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The Pasquantino Plea: The Unfortunate Decline of the Revenue Rule and the Imprudent Extraterritorial Expansion of the American Wire Fraud Statute to Enforce Foreign Tax Law

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CASENOTE

The Pasquantino Plea: The Unfortunate Decline of the Revenue Rule and the Imprudent Extraterritorial Expansion of the American Wire Fraud Statute to Enforce Foreign Tax Law

Joshua Shore*

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Early in the nation's history, American judges often examined the legal precedents of foreign courts to guide the development of domestic common law. Over time, as American legal culture grew to become more robust and distinctive, American courts' reliance on foreign common law waned.¹ As modern technology and communication have increased the pace of globalization, however, the relationship between American and foreign law has grown closer once again. Consequently, American courts now find themselves in the midst of new debates over matters related to international and foreign law. Some disputes arise over the extent to which international law constrains American action² and others over the proper role of analyzing, applying, and referring to foreign legal principles in order to guide evolving American legal standards.³ Notwithstanding the interesting and important issues involved in such debates, this note focuses on the narrow question of how far American courts ought to extend the extraterritorial reach of domestic criminal law in order to punish certain criminal behavior that has negligible or nonexistent effects upon American interests.

Specifically, this note questions the wisdom of continuing the practice of using the American wire fraud statute to prosecute attempts to violate foreign tax laws. The introduction in Part I of

1. See *The Insidious Wiles of Foreign Influence*, THE ECONOMIST, June 11, 2005, at 25.

2. See, e.g. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, at 31 (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> ("We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept.")

3. Compare *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) (Kennedy, J.) (recognizing that the United States Supreme Court "has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments'"), with *Foster v. Florida*, 537 U.S. 990, 991 (2002) (Thomas, J., concurring) ("[T]his Court . . . should not impose foreign moods, fads, or fashions on Americans.")

this note will describe the factual and legal background of a recent case involving two brothers who sought to evade Canadian taxes by smuggling alcohol from America across the Canadian border. Part II of this article will examine the trend in academic commentary that criticizes the revenue rule, a common law principle that has played a subtle but important role in protecting domestic and foreign interests by prohibiting the use of the American criminal code to enforce foreign tax law. This part will also include a defense of the revenue rule with regard to its application in the *Pasquantino* line of cases. Part III will consider why using the wire fraud statute is a particularly inappropriate strategy to extend the jurisdiction of American courts into the realm of foreign law. A brief conclusion will appear in Part IV.

I. INTRODUCTION

A. *Factual Background: The Pasquantinos' Scheme*

To the Pasquantino brothers, of Niagara Falls, New York,⁴ the Canadian Parliament's passage of a new sin tax on alcohol sold within its borders presented an opportunity to make some money. Recognizing that they could turn a profit by smuggling large quantities of American liquor over the Canadian border and selling it on the Canadian black market, David and Carl Pasquantino settled on establishing a criminal enterprise to do just that. From 1996 to 2000, the Pasquantinos made telephone calls from their New York residence to various Maryland liquor stores in order to arrange high-quantity purchases of alcohol, which they would transport to New York and smuggle into Canada to avoid paying Canadian taxes.⁵ Once the alcohol was in Canada, they were able to sell it at a substantial profit.⁶

The Pasquantinos' scheme to avoid Canadian sin taxes on certain goods (like alcohol and tobacco products) by smuggling them from the United States was anything but novel,⁷ and was uncovered by an investigation conducted by the Bureau of Alcohol Tobacco and Firearms and the Royal Canadian Mounted Police.⁸

4. *United States v. Pasquantino (Pasquantino I)*, 305 F.3d 291, 293 (4th Cir. 2002).

5. *Id.*

6. *Id.* at 293-94.

7. *See United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997); *Attorney General of Canada v. RJ Reynolds Tobacco Holdings, Inc. (Reynolds I)*, 103 F. Supp. 2d 134 (N.D.N.Y. 2000); *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996).

8. *Pasquantino I*, 305 F.3d at 293.

The Pasquantinos and their associates were arrested and indicted for tax violations in Canada.⁹ While the Pasquantinos might have expected to be charged in Canadian courts for evading the payment of Canadian taxes, they must have been surprised to find themselves also facing indictments filed by United States prosecutors for violations of American law. By virtue of their interstate telephone calls to Maryland liquor stores in furtherance of their fraudulent scheme to evade Canadian excise taxes, the Pasquantinos had wandered within the expansive realm of the American wire fraud statute. Colorfully nicknamed by commentators because of its comprehensive coverage of almost all criminal (or potentially criminal) activity,¹⁰ the federal wire fraud statute¹¹ and its cousin, the federal mail fraud statute,¹² are powerful prosecutorial weapons that criminalize the transmission of any “communication in interstate commerce . . . for the purpose of executing” a fraudulent scheme.¹³ The language, history, and interpretation of the mail fraud statute and the wire fraud statute are sufficiently similar that the two statutes have been treated interchangeably in numerous decisions,¹⁴ as well as in accompanying commentary, including this note.

B. Procedural History: The Pasquantino Cases

Though the Pasquantinos were convicted initially in federal district court, their convictions were overturned by a three-judge panel of the United States Fourth Circuit Court of Appeals in *Pasquantino I*.¹⁵ The panel decision held that the revenue rule, a com-

9. *Id.* at 293 n.4.

10. See, e.g., Bradley R. Wilson, *Subtle Indiscretions? International Smuggling, Federal Criminal Law, and the Revenue Rule*, 89 CORNELL L. REV. 231, 231, 231 n.1, 232 (2003) (referring to “the ‘Colt .45’ of the federal prosecutor” because of its “simplicity, adaptability, and comfortable familiarity” (citing Jed. S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980)); Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 ST. THOMAS L. REV. 557, 558 (1998) (referring to the mail fraud statute as “the prosecutor’s ‘Uzi,’” noting a similar referral to the statute as “the prosecutor’s ‘Stradivarius’” (citing Rakoff, *supra*, at 771), and comparing it to “hydrogen bombs on stealth aircraft” (citing Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 954, 954 (1993))).

11. 18 U.S.C. § 1343 (2004).

12. 18 U.S.C. § 1341 (2004).

13. 18 U.S.C. § 1343 (2004).

14. See *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987); *United States v. Slevin*, 106 F.3d 1086, 1088 (2d Cir. 1996); *United States v. Hsu*, 155 F.3d 189, 194 (3d Cir. 1998).

15. *Pasquantino I*, 305 F.3d 291, 292 (4th Cir. 2002).

mon law principle that precludes American courts from recognizing or enforcing foreign law, including tax judgments, applied to the Pasquantinos' scheme to use interstate telephone wires to avoid foreign taxes, and placed it beyond the reach of the American criminal wire fraud statute.¹⁶

However, in an *en banc* decision, the Fourth Circuit reversed the panel decision made in *Pasquantino I* and affirmed the Pasquantinos' convictions.¹⁷ The *en banc* decision in *Pasquantino II* gave rise to a circuit split regarding the proper scope of the extraterritorial effect of the American wire fraud statute.

The Supreme Court granted *certiorari* to resolve the conflict among the circuits, and, in a decision written by Justice Thomas, adopted the expansive interpretation of the wire fraud statute favored by the Fourth Circuit in *Pasquantino II*.¹⁸ The Supreme Court's expansion of the wire fraud statute's extraterritorial effect, contrary to legislative intent, simultaneously tramples traditional notions of foreign sovereignty and threatens domestic American interests while increasing the complexity and exacerbating competing tensions in American jurisprudence.¹⁹

II. THE REVENUE RULE

The Restatement (Third) of Foreign Relations reflects an axiom derived from common law that "[c]ourts in the United States are not required to recognize or to enforce judgements for the collection of taxes, fines, or penalties rendered by the courts of other states."²⁰ Critics have characterized the revenue rule as a relic that does not properly recognize the interdependence between America and foreign nations in light of modern advancements in global communication, transportation, and diplomacy. Commentators have claimed that it harms American and foreign interests alike, and that it is either invalid or has been improperly applied by judges who rely on it to support their rulings.²¹ Such

16. *Id.* at 295-96.

17. *United States v. Pasquantino (Pasquantino II)*, 336 F.3d 321 (4th Cir. 2003).

18. *Pasquantino v. United States (Pasquantino III)*, 125 S. Ct. 1766, 1781 (2005).

19. *Id.*

20. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 483 (1987); *See, e.g., Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc. (Reynolds II)*, 268 F.3d 103 (2d Cir. 2001); *Her Majesty the Queen ex rel. B.C. v. Gilbertson*, 597 F.2d 1161, 1163 (9th Cir. 1979) (recognizing the revenue rule in an international context); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 448-49 (1964) (White, J., dissenting).

21. *See, e.g., Wilson, supra* note 10; Joseph M. West, *Federal Fraud Prosecutions of Schemes to Defraud Foreign Sovereigns of Import Taxes*, 50 WAYNE L. REV. 1061

arguments are misguided.

