. Tax Comm'n v. Rodgers, 193 S.W.2d 919, 922 (Mo. Ct. App. 1946)); Dodge, *supra* note 26, at 171.

[29] However, unlike a court holding, dictum is not a controlling statement of the law. Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 379 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend . . . ."). Thus, some scholars assert that the revenue rule is simply an "archaic vestige" of the common law springing forth from statements by Lord Mansfield that had no bearing upon the actual facts of the cases over which he presided. William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 HOUS. J. INT'L L. 265, 267, 273 (2000).

[30] 98 Eng. Rep. 1120, 1121 (K.B. 1775); Dodge, *supra* note 26, at 170; *see, e.g.*, HM the Queen in Right of the Province of B.C. v. Gilbertson, 597 F.2d 1161, 1164 (9th Cir. 1979) (stating "Lord Mansfield is generally credited as being the first to express the revenue rule"); *European Cmty.*, 150 F. Supp. 2d at 478 ("The origin of the revenue rule is nearly always traced to Lord Mansfield's often-repeated and conclusory dictum in *Holman* . . . .").

[31] Kovatch, *supra* note 29, at 272.

and avoiding customs duties.[32] At trial, Johnson alleged that Holman was aware of this illegal aim at the time of the contract's formation and was not entitled to payment for the tea since this illegal objective made the contract invalid.[33] Lord Mansfield declined to apply the choice of law principle which states that the laws of the country in which the cause of action arose shall govern in disputes involving contracts formed abroad.[34] In essence, he modified the traditional conflicts of law rule to include an exception applicable to contract cases in which the disputed contract was made abroad with the aim of flouting English revenue laws.[35]

Several years later, Lord Mansfield once again applied the revenue rule in *Planche v. Fletcher*.[36] In *Planche*, a cargo insurer refused to cover a client, alleging that he had fraudulently claimed that the cargo originated in London rather than Ostend, Belgium, in order to circumvent higher French duties on English goods.[37] Lord Mansfield ruled against the insurer and held that fraud had not occurred because the client simply acted in accordance with a common custom in the shipping trade.[38] He then proceeded to state, as dicta, "at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another."[39]

However, even in Lord Mansfield's day, the revenue rule did not bar all enforcement of foreign revenue law without exception.[40] For example, the English courts were fully prepared to invalidate foreign contracts which omitted certain tax stamps required under foreign revenue law.[41] By voiding foreign contracts, the English courts enforced foreign revenue law in, at least, an attenuated sense since the holdings encouraged the payment of foreign taxes.[42]

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[32] *Id.*

[33] *Id.*

[34] *See European Cmty.*, 150 F. Supp. 2d at 478; Kovatch, *supra* note 29, at 272-73.

[35] *See European Cmty.*, 150 F. Supp. 2d at 478.

[36] (1779) 99 Eng. Rep. 164 (K.B.).

[37] *European Cmty.*, 150 F. Supp. 2d at 478.

[38] *Id.*

[39] *Planche*, 99 Eng. Rep. at 165.

[40] Pasquantino v. United States, 125 S. Ct. 1766, 1778 (2005) (noting the early English cases of *Clegg v. Levy*, (1812) 170 Eng. Rep. 1343 (N.P.), and *Alves v. Hodgson*, (1797) 101 Eng. Rep. 953 (K.B.)).

[41] *Clegg*, 170 Eng. Rep. at 1343; *Alves*, 101 Eng. Rep. at 953.

[42] *Pasquantino*, 125 S. Ct. at 1778.

2. The Revenue Rule Crosses the Atlantic: Learned Hand Contributes His Two Pence

By the time the revenue rule was adopted in the United States, the primary justification for the rule had changed. The focus had shifted to the issues of judicial competence and direct enforcement of the revenue laws, final tax judgments, and unadjudicated tax claims of foreign sovereigns.[43] The new justification asserted that courts lack the competence to assess whether the enforcement of a foreign tax judgment would run counter to the local public policy and, therefore, whether the foreign revenue law should be enforced.[44] Thus, the common law revenue rule came to stand for the principle that the courts of one country will not enforce foreign tax judgments or unadjudicated tax claims.

During the early twentieth century, American courts first applied the revenue rule in the domestic interstate context as a basis to reject suits brought by sister states to collect taxes.[45] In *Moore v. Mitchell*,[46] Judge Learned Hand penned the classic formulation of the revenue rule and its prohibition against one state collecting its taxes in the courts of another.[47] Hand concluded that:

> To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted [sic] to other authorities. It may commit the domestic state to a position which would seriously embarrass its neighbor. Revenue laws fall within the same reasoning; they affect a state in matters as vital to its existence as its criminal laws. No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.[48]

Thus, Learned Hand asserted that it was preferable to preclude any enforcement of foreign laws as a whole than to risk having to find such laws contrary to public policy and cause embarrassment for a foreign state.[49]

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[43] Sean D. Murphy, *"Revenue Rule" Barring of Foreign Suits Concerning Cigarettes*, 96 AM. J. INT'L L. 715, 716 (2002) ("The revenue rule is a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns." (quoting Attorney Gen. of Can. v. RJR Tobacco Holdings, 268 F.3d 103, 109-13 (2d Cir. 2001))).

[44] Philip R. West & Keith Sieverding, *Supreme Court Decision May Impact Foreign Tax Planning*, A.B.A. NEWS Q., SEC. OF TAX'N, Summer 2005, at 5.

[45] Dodge, *supra* note 26, at 172.

[46] 30 F.2d 600 (2d Cir. 1929).

[47] *Id.* at 603-04 (Hand, J., concurring); *see also* Dodge, *supra* note 26, at 173.

[48] *Moore*, 30 F.2d at 604 (Hand, J., concurring).

[49] *Id.*; Dodge, *supra* note 26, at 173.

Shortly after the *Moore* decision, the Supreme Court rejected Hand's argument as it applied to domestic interstate suits, in *Milwaukee County v. M. E. White Co.*[50] The Court held that the revenue rule could not serve to preclude enforcement of sister states' tax judgments because of the Full Faith and Credit Clause in the Constitution.[51] However, Hand's logic has continued to influence courts in the international context when they are presented with actions involving a foreign sovereign's efforts to obtain direct enforcement of tax claims or judgments.[52] Although this logic has its detractors, it is relatively well-accepted today "that one nation may not enforce a tax claim or judgment directly in another nation's courts—because of a reluctance to scrutinize the foreign tax law, sovereignty concerns, administrative difficulties, or some combination of these reasons."[53] Thus, the English courts' desire to promote trade was cast aside in favor of an emphasis upon jurisdictional and prudential considerations.[54]

C. PROSECUTION FOR FOREIGN TAX EVASION UNDER THE WIRE FRAUD STATUTE

1. The First Circuit: United States v. Boots[55]

In 1996, the First Circuit became the first appellate court to address the issue of whether an individual could be prosecuted for a wire fraud violation based upon a scheme to defraud a foreign government of its tax revenue.[56] In *United States v. Boots*, the defendants had devised and carried out a scheme to smuggle tobacco from a Native American reservation in New York into Canada without paying the excise taxes imposed by the

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[50] 296 U.S. 268, 279 (1935).

[51] U.S. CONST. art. IV, § 1; *Milwaukee County*, 296 U.S. at 279.

[52] Dodge, *supra* note 26, at 174.

[53] *Id.* at 176; *see also* HM the Queen in Right of the Province of B.C. v. Gilbertson, 597 F.2d 1161, 1166 (9th Cir. 1979); Banco do Brasil, S. A. v. A. C. Isr. Commodity Co., Inc., 190 N.E.2d 235, 237 (N.Y. 1963); United States v. Harden, [1963] 41 D.L.R. 2d 721 (Can.). *But see* Attorney Gen. of Can. v. RJR Tobacco Holdings, 103 F. Supp. 2d 134, 140 n.3 (N.D.N.Y. 2000), *aff'd*, 268 F.3d 103 (2d Cir. 2001) ("Were the Court writing on a clean slate . . . , it would be inclined to find the Revenue Rule to be outdated . . . and the rationales for the rule to be largely unpersuasive, at least with respect to the recognition of foreign tax judgments."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 483 n.2 (1987) ("In an age when virtually all states impose and collect taxes and when instantaneous transfer of assets can be easily arranged, the rationale for not recognizing or enforcing tax judgments is largely obsolete."); Kovatch, *supra* note 29, at 277-80.

[54] Dodge, *supra* note 26, at 179.

[55] 80 F.3d 580 (1st Cir. 1996).

[56] *See Boots*, 80 F.3d at 580.

Canadian government.[57] The *Boots* court held that the defendants' wire fraud convictions were to be reversed because foreign tax and customs frauds were not schemes to defraud within the meaning of the wire fraud statute.[58]

The First Circuit noted that "[f]oreign customs and tax frauds [were] intertwined with enforcement of a foreign sovereign's own laws and policies to raise and collect such revenue . . . ."[59] The American legal system adhered to a common law revenue rule which dictated that courts typically will not enforce foreign revenue laws.[60] Affirmation of the wire fraud convictions would equate to enforcement of Canadian customs and tax laws since the court would have to assess the validity of a foreign government's revenue laws in order to rule on the defendants' challenges to their convictions for violating those same laws.[61] Further, interpretation and application of foreign law by a domestic court ran the risk of undermining the "foreign policymaking powers" of the executive and legislative branches.[62] Additionally, upholding these convictions would open the door to future prosecutions against smugglers, irrespective of whether the victim foreign government had agreed to reciprocity with the United States.[63] Finally, the rule of lenity counseled against affirmation of the convictions because "the harsher of two possible readings of a criminal statute will be enforced only when Congress has spoken clearly."[64]

2. The Second Circuit: United States v. Trapilo[65]

The Second Circuit was presented with a similar legal quandary the following year. In *United States v. Trapilo*, the defendants purchased liquor

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[57] *Id.*

[58] 18 U.S.C. § 1343 (2000); *Boots*, 80 F.3d at 588-89.

[59] *Boots*, 80 F.3d at 587.

[60] *Id.*; Holman v. Johnson, (1775) 98 Eng. Rep. 1120, 1121 (K.B.).

