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Article abstract

Professor Coughlan maintains that the maxim *de minimis non curat lex*—the law does not concern itself with trifles—ought not be recognized as a criminal defence. He contends that the defence is redundant in light of existing principles of statutory interpretation, alternative defences to challenge improper decisions to bring charges, and the availability of an absolute discharge at sentencing. He further suggests that utilizing the *de minimis* defence is no different than allowing a constitutional exemption which has explicitly been prohibited by the Supreme Court of Canada. In response, I maintain that Coughlan improperly conceptualizes the *de minimis* defence as a challenge to prosecutorial discretion. In my view, the defence serves to prevent judges from finding an accused guilty where the consequences would be grossly disproportionate to the harm caused by the offence. Such proceedings should be stayed because the grossly disproportionate effects arise by virtue of instituting criminal process, not imposing punishment. Although the *de minimis* defence and constitutional exemptions both exempt accused from statutes, the latter are problematic because they conflict with statutory intent. The same cannot be said of defences as the legislature passes offences with knowledge that they will be circumscribed by defences.

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Why *De Minimis* is a Defence: A Reply to Professor Coughlan

*Colton Fehr**

Professor Coughlan maintains that the maxim *de minimis non curat lex*—the law does not concern itself with trifles—ought not be recognized as a criminal defence. He contends that the defence is redundant in light of existing principles of statutory interpretation, alternative defences to challenge improper decisions to bring charges, and the availability of an absolute discharge at sentencing. He further suggests that utilizing the *de minimis* defence is no different than allowing a constitutional exemption which has explicitly been prohibited by the Supreme Court of Canada. In response, I maintain that Coughlan improperly conceptualizes the *de minimis* defence as a challenge to prosecutorial discretion. In my view, the defence serves to prevent judges from finding an accused guilty where the consequences would be grossly disproportionate to the harm caused by the offence. Such proceedings should be stayed because the grossly disproportionate effects arise by virtue of instituting criminal process, not imposing punishment. Although the *de minimis* defence and constitutional exemptions both exempt accused from statutes, the latter are problematic because they conflict with statutory intent. The same cannot be said of defences as the legislature passes offences with knowledge that they will be circumscribed by defences.

Le professeur Coughlan soutient que la maxime *de minimis non curat lex* — la loi ne s'occupe pas de choses insignifiantes — ne doit pas être reconnue comme un moyen de défense en droit criminel. Il explique que ce moyen de défense est superflu au vu des principes actuels d'interprétation des lois, des moyens de défense alternatifs s'attaquant à des décisions abusives d'intenter des poursuites et de la possibilité de rendre une décision d'absolution inconditionnelle à l'étape de la détermination de la peine. Il suggère également que l'utilisation du moyen de défense *de minimis* équivaudrait à autoriser une exemption constitutionnelle qui a été expressément interdite par la Cour suprême du Canada. En réponse à ces arguments, je défends que le professeur Coughlan conceptualise de manière incorrecte le moyen de défense *de minimis* en le considérant comme un moyen de contester le pouvoir discrétionnaire du procureur de la Couronne. Selon moi, ce moyen de défense a pour fonction d'éviter que les juges ne trouvent un accusé coupable lorsque les conséquences d'une telle décision de culpabilité seraient exagérément disproportionnées comparativement au préjudice découlant de l'infraction. De telles procédures judiciaires doivent être abandonnées car les effets exagérément disproportionnés découlent du déclenchement du processus de justice pénale, et non de l'application d'une sanction. Bien que le moyen de défense *de minimis* et les exemptions constitutionnelles exemptent tous les deux un accusé de l'application de la loi, les exemptions sont problématiques car elles entrent en conflit avec l'intention du législateur. Ce problème ne se produit pas dans le cas des moyens de défense car le pouvoir législatif crée des infractions en sachant qu'elles seront limitées par des moyens de défense.

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Introduction

The *de minimis non curat lex* maxim provides that the law ought not be concerned with "trifle[s]."[1] The principle has two distinct applications in Canadian law. The first employs the absurdity principle of statutory interpretation to confine the applicable scope of a law.[2] This application prevents a plausible interpretation of a law from being adopted if its results could not have been intended by the legislature.[3] The second application invokes *de minimis* as an excusatory defence to unlawful conduct.[4] *De minimis* as a defence has yet to be affirmed by the Supreme Court of Canada,[5] though various trial courts have applied the principle in this manner.[6]

In an intriguing article, Steve Coughlan endorses the *de minimis* principle as an element of the absurdity principle but maintains that *de minimis* ought not be preserved as a criminal defence.[7] Coughlan thinks that the absurdity principle can be used to avoid convicting people for the vast majority of *de minimis* conduct.[8] Where it cannot, he suggests that deference be shown to legislatures and *de minimis* conduct be duly prosecuted unless it would amount to an abuse of process. To conclude otherwise would constitute an unjustifiable intrusion into the prosecutor's discretion to bring charges.[9] For Coughlan, however, the availability of the abuse of process defence obfuscates the need to preserve *de minimis* as a defence.[10] In addition, Coughlan maintains that the *de minimis* principle ought not be a defence because its purpose is already served by a particu-

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1 *The Reward* (1818), 2 Dods 265 at 269–70, 165 ER 1482 (Admlty) [*The Reward*].

2 See e.g. *R v Gale*, 2010 CarswellNfld 427 at paras 27–28, 86 WCB (2d) 508 [*Gale*].

3 See *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 at 1081–82, 125 DLR (4th) 385 [*Canadian Pacific*].

4 Courts and scholars tend to conceptualize *de minimis* as an excuse, though others argue it is a justification (see Douglas Husak, "The De Minimis 'Defence' to Criminal Liability" in RA Duff & Stuart P Green, eds, *Philosophical Foundations of Criminal Law* (New York: Oxford University Press, 2011) 328 at 343–48).

5 See *R v Hinchey*, [1996] 3 SCR 1128 at 1165, 142 DLR (4th) 50; *R v Cuerrier*, [1998] 2 SCR 371 at 391, 162 DLR (4th) 513 [*Cuerrier*]; *R v JA*, 2011 SCC 28 at para 63. But see *Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4 at paras 102, 200–08 [*Canadian Foundation*] (where Justice Arbour, writing for herself, affirmed the *de minimis* defence).

