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I. INTRODUCTION

Surprisingly, one of the most innovative, interesting, and complex provisions of the Model Penal Code, section 2.12, has attracted little attention, certainly much less than it deserves.[1] It has attracted a very limited legislative following,[2] drawn little notice from the judiciary,[3] and has been almost entirely ignored by legal academia which otherwise has produced substantial scholarship on the Model Penal Code ("MPC").[4] Perhaps one of the reasons MPC section 2.12 has acquired such a low profile was an inadequate "initial push" given to it by its creators and promoters. It was submitted to the American Law Institute

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1. Section 2.12 of the Model Penal Code reads:

> The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:
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> (1) was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense; or
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> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
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> (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.
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> The Court shall not dismiss a prosecution under Subsection (3) of this Section without filing a written statement of its reasons.

MODEL PENAL CODE § 2.12 (1962).

2. Only four states and the federal territory of Guam have adopted section 2.12, verbatim or with modifications. *See* HAW. REV. STAT. § 702-236 (1993); ME. REV. STAT. ANN. tit. 17A, § 12 (West 1996); N.J. STAT. ANN. § 2C:2-11 (West 1995); 18 PA. CONS. STAT. ANN. § 312 (West 1996); 9 GUAM CODE ANN. § 7.67 (1995).

3. *See infra* notes 108-115 and accompanying text.

4. The only notable exception is work by Paul H. Robinson. *See* 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 67 (1984).

("ALI") almost at the last moment with a few perfunctory comments by the Chief Reporter and was quickly approved without much discussion.[5]

The theory on which section 2.12 was submitted to the ALI by Professor Wechsler did not do full justice to the nature, novelty, and complexity of the provision:

> Now, [said Wechsler,] I will say a word of general justification for [section 2.12]. Nothing is more common in criminal law enforcement, of course, than the exercise on the part of the prosecuting attorney, to some extent—grand juries where there are grand juries—of a kind of unarticulated authority to mitigate the general provisions of the criminal law to prevent absurd applications, and this is an in camera operation. It doesn't come to court.
>
> It has been a general purpose of the Code to try to lay a foundation for bringing this general practice in criminal law administration which we agree is necessary, somewhat further out into the open, and the only way to do that seemed to be to vest in the court a kind of power analogous to the general dispensing power which is now exercised in practice by the organs of administration.[6]

With all due respect, this is a rather limited view. Section 2.12 represents more than a mere extension of discretionary power to dismiss charges beyond the office of a prosecutor. No doubt there are functional similarities between section 2.12 and negative prosecutorial discretion: both may serve as mechanisms of screening out trivial cases. This functional similarity notwithstanding, there are some essential theoretical and practical differences. Under the MPC approach, conduct that meets criteria specified in section 2.12 is, arguably, *not deemed a criminal offense at all*. If so, defendants engaging in such conduct have *the right* to be relieved of criminal responsibility and the court has not only the authority, but also the duty to act accordingly.[7] In effect, defendants may litigate the issue through the entire sys-

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5. *See Discussion of the Model Penal Code*, 39 A.L.I. PROC. 61, 105-08, 226-27 (1962) [hereinafter *Discussion of the MPC*].

6. *Id.* at 105.

7. The language of MPC section 2.12 suggests that the defendant is entitled to a dismissal once the statutory criteria obtain: "The Court *shall* dismiss a prosecution if . . . ." MODEL PENAL CODE § 2.12 (1962) (emphasis added). Some jurisdictions changed the original MPC's formulation "shall dismiss" to a more discretionary "may dismiss." *See* HAW. REV. STAT. § 702-236 (1993); ME. REV. STAT. ANN. tit. 17A, § 12 (West 1996); N.J. STAT. ANN. § 2C:2-11 (West 1995).

tem, including appellate and postappellate remedies. Therefore, freedom from prosecution and conviction becomes a matter of right rather than a matter of grace. Accordingly, conceptualizing the problem as a matter of substantive law or as a matter of official discretion is pregnant with some definite consequences. Moreover, the MPC drafters accorded section 2.12 the misleading and unduly limiting title "De Minimis Infractions." In fact, section 2.12 codifies four distinct defenses which belong to at least three different analytical categories, of which the de minimis defense proper is only one.[8] Consequently, each of the defenses housed under the de minimis heading, namely, customary license or tolerance, nonexistent or trivial harm, and extraordinary extenuating circumstances, must be discussed separately.

II. CONDUCT WITHIN A CUSTOMARY LICENSE OR TOLERANCE

Model Penal Code section 2.12(1) mandates that the court dismiss a prosecution if it is satisfied that the defendant's conduct "was within a customary license or tolerance, neither expressly negatived by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense."[9] All five jurisdictions who have adopted this provision[10] have done so either verbatim[11] or with slight modifications.[12] Wechsler offered to the ALI two illustrative hypotheticals as the only elucidation of this provision:

> [Section 2.12] gives the court an authority to dismiss upon the finding that the defendant's conduct, first, was within a customary license or tolerance not expressly negatived by the victim or inconsistent with the law—trespassing, for example, in an area where trespassing has been traditionally permitted by the owners; picking up newspapers from the stand when you haven't got five cents to pay for them, but paying the next day when you get your paper.[13]

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8. *See* 1 MODEL PENAL CODE AND COMMENTARIES § 2.12 cmt. 2, at 403 (1985); 1 ROBINSON, *supra* note 4, § 67(a), at 320 (pointing out the imprecision of the de minimis heading).

9. MODEL PENAL CODE § 2.12 (1962).

10. *See supra* note 2.

11. *See* 18 PA. CONS. STAT. ANN. § 312 (West 1996).

12. The Guam and New Jersey statutes use the word "negated" instead of "negatived," whereas the Hawaii and Maine statutes have substituted "refused" for "negatived." *See* HAW. REV. STAT. § 702-236 (1993); ME. REV. STAT. ANN. tit. 17A, § 12 (West 1996); N.J. STAT. ANN. § 2C:2-11 (West 1995); 9 GUAM CODE ANN. § 7.67 (1995).

13. *Discussion of the MPC*, *supra* note 5, at 105.

Subsequently, the official commentary to the MPC,[14] as well as Paul Robinson,[15] essentially endorsed the idea somewhat cryptically expressed by Wechsler's hypotheticals. As Robinson succinctly stated, "This customary license ground for the defense is essentially a form of consent defense."[16]

Robinson and Wechsler's interpretation of the customary license provision should be rejected as deficient for at least two reasons. First, such an interpretation would make section 2.12(1) devoid of any normative significance and therefore redundant. The customary license clause would amount to a mere repetition of what is already included in other parts of the Code, particularly in section 2.11 regarding consent.[17] Such a reading of section 2.12(1) would offend not only common sense, but also one of the first principles of statutory construction, which presumes that every statutory provision has some normative potency of its own and thus is not redundant.[18] The very hypothetical used by Wechsler illuminates the point quite well: a person taking a newspaper from the stand with intent to pay for it the next day and with implied consent of an owner is not guilty of larceny, regardless of the customary license provision. He is not guilty because under such circumstances two material elements of the crime of larceny are missing: there is neither trespassory taking (negated by the owner's implied consent) nor intent to steal (negated by the belief in the owner's consent and intent to pay for the newspaper). Under the circumstances, the prosecution must fail for want of proof of material elements of the offense; there is no need to reach the issue of any "defense" in the proper sense of the term, in particular the de minimis defense.[19] Similar anal-

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14. *See* 1 MODEL PENAL CODE AND COMMENTARIES § 2.12 cmt. 2, at 402 (1985).

15. *See* 1 ROBINSON, *supra* note 4, § 67(b), at 323 ("Indeed, customary license is commonly considered to be a form of implied consent.").

16. *Id.* at 322.