A. *Divining Legislative Intent*

The role of American courts is to interpret the will of the Legislature. By discarding the revenue rule absent a clear manifestation of congressional intent to abandon it, the Supreme Court overstepped its constitutional mandate.

1. The Presumption Against Extraterritoriality

American courts review legislation “against the backdrop of the presumption against extraterritoriality.”²² Additionally, American courts are most vigilant in their protection of common law principles without explicit legislative direction to the contrary “when an interpretation of a broad, general statute would implicate foreign relations.”²³ As it is applied in the *Pasquantino* cases, the wire fraud statute is interpreted broadly to criminalize activity in furtherance of a scheme, successful or not, to evade foreign taxes, and thus, self-evidently meets the standard of a broad statute involving foreign relations.

2. The Common Law Background

To be sure, Congress is not obligated to ensure that its statutory enactments comport in lockstep fashion with existing common law. However, American courts are loath to assume that the legislature intends to contradict common law by mere implication. Rather, when faced with a legislative act that appears to contradict common law, courts approach the question of whether Congress intended to supercede common law by presuming that the Legislature acted “against a background of common-law adjudicatory principles.”²⁴ The presumption in favor of upholding established common law principles is especially stringent with regard

(2004); William J. Kovatch, Jr., Article, *Recognizing Foreign Tax Judgments: An Argument for the Revocation of the Revenue Rule*, 22 Hous. J. INT'L L. 265 (2000).

22. *Pasquantino III*, 125 S. Ct. at 1782 (Ginsburg, J., dissenting) (citing *EEOC v. Arabian American Oil Co.* 499 U.S. 244, 248 (1991); *Small v. United States*, 125 S. Ct. 1752, 1755 (2005)).

23. *Reynolds II*, 268 F.3d at 128 (citing *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963)).

24. *Astoria Fed. Sav. & Loan Ass'n v. Solomino*, 501 U.S. 104, 108 (1991); see also *Pasquantino II*, 336 F.3d 321, 338 (4th Cir. 2003) (Gregory, C.J., dissenting); *United States v. Boots*, 80 F.3d. 580, 587 (1st Cir. 1996).

to statutes that have an expansive scope.²⁵ The wire fraud statute, which criminalizes behavior that is indicative of a mere intent to deceive, could hardly be more expansive. Consequently, it would seem to require a clear and unambiguous statement of legislative intent to pass the demanding judicial scrutiny necessary to abrogate the revenue rule and thereby convict the Pasquantino defendants, who were charged with violating a statute which was not only broad but also implicated matters related to foreign affairs.²⁶

However, the closest thing to a clear statement in favor of the legislature's intent to abrogate the revenue rule that Justice Thomas was able to find is the wire fraud statute's application to frauds "executed 'in interstate or foreign commerce.'"²⁷ Despite Justice Thomas's assertion that Congress used such language to indicate that it had more than just "domestic concerns in mind"²⁸ in enacting the wire fraud statute, that provision is ostensibly boilerplate language in furtherance of establishing federal jurisdiction. It is not a statement intended to express a congressional preference concerning a controversial and complicated common law principle.²⁹ In fact, Justice Ginsburg's dissent points out that a clearer legislative statement is required before the Court may abrogate the revenue rule: "A statute's express application to acts committed in foreign commerce, the Court has repeatedly held, does not in itself indicate a congressional design to give the statute extraterritorial effect."³⁰

In sum, the most logical interpretation of the legislative intent motivating the expansion of the wire fraud statute to all frauds executed "in interstate or foreign commerce" would simply underscore Congress's commitment to extend American courts' extraterritorial jurisdiction to criminal activity that carries some threat of actual harm to American commerce, even when such activity takes place outside of the United States. But, it does not

25. See *Reynolds II*, 268 F.3d at 128 (citing, *inter alia*, *Neder v. United States*, 527 U.S. 1, 21-23 (1999)).

26. See *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

27. *Pasquantino III*, 125 S. Ct. at 1781 (citing 18 U.S.C. § 1343).

28. *Id.* (citing *Small v. United States*, 125 S. Ct. 1752, 1752 (2005)).

29. A WestLaw search of the United States Code containing the phrase "in interstate or foreign commerce" returns 335 results, a sum that suggests such language is too ordinary and commonplace in federal legislation to constitute a clear and specific legislative intent to abrogate a common law principle by giving extraterritorial effect to a broad, general statute.

30. *Pasquantino III*, 125 S. Ct. at 1785 n.7 (citing *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 250-53 (1991)).

necessarily follow that the legislature also intended to settle a complex debate involving controversial notions of international relations, universal jurisdiction, and conflicts of law by expanding the scope of the wire fraud statute to cases that involve the enforcement of foreign revenue law simply by including run-of-the-mill language that has the oblique effect of applying the wire fraud statute to schemes that violate foreign tax laws.³¹

3. Legislative Inaction

Congress has demonstrated its willingness to expand the scope of legislation that it concludes courts have interpreted too narrowly. For example, the Supreme Court, in *McNally v. United States*, held that Congress did not intend to include the “intangible right” to honest services as a property right covered by the wire fraud statute.³² Congress responded to the Court’s overly restrictive interpretation of the intended scope of the wire fraud statute less than one year later by enacting legislation that explicitly included the deprivation of a victim’s “intangible right” of honest services as a component of a “scheme or artifice to defraud” under the statute.³³ Despite the longstanding division among federal courts with regard to the proper scope of the wire fraud statute’s application to schemes intended to evade foreign taxes, Congress has not addressed the issue in a way that even approaches the degree of clarity that it demonstrated in its response to the *McNally* decision. In fact, Congress has approved narrowly tailored bilateral and multilateral smuggling and tax assistance treaties with foreign nations to deal with such sensitive matters of foreign relations, avoiding the need to give the wire fraud statute such an expansive scope by way of judicial fiat.³⁴

Rather than pointing to a clear legislative statement in favor of abrogating the revenue rule (which does not exist), those in favor of following that course instead insist that the revenue rule, even if applied to the Pasquantinos’ scheme, would not have prevented its prosecution under the wire fraud statute. For instance, Judge Hamilton’s majority opinion in *Pasquantino II* traces the creation of the revenue rule to two eighteenth century English cases and concludes on the basis of those cases that the revenue

31. Cf. Russell J. Davis, *Extraterritorial Application of Federal Antitrust Laws to Acts Occurring in Foreign Commerce*, 40 A.L.R. FED. 343, § 2 (2004).

32. *McNally v. United States*, 483 U.S. 350 (1987).

33. 18 U.S.C. § 1346 (2005).

34. See also discussion *infra* Part II.B.4.

rule was “pure and simple dicta” and did not constitute “binding authority in American jurisprudence.”³⁵ In similar fashion, Justice Thomas finds that the revenue rule originally barred the direct collections of foreign tax obligations.³⁶ He concludes that because the modern incarnation of the revenue rule has derogated from its original roots, it should no longer be applied to prohibit what he regards as indirect enforcement of foreign revenue laws.³⁷

These arguments are misguided because they seize upon the uncontroverted conclusion that the revenue rule’s history in early English cases and its inclusion in the Restatement does not constitute authority to bind American courts as a matter of law. It subtly distracts from the fact that congressional notice of the revenue rule, not its binding force as legal authority, is relevant in assessing its vitality in modern American law. Since the revenue rule was established in the eighteenth century, it has been interpreted in both foreign and domestic litigation and it has been the focus of academic commentary. Such extensive treatment is sufficient to give rise to at least a presumption of congressional awareness of the revenue rule’s existence as a common law principle. Consequently, American courts should demand a clear statement of legislative intent to abrogate the revenue rule before entertaining prosecutions that contradict its mandate.

Nevertheless, the Court argues that the revenue rule did not clearly apply to the type of criminal activity at issue in *Pasquantino III* at the time that the legislature passed the wire fraud statute in 1952.³⁸ The Court concludes that the Congress which passed the wire fraud statute in 1952 would not have expected the revenue rule to constrain such prosecutions,³⁹ so the revenue rule will not bar the Pasquantinos’ convictions in 2005. However, the Court overestimates the prerequisites that are necessary to establish the prominence of a common law principle at the time that a potentially superceding statute is enacted in order for the common law principle to persist.

First, the authorities cited by the Court in support of its exacting proposition are not particularly consistent. For example, the Court defines the test as one that requires a finding that “the common-law revenue rule clearly barred such a prosecution” in

35. *Pasquantino II*, 336 F.3d 321, 329 (4th Cir. 2003) (citing *Holman v. Johnson*, 98 Eng. Rep. 1120 (K.B. 1775); *Planche v. Fletcher*, 99 Eng. Rep. 164 (K.B. 1779)).

36. *Pasquantino II*, 336 F.3d at 329.

37. *Id.*; *Pasquantino III*, 125 S. Ct. 1766, 1777-78 (2005).

38. *Pasquantino III*, 125 S. Ct. at 1776.