6 Cases will be discussed below.

7 See Steve Coughlan, "Why *De Minimis* Should Not Be a Defence" (2019) 44:2 Queen's LJ 262.

8 See *ibid* at 269.

9 See *ibid* at 274–75.

10 See *ibid* at 275.

lar sentencing tool: an absolute discharge.[11] Finally, he suggests that *de minimis* ought not be a defence for substantially the same reasons constitutional exemptions are impermissible under the *Canadian Charter of Rights and Freedoms*.[12]

Coughlan's arguments provide a strong case against preserving the *de minimis* defence from one of Canada's leading criminal law scholars.[13] Nevertheless, I think he relies on an improper conception of the *de minimis* principle in rejecting its role as a criminal defence. The *de minimis* defence does not interfere with the Crown's discretion to bring charges, but instead ensures that judges are not forced to find an accused guilty where it would be inconsistent with the principles of fundamental justice. Put differently, in the rare cases that a judge applies the *de minimis* defence, it is because the consequences of finding the accused guilty—regardless of the potential to apply a lenient punishment—would be grossly disproportionate to the ability of the law to further its objective in relation to the accused's conduct.

Coughlan's argument that the *de minimis* defence is unnecessary given existing defences (abuse of process) or sentencing provisions (absolute discharge) also cannot stand up to closer scrutiny. In my view, the *de minimis* defence is a unique instance of the abuse of process doctrine. As with other defences situated within that doctrine—such as entrapment—the unique context within which the *de minimis* defence operates leaves adequate conceptual space for it to be recognized as its own defence. As

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11 See *ibid* at 280 (citing *Criminal Code*, RSC 1985, c C-46, s 730(3)).

12 See *ibid* at 280–83 (discussing the *Canadian Charter or Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Canadian Charter*]).

13 Notably, Coughlan is one of few people to write on the topic, and to my knowledge the only Canadian author other than myself to have written about the conceptual origins of the defence. Others, however, have expressed their views with respect to the defence's existence. Don Stuart recognizes that "general authority for the maxim in criminal law is, at best, sketchy" and that the defence is "undoubtedly elastic" (Don Stuart, *Canadian Criminal Law: A Treatise*, 7th ed (Toronto: Carswell, 2014) at 656, 661). He nevertheless opines that "[s]ince our judges are already entrusted with all sorts of other important discretions there seems to be a strong case for this dispensing power" (*ibid* at 661). He bolsters this view by observing that the *de minimis* defence is rooted in the common law and as a result "there is nothing to stop a Canadian judge from developing [its] principles" (*ibid*). Other leading Canadian criminal law scholars suggest that the *de minimis* defence foregoes the need to challenge various offences for overbreadth. As Kent Roach observes, "a *de minimus* defence could provide more narrowly tailored relief from potentially overbroad criminal offences than ... holding that the vagueness or overbreadth of the law violates section 7 of the *Charter*" (Kent Roach, *Criminal Law*, 7th ed (Toronto: Irwin Law, 2018) at 116). See also Morris Manning & Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 4th ed (Markham: Lexis Nexis, 2009) at 527.

for the availability of absolute discharges, I maintain that there are several potential consequences that distinguish receiving an absolute discharge from being acquitted of a crime outright. Thus, the mere existence of an absolute discharge is not sufficient to render the *de minimis* defence moot.

Finally, Coughlan's contention that the *de minimis* defence is analogous to a constitutional exemption is unpersuasive in light of the role of defences in criminal law. Constitutional exemptions are not permitted because they would involve judges rewriting statutes contrary to legislative intent. Although providing an exemption to something like a mandatory minimum sentence—the locus point of the debate about exemptions[14]—unjustly interferes with Parliament's discretion, this is because Parliament did not enact such a provision with any exceptions in mind. Defences exist to ensure broadly drafted laws are not applied in an unduly harsh manner, and legislatures craft offences knowing that defences play this role. The comparison between *de minimis* as a defence and constitutional exemptions is therefore inapt.

Before proceeding, I should be clear with respect to the scope of my argument. I am discussing the role of *de minimis* as a defence in criminal law. As such, I make no recommendations with respect to whether *de minimis* ought to be preserved as a defence in the civil law, where it in fact originated.[15] I limit the scope of my argument because I think the *de minimis* defence in criminal law takes its shape from the *Canadian Charter*. The civil law context will typically not engage constitutional interests as is routinely the case with criminal prohibitions. This fact may well result in a different conception of the *de minimis* defence in civil law, but I have nothing further to say about the role of *de minimis* in that context.

I. The Absurdity Principle

The *de minimis* principle is often traced back to a decision of the English courts commonly cited as *The Reward*.[16] Writing in 1818, Sir Walter Scott recognized that courts could not properly take on legislative functions and declare a clear breach of the law of no force or effect. In so concluding, however, he also recognized that there are exceptions to this general principle. In Sir Walter Scott's view:

> The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification im-

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14 See e.g. *R v Ferguson*, 2008 SCC 6 [*Ferguson*].

15 This history will be discussed below.

16 See *The Reward, supra* note 1.

> plied in the ancient maxim, *De minimis non curat lex*.—Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.[17]

Although Sir Walter Scott identified a general *de minimis* principle, he also delimited its scope by opining upon the purpose of the principle. His reference to a need to avoid "inflexibly severe penalties" suggests that the *de minimis* principle was originally concerned with avoiding undue punishment, not a perceived need to restrict the scope of offences.[18]

The *de minimis* principle was first applied in the Canadian civil law context in 1932.[19] However, it was not until the mid-twentieth century that it was cited in the Canadian criminal law context.[20] One of the first cases to apply the *de minimis* principle was the Alberta Supreme Court's decision in *R v. Ling*.[21] The accused was charged with illegal possession of heroin under the *Opium and Narcotic Drug Act*.[22] The police discovered the drug after seizing and searching the accused's pants pockets. The heroin found was not detectable by the naked eye and was only discovered "through a number of complicated chemical steps."[23] In acquitting the accused, Justice McBride observed that the prosecution was "asking the court to carry findings to an absurdity."[24] He continued: "I cannot bring myself to the view here, that there was illegal possession of heroin in the contemplation of Parliament, in what otherwise were empty pockets. If Parliament had so intended it would have been a simple matter to have said so explicitly in the Act."[25]

The Supreme Court of Canada approved of this use of the *de minimis* principle in *Ontario v. Canadian Pacific Ltd*.[26] As Justice Gonthier observed, the absurdity principle allows for the consequences of competing interpretations of a statute to be used to "assist the courts in determining

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17 *Ibid* at 269–70.

18 *Gale*, *supra* note 2 at para 28. Judge Gorman concludes that the original purpose of the *de minimis* principle is important. I will elaborate upon and rebut his views below.

19 See *Would v Herrington*, [1932] 40 Man R 365 at 375, 4 DLR 308 (MBCA).

20 See *R v Peleshaty* (1949), [1950] 57 Man R 500 at 509, 96 CCC 147 (MBCA), Adamson JA.

21 (1954), 109 CCC 306 at 310, 19 CR 173 (Alta SC (TD)) [*Ling*].

