

General Aspects of Law **GALA**

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**FRIDAY
NOVEMBER 20, 2009 - 12:10 P.M.**

The De Minimis “Defense” To Criminal Liability

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The De Minimis “Defense” to Criminal Liability

Douglas Husak*

INTRODUCTION

Of the many defenses sufficiently important to be included in the influential Model Penal Code, surely the de minimis defense has attracted the least scholarly attention and generated the fewest judicial opinions.¹ Despite its potential availability in a broad range of circumstances, treatises often neglect this defense altogether. Entire monographs are written about self-defense, insanity, entrapment, and the like. But a search of legal periodicals reveals only a small handful of articles that focus on this mysterious plea.² Most of these articles presuppose a utilitarian, cost-benefit perspective on liability and punishment, and thus are only marginally relevant to the desert-based approach I invoke here. My aim is to correct this oversight by critically examining the de minimis defense from the standpoint of desert---if, indeed, it *has* a desert base and is properly categorized as a defense at all. Despite reaching few firm conclusions, my work is pioneering almost by default. But my objective is not merely to fill a lacuna among criminal law commentators by examining a neglected topic. I hope to demonstrate that de minimis is significant in its own right, but my inquiry is valuable largely because of

*Professor of Philosophy and Law, Rutgers University. Ken Levy, Peter Westen, and Jae Lee provided very helpful and detailed comments. Special thanks to Stuart Green, whose parallel research on the topic of de minimis theft has been extraordinarily valuable.

¹ The text of the statute is:

Model Penal Code §2.12. De Minimis Infractions

The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant’s conduct:

- (1) was within a customary license or tolerance, neither expressly negatied by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or
- (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
- (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

² Perhaps the most conceptually sophisticated piece is Stanislaw Pomorski: “On Multiculturalism, Concepts of Crime, and the De Minimis Defense,” 51 *Brigham Young University Law Review* 51 (1997).

what it reveals about other doctrines and principles in criminal theory that have attracted far more scrutiny from philosophers of law. I aim to establish that careful thought about *de minimis* helps to shed light on such central and fundamental topics as criminalization, the rule of law and the parameters of discretion, the relationship between morality and law, the structure of wrongdoing, the contrast between offenses and defenses, the concepts of justification and excuse, and even the nature of retributive justice itself.

I

In what follows, my discussion focuses on what I take to be (and what I will subsequently call) true *de minimis* rather than on the particular text of §2.12 of the Model Penal Code. My reasons are simple. By its own terms, §2.12 creates a defense, and *de minimis* may not always function as a defense. Moreover, §2.12 contains what I take to be *four* separate but loosely related defenses that are misleadingly assimilated in a single statute titled “De Minimis Infractions.” Perhaps only one and at most two of these distinct defenses can plausibly be construed as a formulation of *de minimis*. §2.12(1) applies when the defendant’s conduct is “within a customary license or tolerance,” and §2.12(3) bars liability when the defendant’s conduct “presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.”³ Fascinating though these (equally neglected) provisions may be, there need be nothing *minimal* about the extent of the harm or evil caused when either §2.12(1) or §2.12(3) is invoked. Thus I will confine almost all of my remarks to §2.12(2)---which is the sole part of the statute that could be said to create a true *de minimis* defense.⁴

§2.12(2) provides that “the court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant’s conduct. . . did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to

³ *Model Penal Code*, §2.12.

⁴ The Comments to the Code acknowledge that the considerations contained in §2.12(2) lie “more literally within the *de minimis* label.” *Comments* to §2.12, p.403.

an extent too trivial to warrant the condemnation of conviction.”⁵ It is evident that each clause in this disjunctive provision creates a separate defense, only the second of which is clearly described as *de minimis*. It is one thing to deny that the defendant’s conduct caused or threatened *any* of the harm or evil sought to be prevented by the law defining the offense, and quite another to admit that her conduct *did* cause or threaten that very harm or evil, but did so only to an extent too trivial to permit a conviction. Why would anyone describe the former phenomenon as *de minimis*? In a true *de minimis* situation, the harm or evil is caused, albeit to a minor degree. To avoid possible confusion, I will refer only to cases that arise under the second clause of §2.12(2) as instances of *true de minimis*.

When the first clause of §2.12(2) is invoked, the defendant alleges that the harm or evil to be avoided by the offense is not caused or threatened at all. *De minimis* or not, such circumstances create a powerful case for exculpation---even more powerful than true *de minimis*. In a true *de minimis* case---contemplated by the second clause of §2.12(2)--- the defendant’s conduct *did* cause the harm or evil sought to be prevented by the law defining the offense, but did so to an extent too trivial to warrant the condemnation of conviction. The example provided by the draftsmen involves an “unconsented-to contact” that “might constitute a technical assault in some jurisdictions, even though the harm that was threatened and that in fact occurred was too trivial for the law to take into account.”⁶ Although a case in which the harm or evil to be prevented by the statute did not occur in any amount provides an even more powerful basis for exculpation, an intuitive basis for acquittal is also compelling in a true *de minimis* situation. Liability in this situation would be unjust, even though persons may disagree about exactly what is unjust about it. In Part V of this paper I will attempt to support this intuition and suggest why a *de minimis* principle is needed. As we will see, the rationale I will provide---although not especially original---has important but easily overlooked implications for a large body of criminal law doctrine. Before turning to this issue, however, several additional observations about the Code’s *de minimis* provision are helpful.

⁵ *Model Penal Code*, §2.12(2).

⁶ *Model Penal Code*, Comments to §2.12, pp.403-404. Presumably, this problem could be rectified by better draftsmanship; an assault statute should ban only nontrivial unconsented touchings.

First, I subsequently omit the “..or evil” part of §2.12(2) when referring to the statutory codification of a true de minimis defense. Part of my reason is simplicity. It is not entirely clear what the “evil” disjunct is designed to add to the “harm” disjunct. Perhaps they are redundant. A second reason for deleting reference to evil is my contention that conduct is best construed as de minimis when its degree of wrongfulness is too minimal to justify a criminal conviction.⁷ This contention may seem peculiar in an argument for retaining that part of the statute that refers to *harm*. After all, wrongfulness and harm are distinct. Many and perhaps most types of acts, however, owe much of their wrongfulness to their tendency to cause harm; their wrongfulness consists solely or partly in their harmfulness. A true de minimis defense is most easily granted when the wrongfulness of the offense is too trivial to warrant a conviction because the amount of harm caused (or risked) is too small to justify the imposition of criminal liability.⁸ Thus I will continue to refer to harm in my examination of de minimis.

Notice also that no one can hope to decide whether a given crime is de minimis unless he is able to identify the particular harm a given statute is designed to prevent. How do we know what objective given statutes are intended to achieve? Often the answer is apparent. Statutes proscribing core offenses such as murder and rape are designed to prevent the obvious harms caused by these crimes. In many cases, however, the harm a statute is designed to prevent is much less clear. Unfortunately, legislators have no duty to inform citizens of the harms they intend their penal laws to proscribe. Courts are generally unwilling to attribute a purpose to a piece of legislation, and thus are reluctant to find that the application of a given statute to a particular situation will not facilitate its objective. Judgments about whether a crime is de minimis may remain contested in the absence of agreement about the nature of the harm a statute is designed to prevent.

⁷ Commentators who have addressed this topic concur in formulating de minimis in terms of wrongfulness. For example, see Andrew Ashworth: Principles of Criminal Law (Oxford: Oxford University Press, 5th ed., 2006), p.47.