39. *See id.* at 1766-67.

the year the wire fraud statute was enacted.⁴⁰ The Court requires that the common law principle have a “well-settled meaning” in order to meet its test.⁴¹ However, the precedent cited in support of that test would require that “the statute . . . ‘speak directly’ to the question addressed by the common law;”⁴² or that the “common-law principle [be] well established.”⁴³ First, in this context, the wire fraud statute does not “speak directly” to the question addressed by the common law revenue rule. Second, well-established principle is not necessarily one that has a well-settled meaning, though the Court seems to equate the two. Moreover, the revenue rule could well be considered a well-established principle with some inconsistent interpretations concerning its function at the margins. Thus, the government’s position in *Pasquantino III* would appear to fail on both levels. However, by interpreting the precedent as requiring that the common law principle in question be “well-settled” in addition to “well-established,” Justice Thomas changes the test midstream and effectively lowers the burden on the government to prove that the Legislature intended to abrogate the common law revenue rule by enacting the wire fraud statute.

Second, although the Court cites precedent suggesting that the common law must have “clearly barred such a prosecution,”⁴⁴ it does not explain how to balance such strict rules of historical analysis with the equally strict rules of statutory interpretation that discourage an assumption of extraterritoriality. In other words, the Court succeeds in identifying stringent requirements that must be met before a common law principle will be deemed relevant to the application of a subsequent legislative enactment, but it does not justify why the mere existence of a controversy over the exact scope of the revenue rule should negate each and every demanding rule of statutory construction that impels a strong presumption against such a broad interpretation of extraterritorial legislative enactments.

Although the relevant period for determining the legislative intent of a statute is formally limited to the date of the statute’s enactment, it should be noted that Congress has seen fit to amend the wire fraud statute at least five times since its enactment in

40. *Id.* at 1774.

41. *See Neder v. United States*, 527 U.S. 1, 22-23 (1999).

42. *United States v. Texas*, 507 U.S. 529, 534 (1993) (citing *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

43. *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991).

44. *Pasquantino III*, 125 S. Ct. at 1774 (citing *Neder*, 527 U.S. at 22-23).

1952, never once signaling that it intended to settle what had become an increasingly prominent and controversial debate in favor of abrogating the revenue rule.⁴⁵ Congress, if it wishes, may definitively assert the scope of the wire fraud statute. The Court should not take it upon itself to fill the void of legislative silence here.

B. *Policy Considerations Advanced by the Revenue Rule*

Arguments in favor of recognizing the revenue rule's constraint upon the wire fraud statute's scope cannot stand on statutory construction alone. Legitimate and substantive legislative policy is advanced by recognizing the vitality of the revenue rule. Without it, American courts face the tripartite danger of breeding inconsistency and confusion with regard to the interpretation of domestic laws and multilateral treaties; overburdening domestic courts; and provoking foreign nations, including even those whose tax laws it seeks to enforce.

1. In General: Preventing Inconsistent Evaluation of Foreign Law

Courts that choose to ignore the revenue rule, despite legislative intent to the contrary, embark upon a path that impels them to practice *de facto* foreign diplomacy from the bench, a task that American judges are not competent to undertake. Judge Calabresi, a Second Circuit judge, considers the "difficulty involved in figuring out the meaning and significance of some foreign laws — especially tax laws" to be the only germane argument in favor of recognizing the revenue rule.⁴⁶ Judge Learned Hand suggested this argument in *Moore v. Mitchell*, a domestic revenue rule case.⁴⁷ Unfortunately, Judge Calabresi takes the wind out of Judge Hand's formulation of the rule by characterizing it as a reaction to the "practical obstacle"⁴⁸ of comprehending the meaning of com-

45. See 18 U.S.C. § 1343 (2005) (amended 1956, 1989, 1990, 1994, 2002); see also *Reynolds II*, 268 F.3d 103, 127 (2d Cir. 2001) ("The Senate itself has, through its actions, shown respect for the revenue rule.") (citing 147 Cong. Rec. S2511 (daily ed. March 19, 2001) (referring to S.420)); discussion *infra* Part II.A.3.

46. To be fair to Judge Calabresi, the full quotation cited in the text refers to the "alleged difficulty involved in figuring out the meaning of some foreign laws" *Reynolds II*, 268 F.3d at 137 (2d Cir. 2001) (Calabresi, J., dissenting) (emphasis added).

47. *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring).

48. *Reynolds II*, 268 F.3d at 137 (Calabresi, J., dissenting).

plex foreign law.⁴⁹ While Judge Calabresi is correct in concluding that issues of interpretation may arise when American courts recognize or enforce complex foreign laws — especially tax laws — his analysis does not tell the whole story. Judge Hand does not believe that tax laws are particularly prone to misapplication by foreign courts on the basis of competence alone.⁵⁰

The underpinning to Judge Hand's concurrence in *Moore* is more nuanced than Judge Calabresi recognizes. Judge Hand observed that courts in one jurisdiction are ill-equipped to balance the cultural sentiments, ideological leanings, and political interests that were involved in shaping the laws of another.⁵¹ His admonition that a court in one state should not "undertake an inquiry which it cannot prosecute without determining whether [another state's] laws are consonant with its own notions of what is proper"⁵² takes on even greater meaning in an international context where notions of propriety are likely to be more disparate between nations than they would be between states.

Judge Hand's concern is not merely academic. The decision to embark on an inquiry of foreign law obligates an American court to consider the foreign law in comparison to its own values, sensitivities, and priorities.⁵³ As a practical matter, American courts will not only inevitably retreat away from enforcing and recognizing foreign laws that they are not capable of comprehending (as Judge Calabresi notes), but also foreign laws that the judges on those courts find odious. Differences with regard to *personal* opinions are likely to result in inconsistency with regard to *judicial*

49. Judge Calabresi assuages his own concern on this point in a footnote, resolving that, "[t]he argument is, to put it mildly, dubious in a global economy, which requires a great amount of interpretation of foreign laws." *Id.* at 138 n.4. But he ignores the fact that, in situations where Congress intends for American courts to pass on complex areas of foreign law, Congress provides safeguards to guide American courts. As regards foreign tax law in particular, statutes like the Anti-Smuggling Law, 18 U.S.C. § 546 (2005), include reciprocity provisions that signal a specific legislative intent for courts to analyze those foreign laws by utilizing the direct American analogue as a tool to guide their interpretation. The wire fraud statute offers no such protection.

50. *Moore*, 30 F.2d 600 (Hand, J., concurring).

51. *Id.* at 604.

52. *Id.*

53. See *Reynolds II*, 268 F.3d at 111 ("[T]ax laws embody a sovereign's political will. They create property rights and affect each individual's relationship to his or her sovereign. They mirror the moral and social sensibilities of a society. Sales taxes, for example, may enforce political and moral judgements about certain products. Import and export taxes may reflect a country's ideological leaning and the political goals of its commercial relationships with other nations."); see also *Moore*, 30 F.2d at 604.

opinions. The sin taxes at issue in the *Pasquantino* cases are a paradigmatic example of a type of foreign law that is particularly reflective of a foreign country's political goals, social ideology, and policy preferences.⁵⁴ Courts that ignore the revenue rule run the risk of "becoming ensnared in the difficult decisions concerning which foreign laws [American courts] will help to enforce."⁵⁵

In earlier cases before American courts, the Canadian government had pursued civil claims based on American law against defendants in an effort to recover damages arising from smuggling operations similar to the one undertaken by the Pasquantinos. At least one commentator, arguing that the revenue rule should *not* apply to bar such claims under the Racketeer Influenced Corrupt Organizations Act (RICO) has said that, "[i]t seems likely that Canada would be . . . offended by the dismissal of its apparently viable RICO claim."⁵⁶ In cases where American prosecutors and American courts indirectly vindicate foreign sovereigns' interests in enforcing foreign tax laws by prosecuting violators under the wire fraud statute, inconsistent patterns of enforcement will constitute an even greater affront to the foreign governments whose laws are not given effect in American courts.

For example, assuming that the foreclosure of Canada's civil RICO action in the preceding hypothetical scenario is offensive to the Canadian government, opponents of the revenue rule fail to account for the indignation that India would express in the likely event that smugglers of Christian bibles into India are not pursued by American judges and prosecutors with the same zeal as smugglers of alcohol into Canada.⁵⁷ The nature of the legislative

54. In its complaint in *Reynolds II*, the Canadian government described the motivation behind the enactment of its sin tax on cigarettes as an effort, "[t]o protect its youth from the health hazards of smoking, and to implement anti-tobacco programs and other public benefits . . . [The tax increases] held the promise of deterring young people from becoming addicted to a harmful drug . . . [and] encouraging established smokers to quit." *Reynolds II*, 268 F.3d at 113. Whatever one makes of the wisdom and beneficence of the Canadian tobacco excise tax in particular, it does not call into question the primarily regulatory nature of the tax hike and its sensitive moral and political undertones, a fact that might be more apparent with regard to foreign excise taxes on other items. See *infra* note 57 and accompanying text.