22 RSC 1952, c 201, as repealed by the *Narcotic Control Act*, RSC 1961, c 35.

23 *Ling*, *supra* note 21 at 307.

24 *Ibid* at 310.

25 *Ibid*.

26 See *Canadian Pacific*, *supra* note 3 at 1081–82.

the actual meaning intended by the legislature."[27] Citing Elmer Driedger, Justice Gonthier agreed that the absurdity principle may be relied upon to narrow the scope of a statute.[28] As such, he concluded that "[w]here a provision is open to two or more interpretations, the absurdity principle may be employed to reject interpretations which lead to negative consequences, as such consequences are presumed to have been unintended by the legislature."[29] Citing Sir Walter Scott's reasoning in *The Reward*, Justice Gonthier explicitly drew a connection between the absurdity principle and the maxim *de minimis non curat lex*.[30]

Although the *de minimis* principle originally delimited the scope of statutes, it was later applied as a defence to a number of offences that clearly prohibited *de minimis* infractions. The assault offence found in section 265 of the *Criminal Code*[31]—which Coughlan agrees captures *de minimis* conduct[32]—is illustrative. That provision criminalizes any "intentional, non-consensual application of force, or the threat thereof."[33] As a result, even a truly trifling act such as a poke on the chest comes within the scope of the assault prohibition.[34] Subsequently, trial courts have applied the *de minimis* defence to a variety of offences, including theft,[35] obstruction of justice,[36] and breach of trust.[37] In all these cases, however, no court has explained why *de minimis* was properly transformed from a principle of statutory interpretation to a full-fledged criminal defence.

II. Abuse of Process

For *de minimis* to be preserved as a defence, it ought to serve a distinct function in the criminal law. Coughlan maintains that the *de minimis* defence overlaps with the defence used for ensuring prosecutorial dis-

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27 *Ibid* at 1082.

28 See *ibid* (citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed (Toronto: Butterworths, 1994) at 94).

29 *Canadian Pacific*, *supra* note 3 at 1082.

30 See *ibid*.

31 See *Criminal Code*, *supra* note 11, s 265.

32 See Coughlan, *supra* note 7 at 270.

33 *Cuerrier*, *supra* note 5 at 385 (interpreting the *Criminal Code*, *supra* note 11, s 265).

34 See e.g. *R v Johnson* (2000), 198 Sask R 87 at para 17, 48 WCB (2d) 46 (Sask Prov Ct).

35 See *R v Fowler*, 2009 SKPC 114.

36 See *R v AM* (1996), 185 AR 11 at para 19, [1996] AJ No 396 (Alta Prov Ct).

37 See *R v Wadel*, [2001] OJ No 4248 at paras 665–66, 51 WCB (2d) 429 (Ont Sup Ct).

cretion is exercised properly: abuse of process.[38] The Supreme Court of Canada has used a variety of terms to describe an abuse of process. In *Krieger v. Law Society of Alberta*,[39] the Court described such actions as constituting "flagrant impropriety."[40] Similarly, in *R v. Nixon*,[41] the Court found that an abuse of process arises where there is evidence demonstrating that the Crown's decision "undermines the integrity of the judicial process,"[42] "results in trial unfairness,"[43] or is an act taken for an "improper motive" or out of "bad faith."[44] Most recently, the Court summarized the doctrine in *R v. Anderson*,[45] noting that "abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system."[46]

Coughlan's argument has significant appeal if the *de minimis* defence is concerned with the exercise of prosecutorial discretion. Indeed, assimilating the *de minimis* defence into this branch of the abuse of process doctrine may well render the *de minimis* defence moot, as there is nothing clearly "egregious" about the prosecutor's choice to bring a criminal charge that falls within the four corners of the *Criminal Code*. However, I cannot agree that the *de minimis* defence is about challenging the Crown's discretion to bring a particular charge. Instead, the defence concerns the judge's decision to find the accused guilty. Thus, whereas Coughlan focuses on whether a prosecution should have been brought, I think the *de minimis* defence more directly asks whether a judge should find an accused guilty.[47]

Focusing on the latter question, the judge's decision to find an accused guilty must be consistent with the judicial function. That function includes a residual discretion for courts to stay proceedings where their actions would be inconsistent with the principles of fundamental justice.[48]

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38 See Coughlan, *supra* note 7 at 275. For a similar argument, see Manning & Sankoff, *supra* note 13 at 518–19.

39 2002 SCC 65 [*Krieger*].

40 *Ibid* at para 49.

41 2011 SCC 34.

42 *Ibid* at para 64.

43 *Ibid*.

44 *Ibid* at para 68.

45 2014 SCC 41.

46 *Ibid* at para 50.

47 See Coughlan, *supra* note 7 at 278.

48 See e.g. *R v Jewitt*, [1985] 2 SCR 128, 20 DLR (4th) 651. It is notable that such an inquiry is not concerned with the prudence of using state resources for any given prosecution. In the criminal law context, I think it is only permissible for courts to consider

The essence of the problem with criminalizing *de minimis* conduct is that it could violate the principle of fundamental justice prohibiting grossly disproportionate state conduct.[49] In *Canada (AG) v. Bedford*,[50] the Supreme Court of Canada explained that a law violates the gross disproportionality principle when its effects are grossly disproportionate compared to its objective.[51] In conducting this analysis, courts need only consider the effect of the law on a single person but must presume that the law fully achieves its objective at the section 7 stage of the analysis.[52] The extent to which the law actually achieves its objective is considered under section 1.[53]

Applying the gross disproportionality principle in the defence context avoids the need to consider the broader ability of a law to achieve its objective. Such a consideration is necessary when challenging the constitutionality of legislation because of the relationship between the various rights provisions and section 1 of the *Canadian Charter*. The latter provision requires that courts determine whether the effects of a law on all individuals' constitutionally protected rights are proportionate to the good otherwise achieved by the law.[54] In the defence context, however, it is only necessary to consider how a law impacts the individual before the court. A judge should therefore apply the gross disproportionality principle by weighing the extent to which the law achieves its objective in a particular case against any costs imposed on the defendant as a result of being found guilty of a crime.

In my view, finding someone guilty for *de minimis* conduct will routinely violate the gross disproportionality principle. As the Supreme

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the effects instituting criminal process has on the accused because to interfere with the Crown's use of resources would unduly interfere with their discretion to bring charges. There is nevertheless American support for the former use of the *de minimis* defence in this manner (see Melissa Beth Valentine, "Defense Categories and the (Category-Defying) De Minimis Defense" (2017) 11 Crim L & Philosophy 545 at 549–50, 553 (citing *Commonwealth v Jackson*, 354 Pa Super 27 (1986); *Commonwealth v Houck*, 233 Pa Super 512 (1975))).

