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New Dimension to the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms, A

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A New Dimension to the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms

Ellen S. Podgor*

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I. INTRODUCTION

David McNab went to prison for eight years for improperly shipping spiny lobster tails from Honduras into the United States. Although the crimes were federal offenses, prosecutors relied upon a violation of Honduran laws.¹ Despite the fact that the Attorney General of Honduras stated that there was no violation of his country's laws,² David McNab was convicted, sentenced, and is serving prison time.

David Pasquantino was sentenced to prison. The conduct alleged in the indictment against him was described as smuggling liquor into Canada from the

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1. See *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003).

2. See Letter from Sergio Zavala Leiva, Attorney General of Honduras, to John Ashcroft, United States Attorney General (Apr. 24, 2003) (on file with the *McGeorge Law Review*).

United States.³ The Department of Justice, however, did not charge David Pasquantino with a smuggling offense, but rather prosecuted him for the crime of wire fraud.⁴ The loss of property alleged in this case was tax revenue of Canada.⁵

Although David McNab and David Pasquantino were convicted of very different crimes, a common theme in both of these cases is that the laws of another country served as a basis for the United States prosecutions. This Article examines and analyzes the *McNab* and *Pasquantino* cases, looking specifically at the facts of these two cases, as well as the surrounding court decisions.⁶ Although the laws of other countries can factor into United States prosecutions,⁷ in these two cases and others like them, the prosecution could not have occurred absent the laws of another country.

This Article considers some of the questions that can arise when a federal prosecution is dependent upon laws of another country. A key issue in the *McNab* case was whether the United States correctly interpreted another country's laws.⁸ In *Pasquantino*, the court struggled with the use of a generic federal statute to prosecute conduct that violated the revenue laws of another country.

A question explored in this Article is whether a United States prosecution should be allowed when the harm caused by the criminal conduct is predominantly harm to another country. It looks at this question in the context of these two cases, while also examining disadvantages in prosecuting conduct based on harm that occurs outside this country. This Article advocates for a more structured approach to the prosecution of conduct with an extraterritorial harm.⁹ Specifically, more consideration needs to be given to issues of comity. This Article recommends that extraterritorial prosecutions, including those in the United States that use foreign law, need to give more recognition to the location of the social harm.¹⁰

3. *Pasquantino v. United States*, 125 S. Ct. 1766 (2005).

4. 18 U.S.C. § 1343 (2002).

5. *See Pasquantino*, 125 S. Ct. at 1771-72.

6. *See infra* notes 11-93 and accompanying text.

7. The laws of other countries can factor into both substantive and procedural issues in a criminal case. *See generally* EDWARD M. WISE, ELLEN S. PODGOR & ROGER S. CLARK, *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* (2d ed. 2004) (including chapters on topics of substantive and procedural international criminal law, such as obtaining evidence from abroad and extradition).

8. Many courts have wrestled with interpreting foreign law. In *United States v. Mitchell*, 985 F.2d 1275 (4th Cir. 1993), the Fourth Circuit summarized some of the different sources that have been used by courts to ascertain the meaning of a foreign law. These include attorneys, judges, certified translations, and a student law review note. *Id.* at 1280 (citations omitted).

9. *See infra* Part V.C.

10. *See infra* notes 137-45 and accompanying text.

II. THE TWO DAVIDS

A. *David McNab*

David Henson McNab,¹¹ was convicted of crimes emanating from a shipment of spiny lobster tails into the United States.¹² A Honduran businessman who owned and operated a fleet of fishing vessels in Honduras, McNab was engaged in the business of catching spiny tail lobsters off the coast of Honduras. Some of these lobsters would then be transported to the United States.

The charges in this case arose from "an anonymous facsimile" advising agents of the National Marine Fisheries Service that one of McNab's vessels would arrive in Alabama with lobster tails that were undersized according to Honduran law.¹³ Oddly enough, the fax also included a statement advising its receiver "that Honduras prohibits the bulk exportation of lobsters and requires that lobsters be packed in boxes for export."¹⁴ The lobsters in this case were sent in plastic bags.¹⁵

The United States' prosecution against McNab rested upon a violation of the Lacey Act.¹⁶ Although the indictment proceeded against McNab for conspiracy, money laundering, and smuggling, the charges could not have been brought without the Lacey Act violation.¹⁷ The Lacey Act incorporates a violation of foreign law as the basis for a federal United States prosecution,¹⁸ and in this case, two Honduran resolutions¹⁹ and one regulation²⁰ served as the Honduran laws

11. The other co-defendants in this case were Abner Schoenwetter, Robert D. Blandford, and Dianne H. Huang. See *United States v. McNab*, 331 F.3d 1228, 1232 (11th Cir. 2003).

12. The convictions of the four defendants included crimes for violations of the Lacey Act, conspiracy, smuggling, and money laundering. *Id.* at 1234 n.10.

13. See *id.* at 1232.

14. See *id.* The source of the fax is not revealed in the case material, but one has to wonder whether a competitor of McNab may have been involved in sending this anonymous fax.

15. *Id.* at 1233.

16. The Lacey Act, among its provisions, "prohibits the importation of 'fish or wildlife taken, possessed, transported, or sold in violation of . . . any foreign law.'" 16 U.S.C. § 3372(a)(2)(A). *Id.* at 1232 n.1. The criminal provisions of the Lacey Act have been criticized for its ability to impose felony penalties when civil penalties might suffice. See, e.g., John Shepard Wiley Jr., *Not Guilty By Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1146-50 (1999) (noting that the Lacey Act has both civil and forfeiture provisions).

17. "If the lobsters were not imported, transported, and sold in violation of Honduran law, there could be no Lacey Act violations. Accordingly, if the lobsters were brought into the United States legally and were not criminally-derived property, there could be no smuggling or money laundering violations." *McNab*, 331 F.3d at 1232 n.1.

18. It is not unique to this case to have a Lacey Act violation premised on foreign law. There are other Lacey Act cases and other federal statutes that incorporate foreign law and also have questions of determining how to interpret that law. See, e.g., *United States v. Mitchell*, 985 F.2d 1275 (4th Cir.1993) (interpreting Pakistani law).

19. Resolution 030-95 pertained to a "5.5-inch size limit for lobsters." Resolution 0008-93 "established inspection and processing requirements for the lobster fishing industry." *McNab*, 331 F.3d at 1239.

20. Article 70(3) "prohibits the harvesting and destruction of lobster eggs." *Id.*

upon which the Lacey Act was alleged to have been violated.²¹ McNab was accused of conspiracy,²² smuggling,²³ and money laundering²⁴ for bringing into the United States spiny tail lobsters that were contrary to these Honduran laws.²⁵

In the *McNab* case, the government had secured the validity of the foreign laws through its contacts with individuals in a Honduran agency that enforced the country's fishing laws.²⁶ It is clear that the United States made repeated efforts to ascertain whether the Honduran laws were valid.²⁷ After receiving testimony from Honduran officials at a pre-trial hearing, the district court upheld the validity of the foreign laws²⁸ upon which the Lacey Act violations were premised.²⁹ This holding was made despite defense evidence in opposition from "two law professors, both experts in Honduran law," and officials from Honduras who offered evidence of the invalidity of the laws used in this case to support the Lacey Act violations.³⁰ The key official Honduran evidence regarding the

21. *Id.* One of the arguments presented by the defense in this case was that the Lacey Act should be limited to "foreign law" and therefore only include "foreign statutes" as opposed to "foreign regulations or provisions." *Id.* at 1235-39.