17. For example, section 2.11(1) states, "The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense."

18. It has been recognized as a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." Kungys v. United States, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion); *accord* Colautti v. Franklin, 439 U.S. 379, 392 (1979).

19. The term "defense," in a substantive law sense, should be reserved only for a set of circumstances which entitles a defendant to exoneration notwithstanding the fact that his conduct included all material elements of the crime charged; hence, "defense" must be a set of circumstances extrinsic to the statutory definition of the

ysis applies to Wechsler's trespass hypothetical: consent of an owner, whether express or implied, negates one of the material elements of the offense definition and for that reason alone precludes conviction.[20]

Second, the customary license defense applies also to offenses where the consent defense is not available, either because the offending conduct encroaches against public rather than individual interests or a victim is legally incapable of consent. Thus, although there is some limited kinship between the consent and customary license defenses,[21] a view which reduces the latter to a variation of the former is fundamentally wrong. Perhaps because of the reductionist gloss put upon the customary license provision, it remains to this day a dead letter, almost completely ignored by the courts and the litigants of the jurisdictions in which MPC section 2.12(1) has been adopted.[22]

In contradistinction to Professor Wechsler's view, my reading of section 2.12(1) is based on the assumption that it refers to societal or communal rather than individual customs.[23] Therefore, conduct "within customary license or tolerance" should be understood as conduct fitting a behavioral pattern followed with certain regularity within a community with its approval ("license") or at least without its disapproval ("tolerance"). Conventional academic wisdom holds that even in jurisdictions adhering to the principle *nullum crimen sine lege*, justifications, unlike offense

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offense. In other words, one can properly speak about a defense only after it is established that the actor's conduct satisfies all the elements of the offense definition. Quite apart from conceptual clarity, in American jurisdictions the rigorous offense-defense dichotomy has important constitutional implications, since the prosecution must sustain the burden of persuasion as well as the burden of production with regard to all material elements of the offense definition, whereas the defendant may be burdened with proving proffered defenses. *See* Jackson v. Virginia, 443 U.S. 307, 324 (1979); Patterson v. New York, 432 U.S. 197, 215 (1977). As Robinson pointed out, "Lack of consent is frequently an element in such offenses as rape, kidnapping, abduction, theft, and trespass." 1 ROBINSON, *supra* note 4, § 66(b), at 308 (footnotes omitted). One wonders what the qualifier "frequently" means in this context: is it ever possible to commit theft or trespass with consent of an owner?

20. *See* 1 ROBINSON, *supra* note 4, § 66(b), at 308; *id.* § 110(b), at 556-59.

21. *See infra* note 27 and accompanying text.

22. These jurisdictions are listed in note 2. My research did not discover any relevant cases from Guam. In the other four jurisdictions, out of 40 reported cases in which the de minimis defense was raised, the customary license clause was invoked in only five cases.

23. That Wechsler had in mind individual customs as a basis to infer implied consent follows unequivocally from his hypothetical examples. *See supra* text accompanying note 13 (individual custom of a vendor who allows his customers to pick up a paper and pay for it the next day).

definitions, do not have to be provided for by legislation, but may grow from extrastatutory sources, such as informal customary rules of behavior.[24] Model Penal Code section 2.12(1) so provides explicitly and elaborately. The language of this provision suggests that we are dealing with a species of justification: conduct which satisfies all elements of the offense definition shall nonetheless be deemed legally authorized if it falls within a "customary license or tolerance."

Such situations, like other instances of justified conduct, might be viewed as a conflict of two rules.[25] Where a written statutory prohibition (offense definition) collides with an unwritten custom-based permission, the latter, under section 2.12(1), overrides the former. At the outset, two striking characteristics of this justification should be noticed. First, it is extremely open ended. Although unwritten customary norms are supposed to fill the void, it is impossible to predict what kind of customs will arise in future cases. The body of customary rules is not only ill-defined, but also constantly evolving. Therefore, we are dealing with moving targets. Moreover, many, if not most, customary rules are likely to be limited either to some localities or to certain ethnic, religious or, possibly, professional groups. Therefore, even at a given point in time, section 2.12(1) must assume a great diversity of justified conduct within the jurisdiction. Second, confronted with a conflict between two types of regulation—an official governmental regulation on the one hand and an unofficial, presumably local, norm on the other—the MPC gives precedence to the latter.

This extreme open-endedness and deference to the informal, local, and culturally diverse, must have limits. No modern government can be expected to incorporate indiscriminately all customs into its collection of justificatory rules. Therefore, quite

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24. *See* HANS-HEINRICH JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 244 (2d ed. 1972); ADOLF SCHÖNKE & HORST SCHRÖDER, STRAFGESETZBUCH: KOMMENTAR 386 (21st ed. 1982); WŁADYSŁAW WOLTER, NAUKA O PRZESTĘPSTWIE 164 (1973).

25. According to an opinion widely held in European legal academia, justified conduct always implicates two legal rules: an offense definition, which expresses a primary prohibitory rule, and a justificatory rule, which makes such conduct permissible under exceptional circumstances notwithstanding its generally prohibited nature. One can view it as a conflict of two rules: a prohibitory rule, which carries a presumption that the conduct is substantively antisocial as well as formally unlawful, and a justificatory rule, which rebuts the presumption. In the conflict-of-rules situation, the prohibitory rules are overridden by the justificatory rules, since the latter represent superior societal interests. *See* HANS WELZEL, DAS DEUTSCHE STRAFRECHT 80-83 (11th ed. 1969).

understandably, section 2.12(1) introduces two qualifying conditions. Customary "license or tolerance" must be neither (1) "expressly negatived by the person whose interest was infringed" nor (2) "inconsistent with the purpose of the law defining the offense."[26] Each of these limitations requires a closer examination.

With respect to the first limit on customary "license or tolerance," it appears that the defense may apply only if an offending conduct infringed upon interests of a person who belonged to a community or a group within which a relevant custom is practiced. Only then may it be reasonably presumed that an interest bearer, as a member of such group, silently acquiesced in an offending conduct and only then can the defense be rationalized as serving the value of autonomy of small communities as well as cultural diversity and normative pluralism. On the other hand, a defendant who has violated interests of outside parties, that is, strangers to a community within which such conduct is customary, should not be allowed to claim the defense at all.[27] But even an "insider" whose interest was infringed does not have to submit to a conduct which his community customarily approves or tolerates.

Under the first explicit limitation in section 2.12(1), such an individual may veto ("negative") a customary license and thereby elect to take shelter behind a formal statutory rule. Thus, no one may be deprived of legal protection against conduct which, although customarily deemed acceptable, is formally prohibited. In this way, the Model Penal Code seeks to reconcile three sometimes conflicting interests: the larger policy expressed in statute; local, informal standards reflected in customs; and individual interests infringed by customary conduct. In the end, the individual concerned may opt in favor of one of the two conflicting rules.

For example, it is customary in many communities in the United States to throw rice at newlyweds. Such conduct, but for

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26. MODEL PENAL CODE § 2.12(1) (1962).

27. Analogous protection of third parties was recognized by courts and commentators in the area of the free-exercise-of-religion exemption. For a further discussion, see Perry Dane, Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350, 368 (1980). That does not mean, however, that the defendant who infringed the third-party interest should never be allowed to introduce evidence tending to show that his conduct was acceptable within his culture. Such evidence may be relevant under a variety of criminal law rules. For example, it may show that the defendant did not entertain the requisite mental state or misconceived the danger to himself and, as a result, engaged in putative self-defense.

the custom, would be an assault since it involves touching without consent. If particular newlyweds do not want to have rice thrown at them, they may effectively proscribe such conduct and thereby "reinstate" the legal protection of the assault statute. This example brings to light some kinship between customary license and the consent defense. If the newlyweds are members of a community where rice-throwing has been customary, one can assume their acquiescence from the absence of protest.