49 See Colton Fehr, "Reconceptualizing *De Minimis Non Curat Lex*" (2017) 64:1/2 Crim LQ 200 at 219–21 [Fehr, "*De Minimis*"].

50 2013 SCC 72 [*Bedford*].

51 See *ibid* at para 120.

52 See *ibid* at paras 120–23, 125; Hamish Stewart, "*Bedford* and the Structure of Section 7" (2015) 60:3 McGill LJ 575; Colton Fehr, "The 'Individualistic' Approach to Arbitrariness, Overbreadth, and Gross Disproportionality" (2018) 51:1 UBC L Rev 55; Colton Fehr, "Rethinking the Instrumental Rationality Principles of Fundamental Justice" (2020) 58:1 Alta L Rev 133.

53 See *Bedford*, *supra* note 50 at paras 124–27.

54 See *R v Oakes*, [1986] 1 SCR 103 at 138–39, 26 DLR (4th) 200.

Court of Canada observed in *R v. Malmo-Levine*,[55] "being prosecuted and convicted in a criminal court bears a stigma that can have far-reaching consequences in an individual's life in such areas as job choices, travel and education. Participating in the criminal court process can also involve personal upheaval."[56] Thus, the miniscule intrusion on a law's objective arising from a truly *de minimis* act—such as a tap on the chest—must be weighed against the potentially life-altering effects of preventing someone from acquiring employment, travelling, or pursuing education. Moreover, the courts must consider the fact that more generic costs of instituting criminal process can be onerous for some accused—especially impoverished persons—as participating in the criminal process may require forgoing work, enduring childcare costs, or other personal expenses.

Application of the gross disproportionality principle in the *de minimis* context admittedly requires a qualitatively different sort of balancing than in the Supreme Court of Canada's jurisprudence applying that principle. A group's security of the person interests are not being sacrificed to avoid the social nuisance arising from undesirable public communications.[57] Nor is anyone's physical safety endangered because they cannot conduct their work from indoors.[58] The laws at issue in the *Bedford* case—prohibitions against communicating in public for the purpose of sex work and operating a bawdy house—were nevertheless able to substantially forward their objectives. In the *de minimis* context, the consequences need not rise to the same levels given the law's trifling ability to further its objective. It is therefore reasonable to conclude that the usual consequences of the criminal process will be grossly disproportionate to the law's ability to achieve its objective.[59]

This conception of the *de minimis* defence differs significantly from the judiciary's limited ability to supervise the exercise of prosecutorial discretion. When the Crown brings a *de minimis* charge, the court is not preventing the prosecution from presenting its case as occurs with abuse of process applications relating to other forms of state misconduct. Con-

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55 2003 SCC 74 [*Malmo-Levine*].

56 *Ibid* at para 172.

57 See *Bedford*, *supra* note 50 at paras 68–72 (discussing the *Criminal Code*, *supra* note 11, s 213(1)(c), as repealed by the *Protection of Communities and Exploited Persons Act*, SC 2014, c 25, s 15).

58 See *Bedford*, *supra* note 50 at paras 130–36 (discussing *Criminal Code*, *supra* note 11, s 210, as repealed by *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25, s 73).

59 For a more detailed review of this argument, see Fehr, "*De Minimis*", *supra* note 49 at 220–22. The limited ability of the law to mitigate these effects by imposing an absolute discharge is discussed below.

sider a plea of entrapment or any form of egregious prosecutorial misconduct. In these types of cases, a stay of proceedings is entered *before* the Crown can fully present its case. As such, the court is directly interfering with the Crown's ability to have the case decided on its merits. Given the neutral role of judges in the adversarial system, such interference rightly ought to be limited.[60] In contrast, the accused pleading the *de minimis* defence only asks for the charges to be stayed *after* the Crown's case has been heard. At this stage, the focus of the defence is not on the prosecutor's decision to bring the charge, but rather whether the court would be acting in accordance with fundamental justice by finding the accused guilty.

This argument is bolstered by considering the way in which the adversarial system determines the facts upon which a defence is based. Although the Crown will endorse a particular theory of any given case, it does not know how the facts will be decided at trial. Put differently, the evidence revealed in court may be different than the evidence which formed the basis upon which the Crown made his or her decision to prosecute a case.[61] One might counter that the Crown's decision to continue a prosecution after hearing all the evidence could provide the basis for challenging the Crown's exercise of discretion. However, such an approach still requires the Crown to make findings of fact based on competing accounts of the evidence to determine whether such an application has merit. As factual findings are the exclusive domain of the trial judge, it is preferable for the *de minimis* defence to focus on the trial judge's determination of whether the accused is guilty than on the Crown's decision to prosecute the case.

III. Absolute Discharges

Both Coughlan and Judge Gorman have asserted that the existence of an absolute discharge dispenses with the need to preserve the *de minimis* defence. Although Coughlan does not directly rely upon Judge Gorman's criticisms, a review of the latter's views can help better understand Coughlan's proposal to abandon the *de minimis* defence in light of the availability of an absolute discharge. Writing in *R v. Gale*,[62] Judge Gorman places significance on the purpose of the *de minimis* defence as originally stated in *The Reward*, namely, to avoid "inflexibly severe" penal-

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60 See *Krieger*, *supra* note 39 at para 32.

61 I thank one of the reviewers for making this point.

62 See *Gale*, *supra* note 2. See also *R v Cross* (1976), 14 Nfld & PEIR 22, 33 APR 22 (Nfld Prov Ct) [*Cross*].

ties.[63] For Judge Gorman, the *de minimis* defence's laudable aim may be achieved without acquitting the accused outright. The trial judge may instead grant the accused an absolute discharge under section 730 of the *Criminal Code*.[64] The availability of such a sentence avoids imposing any punishment at all, thereby serving the very purpose of the *de minimis* defence.

Judge Gorman's argument for abandoning the *de minimis* defence relies on the wording of subsection 8(3) of the *Criminal Code*. That subsection preserves justifications, excuses, and other defences "except in so far as they are altered by or are inconsistent with ... [an] Act of Parliament."[65] As a discharge is available for any offence to which the *de minimis* defence could feasibly be applied,[66] the *de minimis* defence is arguably inconsistent with section 730 of the *Criminal Code*.[67] As I have argued elsewhere, however, just because two laws may be applied to achieve the same end does not render those laws inconsistent with each other. The *de minimis* defence may become *superfluous* in light of the availability of an absolute discharge, but subsection 8(3) requires an inconsistency, which is a higher bar to meet.[68]

More fundamentally, it should also be questioned whether the initial purpose of the *de minimis* principle—avoiding "inflexibly severe" penalties[69]—ought to be transposed onto the criminal defence domain. In my view, the operation of the *de minimis* defence in the criminal law serves a different function than in the civil law context. Given the significant force that is brought upon a person when the state institutes criminal process, the state ought to be required to justify using that process at all, not just any penalty ultimately imposed. These effects include the stigma of being branded a criminal, which can have far reaching consequences in terms of employment, education, and travel, as well as personal upheaval resulting from proceeding through the criminal justice system.[70] Unlike civil

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63 *Gale*, *supra* note 2 at para 28 (citing to *The Reward*, *supra* note 1 at 270).