22. The conspiracy count alleged that the "four defendants conspired to smuggle unlawful merchandise into the United States in violation of 18 U.S.C. § 545, to import unlawfully taken lobster in violation of the Lacey Act." Brief for the United States at 11, *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003) (No. 01-15148-JJ) (on file with the *McGeorge Law Review*).

23. Counts 2-12 of the superseding indictment charged McNab with "smuggling in violation of 18 U.S.C. § 545, by importing Caribbean spiny lobster tails and shrimp that were taken, possessed, transported, and sold in violation of Honduran law." *Id.* at 12.

24. Counts 28-43 charged McNab with violations of money laundering pursuant to 18 U.S.C. § 1957, for "engaging in monetary transactions involving proceeds from criminally derived property—the smuggled lobsters" and pursuant to 18 U.S.C. § 1956(h) "by conspiring to engage in monetary transactions involving proceeds from criminally derived property—the smuggled lobsters." *Id.* It is not unusual for prosecutors to add money laundering charges to a white collar indictment. See Teresa E. Adams, *Taking on Money Laundering Charges to White Collar Crimes: What Did Congress Intend, And What Are Courts Doing?*, 17 GA. ST. L. REV. 531 (2000).

25. Ironically, McNab was indicted for smuggling for using clear plastic bags instead of opaque cardboard boxes and for money laundering for depositing the sales receipts from these transactions in a bank. See Ellen S. Podgor & Paul Rosenzweig, *Bum Lobster Rap*, THE WASH. TIMES, Jan. 6, 2004, at A14. The co-defendants in this case were also charged with some of the same crimes as McNab and in some cases co-defendants also faced specific charges of violating the Lacey Act and for obstruction of justice pursuant to 18 U.S.C. § 1503(a). Brief for the United States at 11-13, *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003) (No. 01-15148-JJ) (on file with the *McGeorge Law Review*). The indictment also sought "forfeiture of all property derived from the proceeds of the defendants' unlawful activities." *Id.* at 13.

26. The United States National Marine Fisheries Service (NMFS) "consulted the Direcccion General de Pesca y Acuicultura (DIGEPESCA) in Honduras regarding the legality of the lobster shipment referenced in the facsimile." *United States v. McNab*, 331 F.3d 1228, 1232 (11th Cir. 2003).

27. There were communications, meetings, and written statements provided to the National Marine Fisheries Service confirming that this was in fact the law in Honduras. *Id.* at 1232-34.

28. Determinations of foreign law are "a question of law to be established by any relevant source, whether or not submitted by a party or admissible under the Federal Rules of Evidence." *United States v. Mitchell*, 985 F.2d 1275, 1280 (4th Cir.1993) (citations omitted).

29. Testimony was provided by Secretary General Paz, of the Secretaria de Agricultura y Gganaderia (SAG), the Honduran agency charged with overseeing the DIGEPSCA, an agency "responsible for the enforcement of the fishing laws and the execution of fishing programs." *McNab*, 331 F.3d at 1232 n.2.

30. Defense testimony at this hearing included "a number of legal opinions from members of the

invalidity of the Honduran laws upon which this case rested came after the conviction.³¹

After a jury trial, David Henson McNab received a sentence of ninety-seven months imprisonment.³² The appeal of this case to the United States Court of Appeals for the Eleventh Circuit included a claim that McNab was improperly convicted because the Honduran laws used to support the conviction were “invalid or void.”³³ The Eleventh Circuit considered it a “matter of first impression” to “decide whether our courts are bound by a foreign government’s new representations regarding the validity of its laws when its new representations are issued only post-conviction and directly contravene its original position upon which the government and our courts relied and the jury acted.”³⁴

In a split decision entered on March of 2003, the Eleventh Circuit upheld the convictions of McNab and his co-defendants. Writing for the majority, Circuit Judge Wilson admitted that the “crux of this case is the validity of the Honduran laws during the time period covered by the indictment.”³⁵ Stressing a post-conviction “shift in position,” the majority noted that “[t]here must be some finality with representations of foreign law by foreign governments.”³⁶ The court was concerned with the “consistency and reliability” of laws from other countries.³⁷ After reviewing the regulations that formed the basis of the Lacey Act violations, the majority concluded that these laws “were valid and legally binding during the time period covered by the indictment.”³⁸

A dissent by Circuit Judge Fay questioned the majority’s claim of “shift in position” by the Honduran government with respect to Resolution 030-95.³⁹ Judge Fay stated that there was never “unanimity” or “agreement” on the validity

Honduran legal community, including the attorney general of Honduras and the regional prosecutor of the Fiscalía Especial Para la Defensa de la Constitución, and a declaration from a practicing Honduran attorney.” *Id.* at 1234 n.7.

31. *Id.* at 1232.

32. *Id.* at 1235. Co-defendants Blandford and Schoenwetter received a similar sentence and co-defendant Huang received a sentence of twenty-four months. *Id.*

33. *Id.* Five arguments on appeal related to McNab’s convictions. In addition to a claim that the Honduran law was “invalid or void” McNab also argued that: (1) it was improper to use Honduran “resolutions and regulations” as the basis of foreign law for a Lacey Act violation; (2) that the district court improperly excluded evidence “relating to his ‘knowledge’ of Honduran law;” (3) jury instruction errors; and (4) insufficiency of the evidence. *Id.*

34. *Id.* at 1232.

35. *Id.* at 1240.

36. *Id.* at 1241. The court expressed concern with “political changes that take place in foreign governments.” *Id.*

37. The Eleventh Circuit noted that “[o]therwise, there never could be any assurance when undertaking a Lacey Act prosecution for violations of foreign law that a conviction will not be invalidated at some later date if the foreign government changes its laws.” *Id.* at 1242.

38. *Id.* at 1247.

39. Later in his dissent, Judge Fay stated that “[t]he so-called ‘shift in position’ is the result of lawful litigation within the courts of a foreign nation.” *Id.* at 1251.

of the resolution and that the determination rested upon the weight given to the experts presented on both sides of the issue.⁴⁰ He noted that following the trial and conviction, McNab contested Resolution 030-95 in a Honduran court, and the Honduran court found the resolution “null and void.”⁴¹

Judge Fay emphasized the position taken in an amicus brief by the Honduran Embassy, the position taken by the Attorney General of Honduras and other top Honduran government officials, that the “Honduran Court’s invalidation of Resolution 030-95 should be applied retroactively.”⁴² Judge Fay stated, “I think we would be shocked should the tables be reversed and a foreign nation simply ignored one of our court rulings because it caused some frustration or inconvenience.”⁴³

Since the issuing of this initial decision on March 21, 2003, and its amended decision on May 29, 2003,⁴⁴ the Attorney General of Honduras, Dr. Sergio Zavala Leiva, wrote a letter to then Attorney General of the United States, John Ashcroft, stating that “the U.S. Attorneys who have handled the case, aided by agents of the National Marine Fisheries Service, relied on Honduran employees who had neither the legal capacity nor the authority to interpret Honduran law, much less speak for the Government of Honduras.”⁴⁵ Asking Ashcroft to intervene, the Attorney General of Honduras noted that prosecutors in the case, upon being apprised of the official position of the Honduran government, “failed to recognize [] the capacity of the Government of Honduras to interpret its own laws and took no heed of the official processes of the Republic of Honduras to certify in court the validity and interpretation of its own legal standards.”⁴⁶

The Embassy of Honduras also filed an amicus brief on McNab’s “Petition for Rehearing and Suggestion for Rehearing *En Banc*.” This brief questioned the majority opinion’s respect for the law of Honduras. It states that “[t]he Panel’s holding, if allowed to stand, would damage international rules of comity and the deference due a sovereign Government’s declaration of the meaning of its own law.”⁴⁷

40. *Id.* at 1247.