However, the kinship does not mean an identity between the two defenses, as some commentators claim.[28] First, the customary license justification also applies in cases where the offending conduct infringes upon public rather than individual interests.[29] In such instances there can be no implied consent since no one is authorized to consent in the first place. It is customary in some communities, for example, to tip a mailman. Technically, such conduct may constitute the offense of bribing a federal officer.[30] Obviously, no one's consent, least of all the consent of the bribee, can justify such conduct. Such conduct is deemed permissible only on the basis of customary license: it is practiced with some regularity with the approval of local communities. Moreover, even conduct directed primarily against individual interests might not be justified by consent alone, since its consequences may reach beyond the sphere of strictly individual interests. Finally, as already mentioned, a person whose interest was infringed may be legally incapable of granting consent—for example, a child. Nonetheless, certain kinds of customary conduct toward such individuals can be deemed justified under the customary license clause.

The second limitation imposed by the language of section 2.12(1) appears to be clear in substance but narrow in scope. It envisions a criminal statute issued with a specific purpose of denouncing customarily accepted types of conduct which the legislature considers socially harmful and in need of eradication or at least containment. Often such statutes reflect conflicts between dominant and minority cultures. A dominant majority uses its central government to break a matrix of tradition-honored be-

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28. *See supra* notes 13-16 and accompanying text.

29. Nothing in the language of section 2.12(1) indicates otherwise.

30. *See* 18 U.S.C. § 201 (1994). Section 201(c)(1)(A), for example, states, "Whoever . . . directly or indirectly gives . . . anything of value to any public official . . . for or because of any official act performed . . . shall be fined under this title or imprisoned for not more than two years or both."

havior within ethnic or religious minority groups. One can easily find examples of such laws in modernizing societies. For example, the criminal code of the former Russian Soviet Federal Socialist Republic included a chapter entitled "Crimes Constituting Survivals of Local Customs." Provisions included in the chapter criminalized, among other forms of customary conduct, blood feuds, payment and acceptance of bride price, bigamy, and polygamy.[31] The issue of criminal statutes specifically targeted at certain customary practices is also bound to emerge in highly developed countries whose population includes various immigrant groups representing cultures radically different from the dominant culture of the host country. A case in point on the American scene is recent federal legislation criminalizing female genital mutilation, a practice reportedly prevailing within several African immigrant communities.[32]

The two limitations imposed on the customary license defense by the language of section 2.12(1) are quite reasonable as far as they go. The problem is that they do not go far enough, thus leaving a large area of customary conduct that is offensive to basic values of modern democratic society free from governmental control. Again, the shocking ritual of female genital mutilation illustrates the point. Specific legislation addressing the problem has not yet begun to operate in most jurisdictions. The "customary license" has not been "negatived" in most cases by

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31. *See* UGOLOVNYI KODEKS RSFSR [Criminal Code of the RSFSR] arts. 231, 232, 235, *translated in* SOVIET CRIMINAL LAW AND PROCEDURE 125, 193 (Harold J. Berman & James W. Spinder trans., 2d ed. 1972). Interestingly, territorial operation of chapter eleven was limited to those regions of Russia where "socially dangerous acts enumerated in the present chapter constitute survivals of local customs." *Id.* art. 236; *see also* F.J.M. Feldbrugge, *Criminal Law and Traditional Society: The Role of Soviet Law in the Integration of Non-Slavic Peoples*, 3 REV. SOCIALIST L. 3 (1977).

32. For further discussion, see Karen Hughes, Note, *The Criminalization of Female Genital Mutilation in the United States*, 5 J.L. & POL'Y 321 (1995).

This cruel and life endangering ritual practice is, reportedly, widespread in 26 African countries. According to the World Health Organization, 85 million to 114 million girls and women have been mutilated. *See* Celia W. Dugger, *Women's Plea for Asylum Puts Tribal Ritual on Trial*, N.Y. TIMES, Apr. 15, 1996, at A1. In spite of the shocking cruelty of the practice, its statutory criminalization at the federal and state levels encountered serious difficulties. According to a New York Times columnist, 'Politicians edge away. . . . [One reason is] nervousness about 'interfering' with 'local customs.'" A.M. Rosenthal, *Fighting Female Mutilation*, N.Y. TIMES, Apr. 12, 1996, at A31; *see also* Layli Miller Bashir, *Female Genital Mutilation in the United States: An Examination of Criminal and Asylum Law*, 4 AM. U. J. GENDER & L. 415 (1996). Only very recently did the U.S. Congress at last outlaw the rite of female genital cutting. *See* Celia W. Dugger, *New Law Bans Genital Cutting in United States*, N.Y. TIMES, Oct. 12, 1996, at A1.

individuals whose interests are infringed for the simple reason that those individuals are not in a position to effectively protest their victimization. For the most part they are helpless minor children or young women dependent on their victimizers.

It seems that an additional qualifying criterion of the scope of customary license is necessary—a general formula drawing a line separating those customs that are acceptable from those that are not. Respect for local autonomy and diverse cultural traditions would dictate tolerance, but the outer limits of tolerance should be defined with an eye on basic decencies expected in a modern democratic society. Minority cultures, while afforded all the respect they deserve, must not be idolized. Courts as well as legislatures should not be shy to recognize that some customary practices are oppressive and must not be tolerated.

While developing a general formula marking outer limits of customary license, it might be helpful to draw inspiration from at least two sources. First, a formula should draw from international legislation on human rights, especially from the instruments ratified by the United States. Conduct violating fundamental human rights should never be exempt from the reach of criminal statutes under the theory of customary license.[33] As a leading British authority aptly observed: "If recognition or enforcement of the custom would run counter to the maintenance of any of the fundamental human rights and freedoms [the human rights conventions] express it can generally be safely assumed that a tolerant approach would be inappropriate."[34] A second source for outer limits are cases dealing with religious exemptions under the Free Exercise Clause of the First Amendment to the U.S. Constitution, the closest body of municipal law from which a useful, if limited, analogy can be drawn.

In 1963, the U.S. Supreme Court held in *Sherbert v. Verner*[35] that "only a compelling state interest could justify imposing a

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33. *See* Sebastian Poulter, *Ethnic Minority Customs, English Law and Human Rights*, 36 INT'L & COMP. L.Q. 589, 601 (1987).

34. *Id.* at 599. In this connection, Poulter observed that the British Parliament passed the Prohibition of Female Circumcision Act 1985, having been "inspired by international human rights provisions banning 'cruel, inhuman or degrading treatment.'" *Id.* at 602; *see also* The European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 3, 213 U.N.T.S. 221, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 326, 327 (Ian Brownlie ed., 3d ed. 1992); The International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 7, S. TREATY DOC. NO. 95-2 (1977), 999 U.N.T.S. 171, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS, *supra*, at 125, 128.

35. 374 U.S. 398 (1963).

burden upon the exercise of religion and that the state bore the burden of demonstrating that no less restrictive regulation could achieve its aims."[36] In applying the test:

> A court, faced with a claim for a religion-based exemption from a government regulation will first consider the sincerity of the religious claim being advanced and the degree to which the challenged regulation interferes with vital religious practice or belief. It will then weigh, on the other side of the balance, the importance of the secular value underlying the rule, the impact of an exemption upon the regulatory scheme, and the availability of a less restrictive alternative. The result of this balancing process determines whether or not the court will grant an exemption.[37]

A number of acts, otherwise subject to government sanctions, were exempted by the courts under the Free Exercise Clause.[38] The Supreme Court remained, in principle, faithful to its religious exemptions doctrine until 1990, when the doctrine was abandoned in *Employment Division v. Smith*.[39] In that case, the five-to-four majority reinterpreted past jurisprudence and concluded that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest."[40] The *Smith* decision was met with strong, if not unanimous, criticism in academia.[41] In response to *Smith*, Congress passed the Religious Freedom Restoration Act of 1993[42] which created a statutory

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36. Dane, *supra* note 27, at 354 (footnotes omitted).

