Why *De Minimis* Should Not Be a Defence

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De minimis non curat lex—*the idea that the law does not concern itself with trifles—is originally a private law maxim whose applicability in criminal law is uncertain. The author argues that* de minimis *should not exist as a criminal defence. This article distinguishes the use of* de minimis *as an (accepted) interpretative principle in criminal law from its application as a defence. In doing so, the author critiques the potential rationales for* de minimis *offered by Arbour J in* Canadian Foundation for Children, Youth and the Law v Canada (Attorney General). *Instead, the author draws a parallel between* de minimis *and constitutional exemptions, arguing that they are functionally identical. As the Supreme Court of Canada has rejected constitutional exemptions as a remedy, it should also reject* de minimis *as a defence. The author also notes that judges are responsible for adjudicating innocence and guilt, not deciding whether the criminal justice system should be invoked—judges should not have the power to override prosecutorial discretion by invoking* de minimis.

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Introduction

Don Stuart is the Dean of Canadian criminal law academics.

How do you talk about the contributions of the man who literally wrote the book on substantive criminal law (*Learning Canadian Criminal Law*, now in its 14th edition), on criminal procedure (*Learning Canadian Criminal Procedure*, now in its 12th edition) and on evidence (*Evidence: Principles and Problems*, now in its 12th edition)? Not to forget as well *Canadian Criminal Law: A Treatise* (now in its 7th edition) and *Charter Justice in Canadian Criminal Law* (also in its 7th edition). There can be very few criminal law scholars in Canada today who did not—like me—*learn* at least one of those subjects from a text written by Don.

And it is not just academics who have benefited from Don's work. As the Editor-in-Chief, for decades, of the *Criminal Reports* and of the National Judicial Institute's Criminal Law Essentials e-Letter, Don has written a great deal that has been readily available to practitioners and the judiciary, and it has been frequently made use of.

Where Don has written so much, about so much, it becomes difficult to decide what topic to focus on in a paper meant to honour him. In an attempt to narrow down the range of possibilities, I decided to look only at Supreme Court of Canada decisions, to see when they had cited him. That was instructive but not helpful: it turns out that the list of areas where the Supreme Court of Canada has relied on Don's work includes subjective fault, objective fault, general versus specific intent, motive, recklessness, wilful blindness, legal duties, predicate offences, consent, causation, the simultaneity principle, constructive murder, dangerous driving, sexual assault, criminal negligence, child luring, party liability, attempts, conspiracy, corporate criminal liability, the presumption of innocence, burden of proof, the role of common law, the principle of legality, vagueness, the air of reality test, self-defence, duress, provocation, officially induced error, entrapment, intoxication, automatism, mental disorder, the right to silence, the doctrine of recent possession, hearsay, *Vetrovec* warnings, cross-examination on prior testimony, exclusion of evidence, jurisdiction over remedies under the *Canadian Charter of Rights and Freedoms*,[1]

1. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

the requirement to give reasons, corporal punishment, non-retrospectivity of punishment, proportionality in sentencing, double jeopardy, police powers, interrogations, arrest powers, bail, search incident to arrest, searches of lawyers' offices, and searches in the school setting. No one else comes even *remotely* close to having been cited by the Court so often in criminal law matters.

Another thing to know about Don—and a thing which anyone who has met him will know—is that he is passionate about ideas. If he thinks something is right, he will defend the notion that it is right, and if he thinks it is wrong, he will staunchly and unambiguously oppose it: the expression "make no bones about it" might have been coined with Don in mind. I fondly recall attending the ceremony where Don was presented with the 2012 G. Arthur Martin Criminal Justice Medal by the Criminal Lawyers' Association, and listening to his acceptance speech in which he berated the lawyers assembled to honour him (I am sure he did not think of it as berating) for not reading enough work by academics. Personally, I find this forthrightness on his part valuable and refreshing: when Don praises someone (and as they say, "praise from Caesar is praise indeed"), you can be certain it is motivated by absolutely nothing but his high opinion.

However, despite his passion, Don is entirely devoid of any personal animosity: he never makes the mistake of confusing the person with the idea, and his disagreement with an opinion about a criminal law matter has no relation to his view of the person holding that opinion. Indeed, more than that, Don is as fair-minded as one could ask: having co-authored a number of things with him, I can say that he is always concerned to see to it that the views of those who hold a differing view from him are given space. Many, indeed once again probably most, Canadian criminal law scholars have been helped by Don somewhere along the way.

Another key feature of Don's approach to the law is to be constructive. He has noted more than once that it is easy for us as academics to sit back and point out when things were done wrong, but it is much harder to be the person who has to try to do things right. Don's view is that academics should contribute to the development of the law by putting forward positive proposals, not just criticize what others have done. It was that attitude which led him to organize a conference of a very large number of academics from across the country, leading to the publication of *Towards a Clear and Just Criminal Law*, a collection of essays putting forward specific proposals about how to reform and improve every aspect of the criminal justice system.[2]

2. Don Stuart, RJ Delisle & Allan Manson, eds, *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999).

Which leads, finally, to my choice of topic for this paper. Don and I agree about many things, but not all, and it seemed appropriate here to choose one of those topics about which we disagree. Further, it needed to be a topic where it was useful to make specific proposals with regard to how the law should behave, not merely criticize the status quo. Accordingly, this paper will address the maxim "*de minimis non curat lex*": the law does not concern itself with trifles. Don's view is that *de minimis* should be available as a defence in criminal proceedings, although he acknowledges that "general authority for the maxim in criminal law is, at best, sketchy".[3] My view is that no such defence ought to exist in Canadian criminal law, and so this paper is intended to show why Don is mistaken. The proper approach for the law—when this point does get settled—is to reject such a defence.