55. *Pasquantino I*, 305 F.3d 291, 297 (4th Cir. 2002).

56. Elizabeth J. Farnam, Note & Comment, *Racketeering, RICO and the Revenue Rule in Attorney General of Canada v. R.J. Reynolds: Civil RICO Claims for Foreign Tax Law Violations*, 77 WASH. L. REV. 843, 869 (2002).

57. See *Pasquantino I*, 305 F.3d at 297 ("[I]magine that Canada imposed an import duty on bibles, and appellants schemed to smuggle bibles rather than liquor. The revenue rule was created in part to avoid these types of political and foreign policy-based determinations.").

branch's constitutional mandate to establish policy and the executive branch's mandate to enforce it allows a certain degree of inconsistent application. The judicial branch, however, nurtures a tradition of fostering consistency – embodied in its adherence to common law principles like *stare decisis* – that does not allow it to manage complicated matters that implicate foreign relations as well as the executive and legislative branches do. Surely, American courts encourage international disdain to the extent that they invite inconsistent results based on cultural and ideological leanings rather than objective legal reflection. “Safety” from the contempt that inherently inconsistent enforcement and recognition of foreign law that American courts will inevitably attract from foreign governments “lies only in universal rejection.”⁵⁸

2. Domestic Considerations

a. *Respecting the Separation of Powers*

In his opinion for the Court, Justice Thomas advances a related yet subtle reformulation of Judge Hand's concern with regard to American courts' evaluation of foreign law. Justice Thomas agrees that “the principal evil against which the revenue rule was traditionally thought to guard [is] judicial evaluation of the policy-laden enactments of other sovereigns.”⁵⁹ Unlike Judge Calabresi, who focuses on the risks inherent in angering third parties as a result of inconsistent judgments touching on matters of foreign law, Justice Thomas concerns himself with the danger that friction will arise as a direct result of the embarrassment felt by the nation whose laws the American court attempts to interpret. He cites the broad grant of authority the executive branch enjoys in managing matters of international relations.⁶⁰ Because the prosecutor represents the executive branch in wire fraud prosecutions arising from foreign tax evasion schemes, he concludes that the danger of causing international friction is of little concern.

The Court's logic is seductive, but misleading. Prosecutions under the wire fraud statute for violations of foreign tax law are not equivalent to the species of activity for which the Constitution has granted “plenary and exclusive power” to the executive

58. *Reynolds II*, 268 F.3d 103, 112 (2d Cir. 2001).

59. *Pasquantino III*, 125 S. Ct. 1776, 1779 (2005).

60. *Id.* (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)); see also *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768-69 (1972).

branch.⁶¹ In fact, the passage from *United States v. Curtiss-Wright Export Corp.* that the majority cites in support of its conclusion is immediately preceded by the admonition that, “[i]t is important to bear in mind that we are here dealing not alone with an authority vested in the [executive branch] by an exertion of legislative power.”⁶² Thus, the majority’s argument puts the cart before the horse because it depends on the assumption that Congress granted the executive branch the authority to initiate criminal wire fraud prosecutions for schemes intended to violate foreign law by abrogating the revenue rule, which it did not.⁶³ The issues at play in cases that involve wire fraud prosecutions for schemes intended to violate foreign tax law are characteristic of matters that the Constitution demands the approval of both the executive and legislative branches,⁶⁴ to the exclusion of other matters upon which the executive branch may act alone.⁶⁵

Contrary to the implication apparent in the Court’s decision, extraterritorial criminal prosecutions must be authorized by a grant of legislative power. When Congress intends to do so, it generally includes reference to foreign law as an element of the criminal offense rather than remaining silent on the matter and leaving the question of extraterritorial application of American criminal law to be resolved by prosecutorial discretion alone.⁶⁶ Eliminating the revenue rule does not comport with the inherent legislative obligation to protect the domestic interests of ensuring judicial economy and regulating commercial relations with foreign nations. The involvement of the executive branch in a criminal prosecution like *Pasquantino* may, at best, alleviate some of the concerns inherent in such a case *assuming* that the prosecution was authorized by Congress. The executive branch cannot, however, justify the initiation of such a criminal proceeding without the blessing of the legislature.

b. Fostering Judicial Economy

One of the important responsibilities inherent in Congress’s obligation to establish laws is the preservation of American courts. It is foolish to compound the well-documented problem of

61. *Curtiss-Wright*, 299 U.S. at 320.

62. *Id.* at 319-20.

63. See discussion *supra* Part II.A.

64. U.S. CONST. art. I, § 8; *id.* art. II, § 2.

65. *Id.* art. II, § 2.

66. See *Pasquantino III*, 125 S. Ct. 1776, 1785 (2005) (Ginsburg, J., dissenting) (citing 18 U.S.C. § 1956(e)(1); 16 U.S.C. § 3372(a)(2)(A)).

overburdened federal dockets with cases that essentially give effect to foreign law.⁶⁷ The claim that abrogating the revenue rule will result in a strain on American judicial resources only to the extent that foreign nations will come to view American courts as an attractive (or inexpensive) venue to enforce its revenue laws is a misleading oversimplification because it suggests that the “mere” recognition of foreign laws will not exacerbate the pressure on American courts.

Most modern American courts have distinguished civil cases, in which foreign governments essentially use American courts as a venue to enforce foreign laws, from criminal prosecutions, like the *Pasquantino* cases where an American prosecutor indirectly enforces foreign law in American courts.⁶⁸ In either case, however, American courts experience a strain on already limited judicial resources. The fact that the Canadian government has a chaperone in the form of a United States Attorney in cases like the *Pasquantinos*⁷ neither substantially reduces the unwarranted windfall that the Canadian government enjoys by enforcing its tax laws in American courts,⁶⁹ nor does it substantially alleviate the direct and indirect costs absorbed by the American legal system in prosecuting actions that are, at their core, petitions for the enforcement of foreign tax law.

3. Foreign Sovereignty Considerations

Applying the criminal wire fraud statute in such a way as to intrude into the operation of foreign tax laws carries a greater danger to American interests beyond the mere burden that it places on American courts. It carries the potential threat of imposing unwelcome acts of interference that disturb the sovereign rights of foreign nations.

67. See *Pasquantino I*, 305 F.3d 291, 297 (4th Cir. 2002) (“The revenue rule should not be viewed as a means for guilty defendants to escape punishment, but rather it should be seen as an important protection mechanism for our courts.”).

68. See, e.g., *Reynolds II*, 268 F.3d 103, 123 (2d Cir. 2001).

69. Her Majesty the Queen *ex rel.* B.C. v. Gilbertson, 597 F.2d 1161, 1164-1165 (9th Cir. 1979); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 448 (1964) (White, J. dissenting) (“[O]ur courts customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign.”).

a. *That Which We Call a Rose: The Illusory Distinction Between Recognition and Enforcement of Foreign Law in Domestic Courts*

To address concerns that its broad interpretation of the wire fraud statute would overburden American courts and threaten the sovereignty of foreign nations, the *Pasquantino II* majority created two sterile conceptual distinctions to guide its analysis.

First, the Fourth Circuit majority dispenses with the concern that their treatment of the wire fraud statute will result in a windfall to Canada by establishing a fine distinction between the impermissible *enforcement* of Canadian tax law and the permissible *recognition* of Canadian tax law in order to establish essential elements of a criminal violation under American law.⁷⁰ *Reynolds II* is generally recognized as the paradigmatic example of a case involving the impermissible enforcement of foreign law in American courts because a civil recovery would enrich the Canadian treasury.⁷¹ Conversely, *Pasquantino II*, a criminal case, does not raise similar disquiet among the Fourth Circuit majority because a verdict against the Pasquantino defendants would not result in any award to the Canadian government. However, any analysis that focuses the distinction on the question of civil damages alone ignores the windfall that Canada gains by enjoying the deterrent effect of public enforcement of its revenue laws while her courts do not bear the burden of adjudicating the action.

In essence, the Fourth Circuit majority establishes a strict categorization schedule that identifies American judicial notice of foreign law as occurring for the purposes of *either* direct enforcement of foreign law *or* recognition of foreign law to establish American criminal liability. The revenue law, according to the majority, only applies when American courts undertake to enforce foreign law, but does not apply in cases where American courts recognize foreign law for any other purpose. The majority emphasizes that a victory for the prosecution in this case “does *nothing* civilly or criminally to enforce any tax judgments or claims that the foreign sovereign has . . . against the defendant,” signaling a belief that the recognition and enforcement of foreign law are mutually exclusive.⁷² According to this logic, if an American court

70. *Pasquantino II*, 336 F.3d at 330; see also Wilson, *supra* note 10, at 250.

71. *Reynolds II*, 268 F.3d at 131 (“[A]t bottom, Canada would have a United States court require defendants to reimburse Canada for its unpaid taxes Thus, Canada’s object is clearly to recover allegedly unpaid taxes.”).