⁸ Admittedly, my interpretation makes it difficult to decide whether and under what conditions given violations of (so-called) regulatory offenses are de minimis. Suppose, for example, that a defendant breaches a law requiring him to certify that he has complied with a rule. Since the wrongfulness of a breach is not easily construed as a function of the harm caused or risked, it is hard to know how a de minimis principle would apply. For similar worries, see *Id.*, p.47.

Although the two clauses of §2.12(2) are easy to distinguish analytically, the difficulty of identifying the harm a statute is designed to prevent may contribute to uncertainty about *which* clause is invoked in a particular case in which the defense is potentially available. In some contexts, the defendant *cannot* cause the harm or evil the statute seeks to prevent precisely because of the sense in which his offense is too trivial to produce it. The offense of drug possession illustrates this phenomenon. Consider a defendant who is arrested and prosecuted after non-usable traces of drugs are vacuumed from the carpet of his house or car. If the point of a statute proscribing drug possession is to prevent persons from using a drug for a given purpose---say, to produce intoxication---the defense should be applicable when the amount possessed is too miniscule to cause that psychological effect.⁹ Admittedly, this defense seldom succeeds,¹⁰ and some statutes contain language that seems to disallow it. If an offense attaches liability to the intention of the defendant rather than to a result he must cause, the fact that the amount of a drug is too small to produce that effect is immaterial. All that matters is that he intended the drug to cause that result.

Next, it is noteworthy that codifications of *de minimis* are fairly uncommon throughout the Anglo-American world. Despite the remarkable success of the Model Penal Code in stimulating statutory reform among the fifty states, only four---New Jersey, Maine, Hawaii and Pennsylvania---have actually adopted a true *de minimis* defense.¹¹ The absence of comparable language in the vast majority of state penal codes is peculiar. After all, *de minimis* is hardly a strange idea with ties to a controversial political ideology. Nor is it of recent vintage.¹² Even a child knows something is amiss when she is punished for a trivial violation of a rule. The absence of a *de minimis* defense would seem to increase the probability of injustice. As commentators recognized over fifty years ago, if criminal statutes were enforced as “precisely and narrowly laid

⁹ See Comment: “Criminal Liability for Possession of Nonusable Amounts of Controlled Substances,” 77 *Columbia Law Review* 596 (1977).

¹⁰ But see *State v. Vance*, 602 P.2d 933 (Haw. 1979), and cases cited therein.

¹¹ Each of these states has tinkered with the language of §2.12. See *N.J. Stat. Ann.* 2C:11; *Me. Rev. Stat. Ann.* 17A, 12; *Haw. Rev. Stat.* 702-236; and 18 *Pa. Cons. Stat. Ann.* 312. Guam also includes a *de minimis* provision.

¹² Indeed, it is dignified with a Latin formulation: *de minimis non curat lex*. This maxim typically is translated as “the law does not concern itself with trifling matters.” The classic piece is Max L. Veech and Charles R. Moon: “De Minimis Non Curat Lex,” 45 *Michigan Law Review* 537 (1947).

down, the penal law would be ordered but intolerable.”¹³ The potential for mischief is even greater today than when the Model Penal Code was drafted. The recent trend has been to enact exceedingly broad and open-ended statutes that legislators do not expect to be enforced as written. Greater numbers of crimes reaching a broader range of conduct magnify the opportunities for unjust convictions.¹⁴ Under these circumstances, the absence of something resembling a de minimis defense seems unthinkable. We know that few employees who commit petty theft against their employers are actually punished. How do we achieve results we take for granted when no explicit provision of law requires exculpation? In other words, how do states manage to avoid injustice without a de minimis defense?

Presumably, states circumvent the need for a true de minimis defense largely through exercises of official discretion. Police and prosecutors inevitably enjoy vast discretionary powers largely as a result of the extraordinary breadth of penal laws. These officials can hardly proceed in every case in which a person is thought to be violating the literal terms of a law, and thus have little choice but to use their judgment about which conduct is worth arresting and prosecuting. Although the principles they employ in exercising their discretion are not always clear, it seems obvious that police and prosecutors fail to arrest or to bring charges in circumstances they assess to be de minimis. Thus injustice is more readily avoided than in a system in which little or no discretion is entrusted to these officials.

If few jurisdictions expressly contain statutory language modeled after §2.12(2), what actually happens to defendants in those rare and regrettable circumstances in which they are arrested and prosecuted for causing a minor harm? Are such persons more likely to be convicted and punished than in jurisdictions that contain a true de minimis defense? As far as I can see, reliable data on this important question is unavailable. But one reason to be skeptical that the outcomes in these two kinds of jurisdictions differ is that few defendants actually succeed on a de minimis plea even where the defense exists. No one

¹³ Charles D. Breitel: “Controls in Criminal Law Enforcement,” 27 *University of Chicago Law Review* 427, 427 (1960).

¹⁴ See Douglas Husak: Overcriminalization (New York: Oxford University Press, 2008).

should doubt, however, that many prosecutions that involve de minimis infractions are resolved through less visible means---whether or not an explicit defense is available.¹⁵

II

Few would deny that de minimis does and should affect sentences. *Ceteris paribus*, offenses that cause minor harms should be punished less severely. But it is crucial to appreciate that de minimis may play at least three distinct but related roles in a theory of criminal liability prior to the sentencing stage. Each of these three roles admits of subtle variations and occasionally blur into one another. First and perhaps most obviously, de minimis may function as a constraint on criminalization. Second, de minimis---or, more precisely, the contrary of de minimis---may appear as an element of a criminal offense. Third, de minimis may serve as a true defense from liability. Criminal theorists have reason to carefully distinguish each of these three roles. Among the ultimate objectives of a theory of de minimis is to specify when this exculpatory consideration should play one role rather than another. Unfortunately, my own efforts will fall short of this aspiration. My more modest goal is to identify some of the factors that should be brought to bear in deciding which of these roles de minimis should play in given situations. One reason I will be unable to reach the more ambitious objective is that theorists are bound to disagree about some of the moral intuitions I will invoke in particular cases.¹⁶ Although I will eventually attempt to support some of these intuitions, I am aware that the entire topic of de minimis is riddled with intractable controversy. No starting point in a theory of de minimis is secure and capable of supporting a foundation. Some theorists are likely reject its exculpatory force altogether.

¹⁵ Impressive evidence that jurors invoke de minimis concerns in reaching verdicts is presented in the path-breaking study by Harry Kalven, Jr. and Hans Zeisel: *The American Jury* (Chicago: University of Chicago Press, 1965), Chapter 18. More recent support for this suspicion can be found in several of the jury nullification studies on www.ncscoline.org.

¹⁶ One source of intuitive complexity is that judgments about de minimis are likely to be relative to the status of victims. For example, it may be more culpable to steal a dollar from a wealthy merchant than from someone who is impoverished. The former act is a better candidate for de minimis than the latter.

I will briefly describe each of the three roles *de minimis* might play in a theory of criminal liability. First, *de minimis* is among the cornerstones of a theory of criminalization, serving to limit the kinds of penal offenses legislatures should enact. As we will see, *de minimis* concerns often arise when a particular instance of criminal conduct is trivial, even though most other acts of that type are not. Some acts of theft are petty, for example, even though theft in general is relatively serious. When a statute proscribes conduct that is *always* innocuous, however, *de minimis* is applicable in its first and most fundamental sense. If a problem is trivial, the heavy hand of a punitive sanction is not an appropriate mechanism to address it. A social concern may be small and thus not require a penal solution for at least two reasons, only the second of which involves a genuine *de minimis* rationale. In the relevant sense, a problem is small not because few persons engage in the activity that causes it, but regardless of the number of such persons. If the problem is insufficiently serious to justify subjecting persons to punishment, a genuine *de minimis* rationale entails that a penal statute should not be created. Statutes that proscribe types of minor harms should not have been enacted in the first place.