I. *De Minimis*: The Issue Explained

The *de minimis* defence is what I like to think of as a "ghost" defence at the moment: it is occasionally sighted (and cited) but has not been proven to exist. Some trial courts have rejected the defence as not applicable in the criminal justice system, while others have applied it.[4] Sometimes courts have considered whether it applies to, or is excluded from application to, particular offences.[5] A typical approach of courts of appeal has been to find that if the defence did exist it was not made out on the facts of the case, and therefore that it was not necessary to decide whether the defence actually existed.[6] The Supreme Court of Canada has not authoritatively pronounced on the defence, though

3. Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Carswell, 2014) at 656, 660. See also Hamish Stewart, "Parents, Children, and the Law of Assault" (2009) 32:1 Dal LJ 1 (noting that "it is not clear whether Canadian criminal law recognizes the defence of *de minimis* at all" at 17).

4. For cases that rejected the defence as not applicable in the criminal justice system, see *R v Li* (1984), 16 CCC (3d) 382, [1984] OJ No 569 (QL) (Ont H Ct J); *R v Appleby* (1990), 78 CR (3d) 282, [1990] OJ No 1329 (QL) (Ont Prov Ct). For cases that determined that the defence could be available, see *R v Lepage* (1989), 79 Sask R 246, 74 CR (3d) 368 (QB); *R v Matsuba (GA)* (1993), 137 AR 34, [1993] AJ No 93 (QL) (Prov Ct); *R v Elek*, [1994] YJ No 31 (QL) (Y Terr Ct); *R v Hnatiuk*, 2000 ABQB 314; *R v Chapman*, 2008 ONCJ 552; *R v Beets*, 2017 YKTC 17; *Peel (Region, Department of Public Health) v Le Royal Resto and Lounge Inc*, 2017 ONCJ 767; *R v Arsenault*, 2018 ONCJ 224.

5. See *R v Carson* (2004), 185 OAC 298, 185 CCC (3d) 541 (CA); *R c Gosselin*, 2012 QCCA 1874. Both cases held that *de minimis* cannot apply to charges of domestic assault.

6. See *R v Kubassek* (2004), 189 OAC 339, 25 CR (6th) 340 (CA); *R v Chessa*, 1983 CarswellBC 1792 (WL Can), [1983] BCJ No 1201 (QL) (BCCA); *R v Babiak* (1974), 21 CCC (2d) 464, 1974 CarswellMan 107 (WL Can) (Man CA).

occasionally in *obiter* it has been referred to without being explicitly rejected, or even as though it might exist.[7] Whether *de minimis* actually exists as a rule within the criminal justice system, therefore, is unsettled.

We should begin by setting out exactly what is at issue here. The rule "*de minimis non curat lex*" is almost exclusively referred to in its Latin form (presumably because, as is well-known, the use of Latin "causes little difficulty for lawyers and judges"[8]), and translates into English as "the law does not concern itself with trifles". In its origin it is a private law rule, meant to be of significance primarily to contract law. It is the notion that, for example, if a contracted shipment of thousands of pounds of some item is short by a few ounces, this will not be seen as a breach of the contract: in essence, some failures to live up to an agreement are so trivial as not to be worth worrying about. The most apt private law example imaginable concerning a rule about "trifles" is *Joe Lowe Food Products Co v JA & P Holland Ltd*, which applied the rule in a case concerning some lumps in a shipment of dessert powder.[9]

I do not propose to discuss whether the rule fits well in a private law context.[10] However, I do argue that it is not a rule which should be transferred to the criminal law sphere: specifically, *de minimis* ought not to be available as a defence to a criminal charge.

It is important from the start to draw a distinction here. The purported "defence" of *de minimis* would allow a judge to make an exception to what would otherwise be criminal liability. That is, just as a person might be found to have committed assault but be acquitted based on self-defence, creating a defence of *de minimis* would allow a judge to say that the accused has committed an offence but should be acquitted nonetheless. A judge could conclude that the accused had committed an assault but such a minor one that the defence should succeed,[11] or had stolen something but of such small value that she should not be convicted,[12] or possessed contraband but in such small quantity

7. In *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, the majority rejected the dissent's reliance on *de minimis* on the basis that "it is equally or more vague and difficult in application than the reasonableness defence offered by s. 43". See 2004 SCC 4 at para 44 [*Canadian Foundation*]. See also *R v Cuerrier*, [1998] 2 SCR 371 at para 21, 162 DLR (4th) 513, L'Heureux-Dubé J (writing for herself only, suggesting that in some cases of deception used to gain consent to what would otherwise be assault, the *de minimis* principle "might apply" to prevent a finding of guilt).

8. *R v Nette*, 2001 SCC 78 at para 71.

9. [1954] 2 Lloyd's Rep 71, [1954] WLUK 34 (QB).

10. Primarily because I would be completely unequipped to do so.

11. Which succeeded in *R v Johnson (DM)*. See (2000), 198 Sask R 87, 2000 CarswellSask 634 (WL Can) (Prov Ct).

12. Which failed in *R v Li*. See *supra* note 4.

that he should be acquitted.[13] As Don has put it, a defence of *de minimis* would be a "dispensing power".[14]

Importantly, that is not the only potential use of the *de minimis* concept. There is a significant difference between using *de minimis* as a defence and simply using it as an interpretive aid. Don has argued, for example, in his temperately titled "The Charter Is a Vital Living Tree Not a Weed to Be Stunted: Justice Moldaver Has Overstated" that:

> The most surprising aspect of the judgment [*R v Boulanger*] is the Court's determination that the accused should have been acquitted because the conduct lacked the level of seriousness required for the offence . . . The *Boulanger* decision is now authority for applying this principle of restraint to the actus reus component. It appears to be saying judges can acquit if they decide that the conduct was trivial. This has the look of the doctrine of *de minimis non curat lex* not previously endorsed by the Supreme Court. The Chief Justice is certainly and commendably on a roll in leading the Court to interpreting criminal offences with restraint.[15]

This passage, it seems to me, does not sufficiently acknowledge the difference between using *de minimis* as an interpretive aid and using it as a defence. To say that only conduct of a certain level of seriousness will *ever* be captured by the wording of an offence is quite different from saying "judges can acquit if they decide that the conduct this time was criminal but trivial".