41. *Id.* at 1248. “The Honduran Court premised its decision on the fact that Resolution 030-95 was not properly issued by the President of the Republic of Honduras and authorized by the proper Secretary or Under Secretary of State as is required under Honduran law.” *Id.* A Honduran Court of Appeals affirmed this decision. *Id.*

42. *Id.* at 1249.

43. *Id.* at 1251.

44. The court amended its decision in order to delete footnote 24 from its initial decision. *See United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003).

45. *See* Letter from Sergio Zavala Leiva, Attorney General of Honduras, to John Ashcroft, United States Attorney General (April 24, 2003) (on file with the *McGeorge Law Review*).

46. *Id.*

47. Brief Amicus Curiae of the Embassy of Honduras and the Asociacion De Pescadores Del Caribe in Support of Defendant-Appellant David Henson McNab at 15, Petition for Rehearing and Suggestion for Rehearing *En Banc*, *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003) (Nos. 01-15148-JJ, 02-11264-JJ).

Rehearing was not granted in this case and the United States Supreme Court denied certiorari in this matter.⁴⁸ David McNab, who had been incarcerated since conviction, had his co-defendants join him in prison.

B. David Pasquantino

David Pasquantino, along with two other co-defendants,⁴⁹ was charged with violating the wire fraud statute⁵⁰ “for carrying out a scheme to smuggle large quantities of liquor into Canada from the United States.”⁵¹ He was not, however, charged with smuggling.⁵²

David Pasquantino, along with his brother Carl Pasquantino⁵³ would “place a large order for low end liquor by telephone with a discount liquor store in Maryland.”⁵⁴ Co-defendant Arthur Hilts would then pick up the liquor in a rented truck and deliver it to New York where some of the alcohol would be stored and some would be transported by Hilts and other drivers across the border to Canada.⁵⁵ The liquor transported would be hidden in vehicles and the drivers would not “declare the goods to Canadian customs officials.”⁵⁶ The scheme to defraud was premised upon the drivers’ failure to pay Canadian tax upon transporting the liquor across the border. The evidence presented at the defendants’ trial was that the Canadian government was being deprived of tax revenue of “approximately double

48. See *McNab v. United States*, 540 U.S. 1177 (2004). An amicus brief in support of defendant’s Petition for Certiorari filed by the National Association of Criminal Defense Attorneys and National Federal of Independent Businesses Legal Foundation later argued a due process violation for imposing an eight year sentence “for the effectively *scienter*-less regulatory offense of importing lobster tails.” See Brief Amici Curiae of National Association of Criminal Defense Lawyers et al. in Support of Petitioners at 3, *McNab v. United States*, 540 U.S. 1177 (2004) (Nos. 03-622, 03-627), 2003 WL 23146417. The Republic of Honduras filed yet another amicus brief in the United States Supreme Court. The Washington Legal Foundation represented McNab’s co-defendants in the Supreme Court.

49. Also charged in this case were Carl J. Pasquantino and Arthur Hilts. See *Pasquantino v. United States*, 125 S. Ct. 1766, 1770 (2005).

50. 18 U.S.C. § 1343 (2002). The wire fraud statute, passed in 1952, requires that the prosecution prove the following elements of the crime: a scheme to defraud, intent, materiality, and a wiring in interstate or foreign commerce that is in furtherance of the scheme to defraud. See ELLEN S. PODGOR & JEROLD H. ISRAEL, *WHITE COLLAR CRIME IN A NUTSHELL* 66-67 (3d ed. 2004).

51. *Pasquantino*, 125 S. Ct. at 1770.

52. During oral argument before the United States Supreme Court, in response to a question by Justice O’Connor as to why this case should not be viewed as a defendant who was involved in a smuggling scheme as opposed to being “viewed as one of trying to enforce some other nation’s tax laws,” defense counsel responded that “the government’s interest in prosecuting somebody does not define the scope of what the statute at issue proscribes.” Transcript of Oral Argument at 4, *Pasquantino v. United States*, 125 S. Ct. 1766 (2005) (No. 03-725), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-725.pdf. In the United States, international smuggling is a criminal offense. See 18 U.S.C. § 546 (1998). Canada, however, does not have a “reciprocal law.” See *Pasquantino*, 125 S. Ct. at 1782 (Ginsburg, J., dissenting).

53. See Transcript of Oral Argument at 21, *Pasquantino v. United States*, 125 S. Ct. 1766 (2005) (No. 03-725), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-725.pdf.

54. *United States v. Pasquantino*, 336 F.3d 321, 325 (4th Cir. 2003).

55. *Id.*

56. *Pasquantino*, 125 S. Ct. at 1770.

the liquor's purchase price."⁵⁷ David Pasquantino was convicted after a jury trial of the crime of wire fraud and he was sentenced to fifty-seven months in prison.⁵⁸

The district court refused to dismiss the case when the defense argued pre-trial that there was no violation of the wire fraud statute "because a scheme to defraud a foreign government of duties and taxes is not cognizable under the wire fraud statute."⁵⁹ This argument was premised on what is known as the "common law revenue rule," a rule that historically held "that one nation generally does not enforce another's tax laws."⁶⁰

The defense reasserted this argument after conviction, when the case progressed to the United States Court of Appeals for the Fourth Circuit. Ruling favorably to the defense, a majority of the panel (in a decision that was later vacated⁶¹) reversed the conviction finding that although Canadian taxes can be property for purposes of a wire fraud charge, the revenue rule precluded this prosecution.⁶²

When the case proceeded *en banc*, it was Circuit Judge Hamilton, the author of the dissent in the vacated panel decision, that was now writing for the majority affirming the convictions.⁶³ Examining the history behind the revenue rule, the *en banc* Fourth Circuit opted for a position that had previously been taken by a case in the Second Circuit.⁶⁴ In *United States v. Trapilo*,⁶⁵ a wire fraud case with comparable facts to this case, the Second Circuit held that "[t]he statute neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a foreign government of tax revenue, and the common law revenue rule, inapplicable to the instant case, provides no justification for departing from the plain meaning of the statute."⁶⁶

57. *Id.*

58. See Transcript of Oral Argument at 21, *Pasquantino v. United States*, 125 S. Ct. 1766 (2005) (No. 03-725), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-725.pdf.

59. *United States v. Pasquantino*, 305 F.3d 291 (4th Cir. 2003).