[61] *Boots*, 80 F.3d at 587.

[62] *Id.* at 587-88 (stating that there is a general principle of noninterference by the federal courts in the legislative and executive branches' exercise of their foreign policymaking powers).

[63] *See* 18 U.S.C. § 546. The anti-smuggling statute's reciprocity requirement exists to ensure that § 546 will only be applied when a given foreign government has enacted reciprocal legislation prohibiting smuggling into the United States. Pasquantino v. United States, 125 S. Ct. 1766, 1786 (2005).

[64] *Boots*, 80 F.3d at 588 (stating that there is a presumption that Congress legislates with domestic applications in mind unless it expressly states otherwise). The wire fraud statute does not expressly state that Congress contemplated a foreign application for "any scheme or artifice to defraud." 18 U.S.C. § 1343. Yet, it does refer to wire communications in "interstate or foreign commerce." *Id.*

[65] 130 F.3d 547, 549 (2d Cir. 1997).

over the telephone and smuggled it into Canada, thereby avoiding payment of customs duties.[66] The *Trapilo* court rejected the reasoning in *Boots*, reversed the defendants' prior acquittals, and held that a scheme to defraud a foreign government of tax revenue fell within the scope of the wire fraud statute.[67]

In rejecting the rationale of *Boots*, the Second Circuit asserted that the wire fraud statute's wording unambiguously barred a person from using the interstate and foreign communication systems if they "intend[ed] to devise *any* scheme or artifice to defraud."[68] Also, "the statute neither expressly, nor impliedly" prohibited the government from prosecuting a person for a scheme to defraud a foreign government of tax revenue.[69] According to the Second Circuit, the wire fraud statute expressly covered frauds involving foreign transactions.[70] The defendants could not avoid prosecution under the wire fraud statute simply because their intended victim was a foreign government.[71]

Thus, even if the common law revenue rule were pertinent to the matter, which it was not, it still did not provide a justification for departing from the statute's plain meaning.[72] The mail and wire fraud statutes both proscribed, on the one hand, forming a scheme to defraud and, on the other hand, using the mails and wires to advance that scheme.[73] Further, both statutes punished "the *scheme* [itself], not its success."[74] Therefore, the defendants' *intent* to defraud did not turn on whether or not they were able to circumvent Canadian revenue laws.[75] As a result, it was unnecessary for the Second Circuit to assess the validity of Canada's tax and excise laws. and the common law revenue rule was not implicated.[76]

In 2000, in ruling on an appeal by two of the *Trapilo* defendants, the Second Circuit once again concluded that a scheme to defraud a foreign government of its tax revenue fell within the meaning of the wire fraud

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[66] *Id.* at 549.

[67] *Id.* at 553.

[68] *Id.* at 551; *see also* 18 U.S.C. § 1343; United States v. DeFiore, 720 F.2d 757, 761 (2d Cir. 1983).

[69] *Trapilo*, 130 F.3d at 551; *see also* 18 U.S.C. § 1343.

[70] *Trapilo*, 130 F.3d at 552.

[71] *Id.*

[72] *Id.* at 551.

[73] *Id.* (citing Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958)).

[74] *Id.* at 552 (citing United States v. Helmsley, 941 F.2d 71, 94 (2d Cir. 1991)).

[75] *Id.*

[76] *Id.* at 553 ("Our goal is simply to vindicate the intended purpose of the statute, that is, 'to prevent the use of [our telecommunication systems] in furtherance of fraudulent enterprises.'" (quoting United States v. Von Barta, 635 F.2d 999, 1005 (2d Cir. 1980))).

statute and that criminal prosecution for such a scheme was not precluded by the common law revenue rule.[77] It is true that the court reversed the defendants' convictions for conspiracy to launder money under a wire fraud scheme because the government failed to submit evidence that Canada in fact taxed or levied a duty upon imported liquor.[78] Yet, the Second Circuit reiterated the idea that the statute punished *intent* to defraud, which did not hinge upon the defendants' success in violating Canadian tax and excise laws.[79]

III. STATEMENT OF THE FACTS

David and Carl Pasquantino, while in New York, ordered liquor over the telephone from discount package stores in Maryland.[80] They then employed numerous other individuals to smuggle the liquor across the Canadian border in their automobiles without paying the substantial excise taxes that Canada imposed upon imported alcohol.[81] Canada had raised the excise taxes on liquor to such a level that Canadian taxes significantly exceeded comparable United States taxes.[82] Following their arrest, the Pasquantinos and one of their conspirators, Arthur Hilts, were indicted for and convicted of wire fraud for devising and implementing a scheme to smuggle liquor into Canada from the United States.[83] Further, the defendants' terms of imprisonment were substantially augmented when their offense levels were increased due to the calculated tax revenue loss to the Canadian and Ontario governments.[84] The base offense level for a violation of the wire fraud statute is six, and, for defendants with a criminal history category of I, the guideline range for such violation is zero to six months.[85] Due to the tax revenue loss calculations, the Pasquantinos'

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[77] United States v. Pierce, 224 F.3d 158, 163-64, 167 (2d Cir. 2000).

[78] *Id.* at 167-68.

[79] *Id.* at 164.

[80] Pasquantino v. United States, 125 S. Ct. 1766, 1770 (2005).

[81] *Id.* In fact, the Canadian taxes due on the alcohol purchased in the United States were roughly double the liquor's purchase price. *Id.*

[82] United States v. Pasquantino, 336 F.3d 321, 325 (4th Cir. 2003), *aff'd*, 125 S. Ct. 1766 (2005). During the original trial, a Canadian Customs Intelligence Officer had testified that the hefty excise taxes on liquor actually resulted from a combination of four separate taxes: a Canadian federal excise tax and general sales tax, a Liquor Control Board of Ontario tax, and a provincial sales tax on imported liquor. *Id.* at 326. The officer estimated that the equivalent of approximately one hundred American dollars would be "due and owing" on a case of liquor that was purchased in the United States for fifty-six American dollars and imported into Canada. *Id.* at 334.

[83] *Pasquantino*, 125 S. Ct. at 1770.

[84] *Pasquantino*, 336 F.3d at 342 (Gregory, J., dissenting).

[85] *Id.* at 342 (Gregory, J., dissenting).

offense levels were increased by thirteen and Hilts' offense level was increased by eleven.[86] Consequently, the Pasquantinos were sentenced to fifty-seven months' imprisonment on each of six counts, to be served concurrently, and Hilts was sentenced to twenty-one months' imprisonment.[87]

IV. PROCEDURAL HISTORY

Prior to trial, the defendants sought to obtain a dismissal, alleging that the government lacked a sufficient interest in enforcing Canadian revenue laws and, therefore, their indictments failed to state a wire fraud violation.[88] The district court denied the motion, and, after the ensuing trial, the defendants were convicted of wire fraud.[89]

On appeal, the Fourth Circuit initially reversed the defendants' convictions.[90] The court decided that the prosecutions ran afoul of the common law revenue rule since it forced the court to recognize and assess Canadian revenue laws.[91] At the same time, the court squarely rejected the defendants' contention that Canada's right to tax them did not constitute "money or property" within the meaning of the wire fraud statute.[92] Then, the Fourth Circuit granted a rehearing en banc, vacated the earlier appellate ruling, and affirmed the defendants' convictions.[93] This decision to reverse course flowed from the conclusion that the common law revenue rule "simply allowed courts to refuse to enforce the tax judgments of foreign nations" instead of "barring any recognition of foreign revenue law"

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[86] *Id.* at 342-43 (Gregory, J., dissenting).

[87] *Id.* at 326.

[88] *Pasquantino*, 125 S. Ct. at 1770.

[89] *Id.*

[90] United States v. Pasquantino, 305 F.3d 291, 292 (4th Cir. 2002), *vacated*, 336 F.3d 321 (4th Cir. 2003), *aff'd*, 125 S. Ct. 1766 (2005). However, Judge Hamilton broke with the rest of the panel in a vigorous dissent. *Id.* at 299 (Hamilton, J., dissenting). First, Hamilton argued that the court was mistaken in determining that the revenue rule barred prosecution because such prosecution was the functional equivalent of penal enforcement of Canadian customs and tax laws. *Id.* (Hamilton, J., dissenting). In his view, such prosecution simply enforced a domestic criminal statute and did nothing civilly or criminally to enforce any Canadian tax claims or judgments. *Id.* (Hamilton, J., dissenting). Second, Hamilton asserted that the court was imposing its own expanded version of the common law revenue rule on section 1343 as a matter of judicial policy. *Id.* at 300 (Hamilton, J., dissenting). Thus, the court's opinion judicially rewrote the plain language of the statute absent any authority to take such an action. *Id.* (Hamilton, J., dissenting).

[91] *Id.* at 295.

[92] *Id.* at 294-95; *id.* at 299 (Hamilton, J., dissenting).

[93] United States v. Pasquantino, 336 F.3d 321, 324 (4th Cir. 2003), *aff'd*, 125 S. Ct. 1766 (2005).

altogether.[94] Also, the court held that Canada's right to receive tax revenue counted as "money or property" within the meaning of the statute.[95]

V. SUMMARY OF OPINIONS

A. JUSTICE THOMAS'S MAJORITY OPINION[96]

The Supreme Court granted certiorari to resolve the circuit split over whether a scheme to defraud a foreign government of tax revenue violates the wire fraud statute.[97] In a five-to-four decision, the Supreme Court ruled that the broad language of the wire fraud statute authorized the government to prosecute an individual for scheming to defraud a foreign government of tax revenue, and that the common law revenue rule did not preclude such a prosecution.[98]

The majority opinion, authored by Justice Thomas, concluded that the defendants' scheme fell within the scope of the statute.[99] First, Canada's right to uncollected taxes on the imported alcohol amounted to "money or property" in its hands.[100] The tax evasion entailed in the smuggling enterprise was aimed at depriving Canada of money legally due.[101] Thus, the object of the defendants' scheme was to deprive that nation of its "property."[102] Second, the defendants' enterprise constituted "a scheme or artifice to defraud" because they had concealed the imported liquor from customs officials and failed to declare those goods on customs forms.[103] These actions were tantamount to "a scheme designed to defraud by representations."[104]

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[94] *Pasquantino* 125 S. Ct. at 1771 (citing *Pasquantino*, 336 F.3d at 327-29).