The Supreme Court of Canada has accepted that the *de minimis* rule can be a guide to interpretation, indicating the proper understanding of a provision which is otherwise ambiguous. In *Ontario v Canadian Pacific Ltd*, for example, the Court was faced with a section 7 challenge to Ontario's *Environmental Protection Act*, based on the argument that the definition of "contaminant", which depended on the phrase "impair the quality of the natural environment for any use that can be made of it", was unconstitutionally vague and overbroad.[16] The Court rejected the challenge, finding that the provision in question had a clear enough meaning. In reaching that conclusion, they relied upon the

13. Which failed in *R v Quigley*. See (1954), 20 CR 152 at 156, 111 CCC 81 (Alta SC (AD)) (where the accused was found guilty of possession of a narcotic for what amounted to dust).

14. Don Stuart, "*Bedford*: Striking Down Prostitution Laws and Revising Section 7 Standards to Focus on Arbitrariness" (2014) 7 CR (7th) 52 at 53.

15. (2006) 40 CR (6th) 280 at 284 [footnotes omitted].

16. [1995] 2 SCR 1031 at paras 61, 65, 125 DLR (4th) 385.

principle that a law should not be interpreted in a way that would make it absurd, as well as the principle *de minimis non curat lex*, to determine the proper interpretation of the provision:

> [Subsection] 13(1)(a) does not attach penal consequences to trivial or minimal impairments of the natural environment, nor to the impairment of a use of the natural environment which is merely conceivable or imaginable. A degree of significance, consistent with the objective of environmental protection, must be found in relation to both the impairment, and the use which is impaired.[17]

The *Charter* claim was therefore rejected.

In that case, however, the *de minimis* rule was not used as a defence. The Court did not find that the accused had contaminated the environment but that, as it was only a trivial contamination, they would ignore the violation of the statute. Rather, they interpreted the statute, because of the *de minimis* principle (among other things), to mean that trivial contaminations were not in this case *or any case* captured by the statute.

That is quite different from using *de minimis* as a defence. In *R v Croft*,[18] for example, the Nova Scotia Court of Appeal was faced with an accused who was charged with having undersized lobsters. Among the defences he pleaded was *de minimis*: that as the lobsters were not very much under the correct size, the court should overlook the offence and acquit him. The court held that the *de minimis* defence was not available in the context of a strict liability offence "where compliance is measured in millimetres".[19] If the accused had violated the terms of the statute, then he was guilty: the offence could not be ignored because it was *close* to compliance.

This distinction was captured well by Dawson J of the Ontario Superior Court of Justice in *R v Khan*:

> While it remains an unsettled question as to whether the *de minimis* principle, embodied in the legal maxim "*de minimis non curat lex*" (the law does not concern itself with trifles), is available as a common law defence preserved by s. 8(3) of the *Criminal Code*, there is considerable authority for reliance on the *de minimis* principle as an aid to statutory interpretation

17. *Ibid* at para 65.
18. 2003 NSCA 109.
19. *Ibid* at para 15.

> when defining the scope or reach of the *actus reus* of a criminal offence.[20]

One consequence of drawing that distinction clearly is the one I have already pointed to: support for the concept of applying *de minimis* in the abstract is not the same as support for a free-standing *de minimis* defence to a criminal charge. But there is a deeper significance to the distinction as well.

The central point of a *de minimis* defence would be to say "although this behaviour is captured within the scope and language of this prohibition, it is so trivial that it ought not to attract a criminal sanction". More simply, the rationale can be thought of as saying that the accused should have a defence because the conduct in question was not what the offence provision was aiming at. The case for such a defence would be more compelling the more that the scope and language of a criminal prohibition is relatively unconstrained: if wording on its face captures far more behaviour than we really think of as criminal, then the temptation to say "this was just *de minimis*" becomes greater.

But in the case of such an overbroad prohibition, our first instinct ought not to be to rely on *de minimis*: it ought to be to rely on overbreadth! That is, if the offence is really so broad as to capture behaviour it ought not to, then it might well violate section 7 of the *Charter* and be unconstitutional.

However, it is not necessary to go so far as to mount a constitutional challenge. The principle of restraint is applicable in the interpretation of criminal prohibitions in many ways, and should be applied to keep too broad an approach in check. Specifically, one of the ways that the principle of restraint can manifest itself is precisely through the use of *de minimis* as an interpretive aid. We ought not to be saying, "usually the offence captures this type of behaviour but, exceptionally, not this time": rather we should say, "this offence must be interpreted never to capture trivial behaviour".

Janine Benedet (one of those people Don disagrees with but respects nonetheless) has pointed to essentially this point, in the context of the potential relevance of *de minimis* to sexual assault. The Supreme Court of Canada has not explicitly ruled out the use of *de minimis* with regard to a sexual assault charge, in part (as we shall see further below) because it has never authoritatively pronounced one way or the other on *de minimis* in general. However, in *R v JA*, McLachlin CJC commented that: "Without suggesting that the *de minimis* principle has no place in the law of sexual assault, it should be noted that even mild non-consensual touching of a sexual nature can have profound implications for the complainant."[21]

20. 2014 ONSC 6541 at para 24.

21. 2011 SCC 28 at para 63.

I suggest we can go further than that. Of course, I am arguing against *de minimis* as a defence to *any* charge, but the sexual assault provision is particularly instructive. Janine points out: "Since the sexual nature of the touching is measured objectively, with the intention or purpose of the accused only one factor to be considered, is it possible that there could be touching that violates the sexual integrity of the victim that should not attract the attention of the criminal law?"[22]

This seems to me to be an important point. In essence "violating the sexual integrity of the victim" and "being trivial" ought to be mutually exclusive categories. We all have some mental image of what might constitute a "minor sexual assault": an example I often use in class is an unwanted kiss on the cheek under the mistletoe at a Christmas party. But properly understood, surely there can be no such thing as a "trivial sexual assault". If it is genuinely trivial it has not violated the complainant's sexual integrity and is not a sexual assault at all, and if it *has* violated her sexual integrity it is hard to see on what basis that could be considered trivial.