37. *Id.* at 355 (footnotes omitted). "The paradigm of a compelling interest is the protection of children and nonconsenting adults from deprivation of classical conceptions of life, liberty, or property. Preventing the subversion of the criminal law or of an entire regulatory program has also been said to constitute such an interest." FREDERICK MARK GEDICKS, THE RHETORIC OF CHURCH AND STATE 102 (1995) (footnotes omitted). For an extensive judicial elaboration on the religious-exemption doctrine, see *Employment Division v. Smith*, 494 U.S. 872, 907 (1990) (Blackmun, J., dissenting).

38. *See* GEDICKS, *supra* note 37, at 104-09; Dane, *supra* note 27, at 351-52.

39. 494 U.S. 872 (1990).

40. *Id.* at 886 n.3. The specific issue before the Court in *Smith* was

> whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

Id. at 874. The majority answered both questions in the affirmative. *See id.* at 890.

41. *See* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 904 (1994).

42. The Act is codified at 42 U.S.C. §§ 2000bb-2000bb4 (1994).

right to religious exemptions coextensive with pre-*Smith* constitutional doctrine.[43] Claims of customary license invite analogy to religious-exemption cases because in both areas the state is expected to "accommodate itself to external norms of conduct,"[44] norms established by nonstate authority. This is indeed a valuable rarity in the ideological landscape dominated by "state exclusivism"[45] or "majoritarian statism."[46] Moreover, in both cases such accommodation serves the value of cultural diversity. After all, religion is very much a cultural phenomenon and quite often religious practices are closely intertwined with the distinct cultural heritages of diverse ethnic groups.

Needless to say, claims of customary license and religious exemptions also present differences. Religious freedom occupies a highly privileged place in the hierarchy of constitutionally protected values. In addition, individuals claiming religious exemptions are often caught between conflicting commands: the norms of their faith on the one hand and secular norms of law on the other. Yielding to the latter would mean transgressing the sacred and facing religious sanction, while obeying the religious command would expose them to the risk of criminal conviction. Individuals who engage in other-than-religious customary practices do not experience such cruel dilemmas. Customary rules do not have to be of an imperative nature. Quite often, they are rules of permission rather than commands. For the foregoing reasons, the analogy to the doctrine of religious exemption is certainly plausible, but at the same time is limited. The connection between the two doctrines does not, however, end here. As recent history demonstrates, the doctrine of religious exemption does not stand on very firm ground. Born in the early 1960s, it was obliterated as a federal constitutional doctrine in 1990, disappearing from federal law altogether until Congress reinstated it as a part of statutory law in 1993. If the Religious Freedom Restoration Act of 1993 is struck down as unconstitutional or repealed, individuals seeking religious exemption will have to look to *state* constitutional or statutory law, including those statutes which codify the customary license doctrine, for protection.[47]

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43. *See* Laycock, *supra* note 41, at 895.

44. Dane, *supra* note 27, at 350.

45. Perry Dane, *The Maps of Sovereignty: A Meditation*, 12 CARDOZO L. REV. 959, 973 (1991).

46. KENT GREENAWALT, FIGHTING WORDS 139 (1995).

47. Challenges to constitutional validity of the Religious Freedom Restoration Act of 1993 have so far been unsuccessful. *See* Sasnett v. Sullivan, 91 F.3d 1018 (7th Cir.

One can envision two different social contexts in which the customary license defense could be claimed: (1) where the defendant's conduct is customary to the majority of the local culture; and (2) where the defendant's conduct results from a custom remote to the dominant local culture.

The easier case is where the defendant's conduct follows a custom prevailing locally in a community belonging to a dominant culture. Such customs, more often than not, will be widespread, and corresponding conduct will be commonly perceived as normal, undisturbing, and inoffensive. Legal personnel such as police, prosecutors, judges, and juries will likely share a benevolent assessment of such customary behavior. Prosecutions will be rare, and thus the customary license defense will rarely be voiced. Thus, throwing rice at newlyweds is unlikely to be prosecuted as assault, tipping a mailman as bribing a federal officer, or playing various Halloween practical jokes as a nuisance.

Moreover, if such conduct is formally prosecuted, there will hardly be any need of proving its customary nature. Courts, being familiar with such customs, will take judicial notice of them. Juries, applying local unwritten standards of conduct, will often acquit using their de facto power of rendering "not guilty" verdicts regardless of formal rules. However, not all customs growing out of the dominant culture are legally so unproblematic. Notions of what is customarily acceptable or desirable are constantly changing, especially in an American society particularly prone to rapid mood swings. Infliction of corporal punishment upon minor children by parents or guardians, especially for serious misbehavior, has traditionally been accepted as "normal" or "natural." Within recent years, however, public attitudes toward child beating have changed significantly. Corporal punishment is much more likely to be prosecuted as child abuse, and courts are less receptive to pleas based on the customary license exception.[48]

1996); Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996). On October 15, 1996, the U.S. Supreme Court granted a petition for the writ of certoriari in *Flores*. *See* City of Boerne v. Flores, 117 S. Ct. 293 (1996); *see also* Linda Greenhouse, *Court Accepts Case Tied to Separation of Powers*, N.Y. TIMES, Oct. 16, 1996, at B8.

48. The plight of a school superintendent who was charged with child abuse for spanking his eight-year-old son illustrates the point. *See* Joseph Berger, *Discipline or Abuse? Arrest Renews a Debate*, N.Y. TIMES, Jan. 30, 1996, at A1.

At the same time, there is a noticeable trend toward imposing criminal sanctions on parents for transgressions of their minor children. A parent of a delinquent child

The customary license defense takes on a different dimension if raised by a defendant coming from a background remote from a dominant culture. In such instances, reliance on judicial notice is not possible—many judges are ignorant about minority cultures and would need to be educated.[49] A defendant claiming customary license in such a situation must introduce evidence showing the existence of the relevant custom and its place and function in his culture as well as its relation to the conduct in question. It seems that customs of central importance to the cultural identity of a group from which defendants are coming should have, other things being equal, a stronger claim for recognition than customs of marginal importance.

Evidence regarding defendants' cultural background is hardly a novelty in American courts; it has been used for over a century.[50] By introducing this kind of evidence, defendants usually try to demonstrate that due to their distinct cultural upbringing, their perception of material facts as well as their mental attitudes are different from those alleged by the prosecution. This way, cultural evidence supports a theory that a defendant either did not entertain the requisite mens rea for the crime charged or qualified for one of the traditional affirmative defenses such as duress, self-defense, or even insanity.[51] In other words, cultural evidence formally introduced at the trial level has always been translated into one of the specific rules of substantive criminal law with exonerating or mitigating potential.[52] Cultural evidence has also been used in less formal settings such as plea negotiations and as a mitigating factor at the sentencing stage.[53] On the other hand, cultural evidence has never been used in support of

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is put in a difficult predicament. To make things worse, statutory definitions of the crime of child abuse tend to be vague. *See* Scott A. Davidson, Note, *When Is Parental Discipline Child Abuse? The Vagueness of Child Abuse Laws*, 34 U. LOUISVILLE J. FAM. L. 403 (1996).

49. *See, e.g.*, Matthew Szlapak, Letter to the Editor, *Immigration Case Exposes Cultural Ignorance*, N.Y. TIMES, Apr. 18, 1996, at A22 (commenting on a case of an asylum seeker who escaped genital mutilation and referring to the cultural ignorance of the immigration judge).

50. *See* Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36, 57 (1995).

51. *See id.* at 59 ("Defendants use cultural evidence te give dominant-culture courts an information framework within which to assess questions of individual culpability under existing criminal law definitions.").