[95] *Pasquantino*, 336 F.3d at 331-32.

[96] Justice Thomas wrote for the majority, which included of Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Stevens.

[97] *Pasquantino*, 125 S. Ct. at 1771.

[98] *Id.* at 1781.

[99] *Id.* at 1771. The defendants' disputed only two of the three elements necessary for a wire fraud violation. *Id.* Clearly, the defendants had made use of the wires in furtherance of some activity or enterprise when they made phone calls to purchase alcohol and arrange for its transport across the Canadian border. *Id.* at 1770. Therefore, the defendants only disputed that they had engaged in "a scheme or artifice to defraud" and that "money or property" had been the object of the alleged scheme or artifice. *Id.* at 1771.

[100] 18 U.S.C. § 1343 (2000); *Pasquantino,* 125 S. Ct. at 1771.

[101] *Pasquantino*, 125 S. Ct at 1772.

[102] *Id.*

[103] 18 U.S.C. § 1343; *Pasquantino*, 125 S. Ct at 1772-73.

[104] *Pasquantino*, 125 S. Ct at 1773 (citing Durland v. United States, 161 U.S. 306, 313 (1896)).

The majority rejected the defendants' argument that the Court's reading of the wire fraud statute would derogate from the well-established understanding of the common law revenue rule.[105] First, the majority stressed that as of 1952, the year that the federal wire fraud statute was enacted, no decision in a common law revenue rule case had held or implied that the revenue rule prohibited the government from prosecuting a scheme to evade foreign taxes.[106] Unlike the actions historically prohibited by the revenue rule, *Pasquantino* was not a suit directed at recovering a foreign tax liability, but rather was a criminal prosecution initiated by the government "in its sovereign capacity to punish domestic criminal conduct."[107] None of the holdings relied upon by the defendants involved a domestic sovereign acting pursuant to authority conferred by a criminal statute.[108] Moreover, any restitution award resulting from the prosecution would not serve a primary purpose of collecting a foreign tax; instead, it was meant to impose a punishment commensurate with the criminal conduct in question.[109] Further, the Court soundly rejected the claim that indirect enforcement of revenue laws stood at the heart of the common law revenue rule, rather than at its margins.[110] Although criminal prosecution for wire fraud enforced Canadian revenue laws in an indirect sense, the boundary drawn by the revenue rule between impermissible and permissible enforcement of foreign revenue laws had always been unclear.[111] Thus, as of 1952, the extent to which the revenue rule actually prohibited indirect recognition of foreign revenue laws was uncertain.[112] The defendants had failed to provide case law yielding "a rule sufficiently well established" to constrict the reading and application of the wire fraud statute in the instant criminal prosecution.[113]

Second, the majority reasoned that the statute did not derogate from a well-established revenue rule principle because the traditional rationales for

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[105] *Id.*

[106] *Id.* at 1774.

[107] *Id.* at 1775.

[108] *Id.* at 1776.

[109] *Id.* at 1777.

[110] *Id.*

[111] *Id.* at 1778; *In re* Hollins, 139 N.Y.S. 713, 716-17 (N.Y. 1913) (holding that an estate executor could satisfy foreign taxes due on a decedent's estate out of property of the estate, notwithstanding a legatee's argument that the revenue rule barred authorizing such payments).

[112] *Pasquantino*, 125 S. Ct. at 1778-79 (noting that "it is sometimes difficult to draw the line between an issue involving merely recognition of a foreign law and indirect enforcement of it" (citing A. Dicey & J. Morris, CONFLICT OF LAWS 90 (L. Collins gen. ed. 13th ed. 2000))).

[113] *Id.* at 1779.

justifying application of the rule did not indicate that prosecution was clearly barred under the circumstances.[114] In assessing these rationales, it addressed the notion that the rule ensures respect for national sovereignty.[115] According to the majority, *Pasquantino* posed no real risk of fostering international friction because the Executive, as represented by federal prosecutors, presumably initiated this prosecution after assessing its probable impact on the relationship between Canada and the United States.[116]

The majority was equally unmoved by the contention that the revenue rule barred a court from giving domestic effect to politically sensitive and controversial policy decisions embodied in foreign revenue laws, regardless of whether or not a court needed to pass judgment on such laws.[117] Assuming it was permissible under the statute, the government's decision to prosecute reflected the policy choice of both Congress and the Executive "to free the interstate wires from fraudulent use, irrespective of the object of the fraud."[118]

The majority found that the judicial competency rationale was not implicated for two reasons. First, the government had presented uncontroverted witness testimony at trial. Second, Federal Rule of Criminal Procedure 26.1[119] gave sufficient means to resolve incidental issues of foreign law arising in wire fraud prosecutions.[120] Rule 26.1, in part, frees federal courts from the restraints contained in the ordinary rules of evidence in evaluating foreign law without causing unconstitutional deprivation of the defendant's rights to confront witnesses testifying against

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[114] *Id.*

[115] *Id.*; *see supra* notes 46-49 and the text accompanying those notes regarding Learned Hand's classic formulation of this rationale.

[116] *Pasquantino*, 125 S. Ct. at 1779.

[117] *Id.*; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 448 (1964) (White, J., dissenting).

[118] *Pasquantino*, 125 S. Ct. at 1780.

[119] FED. R. CRIM. P. 26.1 ("FRCP"). Rule 26.1 reads as follows:

> A party intending to raise an issue of foreign law must provide the court and all parties with reasonable written notice. Issues of foreign law are questions of law, but in deciding such issues a court may consider any relevant material or source—including testimony— without regard to the Federal Rules of Evidence.

[120] Prior to the creation of FRCP 26.1, the federal courts looked to the common law and state law analogs for methods of interpreting foreign laws. This approach occurred in the context of both civil and criminal actions. Yet, these methods varied and often dictated procedures that were time consuming, expensive, and inefficient were cumbersome and inadequate. A. Nussbaum, *Proving the Law of Foreign Countries*, 3 AM. J. COMP. L. 60, 66-67 (1954). Thus, these methods were often inapposite to determining the content of foreign laws. *Id.* at 66-67.

him.[121] For instance, during both the trial and sentencing phases, a court can rely upon testimony from a foreign nation's customs officials and tax experts to help delineate the purpose and proper application of that sovereign's tax laws.[122] Further, Rule 26.1 allows federal courts the flexibility to review "any relevant material or source" to gain a complete understanding of the foreign laws at issue in a given matter.[123]

Finally, the majority determined that its reading of the wire fraud statute did not have extraterritorial effect because the defendants' offense was perfected as soon as they executed the scheme inside the United States.[124] The government sought to punish the domestic aspect of their conduct.[125] Regardless, the wire fraud statute could not be "a statute in which Congress only had domestic concerns in mind" since its plain language provided for punishment of frauds executed "in interstate or foreign commerce."[126]

B. JUSTICE GINSBURG'S DISSENTING OPINION[127]

The dissenting opinion, authored by Justice Ginsburg, asserted that the common law revenue rule was directly implicated in this prosecution and that Congress never sought to displace the revenue rule by enacting the wire fraud statute.[128] The defendants' conduct could only be brought within the scope of the wire fraud statute because their aim was to evade the customs and tax laws of Canada.[129] Moreover, the results flowing from an

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[121] *See* FED. R. CRIM. P. 26.1 advisory committee's notes (1966).

[122] *Pasquantino*, 125 S. Ct. at 1780. At trial, a Canadian Customs Intelligence Officer enumerated the excise taxes applicable to imported liquor and provided estimates of the taxes that would be "due and owing" on cases of such liquor. United States v. Pasquantino, 336 F.3d 321, 326 (4th Cir. 2003), *aff'd*, 125 S. Ct. 1766 (2005). During the sentencing phase, the court once again relied on the customs officer's testimony in assessing the validity of the government's amount-of-loss computations. *Id.* at 343 (Gregory, J., dissenting). These computations served as the basis for determining the defendants' terms of imprisonment. *Id.* (Gregory, J., dissenting).

[123] FED. R. CIV. P. 44.1. Federal Rule of Criminal Procedure 26.1 is substantially the same as Federal Rule of Civil Procedure 44.1. *Compare* FED. R. CRIM. P. 26.1, *with* FED. R. CIV. P. 44.1. For a complete description of the merits and practicability of these "sister" rules, see FED. R. CIV. P. 26.1 advisory committee's notes (1966).

[124] *Pasquantino*, 125 S. Ct. at 1780; United States v. Pierce, 224 F.3d 158, 166 (2d Cir. 2000).

[125] *Pasquantino*, 125 S. Ct. at 1780.

[126] 18 U.S.C. § 1343 (2000); *Pasquantino*, 125 S. Ct. at 1780-81.

[127] Justice Ginsburg wrote for the dissent, in which Justice Breyer joined in the entire dissent, and Justices Scalia and Souter joined in Parts II and III of the dissent. *Id.* at 1781 (Ginsburg, J., dissenting).

[128] *Id.* at 1786-87 (Ginsburg, J., dissenting).

[129] *Id.* at 1786 (Ginsburg, J., dissenting). Indeed, Ginsburg noted that "shorn of that

application of the Mandatory Victims Restitution Act ("MVRA") to wire fraud offenses supported this point.[130] The MVRA applied to all "offense[s] against property,"[131] and stated that "[n]otwithstanding any other provision of law . . . the court *shall* order . . . that the defendant make restitution to the victim of the offense."[132] The dissent noted that at the district court level, the government refrained from asking the court to impose restitution as the victim was a foreign government suffering a loss related to its tax laws.[133]

According to Justice Ginsburg, the government's willingness to overlook the MVRA in deference to the revenue rule demonstrated the need for the Court to reject the government's overly-broad interpretation of the wire fraud statute.[134] Further, the dissent declined to construe the MVRA as excluding mandatory restitution in instances where wire fraud prosecutions might bring the revenue rule into play.[135] Instead, the MVRA illustrated the point that foreign taxes were not envisioned by Congress as an object of a fraudulent scheme when it enacted the statute.[136]

Next, the dissent posited that the rule of lenity required the Court to conclude that "schemes directed solely at defrauding a foreign government of tax revenue" did not constitute a scheme to defraud within the meaning of the wire fraud statute.[137] Wire fraud was a predicate offense as set forth in both the Racketeer Influenced & Corrupt Organizations Act ("RICO")[138] and the money laundering statute.[139] Therefore, finding that the defendants' conduct amounted to wire fraud without "clear and definite language" in the

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purpose, no other aspect of their conduct was criminal in this country." *Id.* (Ginsburg, J., dissenting).