Clearly, perceptions of the seriousness of given harms may evolve over time. When an existing law is designed to prevent a type of harm that comes to be regarded as trivial, one would expect *de minimis* concerns to bring about *de facto* if not *de jure* legal change. One of the main reasons that offenses fall into desuetude is because the community has ceased to believe they are sufficiently serious. I suspect that the non-enforcement of such crimes as adultery and fornication (in jurisdictions where they still exist) is explained partly by applications of a *de minimis* principle. Thus the law in action is bound to reflect judgments about *de minimis*, even when the law on the books does not.

It is hard to offer examples of *de minimis* offenses that should not have been enacted, since many acts that should not be punished are tokens of types that are legitimately criminalized. Consider a law proscribing the defacing of library books. Most citizens would differentiate between a borrower who uses a pencil to place a faint dot next to a memorable passage in a paperback and a patron who rips whole pages from valuable hardcover books. In light of this, can any examples of *de minimis* statutes be identified? The best candidates would be laws utilizing verbs that necessarily describe

relatively trivial behavior. A statute prohibiting conduct that causes annoyance, irritation or inconvenience, for example, would fail a *de minimis* test; serious harms simply do not satisfy these descriptions---although they might be useful to prosecutors in plea-bargaining. In any event, I am unsure whether any existing law proscribes a type of activity for which no token is serious.

De minimis plays a second role in the criminal law: its contrary may be an element of a criminal offense. This function might be performed implicitly. Absent language to the contrary, it is arguable that all offenses should be construed to include clauses that exculpate *de minimis* offenders. This contention might be defended by a principle of statutory interpretation that forbids laws to be applied to reach absurd results.¹⁷ But are *de minimis* convictions really *absurd*? This second function is performed with less controversy when such clauses are explicit. A given offense might expressly provide that violations must exceed a given threshold of harm. At least two distinct means are available to ensure that statutes cannot be construed to punish minimal harms. First, a statute might specify exactly what quantum of harm is needed before a violation occurs. This result is achieved most readily when harms are easily quantifiable. Consider, for example, a noise (or pollution) ordinance. Obviously, activities that cause some amount of noise are necessary and beneficial. Ideally, then, legislators should provide guidance by specifying exactly how *much* noise---in decibels---persons are permitted to make.

When levels of harm resist simple quantification, however, it is nearly impossible to describe what amount of harm is needed before an offense occurs. In these situations, a second device can be used to ensure that statutory infractions exceed a given threshold. The offense itself might explicitly require violations not to be *de minimis*, without specifying exactly which actions do or do not qualify. A statute might include a vague standard by stipulating that an infraction must be serious, severe, substantial, or the like. A probable example is the Federal Copyright Law. The complex scheme governing copyright infringements creates an exception for “fair use,” defined in part by reference to “the amount and substantiality of the portion used.”¹⁸ Although this exception does

¹⁷ I owe this suggestion to Alessandro Spina.

¹⁸ 17 U.S.C. §107.

not literally employ the term “de minimis,” it seems reasonable to construe it to permit infringements deemed to be trivial.¹⁹ Much of the recent commentary about de minimis addresses this second role.²⁰ Theorists have struggled to draw the line beyond which a copyright infringement becomes substantial.²¹ The fact that the bulk of legal commentary on de minimis seeks to answer such questions demonstrates the remarkable extent to which a true de minimis *defense*---the third role I will eventually discuss---is invoked so infrequently.

On some occasions, statutes are construed to contain language said to require the conviction of the de minimis offender. As we have seen, for example, courts have wrestled with the question of whether to punish persons for possessing quantities of drugs too small for the body to detect.²² Some judges have purported to resolve this issue through statutory interpretation. Laws prohibiting the possession of “any controlled substance” or a controlled substance “in any amount” have been construed to bar the de minimis plea.²³ I suspect, however, that statutory interpretation does not wholly explain the result in these cases. When a drug offender alleges de minimis, courts sometimes respond that “narcotics are contraband and dangerous, causing untold harm to users and to the public by illegal use. A more liberal interpretation favorable to drug addicts cannot reasonably be given.”²⁴ Such remarks raise the question of whether the commission of some types of crime *cannot* be de minimis. If so, what properties must a crime possess before de minimis pleas are ruled out? One would think that the most serious crimes---murder and rape, for example---might qualify. Drug possession, however, does not seem especially serious.²⁵ Moreover, I have pointed out that even though a *type* of offense is serious, it hardly follows that each *instance* of that type must be serious as well. In principle, it is hard to see why *any* crime (that does not explicitly allow minor infractions)

¹⁹ See, for example, *Sony Corp. of America v. Universal City Studios*, 464 U.S. 407 (1984).

²⁰ For example, see Andrew Inesi: “A Theory of De Minimis and a Proposal for Its Application in Copyright,” 21 *Berkeley Technology Law Journal* 945 (2006).

²¹ For example, see David S. Blessing: “Note, Who Speaks Latin Anymore?: Translating De Minimis Use for Application to Music Copyright Infringement and Sampling,” 45 *William and Mary Law Review* 2399 (2004).

²² One-half grain (32 milliliters) was possessed in *People v. Leal*, 413 P.2d 665 (Cal. 1966).

²³ See *State v. Forrester*, 564 P.2d 289 (Ore. 1977).

²⁴ *State v. Dodd*, 137 N.W. 2d 465, 473 (Wisc. 1965).

²⁵ See Douglas Husak: “Desert, Proportionality, and the Seriousness of Drug Offences,” in Andrew Ashworth and Martin Wasik, eds.: Fundamentals of Sentencing Theory (Oxford: Clarendon Press, 1998), p.187.

should be construed to forbid an acquittal on de minimis grounds. I suspect that cases of de minimis rapes and murders are possible, although examples are bound to generate controversy.

De minimis plays yet a third conceptually distinct role in the criminal law. Suppose a given statute prohibits a type of harm that is serious and does not contain language governing the trivial offender (one way or the other). Still, no defendant should be convicted if his particular conduct causes a trivial amount of the harm the law is designed to prevent. Most of my subsequent comments will focus on this third and final role---which alone is properly described as a true de minimis defense.

It is important to notice that de minimis cannot play this third role---as a true defense---when it plays its second role---and its contrary is included as an explicit element of a criminal offense. Suppose, for example, that a statute forbids lenders to charge a rate of interest greater than 18%. Defendants will have an uphill struggle in contending that their lending is de minimis when it exceeds, however trivially, the specified threshold. In addition, a de minimis defense is unavailable when statutes are graded. Suppose a law specifies that a defendant commits grand larceny when he steals property worth \$100,000 or more, and otherwise commits petty larceny. If a defendant steals property worth exactly \$100,000, has he committed de minimis grand larceny so that his charge should be reduced to petty larceny? Obviously not. Once a clear numerical threshold has been established, no crimes beyond that level can be de minimis.