64 See *Gale*, *supra* note 2 at para 29; *Criminal Code*, *supra* note 11, s 730.

65 *Criminal Code*, *supra* note 11, s 8(3).

66 See Fehr, "*De Minimis*", *supra* note 49 at 217–18 (responding to Don Stuart's concern that removing the *de minimis* defence would leave some offenders without a defence); Stuart, *supra* note 13 at 598.

67 See *Gale*, *supra* note 2 at para 29; *Cross*, *supra* note 62 at para 5 (*Cross* refers to subsection 662.1(1) of the *Criminal Code*, the former provision for absolute or conditional discharges).

68 See Fehr, "*De Minimis*", *supra* note 49 at 218–19.

69 *The Reward*, *supra* note 1 at 270.

70 See *Malmo-Levine*, *supra* note 55 at para 172.

proceedings, failure to appear in court or obey conditions of release will also result in further criminal charges.[71]

Coughlan nevertheless suggests that most of these consequences are avoided by utilizing the absolute discharge provision. As he observes, the effect of imposing an absolute discharge under section 730 of the *Criminal Code* is that the person "shall be deemed not to have been convicted of [an] offence."[72] For Coughlan, this aspect of the absolute discharge provision renders it functionally equivalent to the *de minimis* defence as the accused is not actually convicted.[73] From a conceptual standpoint, Coughlan also observes that an absolute discharge "serves the goal of preserving respect for the administration of justice ... by showing that the system as a whole is able to properly acknowledge the triviality of some breaches."[74]

There are nevertheless important differences between being found not guilty and being granted an absolute discharge. Despite the wording of the discharge provisions, Allan Manson observes that a discharge is not "tantamount to an acquittal since the finding of guilt is not expunged."[75] This fact may have implications with respect to one's ability to receive employment, pursue education, or travel as a result of a discharge. Although a person who is granted an absolute discharge may answer "no" to the question of whether they have been convicted of a crime, they must answer "yes" to the question of whether they have been found guilty of a crime.[76] If an employer, educator, or border agency uses the latter type of question, this may have a broad and difficult to predict effect on a person's livelihood.

In addition, a discharge results in a criminal record. The *Criminal Records Act*[77] states that an absolute discharge will remain on the offender's record for one year.[78] However, the *CRA* only establishes this requirement for the Royal Canadian Mounted Police.[79] Other provincial police forces are therefore not compelled to take such action, resulting in

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71 See *Criminal Code*, *supra* note 11, ss 145(2), 145(5).

72 *Ibid*, s 730.

73 See Coughlan, *supra* note 7 at 280.

74 *Ibid*.

75 Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 217.

76 See *ibid* at 217–18.

77 RSC 1985, c C-47 [*CRA*].

78 See *ibid*, s 6.1(1)(a).

79 See Clayton C Ruby, Gerald J Chan & Nader R Hasan, *Sentencing*, 8th ed (Markham: Lexis Nexis, 2012) at 428.

discharges being more permanent.[80] Moreover, a prosecutor is legally permitted to apply for the consent of the Solicitor General to provide evidence of a discharge even after the one-year period has elapsed.[81] This ability to raise prior discharges in criminal proceedings may impact future decisions by the Crown. For instance, an offence that might otherwise be mediated under section 717 of the *Criminal Code* could feasibly be prosecuted because the prosecutor is aware of a previous discharge. Some courts have also used prior evidence of a discharge as an aggravating factor in sentencing,[82] or as a "previous conviction" for the purpose of seeking a greater punishment in subsequent proceedings under subsection 727(1) of the *Criminal Code*.[83]

Given the various potential effects of receiving an absolute discharge, I cannot agree with Coughlan that an absolute discharge and a *de minimis* defence are functionally equivalent. Instead, there are distinct roles for both the *de minimis* defence and the absolute discharge provision. Conduct that is truly *de minimis* ought not result in a finding of guilt. Conduct above the *de minimis* threshold should nevertheless be granted an absolute discharge if balancing the various sentencing principles warrants such a sanction. Preserving the *de minimis* defence would therefore allow the accused to avoid a myriad of potential consequences in future proceedings or in their personal and professional lives.

IV. Constitutional Exemptions

Coughlan's final argument for abandoning the *de minimis* defence is premised on an analogy to constitutional exemptions.[84] At the outset, it is important to clarify what Coughlan means by a constitutional exemption. It is not uncommon for a law to be found unconstitutional, but that the declaration of invalidity be suspended for a short period. During that time, courts will sometimes exempt particular people from application of the law during the suspended declaration of invalidity.[85] This is not the type of exemption Coughlan is referencing. Instead, he is concerned with

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80 See *ibid*. As a former prosecutor, I found that discharges frequently were not removed after the federal expiry date.

81 See *ibid* at 428–29.

82 See Ruby, Chan & Hasan, *supra* note 79 at 385 (citing *R v Panagiotou* (1989), 57 Man R (2d) 156, [1989] MJ No 29 (Man QB); *R v Naraindeen* (1990), 75 OR (2d) 120 at 132, 80 CR (3d) 66 (ONCA)); *Criminal Code*, *supra* note 11, s 717.

83 See *R v Brown*, 2003 ABPC 192 at paras 8–20; *Criminal Code*, *supra* note 11, s 727(1).

84 See Coughlan, *supra* note 7 at 280–83.

85 See e.g. *Carter v Canada (AG)*, 2015 SCC 5 at para 32 [*Carter* 2015]; *Carter v Canada (AG)*, 2016 SCC 4 at paras 5–7.

instances where a statute is found unconstitutional but, to preserve its constitutionality, the accused and others whom the statute impacts in an unconstitutional manner are exempted from the statute's application on a case-by-case basis.[86]

The Supreme Court of Canada has consistently rejected the latter type of exemption as a remedy under section 52 of the *Constitution Act, 1982*.[87] For Coughlan, the *de minimis* defence is no different than a constitutional exemption.[88] He is right in one sense. The *de minimis* defence—as with all defences—are exemptions to criminal statutes. Thus, both defences and constitutional exemptions serve the function of exempting a person from a particular law. However, I do not think this similarity is sufficient to require *de minimis* to be abandoned as a defence. My reasoning broadly relates to the role of defences in the Anglo-American structure of the criminal law and the way that defences necessarily impact how legislative intent is interpreted.