[130] 18 U.S.C. § 3663A.

[131] *Id.* § 3663A(c)(1)(A)(ii); *Pasquantino*, 125 S. Ct at 1787 (Ginsburg, J. dissenting).

[132] 18 U.S.C. § 3663A(a)(1); *Pasquantino*, 125 S. Ct at 1787 (Ginsburg, J., dissenting).

[133] *Pasquantino*, 125 S. Ct at 1787 (Ginsburg, J., dissenting).

[134] *Id.* (Ginsburg, J., dissenting).

[135] *Id.* (Ginsburg, J., dissenting) ("Congress, however, has expressed with notable clarity a policy of mandatory restitution in *all* wire fraud prosecutions. In contrast, Congress was 'quite ambiguous' concerning § 1343's coverage of schemes to evade foreign taxes.").

[136] 18 U.S.C. § 3663A; *Pasquantino*, 125 S. Ct at 1787 (Ginsburg, J., dissenting).

[137] *Pasquantino*, 125 S. Ct at 1787 (Ginsburg, J., dissenting) (citing McNally v. United States, 483 U.S. 350, 359-60 (1987)). The rule of lenity states that, when confronted with "two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Id.* (Ginsburg, J., dissenting).

[138] 18 U.S.C. § 1961(1).

[139] *Id.* § 1956(c)(7)(A).

statute would unfairly subject them to the possibility of harsh criminal penalties and forfeitures.[140]

In addition, Justice Ginsburg asserted that the majority decision improperly bestowed extraterritorial effect upon the wire fraud statute by reading it to include violations of foreign revenue laws.[141] Absent express congressional intent, the Court refrained from interpreting statutes in a manner that would reach conduct that was mainly another country's concern.[142] Even "a statute's express application to acts committed in foreign commerce," without more, would be insufficient to signal congressional intent "to give the statute extraterritorial effect."[143] Further, Congress had already made its general view of foreign customs and tax laws quite clear. In both domestic legislation and treaties, Congress provided for strict limitations on the assistance to be extended to foreign countries.[144] For example, Congress had enacted a specific anti-smuggling statute criminalizing offenses of the genre carried out by the Pasquantinos. The application of the anti-smuggling statute hinged upon whether or not a given foreign government had enacted a reciprocal statute barring smuggling into the United States.[145] Yet, Canada failed to meet this reciprocity requirement as it had not established a statute criminalizing smuggling into the United States.[146] As another example, Justice Ginsburg

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[140] *Pasquantino*, 125 S. Ct at 1787 (Ginsburg, J., dissenting).

[141] *Id.* at 1784 (Ginsburg, J., dissenting).

[142] *Id.* at 1785 (Ginsburg, J., dissenting) (citing Foley Bros. v. Filardo, 336 U.S. 281, 286 (1949)). For the most part, American courts have long adhered to the principle that Congress primarily crafts and enacts statutes with domestic applications in mind. *See also* Small v. United States, 125 S. Ct. 1752, 1755 (2005); Smith v. United States, 507 U.S. 197, 204 n.5 (1993). *But see* F. Hoffman-La Roche Ltd. v. Empagran S. A., 542 U.S. 155, 164 (2004) (noting the presumption that "legislators take account of the legitimate sovereign interests of other nations when they write American laws").

[143] *Id.* at 1785 n.7 (Ginsburg, J., dissenting) (citing EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 250-53 (1991)). The wire fraud statute refers to "any scheme or artifice to defraud" by means "of wire, radio, or television communication *in interstate or foreign commerce*." 18 U.S.C. § 1343 (emphasis added).

[144] *Pasquantino*, 125 S. Ct at 1785 (Ginsburg, J., dissenting); *see also* Attorney Gen. of Can. v. RJR Tobacco Holdings, Inc., 268 F.3d 103, 119 (2d Cir. 2001).

[145] 18 U.S.C. § 546. The statute relates to the smuggling of goods into foreign countries and reads, in pertinent part,

> [a]ny person owning in whole or in part any vessel of the United States who employs . . . such vessel for the purpose of smuggling . . . any merchandise into the territory of any foreign government in violation of the laws there in force, if under the laws of such foreign government any penalty or forfeiture is provided for violation of the laws of the United States . . . shall be fined under this title or imprisoned not more than two years, or both.

Id.

[146] *Pasquantino*, 125 S. Ct at 1786 (Ginsburg, J., dissenting). Justice Ginsburg made

noted the "comprehensive" tax protocol existing between the United States and Canada.[147] Among other things, the protocol only applied to tax judgments finalized under the requesting country's laws, and it prohibited tax collection assistance against a citizen or corporation of "the requested State."[148]

VI. ANALYSIS

The majority correctly determined that the common law revenue rule does not preclude the government from prosecuting a person under the wire fraud statute for a scheme to evade foreign taxes. First, the revenue rule only bars domestic courts from direct enforcement of a foreign sovereign's tax judgments or unadjudicated tax claims. Within American revenue rule jurisprudence, no well-established prohibition exists which would bar government prosecution for domestic criminal conduct that may lead to indirect enforcement of foreign revenue laws. Second, such a prosecution does not run afoul of the traditional rationales underlying the revenue rule—national sovereignty, separation of powers, and judicial competency. Third, the rule is discretionary in nature and does not sweep so broadly as to establish an absolute prohibition upon prosecutions involving *any degree* of recognition of foreign revenue laws.

Although the majority arrived at the proper conclusion regarding the common law revenue rule, it erred in finding that a scheme to evade foreign taxes fell within the scope of the wire fraud statute. At first glance, this type of scheme appears to meet the statute's literal terms. However, these terms cannot be evaluated in a vacuum. When assessed in light of the legislative history, principles of statutory construction, and tensions with other congressional enactments, a prosecution for a scheme to evade foreign taxes is properly interpreted as falling outside the intended scope of the statute. Moreover, permitting the prosecution of such a scheme as a wire fraud violation gives unintended extraterritorial effect to the statute.

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mention of the anti-smuggling statute to convey a general conceptual point. She acknowledged that § 546 would be inapplicable to the defendants' conduct in the instant case since that provision required that a vessel be used to transport the smuggled goods into the foreign country. *Id.* at 1786 n.9 (Ginsburg, J., dissenting).

[147] Protocol Amending Convention with Respect to Taxes on Income and Capital, U.S.-Can., art. 15, ¶ 2, Nov. 9, 1995, 2030 U.N.T.S. 236 [hereinafter Protocol]; *Pasquantino*, 125 S. Ct. at 1786 (Ginsburg, J., dissenting).

[148] Protocol, *supra* note 147, at art. 15, ¶ 8.

A. THE COMMON LAW REVENUE RULE DOES NOT BAR PROSECUTION FOR A SCHEME TO EVADE FOREIGN TAXES UNDER THE WIRE FRAUD STATUTE

1. American Revenue Rule Jurisprudence Precludes Only Direct Recognition or Enforcement of Foreign Tax Judgments and Unadjudicated Tax Claims

The majority's interpretation of the scope and application of the revenue rule is consistent with the bulk of American case law. Early on, a line of American cases established a prohibition on the enforcement of one sovereign's tax liabilities in the courts of another sovereign, with a common example being a suit to enforce a tax judgment.[149] "The revenue rule's grounding in these cases shows that, at its core, it prohibited the collection of tax obligations of foreign nations."[150] Modern courts continue to interpret the revenue rule as being pertinent to matters in which a foreign government brings suit either to enforce a finalized tax judgment or to litigate an unresolved tax claim.[151] Further, the immediate response to *Pasquantino*'s holding, in *European Community v. RJR Nabisco, Inc.*, suggests that a matter involving direct enforcement of foreign revenue laws is still viewed as the setting in which the revenue rule is properly implicated.[152] The Second Circuit emphasized in *European Community* that, rather than entailing a prosecution by the United States government, this case involved a civil lawsuit brought by foreign sovereigns whose sole aim in bringing suit was to collect tax revenue and the costs connected with its collection.[153] In assessing *Pasquantino*'s impact, the *European*

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[149] *See* Moore v. Mitchell, 30 F.2d 600, 603-04 (2d Cir. 1929), *aff'd*, 231 U.S. 18 (1930) (L. Hand, J., concurring); Maryland v. Turner, 132 N.Y.S. 173, 175 (N.Y. Sup. Ct. 1911); Arkansas v. Bowen, 9 Mackey 291, 295 (D.C. 1891). These cases involved a court in one state determining that the common law revenue rule precluded that state from acting as a collector of taxes for a sister state. *Pasquantino*, 125 S. Ct. at 1775. This approach to the application of the revenue rule is transferable to suits brought by foreign sovereigns as well. *Id.*

[150] *Pasquantino*, 125 S. Ct. at 1775.

[151] Attorney Gen. of Can. v. RJR Tobacco Holdings, Inc., 268 F.3d 103, 109 (2d Cir. 2001) (describing the common law revenue rule as "a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns"); *see also* Michael A. Rosenhouse, *Application of Common Law Revenue Rule by Federal Courts*, 4 A.L.R. FED. 279 (2005) (stating "the long-standing common law revenue rule prevents the courts of one sovereign from enforcing or adjudicating tax claims from another sovereign").

[152] European Cmty. v. RJR Nabisco, 424 F.3d 175, 180-81 (2d Cir. 2005).