The fact that de minimis is hard to plead when statutes create a precise numerical threshold may help to explain the dearth of cases in which the defense is invoked for violations of speed limits. Intuitively, speed limits may seem to be among the very best examples of laws that should allow a de minimis defense. We all know that persons who drive faster than the speed limit by a single mph almost never are arrested or prosecuted. But if a statute expressly specifies that drivers may not exceed 35 mph, for example, it is problematic to argue that a speed of 36 is de minimis. Legislatures would have had no difficulty exempting persons who drive at this speed from liability. The fact that they stipulated 35 as the exact threshold is powerful evidence that they did not regard drivers

who travel at 36 mph as qualifying for a defense.²⁶ If drivers should not be liable under these circumstances---as I am inclined to believe---the basis of their acquittal is probably not *de minimis*. Perhaps the “customary license or tolerance” provision of §2.12(1) provides a better rationale for acquittal than the true *de minimis* defense of §2.12(2).

The defense of *de minimis* is unavailable even when statutes include a vague standard rather than a bright quantifiable line. Suppose that an offense imposes liability only when an act of littering, for example, is “substantial”, “serious”, or the like. Defendants are ineligible for sanctions when they produce insubstantial amounts of litter; those below that level would simply not be in violation of the statute and therefore would have no need for a defense. This point is important, since the contrary of *de minimis* is implicitly incorporated into statutory definitions of recklessness and negligence.²⁷ Both culpability terms require that defendants create a *substantial* risk of harm before liability may be imposed. Substantial risks, I assume, cannot be *de minimis*. If a defendant who is otherwise reckless or negligent creates a risk that is not substantial, he has no need for a *de minimis defense*, as he has not breached the statute itself. Since the contrary of *de minimis* is implicitly incorporated into statutory definitions of recklessness and negligence, a true *de minimis* defense should be available only for crimes requiring the culpability of knowledge or purpose.

In describing *de minimis* as a true *defense*, I mean to ignore the most familiar rationale in its favor. Frequently, judicial proceedings involving a *de minimis* infraction are denounced as an inefficient use of judicial resources.²⁸ Clearly, the social costs of applying a legal rule to a particular infraction may outweigh their benefits, and a *de minimis* provision allows a criminal justice system to allocate its resources wisely. But even though this rationale for *de minimis* is sensible and important, I will not explore it further here. As I have indicated, I am interested in arguments of principle, that is, in the

²⁶ The “plain meaning” of such laws is hard to reconcile with a tolerance for *de minimis* violations. See, for example, *U.S. v. Locke*, 471 U.S. 84 (1985).

²⁷ Analogues to §2.12(2) can be found in other statutory language as well. A prosecution for attempt, solicitation, or conspiracy, for example, can be dismissed if the conduct charged is “so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger.” See *Model Penal Code*, §5.05(2).

²⁸ This rationale pertains to civil litigation as well. When a man sued a company for tricking him into opening an envelope, a California appellate court called the suit “an absurd waste of the resources of this court, the superior court, the public interest law firm handling the case and the citizens of California whose taxes fund our judicial system.” *Harris v. Time, Inc.*, 191 Cal.App. 3d 449, 458 (Ct. App. 1987).

issue of whether defendants *deserve* to be acquitted for de minimis infractions. Although a defendant may complain if a court is using its resources ineffectively, his complaint cannot be couched in terms of desert. In what follows, I will investigate whether de minimis might be construed as a *substantive* defense---a defense to which persons are entitled as a matter of justice.²⁹ I continue to put utilitarian arguments aside.³⁰

If the foregoing distinctions between the three possible roles played by de minimis are tolerably clear, we should inquire whether and under what conditions these distinctions are important. In what circumstances should the contrary of de minimis be an element of the offense and when should de minimis function as a true defense? What difference does it make which of these roles de minimis plays? Procedurally, of course, these distinctions can be crucial for the assignment of burdens of proof. But do these contrasts matter substantively? Unless the answer is affirmative, it is unclear *why* these distinctions should have any procedural significance. As I have indicated, I will not hazard a general answer to these difficult questions. The best way to make progress toward their resolution is by deciding whether and why the contrast between offenses and defenses is important. Thus this inquiry about de minimis plunges us directly to the heart of some of the most central topics in criminal law theory. To these issues I now turn.

III

Assume that a statute does not violate principles of criminalization by proscribing a trivial *type* of harm. De minimis might still play the second or third of the foregoing roles I have distinguished. Either its contrary may appear as an element of a criminal offense, or de minimis may serve as a true defense from liability. Which of these remaining roles should it play? Various proposals for distinguishing offenses from

²⁹ See Douglas Husak: Philosophy of Criminal Law (Totowa, N.J.: Rowman & Littlefield, 1987), Chapter Seven.

³⁰ Although many of the considerations he invokes would seem to support the conclusion that defendants deserve to be acquitted for de minimis infractions, the rationale Paul Robinson eventually cites is more clearly consequentialist in nature. He indicates: "By excluding [from the criminal justice process those harms and evils that are too trivial to merit the special condemnation of criminal conviction] the condemnation value of conviction is maintained and is more likely to be effective in serious cases, where it is most useful." 1 Paul Robinson: Criminal Law Defenses (St.Paul: West Pub. Co., 1984), p.324.

defenses appear to have very different implications for understanding the exculpatory significance of *de minimis*. To be sure, a few distinguished theorists have contended that this contrast is wholly irrelevant for substantive purposes.³¹ Nearly all commentators, however, concur that the distinction between offenses and defenses is normatively important. They disagree, however, about *what* is substantively significant about it, and thus about how this distinction should be drawn. I assume that all issues that are material to liability must be relevant either to whether the defendant has committed an offense or to whether he has a defense for committing it. Careful thought about how to understand the significance of *de minimis*---whether it should be treated as a defense or whether its contrary should somehow be included in an offense---may help us to gain insight not only about this plea, but also about the contrast itself.

Some of the most distinguished criminal theorists have sought to show how the distinction between offenses and defenses should be drawn and why this contrast matters substantively. In what follows, I will briefly examine how thoughts about *de minimis* reflect on the merits of three such proposals. Unfortunately, the implications of these views for the categorization of *de minimis* are far from clear, and my attempts to apply their positions to questions about this plea involve enormous conjecture and speculation. Thus I say that each of these proposals to distinguish offenses from defenses *appears* to have very different implications for how *de minimis* might be understood.

It may be instructive to try to assess the implications of these three proposals for *theft*---a crime for which it seems intuitively plausible to suppose that a defendant should not be punished when his conduct is *de minimis*. If a theft involves property of exceptionally low value, a *de minimis* defense seems applicable.³² In *State v. Smith*, for example, a defendant was acquitted despite stealing three pieces of bubble gum.³³ In *State v. Nevens*, a defendant escaped liability when he took home a few items of fruit from an all-you-can-eat restaurant buffet.³⁴ Although I will try to support this intuition later, for the moment I will tentatively suppose that the above decisions are correct. I will use this supposition to assess scholarly attempts to contrast offenses from defenses. If the

³¹ See Glanville Williams: "Offences and Defences," 2 *Legal Studies* 233 (1982).

³² Somewhat surprisingly, acquittals for *de minimis* thefts are infrequent. For example, in *Commonwealth v. Campbell*, 417 A.2d 712 (1980), the defense failed when the defendant shoplifted goods valued at \$1.59.

³³ 480 A.2d 236 (1984).

³⁴ 485 A.2d 345 (1984).

defendants in the above cases deserve to be exculpated, should the basis of their acquittal be located in the offense or in a defense? Admittedly, we need not reach the same answer for each and every situation involving de minimis in which we believe that exculpation is warranted. Still, a single example of a crime may be helpful both to understand and to evaluate the following three proposals to distinguish offenses from defenses.