Now of course not every offence in the Code has been interpreted with such care to try to find the right balance as sexual assault, and it might be that not every offence has language which lends itself easily to that task. Further, in some cases provisions have already been interpreted in ways that might be inconsistent with this goal: for example, in assault "'[f]orce' can include any touching, no matter the degree of strength or power applied".[23] But perhaps instances like that should be seen as a lost opportunity to be revisited, rather than an obstacle. The open-endedly broad interpretation of assault creates more than one difficulty,[24] and one of them is the very temptation to create a *de minimis* defence in order to solve the problem that interpretation caused. Wouldn't an approach that avoided problems, rather than creating them and then solving them, be a better use of judicial time and resources?

That is why I say recognizing the distinction between *de minimis* as a defence and as an interpretive aid is important. Nothing prevents courts from trying to use the *de minimis* principle as an interpretive aid, with regard to any offence, in order to "calibrate" it to capture only the intended behaviour: indeed, they *ought* to do so. As the Supreme Court of Canada has held, there is "a principle of statutory construction which decrees that Parliament does not intend through the criminal law to trap

22. Janine Benedet, Case Comment on *R v Smale*, (2016) 27 CR (7th) 84 at 84.

23. *Cuerrier*, *supra* note 7 at para 10.

24. See e.g. *R v Barton*, 2017 ABCA 216. "'Force' is an easily misunderstood term. As a legal term of art under s 265, it includes touching. However, while lawyers and judges appreciate the nuances in this term, the word 'force' confounds juries. And understandably so" (*ibid* at 202).

trivial, non-criminal conduct".[25] And once that is done, once the wording of the offence is interpreted in a way limited only to the behaviour genuinely intended to be proscribed, it becomes very difficult to say "this particular piece of behaviour falls within the intended scope of the provision, but nonetheless is too trivial to be worth worrying about".

As a result, acknowledging the possibility of the principle's use as an interpretive aid does not merely reduce the need to use *de minimis* as a defence: it makes the range of cases where the defence could plausibly be pleaded diminishingly small.

II. The Case for *De Minimis* (Rebutted)

If *de minimis* does exist, it is of course as a common law defence "preserved" by subsection 8(3). I put "preserved" in scare quotes because there is a distinction about the common law which is rarely drawn but ought to be noted more often; the difference between what I like to describe as "historical" common law and "new" common law. Some common law can definitely be thought of as being preserved, and in a sense discovered. When the Supreme Court of Canada decided in *R v Ruzic*, for example, that the common law defence of duress required only a strict temporal connection, rather than that the threatener be physically present and making the threat at the time, it did so by looking at the prior case law from Canada, England, Australia, and the United States to determine what was already being done.[26] In contrast, when the Court decided in *Lévis (City) v Tétreault; Lévis (City) v 2629–4470 Québec Inc* that the common law defence of officially induced error existed, it was a conscious rejection of the "ignorance of the law is no excuse" rule which otherwise prevailed.[27] That is, one can think of *Ruzic* as discovering what the law already was, and beginning to apply again rules which had been overwritten by statute: *Lévis*, on the other hand, was not discovering what the law was, but deciding what the law *should* be.[28]

It is a difference worth noting, because in the case of a historical common law defence, broadly speaking the question is whether it *does* exist, while in the case of a new common law defence the question is whether it *should* exist. If *de minimis* is to apply, it will be a new defence, which means the arguments for

25. *R v Hinchey*, [1996] 3 SCR 1128 at para 36, 142 DLR (4th) 50.

26. 2001 SCC 24.

27. 2006 SCC 12 at para 21.

28. And, it is worth noting, the policy justification for that new defence came from Don's *Canadian Criminal Law: A Treatise*, by way of Lamer CJC's judgment in *R v Jorgensen*. See *R v Jorgensen*, [1995] 4 SCR 55 at paras 5–7, 129 DLR (4th) 510.

it should focus on whether it should be created. However, as a generalization, and with respect, most judicial consideration which has favoured the existence of the defence has focused more on whether it does exist, and has said relatively little about whether it should. There are some cases, however, which have looked at *why* the defence should exist, not merely whether it does.

A majority of the Supreme Court of Canada referred to the possibility of a *de minimis* defence but specifically declined to decide the point in *R v Hinchey* (where, of course, they cited Don on the point).[29] In *Hinchey* the Court was faced with interpreting subsection 121(c) of the *Criminal Code*, which very broadly prohibits government employees from receiving a "benefit of any kind" from people who have dealings with government.[30] The majority and minority agreed that some way of limiting the scope of this provision needed to be found, since on its face it would criminalize, for example, accepting a cup of coffee. The majority and minority disagreed over exactly how to limit the subsection. For our purposes here, it is only important to know that the minority's approach would have limited the subsection much more significantly than the majority's did: the majority's approach, though not unlimited, still left the subsection with quite a broad scope. Writing for the majority, L'Heureux-Dubé J held that this approach was sufficient to avoid criminalizing trivial and unintended violations of the statute. She went on to add, however, that:

> Nevertheless, assuming that situations could still arise which do not warrant a criminal sanction, there might be another method to avoid entering a conviction: the principle of *de minimis non curat lex*, that "the law does not concern itself with trifles". This type of solution to cases where an accused has "technically" violated a *Code* section has been proposed by the Canadian Bar Association, in *Principles of Criminal Liability: Proposals for a New General Part of the Criminal Code of Canada* (1992), and others: see Professor Stuart, *Canadian Criminal Law*: A Treatise (3rd ed. 1995) at pp. 542-46. I am aware, however, that this principle's potential application as a defence to criminal culpability has not yet been decided by this Court, and would appear to be the subject of some debate in the courts below. Since a resolution of this issue is not strictly necessary to decide this case, I would prefer to leave this issue for another day.[31]

29. *Supra* note 25 at para 69.

30. RSC 1985, c C-46, s 121(c).

31. *R v Hinchey*, *supra* note 25 at para 69. Commenting on this, Don asked: "Why then did she expressly back off adopting the controversial but sensible de minimis non curat lex principle? This was the logical extension of the opinion and would have established a useful doctrine."