[153] *Id.* at 177, 180. The Supreme Court had vacated and remanded this matter for reconsideration in light of the *Pasquantino* decision, and the Second Circuit handily

Community court "saw no reason why *Pasquantino*'s analysis should disturb our conclusion that the revenue rule bars civil RICO suits by foreign governments against smugglers."[154]

The majority opinion presents a valid distinction between direct enforcement of foreign revenue laws and indirect enforcement of these laws as a byproduct of prosecutions which aim to punish fraudulent domestic criminal conduct. There is a dearth of holdings which clearly signal that the revenue rule prohibits our government from enforcing a domestic criminal law; this is especially true when the nexus between the criminal prosecution and enforcement of foreign revenue laws is attenuated. Thus, the distinction between "impermissible and permissible 'enforcement' of foreign revenue law" is unclear.[155] At a minimum, American case law is not well-settled enough to conclude that the revenue rule bars a prosecution resulting in "indirect recognition of foreign revenue laws."[156]

2. American Courts Have Yet to Adopt a "Functional Equivalent" Standard Extending the Revenue Rule's Scope to Prosecutions Involving Indirect Enforcement of Foreign Revenue Laws

Justice Ginsburg attacks the distinction, drawn by the majority, between direct and indirect enforcement of foreign revenue laws. In her dissent, she points to the "functional equivalent" standard proffered by the First Circuit in *Boots*.[157] This standard provides that the revenue rule precludes prosecution under the wire fraud statute of a scheme to evade foreign taxes if a "conviction would amount functionally to penal enforcement of Canadian customs and tax laws."[158]

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reinstated its prior ruling which precluded the EC's suit. *Id.* at 178-79. The EC had filed a civil action alleging that the defendant tobacco companies directed and facilitated the smuggling of contraband cigarettes into its member states. *Id.* at 177-78. The EC, and its member states, sought to recover damages for duties and taxes owed on the cigarettes. *Id.* at 177. Originally, the Second Circuit had concluded that "the revenue rule prohibited the foreign sovereigns' civil claims for recovery of lost tax revenue and law enforcement costs" in relation to the alleged smuggling activities of tobacco companies. European Cmty v. RJR Nabisco, Inc., 355 F.3d 123, 127-28 (2d Cir. 2004), *vacated and remanded*, 125 S. Ct. 1968 (2005), *reinstated*, 424 F.3d 175 (2d Cir. 2005).

[154] The Second Circuit's reasoning indicates that future courts will not view the *Pasquantino* decision as an "Open, sesame" ruling that swings the door wide open for foreign sovereigns to bring unadjudicated tax claims into United States courts.

[155] *Pasquantino*, 125 S. Ct. at 1778-79.

[156] *Id.*

[157] *Id.* at 1786 (Ginsburg, J., dissenting) (citing United States v. Boots, 80 F.3d 580, 587 (1st Cir. 1996)).

[158] *Boots*, 80 F.3d at 587.

However, a "functional equivalent" standard pertaining to indirect enforcement has been adopted by few, if any, other courts. The Second and Fourth Circuits have analyzed this concept and declined to adopt it.[159] The Second Circuit rejects the notion that a wire fraud prosecution for a scheme to evade foreign taxes is "equivalent to an effort to collect those taxes on [a foreign sovereign's] behalf."[160] Further, the Second Circuit asserts that vindication of the intended purpose of a domestic criminal statute should not be thwarted simply because indirect enforcement of foreign revenue laws is likely to result.[161] Similarly, the Fourth Circuit finds that a "functional equivalent" standard is inapplicable to prosecutions that advance our government's strong interest in preventing misuse of the wires as part of a "criminal fraudulent enterprise."[162]

3. The Discretionary Language Used to Define the Revenue Rule Weighs Against a Conclusion that the Rule Bars Prosecutions Involving Indirect Enforcement of Foreign Revenue Laws

The "functional equivalent" standard may have had difficulty gaining traction in American courts due to the discretionary language in which the revenue rule is frequently couched. The Restatement (Third) of Foreign Relations, defines the revenue rule as follows: "Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states."[163] In its Reporter's Notes, the Restatement goes so far as to posit that even the justification for neither recognizing nor enforcing foreign *tax judgments* "is largely obsolete."[164]

Domestic courts may not be so ready to dispense with the revenue rule altogether when it comes to direct enforcement of foreign tax judgments.

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[159] United States v. Pasquantino, 336 F.3d 321, 330-31 (4th Cir. 2003), *aff'd*, 125 S. Ct. 1766 (2005) (noting that the First Circuit in *Boots* "missed the critical point that prosecution for" a wire fraud violation, "even when the subject of the wire fraud scheme involved is certain tax revenue due a foreign sovereign, does nothing civilly or criminally to enforce any tax judgments or claims of a foreign sovereign"); United States v. Trapilo, 130 F.3d 547, 553 (2d Cir. 1997) ("Whether our decision today indirectly assists our Canadian neighbors in keeping smugglers at bay or assists them in the collection of taxes is not our Court's concern.").

[160] United States v. Pierce, 224 F.3d 158, 167 (2d Cir. 2000).

[161] *Trapilo*, 130 F.3d at 553.

[162] *Pasquantino*, 336 F.3d at 331.

[163] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 (1987). The Restatement is created by the draft reporters of the American Law Institute. Kovatch, *supra* note 29, at 270.

[164] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 n.2.

Yet, these courts describe the revenue rule in a manner that is "nearly identical"[165] to the Restatement's discretionary definition. For instance, the First Circuit has stated that the rule "holds that courts *generally* will not enforce foreign tax judgments . . . ."[166] Similarly, the Second Circuit has recognized that "our courts will *normally* not enforce foreign tax judgments."[167] The Ninth Circuit has explained that American courts remain true to the notion that they "*need not* give effect to the penal or revenue laws of foreign countries."[168] Finally, the district court for the Eastern District of New York recently commented that "the revenue rule is discretionary rather than jurisdictional."[169]

These discretionary definitions of the revenue rule put forth by the judiciary signal that domestic courts are unlikely to find that the rule acts as an absolute prohibition precluding recognition of a foreign sovereign's revenue laws in any context. Taken from a more extreme perspective, these discretionary definitions may be seen as dovetailing with the claim of some scholars that the revenue rule is no more than "an archaic vestige of English common law."[170]

Thus, American revenue rule jurisprudence lines up quite closely with the majority's assertion that the rule stands only for the principle that courts do not enforce the tax judgments or unadjudicated tax claims of a foreign sovereign.[171] In turn, American revenue rule cases do not establish a clear precedent barring the government from prosecuting a person under the wire fraud statute for a scheme to evade foreign taxes.[172]

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[165] *Pasquantino*, 336 F.3d at 327.

[166] United States v. Boots, 80 F.3d 580, 587 (1st Cir. 1996) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483) (emphasis added).

[167] United States v. Trapilo, 130 F.3d 547, 550 (2d Cir. 1997) (emphasis added).

[168] HM the Queen in Right of the Province of B.C. v. Gilbertson, 597 F.2d 1161, 1165 n.10 (9th Cir. 1979) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 413 (1964)) (emphasis added).

[169] European Cmty. v. RJR Nabisco, Inc., 150 F. Supp. 2d 456, 476 (E.D.N.Y. 2001), *aff'd in part, vacated and remanded in part*, 355 F.3d 123, 127-28 (2d Cir. 2004), *vacated and remanded*, 125 S. Ct. 1968 (2005), *reinstated*, 424 F.3d 175 (2d Cir. 2005).

[170] Kovatch, *supra* note 29, at 267.

[171] Pasquantino v. United States, 125 S. Ct. 1766, 1775 (2005); *Banco Nacional de Cuba*, 376 U.S. at 448 (White, J., dissenting) (noting that "our courts customarily refuse to enforce the revenue and penal laws of foreign state").

[172] *Pasquantino*, 125 S. Ct. at 1774.

4. The Traditional Rationales Justifying the Common Law Revenue Rule Do Not Indicate that It Bars a Prosecution for a Scheme to Evade Foreign Taxes

a. The Respect for National Sovereignty Rationale

For many, the revenue rule preserves respect for national sovereignty by acting as a bulwark defending against the international friction or embarrassment which could result from judicial evaluation of the public policies underlying a foreign sovereign's laws.[173] Yet, the main thrust of the government's prosecution is directed toward punishing individuals for that portion of their overall conduct constituting misuse of United States wires in furtherance of a fraudulent scheme. The government's pursuit of its independent, sovereign interest in punishing domestic criminal conduct need not lead a foreign sovereign to conclude that the policies underlying its revenue laws are being ridiculed or discounted.

Further, prosecutors bringing charges of wire fraud violations are agents of the executive branch.[174] Presumably, they carefully assess the potential impact that a wire fraud prosecution will have upon America's relationship with a foreign sovereign. The Executive has "ample authority and competence to manage . . . relations between [a] foreign state and its own citizens."[175] Admittedly, prosecutorial discretion is not a foolproof safeguard. Yet, this intermediate step makes it unlikely that prosecution for a scheme to defraud a foreign government of tax revenue will result in international friction. To date, there appear to be no case precedents in which a court has applied the common law revenue rule to bar a prosecution "accompanied by such a safeguard," namely the prior judgment call of a prosecutor.[176] Indeed, it is plausible that the Judiciary is more apt to interfere with the Executive's foreign policymaking decisions by routinely declining to review wire fraud prosecutions based upon prudential considerations when these judgment calls have already been made.

b. The Separation of Powers Rationale

Revenue rule proponents also assert that the rule maintains a proper separation of powers among our branches of government. Yet, a breach of the separation of powers does not occur in a prosecution for a scheme to

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[173] *Id.* at 1779; Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring), *aff'd*, 231 U.S. 18 (1930).

[174] *Pasquantino*, 125 S. Ct. at 1779.

[175] *Id.* (citing *Moore*, 30 F.2d at 604 (Hand, J., concurring)).