60. *Pasquantino*, 125 S. Ct. at 1786 (Ginsburg, J., dissenting) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 448 (1964) (White, J., dissenting) (noting that "our courts customarily refuse to enforce the revenue and penal laws of a foreign state")).

61. *United States v. Pasquantino*, 336 F.3d 321, 326 (4th Cir. 2003).

62. The majority in the panel stated that "determination of whether Canada was actually or would have been entitled to the tax revenues involves an inquiry into the validity and operation of a foreign revenue law." *United States v. Pasquantino*, 305 F.3d 291, 295 (4th Cir. 2003). Noting a split in decisions between the First and Second Circuit Courts of Appeal, the majority panel decision chose to adopt the position of the First Circuit in *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), a decision that upheld the revenue rule. A dissent by Circuit Judge Hamilton criticized the majority stating, "the majority opinion does nothing less than judicially rewrite the plain language of the wire fraud statute so that it no longer prohibits a person from devising or intending to devise a wire fraud scheme to defraud a foreign sovereign of its property rights when such property rights are in the nature of accrued tax revenues." *United States v. Pasquantino*, 305 F.3d 291, 300 (4th Cir. 2003).

63. See *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003)(*en banc*).

64. *Id.* at 331.

65. 130 F.3d 547 (2nd Cir. 1997).

66. *Id.* at 551.

With the circuits split⁶⁷ on the applicability of wire fraud when the scheme to defraud involved another country's tax revenues, it was not surprising that the Supreme Court granted certiorari.⁶⁸ In a five-four opinion, the Court affirmed the Fourth Circuit's *en banc* decision and affirmed the conviction of David Pasquantino.⁶⁹

Writing for the majority, Justice Thomas stated that "uncollected excise taxes on the liquor petitioners imported into Canada is 'property'" for purposes of the wire fraud statute.⁷⁰ This is a crucial step necessary for affirming the conviction, as the law requires that prosecutions under the wire fraud statute that are not premised on the "intangible right to honest services" be premised on a deprivation of property.⁷¹ In prior decisions, the Court restricted what would be allowed as property.⁷² Thus, finding foreign tax revenue to be "property" was the first step in allowing the conviction to stand.

In addition to finding that tax revenue owed to Canada could serve as "property" for purposes of the wire fraud statute, the Court also rejected petitioners' argument that the common-law revenue rule precluded this prosecution.⁷³ The Court stated that "[g]ranted, this criminal prosecution 'enforces' Canadian revenue law in an attenuated sense, but not in a sense that clearly would contravene the revenue rule."⁷⁴ The majority was unconvinced with petitioners' argument "that the revenue rule

67. See *Trapilo v. United States*, 130 F.3d 547 (2nd Cir. 1997) (finding a scheme to defraud a foreign country of tax revenue does not implicate the revenue rule); *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996) (holding that wire fraud is inapplicable when the scheme to defraud involves the tax revenue of a foreign country). This issue, however, is not exclusive to these two cases. See *Fountain v. United States*, 357 F.3d 250, 252 (2nd Cir. 2004) (finding that a scheme to avoid Canadian cigarette taxes was not barred by the common law revenue rule in a case where the defendant was charged with "conspiracy to launder the proceeds of a wire fraud scheme in violation of the money laundering statute.").

68. See *Pasquantino v. United States*, 541 U.S. 972 (2004).

69. See *Pasquantino v. United States*, 125 S. Ct. 1766 (2005).

70. *Id.* at 1771-72.

71. In *McNally v. United States*, 483 U.S. 350, 360-61 (1987), the Court found that "money or property" was a necessary element of a mail fraud prosecution. The Court in this case reversed a lower court decision because the case was premised on intangible rights, and intangible rights would not be considered "property" for purposes of the mail fraud statute. *Id.* Following this decision, Congress enacted a new statute, 18 U.S.C. § 1346 that defines a "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." See generally Peter Henning, *Maybe it Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435 (1995); Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEG. 153 (1994); Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C.L. REV. 223 (1992). In the *Pasquantino* case the prosecution was not premised on section 1346, and it was therefore necessary for the government to provide proof of a deprivation of money or property.

72. In *United States v. Carpenter*, 484 U.S. 19 (1987), the Court found that "intangible property" can be property for purposes of the mail fraud statute. The Court, however, in the *Cleveland* case, held that regulatory licenses would not constitute property for purposes of the mail fraud statutes. See *Cleveland v. United States*, 531 U.S. 12, 15 (2000). Although the *Carpenter* and *Cleveland* decisions were premised on mail fraud, courts have consistently held that wire fraud works in *pari materia* to the mail fraud statute. See *Pasquantino v. United States*, 125 S. Ct. 1766, 1771 n.2 (2005) (citing *Neder v. United States*, 527 U.S. 1, 20 (1999)).

73. See *Pasquantino*, 125 S. Ct. at 1773.

74. *Id.* at 1778.

avoids giving domestic effect to politically sensitive and controversial policy decisions embodied in foreign revenue laws.”⁷⁵ Since the executive (by bringing the prosecution) and the legislature (by enacting the wire fraud statute) had made a “policy choice,” the Court felt comfortable upholding this “policy choice of the two political branches of our Government—Congress and the Executive.”⁷⁶ This decision establishes that deference will be given to the executive to choose the cases it will prosecute even when there may be international implications.⁷⁷

The majority opinion definitively asserted that its “interpretation of the wire fraud statute does not give it ‘extraterritorial effect.’”⁷⁸ The majority saw the issue of extraterritoriality as a novel argument for this case.⁷⁹ Since the scheme occurred in the United States, the prosecution brought an action with a domestic concern in mind, that being a wire fraud.⁸⁰

Although the majority affirmed the conviction of David Pasquantino and the other co-defendants, it expressed some criticism of the Government’s use of resources for this prosecution. In the final paragraph of the majority opinion, Justice Thomas stated that although “[i]t may seem an odd use of the Federal Government’s resources to prosecute a U.S. citizen for smuggling cheap liquor into Canada,” the wire fraud statute permits such a prosecution.⁸¹

The majority opinion does not resolve two issues that may present themselves in future cases. First, the Court explicitly reserved ruling on whether this opinion would apply in the context of civil actions.⁸² This is particularly important as the Racketeer Influenced and Corrupt Organization Act (“RICO”)

75. *Id.* at 1779.

76. *Id.* at 1780. After noting that this prosecution does require the Court to recognize foreign law, the Court stated that “we may assume that by electing to bring this prosecution, the Executive has assessed this prosecution’s impact on this Nation’s relationship with Canada, and concluded that it poses little danger of causing international friction.” *Id.*

77. In many ways this deference to the executive is similar to the Court’s decision in the case of *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), where the majority held that although an abduction of a doctor from Mexico to stand trial in the United States may be “shocking” and “may be in violation of general international law principles,” the matter rested with the executive. *Id.* at 669.

78. *See Pasquantino*, 125 S. Ct. at 1780.

79. The Court in rejecting extraterritoriality stated that the “novelty of the dissent’s ‘extraterritoriality’ argument” was indicated by the fact that it was not raised until “petitioners’ reply brief, depriving the Government of a chance to respond.” *Id.* at 1781 n.12.

80. *Id.* at 1780-81.