It is trite to say that offences catch conduct that is not criminal and cannot reasonably be expected to be drafted to avoid these consequences. That is why defences exist. Readily accepted defences such as self-defence, duress, and necessity all ensure that instances of justifiable or excusable conduct do not result in convictions.[89] As a result, it is illogical to assess an offence's scope without understanding the applicability of defences. To conclude otherwise would lead to absurd results, especially since defences have been constitutionalized under section 7 of the *Canadian Charter*.[90] If offences are constitutionally examined without acknowledging the role of defences, then every offence would violate section 7 of the *Canadian Charter*. This is true because every offence can feasibly be committed in a manner that is either excusable (i.e., "morally involuntary")[91] or justified (i.e., morally permissible or innocent).[92]

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86 See Coughlan, *supra* note 7 at 281.

87 Most recently, see *Carter* 2015, *supra* note 85 at paras 124–25.

88 See Coughlan, *supra* note 7 at 280.

89 It is notable that Coughlan alludes to this point later in his article but does not recognize its force (see *ibid* at 274).

90 See *R v Ruzic*, 2001 SCC 24 at paras 21–22 [*Ruzic*]. Building on the *Ruzic* case, I have elsewhere provided what I think is a more robust conceptualization of justification- and excuse-based defences (see Colton Fehr, "(Re)Constitutionalizing Duress and Necessity" (2017) 42:2 Queen's LJ 99 [Fehr, "Duress and Necessity"]; Colton Fehr, "Self-Defence and the Constitution" (2017) 43:1 Queen's LJ 85; Colton Fehr, "Consent and the Constitution" (2019) 42:3 Man LJ 217).

91 The principle that an accused must not be convicted for morally involuntary conduct was constitutionalized in *Ruzic* (*supra* note 90 at para 47).

Different principles were at play when the Supreme Court of Canada considered the constitutionality of granting constitutional exemptions. For instance, litigants have maintained that constitutional exemptions constitute a remedy for unconstitutional mandatory minimum sentences, as was argued in the leading case of *R v. Ferguson*.[93] An intrinsic feature of mandatory minimum sentences is that they are mandatory. In other words, Parliament in no way contemplated allowing for any exceptions to the minimum sentence. Therefore, granting an exemption to a mandatory minimum sentence significantly intrudes into the legislative realm.[94] This is the heart of the reason why constitutional exemptions are impermissible.[95] Yet, criminal defences are not at all similar in this sense. When Parliament enacts offences, it does so with knowledge that defence-based "exemptions" will occur as a matter of course.

Coughlan also maintains that constitutional exemptions raise issues relating to the need to uphold the rule of law.[96] As the Supreme Court of Canada held in *Ferguson*, "[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."[97] Most notably, constitutional exemptions undermine the rule of law by impairing the ability of citizens to know the law.[98] Again, however, Coughlan's comparison to criminal defences is distinguishable. Any reasonably informed citizen knows that there are applicable defences to criminal offences. Citizens can therefore be expected to govern their conduct accordingly. This is not the case with constitutional exemptions to something like a mandatory minimum sentence. Crafting exemptions to such mandatory provisions would create clear confusion as the law on the books would say one thing while judges would maintain the power to ignore the law if the judge deems fit. Given this difference, preserving a *de minimis* defence cannot reasonably be said to undermine the rule of law.

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92 This latter point obviously assumes that justifications will receive constitutional status (for my argument as to why this must be the case, see Fehr, "Duress and Necessity", *supra* note 90 at 101). In sum, it would be incongruous if excuses (which excuse wrongful but morally involuntary conduct) received constitutional protection but justifications (which apply to rightful conduct) did not.

93 See *Ferguson*, *supra* note 14 at para 1.

94 See *ibid* at para 50.

95 See *ibid*.

96 See Coughlan, *supra* note 7 at 282–83.

97 *Ibid* at 282 (citing *Ferguson*, *supra* note 14 at para 72).

98 See *Ferguson*, *supra* note 14 at para 72.

V. Conceptualizing the *De Minimis* Defence

It is prudent to conclude by providing an affirmative case for why I think *de minimis* constitutes a defence in criminal law. If it is not a defence as that term is legally understood,[99] my argument is significantly weakened. My own work *prima facie* works against me at this juncture. Elsewhere I maintain that the *de minimis* defence does not constitute an excuse or justification as those terms have been defined in Canada.[100] Excuses focus on the "morally involuntary" nature of an accused's actions, and the *de minimis* defence clearly involves voluntary actions.[101] Justifications, according to the Supreme Court of Canada, connote "rightful" conduct.[102] As the essence of the *de minimis* defence is that the accused's actions were not "wrongful" enough to warrant criminal sanction, it again does not fit within the definition of a justification.[103]

Fortunately, justifications and excuses are not the only recognized categories of criminal defences. In my view, the *de minimis* defence fits comfortably into the category of what Andrew Botterell calls a "procedural" defence.[104] Botterell cites the entrapment defence and the prohibition

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99 By this I mean to exclude the passive use of defence as any argument that results in an acquittal. Instead, a defence is restricted to pleas that result in an acquittal to a proven offence.

100 For a more detailed review, see Fehr, "*De Minimis*", *supra* note 49 at 211–16. Notably, courts typically refer to the defence as an "excuse" (see e.g. *Canadian Foundation*, *supra* note 5 at para 204).

101 See Fehr, "*De Minimis*", *supra* note 49 at 211–16 (relying on the definition of justification and excuse first elaborated by the Court in *Perka v The Queen*, [1984] 2 SCR 232 at 246–47, 13 DLR (4th) 1 [*Perka*]). Others have argued that *de minimis* could, in rare circumstances, ground an excuse claim based on a denial of responsibility (see Valentine, *supra* note 48 at 554 (citing *People v Doe*, 602 NYS 2d 507 (NY City Crim Ct 1993))). Even if excuses were recognized as "morally blameless," as the Court explicitly rejected in *Ruzic* (see *supra* note 90 at para 41), the *de minimis* defence still cannot fit into the excuse category as a *de minimis* crime strikes me as inherently blameworthy.

102 *Perka*, *supra* note 101 at 246.

103 See *ibid*. See also *Canadian Foundation*, *supra* note 5 at para 203. For an interesting proposal to modify the definition of justification and excuse to fit the *de minimis* defence, see Husak, *supra* note 4 at 345–46.