Subsequently in *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, Arbour J, in dissent, argued that even if section 43 of the *Criminal Code*, permitting physical discipline by parents of children, were struck down, parents could still rely on the *de minimis* defence "for their trivial use of force to restrain children when appropriate".[32] Justice Arbour's discussion of *de minimis* in that case, though relatively brief, is the most extensive to date in a Supreme Court of Canada decision. She says:

> Generally, the justifications for a *de minimis* excuse are that: (1) it reserves the application of the criminal law to serious misconduct; (2) it protects an accused from the stigma of a criminal conviction and from the imposition of severe penalties for relatively trivial conduct; and (3) it saves courts from being swamped by an enormous number of trivial cases.[33]

None of these reasons should be seen as persuasive.

No one could disagree that the application of the criminal law ought to be reserved to serious misconduct, but that does not lead to the conclusion that a *de minimis* defence should exist. The whole point of moving our criminal law from a common law system to one based on statute is to respect the rule of law: specifically, to decide the criminal law based on rules, not on the case-by-case feelings of the individual judge in the individual case. I think that is an unexceptional claim.

There is at some level a broad societal sense of what should or should not be criminal, and the provisions in the *Criminal Code* are meant to "map on" to that intuitive sense and capture it accurately. Of course, there will certainly be times when a judge's individual sense of what should or should not be criminal and what the application of the provisions in the Code say is criminal will reach a different result. That is the reason that we have the expression "hard cases make bad law": the hard cases are those ones where there is a disconnect between our intuitive sense of fairness and the dictates of the statute.[34] But the point of the rule of law—of the system we have long opted for and have now enshrined in the *Charter*—is that the statute has to prevail over the individual judge's personal sense of right and wrong.

See Don Stuart, "Corruption in Hinchey: Scrambling Mens Rea Principles" (1997) 3 CR (5th) 238 at 246.

32. *Supra* note 7 at para 132.

33. *Ibid* at para 204.

34. For further discussion of this point, see Steve Coughlan, "Canada Needs a *Criminal Code*" in Julie Desrosiers, Margarida Garcia & Marie-Eve Sylvestre, eds, *Criminal Law Reform in Canada: Challenges and Possibilities* (Montreal: Yvon Blais, 2017) 37 at 42–43.

Now, of course "reserving the application of the criminal law to serious misconduct" is a very good reason to use *de minimis* as an interpretive principle, and to read provisions in the *Criminal Code* so that they always, in every case, are limited to serious enough conduct as to be the appropriate concern of the criminal law. As Arbour J also observed in *Canadian Foundation*: "In part, the theory is based on a notion that the evil to be prevented by the offence section has not actually occurred. This is consistent with the dual fundamental principle of criminal justice that there is no culpability for harmless and blameless conduct."[35]

But to interpret a section to always be limited to the evil to be prevented is very different from giving individual judges a dispensing power to choose not to apply the law. As noted in the previous section, if provisions are interpreted with restraint in the first place, the need for a *de minimis* defence is greatly reduced. And if we are genuinely in the realm where the "fundamental principle of criminal justice that there is no culpability for harmless and blameless conduct" is in issue,[36] then a *Charter* remedy of either striking down or reading in to the provision will be available. That rationale and the approach it leads to, as noted in the previous section, not only does not require the use of a dispensing power of *de minimis* as a defence, it actually reduces the potential number of cases where such a defence could plausibly arise.

That said, of course it is unlikely—perhaps impossible—that every provision will be capable of interpretation in a way to remove all of the "hard cases". But in those very few cases, one should take note of what the majority also said in *Hinchey*: "If Parliament chooses to criminalize conduct which, notwithstanding *Charter* scrutiny, appears to be outside of what a judge considers 'criminal', there must be a sense of deference to the legislated authority which has specifically written in these elements."[37]

Constitutionally this is correct. Courts have the ability and the duty to make the *Criminal Code Charter* compliant, and beyond that to interpret offences in order not to capture trivial behaviour. But if all of that work has been done and there is still a policy disagreement between the judge and Parliament about the individual case, courts should defer to legislators.[38]

Justice Arbour's second rationale is that *de minimis* "protects an accused from the stigma of a criminal conviction and from the imposition of severe penalties

35. *Supra* note 7 at para 204.

36. *Ibid*.

37. *Supra* note 25 at para 36.

38. There is an analogy here to minimum sentences, where the Supreme Court of Canada has reached the conclusion that judges must either find that a statutory provision is unconstitutional and strike it down for all cases, or respect it: see the discussion of constitutional exemptions at 280–83, *below*.

for relatively trivial conduct".[39] To a large extent this concern seems only to be the first concern again, but looked at from the perspective of the accused: in the abstract, the system should not capture trivial conduct, and the accused should not be prosecuted for trivial conduct. To that extent the discussion above addresses the second point as well. However, there is potentially a distinction to be drawn between the interests of the accused in not being convicted and the interests of the system itself. This concern might also be understood to be, as Duncan J put it in *R v Juneja*, "to preserve dignity and respect for the administration of justice by not trivializing the important work of the courts".[40]

Again, one could hardly say that this is not an appropriate concern: preserving respect for the administration of justice is, at bottom, the foundation for section 24 *Charter* remedies such as exclusion of evidence or stays of proceedings, for example. But also, again, that the concern is a legitimate one does not lead to the conclusion that a defence of *de minimis* should exist.

Fundamentally, to say that the concern is that the work of the court has been trivialized is to say that this particular case ought not to have been brought before it: to say *that* is simply to disagree with the Crown's exercise of prosecutorial discretion in the individual case. However, it is well-established that a judge is *not* entitled to simply disagree with a Crown's exercise of prosecutorial discretion, or at least not short of abuse of process—and if an abuse of process claim could be made out, a *de minimis* defence would be unnecessary.

There can, in some cases, be confusion over exactly what sorts of decisions by a prosecutor fall within core prosecutorial discretion, but there is no ambiguity at all that the decision to initiate or continue a prosecution falls within it.[41] Once it is recognized that the proposed *de minimis* defence is merely disagreement with the decision to bring a prosecution—not analogous to that, not similar to that, but that—it should be obvious that judges cannot be given entry by the back door to the power they have been deliberately denied at the front door. The Supreme Court of Canada explained in *R v Anderson* the rationale for this rule:

> The many decisions that Crown prosecutors are called upon to make in the exercise of their prosecutorial discretion must not be subjected to routine second-guessing by the courts. The courts have long recognized that decisions involving prosecutorial discretion are unlike other decisions made by the executive . . .. Judicial non-interference with prosecutorial discretion has been referred to as a "matter of principle based on the doctrine of separation of powers as well

39. *Canadian Foundation*, *supra* note 7 at para 204.