81. *Id.* at 1781.

82. *Id.* at 1771 n.1. (noting two cases where foreign governments had unsuccessfully brought civil RICO actions to recover for schemes to defraud their country of tax revenue). In *Republic of Honduras v. Philip Morris Companies, Inc.*, 341 F.3d 1253 (11th Cir. 2003), the court stated that “the revenue rule requires this court to abstain from considering the Republics’ claims because, not to do so, would necessarily require us to pass judgment on unadjudicated foreign tax claims for which the political branches of our government have not provided an enforcement mechanism.” *Id.* at 1261.

allows for both criminal⁸³ and civil actions,⁸⁴ and wire fraud can be a prominent player as one of the predicate acts in a RICO action.⁸⁵

The *Pasquantino* decision also does not resolve whether extraterritorial concerns can be considered in cases involving the application of federal statutes to social harms that occur outside the United States. Although it alluded to wire fraud having an extraterritorial application because of the language of the statute including the words “interstate or foreign commerce,” it also noted that the issue of extraterritoriality is a novel theory of a two-person dissent on an issue that the government did not have the opportunity to brief.⁸⁶

The *Pasquantino* dissent is divided into three parts with two justices, Justices Ginsburg and Breyer, on Part One, and Justices Scalia and Souter joining these two dissenters only on the remaining two parts of the decision. In Part One of the dissent, Justices Ginsburg and Breyer explored the issue of extraterritoriality, recognizing the “presumption against extraterritoriality.”⁸⁷ Without “congressional instruction,” the two-person dissent advised against extraterritorial application of the wire fraud statute.⁸⁸ This dissent noted the availability of Canada to extradite and prosecute these individuals.⁸⁹ Quoting from Judge Gregory’s dissenting opinion in the lower court’s *en banc* decision, Justice Ginsburg and Breyer stated that “Canadian courts are best positioned to decide ‘whether, and to what extent, the defendants have defrauded the governments of Canada and Ontario out of tax revenues owed pursuant to their own, sovereign, excise laws.’”⁹⁰

Part Two of the dissent, joined by Justices Scalia and Souter, expressed the view that the revenue rule was implicated by this wire fraud prosecution.⁹¹ This portion of the dissent stated “that Congress did not endeavor, by enacting § 1343, to displace the rule.”⁹² Part Three advocated for not allowing this conviction to

83. See 18 U.S.C. § 1963 (2005) (providing “criminal penalties”).

84. See 18 U.S.C. § 1964 (2005) (providing “civil remedies”).

85. See 18 U.S.C. § 1961 (2005). An unanswered question here is whether foreign governments will be permitted to bring civil RICO actions in the United States under the wire fraud statute for tax revenues that may be owing to their government. Civil RICO actions provide for treble damages and attorney fees and as such there are strong incentives for pursuing the actions in this country. See 18 U.S.C. § 1964 (2005).

86. Although the Court rejected the dissent’s extraterritoriality argument, in dicta it does note that the wire fraud statute included language of “punish[ing] frauds executed ‘in interstate or foreign commerce.’” *Pasquantino v. United States*, 125 S. Ct. 1766, 1780-81 (2005).

87. See *id.* at 1782. Interestingly the dissent failed to mention the prior Court precedent of *United States v. Bowman*, 260 U.S. 94 (1922) where the Court upheld a presumption against extraterritoriality in criminal cases unless Congress has spoken or the statute “as a class” is “not logically dependent on” the “locality for the government’s jurisdiction.” *Id.* at 98.

88. See *Pasquantino*, 125 S. Ct. at 1782-86. This dissent contrasted the wire fraud statute with other statutes that do provide for extraterritoriality. See *id.* at 1785. This dissent noted that the reference to “in interstate or foreign commerce” in the statute does not give it “extraterritorial effect.” *Id.* at 1785 n.7.

89. *Id.* at 1782.

90. *Id.* at 1782-83 (citing *United States v. Pasquantino*, 336 F.3d 321,343 (4th Cir. 2003)(*en banc*) (Gregory, J., dissenting)).

91. See *Pasquantino*, 125 S. Ct. at 1786-87.

92. *Id.*

stand because this involved a “close question” of statutory interpretation, and therefore the rule of lenity should have guided against using the harsher application.⁹³

C. Common Themes and Differences

Although David McNab and David Pasquantino were charged with very different crimes, there was a common theme in both of these cases. In both cases, a significant social harm was alleged to be occurring outside the United States. In the *McNab* case the violation that was punished was contingent on the laws of Honduras. Likewise, in *Pasquantino* the violation required a deprivation of property and the property was a loss of Canadian tax revenue. Neither case could have proceeded absent the laws of another country being used in the prosecution of the defendants.

In both cases the courts found that the United States had jurisdiction to prosecute the conduct because it violated a federal statute in the United States. Both cases gave deference to the executive to proceed with these types of prosecutions, and the majority opinions in both cases were less concerned with the international implications of the decisions.

A noteworthy difference between these two decisions was that in *McNab*, Congress had explicitly spoken on the incorporation of foreign law, namely the expression of foreign law found in the Lacey Act,⁹⁴ and in *Pasquantino*, the Court allowed the statute, the wire fraud statute, to include property of a foreign country.⁹⁵

III. EXTRATERRITORIAL PROSECUTIONS

In recent years, extraterritorial prosecutions have increased, and it is likely that globalization factors into this expansion.⁹⁶ Increased travel, commerce, and accessibility to communicate with other countries have the unfortunate side effect of increased extraterritorial criminal activities.

Prosecuting crimes with an international dimension presents new challenges for federal prosecutors. The initial question in all of these cases is whether there is appropriate jurisdiction to proceed with the criminal action.⁹⁷ At the heart of

93. *Id.* at 1787.

94. *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003).

95. *Pasquantino v. United States*, 125 S. Ct. 1766 (2005).

96. If one uses the terms “extraterritorial” and “United States” in a Lexis search under the category of federal cases, the following are the numerical results of “hits” over several years: 1970—28 hits, 1980—61 hits, 1990—65 hits, 2000—88 hits, and 2004—94 hits. Comparable results are found using Westlaw: 1970—28, 1980—63, 1990—7, 2000—97, 2004—98. Using the term “extraterritoriality” in place of extraterritorial also presents an ascending progression.

97. There are two aspects to the jurisdiction question. One is jurisdiction for prosecution of the crime and the other is obtaining jurisdiction of the person. This Article focuses only on jurisdiction for the prosecution

this question is whether the statute at issue encompasses activities occurring outside the United States.

Statutes fall into three categories when it comes to extraterritorial application.⁹⁸ In some cases, Congress writes a statute that exclusively focuses on extraterritorial conduct, as one finds in the Foreign Corrupt Practices Act⁹⁹ and the Export Administration Act.¹⁰⁰ With respect to these statutes, there is no question that the United States can prosecute extraterritorial conduct, as the statutes were written expressly for this purpose.

A second category involves generic statutes¹⁰¹ that specifically include a provision that permits an extraterritorial application. In this category, Congress has not focused exclusively on conduct outside the United States, but permits extraterritorial prosecutions by inserting explicit language in the statute.