104 Andrew Botterell, "A Primer on the Distinction between Justification and Excuse" (2009) 4:1 Philosophy Compass 172 at 173. Other scholars conceptualize defences differently but not in a way that is inconsistent with Botterell's four categories (see e.g. Paul H Robinson, "Criminal Law Defenses: A Systematic Analysis" (1982) 82:2 Colum L Rev 199 at 203). Robinson proposes five categories of defences: "failure of proof defenses, offense modification defenses, justifications, excuses, and nonexculpatory public policy defenses" (*ibid*). In essence, the first two categories of defences are, practically speaking, denials that the offender committed the offence and thus are not "true" defences. Justification and excuse are the same for both scholars, while "non-exculpatory public policy defenses" encompass procedural- and exemption-based defences.

against double jeopardy as examples of this category of defence.[105] He also distinguishes justifications, excuses, and procedural defences from a fourth category of defences: exemptions. The latter category is concerned with statutory bars to prosecution such as the defence of diplomatic immunity.[106]

Botterell does not elaborate upon what distinguishes procedural defences from justifications, excuses, and exemptions. This is no doubt because his article is primarily concerned with the distinction between justifications and excuses.[107] Nevertheless, I think a more robust conceptualization of procedural defences vis-à-vis the other three categories of defences is critical to understanding the place of the *de minimis* defence in the criminal law. As John Gardner explains, justifications and excuses broadly turn on the reasons an accused provides for committing a criminal act.[108] This is not the only conceptualization of these categories of defences,[109] but it seems to be a reasonable explanation. The accused pleading self-defence, duress, or necessity admits to committing the offence but asks to be acquitted as they offer a coherent moral reason for their actions. In essence, the justified or excused accused claims that they committed the crime to protect their person, some other person, or property.

An accused pleading a procedural defence does not offer a reason for committing an offence. Instead, they offer a reason for why the state ought not be permitted to continue its prosecution against them. Relying on Botterell's two examples, an accused who has been entrapped by police claims that random virtue testing of citizens is not a proper state function.[110] To deter such conduct, the court enters a stay of proceedings. Similarly, an accused who was previously acquitted of an offence claims that the prosecutor acts inappropriately by attempting to prosecute the ac-

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105 See Botterell, *supra* note 104 at 173.

106 See *ibid*. Although Botterell also includes statutory bars to prosecuting children under a certain age, I am hesitant to assert that such a defence ought to be categorized as an exemption. I think exemptions are based on pure policy reasons, while justifications, excuses, and procedural defences are based on moral reasons. There appear to be both policy (efficiency in enforcing criminal justice) and moral reasons (although many children are incapable of committing a crime, those that are capable ought not to be criminally sanctioned) for not prosecuting children of a young age. As my argument relating to the proper conception of the *de minimis* defence is not impacted by this issue, I prefer to leave this question for another day.

107 See Botterell, *supra* note 104.

108 See *ibid* at 182 (citing John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford, UK: Oxford University Press, 2007) at 86).

109 See Botterell, *supra* note 104 at 180–89 (explaining the "responsibility" and "reasonable belief" theses).

110 See *R v Mack*, [1988] 2 SCR 903 at 965–66, 44 CCC (3d) 513 [*Mack*].

cused again for the same crime. To conclude otherwise would leave citizens perpetually liable for their conduct.

Understood in this way, the distinction between justifications or excuses and procedural defences is readily discernible. Justifications or excuses turn on the reasons provided by the accused for committing a crime, while procedural defences assess the actions of the state in exercising its criminal law powers. These three categories of defences may also be distinguished from the fourth category: exemptions. Unlike the first three categories, there are no definitive moral reasons for granting an exemption. Instead, a defence like diplomatic immunity is based strictly on policy reasons devised by legislatures. If diplomatic immunity were not a defence in Canada, other countries likely would not grant Canada's diplomats a similar immunity. To protect Canadian diplomats from arbitrary exercises of foreign authority, it is therefore necessary to provide this more general protection to other countries' diplomats as well. This rationale, however, is strictly based on policy reasons, not moral reasons.

The *de minimis* defence cannot be an exemption as it is not sanctioned by a legislature and, as Coughlan rightly observes, it would be inappropriate for a court to assert a defence for policy reasons alone.[111] Fortunately, the *de minimis* defence fits squarely into the rationale for procedural-based defences: it ensures that state conduct conforms with basic principles of justice. Unlike entrapment, however, the defence is not concerned with police actions. Nor is it concerned with the actions of prosecutors. Instead, the *de minimis* defence is concerned with the judge's choice to find an accused guilty. I see no reason why a procedural defence cannot be based on state actions taken by either the police, prosecution, or judiciary. If true, then the *de minimis* defence fits comfortably as a procedural defence as its primary focus is to ensure a state actor (the judge) does not render a decision that is contrary to fundamental justice.

Unfortunately, in considering what constitutes a defence in Canadian criminal law, the Supreme Court of Canada has not adequately distinguished between these various categories. Most notable is the Court's jurisprudence defining the terms justification, excuse, and "defence to a charge" in subsection 8(3) of the *Criminal Code*.[112] Although the Court has provided a reasonably clear definition of the former categories,[113] it has provided very little substance to the "defence to a charge" category. The

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[111] See Coughlan, *supra* note 7 at 274.

[112] *Criminal Code*, *supra* note 11, s 8(3).

[113] See e.g. *Perka*, *supra* note 101 at 246–47; *Ruzic*, *supra* note 90 at paras 39–40; *R v Ryan*, 2013 SCC 3 at para 25 [*Ryan*].

Court's decision in *R v. Mack*[114] is illustrative. The Crown argued that the exclusive rationale for the entrapment defence lied "in the inherent jurisdiction of the court to prevent an abuse of its own processes."[115] The accused maintained that entrapment could also bear on culpability and thus could be conceptualized as an excuse or justification.[116] The Court convincingly concluded that entrapment does not fall into the excuse or justification categories as it does not concern culpability, but instead turns solely on the propriety of state action.[117]

Curiously, the Court does not conclude that the entrapment defence might be preserved as a "defence to a charge" under subsection 8(3) of the *Criminal Code*. Instead, it preferred to conclude that the entrapment defence derived from the Court's inherent jurisdiction to stay proceedings where there is an abuse of process. It is simply unclear why entrapment or any other instances of abuse of process could not constitute a "defence to a charge" under subsection 8(3). What else could that term possibly mean if not the only other affirmative type of plea that bars an accused from being found guilty? It might therefore be useful to think of procedural defences—or, perhaps more accurately, abuse of process defences—as a distinct category of defences that are preserved under subsection 8(3) of the *Criminal Code*.

It would nevertheless be inappropriate to subsume the abuse of process defences I have identified into one broader defence. This is because the factors underlying each defence are informed by the unique circumstances giving rise to each defence. With respect to entrapment, which arises at an early stage of the criminal process, the officer must simply have a reasonable suspicion that the accused is involved in particular criminal activity or act pursuant to a *bona fide* inquiry before providing the accused with the opportunity to commit an offence.[118] The limited jeopardy facing the accused and the fact that the state is not compelling the accused to do anything at this stage sets a relatively low bar for police to avoid a finding of abuse of process.