40. 2009 ONCJ 572 at para 15.

41. See *R v Anderson*, 2014 SCC 41 at para 44.

> as a matter of policy founded on the efficiency of the system of criminal justice" which also recognizes that prosecutorial discretion is "especially ill-suited to judicial review".
>
> The Court also [in *Krieger*] noted the more practical problems associated with regular review of prosecutorial discretion:
>
> > The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution.[42]

Preventing the work of the courts from becoming trivialized might therefore be a worthwhile goal, but it is not one which can justify the existence of a *de minimis* defence.

Justice Arbour's final argument was that the defence "saves courts from being swamped by an enormous number of trivial cases".[43] Once again the concern, especially in our post-*Jordan* time, is not an inappropriate one, but does not lead to the conclusion sought. In fact, this justification seems like a bit of a red herring.

Are courts currently swamped by an enormous number of trivial cases? Given how rarely *de minimis* is even argued, it does not seem that that can be the case. And given that it is undecided whether there even is a defence of *de minimis*, its use cannot be the explanation for the absence of that swamping.[44] If anything, the absence of such a swamping is a demonstration that prosecutorial discretion provides sufficient protection. Crown prosecutors are obliged to consider, beyond the question of whether there is a reasonable prospect of conviction, factors such as the gravity of the incident, the degree of culpability of the accused, that a conviction is likely to result in an insignificant penalty or alternatively that the sentence would be unduly harsh to the accused,

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42. *Ibid* at paras 46–47 [citation omitted].

43. *Canadian Foundation*, *supra* note 7 at para 204.

44. Justice Arbour claims in *Canadian Foundation* that: "The judicial system is not plagued by a multitude of insignificant prosecutions for conduct that merely meets the technical requirements of 'a crime' (e.g., theft of a penny) because prosecutorial discretion is effective and because the common law defence of *de minimis non curat lex* (the law does not care for small or trifling matters) is available to judges." See *ibid* at para 200. With respect, there is very little evidence to support the second half of her claim.

whether there are alternatives to prosecution, and even directly that the offence is of a trivial or technical nature:[45] it is difficult to think of a basis for deciding that a case is too trifling that is not encompassed within those considerations. The current absence of an enormous number of trivial cases in court is more a demonstration of the lack of need for a *de minimis* defence than it is an argument for the creation of one.

Further, creating an additional defence is not likely, in most cases, to reduce the burden on courts: it is more likely to increase it. Creating a defence of *de minimis* will not mean that cases do not end up in court in the first place: a judge cannot realistically decide that a particular case was trivial until at least the entire Crown's case has been presented. It would then be possible formally to treat a *de minimis* claim as some sort of directed verdict claim,[46] but far more likely is that the defence will be argued at the close of the accused's case. In that event no time will have been saved: the only effect will be that additional court resources were used to argue the *de minimis* point along with everything else.

If there were a good policy rationale for having a *de minimis*-based dispensing power, the fact that it would use additional resources would not be a reason to refuse to have such a power. However, the claim that it will reduce the use of resources is flimsy at best, and not a justification for the creation of such a power.

In sum, then, the rationales which have been offered for creating a defence of *de minimis* are not compelling. We now turn to the reasons against creating such a defence.

III. The Case Against *De Minimis*

Broadly, once the criminal justice system has been invoked, it is up to judges to adjudicate guilt or innocence. However, it is not up to judges to decide whether the system *should* be invoked. There is no question that there must be discretion about the use of the system, but that discretion does not belong to judges. Judges quite properly have a lot of discretionary powers, but those are all powers which exist after it has been decided that a prosecution should be brought: they have no discretion with regard to that initial decision. There are a number of other contexts in which that is the well-settled and (appropriately)

45. See for example the factors listed in the *Ontario Crown Prosecution Manual* under the heading "Charge Screening: Public Interest" or in the *British Columbia Crown Counsel Policy Manual* under the heading "Charge Assessment Guidelines: Public Interest Factors that Weigh Against Prosecution". See Ministry of the Attorney General, *Ontario Crown Prosecution Manual* (Prosecution Directive) (14 November 2017); British Columbia Prosecution Service, *Crown Counsel Policy Manual* (Prosecution Directive) (1 March 2018).

46. See e.g. *R v Juneja*, *supra* note 40 (*Juneja* perhaps being *the* example).

unquestioned approach. To decline to have a dispensing power based on *de minimis* is to adopt the same approach in that context as the settled orthodoxy in other analogous situations.

Further, the interests a judge might be trying to serve by using a *de minimis* defence can be equally or better served by other means which are already available: in that event, the dispensing power is not only ill-advised but unnecessary. Let us consider why that is so.

It is for good reason that we do not allow judges to decide whether the criminal justice system should be invoked in the first place: such a role would not sit well with a judge's role as a neutral arbiter, nor with judicial independence. The separation of powers arguments on this point are familiar and well-established, but no less correct for being longstanding.[47] If a judge says of some cases "I do not approve of *this* prosecution being brought", then in appearance and in practical terms that amounts to approving of all the other prosecutions being brought. That would be inappropriate, but *de minimis* amounts to nothing more than saying "I do not approve of this prosecution being brought".

To some extent this argument has already been made in the previous section, in pointing out that a judge quite properly does not have the ability to override prosecutorial discretion to bring a prosecution simply because she disagrees with the way that discretion was exercised. That rule exists for good reason. Prosecutors have all of the facts before them and might be aware of reasons—reasons which cannot properly be disclosed to the judge—that the prosecution ought to be brought. Perhaps there is a raft of such offences in the area. Perhaps the prosecution of this offender for stealing a single grape, or throwing a single cigarette butt on the ground, has been deemed necessary for reasons of general deterrence. Perhaps there are other proper motives, relating to different prosecutions, of which the judge cannot be informed. If those reasons are improper ones, then of course an abuse of process claim might be a live possibility: if they are not improper then the decision is the correct, or at least a justifiable, one.