72. *Pasquantino II*, 336 F.3d 321, 331 (4th Cir. 2003) (emphasis added).

“merely recognizes” foreign law, it therefore does not “enforce” foreign law; and if the court does not enforce foreign law, the revenue rule is not implicated. The reality, of course, is not so simple. Rather than doing nothing civilly or criminally to enforce Canadian law, American courts increase the deterrent effect of Canadian tax law by prosecuting its evasion under the wire fraud statute while exerting a strain on domestic judicial resources and raising potential instances of American interference with Canadian sovereignty.

As the dissent notes, the majority’s hermetic analysis renders the revenue rule effectively irrelevant, because it narrows the application of the revenue rule only “to those rare instances in which a court is compelled to actually enforce the judgement of a foreign court.”⁷³ The majority is quick to assuage this concern by constructing its second false partition between the enforcement (or recognition) of foreign *judgments*, which it considers to still be barred by the revenue rule, on one hand; and the enforcement (or recognition) of foreign *law* on the other.⁷⁴ Under this logic, the revenue rule would function to prevent American courts from being used to effectuate final judgements of foreign courts, but American courts could nonetheless make rulings that enforce the substantive laws of a foreign government and recognize aspects of foreign substantive law for the purposes of establishing elements of American law.

The Supreme Court starts on the right path by acknowledging the difficulty of drawing “the line between an issue involving merely recognition of a foreign law and indirect enforcement of it.”⁷⁵ Surprisingly, however, it does not regard the inability of American courts to make principled distinctions about the scope of the wire fraud statute’s application as a problem deserving its concern. Rather, in a remarkable display of misdirection, the Court uses the haziness as an example of the revenue rule’s uncertain application in support of its proposition that it was not a sufficiently well-established principle at the time of the wire fraud statute’s enactment to merit legislative incorporation of the doctrine.⁷⁶ In other words, it emphasizes the opacity of the distinction between enforcement and recognition as it applies to the interpre-

73. *Id.* at 338 (Gregory, J., dissenting).

74. *Pasquantino II*, 336 F.3d at 328.

75. *Pasquantino III*, 125 S. Ct. 1766, 1779 (2005) (citing A. DICEY & J. MORRIS, CONFLICT OF LAWS 90 (L. Collins gen. ed., 13th ed. 2000)).

76. *Id.*

tation of the revenue rule in the minds of those in the 1952 Congress and minimizes the import that the unclear line between enforcement and recognition carries in present practice.⁷⁷ The Court does not address the practical effects of authorizing American courts to enforce foreign law where such enforcement is a necessary consequence of recognizing foreign law for the purpose of prosecuting a domestic criminal matter.

b. The Recognition-Enforcement Merger

In its operation, the excise tax on alcohol at issue in the *Pasquantino* cases is largely indistinguishable from a traditional licensing scheme that allows individuals to participate in activities that the government aims to control and limit without prohibiting outright. Participation in those activities often carries a price, and in the case of a license or a sin tax, "the State's core concern is *regulatory*."⁷⁸ By enacting a sales tax on liquor, the Canadian government exercised its traditional police powers.⁷⁹ In this light, the difference between enforcing the Canadian tax law by allowing American courts to hear a civil RICO claim filed by the Canadian government in *Reynolds II* (which is indisputably a violation of the revenue rule) on one hand, and recognizing the Canadian tax law by allowing an American wire fraud prosecution arising from an alleged violation of Canadian tax law on the other, seems very slight indeed.

In an earlier civil action, the Canadian government asserted injuries against smugglers in an American federal court that were based on the costs of enforcement and the harm incurred by its citizenry as a result of the smuggling operation,⁸⁰ not merely the lost revenue that would be indicative of the standard tax collection action barred by the revenue rule.⁸¹ The nature of these damages belies the claim of the *Pasquantino II* majority that "merely recognizing" foreign law in American courts will have no practical effect

77. See *supra* notes 38-45 and accompanying text.

78. *Cleveland v. United States*, 531 U.S. 12, 20 (2000) (emphasis in original).

79. *Cf. id.* at 23

80. Canada's civil complaint included, *inter alia*, injuries arising from: (1) Increased tobacco consumption among its population, especially its youth; (2) continued tobacco consumption among existing smokers; and (3) monies spent seeking to stop the smuggling and catch the wrongdoers. *Reynolds I*, 103 F. Supp. 2d 134, 143 (N.D.N.Y. 2000).

81. "[L]ost revenues resulting from the evasion of duties and taxes . . . require [Canada] to show that the scheme utilizing the . . . wire communications to defraud it out of tax revenue was successful." *Id.*

with regard to the *de facto* enforcement of those laws.⁸² In this way, the Fourth Circuit improperly acts to “give effect to the . . . revenue laws of foreign countries” in the precise way contemplated and barred by the United States Supreme Court in *Banco Nacional de Cuba v. Sabbatino*.⁸³

The Canadian government seeks to preserve the health and welfare of its citizens by discouraging the use of alcohol and tobacco products. Thus, the motivating concern of the Canadian legislature that levied sin taxes on such unhealthful products are primarily designed to deter Canadian citizens from purchasing and using them. Although the enactment of sin taxes carries the ancillary benefit of generating revenue, the Canadian government’s interest in those financial gains is secondary to the fundamental value that the taxes provide with regard to preserving a social policy objective of discouraging and reducing alcohol and tobacco consumption. Taken to its logical extreme, the ultimate goal of the Canadian government (and the greatest indicator of the tax regime’s success) would occur at the point where the Canadian government received no revenue stream from its collection of sin taxes.

For American courts to consider the enforcement of foreign laws to consist of only monetary judgments to recoup revenue lost as a result of tax evasion schemes is an oversimplification of the intended operation of the excise law from the Canadian government’s perspective. In reality, the difference between recognizing and enforcing foreign law is not as stark as critics of the revenue rule would like to believe. Rather, an American court that “merely” recognizes Canadian revenue law for the purposes of prosecuting a wire fraud violation gives effect to Canadian tax law and essentially enforces a Canadian licensing scheme.

Contemporary discourse on the subject has reduced the debate to a bulky, shapeless form. It is not necessarily the case that American treatment of foreign laws either “recognizes” or

82. Kathryn Keneally, Column, *White Collar Crime: Fourth Circuit Upholds Wire Fraud Conviction Based on a Scheme to Evade Foreign Tax*, 27 CHAMPION 48, 50 (2003).

83. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413 (1964); see also *Oklahoma ex rel. West v. Gulf, Colo., and Santa Fe Ry. Co.*, 220 U.S. 290, 299-300 (1911) (refusing to exercise original jurisdiction in a civil action brought by a state government to enjoin distributors from continuing to distribute alcohol to minors in violation of state law where exercising federal jurisdiction to issue an injunction would cause the Supreme Court “to enforce a statute, one of whose controlling objects is to impose punishment in order to effectuate a public policy”) (emphasis added).

“enforces” foreign law. Rather, it is possible for an American court to recognize foreign law in such a way that it enforces foreign law for all practical purposes, by “giving effect” to foreign law. It is a logical fallacy to insist that American judicial notice of foreign law must take the form of either recognition or enforcement without conceding that it may assume both forms simultaneously. The distinction between the direct enforcement and the indirect enforcement of (, i.e. “giving effect to,” or “effectuating”) foreign revenue laws is ephemeral in practice, and presents the risk of inconsistent application if the revenue rule is sought to be applied in a case-by-case basis that is based on an unworkable theoretical standard.⁸⁴

*c. Just Because You See It, Doesn't Mean It's There:
Insisting Upon a Partition Between Recognition
and Enforcement*

Although the argument can be (and has been) made that an academic distinction exists between the recognition of foreign law for the purpose of establishing domestic criminal liability and the direct enforcement of foreign law in domestic courts, it is largely a distinction without a difference. The *Pasquantino* cases are not unusual in that they present a factual situation where foreign law is simultaneously recognized and enforced in American courts. The Supreme Court acknowledged the dual nature of the Canadian tax law in *Pasquantino III* when it referred to the “indirect” enforcement of the Canadian law that is concomitant with its “mere” recognition as a vehicle to establishing criminal liability.⁸⁵ As a result, the “mere” recognition of foreign law is often the practical equivalent of enforcing foreign law, and even where the two are not identical, recognizing foreign law carries an equivalent threat of interfering with the sovereignty of foreign nations as enforcing foreign law.

American courts that evaluate foreign law for the purpose of establishing elements of American criminal violations must be vigilant to avoid becoming ensnared in the messy business of interpreting foreign law. The act of recognizing Canadian tax law

84. *Boots* involved facts and circumstances that could not be considered an action to “enforce” foreign law by any reasonable standard. Yet, the First Circuit refused to “recognize” the tax law because it foresaw that a case-by-case, or “country-by-country” determination of whether an American court was enforcing foreign law on one hand, or merely recognizing it on the other, was likely to be problematic. *United States v. Boots*, 80 F.3d 580, 588 (1st Cir. 1996).