There are two types of extraterritorial provisions that can be found in these generic statutes. In some statutes, there is an extraterritorial provision that applies to everything covered under the terms of that statute.¹⁰² For example, the false declarations statute specifically provides that “[t]his section is applicable whether the conduct occurred within or without the United States.”¹⁰³ Other statutes, however, may only allow for extraterritorial prosecutions in one or more specific contexts described by the statute. For example, the money laundering statute limits extraterritorial application to select circumstances related to nationality and the monetary amount of the transaction.¹⁰⁴

But whether Congress writes a statute with exclusive focus on extraterritorial conduct, or writes a statute that provides for an extraterritorial application by a provision within a statute, it is without question that in these two circumstances Congress has spoken clearly to allow for prosecution of conduct outside the

and does not venture into important questions such as obtaining jurisdiction of the person who will be prosecuted, and obtaining evidence from abroad in order to proceed with this prosecution. *See generally* ELLEN S. PODGOR, UNDERSTANDING INTERNATIONAL CRIMINAL LAW 87-113 (2005).

98. *See generally* Ellen S. Podgor, Essay, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CR. L. REV. 325 (1997).

99. *See* 15 U.S.C. §§ 78dd-1 to -3. (1998).

100. *See* 50 U.S.C. §§ 2401-10. (2000).

101. This refers to statutes that may have international aspects, but are really mainstream offenses that can apply to conduct both within and outside the United States. For example, the computer fraud statute can apply to conduct within the United States, but also can apply when the keystroke is outside the United States, but the individual is hacking into a computer that is located in this country. *See* 18 U.S.C. § 1030 (2005) (computer fraud).

102. *See* 18 U.S.C. § 1621 (2000) (perjury).

103. 18 U.S.C. § 1623 (2005).

104. 18 U.S.C. § 1956(f) (2000). The section provides:

There is extraterritorial jurisdiction over the conduct prohibited by this section if—

- (1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and
- (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding \$10,000.

Id.

United States. There is seldom an issue concerning the intent of Congress in either of these two scenarios.¹⁰⁵

Most cases, however, fall within the third category, a class composed of statutes that are completely silent as to the permissibility of prosecuting extraterritorial conduct. When jurisdiction is questioned, the extraterritorial issue is placed in the hands of the judiciary to resolve the issue. Judges are left to determine whether the statute's silence was intentional so as to prohibit extraterritorial prosecutions in this context, or whether it was an omission caused by a failure to consider this new aspect of criminal prosecutions.¹⁰⁶

Judicial incorporation of extraterritoriality into a statute starts by examining the language of the statute to determine if the intent of Congress was to have the statute apply to conduct outside the United States. Courts also use international law principles to ascertain whether there is an appropriate base of jurisdiction.¹⁰⁷

As one might suspect, discerning the intent of Congress can be extremely difficult, especially with older statutes where extraterritoriality might not have been a consideration at the time the statute was enacted. In criminal cases, looking at the intent of Congress starts with a presumption against extraterritoriality. As recently stated by the Supreme Court in *Small v. United States*,¹⁰⁸ there is a "legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial application."¹⁰⁹ This is particularly true in criminal cases where territorial jurisdiction usually serves as the driving force for determining jurisdiction for the prosecution.¹¹⁰

Despite a presumption in favor of territorial jurisdiction and against extraterritorial jurisdiction in criminal cases, federal courts almost always find that the statute allows for extraterritorial application. Courts reason that the intent of Congress was to allow for the statute to have an extraterritorial application, and that therefore an extraterritorial prosecution should be permitted.¹¹¹

105. See Podgor, *supra* note 98, at 329-35.

106. See *id.* at 335-40.

107. See *id.* at 335-44.

108. 125 S. Ct. 1752 (2005).

109. *Id.* at 1755. Additionally, the Court in *Small* stated, "In determining the scope of the statutory phrase we find help in the 'commonsense notion that Congress generally legislates with domestic concerns in mind.'" *Id.*

110. See *Bowman v. United States*, 260 U.S. 94 (1922). In *Bowman*, the Court stated, "The necessary locus, when not specifically defined, depends upon the purpose of Congress as evidenced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations." *Id.* at 97-98. The Court in *Bowman* found that "[c]rimes against private individuals or their property . . . must . . . be committed within the territorial jurisdiction of the government." *Id.* at 98. The Court distinguished this from "criminal statutes which are, as a class, not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents." *Id.*

111. See, e.g., *United States v. Layton*, 855 F.2d 1388 (9th Cir. 1988) (finding the intent of Congress in 18 U.S.C. § 1116 to allow for extraterritorial application).

In addition to discerning the intent of Congress, courts also look to international principles, as they provide guidance on whether extraterritoriality should be permitted.¹¹² In looking to international principles, five bases of jurisdiction, referred to as the Harvard Principles, assist courts in determining whether extraterritorial jurisdiction should be allowed.¹¹³ The Restatement (Third) of Foreign Relations Law also provides guidance as to when jurisdiction should be allowed,¹¹⁴ or when it might be unreasonable.¹¹⁵ Finally, in many cases treaties can assist in resolving jurisdictional questions.¹¹⁶

The most common base of jurisdiction is territorial jurisdiction, the place where the act occurred. A derivative of this form of jurisdiction considers extraterritorial conduct, and allows for prosecutions of conduct outside of the United States, when it "effects" this country. Called "objective territoriality," this principle emanates from the Supreme Court's decision in *Strassheim v. Daily*,¹¹⁷ where Justice Holmes found jurisdiction for acts outside a jurisdiction that were "intended to produce and producing detrimental effects within it."¹¹⁸ Although the *Strassheim* case involved the extraterritorial application of conduct between two states, courts continually use this principle to affirm the prosecution of conduct

112. See generally Podgor, *supra* note 98, at 340-44.

113. See Harvard Research in International Law, *Jurisdiction With Respect to Crime*, 29 AM J. INT'L L. 437, 445 (Supp. 1935) (describing the five bases of jurisdiction to prescribe as nationality, territoriality, passive personality, protective principle, and universality). Although these five bases are continually used in the court's jurisprudence, this has not precluded scholarship calling for reevaluation of the existing bases. See Ellen S. Podgor, *Extraterritorial Criminal Jurisdiction: Replacing "Objective Territoriality" with "Defensive Territoriality"*, in STUDIES IN LAW, POLITICS, AND SOCIETY 117 (Austin Sarat & Patricia Ewick eds., 2003) (discussing the problems with the breadth of objective territoriality with respect to all forms of criminal conduct and calling for the use of a model based on "defensive territoriality"); Ellen S. Podgor, "Defensive Territoriality": A New Paradigm for the Prosecution of Extraterritorial Business Crimes, 31 GA. J. INT'L & COMP. L. 1 (2002) (examining a new paradigm called "defensive territoriality" when prosecuting extraterritorial business crimes).

114. THE RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1986). The section provides:

Subject to § 403, a state has jurisdiction to prescribe law with respect to

- (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
- (b) the status of persons, or interests in things, present within its territory;
- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id.

115. *Id.* § 403.

116. See Note, Shannon K. Baruch, *The Proposed Florida Nonindigenous Species Statute: A Salvation for the Lacey Act*, 10 FLA. J. INT'L L. 185, 206-09 (1995) (discussing the "[m]arriage of the Lacey Act to [i]nternational [t]reaties").