52. For an extensive review of cases in which cultural evidence was put to such uses, see *id.* at 69-86.

53. *See id.* at 62-69.

a freestanding "cultural defense." The reason for the conspicuous absence of such claims is clear and simple: as Holly Maguigan remarked,

> There is not and will not be a separate cultural defense because as a practical matter such a defense can be neither defined nor implemented. In short, debate over a new cultural defense is misguided because the use of cultural information is not new, a workable legal definition of culture is impossible to develop, and the information is not being offered in court to create a separate defense.[54]

Although the debate over a cultural defense is indeed conceptually misguided and the opponents struggle over a phantom created by themselves, nonetheless concerns animating the debate are not futile. Proponents of a cultural defense are motivated by a genuine problem created by the insufficient responsiveness of the legal actors to the plight of defendants of radically different cultural backgrounds.[55] Critics of the defense, on the other hand, are concerned about the threat that overcommitment to normative pluralism could pose to the supremacy of law; the protection of victims, particularly against acts of violence; and the principle of legal equality. Others, primarily feminist writers, oppose a "cultural defense," sounding the alarm that excessive deference to foreign cultures could lead to condoning and perpetuating intrafamily violence or, generally, the violence against women which many of those cultures legitimize.[56] All of these concerns are valid.

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54. *Id.* at 44-45.

55. *See* Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CAL. L. REV. 1053, 1097 (1994); Note, *The Cultural Defense in the Criminal Law*, 99 HARV. L. REV. 1293, 1296-1302 (1986). The predicament of defendants coming from radically different cultural backgrounds is particularly acute in the current political climate pervaded by the anti-immigrant xenophobia amply reflected in California Proposition 187 and the 1996 Republican Party Platform. *See* Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 617 (1996); A.M. Rosenthal, *Dred Scott in San Diego*, N.Y. TIMES, Aug. 9, 1996, at A27. As Professor Suérez-Orozco put it, "a xenophobic idiom is coming to dominate discussion of the profoundly important problems involving the movements of peoples and culture around the planet." Marcelo M. Suérez-Orozco, *Unwelcome Mats*, HARV. MAG., July-Aug. 1996, at 32, 35. One should also not overlook in this connection the harsh collateral consequences of criminal convictions which many immigrant defendants are bound to suffer. Regarding these issues, see Robert James McWhirter, *The Rings of Immigration Hell: The Immigration Consequences to Aliens Convicted of Crimes*, 10 GEO. IMMIGR. L.J. 169 (1996).

56. *See* Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 COLUM. L. REV. 1093 (1996); Nilda

The customary license defense, cast in terms suggested in this article, obviously cannot alone solve a complex problem of proper utilization of cultural evidence. Nonetheless, albeit in a limited way, it is responsive to concerns articulated on both sides of the debate. First, it creates an additional substantive-law framework for admission of cultural evidence. Second, the explicit statutory language referring to customary norms puts defendants' culture at the center of the judicial inquiry. Once the defense is properly raised, it becomes virtually impossible to ignore defendants' cultural background. Third, the limitations imposed upon the customary license defense[57] seem to create sufficient protection against recognition and enforcement of customs that are incompatible with basic decencies expected in a democratic society. Fourth, the customary license defense differs significantly from other defenses activated on the basis of cultural evidence. Here, the defendant is not trying to excuse his violation of the statutory norm, but claims that his conduct should be evaluated under customary norms prevailing in his community, rather than under a written rule of the state. Such a defendant seeks an exemption from the written rule by claiming that it was overridden by the customary local rule. Thus, as mentioned earlier, the customary license defense is a species of justification rather than a species of excuse, or as some writers put it, a "rule of conduct" rather than a "rule of decision."[58] The justificatory nature of the defense has broader implications in this particular context. A judicial decision granting this defense, provided it came from a court where decisions have precedential value, would legitimize the custom in question and protect it from governmental interference in the future. In this sense, an individual who claims innocence under a theory of customary license not only defends himself against criminal charges, but at the same time defends the autonomy and cultural identity of his community against interference by the majoritarian government.

Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991); Chiu, *supra* note 55, at 1103; Alice J. Gallin, Note, *The Cultural Defense: Undermining the Policies Against Domestic Violence*, 35 B.C. L. REV. 723 (1994); Melissa Spatz, Student Article, *A "Lesser" Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives*, 24 COLUM. J.L. & SOC. PROBS. 597 (1991). For an extensive survey of the relevant literature, see Coleman, *supra*, at 1145-50.

57. *See supra* text accompanying notes 26-46.

58. *See, e.g.*, Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729 (1990).

The application of such a defense raises several questions. How may a customary license defense be rationalized? Why should criminal law look favorably at customarily accepted conduct which violates its specific prohibitions? What might be a redeeming quality of conduct within a customary license?

One possible answer to these questions is that by adjusting itself to evolving customary patterns of behavior, criminal law acquires flexibility as well as social acceptability, thereby keeping in touch with evolving social mores. Criminalization of conduct deemed "normal" or even beneficial by community standards tends to erode legitimacy of written law and the government that creates and enforces it. Criminalization of such conduct ultimately subverts the desirable notion that criminal sanction is reserved for conduct perceived by an average person as morally reprehensible. As the late Herbert Packer argued, a wise use of criminal sanction "always involves a prediction about how people are likely to respond."[59] When they resist, "the effect is not confined to the immediate proscription but makes itself felt in the attitude that people take toward legal proscriptions in general."[60] In conclusion, Packer recommended that "the criminal sanction should ordinarily be limited to conduct that is viewed, without significant social dissent, as immoral."[61]

Packer's intuition is now well supported by empirical studies about psychological reasons for obedience or disobedience to law. Professor Tom R. Tyler concludes his important book, based on an extensive study of the "experiences, attitudes, and behavior" of citizens in Chicago towards law and legal authority, thus:

> The key implication of the Chicago study is that normative issues matter. People obey the law because they believe that it is proper to do so, they react to their experiences by evaluating their justice or injustice, and in evaluating the justice of their experiences they consider factors unrelated to outcome, such as whether they have had a chance to state their case and been treated with dignity and respect. . . . The image of the person resulting from these findings is one of a person whose attitudes and behavior are influenced to an important degree by social values about what is right and proper. . . .
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> . . . People are more responsive to normative judgments and appeals than is typically recognized by legal authorities. Their

59. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 263 (1968).
60. *Id.*
61. *Id.* at 264.

> responsiveness leads people to evaluate laws and the decisions of legal authorities in normative terms, obeying the law if it is legitimate and moral and accepting decisions if they are fairly arrived at.[62]

At the operational level, a customary license exemption is likely to reduce the number of cases where written rules are disregarded ("nullified") by the juries applying local community standards through their ultimate, unreviewable power to acquit. In conclusion, one can say that the customary license doctrine strengthens legitimacy and moral authority as well as the overall effectiveness of criminal law.

Another beneficial effect of the customary license justification is that it leaves the traditional and the spontaneous at the local community level undisturbed by governmental regulation, thereby maximizing the values of freedom and local autonomy. Vertical diffusion of power has always been a strong preference regarding structure of public authority in the United States. Probably in no other highly developed country has so much in the criminal process been managed locally as it has in the United States.[63] Suffice it to mention here that most prosecutors and top police officers are either locally elected officials or are subordinate to those locally elected.[64] Typically, they enjoy broad discretionary power subject only to political accountability before local electorates rather than to formal scrutiny by officials at the higher level of law-enforcement bureaucracy. In most places such hierarchial superiors simply do not exist because prosecutorial or police agencies are built according to the "coordinate" rather than "hierarchial" model of authority structure.[65] Under such circumstances, it is only reasonable to expect that many of these prosecutorial decisions must be guided by unwritten local standards.