85. *Pasquantino III*, 125 S. Ct. 1766, 1778 (2005).

potentially involves: "inquiry into the motivations of the Canadian Parliament in passing and/or repealing various . . . taxes[;] discovery with respect to Canadian officials and law enforcement personnel[;] and the determination of the credibility of Canadian officials."⁸⁶ Inquiry into these sensitive realms of Canadian sovereignty is intrusive, and one that the Canadian government (and the majority of foreign jurisdictions) is unlikely to expect, since the revenue rule has been construed broadly by the Canadian legislature and courts.⁸⁷ Specifically, the Canadian government manifested an intent to be bound by bilateral treaties⁸⁸ for tax enforcement assistance and statutes requiring reciprocity⁸⁹ for the regulation of cross-border smuggling. It has never similarly signaled its approval of unilateral United States prosecution of individuals attempting to evade Canadian taxes.

Moreover, it is paternalistic to conclude that the Canadian government will always eagerly submit to American efforts to enforce its tax laws. First, the impression that the Canadian government relies on American intervention to prosecute Canadian tax law violations could adversely affect Canada's standing in the eyes of other foreign nations, which may perceive Canada's inability to enforce its own laws as a sign of weakness. Furthermore, it is not beyond the realm of possibility that the Canadian government enacted a tax on liquor to appease a morality-based interest group, while reaching a sensitive understanding with a powerful lobbying group representing domestic alcohol producers that the tax would not be stringently enforced. This is but a simple example of the types of political conflicts that are easily implicated in cases where American courts ignore the revenue rule and pass judgements bearing on the functioning of foreign regulatory programs. Also, judgements rendered in American courts regarding Canadian law may create unforeseeable preclusive effects that bind Canadian courts to new common law precedent and foster claims of collateral estoppel and *res judicata* that are unattractive to the Canadian government, which deserves the unfettered right

86. *Reynolds I*, 103 F. Supp. 2d at 144.

87. See *United States v. Harden*, [1963] S.C.R. 366, 371 (Can.) (explaining that the revenue rule is still vigorous in this country in spite of the modern spirit of international co-operation in the field of taxation and that "foreign states cannot directly or indirectly enforce their tax claims [in Canadian courts]" (citing *Government of India v. Taylor*, [1955] A.C. 491, 515)) (emphasis added).

88. See Protocol Amending Convention with Respect to Taxes on Income and on Capital, Sept. 26, 1980, S. TREATY DOC. NO. 104-4, 2030 U.N.T.S. 236, Art. 15, ¶ 2.

89. 18 U.S.C. § 546 (2005).

to exercise its sovereign authority without foreign interference. Finally, at the practical level, it is possible that the Canadian government's ability to vindicate its lost tax revenue in Canadian court may be threatened if the defendants are financially handicapped or incarcerated by virtue criminal judgements imposed by American courts based on their violations of the wire fraud statute.

The Canadian tax law that the Pasquantinos sought to evade bears a unique relationship to the American wire fraud statute that cannot be effectively prosecuted without it. The Canadian government has chosen to abolish imprisonment as a penalty for the non-payment of debt,⁹⁰ and may perceive a prison sentence imposed on the Pasquantinos (by virtue of their violation of the wire fraud statute)⁹¹ as a penalty imposed based on their non-payment of Canadian revenue tax. At a time when international scorn arising from the widespread sense of American arrogance in world affairs is at a high level, it is injudicious to ignore the revenue rule and use American courts to interpret foreign law as a subversive means of asserting American policies that are potentially unwelcome in foreign legal systems.

4. The Rule of Lenity: Giving Effect to Legislative Intent and Foreign Expectations

In order to pursue the criminal prosecution against the Pasquantinos for their violation of the wire fraud statute, American courts are forced to contend with existing statutes and treaties that sometimes conflict with each other. The rule of lenity instructs courts to enforce the less severe of two conflicting criminal statutes absent clear legislative direction to the contrary.⁹² In *United States v. Boots*, an earlier case involving facts similar to those in the *Pasquantino* cases, a majority of the Court of Appeals for the First Circuit noted the "inherent tensions"⁹³ that prohibited it from giving meaning to the anti-smuggling statute⁹⁴ and the wire fraud statute simultaneously.⁹⁵ In this context, the rule

90. See *Parent v. Perreault*, [1979] C.A. 237.

91. 18 U.S.C. § 1343 ("[Violators] shall be fined under this title or imprisoned not more than 20 years . . .").

92. See *Pasquantino III*, 125 S. Ct. 1766, 1787 (2005) (Ginsburg, J., dissenting); see also *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *Fasulo v. United States*, 272 U.S. 620 (1926).

93. *United States v. Boots*, 80 F.3d 580, 588 (1st Cir. 1996).

94. 18 U.S.C. § 546 (2005); 18 U.S.C. § 1343 (2002).

95. Kathryn Keneally, *The U.S. Prosecutes Foreign Tax Evasion as a Domestic*

of lenity serves a dual purpose. First, it signals the Legislature's intent to manage issues related to transnational smuggling and tax assistance by reaching bilateral and multilateral agreements with foreign nations, rather than resorting to the utilization of American criminal law.⁹⁶ Second, it protects the expectations of foreign nations that have entered into bilateral and multilateral agreements with the United States by ensuring that the narrow scope of those instruments are not superceded by unilateral judgments in American courts. The difficulty that the *Boots* court encountered while attempting to assess the proper scope of the wire fraud statute in light of the anti-smuggling statute should have presented an equally vexing problem to the Fourth Circuit as well as the Supreme Court, and should have resulted in the same conclusion.

The Supreme Court addresses the problem of conflicting statutory instruction that was raised in Justice Ginsburg's dissent, but summarily dismisses the argument by proclaiming that "[t]he Federal Criminal Code is replete with provisions that criminalize overlapping conduct," and concluding that existing statutes and treaties do not occupy the field to the exclusion of the wire fraud statute.⁹⁷ However, this is not an ordinary case of overlapping domestic laws. First, the fact that the wire fraud statute primarily concerns issues of foreign law raises the potential that American courts will struggle to resolve conflicts between international treaties, foreign tax law, and domestic criminal law that do not arise when overlapping occurs between two familiar domestic laws. Second, the existence of a bilateral tax treaty suggests that the United States and Canadian governments sought: 1) to be responsible for foreign tax collection only to the extent that its partner was obligated to do the same; 2) to assure that tax law was interpreted according to the courts of the aggrieved nation; and 3) to ensure that the courts of one nation did not trample the sovereignty of the other. Mutual treaties also provide a framework for shared understandings and interpretations of laws between sovereigns, a feature unique to cross-border cases like *Pasquantino*, but not applicable with regard to overlaps in typical domestic laws. Finally, Justice Thomas's opinion for the Court in

Crime-With Far Reaching Consequences, 88 J. TAX'N 224, 225 (1998) (noting that the court was faced with a decision "between a broad reading of the wire fraud statute on one side, and the revenue rule and the reciprocity element of the anti-smuggling statute on the other side").

96. See discussion *supra* Part II.A.3.

97. *Pasquantino III*, 125 S. Ct. at 1773 n.4.

Pasquantino generally minimizes how vexatious foreign law can be. His claim that “[f]oreign law . . . posed no unmanageable complexity in this case”⁹⁸ is disingenuous because the Government and the District Court “made no serious attempt to [address relevant Canadian law]” beyond the testimony of a single witness.⁹⁹ Justice Thomas goes on to say that Federal Rule of Criminal Procedure 26.1 sets “forth a procedure for interpreting foreign law” and describes those “procedures” as including the admission of “any relevant material.”¹⁰⁰ Somehow, the irony of describing a particular “procedure” by referring to a complete lack of procedure escaped four other Supreme Court Justices who joined his opinion.

To convict the Pasquantinos under the federal wire fraud statute for a scheme to evade foreign taxes, the wire fraud statute must be read so broadly as to swallow existing tax treaties and the anti-smuggling statute, which were specifically designed to be narrowly tailored.¹⁰¹ In response, Justice Thomas cites Justice Stevens’s dissent in *United States v. Wells*¹⁰² in support of the proposition that “the mere fact that two federal criminal statutes . . . criminalize similar conduct says little about the scope of either.”¹⁰³ However, Justice Stevens’s opinion in *Wells* is inapposite because the issue in that case was whether the materiality of a false statement constituted an element of a particular criminal statute.¹⁰⁴ It was already established that the defendants’ behavior in *Wells* violated some American laws, and the question was whether the jury properly considered materiality as an element of the crime.¹⁰⁵ *Pasquantino*, however, is a case of whether defendants’ behavior fell into *any* class of activity within the purview of American courts at all. It is one thing to question whether, out of “at least 100 federal false statement statutes,” the fact that 42 contain an express materiality requirement shines any light on the scope of one particular criminal false statement charge, as was the case in *Wells*.¹⁰⁶ It is another thing entirely to examine two carefully crafted documents regarding a particular species of international

98. *Id.* at 1780.