George Fletcher was perhaps the first theorist to propose that the distinction between offenses and defenses matters for normative purposes. According to Fletcher, offense definitions should describe conduct that “incriminates the actor in a given society at a given time... The minimal demand on the definition of an offense is that it reflects a morally coherent norm.”³⁵ These sketchy remarks are insightful, but are difficult both to interpret as well as to apply. Fletcher admits that “we find it hard” to specify the precise “questions of degree” that inevitably arise in deciding whether there exists a “coherent moral imperative” against particular modes of conduct.³⁶

As I construe it, Fletcher’s methodology for distinguishing offenses from defenses yields no single answer to whether de minimis should be treated as a defense or whether its contrary should be included in the definition of an offense. Uncertainty of application is not surprising here. The contrast between acts that are trivially wrongful and acts that are not wrongful at all is hard to draw. Thus I regard this uncertainty as an advantage of his view. In some contexts, like copyright, my own interpretation of our “moral imperative” is that we do not regard behavior as incriminating *at all* when persons commit given de minimis infringements. As one court has noted,

“most honest citizens in the modern world frequently engage, without hesitation, in trivial copying that, but for the de minimis doctrine, would technically constitute a violation of law. We do not hesitate to make a photocopy of a letter from a friend to show another friend, or of a favorite cartoon to post on the refrigerator... Waiters at a restaurant sing ‘Happy Birthday’ at a patron's table. When we do such things, it is not that we are breaking the law but unlikely to be

³⁵ George Fletcher: Rethinking Criminal Law (Boston: Little, Brown and Co., 1978), p.562 and p.567.

³⁶ *Id.*, p.568.

sued given the high cost of litigation. Because of the de minimis doctrine, in trivial instances of copying, we are in fact not breaking the law.”³⁷

If this judgment is correct, as I believe it to be, Fletcher’s view entails that the contrary of de minimis should be included in the definition of the behavior that constitutes a violation of copyright law. As I have indicated, existing copyright (apparently) does just that.

In other contexts, however, our judgments about the exculpatory significance of de minimis almost certainly differ. Consider my example of the theft of a small amount of merchandise. The act of stealing a piece of bubble gum from a store unquestionably violates a coherent moral imperative, even though its *degree* of wrongfulness is minimal.³⁸ If so, the exculpatory significance of de minimis must be conceptualized as a true defense to this act of theft. Although there may be good reason *not* to recognize such a defense---a reason to which I will return---my attempt to apply Fletcher’s proposal for contrasting offenses from defenses would not allow the contrary of de minimis to function as an element of the crime of theft.

Still other examples are hard to categorize either way. The parameters of what employees are permitted to take from their employers for personal use are vague.³⁹ Is it a “coherent moral imperative” to forbid office managers, for example, from taking pens and pencils from their workplace to the home? Or do our norms permit such behavior? As Fletcher anticipated, judgments about coherent moral norms may be ambivalent and unclear. If so, reasonable minds will differ about whether the contrary of de minimis should be treated as an element of the offense that prohibits such conduct or whether de minimis should be treated as a true defense.

Next, consider Antony Duff’s novel proposal for distinguishing offenses from defenses. According to Duff, the contrast between offenses and defenses mirrors the contrast between responsibility and liability. Persons are responsible for that for which they may be made to answer, and it is fair to require them to answer in criminal court for a presumptive (or *prima facie*) wrong. Persons are liable when they lack a defense for a presumptive wrong for which they are responsible. A presumptive wrong, in turn,

³⁷ *Davis v. Gap, Inc.*, 246 F.3d 152, 173 (2d Cir. 2001). Presumably, Fletcher’s proposal to distinguish offenses from defenses would apply just as well to *civil* norms designed to prevent faulty behavior.

³⁸ *State v. Smith*, 480 A.2d 236 (1984).

³⁹ See Stuart Green: “De Minimis Thefts” (forthcoming). Green provides data suggesting that as many as 60% of all American employees admits to having taken office supplies from work for personal use.

consists in conduct that individuals normally have categorical and conclusive reasons not to consider as options. Thus presumptive wrongs must be defined as wrongs for which persons will be convicted unless they can offer an exculpatory defense.⁴⁰ Is conduct a presumptive wrong even when it is de minimis? In other words, should a defendant be required to answer in criminal court for his de minimis wrongs? If so, the exculpatory significance of de minimis must be treated as a true defense. If not, the contrary of de minimis must be included among the set of elements that comprise an offense.

Although the above *question* is tolerably clear, its *answer* is not. Superficially, at least, it seems that persons should never be made to appear in criminal court for a de minimis infraction. If someone engages in conduct that causes a trivial harm, it seems unjust to deem him responsible (in Duff's sense) and to require him to respond by pleading a defense on pain of liability. Unless I have misunderstood it, Duff's theory makes it hard to see why de minimis should *ever* be a true defense. To return to my example, suppose our bubble-gum thief is arrested and prosecuted. If his conduct should not be punished, as I have tentatively claimed is intuitively correct, it must be because he should not be required to answer for it in criminal court. What could this defendant possibly say to a judge that was not already known? If I am correct, legislators who implement Duff's methodology for contrasting offenses from defenses are well advised to include the contrary of de minimis in any offense for which it has exculpatory significance. In other words, all statutes for which de minimis is exculpatory should be defined analogous to copyright law. A defendant whose conduct causes a trivial harm should not be treated as having committed a crime in the first place.

Finally, consider John Gardner's view that the contrast between offenses and defenses should be drawn by deciding what we have reasons *against* and what we have reasons *for*.⁴¹ According to this conception, offenses consist in what the law gives us reasons *not* to do, whereas defenses consist in what the law gives us reasons *to* do. Applications of this test, like that of its rivals, will generate borderline cases in which reasonable minds may differ. Inasmuch as we have difficulty deciding whether to treat a

⁴⁰ R.A. Duff: Answering for Crime: Responsibility and Liability in the Criminal Law (Oxford: Hart Pub. Co., 2007), especially pp.220-224.

⁴¹ John Gardner: "Fletcher on Offences and Defences," 39 *Tulsa Law Review* 817 (2004). He attributes this suggestion to Kenneth Campbell: "Offence and Defence," in Ian Dennis, ed.: Criminal Law and Justice (London: Sweet & Maxwell, 1987), p.73.

given factor as material to performing an action or as material to abstaining from it, we will be unsure whether that factor belongs in an offense or should be treated as a defense. In any event, this test does not seem unclear in its categorization of de minimis. In the vast majority of contexts, it would be bizarre to say that persons had reasons to commit a crime that is de minimis. Surely the law does not give our petty thief reason a reason in favor of stealing bubble-gum. If defenses consist solely of conduct we have reason to perform, and the contrast between offenses and defenses is drawn pursuant to Gardner's proposal, it is difficult to comprehend why de minimis should *ever* function as a true defense for criminal conduct.

So far, Gardner's methodology yields the same results as Duff's. But applications of Gardner's proposal appear to produce a more radical conclusion. If he is correct, it is not clear why the contrary of de minimis should ever function as an element of a crime. Although there may be a handful of exceptions to this generalization---the "Happy Birthday" example might qualify---in most contexts persons have reason not to commit even those crimes that are de minimis. Their reasons not to commit a de minimis offense are weaker than their reasons not to cause substantial harm, but they still *have* reason not to commit either one. If offenses consist solely of conduct we have reason not to perform, the contrary of de minimis should no more be included in an offense than de minimis should be treated as a defense. On Gardner's proposal, it is hard to see why de minimis should have *any* exculpatory significance in a theory of penal liability.