The most celebrated local decision-makers in criminal cases are, of course, the juries. The jury is supposed to represent a cross section of the local community[66] and often applies its equi-

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62. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 178 (1990); *see also* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME 6-7, 310 (1994).

63. *See* Mirjan Damaška, *Structure of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 529-42 (1975).

64. Typically, top police officers in urban areas report to elected mayors, whereas in rural areas the top police officers—sheriffs—are themselves elected officials.

65. *See* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY 44-46 (1986).

66. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 967-68 (2d

table notions of right and wrong according to local community standards.[67] Juries are neither required to give an account of their verdicts,[68] nor are their verdicts of "not guilty" open to any official scrutiny. Given that so much in the American criminal process is geared toward maximization and protection of local autonomy, it is hardly surprising that deference to unwritten customary rules has been registered in substantive criminal law as well. It certainly fits well with the larger picture of the American criminal process, which to a considerable extent has been locally managed. Thus, under the customary license provision, the courts are empowered to apply openly, in a structured and reasoned manner, what has been done hitherto *sub rosa* on an ad hoc basis by other legal actors using their discretionary power. Therefore, the customary license provision, if applied to conduct growing from the mainstream culture, can be seen as an extensive refinement and reconceptualization of existing practices. It should acquire, however, a broader function when applied to minority cultures. Here, the defendant can hardly depend upon the discretionary benevolence of the local actors. In most instances, they are unlikely to be familiar with customs rooted in cultures alien to them and will often consider them to be bizarre, if not abhorrent. In such cases, a defendant can hardly count on a sympathetic hearing before a local prosecutor or a jury. The customary license provision, by vesting in the court the authority to dismiss, seems to create a more favorable procedural forum for these types of defendants. Moreover, one should keep in mind that there is no constitutional right to trial by jury in petty cases, the type of cases where exoneration on de minimis grounds should have the best chance of success. Thus, statutes vesting in courts the power to dismiss on de minimis grounds give the doctrine much broader scope of application than the de facto jury power to acquit.[69]

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ed. 1992).

67. *See* Miller v. California, 413 U.S. 15, 33 (1973).

68. So much so that any step leading in this direction is constitutionally suspect. *See* United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969).

69. It was held in *Baldwin v. New York*, 399 U.S. 66, 69 (1970), that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." Last term, the Court held that

> no jury-trial right exists where a defendant is prosecuted for multiple petty offenses. The Sixth Amendment's guarantee of the right to a jury trial does not extend to petty offenses, and its scope does not change where a defendant faces a potential aggregate prison term in excess of six months for petty offenses charged.

III. THE NONEXISTENT OR TRIVIAL HARM OR EVIL CAUSED OR THREATENED BY THE DEFENDANT'S CONDUCT

MPC section 2.12(2) mandates[70] that the court dismiss a prosecution if,

> having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> . . . .
>
> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction.

Clause one of subsection two deals with a situation when the defendant's conduct did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense. In that circumstance no socially undesirable state of affairs was brought about by the defendant's action, and therefore *no wrongdoing occurred*. Clause two of subsection two, on the other hand, addresses a situation when the defendant's conduct did cause or threaten the "harm or evil" sought to be prevented by law defining the offense, but "did so only to an extent too trivial to warrant the condemnation of conviction." Apparently in situations envisioned by clause two, the defendant did engage in wrongdoing, but the wrong, caused or threatened, was too insignificant to warrant the "condemnation of conviction." Each of the two clauses must be addressed separately.

A. MPC Section 2.12(2), Clause One

What is the nature of the rule expressed by clause one? Is the defendant entitled to have a prosecution dismissed because his conduct was justified or because it was excused? Here, as elsewhere, the inclusion of a particular rule in one of several general analytical categories depends to a large extent upon one's views of the broader concepts of "criminal offense" and "justification." Another variable is, of course, one's interpretation of specific statutory language.

Lewis v. United States, 116 S. Ct. 2163, 2165 (1996).

70. As already mentioned, three jurisdictions changed the original MPC language "shall dismiss" to the permissive phrase "may dismiss." *See supra* note 7.

The concept of "criminal offense" can be understood either formally or substantively. Understood formally, a criminal offense is conduct forbidden by a statute under a threat of punishment. Or, as Professor Fletcher reminded us recently, "The offense is a violation of a prohibition against a specific action or a prescription requiring a particular action."[71] Professor Fletcher refers to this "violation of the norm" as "wrongdoing."[72] Equating the formal concept of criminal offense with mere violation of legal prohibitions or prescriptions was characteristic of the continental European, particularly German, theory of criminal law in the early part of this century. Its principal exponent at that time was Ernst Beling.[73]

According to the substantive concept of crime, on the other hand, a criminal offense, in addition to being forbidden by the law, must also have some negative societal quality, an antisocial substance. What exactly gives a formally forbidden conduct its antisocial quality has been a matter of dispute in continental European theory, and particularly in German theory, for many years. In the early discussions, the dominant opinion seemed to focus exclusively on the objective harm to a societal *interest* protected by the legal norm, whether actually brought about or proximately threatened by the offending conduct. Later, a consensus gradually emerged that the antisocial character of criminal conduct cannot be reduced to its objective harmfulness whether actual or potential. It was pointed out that, at least in some instances, the antisocial quality or wrongful nature of conduct resides in a particular state of mind of an actor rather than in any objective harmfulness of his act. Such is the case of criminal attempts or other crimes characterized by "dominant inner tendency," like larceny.[74] Still later, Hans Welzel and his followers advanced an even more radical thesis: that objective harm to legally protected interests is only of marginal importance. It is rather the negative societal quality of the *conduct* itself, as col-

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71. George P. Fletcher, *What Is Punishment Imposed For?*, 5 J. CONTEMP. LEGAL ISSUES 101, 106 (1994).

72. *Id.*

73. *See* ERNST BELING, DIE LEHRE VOM VERBRECHEN 7, 32 (1906); *see also* ANDRZEJ ZOLL, OKOLICZNOŚCI WYŁĄCZAJĄCE BEZPRAWNOŚĆ CZYNU 46 (1982).

74. ZOLL, *supra* note 73, at 46-47. As a distinguished Polish scholar, the late Professor Wolter, pointed out, in cases of impossible attempts, objective harmfulness of the conduct involved is altogether absent. It is the wrongful tendency of the conduct due to the criminal purpose which makes the conduct antisocial. *See* WOLTER, *supra* note 24, at 20.

ored by the wrongful state of mind, that makes conduct antisocial.[75] Without going any further into subtleties of various views on the subject, it is submitted that the substantive concept of crime has been and remains supported by a respectable current of academic opinion in Germany. A leading contemporary criminal law writer, Professor Hans-Heinrich Jescheck, explains:

> Unlawfulness is not to be reduced to the relationship between a conduct and a norm, since it also has substantive meaning *(materielle Rechtswidrigkeit)*. Unlawful in a substantive sense is conduct which infringes upon the legal interest *(Rechtsgut)* protected by a norm in question. . . . Harm to society consists of a violation of an interest protected by law; this harm justifies describing the crime as "socially harmful conduct."[76]

The substantive concept of crime gained particular prominence in the penal systems of the former Communist countries. It was a universal as well as distinctive feature of the Communist criminal codes.[77] Legal literature often juxtaposed and contrasted the purely formal approach of the bourgeois legislation with the substantive definitions characteristic of Communist penal codes. Two examples, one from each group, illustrate the difference. Article 1 of the Polish Criminal Code of 1969 reads: "Penal liability shall be incurred only by a person who commits a socially dangerous act prohibited under threat of a penalty by a

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75. *See* WELZEL, *supra* note 25, at 130, 136. For a concise presentation and critique of the competing concepts of wrongdoing in German theory, see Björn Burkhardt, *Is There a Rational Justification for Punishing an Accomplished Crime More Severely Than an Attempted Crime?*, 1986 BYU L. REV. 553, 560-62.