99. *Id.* at 1784 n.4 (Ginsburg, J., dissenting).

100. *Id.* at 1780.

101. See Protocol Amending Convention with Respect to Taxes on Income and on Capital, U.S.-Can., Art. 15, ¶ 2, Sept. 26, 1980, S. TREATY DOC. NO. 104-4; 18 U.S.C. § 546.

102. *United States v. Wells*, 519 U.S. 482, 505-509 (1997).

103. *Pasquantino III*, 125 S. Ct. at 1773 n.4.

104. See *Wells*, 519 U.S. 482.

105. *Id.* at 490.

106. *Id.* at 505.

conflict – a bilateral tax treaty¹⁰⁷ and a bilateral anti-smuggling statute¹⁰⁸ — that tilt in favor of lenity in a particular case and then declare that their existence “says little about the scope”¹⁰⁹ of the third.

III. THE WIRE FRAUD STATUTE

The *Pasquantino* cases are compelling because they impel an examination of the wire fraud statute that illuminates the necessity of applying limiting principles, of which the revenue rule is the most significant, to constrain the natural propensity of prosecutors and American courts to pass on foreign law.

A. *To Deprive a Phrase of Meaning: “A Scheme to Defraud”*

The wire fraud statute is an attractive tool for prosecutors, because it ostensibly shifts the focus away from the foreign law that lies at the heart of the matter and requires the prosecutor to prove only: 1) that the defendant “intended to devise any scheme or artifice to defraud”; and 2) the transmission of interstate communication “for the purpose of executing such scheme or artifice.”¹¹⁰ But, “[a] scheme to deceive, however dishonest the methods employed, is not a scheme to defraud in the absence of a property right.”¹¹¹ Thus, in *United States v. Pierce*, the Second Circuit concluded, “without evidence that Canada imposes duty on imported liquor in the first place, the government cannot prove a scheme to defraud the Canadian government because there is no evidence whatsoever of a property right – a right to revenue – of which the Canadian government could be defrauded.”¹¹²

The majority of the Fourth Circuit concluded in *Pasquantino II* that the “prosecution seeks only to enforce the federal wire fraud statute for the singular goal of vindicating our government’s substantial interest in preventing our nation’s interstate wire communication systems from being used in furtherance of crimi-

107. Protocol Amending Convention with Respect to Taxes on Income and on Capital, U.S.-Can., Art. 15, ¶ 2, Sept. 26, 1980, S. TREATY DOC. NO. 104-4.

108. 18 U.S.C. § 546.

109. *Pasquantino III*, 125 S. Ct. 1766, 1773 n.4 (2005).

110. 18 U.S.C. § 1343 (2002).

111. *United States v. Pierce*, 224 F.3d 158, 165 (2d Cir. 2000) (citing *Carpenter v. United States*, 484 U.S. 19, 27-28 (1987) (stating that since the passage of 18 U.S.C. § 1346, the “property right” includes the “intangible right to honest services”).

112. *Id.* at 166-67.

nal fraudulent enterprises.”¹¹³ Similarly, a majority of the Supreme Court agreed with the conclusion that the wire fraud statute “embodies the policy choice [of the government] to free the interstate wires from fraudulent use, irrespective of the object of the fraud.”¹¹⁴ Neither statement is accurate, and each engages in its own variation of misdirection.

While the Supreme Court correctly identifies the first element of a wire fraud violation – fraudulent use of interstate wires – it neglects to acknowledge the fact that such improper use of interstate wires is only criminal when it occurs in furtherance of a scheme to defraud. By leaving out the second of two elements in the criminal statute, the Supreme Court essentially outlaws all acts of “interstate lying” that occur over public phone lines.

The Fourth Circuit makes a similar, but more devious error. It fails to define a method of determining what constitutes a “criminal enterprise” as it relates to foreign tax law. While the court in *United States v. Trapilo* tries to expand the reach of the wire fraud statute from the bench by declaring that “[t]he term ‘scheme to defraud’ is measured by a ‘nontechnical standard,’”¹¹⁵ it neglects to mention that the standard to prove the defendants’ “intent to defraud” is not so fluid. And, in fact, it is not. Until the Legislature sees fit to make a change, courts that adjudicate criminal cases predicated on the wire fraud statute’s criminalization of communication intended to defraud foreign governments of tax revenue will inevitably face a catch-22 that will prevent them from enforcing violations of the wire fraud statute that are based solely on violations of foreign revenue laws. Before convicting defendants seeking to evade foreign taxes under the wire fraud statute, an American court must determine that the defendants’ actions constituted “a scheme or artifice to defraud” and that defendants “intended” to engage in such a fraud or artifice. But, before it can do any of those things, the court must first find that the Canadian government had a property right in the accrued tax revenue that defendants sought to evade.

To arrive at the conclusion that the Canadian government had a property right in the accrued tax revenue, an American court must examine Canadian law to determine the “existence” of the law, which is “inherently and inescapably tied to recognizing

113. *Pasquantino II*, 336 F.3d 321, 331 (4th Cir. 2003).

114. *Pasquantino III*, 125 S. Ct. at 1780.

115. *United States v. Trapilo*, 130 F.3d 547, 550 (2d Cir. 1997).

the "validity and scope of that law,"¹¹⁶ with all the trappings of interference with national sovereignty that such an exercise necessarily entails.¹¹⁷ Because this is an unattractive and unfeasible option, the only alternative left open to the court involves making a summary decision on the basis of prosecution testimony alone that the Canadian tax law exists. *Pierce* foreclosed this alternative, indicating that "a juror could not infer the existence of a Canadian tax or duty from the defendants' suspicious behavior alone,"¹¹⁸ and while the "liquor may very well have been illegally imported, . . . that does not establish that Canadian tax was due . . ." ¹¹⁹ To convict defendants under the wire fraud statute for the evasion of foreign taxes a court must either: 1) deprive defendants of a proper opportunity to mount a defense of legal impossibility¹²⁰ (an absurd proposition, resulting in greater protection in American courts for defendants accused of violating domestic tax laws than foreign tax laws);¹²¹ or 2) commence down the treacherous path of interpreting foreign tax law.¹²²

Assuming *arguendo* that a court could presume a defendant's criminal intent on the basis of his suspicious activity alone, without requiring an examination of the property right he is alleged to have deprived the victim, applying the wire fraud statute in such a way that a scheme to defraud a foreign government would serve as a valid predicate for the "fraud" contemplated by the statute would most likely extend beyond the reach that Congress intended to provide. Unlike *Reynolds II*, which was a civil action brought under the Racketeer Influenced Corrupt Organizations Act (RICO) and predicated upon a violation of the wire fraud stat-

116. *Pasquantino I*, 305 F.3d 291, 298 (4th Cir. 2002) (emphasis in original).

117. See discussion *supra* Part II.B.2.

118. *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000).

119. *Id.* at 167.

120. *Id.* at 166 ("If no Canadian duty or tax actually existed, the Pierces were no more guilty of wire fraud than they would have been had they used the wires in furtherance of a scheme surreptitiously to transport liquor down the Hudson River from Yonkers into New York City . . . in the sincere but mistaken belief that New York City imposes a duty on such cross-border shipments."). Surprisingly, suspicious behavior suffices as a waiver of a legal impossibility defense in *Pasquantino II*: "The fact that [a defendant] abandoned the liquor laden rental truck after detecting surveillance . . . is strong evidence of his criminal intent. The same goes for his evasive driving maneuvers." *Pasquantino II*, 336 F.3d 321, 336 (4th Cir. 2003).

121. See *Keneally*, *supra* note 95, at 228 (citing *Spies v. United States*, 317 U.S. 492 (1943); *United States v. Henderson*, 386 F. Supp. 1048 (S.D.N.Y. 1974)) (explaining that the cumulative and extensive tax code preempted the field, leaving no room for the application of the mail fraud statute to apply to tax evasion without violating legislative intent).

122. See discussion *supra* Part II.B.

ute,¹²³ free-standing wire fraud actions were never intended to turn victims into “private attorneys general”¹²⁴ as a response to the particular difficulties associated with combating organized crime.¹²⁵ Instead, the precursor to the modern wire fraud statute reveals a legislative intent that is useful in a contemporary setting as a means of controlling the reach of American courts to enforce foreign tax law.

B. To Cast a Law from its Moorings: The Wire Fraud Statute

The wire fraud statute has an indispensable legislative historical foundation to guide and limit courts’ interpretation of the wire fraud statute. By holding that the wire fraud statute covers a foreign tax evasion scheme, like the one undertaken by the Pasquantinos, American courts have exposed their willingness to ignore the historical underpinnings that should give shape and structure to the wire fraud statute in its present form.