With prosecutorial misconduct, the state has brought charges against the accused and therefore has increased its intrusion onto the accused's liberty interests. The prosecutor is thus held to a higher standard than the investigating police officer. They must have at least a *prima facie* case against the accused before bringing a prosecution, and they must abide

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114 See *Mack*, *supra* note 110.

115 *Ibid* at 942.

116 See *ibid* at 943.

117 See *ibid* at 951.

118 See *ibid* at 964–65.

more generally with the duties of the Crown operating within the adversarial system of justice. The latter and more demanding context provide the relevant considerations for determining when a prosecutor's actions will amount to an abuse of process. Any actions deemed substantially prejudicial to the administration of justice—such as tampering with evidence or deliberately failing to disclose exculpatory evidence—will result in a stay of proceedings.

Lastly, a judge's duty to uphold the judicial function requires a final and more searching inquiry before finding the accused guilty. The decision to condemn the accused's actions using the state's heaviest hand requires that the judge ensure that the consequences of employing the criminal justice system are not grossly disproportionate to the objective of a particular prosecution. Where the accused's actions are truly *de minimis*, finding the accused guilty—regardless of the potential to apply a lenient punishment—can have such a disproportionate effect on an accused person that it shocks the conscience of the community. In those circumstances, a judicial finding of abuse of process is warranted.

Coughlan was correct, then, to say that the *de minimis* defence is encompassed by the idea of abuse of process. However, he incorrectly assumed that the defence derived from the Crown's decision to prosecute a *de minimis* offence. Preserving the *de minimis* defence as a component of the judge's determination of whether the accused ought to be found guilty requires assessing entirely different factors: the consequences arising from a finding of guilt as weighed against the minimal harm caused by the offence. In contrast, abuse of process applications relating to prosecutorial misconduct often turn on trial fairness considerations (e.g., destroying or tampering with evidence). To the extent that a prosecutorial misconduct defence turns on the repute of the justice system (e.g., failing to disclose evidence, double jeopardy),[119] the factors considered in determining such a defence—the nature of the Crown's actions and its impact on public confidence in the justice system—differ from those underlying the *de minimis* defence.

The different species of the abuse of process doctrine that I identify ought to be preserved for precisely the same reason that accused do not plead excuse or justification as a defence. Instead, they plead self-defence,

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[119] There is some overlap between whether a particular state action implicates fair trial interests and whether such an action undermines the integrity of the justice system. For instance, failing to disclose evidence may do both. However, I think this defence fits better under the administration of justice purpose because it is still technically possible to conduct a fair trial if the evidence is later disclosed. However, if the evidence were not disclosed due to gross or systemic negligence, a court might deem it fit to stay proceedings.

duress, or necessity, among other defences. Although these defences fit under the umbrella concepts of excuse and justification, each defence takes its shape from the unique circumstances giving rise to it. The most important distinguishing factor derives from the nature of the threat. As the Supreme Court of Canada explained in *R v. Ryan*,[120] self-defence is generally more readily available because the threat derives from the victim, while duress and necessity are more strictly construed because the victim is an innocent party.[121] The latter two defences are further distinguished from each other based on the source of the threat. While a duress defence arises because of a threat posed by a third party, a necessity defence derives from a threat of circumstances. The Court has used this difference to justify different legal tests, most notably by concluding that only necessity imposes an imminence requirement.[122]

Defendants should not be required to plead a broader category of justification or excuse because it makes it more difficult to isolate the relevant factors inherent to resolving a defence. Put differently, distilling the moral rationales underlying defences into narrower legal tests that apply to readily identifiable contexts allows the broader moral principles to be shaped in a manner that can be easily applied by criminal justice actors. Dividing each category of defences into multiple individual defences therefore serves a functional purpose. It is an interesting question whether the broader moral principles underlying criminal defences could themselves be shaped in a more determinate manner.[123] For present purposes, however, distinguishing between different types of defences as opposed to relying on a broader category of defence is generally accepted as prudent in the justification and excuse context. I see no reason why a similar rationale should not also justify preserving the narrower defences arising from the broader defence category of abuse of process.

Before concluding, it is prudent to address one further question: would my conception of the *de minimis* defence impact its availability? As my framing of the *de minimis* defence focuses on the consequences of conviction, it will necessarily result in the defence becoming less readily availa-

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120 See *Ryan*, *supra* note 113.

121 See *ibid* at paras 23–26.

122 See *ibid* at para 74. For a summary and criticism of the different legal tests underlying duress and necessity, see David M Paciocco, "No-one Wants to Be Eaten: The Logic and Experience of the Law of Necessity and Duress" (2010) 56:3 Crim LQ 240.

123 Kent Greenawalt raised a similar question several decades ago. See Kent Greenawalt, "The Perplexing Borders of Justification and Excuse" (1984) 84:8 Colum L Rev 1897 ("[i]nstead of introducing sharp distinctions between justification and excuse in the definition of specific defenses, a jurisdiction might adopt general and abstract definitions of justification and excuse that would cut across specific defenses that themselves did not sharply distinguish the two general grounds of defense" at 1913).

ble. As the consequences deriving from a criminal record are the most substantial to a *de minimis* offender, those who face the prospect of merely extending their record will face no substantial new harm. Although the offence will appear on their record and could feasibly be an aggravating factor at a future sentencing hearing, the judge sentencing an offender for a *de minimis* crime is able to communicate the trifling nature of the offence to future courts by granting an absolute discharge regardless of the offender's record. Such a conviction is unlikely to have much of an effect on a prior offender. Although the Supreme Court of Canada correctly identified various other consequences inherent to attending criminal court,[124] I do not think that such additional costs alone are sufficient to give rise to a grossly disproportionate effect. As such, the *de minimis* defence should practically be restricted to those without a criminal record.

Conclusion

Coughlan's argument against preserving the *de minimis* defence is intriguing, novel, and pushes his readers to think deeply about the conceptual origins of the criminal law. I nevertheless disagree with his assertion that *de minimis* ought to be rejected as a defence. In outlining my argument, I hope to not only have provided a convincing case for preserving the *de minimis* defence, but also to have moved forward our thinking about criminal defences. Although Canadian judges and scholars have written extensively about the theory underlying justifications and excuses, relatively few of them have paid similar attention to the abuse of process defences. In my view, this category of defences provides an umbrella concept for thinking about at least three contextually distinct defences, namely, entrapment, prosecutorial misconduct, and *de minimis*. Recognizing the relationship between these defences and abuse of process leads inexorably to the conclusion that *de minimis* ought to retain its status as a criminal defence.

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[124] See *Malmo-Levine*, *supra* note 55 at para 172. These costs were discussed in Part II, *above*.