117. 221 U.S. 280 (1911).

118. *Id.* at 285.

occurring outside this country.¹¹⁹ The “objective territorial” principle provides an almost limitless breadth, as it is relatively easy to demonstrate that the criminal conduct had an effect on the United States.¹²⁰

IV. A NEW DIMENSION TO EXTRATERRITORIALITY— APPLYING FOREIGN LAW

Clearly, acts that occur outside the United States that are prosecuted within this country are extraterritorial prosecutions. But how should prosecutions with extraterritorial harms be treated? What happens when the extraterritoriality involves the law of another nation and the United States is enforcing that law by proceeding with a criminal prosecution? These questions present a new dimension to the extraterritoriality discussion.

The *McNab* case rested upon use of the Lacey Act, which has a specific provision that incorporates foreign law.¹²¹ From its initial passage in 1900, the Lacey Act has played an important role in curtailing “illegal wildlife trade.”¹²² It has served as a model for other regulatory statutes that allow for consideration of foreign law.¹²³ For example, The Endangered Species Act of 1973 provides an extraterritorial application similar to that found in the Lacey Act.¹²⁴

Extraterritoriality was not an issue discussed in the appellate court decision in *McNab*. Most likely this is because Congress had spoken clearly in the Lacey Act by incorporating specific reference to foreign law. The relevant question in the *McNab* case was the accuracy of that law and at what point the law of a foreign nation would become final.¹²⁵

119. See, e.g., *United States v. Nippon*, 109 F.3d 1 (1st Cir. 1997) (allowing an extraterritorial prosecution of price-fixing activity that occurred wholly outside the United States but having an effect in this country); *Chau Han Mow v. United States*, 730 F.2d 1308 (9th Cir. 1984) (prosecuting drug related conduct because of its possible harmful effect in the United States).

120. The breadth of “objective territoriality” is not without criticism. See generally Ellen S. Podgor, *Extraterritorial Criminal Jurisdiction: Replacing “Objective Territoriality” with “Defensive Territoriality,”* in *STUDIES IN LAW, POLITICS, AND SOCIETY* 117 (AUSTIN SARAT & PATRICIA EWICK eds., 2003); Ellen S. Podgor, *“Defensive Territoriality”: A New Paradigm for the Prosecution of Extraterritorial Business Crimes*, 31 GA. J. INT’L & COMP. L. 1 (2002) (examining a new paradigm called “defensive territoriality” when prosecuting extraterritorial business crimes).

121. See *supra* note 16.

122. See Robert S. Anderson, *The Lacey Act: American’s Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 29, 36-40 (1995) (presenting a historical overview of the Lacey Act and the features of the present day laws).

123. The Black Bass Act initially mirrored the Lacey Act, and in 1949 it was extended to cover “interstate and foreign commerce.” *Id.* at 48. Eventually the Black Bass Act merged with the Lacey Act. See *id.* at 49.

124. See generally Comment, Mary A. McDougall, *Extraterritoriality and the Endangered Species Act of 1973*, 80 GEO. L.J. 435 (1991) (discussing the development of this act and the initial opposition to its extraterritorial provisions).

125. See *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003).

Although the discussion in *McNab* did not focus on the location of the alleged social harm, this was, in fact, implicit in deciding what the foreign law required. More importantly, if the foreign law had not been supposedly violated and there was no social harm to Honduras, there would have been no violation of the Lacey Act and no resulting prosecution. By enforcing the law of Honduras, whether correct or not, the U.S. justice system was proceeding under the guise of enforcing another country's law and attempting to punish conduct believed to be a social harm of this other country.¹²⁶

The *Pasquantino* case presents a similar constellation, in that the prosecution rested upon the law of another country, in this case the tax laws of Canada. More importantly, the social harm that supposedly occurred was to another country. Without a tax loss to Canada, there was no basis for the "property" element of wire fraud action.¹²⁷

Unlike the *McNab* case, in *Pasquantino*, the issue of extraterritoriality was raised and discussed. The five person majority in the *Pasquantino* case definitively stated that its "interpretation does not give it 'extraterritorial effect.'"¹²⁸ The Court called this "'extraterritoriality' argument" a "novelty." The Court found support for its position that the extraterritoriality argument should be considered a "novelty," in that the petitioners had not brought this issue to the Court's attention prior to their reply brief.¹²⁹

A two-person dissent, however, presented a different picture. The claim here was that the wire fraud statute should not be applied extraterritorially.¹³⁰ Unlike the Lacey Act, the 1952 wire fraud statute is not focused on extraterritorial conduct and does not contain within the statute a clear statement that it is to apply extraterritorially.¹³¹ The wire fraud statute's failure to provide explicit language allowing for extraterritoriality leaves to the judiciary whether the statute should have an extraterritorial application.¹³²

The two person dissent, led by Justice Ginsburg, considered the issue of extraterritoriality, finding the Court's majority decision "novel" in that it "fail[s] to take account of Canada's primary interest in the matter at stake."¹³³ This dissent stated that "[t]he defendants' convictions for wire fraud therefore resulted

126. This can in fact also be claimed to be a social harm to the United States, but the social harm here is still dependant upon foreign law. Without the Honduran regulation and resolutions the defendants would not have engaged in any improper activity. See *supra* notes 11-48 and accompanying text.

127. See *supra* notes 49-93 and accompanying text.

128. *Pasquantino v. United States*, 125 S. Ct. 1766, 1780 (2005).

129. *Id.* at 1781 n.12. The Court also noted that this deprived the government of the opportunity to respond. *Id.*

130. *Id.* at 1781.

131. Although the statute does contain the term "foreign commerce," this language goes to the wire transmission, a jurisdictional hook required for a prosecution. It is not focused on the scheme to defraud, a crucial element of the statute. In this case, the Court is allowing the property necessary for a scheme to defraud to be the property loss of another country, namely Canada.

132. See *supra* notes 106-07 and accompanying text.

133. *Id.* at 1782.

from, and could not have been obtained without proof of, their intent to violate Canadian revenue laws.”¹³⁴ The dissent found this improper because “[c]onstruing § 1343 to encompass violations of foreign revenue laws, the Court ignores the absence of anything signaling Congress’ intent to give the statute such an extraordinary extraterritorial effect.”¹³⁵

Interestingly, in a case issued on the same day as *Pasquantino*, the Supreme Court considered extraterritoriality of a federal statute and explicitly held that a statute that used the word “convicted in any court” would be limited to domestic convictions.¹³⁶ In *Small v. United States*,¹³⁷ the Court was not focused on the extraterritorial application of foreign law, but rather the use of foreign convictions in a United States court, and specifically, whether their use was permitted under the terms of the statute. In this context the Court found that a statute silent on extraterritoriality would be presumed to have no extraterritorial application.¹³⁸

V. EXTRATERRITORIALITY OF THE SOCIAL HARM

A. *The Two Davids*

Other than the two-person dissent in *Pasquantino*, the decisions in these two cases did not focus on the issue of extraterritoriality. Further there was relatively no direct mention in these decisions of the extraterritoriality of the alleged social harm. Yet by incorporating the law of another jurisdiction to determine the United States illegality, as was done in both the *McNab* and *Pasquantino* cases, the supposed social harm of another country formed the basis of a United States prosecution.