To be sure, application of the modern wire fraud statute is not expressly limited to the types of crimes listed in the early incarnation of the mail fraud statute, including “the ‘sawdust swindle’ . . . or dealing or pretending to deal in what is commonly called ‘green articles,’ ‘green coin,’ [or] ‘spurious Treasury notes’”¹²⁶ This predecessor of the mail fraud statute, like its contemporary cousin, the wire fraud statute, contains expansive language that is designed to address a particular species of crime. The court in *United States v. Henderson* describes the aim of the statute as a means to “protect the public, more precisely, the gullible public, against the various fraudulent schemes that the cunning of the trickster could devise.”¹²⁷ Though Justice Thomas’s majority opinion in *Pasquantino III* identifies the objective of the wire fraud statute as an effort to “free the interstate wires from fraudulent use,”¹²⁸ his definition of the governmental aim is too broad. A more historically accurate description of the wire fraud statute’s purpose would limit its application to protect a vulnerable public from harm that is furthered by the use of interstate wires. There is nothing in Justice Thomas’s discussion to suggest that prosecut-

123. 18 U.S.C. § 1962 (2005).

124. *Rotella v. Wood*, 528 U.S. 549, 557 (2000).

125. See Farnam, *supra* note 56.

126. Act of Mar. 2, 1889, ch. 323, 25 Stat. 873 (current version at 18 U.S.C. § 1343 (2004)).

127. *United States v. Henderson*, 386 F. Supp. 1048, 1052-53 (S.D.N.Y. 1974).

128. *Pasquantino III*, 125 S. Ct. 1766, 1780 (2005).

ing an out-of-state college student for lying to his mother about his whereabouts over the phone would stretch the meaning of the wire fraud statute, despite the fact that such a construction is clearly contrary to the plain meaning of the statute.

1. The Wire Fraud Statute as a "Stop-Gap Device"

The American legal machinery has a powerful tool in the wire fraud statute that allows its prosecutors greater power to frustrate the efforts of creative criminals who are capable of harming an innocent public by engaging in schemes that do not violate any existing statutory law. The wire fraud statute functions properly as an analogue to the temporary injunction — a "stop-gap device"¹²⁹ to stop or slow destructive behavior until the legislature can overcome its institutional inertia to address the evil by enacting more narrowly tailored legislation.

In *Henderson*, the court refused to apply the mail fraud statute to prosecute a scheme to avoid domestic federal income taxes because legislation addressing the defendant's crime already existed. Similarly, the existence of a bilateral tax treaty providing for tax enforcement assistance¹³⁰ and a reciprocal anti-smuggling statute¹³¹ should indicate to American courts that Congress has addressed the criminal activity at issue in the *Pasquantino* cases, and therefore eliminated the need to use the powerful wire fraud statute that is intended "as a first line of defense" against a "new" fraud.¹³² To apply the wire fraud statute to the time-worn scheme executed by the Pasquantinos in an effort to evade foreign excise taxes stretches the original objective of the statute beyond recognition and logic.¹³³

129. *Henderson*, 386 F. Supp. at 1053.

130. See Protocol Amending Convention with Respect to Taxes on Income and on Capital, U.S.-Can., Art. 15, ¶ 2, Sept. 26, 1980, S. TREATY DOC. NO. 104-4.

131. 18 U.S.C. § 546.

132. *United States v. Maze*, 414 U.S. 395, 405 (1974) (Burger, C.J., dissenting).

133. For example, the wire fraud statute might serve as the only deterrent to a computer hacker contemplating a novel scheme, with the belief that the Internet is not as substantially regulated as other public forums. While a wire fraud statute with an expanded reach can be reasonably expected to inspire the contemplative computer hacker to alter his deceitful behavior, it is difficult to imagine that the threat of being prosecuted under the wire fraud statute (to the extent that they were aware of the statute at all) would have altered the Pasquantinos resolve to evade Canadian taxes, a scheme that the defendants surely anticipated would involve the violation of well-established Canadian law.

2. The Wire Fraud Statute as a Shield to Protect the Ordinary Victim

The second significant (and related) rationale that justifies the expansive breadth of the wire fraud statute, while providing an inherent limitation, is its goal of protecting innocent victims from clever scam artists. In order for the statute to function properly, it must be sufficiently flexible and adaptable to protect the helpless every-man who generally does not enjoy the benefit of an aegis of resources which would allow him to withstand creative schemes designed to swindle him out of money. Waiting for the Legislature to criminalize novel fraudulent schemes would be financially disastrous for the average citizen-victim.

In denying Canada's civil RICO action, the court in *Reynolds II* distinguished the damages that Congress envisioned awarding to private victims of fraudulent schemes from the damages that Canada claimed. The Second Circuit concluded that Canada's petition for relief was essentially "an indirect attempt to have a United States court enforce Canadian revenue laws," an inappropriate result because "foreign sovereigns, unlike individuals, have at their disposal state-funded and state-maintained resources."¹³⁴

The wire fraud statute is intended to protect the general public by criminalizing harmful behavior that would otherwise go unchecked as a result of the difficulty that individual American citizens would encounter in overcoming the constraints of organizing collective action.¹³⁵ A properly pled RICO claim presents a stronger argument in favor of a broad reading of the wire fraud statute because there is a clear and likely danger that the organized racketeering activity targeted by RICO will result in direct harm to American interests.¹³⁶ However, the *Pasquantino* cases are merely free-standing wire fraud actions based on an intended scheme to evade foreign taxes, which do not implicate any of the interests in favor of applying such an expansive interpretation of the statute as the majority concludes. The Fourth Circuit and United States Supreme Court decisions are outwardly represented as resting on the American government's sovereign interest in protecting this nation's telephone wires from improper use.¹³⁷ While that conclusion finds legal support on a formalistic

134. *Reynolds II*, 268 F.3d 103, 131-32 (2d Cir. 2001) (citing MAX WEBER, THE THEORY OF SOCIAL & ECONOMIC ORGANIZATION 156 (Talcott Parsons ed., 1947)).

135. See *United States v. Henderson*, 386 F. Supp. 1048, 1053 (S.D.N.Y. 1974).

136. *Reynolds I*, 103 F. Supp. 2d 134, 148 (N.D.N.Y. 2000).

137. *Pasquantino II*, 336 F.3d 321, 331 (4th Cir. 2003).

level,¹³⁸ it leads to inconsistent results in practice. On the one hand, American courts have displayed a willingness to use the revenue rule to bar thinly veiled claims for tax enforcement assistance when foreign governments initiate civil RICO actions in American courts. On the other hand, American courts contravene the revenue rule by refusing to look beyond illusory criminal wire fraud claims to discover the significant foreign interests that are at stake when the wire fraud statute is manipulated to enforce foreign tax law by punishing smugglers and deterring future smuggling operations. It is simply a misstatement of facts to conclude that American courts will be unable to identify which cases have, at their core, a natural tendency to implicate substantive domestic interests. Although precedent is clear that "the identity and location of the victim . . . are irrelevant,"¹³⁹ the history of the statute, its objectives, and its interaction with contextual materials suggests otherwise, because Congress surely did not intend to give the judiciary a blank check to create criminal liability for every defendant who uses a phone, regardless of whether there exist more appropriate avenues of relief and regardless of the United States' interests at stake.

IV. CONCLUSION

The wire fraud statute is an effective prosecutorial tool that will only grow in significance as the pace of global technology and communication accelerate, leaving broad swaths of uncultivated legal terrain. However, for the statute to function effectively and justly, it must be anchored to identifiable principles. The statute must be wielded judiciously to avoid harming short- and long-term American interests by swallowing legislation and treaties that are more closely tailored to the criminal conduct at hand; by straining judicial resources and international goodwill by removing foreign tax cases from appropriate foreign courts to American criminal

138. See, e.g., *United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997) ("[A]s the statute plainly states, what is proscribed is use of the telecommunication systems of the United States in furtherance of a scheme"); *United States v. DeFiore*, 720 F.2d 757, 761 (2d Cir. 1983) ("Its focus is upon the misuse of wires.").

139. *Trapilo*, 130 F.3d at 552. Similar language appears throughout the literature on the revenue rule and illustrates the proclivity of some judges and authors to collapse 1) the determination whether the scheme to defraud was successful (which is irrelevant), and 2) the determination of whether a property right existed in the first place (which is relevant and an essential element to the government's case), into a single analysis. See also *supra* notes 116-125 and accompanying text.

courts; or by depriving defendants the opportunity to present essential defenses.

It may be viscerally satisfying to utilize the wire fraud statute to punish all criminals, whether they break foreign or domestic law; to the extent that the Pasquantinos' scheme succeeded in depriving the Canadian government of tax revenue, they deserve to be sanctioned. However, Canadian judges are better-positioned to achieve that objective than their American counterparts. While complete tax enforcement assistance with Canada is a laudable goal, it is wise to continue on the path of bilateral treaties, reciprocal statutes and extradition assistance to ensure the fair and consistent interpretation of law and the preservation of the principles that inhere in international comity and domestic justice.