As we have seen, these three scholarly attempts to contrast offenses from defenses *appear* to have very different implications for the treatment of de minimis in penal codes. Of course, my own efforts to apply these abstract proposals to the plea of de minimis---a plea that none of these theorists had in mind when drawing the distinction---may be misguided. As I have said, my interpretations involve enormous conjecture and speculation. But where does this brief exercise leave us if my efforts are on the right track? My very tentative conclusions are as follows. We have reason to prefer Fletcher's proposal for distinguishing offenses from defenses if we hold that de minimis should sometimes function as a true defense and sometimes should function as the contrary of an element of an offense. But we have a basis to prefer Duff's device for drawing this contrast. if we think that de minimis should function as the contrary of an element of an

offense but never as a true defense. And we have reason to prefer Gardner's idea for distinguishing offenses from defenses if we believe that de minimis should play no role in a theory of criminal liability at all, but only in sentencing. Once again, however, I repeat the highly speculative nature of these conclusions.

I have further suggested that we might begin with an example in which we are inclined to believe that a defendant should be acquitted because his conduct is de minimis---such as the theft of a piece of bubble-gum. If we are relatively certain either that the contrary of de minimis should be part of an offense or that de minimis should be a defense from liability, we can use our confidence to assess the foregoing proposals about how the contrast between offenses and defenses should be drawn. Unfortunately, with the possible exception of a handful of cases, I suspect that criminal theorists will have no firm intuitions about such matters. Reflective equilibrium is not a methodology that can generate clear conclusions when intuitions about matters both abstract and specific are so frail and uncertain. At the end of the day, I draw no straightforward and unambiguous lessons about de minimis by reflecting on the distinction between offenses and defenses. Nonetheless, I hope to have moved the inquiry a small way forward by hazarding a few tentative observations.

IV

Assuming that de minimis sometimes has exculpatory significance, criminal theorists should be uncertain when it should serve as a true defense or when its contrary should be included in the definition of an offense. Part of the explanation for this uncertainty is that we are unclear about how to contrast offenses from defenses and how various proposals for drawing this distinction apply to our fuzzy intuitions about de minimis. In this section I will suppose that we somehow overcome these obstacles and decide in a given case to treat de minimis as a true defense---as it is portrayed in the Model Penal Code. I then ask: What *kind* of defense could it be? As we will see, enormous confusion surrounds the question of how to conceptualize and understand this plea within conventional defense categories. De minimis cannot qualify as (what might

be called) a denial that the offense occurred, since this allegation does not amount to a defense. Among true defenses, there are only three possible ways to construe *de minimis* unless we jettison a great deal of orthodox wisdom in criminal theory. First, *de minimis* might function as a justification. Second, it could be an excuse. Finally, the existence of a true *de minimis* defense might show that not all substantive defenses can be conceptualized either as justifications or excuses, thus demonstrating the need for additional categories. In my judgment, none of these three possibilities should be dismissed out of hand. If each proves to be untenable, however, we have reason to re-examine our initial decision to treat *de minimis* as a true defense. The exculpatory significance of this curious plea must be located in offenses---or rejected entirely.

Paul Robinson endorses the third of these alternatives. He claims “the *de minimis* infraction defense... does not exculpate a defendant because of a justifying or excusing condition, but rather serves to refine the offense definition...[The defendant] is “outside the harm or evil sought to be prevented and punished by the offense.”⁴² Some theorists believe that justification and excuse exhaust the terrain of substantive defenses so that no third type is possible. Still, Robinson *may* be correct to suppose that not all defenses can be pigeon-holed into our preexisting categories of justification and excuse.⁴³ If he is right, however, one wonders why conduct that is “outside the harm or evil sought to be prevented by the offense” is properly proscribed by the offense in the first place. Robinson’s position seems more apt with respect to the first rather than the second disjunct of §2.12(2). As I have indicated, *de minimis* offenses are not literally *outside* the harm the statute is designed to prevent.⁴⁴ Statutes that are vulnerable to the problem Robinson recognizes are overinclusive; if possible, they should be redrafted more narrowly.⁴⁵ Despite some sympathy with Robinson’s remarks, I do not believe we should be quick to concede that *de minimis* cannot be assimilated into more familiar

⁴² 2 Robinson: *Op.Cit.* Note 30, p.79.

⁴³ Duff, for example, believes that the category of justification should be subdivided into permissible and warranted. See *Op.Cit.* Note 40, p.275.

⁴⁴ Moreover, Robinson himself seems to attach no significance to the distinction between the second and third functions I have assigned to *de minimis*. He writes: “Whether the negative of the defense is written into the definition of an offense... or stated as an independent defense applicable to that particular defense... may be merely a matter of drafting ease or efficiency.” *Op.Cit.* Note 30, p.82.

⁴⁵ But see Samuel W. Buell: “The Upside of Overbreadth,” 83 *New York University Law Review* 1491 (2008).

defense categories. Although I think we should allow the possibility that it should be regarded as an excuse, I will argue that the preferable option is to treat a true de minimis defense as a justification.

Despite major differences, the accounts of Fletcher, Robinson and Gardner are all incompatible with efforts to construe true de minimis as an instance of this type of defense. According to Fletcher, “grounds of justification represent licenses or permissions to violate the prohibitory norm.”⁴⁶ He goes on to construe justifications as Hohfeldian privileges or liberties; “one has a duty to obey a prohibitory norm and a privilege to violate it when justificatory circumstances are present.”⁴⁷ It would be misguided, of course, to conceptualize de minimis as a *permission* or *privilege* to violate a prohibitory norm---as though persons have no duty *not* to violate a norm when their wrongdoing is trivial. To express the matter bluntly, no one is permitted to steal bubble gum. Even more obviously, de minimis cannot be a justification while continuing to hold Robinson’s more general views about this type of defense. All justifications, according to Robinson, describe circumstances in which defendants infringe norms to avoid a greater societal harm or to gain a greater societal benefit.⁴⁸ Clearly, no greater good is achieved when defendants commit de minimis offenses. In addition, it would be ludicrous to believe that de minimis has the implications for third-party assistance and interference that Robinson assigns to justifications. If de minimis were a justification that operated pursuant to Robinson’s principles, the state should encourage persons to commit de minimis infractions and should not interfere when others perpetrate them.⁴⁹ Needless to say, each of these implications is patently false. Finally, suppose that Gardner is right to think that a justification does not cancel but rather “defeats the reasons against an action.”⁵⁰ No one believes that the fact that a particular crime is de minimis serves to wholly defeat the reasons against committing it. If any of these theorists were correct

⁴⁶ Fletcher: *Op.Cit.* Note 35, p.563.

⁴⁷ *Id.*, p.564.

⁴⁸ 1 Robinson: *Op.Cit.* Note 30, p.90.

⁴⁹ 2 Robinson: *Op.Cit.* Note 30, p.9.

⁵⁰ John Gardner: “Justifications and Reasons,” in A.P. Simester and A.T.H Smith, eds.: Harm and Culpability (Oxford: Clarendon Press, 1996), p.103, 109. Gardner may be correct to subscribe to the remainders view: justified wrongs are prima facie wrong. Clearly, this view is congenial to regarding a de minimis defense as a justification. The “remainder” would be the trivial wrong that is justified. At the very least, a de minimis thief becomes eligible for non-punitive sanctions and must return the stolen property.

about the nature of justification, a true de minimis defense could not possibly qualify as an instance of this kind of defense.