Now, of course there are likely to occasionally be times when an individual Crown prosecutor will make what the great majority of people, perhaps even the great majority of people apprised of all the facts, would regard as the wrong decision. Sometimes Crown prosecutors will make mistakes. But it does not follow from that fact that the solution is to give a supervisory power to a person who possesses *less* information. Judges are not immune to making mistakes either, and we should not decide to create a defence on the fiction that it would be applied perfectly. Yes, a Crown can lose objectivity, but a judge can fail to understand the objective circumstances through lack of knowledge. We *could*

47. For a discussion of the separation of powers arguments, see *R v Anderson*, *supra* note 41; *R v Felderhof* (2003), 68 OR (3d) 481, 235 DLR (4th) 131 (CA).

create a system which did not trust the Crown with a discretionary role—but that is not the system we have created. We either place our faith in the good sense of Crown prosecutors or we do not: we should not do so everywhere except when it comes to a possible *de minimis* claim.

There are other contexts in which the system takes this same approach. If a conviction has been overturned, for example, subsection 686(2) of the Code sets out the powers of a court of appeal: to acquit or to direct a new trial.[48] In choosing between an acquittal or a new trial, the case law has set out criteria by which to make that decision, but in general it is a question of whether it is possible that the accused could be convicted at a new trial.[49] We are all familiar with cases where a court of appeal will conclude that it does not have the authority to order an acquittal, but in ordering a new trial uses language which seems like a hint to the Crown that it recommends against proceeding again.[50] When no conviction is *possible*, a court of appeal can acquit, but when conviction is possible but prosecution seems unwise or unnecessary, the most a court of appeal can do is *suggest* to the Crown how it might choose to exercise its own discretion.

The first point to note is that this is another example of a circumstance where the actual decision whether to use the system or not rests with the Crown, not a court. The second point to note, though, is that just as a court of appeal has the ability to make suggestions to the Crown, so too does a trial judge. A trial court has an implied power to control its own process, which goes beyond protecting against abuse of process. The use of this power raises the risk of a judge seeming to "enter the arena" and must be exercised with caution, but it certainly exists.[51] Could a judge, faced with a prosecution where it seems as though a *de minimis* defence, if it existed, might be relevant, raise that question with the Crown, either in a conference or in open court?

Would it be improper for a trial judge to ask a prosecutor a question such as "this incident seems very minor: have you fully thought through whether to bring this prosecution?" If that question by itself seems improper, then of course a *de minimis* defence where the judge not merely asks but *answers* that question on behalf of the Crown is even more improper. If the question is not improper,

48. See *Criminal Code*, *supra* note 30, s 686(2). Case law has concluded that a court of appeal can also order a stay of proceedings, but only to prevent an abuse of process. See *R v Dhillon*, 2014 BCCA 480 at para 38.

49. See e.g. *R v Maciel*, 2007 ONCA 196. Though in that case, the particular issue was the impact of fresh evidence. Unsurprisingly, *Maciel* is another decision which relied on Don's work, though not on that particular point.

50. See *Reference re Milgaard*, [1992] 1 SCR 875, 1992 CarswellSask 459; *R v Sheppard*, 2002 SCC 26.

51. See *R v Felderhof*, *supra* note 47 at para 45.

then it is an alternative to a *de minimis* defence which respects the appropriate and differing roles played by judges and Crown prosecutors.

For that matter, another alternative available to a judge who feels that a prosecution should not have been brought exists at the sentencing stage: an absolute discharge. A trial judge who concludes that the accused was technically guilty of the offence but that the incident was so minor that the prosecution ought not to have been brought can rely on section 730 of the *Criminal Code* to discharge the accused absolutely, the effect of which is that the person "shall be deemed not to have been convicted of the offence".[52] Functionally this serves all the goals that a *de minimis* defence would serve. Legally, it has the same effect that the accused was not convicted. Practically, the accused will have had to go through the trial first to receive a discharge, but that is equally the case in order to successfully raise a defence. Conceptually, granting an absolute discharge serves the goal of preserving respect for the administration of justice (at least insofar as the behaviour of courts is concerned, which is all a judicial dispensing power could do) by showing that the system as a whole is able to properly acknowledge the triviality of some breaches.

And of course, we can think about those two possibilities being combined: at a conference a judge could say "this seems so trivial that I expect I would grant an absolute discharge: are you sure you want to bring the prosecution?" Once again, if it seems acceptable for a trial judge to say that, then it serves the purpose of a *de minimis* defence but is more consistent with the differing roles of judges and prosecutors. If it does not seem acceptable for a trial judge to say that, then a *de minimis* defence itself should seem even more unacceptable.

So, in other contexts, judges for good reasons do not have the power to decide whether the system should be used, but do have options which give them input into the important results. To not have a *de minimis* defence is therefore to remain consistent with the approach used in all other contexts.

One final analogy should be drawn, between the *de minimis* defence and constitutional exemptions. Briefly, my argument here that a *de minimis* defence should not exist is that: (1) constitutional exemptions and a *de minimis* based dispensing power are functionally identical; (2) if anything, the argument for constitutional exemptions is stronger than that for *de minimis*; and (3) the Supreme Court of Canada has correctly rejected the possibility of constitutional exemptions as a *Charter* remedy.

First, let us consider why constitutional exemptions and a *de minimis* based dispensing power are functionally identical. A *de minimis* defence, of course, would allow a judge to say "the statute has been violated and I will leave that statutory prohibition in place, but I will not apply it on this occasion". The notion behind a constitutional exemption was exactly the same: as it was put in *R v Ferguson*, "that the law remain in force, but that it not be applied in

52. *Supra* note 30, s 730(3).

cases where its application results in a *Charter* violation".[53] Both defences would purport to create a dispensing power, allowing an individual judge's view, based on that judge's personal sense of the moral blameworthiness of the particular accused's behaviour, to override the statutory provision saying that behaviour of that sort should be the subject of criminal punishment.[54]

It is worth noting, in order to avoid confusion, an ambiguity in the use of the term "constitutional exemption". There is also a specialized meaning of the term used when a law has been struck down in its entirety under section 52 of the *Constitution Act, 1982*, but the declaration of invalidity has been suspended for some period of time.[55] In such cases, the individual claimant is sometimes allowed to benefit from the declaration of invalidity despite the general suspension, and some cases refer to that as a "constitutional exemption".[56] That is in effect the exact opposite of the normal use of the term. Normally the point is that an accused is not bound by a statute which remains valid: in the specialized use the accused is not bound by a statute which has been found to be invalid. The thing requiring justification in the specialized case is that *anyone* is bound by it, not the exception to that.