[176] *Id.*

evade foreign taxes. Indeed, "when the executive branch affirmatively consents to litigation . . . there is little reason to worry about infringing on the executive's sphere of decision-making, and the rule will not be applied."[177] So long as the federal prosecutor controls initiation of such actions, the judiciary will not be placing itself at odds with the Executive's foreign policy goals by allowing these actions to proceed.[178] Further, no breach arises between the executive and legislative branches since prosecutors initiate these actions as part of a good faith effort to interpret and apply Congress's intent in enacting the wire fraud statute. In this sense, the Executive can simply be viewed as acting pursuant to its constitutional mandate to "take [care] that the [laws] be faithfully executed."[179]

c. The Judicial Competency Rationale

A final justification underlying the revenue rule is the claim that courts lack the necessary competence to assess the validity of foreign tax schemes.[180] Undoubtedly, foreign tax laws involve a degree of complexity. Yet, this inherent complexity need not be insurmountable for federal courts equipped with appropriate tools for interpreting foreign tax laws. The common law methods and state analogs previously relied upon by courts for interpreting foreign laws were cumbersome and inadequate.[181] However, Federal Rule of Criminal Procedure 26.1 equips the federal courts with sufficient means to resolve the incidental foreign law issues that might arise in wire fraud prosecutions.[182]

Furthermore, federal courts are called upon in a variety of contexts to evaluate foreign laws that range across a broad spectrum of complexity. One conspicuous example was, ironically, pointed out in Justice Ginsburg's own dissent in *Pasquantino*; namely the extradition requests of foreign sovereigns.[183] Justice Ginsburg asserted that Canada had the "primary interest in the matter at stake" and that "United States citizens who have committed criminal violations of Canadian tax law [could] be extradited to stand trial in Canada."[184] Arguably, these comments were simply meant to

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[177] European Cmty. v. RJR Nabisco, 424 F.3d 175, 180 (2d Cir. 2005).

[178] Republic of Ecuador v. Philip Morris Cos., 188 F. Supp. 2d 1359, 1364-65 (S.D. Fla. 2002), *aff'd*, 341 F.3d 1253 (11th Cir. 2003).

[179] U.S. CONST. art. II, § 3.

[180] *Pasquantino*, 125 S. Ct. at 1780.

[181] Nussbaum, *supra* note 120, at 60, 66-67.

[182] *See supra* notes 119-123 and the text accompanying those notes regarding the application of FRCP 26.1 and the manner in which the Rule aids the evidentiary process for federal courts.

[183] *Pasquantino*, 125 S. Ct. at 1782 (Ginsburg, J., dissenting).

[184] *Id.* (Ginsburg, J., dissenting).

buttress Justice Ginsburg's contention that Canadian courts had greater familiarity with their nation's excise laws and, in turn, were better "positioned to decide 'whether, and to what extent, the defendants [had] defrauded . . . Canada . . . out of tax revenue owed . . . .'"[185] Even so, judicial review of extradition requests carries an express obligation to evaluate the elements, purposes, and punishments associated with foreign laws. Absent a contrary provision in an extradition treaty, for an offense to be extraditable, "the act charged must ordinarily be considered criminal by both nations."[186] This rule of "double criminality" provides that the offense must be serious and punishable under the laws of both countries and it is satisfied if the two nations' laws are "substantially analogous."[187] If federal courts can fairly and accurately interpret complex foreign criminal laws during extradition proceedings, it seems likely that they also possess the competency to assess foreign tax laws.

B. PROSECUTION FOR A SCHEME TO DEFRAUD A FOREIGN GOVERNMENT OF TAX REVENUE SATISFIES THE LITERAL TERMS OF THE WIRE FRAUD STATUTE

1. A Smuggling Enterprise Constitutes "a Scheme or Artifice to Defraud"

Ample case precedent indicates that the defendants' smuggling enterprise constituted a scheme "designed to defraud by representations"[188] which, in turn, was a "scheme or artifice to defraud" Canada of taxes due on

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[185] *Id.* at 1782-83 (Ginsburg, J., dissenting) (quoting United States v. Pasquantino, 336 F.3d 321, 343 (4th Cir. 2003) (Gregory, J., dissenting), *aff'd*, 125 S. Ct. 1766 (2005)).

[186] 31A AM. JUR. 2D EXTRADITION § 40 (2005).

[187] *Id.* As explained by the authors of American Jurisprudence, the principle of dual criminality does not require that the laws of the surrendering and requesting states replicate each other exactly. *Id.* Also, dual criminality is not "defeated" by differences in the instrumentalities or stated purposes of the two nations' laws. *Id.* Further, even "if a complaint charges two offenses, only one of which is extraditable under the treaty, the detention of the accused person is [still] lawful." *Id.* Finally, extradition is not precluded when defenses available to the defendants in the surrendering state are not available in the requesting state. *Id.*

[188] *Pasquantino*, 125 S. Ct at 1773 (citing Durland v. United States, 161 U.S. 306, 313 (1896)); *see also* United States v. Brewer, 528 F.2d 492, 496 (4th Cir. 1975). Beginning in 1996, and continuing through May 2000, the defendants conducted a sizeable liquor smuggling operation which fed into the black market for liquor in Canada. *Pasquantino*, 336 F.3d at 324-25. The success of this operation relied upon the regular concealment of imported liquor from Canadian officials and the failure to declare this same liquor on customs forms. *Id.* at 333. Such conduct amounted to a representation to Canadian customs officials that the drivers transporting the liquor had no goods to declare. *Pasquantino*, 125 S. Ct. at 1772-73.

the imported liquor.[189] Courts have described a scheme to defraud as "one reasonably calculated to deceive persons of ordinary prudence and comprehension."[190] They have also emphasized that the term "scheme to defraud" is assessed by a standard that is "a reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general [and] business life of members of society."[191] Further, a scheme to defraud can result from "an assertion of a material falsehood with the intent to deceive [or the] active concealment of a material fact with the intent to deceive."[192] A fact is deemed to be material if it would naturally influence or is capable of influencing the intended victim.[193]

The failure to make the requisite declarations of goods influenced Canadian customs officials to permit the vehicles transporting the liquor into Canada without further inspection.[194] As a result, the defendants' conduct amounted to active concealment of a material fact with intent to deceive.[195] Additionally, smuggling activities run afoul of "fundamental notions of honesty, fair play, and right dealing."[196]

2. A Government's Right to Uncollected Taxes Constitutes "Property" in the Victim's Hands

Courts construe the "property" requirement of the mail and wire fraud statutes quite broadly.[197] In general, they deem uncollected taxes owed to a government to be property in that government's hands.[198] Thus, courts consistently permit prosecutions for schemes to defraud federal or state governments of taxes owed to them.[199] For example, the Ninth Circuit has

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[189] *Pasquantino*, 125 S. Ct. at 1773.

[190] United States v. Drake, 932 F.2d 861, 863 (10th Cir. 1991).

[191] United States v. Trapilo, 130 F.3d 547, 550 n.3 (2d Cir. 1997) (citing United States v. Von Barta, 635 F.2d 999, 1005 n.12 (2d Cir. 1980)).

[192] *Pasquantino*, 336 F.3d at 333.

[193] Neder v. United States, 527 U.S. 1, 22, 24 (1999).

[194] *Pasquantino*, 336 F.3d at 333.

[195] *Id.*

[196] *Trapilo*, 130 F.3d at 550 n.3.

[197] *See* Fountain v. United States, 357 F.3d 250, 256 (2d Cir. 2004).

[198] *Id.* at 257.

[199] *Id.* at 251-52 (holding that taxes owed to a government could qualify as property in its hands within the meaning of the federal mail and wire fraud statutes). *See also* United States v. Dale, 991 F.2d 819, 849 (D.C. Cir. 1993) (federal tax revenue); United States v. Helmsley, 941 F.2d 71, 94 (2d Cir. 1991) (affirming defendant's mail fraud conviction for tax fraud); United States v. Porcelli, 865 F.2d 1352, 1360 (2d Cir. 1989) (reasoning that the intangible nature of New York State's interest in uncollected taxes owed did not serve as an obstacle to a mail fraud prosecution); United States v. DeFiore, 720 F.2d 757, 761 (2d Cir. 1983); United States v. Melvin, 544 F.2d 767, 773-74 (5th Cir. 1977) (mail fraud in connection with

upheld mail fraud convictions that are based on the defendants' filing of false tax returns.[200] In a similar vein, the Seventh Circuit has reasoned that the federal government's property right in income tax revenue meets the "money or property" requirement for mail and wire fraud convictions.[201] Also, the Second Circuit has found that taxes owed to the Canadian government, although uncollected, were still property in the hands of that government for the purposes of the mail and wire statutes' "money or property" requirement.[202] These decisions are consistent with the manner in which the government's right to collect taxes has traditionally been viewed by the Supreme Court outside the framework of the mail and wire fraud statutes.[203]

Moreover, the Supreme Court's holding in *Cleveland v. United States* is not at odds with the consensus among the courts that a government's right to taxes owed constitutes "property" under the mail and wire fraud statutes.[204] In *Cleveland*, a unanimous Supreme Court asserted that it was not enough that the object of a scheme to defraud "[*might*] become property in the recipient's hands."[205] Rather, "for the purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim."[206] There, the Supreme Court decided that unissued state video poker licenses did not qualify as "property" within the meaning of the mail fraud statute.[207] Yet, that conclusion rests, primarily, upon the notion that the government's ability to regulate liquor sales by itself does not constitute property.[208] Indeed, monetary loss was not involved in the offense underlying the *Cleveland* conviction.[209] Thus, *Cleveland*'s holding can be reconciled with the consensus of the courts by recognizing that, while unissued regulatory licenses may not constitute property, "the sales taxes that the government

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interstate sale of cigarettes); United States v. Brewer, 528 F.2d 492, 496-97 (4th Cir. 1975) (same); United States v. Mirabile, 503 F.2d 1065, 1066 (8th Cir. 1974) (mail fraud in connection with false state tax return).

[200] United States v. Miller, 545 F.2d 1204, 1216 (9th Cir. 1976).

[201] United States v. Bucey, 876 F.2d 1297, 1310 (7th Cir. 1989).

[202] *Fountain*, 357 F.3d at 260.

[203] *Id.* at 257. The Court has held that a taxpayer has a positive "duty to pay [his] tax" and that the government "possess[es] the right of use of the money owed" rather than the taxpayer. Manning v. Seeley Tube & Box Co. of N.J., 338 U.S. 561, 565-66 (1950).

[204] *Fountain*, 357 F.3d at 257.