If de minimis *can* be a justification, each of the above theorists must be mistaken about the nature of this type of defense. How should our understanding of justification be altered to allow the possibility that de minimis might justify criminal conduct? Details aside, conduct is generally regarded as justified when it is permissible, that is, when it is not wrongful all-things-considered. Suppose we say, however, that a person is justified not only when his conduct is not wrongful, but also when his conduct is *not wrongful enough*---in other words, not *sufficiently* wrongful---to merit criminal condemnation. De minimis does not cancel, negate or override the presumptive wrongfulness of a criminal offense altogether, but precludes a sufficient degree of its presumptive wrongfulness to render the defendant ineligible for punishment. In Part V, I will address the issue of why we should withhold criminal liability from defendants whose conduct is not literally permissible, but is relatively close to being permissible. For now, the crucial point is that this conception of the nature of justification would allow a de minimis plea to function as a justification (or what might be called a quasi-justification) from criminal liability.

Whether or not we accept my proposal to revise our understanding of the nature of justification, we should also inquire whether de minimis could function as an excuse from criminal liability. Although the nature of excuse has probably created even more controversy than the analogous debate about justification, it would be easy to show that scholarly thought about this topic is equally unreceptive to the possibility that this plea could be an instance of this type of defense. Typically, excuses are thought to cancel or eliminate altogether the blame deserved by a defendant who commits a criminal act without justification.⁵¹ If de minimis were to qualify as an excuse, however, this characterization must be too narrow. De minimis offenders are not totally blameless. How would theorists have to characterize excusing conditions in order for de minimis to be an instance of this defense type? My answer is not unlike that provided in the context of justification. Perhaps an excuse should not be understood to preclude blame for unjustified conduct altogether, but merely to reduce it to an amount too small to merit

⁵¹ For further clarification, see Douglas Husak: "On the Supposed Priority of Justification to Excuse," 24 *Law and Philosophy* 557 (2005).

punishment. Again, we may be dubious that excuses *should* be construed in this way. But this interpretation would allow the possibility that de minimis can be conceptualized as an excuse (or a quasi-excuse) from liability.

Although I do not believe that it is obviously mistaken to conceptualize de minimis as an excuse, my own preference is to regard it as a justification---if we amend the nature of justification in the way I have described. I tend to believe that excuses pertain to persons, and justifications pertain to conduct. Even though distinguishing properties of agents from properties of their actions is often difficult, this general problem is not especially troublesome in the case of de minimis. Clearly, the claim that a crime is de minimis describes the action rather than the agent who performed it. If so, de minimis is better regarded as a justification than as an excuse---assuming, of course, that we accept my device for contrasting these two types of defense.

Alas, matters are not so simple. An additional consideration might be thought to militate in the opposite direction, indicating that a true de minimis defense is better construed as an excuse than as a justification. A number of theorists have contended that justifications are part of the “conduct rules” of law so that persons are entitled to rely *ex ante* on their content.⁵² Defendants should be placed on notice of what behavior is justified, and may employ this information when deliberating what to do. By contrast, excuses are “rules of adjudication,” addressed *ex post* to courts rather than to persons. Thus defendants should not be entitled to rely on the availability of an excuse in planning their behavior. For example, a defendant is not treated unjustly simply because the state alters the legal test of insanity to his detriment. So much the worse for him if he would not have committed the crime but for his expectation of an excuse. If indeed justification and excuse differ in this respect, it should be apparent that a true de minimis defense should not be categorized as a justification. No one should rely on the availability of a de minimis defense in planning his behavior. Shoppers in retail stores, for example, should not be encouraged to calculate the threshold at which their theft exceeds de minimis in order to insulate themselves from criminal liability.

⁵² See, for example, Meir Dan-Cohen: “Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,” 97 *Harvard Law Review* 625 (1984).

Clearly, the supposition that persons are entitled to rely on the availability of a justification must be mistaken if *de minimis* is to count as an instance of this defense type. Fortunately, the foregoing revision in the nature of justification gives us good reason to reject this supposition. Justified conduct need *not* be all-things-considered permissible; it may still be wrongful. If justified conduct is wrongful, although not wrongful enough to merit criminal liability, the law has less reason to allow defendants to use their knowledge about justification when making plans. Thus this argument, at least, does not show why a true *de minimis* defense cannot be regarded as a justification.

What *should* we say about notice? Even though I have argued that the recognition of a *de minimis* justification need not be construed to entail that the theft of a miniscule amount is literally permissible, I am sure that the inclusion of a specific dollar amount that could be stolen before a defendant would become liable for theft would be misconstrued to authorize takings under that amount. In the words of Stuart Green, this information would be misinterpreted to confer a “license to steal” on petty shoplifters.⁵³ This fear would arise whether *de minimis* were a true defense or its contrary were included in an offense. On either alternative, the law should avoid precise language about what counts as *de minimis*. This result is yet another surprising implication of the claim that *de minimis* should be afforded exculpatory significance. Ordinarily, we tend to value precision and specificity in statutory language---whether that language is included in an offense or in a defense of justification. Vagueness is typically regarded as antithetical to the rule of law. But the threshold for *de minimis* should remain uncertain. Since the state wants to discourage *all* thefts, a true defense of *de minimis* should probably say that defendants are not liable for causing minimal harms---without specifying which harms qualify.⁵⁴ Unfortunately, this strategy guarantees that different officials will make different judgments about which particular cases are eligible for exculpation under a *de minimis* rationale. But the price paid for uniformity is too great.

⁵³ Thus Green is lukewarm about recognizing explicit numerical thresholds in a theft statute. See *Op.Cit.* Note 39.

⁵⁴ Even so, some defendants are bound to calculate that they will not incur liability when they commit infractions that officials will deem to be trivial. Should such persons lose the *de minimis* defense? Although arguments can be constructed to show that they *should* lose the defense, I am inclined to prefer the view that it should be retained even in the case of calculating defendants. A different unresolved question is whether repeat *de minimis* offenders should lose the defense.

Suppose I am correct to conclude that the law should sometimes, somehow, acquit defendants for de minimis crimes. Even in the context of petty shoplifting, where it seems that persons should not be punished for trivial infractions, it is tempting to punish them anyway---to prevent others from incorrectly believing that such behavior is permissible. But justice requires us to reject this argument. No one should be punished in the absence of desert, and I have assumed that defendants who commit de minimis offenses do not deserve to be punished.⁵⁵ Thus they do not deserve to be punished even to serve the broader goals of crime prevention. What, then, *should* be done to such persons? If de minimis shoplifters should not be punished, but cannot be allowed to steal with impunity, it follows that mechanisms to discourage de minimis shoplifting must be found outside the parameters of the criminal law. According to Green, such mechanisms are already in place.⁵⁶ Criminal theorists should applaud these developments.

I emphasize yet again that often it is appropriate for the contrary of de minimis to appear in an offense. Sometimes, however, I assume that de minimis should function as a true defense. When this is so, I am not altogether confident that it should be regarded as a justification, an excuse, or as some third category of defense---although I have a slight preference for the former alternative. The important point, however, is that we would need to reconceptualize the nature of justification and excuse in order to categorize de minimis as an instance of either of these types of defense. The necessary reformulations seem plausible to me, and no competing conceptualization of the de minimis defense is less problematic. However this issue is ultimately resolved, I hope it is clear that careful thought about the exculpatory force of de minimis has broader significance, helping to shed light on the nature of justification and excuse more generally.

V

⁵⁵ On the other hand, de minimis offenders are not entirely blameless, so familiar worries about sacrificing wholly innocent persons for the common good are not as forceful here.