76. HANS-HEINRICH JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL 210 (4th ed. 1988) (translation by author).

77. *See* Stanislaw Pomorski, *Communists and Their Criminal Law: Reflections on Igor Andrejew's "Outline of the Criminal Law of Socialist States,"* 7 REV. SOCIALIST L. 7, 16 (1981). Legislative commitment to the substantive concept of crime in some former Communist countries survived the fall of Communist regimes. A case in point is post-Soviet Russia whose new criminal code, signed into law on June 13, 1996, includes a substantive definition of crime. *See* UGOLOVNYI KODEKS RF [Criminal Code of the Russian Federation] art. 14(1) (adopted on May 24, 1996), *first published in* ROSSIISKAIA GAZETA, June 18, 1996, at 4. For a further discussion see A.V. NAUMOV, ROSSIISKOE UGOLOVNOE PRAVO 117-22 (1996). Similarly, in Poland, where the old 1969 Criminal Code is still in operation, all drafts of the new criminal code, including the most recent one currently pending before the parliament, include a substantive definition of "criminal offense," albeit awkwardly phrased. *See Projekt reformy kodeksu karnego. Część ogolna*, art. 1 (1989); Hans-Heinrich Jescheck, *Część ogolna projektu z 1990 r. polskiego kodeksu karnego w świetle prawnoporownawczym*, PANSTWO I PRAWO, Feb. 1992, at 26-28; Wladyslav Macior, *Zasady odpowiedzialności karnej w projekcie kodeksu karnego z 1995 r.*, PANSTWO I PRAWO, June 1996, at 67.

law in force at the time of its commission."[78] The Penal Code of Sweden of 1962, Chapter 1, Section 1 reads: "Crime is an act for which a punishment as stated below is provided by this Code or by other codes or laws."[79]

The difference between the two is clearly visible. Under the Polish Code, every offense must include two characteristics: it must be prohibited by a criminal statute (a formal dimension—*nullum crimen sine lege poenali*) and it must have, in addition, a negative societal quality (*nullum crimen sine periculo sociali*). Unless both characteristics are present in conjunction, there is no crime and there may be no conviction. The Swedish law, on the other hand, requires only the former; as soon as it is found that the defendant's act violated a statutory prohibition, any further inquiry into its substantive societal qualities is, for the purpose of penal liability, irrelevant. This difference does not mean that in jurisdictions adhering to the substantive concept of crime, the prosecution in every case shoulders an additional burden of proving that the defendant's conduct was not only formally prohibited, but also substantively antisocial. There is a general assumption that the legislature, in the formal description of the prohibited conduct, has already essentially captured its antisocial substance. Thus, so the argument goes, the statutory description of the prohibited conduct sufficiently "reflects" its antisocial substance in most cases.[80]

But if so, one may ask, why reopen the issue at the level of adjudication once the legislature has already decided that a given type of conduct warrants punishment as antisocial? The answer would be that legislative decisions are made in the abstract with respect to whole, generally defined classes of conduct, whereas law application agencies (courts and prosecutors) deal with specific acts committed under concrete circumstances. As a general rule, acts in violation of statutory norms display antiso-

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78. KODEKS KARNY [Penal Code] art. 1 (Poland), *translated in* THE PENAL CODE OF THE POLISH PEOPLE'S REPUBLIC 35, 35 (William S. Kenney & Tadeusz Sadowski trans., 1973). As of the time of this writing, the 1969 Criminal Code, as amended, is still in operation, including its article 1. Article 1 should be read in conjunction with article 26 section 1 which reads, "An act whose social danger is insignificant shall not constitute an offense." *Id.* art. 26(1), *translated in* THE PENAL CODE OF THE POLISH PEOPLE'S REPUBLIC, *supra*, at 40.

79. BROTTSBALKEN [Penal Code] ch. 1, § 1 (Sweden), *translated in* THE PENAL CODE OF SWEDEN 13, 13 (Thorsten Sellin trans., 1972).

80. *See* WOLTER, *supra* note 24, at 14-15; Wladyslaw Wolter, *O stopniowaniu społecznego niebezpieczeństwa czynu karalnego, in* 3 KRAKOWSKIE STUDIA PRAWNICZE 109, 111 (1970).

cial qualities. However, this is not always so. In some presumably exceptional cases, a discrepancy develops between the abstract, general legal assessment, on the one hand, and the specific, fact-bound, substantive assessment on the other; conduct generally prohibited may have no antisocial substance in its individual, concrete manifestation. In such situations the decision maker confronts two conflicting assessments: legal and substantive. Consistent with the substantive concept of crime, the substantive assessment is given primacy over the formal, legal one. Thus, the doctrine of social danger is an instrument of individualized equitable justice, a vehicle of moderating and correcting abstract definitions of criminal conduct. Therefore, it can be used defensively.

Instances of conflict between the abstract and the specific, between the legal and the factual, occur, of course, in every system adhering to general, impersonal rules of law. Such systems have to devise some response to the problem. American systems traditionally have responded through discretionary decisions, vesting relevant powers, formally or informally, in prosecutors, police officers, judges, and juries. The Model Penal Code seems to have taken a step away from this tradition and toward a response based on the substantive concept of crime.

At the same time, the MPC also appears to continue in the tradition of the formal concept of crime. The first sentence of MPC section 1.04(1) reads: "An offense defined by this Code or by any other statute of this State, for which a sentence of [death or of] imprisonment is authorized, constitutes a crime."[81] Read in isolation, it appears to codify the formal concept of criminal offense, defining crime as conduct forbidden by the law under the threat of punishment—here, death or imprisonment. I submit, however, that the comprehensive code's provisions should not be read in isolation, but rather in conjunction with other relevant provisions and recast into theoretically coherent wholes. Perhaps MPC section 2.12(2) clause one should be read as supplementing the definition of section 1.04(1). According to this view, section 2.12(2) clause one puts a substantive gloss on the purely formal definition of crime. Now a "criminal offense" is defined not only as conduct generally prohibited under the threat of punishment (MPC sections 1.04(1) and 1.05(1)—*nullum crimen sine lege*), but also as conduct of antisocial substance under specific circum-

81. MODEL PENAL CODE § 1.04(1) (1962) (brackets in original).

stances of a concrete case (MPC section 2.12(2) clause one—*nullum crimen sine periculo sociali*). The language of the respective provisions is consistent with such an interpretation. While section 1.04(1) refers to a legislative prohibition imposed upon general classes of conduct, section 2.12(2) clause one refers to the substantive assessment of the defendant's conduct in its concrete, individual manifestation.

It is somewhat unclear how the distinction between the "harm" and "evil" made by section 2.12(2) is to be understood. One possibility is that "harm" should be understood as a tangible, material injury resulting from a forbidden conduct such as death in cases of homicide, whereas "evil" denotes a violation of a societal interest without any tangible injury such as drunk driving. Another possibility is that the "harm" should be understood as an objective violation or threat to a legally protected interest, whereas the "evil" refers to a negative societal assessment of the conduct itself—to its antisocial tendency—regardless of the lack of any actual or even potential injury to a legally protected social interest. And so, for example, even though the type or degree of "harm" in various types of criminal homicide is the same, namely human death, the "evil" of murder is greater than the "evil" of manslaughter.

Consistent with the previous discussion of foreign experience, injecting the substantive concept of crime into the MPC does not imply any increase in the prosecutorial burden of proof. Once the prosecution proves all the elements of a statutory prohibition it need not go any further to win a conviction. The state may then impose upon the defendant the burden of production as well as the burden of persuasion regarding the absence of the "harm or evil" under the concrete factual circumstances. Such allocation of the evidentiary burdens is entirely consistent with due process requirements under *In re Winship*[82] and its progeny.[83] Thus from the evidentiary and the constitutional point of view, MPC section 2.12(2) clause one provides for a "defense."