[205] Cleveland v. United States, 531 U.S. 12, 15 (2000) (emphasis added).

[206] *Id.*

[207] *Id.*

[208] *Fountain*, 357 F.3d at 257.

[209] *Id.*

can anticipate from transactions in" the regulated goods or services "are property under the mail and wire fraud statutes."[210]

C. JUSTICE THOMAS'S READING OF THE WIRE FRAUD STATUTE GIVES SECTION 1343 UNINTENDED EXTRATERRITORIAL EFFECT

1. When Evaluated in a Broader Context that Extends Beyond the Statute's Literal Terms, the Majority's Reading Gives the Statute Unintended Extraterritorial Effect

The majority provides substantial support for its conclusion that the fraudulent scheme at issue satisfies the wire fraud statute's literal terms. However, the majority opinion makes short shrift of Justice Ginsburg's extraterritoriality concerns. In a single paragraph, the majority dismisses the notion that its reading of the wire fraud statute has unintended extraterritorial effect by making two brief points.[211] First, it notes that the government's aim is to punish the domestic element of the defendants' conduct.[212] Second, it concludes that Congress must have had more than "domestic concerns in mind"[213] since the statute punishes frauds executed "in interstate or foreign commerce."[214] Beyond these two assertions, nothing more is said.

The absence of a satisfactory exploration of the extraterritoriality issue is disconcerting. Both the sentence length and restitution amount resulting from a wire fraud conviction are determined, in part, by calculating the monetary loss suffered by the foreign sovereign due to the uncollected taxes. Indeed, as pertains to restitution, Congress "has expressed with notable clarity a policy of mandatory restitution in *all* wire fraud prosecutions."[215] Further, a strong connection exists between the domestic criminal conduct which the government seeks to punish (i.e., misuse of the United States wires in furtherance of a fraudulent scheme) and the extraterritorial conduct that leads to the culmination of the fraudulent scheme. Without clearer guidance from Congress as to the statute's intended scope, future courts should not be placed in the position of

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[210] *Id.*

[211] Pasquantino v. United States, 125 S. Ct. 1766, 1780 (2005).

[212] *Id.*

[213] *Id.* at 1780-81 (citing Small v. United States, 125 S. Ct. 1752, 1755 (2005)).

[214] 18 U.S.C. § 1343 (2000 & Supp. 2002).

[215] *Pasquantino*, 125 S. Ct. at 1787 (Ginsburg, J., dissenting). The Mandatory Victims Restitution Act of 1996 applies to all "offenses against property" and directs that "[n]otwithstanding any other provision of law . . . the court *shall* order . . . that the defendant make restitution to the victim of the offense." 18 U.S.C. § 3663A.

handing down prison sentences and ordering restitution awards calculated, in many cases, on the combined impact of domestic and extraterritorial conduct. Such a result would give rise to unintended extraterritorial effect.

Justice Ginsburg admonished the majority for extending the reach of the wire fraud statute to apply to circumstances that were largely extraterritorial.[216] A significant portion of the criminal conduct entailed in the smuggling operation occurred in Canada.[217] The fraudulent scheme supplied Canada's black market with liquor and had the end result of depriving Canada of revenue due under its customs and tax laws.[218] Further, the statute was "[s]ilent on its application to activity culminating beyond our borders" since its language did not express a clear, unambiguous intent on the part of Congress to give it extraterritorial effect.[219] Moreover, Justice Ginsburg stressed that "Congress legislates against the backdrop of the presumption against extraterritoriality."[220] This presumption means that Congress ordinarily intends for its legislative enactments to have domestic, as opposed to extraterritorial, application.[221] By and large, the extraterritoriality canon restricts federal statutes from reaching conduct beyond United States borders.[222]

Justice Ginsburg's concerns reflect the delicate balance that the Supreme Court seeks to maintain in defining the wire fraud statute's proper boundaries. On the one hand, the statute is seen as having broad applicability to a diverse spectrum of fraudulent schemes.[223] On the other hand, the Court must prevent imprudent readings of the statute from

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[216] *Id.* at 1781 (Ginsburg, J., dissenting).

[217] *Id.* at 1783-84 (Ginsburg, J., dissenting).

[218] *Id.* at 1781-82 (Ginsburg, J., dissenting) (emphasizing Canada's "primary interest in the matter at stake"); *see also* Foley Bros. v. Filardo, 336 U.S. 281, 286 (1949) (holding that, in general, the Court does not interpret statutes to reach conduct that is "the primary concern of a foreign country"). *But see* F. Hoffman La-Roche Ltd. v. Empagran S. A., 124 S. Ct. 2359, 2366 (2004) (referring to the presumption that "legislators take account of the legitimate sovereign interests of other nations when they write American laws").

[219] *Pasquantino*, 125 S. Ct. at 1781 (Ginsburg, J., dissenting).

[220] *Id.* at 1782 (Ginsburg, J., dissenting); *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

[221] Small v. United States, 125 S. Ct. 1752, 1755 (2005) (stating that "[t]he Court has adopt[ed] the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application").

[222] *Id.* at 1761 (Thomas, J., dissenting).

[223] *Pasquantino*, 125 S. Ct. at 1784 (Ginsburg, J., dissenting) ("This Court has several times observed that the wire fraud statute has a long arm, extending to 'everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future.'" (quoting Durland v. United States, 161 U.S. 306, 313 (1896))). *But see* Nirav Shah, *Mail and Wire Fraud*, 40 AM. CRIM. L. REV. 825, 832 (2003) ("The mail and wire fraud statutes are broadly applied, but not without limit.").

flourishing. In the absence of such a judicial safeguard, a detrimental expansion of the reach of federal criminal law could result.[224] When viewed together, the legislative history, proper statutory construction, and tensions between the statute and other enactments reveal that the majority's reading of the statute tips the balance toward a harmful extension of federal criminal law. Therefore, Justice Ginsburg gets the better of the extraterritoriality argument.

2. The Wire Fraud Statute's Legislative History Indicates that the Majority's Reading Gives the Statute Unintended Extraterritorial Effect

The legislative history pertinent to the wire fraud statute is sparse. Further, the minimal substantive guidance to be gleaned from it cuts against the majority's conclusion that a scheme to evade foreign taxes falls within the statute's intended scope. At its inception in 1952, the wire fraud statute was simply one of many amendments to the Communications Act and was advanced without any textual explanation as to the statute's scope.[225] In 1956, Congress revisited the wire fraud statute and modified its language.[226] The purpose of the modification was to close a "loophole" that "limit[ed] the prosecution of frauds involving wire, radio, and television communication to interstate [transmissions] only."[227] The new statutory language ensured that foreign communications came under the purview of the wire fraud statute.

At the prompting of the Attorney General, Congress modified the wire fraud statute to include the phrase "in interstate or foreign commerce."[228] Specifically, the Attorney General had alerted Congress to a California criminal prosecution under the wire fraud statute involving wire communications between Mexico and Los Angeles.[229] The district court

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[224] *Pasquantino*, 125 S. Ct. at 1784 (Ginsburg, J., dissenting).

[225] H.R. REP. NO. 82-1750 (1952). The bill as a whole resulted from more than a decade of congressional inquiry and debate. *Id.* However, the general statement of the House Report fails to even mention the wire fraud statute. In fact, a general statement shedding light upon the concerns leading to the creation of the wire fraud statute itself was not provided until the statute's language was modified in 1956. S. REP. NO. 84-1873, at 1 (1956); H.R. REP. NO. 84-2385, at 1 (1956).

[226] H.R. REP. NO. 84-2385; S. REP. NO. 84-1873.

[227] H.R. REP. NO. 84-2385 at 1. The term "interstate" appearing within the passage "transmitted by means of interstate wire" was deleted and the phrase "in interstate or foreign commerce" was inserted following the passage "transmitted by means of wire, radio, or television communication." H.R. REP. NO. 84-2385, at 3; S. REP. NO. 84-1873, at 1.

[228] H.R. REP. NO. 84-2385, at 2; S. REP. NO. 84-1873, at 3.

[229] S. REP. NO. 84-1873, at 2-3. The Senate Report included a letter dated March 30, 1956, sent from Attorney General Herbert Brownell, Jr. at the Department of Justice, and addressed to the Vice President in his role as President of the Senate. *Id.* The letter

had concluded that the scheme could not be prosecuted under the statute because the wire communications, serving as key evidence, originated from outside of the United States.[230] Arguably, the impetus for adding the "in interstate or foreign commerce" language to the statute was a focus on domestic schemes, and concomitant domestic injuries, resulting from misuse of the wires outside the United States, not on protecting the interests of foreign jurisdictions. The phrase "in interstate or foreign commerce" cannot bear the conclusive weight that the majority places upon it to support the claim that the wire fraud statute "is surely not a statute in which Congress had only 'domestic concerns in mind.'"[231] Therefore, the Court was wrong to focus on the phrase "in interstate or foreign commerce" without considering the origins of that wording.

3. Principles of Statutory Construction Indicate that the Majority's Reading Gives the Wire Fraud Statute Unintended Extraterritorial Effect

The Supreme Court's general approach to statutory interpretation of expansive, yet ambiguous terms indicates that the majority's reading of the wire fraud statute has unauthorized, extraterritorial effect. While the phrase "any scheme or artifice to defraud" implies broad application, a catchall phrase is not meant to catch everything.[232] So, a court must look beyond the literal terms themselves. As the Supreme Court aptly stated just prior to the statute's enactment, "words having universal scope . . . will be taken, as a matter of course, to [apply to] only every one subject to such legislation, not all that the legislator subsequently may be able to catch."[233] Just as Congress may or may not intend to include persons outside United States jurisdiction when it uses the statutory phrase "any person," it may or may not intend to include certain fraudulent schemes involving strong

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emphasized that the decision in *Wentz* demonstrated the need for § 1343 to reach both interstate and foreign communications. Wentz v. United States, 244 F.2d 172, 175-76 (9th Cir. 1957). It should be noted that the federal district court opinion appears not to have been published; however, it was referenced and discussed in the Ninth Circuit's later opinion.

[230] *Wentz*, 244 F.2d at 173.