Second, the case for constitutional exemptions was stronger than for *de minimis*. As explained above, a dispensing power based simply on a trial judge's disagreement with a Crown prosecutor as to whether a particular violation was or was not worth prosecuting is inconsistent with our approach in many other aspects of the criminal justice system, and would dramatically expand the sphere in which a judge can operate. In contrast, the question of whether a constitutional exemption should be given would only arise after a judge had determined that there was a *Charter* violation. It would only be in a context where it was unambiguous that that judge could give *some* remedy that the question of whether that particular remedy was available. Further, there was even an argument for constitutional exemptions on the wording of the Constitution: section 52 provides that a law is of no force and effect "to the extent of the inconsistency".[57] It was at least arguable that, in some cases, the extent of the inconsistency was only "the exact facts of this case".

53. 2008 SCC 6 at para 37.

54. In *Ferguson*, the particular issue was whether to make an exemption to the minimum punishment rather than to the prohibition itself, but that does not change the fundamental point that the judge's own moral sense of blameworthiness would be allowed to replace Parliament's assessment of blameworthiness. See *ibid*.

55. s 52, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

56. For an example of such a case, see *Carter v Canada (Attorney General)*, 2015 SCC 5 [*Carter*]. "In the result, the trial judge declared the prohibition unconstitutional, granted a one-year suspension of invalidity, and provided Ms. Taylor with a constitutional exemption for use during the one-year period of the suspension" (*ibid* at para 32).

57. *Constitution Act, 1982*, *supra* note 55, s 52.

Nonetheless, the Court decided in *Ferguson* that constitutional exemptions simply do not exist as a remedy, and in *Carter v Canada (Attorney General)* declined an explicit invitation from the British Columbia Court of Appeal to change their mind about that point.[58] The reasons in *Ferguson* for rejecting constitutional exemptions apply equally well or better to a *de minimis* based dispensing power.

The Court notes, for example, that constitutional exemptions are an intrusion into the legislative sphere: that "the effect of granting a constitutional exemption would be to so change the legislation as to create something different in nature from what Parliament intended".[59] That is true of a *de minimis* defence as well: Parliament will have said that a provision applies to a particular type of behaviour but the judge will be saying that it does not. As noted above, if the judge were simply using *de minimis* as an interpretive principle to understand how an offence should always be interpreted, that would be the proper role of a judge: to use it as a dispensing power, however, is to intrude on the role of Parliament. Further, it is to do so with even less justification than a constitutional exemption might have had, since the basis for it will not be a *Charter* violation but only the judge's personal sense of discomfort.

Further—and finally, for our purposes—the Court rejected constitutional exemptions on the basis that they "buy flexibility at the cost of undermining the rule of law."[60] It held:

> The mere possibility of such a remedy thus necessarily generates uncertainty: the law is on the books, but in practice, it may not apply. As constitutional exemptions are actually granted, the law in the statute books will in fact increasingly diverge from the law as applied.[61]

That concern applies equally to a *de minimis* based dispensing power. Indeed, one could simply replace the words "constitutional exemptions" in that quote with "*de minimis* defences" and it would capture a legitimate objection to them.

The Court also held in *Ferguson* that

> [t]he divergence between the law on the books and the law as applied — and the uncertainty and unpredictability that result — exacts a price paid in the coin of injustice. First, it impairs the right of citizens to know what the law is in advance

58. See *R v Ferguson*, *supra* note 53 at para 74; *Carter*, *supra* note 56 at paras 37, 124–25.

59. *R v Ferguson*, *supra* note 53 at para 50.

60. *Ibid* at para 67.

61. *Ibid* at para 70.

> and govern their conduct accordingly — a fundamental tenet of the rule of law. Second, it risks over-application of the law; as Le Dain J. noted in *Smith*, the assumed validity of the law may prejudice convicted persons when judges must decide whether to apply it in particular cases. Third, it invites duplication of effort. The matter of constitutionality would not be resolved once and for all as under s. 52(1); in every case where a violation is suspected, the accused would be obliged to seek a constitutional exemption. In so doing, it creates an unnecessary barrier to the effective exercise of the convicted offender's constitutional rights, thereby encouraging uneven and unequal application of the law.[62]

Each of these concerns translates over to a *de minimis* dispensing power as well. If in fact particular behaviour would not be found by a judge to be unlawful, despite the fact that the *Criminal Code* says that it is, then citizens cannot know what the law is in advance. If police and prosecutors rely on what the Code says—as they must, since they do not have access to the eventual trial judge's personal sense of fairness—then there is a risk that the law will be overapplied. And if that view of the individual trial judge were allowed to take priority over the expression of the will of Parliament, then of course there is inevitable duplication of effort: we will have moved away from having the law dictated by statute, and will have taken a retrograde step toward it being whatever the individual trial judge in the individual case thinks it should be.

Conclusion

In sum, a defence of *de minimis* would sit so uneasily with foundational approaches to Canadian criminal law that it should not be created. Yes, the fact that a transgression is so minor that it does not merit criminal liability is relevant, but that notion is properly taken into account as an interpretive aid, not as a dispensing power. Yes, someone needs to have the ability to say "technically this violates the statute but a prosecution would be inappropriate", but that person ought not to be a judge. The interests that are intended to be served by having a *de minimis* dispensing power can all be served equally well by other means, and those other means are not inconsistent with the proper role of judges or with the rule of law. *De minimis* should not be a defence.

62. *Ibid* at para 72.