⁵⁶ See Green: *Op, Cit.* Note 39. Presumably, these devices vary enormously with the circumstances of the offender. For example, shoplifters might be shamed, barred from shopping at that store, have their credit revoked, warned that the police will be contacted if another incident occurs, have their parents notified, or the like.

Thus far I have relied almost solely on intuitions in supposing that some defendants who commit de minimis crimes should somehow escape liability and punishment. I admit that these intuitions are frail and unlikely to be universally shared. Perhaps the formidable difficulties in conceptualizing de minimis within orthodox criminal law theory provide reason to be skeptical that this plea has exculpatory significance. Why should de minimis *ever* be relevant to liability as opposed to sentencing? A response to this question must begin by taking a few points for granted. Unquestionably, de minimis crimes are less serious, *ceteris paribus*, than crimes that are not. The seriousness of crime is a function of its culpability, wrongfulness and harm.⁵⁷ A particular offense is de minimis when it is much less wrongful because it causes much less harm than a typical offense of that type, and therefore is far less serious. The controversial claim is that the imposition of liability and punishment are unjust when the seriousness of a given criminal act meets this description. In the remainder of this paper I try to offer some inconclusive support for this claim.

Why should the degree of wrongfulness of criminal conduct have to exceed a given threshold before punishment is warranted? Of course, consequentialists have a powerful reply. Criminal law is expensive, error-prone and subject to abuse, and should not be invoked when its costs exceed its benefits.⁵⁸ Resort to penal sanctions is likely to do more bad than good when an offense is trivial. Little more needs to be said to explain why de minimis should have exculpatory significance in criminal law. But this reply, as I have indicated, does not purport to show why defendants do not *deserve* to be punished for their minor misdeeds. A conception of retributive justice is required to find a desert-based rationale to preclude liability for de minimis offenders. Retribution should not be exacted through the penal law when defendants engage in trivial wrongdoing. Why not?

I contend that the very meaning of retributive guilt entails that the censure and blame that attends a criminal conviction *cannot* be trivial. A penal conviction is and ought to be stigmatizing. Labeling a person as a criminal expresses not only that he acted wrongfully, but also that his wrongful act rises (or sinks) to a level of seriousness that

⁵⁷ See Andrew von Hirsch and Nils Jareborg: "Gauging Criminal Harm: A Living-Standard Analysis," 11 *Oxford Journal of Legal Studies* 1 (1991).

⁵⁸ For the implications of these facts for a retributive theory of punishment, see Douglas Husak: "Why Punish the Deserving?" 26 *Nous* 447 (1992).

makes the application of that label appropriate.⁵⁹ A principle of fair labeling governs not only particular crimes, but also the criminal category as a whole. The criminal law is and ought to be *different* from other devices to convey censure.⁶⁰ A principle of retributive justice should be construed not to allow the punishment of all culpable wrongdoing, but only of culpable wrongdoing that is wrongful enough to merit the powerful stigma of a criminal conviction. After all, criminal blame is not simply a judgment of censure. It is a judgment that is publicly and formally expressed, and used for countless practical purposes that disadvantage those to whom it is applied. A given offense must be relatively serious if a conviction should automatically trigger a wide variety of collateral consequences.⁶¹ As long as we want a criminal record to retain its expressive meaning and real-world significance, we should not impose penal liability on a trivial breach.

Applications of the principle of proportionality suggest a similar result. I construe this principle to require the severity of the punishment to be a function of the seriousness of the offense.⁶² As I have said, the seriousness of the offense, in turn, is partly a function of its wrongfulness. When wrongdoing is utterly trivial, *no* criminal sanction---not even a suspended sentence---can be proportionate to it. Any amount of state punishment, no matter how lenient, imposes greater stigma on defendants than they deserve and is disproportionate to the seriousness of their offense.⁶³ If so, a theory of criminal law that takes proportionality seriously has reason to afford exculpatory significance to *de minimis*.

If the foregoing considerations are cogent, some of the most fundamental concepts in criminal law function somewhat differently than their moral counterparts. Although I generally believe that the criminal law should track moral philosophy

⁵⁹ See Andrew Ashworth: *Op.Cit.* Note 7, p.47.

⁶⁰ See Husak: *Op.Cit.* Note 14.

⁶¹ For example, see Michael Pinard: "An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals," 86 *Boston University Law Review* 623 (2006).

⁶² See Andrew von Hirsch and Andrew Ashworth: Proportionate Sentencing: Exploring the Principles (Oxford: Oxford University Press, 2005).

⁶³ In *Op.Cit.* Note 15, at 262, Kalven and Zeisel speculate that juries sometimes acquit on *de minimis* concerns when the lack of seriousness of the crime combines with the sentiment that the defendant has already been punished enough by extrinsic circumstances. For a general discussion, see Douglas Husak: "Already Punished Enough," 18 *Philosophical Topics* 79 (1990).

closely,⁶⁴ the exculpatory significance of *de minimis* indicates an important respect in which they appear to diverge. Unlike moral blame---which arguably exists notwithstanding its triviality---the blame that attends a criminal conviction *cannot* be trivial.⁶⁵ To be sure, wrongdoing and blame admit of degrees, both in morality and in law. In morality, however, infinitesimal amounts of blame are cognizable. In criminal law, by contrast, quanta of blame beneath a given threshold cease to qualify as criminal blame at all.

I admit that the foregoing considerations are sketchy and provide almost no guidance in deciding when *de minimis* should be afforded exculpatory significance---either as the contrary of an element of an offense or as a true defense. *How* wrongful must conduct be before it is not wrongful enough to merit penal liability? Although I doubt that this question is possible to answer generally,⁶⁶ we might turn to our reactive emotions for clues. Under what conditions do victims of crime feel resentment or indignation, and when do offenders feel guilt or remorse? *De minimis* offenders should be exculpated when persons with normal sensibilities in a given community do not exhibit a sufficient degree of these reactive attitudes to warrant imposing the stigma that attends a criminal conviction. This approach introduces an empirical dimension into our inquiry. We may find that many crimes---such as petty acts of shoplifting or employee theft---attract little stigma. Moreover, large numbers of persons commit these offenses,⁶⁷ and it is hard to see how a response to wrongdoing can stigmatize if a great many individuals in similar circumstances engage in the same behavior.⁶⁸ Particular crimes are *de minimis* when the demand for retributive punishment recedes to the vanishing point. Admittedly, precise lines about this matter are exceedingly hard to draw. But no one should conclude that the *de minimis* plea lacks exculpatory significance because of the difficulty in drawing precise lines. In this respect, controversies about *de minimis*

⁶⁴ See Douglas Husak: "The Costs to Criminal Theory of Supposing that Intentions are Irrelevant to Permissibility," 3 *Criminal Law and Philosophy* 51 (2009).

⁶⁵ I assume, however, that there must be a point below which judgments of moral blame should not be *expressed* because of the triviality of the wrongdoing.

⁶⁶ See Jeff Nemerofsky: "What is a 'Trifle' Anyway?" 37 *Gonzaga Law Review* 315 (2001 / 2002).

⁶⁷ Green provides data suggesting that as many as 60% of all American consumers have committed shoplifting at some time in their lives. See *Op.Cit.* Note 39.

⁶⁸ See Douglas Husak: "The 'But Everybody Does That!' Defense," 10 *Public Affairs Quarterly* 307 (1996).

resemble those about almost every topic in moral and criminal theory. My primary ambition has not been to resolve these debates, but to respond to the scholarly neglect about de minimis by demonstrating how careful reflection about this exculpatory consideration relates directly to several of the most basic issues in the philosophy of criminal law.