[231] Pasquantino v. United States, 125 S. Ct. 1766, 1781 (2005) (citation omitted).

[232] Small v. United States, 125 S. Ct. 1752, 1755 (2005); Flora v. United States, 362 U.S. 145, 149 (1960) (noting that a "catchall" phrase does not "define what it catches").

[233] Foley Bros. v. Filardo, 336 U.S. 281, 288 n.3 (1949); United States v. Palmer, 3 Wheat. 610, 631 (1818) (Marshall, C.J.) ("[G]eneral words," such as the word "any," must "be limited" in their application "to those objects to which the legislature intended to apply them."). *But see Small*, 125 S. Ct. at 1758 (Thomas, J., dissenting) ("In concluding that 'any' means not what it says, but rather 'a subset of any,' the Court distorts the plain meaning of the statute.").

interdependence between domestic and foreign conduct when it employs the phrase "any scheme or artifice to defraud."[234]

The need for unambiguous direction in congressional statutes dovetails nicely with the dictates of the rule of lenity. This rule provides that, when a court must decide between "two rational readings of a criminal statute, one harsher than the other," the court may "choose the harsher only when Congress has spoken in clear and definite language."[235] In essence, the rule of lenity acts as a device for reining in overbroad criminal statutes by requiring that statutory ambiguities be resolved in the defendant's favor and encouraging legislators to clarify contested issues of crime definition.[236] The Court's adherence to the rule of lenity is especially important in light of the fact that "legislators define crimes prospectively," and, thus, at the time a statute is enacted they cannot "know the precise mix of cases that will be brought under [that] statute."[237] Consequently, legislators are routinely trading off the risks that a statute may create too broad or too narrow a scope for criminal liability.[238] The Court can apply the rule of lenity to provide a signal that further legislative clarification of a statute is in order.

The Supreme Court's approach to statutory construction, as outlined by Justice Ginsburg, should not be equated to a "clear statement" rule saddling Congress with a special burden of specificity.[239] Rather, it simply asserts that the Court should adhere to an ordinary assumption about the reach of domestically oriented statutes. Such an approach is provident when other "indicia of intent" such as legislative history, case precedent, or related enactments suggest that Congress did not consider application of the

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[234] *Small*, 125 S. Ct. at 1754-55.

[235] *Pasquantino*, 125 S. Ct. at 1787 (Ginsburg, J., dissenting) (citing McNally v. United States, 483 U.S. 350, 359-60 (1987)).

[236] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 561-62 (2001). The author does note, however, that the rule of lenity might actually cause more overcriminalization than it prevents because a strong rule of lenity could increase the incentive for legislators to resolve contested issues of crime definitions in advance in the government's favor. *Id.* at 561. Further, courts dislike having their decisions overturned by statute and may very well internalize legislative preferences when construing statutes. *Id.* at 562.

[237] *Id.* at 547.

[238] *Id.*

[239] *Small*, 125 S. Ct. at 1761 (Thomas, J., dissenting); *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 261 (1991) (Marshall, J., dissenting) (stating that the extraterritoriality "canon is *not* a 'clear statement' rule, the application of which relieves a court of the duty to give effect to all available indicia of the legislative will"). Clear statement rules operate less to reveal actual congressional intent than to shield important values from an insufficiently strong legislative intent to displace them. *Id.* at 262 (Marshall, J., dissenting).

statute to largely extraterritorial conduct.[240] Also, the presumption against extraterritoriality remains open to rebuttal in the form of direct statutory language, history, or purpose. As the wire fraud provision is a criminal statute, its language should be construed with due caution in the absence of sufficient evidence of a contrary congressional intent to apply the statute to strongly intertwined domestic and foreign conduct. Thus, the majority errs in concluding that the broad language of the statute authorizes the government to prosecute for a scheme to evade foreign taxes.[241]

4. The Majority's Expansive Reading of the Wire Fraud Statute Conflicts with the Express Purposes of Other Congressional Enactments

The majority's interpretation of the wire fraud statute is disconcerting, in part, because of its awkward fit with several congressional enactments. First, the application of the Mandatory Victims Restitution Act[242] to wire fraud offenses indicates that the majority's reading of the statute has extraterritorial effect as concerns restitution awards. The MVRA codifies, *inter alia*, a policy of mandatory restitution in *all* wire fraud prosecutions.[243] Thus, a court must order a defendant convicted of a scheme under the wire fraud statute to pay restitution to all victims for the losses they suffered from the defendant's conduct in the course of the scheme.[244] However, at the district court level, the government found itself placed in the uncomfortable position of discouraging the court from ordering the defendants' to pay restitution because the victim was a foreign sovereign and the loss resulted from uncollected taxes owed.[245] It is unlikely that Congress intended for federal prosecutors to invite courts to ignore the express language of the MVRA in order to make it consistent with the ambiguous terms of the wire fraud statute. Thus, the majority's interpretation of the statute gives it extraterritorial effect by extending the statute's reach to cover schemes to defraud victims of foreign property.[246]

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[240] *Small*, 125 S. Ct. at 1756.

[241] Nixon v. Mo. Mun. League, 541 U.S. 125, 132 (2004) (stating that "any" means "different things depending upon the setting"); United States v. Alvarez-Sanchez, 511 U.S. 350, 357 (1994) (holding that the "respondent errs in placing dispositive weight on the broad statutory reference to 'any' law enforcement officer or agency without considering the rest of the statute").

[242] 18 U.S.C. § 3663A (2000).

[243] Pasquantino v. United States, 125 S. Ct. 1766, 1787 (2005) (Ginsburg, J., dissenting).

[244] United States v. Dickerson, 370 F.3d 1330, 1335-36 (11th Cir. 2004).

[245] *Pasquantino*, 125 S. Ct. at 1787 (Ginsburg, J., dissenting).

[246] *Id.*

Second, the majority's expansion of the wire fraud statute's scope is at odds with the anti-smuggling provision.[247] This provision criminalizes schemes of the same genre as the one at issue in *Pasquantino*[248] and bars the transport of goods by vessel "into the territory of any foreign government in violation of the laws there in force."[249] Further, the anti-smuggling statute sets forth a reciprocity requirement which expressly demands that the victim nation have reciprocal legislation on their books aimed at helping the United States stave off harmful smuggling.[250] Canada has no such reciprocal legislation in place.[251] Thus, the majority's reading would permit the wire fraud statute to reach defendants carrying on a smuggling enterprise causing injury to a foreign sovereign when the anti-smuggling statute itself would prohibit such criminal liability.[252] Equally disturbing, is the fact that the Pasquantinos were sentenced to prison terms of over four years when the anti-smuggling statute only calls for a fine or imprisonment of "not more than two years."[253]

Finally, the restitution orders resulting from the application of the wire fraud statute to schemes to evade foreign taxes diverge sharply from the procedures outlined in the tax treaties that the United States has established with Canada.[254] After extensive negotiation and review, the two countries established a tax protocol providing for collection assistance with respect to each nation's tax claims.[255] There are two important features to note regarding the protocol. First, the protocol states that neither nation is required to "interpret or calculate liability under the other's tax statutes."[256]

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[247] 18 U.S.C. § 546. The statute provides, in pertinent part, that

> any person . . . smuggling, or attempting to smuggle, or assisting in smuggling, any merchandise into the territory of any foreign government in violation of the laws there in force, if under the laws of such foreign government any penalty or forfeiture is provided for violation of the laws of the United States respecting the customs revenue . . . shall be fined under this title or imprisoned not more than two years, or both.

Id.

[248] *Pasquantino*, 125 S. Ct. at 1785 (Ginsburg, J., dissenting).

[249] 18 U.S.C. § 546.

[250] *Pasquantino*, 125 S. Ct. at 1786 (Ginsburg, J., dissenting).

[251] *Id.*

[252] *Id.*

[253] 18 U.S.C. § 546. David and Carl Pasquantino were convicted on all six counts of the indictment and sentenced to fifty-seven months' imprisonment on each count, to be served concurrently. United States v. Pasquantino, 336 F.3d 321, 326 (4th Cir. 2003), *aff'd*, 125 S. Ct. 1766 (2005). Arthur Hilts, an accomplice, was sentenced to twenty-one months' imprisonment. *Id.* at 326.

[254] *Pasquantino*, 125 S. Ct. at 1786 (Ginsburg, J., dissenting).

[255] Protocol, *supra* note 147, at art. 15, ¶ 2.

[256] *Id.*

As a result, the protocol is meant to apply to fully and finally adjudicated tax claims resolved under the law of the requesting nation. Second, unlike the sentencing results in *Pasquantino*, the protocol prohibits "assistance in collecting any claim against a citizen or corporation of 'the requested State.'"[257] It is unlikely that Congress sought to provide tax collection assistance under the wire fraud statute which it specifically chose not to grant under the tax protocol.

VII. CONCLUSION

The Supreme Court's determination that the revenue rule does not bar prosecution for a scheme to defraud a foreign nation of tax revenue was correct. However, the Court erred by concluding that such a scheme fell within the intended scope of the wire fraud statute. It is true that American revenue rule jurisprudence does not preclude prosecution for domestic criminal conduct which leads to indirect enforcement of foreign revenue laws as a byproduct, and the Court is on firm ground in asserting that the traditional rationales underlying the rule do not indicate that such a prosecution should be barred. However, the legislative history, principles of statutory construction, and tensions with other congressional enactments all strongly suggest that a scheme to evade foreign taxes falls outside the intended scope of the statute. A contrary reading of the statute gives it unintended extraterritorial effect.

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[257] *Pasquantino*, 125 S. Ct. at 1786 (Ginsburg, J., dissenting) (citing Protocol, *supra* note 147, at art. 15, ¶ 2).

* J.D. Candidate 2007, Northwestern University School of Law. I would like to thank Professor Sam Donaldson, Katina Austin, and James Anderson for their valuable feedback on various drafts of this note. Thanks are also due to Pegeen Bassett for her superb research assistance. I thank my parents, James and Susan Friedman, and my sister, Allison Friedman, for their love and support. Finally, I dedicate this note to the memory of my grandfather, Theodore Balsky, who always was, and still remains, a great source of personal inspiration.