Some might claim that there is a dual harm, that being the violation of the law of another country and the resulting violation to United States law. Admittedly, it is possible to assert that there is a social harm to the United States if approached from this perspective. But the social harm to the United States only arises as a result of the preceding social harm to another country. Absent the initial social harm to another country, there is no derivative social harm to the United States.

One cannot, however, successfully argue that the underlying conduct, such as the smuggling that might have been involved in the *Pasquantino* case, should be considered a social harm to the United States as David Pasquantino and his co-

134. *Id.* at 1783. A lengthy footnote of this dissent notes how foreign law needed to be used to determine the sentence. *Id.* at 1784 n. 4.

135. *Id.* at 1784.

136. *See Small v. United States*, 125 S. Ct. 1752 (2005).

137. *See id.*

138. *Id.* at 1758. (“Given the reasons for disfavoring an inference of extraterritorial coverage from a statute’s total silence and our initial assumption against such coverage, . . . we conclude that the phrase ‘convicted in any court’ refers only to domestic courts, not to foreign courts.” (citations omitted)).

defendants were not charged with smuggling contraband into this country. The criminal case was premised on wire fraud, and the property element of the statute was premised on a deprivation of property via a scheme to defraud the government of Canada of tax revenues.¹³⁹ Likewise, in *McNab*, where the defendant was charged with smuggling, absent the foreign law, there would have been no violation of United States anti-smuggling law.¹⁴⁰

B. Disadvantages of Prosecuting Extraterritorial Social Harms

Most criminal cases with issues of extraterritoriality involve concerns of whether the United States has appropriate jurisdiction to proceed against conduct outside this country when the social harm occurs within the United States. Here, in contrast, the question is to what extent can the United States proceed against conduct when the social harm is outside this country. And equally important, when *should* the United States proceed against conduct with a social harm outside this country?

There are strong arguments for restricting white collar prosecutions premised on extraterritorial social harms.¹⁴¹ At the forefront of these concerns is the possible impediment to foreign policy. This is particularly apparent when there is a question as to the accuracy of the law of another country that is being enforced by the United States. The *McNab* case serves as an example of the disfavor that can accrue to the United States by continuing to pursue conduct that is thought to be contrary to the law of another country, but later is determined not to be.¹⁴²

Equally important are cost concerns. Justice Thomas, although writing for the majority in *Pasquantino*, questioned the use of prosecutorial resources in pursuing this conduct.¹⁴³ Should the United States be spending its justice related funds to pursue conduct that has a harm to another country? This is equally questionable in the context of *McNab*, where the other country, Honduras, now opposes the United States' enforcement of its supposed social harm. If the "social

139. See *supra* notes 49-93 and accompanying text.

140. See *supra* notes 11-48 and accompanying text.

141. This Article is limited to a discussion of extraterritoriality in the context of white collar offenses. It is unusual that issues of national security play a factor in these cases. Should national security be involved, a derivative harm to the United States might exist and might warrant prosecution of an extraterritorial social harm. See Podgor, *supra* note 120, at 29-30.

142. The executive that may be at the forefront of proceeding in a criminal action is not necessarily attuned to the concerns of foreign policy that might arise. The Department of Justice does have internal guidelines that require prosecutions involving international matters receiving approval of the Office of International Affairs. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-110.101. These guidelines, however, are merely internal guidelines that are not enforceable under law. See *United States v. Caceres*, 440 U.S. 741 (1979) (finding no constitutional violation when there is a failure to adhere to IRS guidelines); see also Ellen S. Podgor, *Department of Justice Guidelines: Balancing "Discretionary Justice,"* 13 CORNELL J. OF L & PUB. POL'Y 167 (2004).

143. See *supra* notes 80-81 and accompanying text.

harm" were in fact a concern of the other country, why not let that country be at the forefront of the prosecution?¹⁴⁴

White collar crimes present some unique qualities in the criminal law spectrum. They often include *malum prohibitum* crimes and in many cases conduct that can be pursued in either or both a civil or criminal context.¹⁴⁵ The crimes are often not obvious offenses. Unlike crimes of homicide, robbery, and rape, people in the business community are forced to go to enormous lengths to be apprised of the regulatory laws of the United States. Allowing the prosecution of extraterritorial social harms could increase the legal burden for businesses operating internationally. Although the *McNab* and *Pasquantino* cases may not have directly presented these issues, the direction being taken by these decisions causes concern for future cases. There is also the concern of increased prosecutorial discretion by giving prosecutors the additional power to not only proceed against social harms in the United States, but also those that may occur abroad.

C. A Paradigm for Prosecuting Extraterritorial Social Harms

There may be some instances when another country might prefer not to proceed with its own prosecution. In these circumstances, a United States prosecution might be specifically requested by that jurisdiction. But the impetus for these prosecutions is then coming from the originating country, the country experiencing the direct social harm. Comity concerns are not implicated when a country experiencing a social harm specifically requests that the United States proceed.

In the case of *McNab*, the reaction to the case might have been a different result if the highest legal authority of Honduras, the Attorney General, had requested the United States to proceed. Mere acquiescence and cooperation should not be seen as a proxy for a formal request to prosecute as made by the country experiencing the social harm.

Formal treaties that set forth procedures would, likewise, enhance the existing system. This would assure accuracy of the applicable law, provide a method of determining the foreign law, and also provide a method for deter-

144. If the individual who was the subject of a prosecution was in the United States, and the United States considered the prosecution warranted, it could easily consent to extradite that individual to the other country. In the case of *Pasquantino*, Justices Ginsburg and Breyer noted that the defendants had been "indicted in Canada for failing to report excise taxes and possession of unlawfully imported spirits." *Pasquantino v. United States*, 125 S. Ct. 1773, 1783 n.3 (2005) (Ginsburg, J., dissenting). Canada, however, had failed to request that the United States extradite the defendants to Canada. *Id.*

145. Prosecutorial discretion is often used in deciding whether to proceed civilly or criminally in the context of statutes such as antitrust violations, securities fraud, and trade violations. *See generally* See John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models-And What Can Be Done About It*, 101 YALE L.J. 1875, 1890 (1992) (discussing how criminal law should be limited to "clearly egregious behavior").

mining when it is appropriate for the United States to proceed with a prosecution. This approach could ameliorate some of the potential problems that can arise when one country proceeds to enforce another country's laws. Providing these safeguards could avoid catastrophes when comity is implicated.

A request by another country for the United States to proceed with a prosecution should not, however, automatically serve as a mandate for an indictment. Careful understanding of the international implications, as well as consideration of cost both in time and inability to prosecute other pressing needs, should be fully considered in determining the proper course of conduct. In addition, there are non-criminal remedies that can be invoked, such as fines and forfeitures.

VI. CONCLUSION

The two Davids discussed in this Article faced the Goliath of the United States criminal justice system and they lost. Although their cases are over, it is only round one for the status of how to approach prosecutions that are premised on social harms outside the United States. With increased globalization, these issues are likely to arise in the future. This is, therefore, a good time to be proactive and provide a construct for when and if prosecution of social harms of other countries will be allowed.

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