The substantive nature of this defense is a different issue altogether. What seems to be reasonably clear is that it does not fit the concept of justification for at least two reasons. First, justifications are norms of permission or "licenses" to violate the basic prohibitory rules (offense definitions) under the generally

82. 397 U.S. 358 (1970).
83. *E.g.*, Patterson v. New York, 432 U.S. 197 (1977).

described conditions. Thus a justificatory rule must always include a general description of a situation when the actor is permitted to engage in otherwise-prohibited conduct. MPC section 2.12(2) clause one does not include any such abstract description. Instead, it is a pure judgment about the societal quality of the defendant's conduct under concrete factual circumstances. Second, justifications, perhaps with the exception of consent, are always based on the balancing of conflicting societal interests. The actor is allowed to violate a societal interest protected by a prohibitory rule in order to serve another overriding societal interest for which the justificatory rule stands. MPC section 2.12(2) clause one refers to situations where no societal interest is violated or threatened. Therefore, there is neither need nor even a possibility for the decision maker to engage in the balancing of conflicting interests. Instead, the actor is entitled to have the prosecution dismissed because of the *total absence of any wrongdoing.*

B. MPC Section 2.12(2), Clause Two

The nature of MPC section 2.12(2) clause two is more problematic. It covers situations where the defendant's conduct did "cause or threaten the harm or evil sought to be prevented by the law defining the offense." However, the defendant's conduct "did so only to an extent too trivial to warrant the condemnation of conviction." This is the de minimis infractions doctrine proper. Two possible approaches to this doctrine, as codified in the MPC, come to mind. First, one can assume that a criminal offense is antisocial conduct of a substantial caliber; therefore, it must rise above a certain threshold of seriousness before it is officially labeled a "crime." According to such an assumption, a crime must be a socially disturbing event capable of generating resentment in an average member of the community—a perspective of "condemnation." Arguably, conduct causing only subminimal harm or evil does not have such properties and consequently should not be deemed a crime, although it violates a prohibitory rule. This view dominated the criminal legislation as well as academic opinion of the former Communist countries. Judging by legal developments in some of these jurisdictions, the opinion is still influential there.[84] The language of MPC section 2.12(2) clause two is entirely compatible with this approach: if triviality of

84. *See supra* note 77.

"harm or evil" does not justify "condemnation of conviction," then, arguably, only wrongdoings which are more than trivial rise to the level of criminality.

Alternatively, the de minimis doctrine might be viewed as a public policy defense, i.e., although trivial violations of the penal statutes are legally deemed criminal offenses, actors should nonetheless be spared formal convictions under a variety of public-policy rationales. One such rationale would be conservation of scarce resources which should not be wasted on trivialities. American police, prosecutors, judges, and juries already screen out trivial cases by exercising their unstructured discretion. Arguably, a superior way of accomplishing the same end is to adopt it as a stated legislative policy and openly vest that authority in the courts.[85] By doing so, the law puts a check on the unbridled discretion of the police as well as prosecutors. Another rationale might be a policy of not consigning people to social margins by branding them with a stigma of conviction for less than compelling reasons. The de minimis doctrine might also prevent the erosion of the authority of criminal law by limiting its application to cases of substantial transgressions. Finally, since juries are likely to bring verdicts of not guilty in trivial cases via their de facto powers,[86] it might be advisable to dismiss prosecution at a pretrial stage of the proceedings and thereby, again, conserve resources. The de minimis doctrine may therefore be viewed as a rule of efficiency.[87]

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85. This rationale was reflected in the comments by the Chief Reporter presented at the 1962 meeting of the American Law Institute. *See Discussion of the MPC, supra* note 5, at 105-08, 226-27.

86. *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 258-61 (1966).

87. This is not to suggest, however, that judicial dismissals on de minimis grounds proper will eliminate all acquittals by juries that are due to the triviality of alleged harm. Judges and juries are likely to differ about notions of "harm or evil . . . too trivial to warrant condemnation of conviction." *See* MODEL PENAL CODE § 2.12(2) (1962). In addition, the factual picture of the defendant's conduct available to the jury after a full trial will often be different from the picture available to the judge at the pretrial stage of the proceedings. Nonetheless, judicial dismissals on de minimis grounds should reduce the number of jury acquittals because of the triviality of harm. Moreover, it should be noted that many, perhaps most, prosecutions which qualify for the application of the triviality of harm or evil doctrine fall in the category of "petty offenses" under the Supreme Court jurisprudence regarding the Sixth Amendment right to a jury trial. *See* Lewis v. United States, 116 S. Ct. 2163 (1996); Baldwin v. New York, 399 U.S. 66 (1970). Thus, in most such cases, jury acquittal on the grounds of triviality is not a viable alternative.

IV. EXTRAORDINARY EXTENUATING CIRCUMSTANCES

MPC section 2.12(3) mandates that the court shall dismiss a prosecution if,

> having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:
>
> . . . .
>
> (3) presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.[88]

This language gives virtually no guidance to the courts. The reference to a presumed legislative intent is entirely unhelpful rhetoric. Considering that section 2.12 was intended, in part, as a response to, as well as a refined articulation of, the discretionary practices of juries, the focus should be on the anticipated reaction of a jury rather than on a fictitious "legislative intent." Because of its indefiniteness, section 2.12(3) functionally amounts to merely a delegation of discretionary authority to dismiss prosecutions on "equitable" grounds. That the MPC draftsmen perceived subsection (3) in this manner, and as qualitatively different from subsections (1) and (2), can be inferred from the fact that only dismissals under subsection (3) have to be justified by a "written statement of [the court's] reasons."[89] It seems that subsection (3) should apply only in cases which present the most extraordinary extenuating circumstances. Such circumstances may be due either to an unusual accumulation of extenuations or to the presence of even a single extenuation with extraordinary appeal. Their individual or cumulative effect may, in some instances, bring the defendant within close proximity of recognized justifications or excuses. One can imagine, for example, that a violent response by a battered spouse or child to maltreatment, although exceeding the boundaries of self-defense, may deserve, under some circumstances, serious consideration under section 2.12(3).

Due to its open-endedness, subsection (3) can conceivably serve as a vehicle for developing new, judicially created defenses.

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88. MODEL PENAL CODE § 2.12(3) (1962).

89. *Id.* § 2.12; *see also* 1 MODEL PENAL CODE AND COMMENTARIES § 2.12 cmt. 2, at 404 (1985) ("Because the authority in Subsection (3) [is] stated in terms of such generality, it is appropriate to require that the court explain, in a written opinion, its reasons when exercising the authority that the subsection grants.").

At least one such attempt, although unsuccessful, deserves comment. In *State v. Sorge*,[90] the defendants were activists in a movement which promoted distribution of clean hypodermic needles to intravenous drug users in exchange for dirty needles. The goal of this activity was containment of the spread of HIV. The defendants were charged with violating a New Jersey statute prohibiting possession or distribution of hypodermic needles.[91] They moved that the prosecution be dismissed on two grounds. First, their conduct did not actually cause or threaten the harm sought to be prevented by the statute under which they were charged. Alternatively, they argued that the beneficial effects of their activity outweighed whatever harm they might have caused. Those benefits brought their conduct within extraordinary extenuations not envisaged by the legislature while forbidding the offense.[92] The court properly characterized the alternative argument as an invitation to create a justification based on a balancing of the two competing societal interests. The invitation was refused, primarily on the principle of division of powers.[93]

It would be useful to see judicial application injecting some substance to the generalities of the provision. Unfortunately, jurisprudence under statutory provisions corresponding to MPC section 2.12(3) is almost nonexistent.[94] A noteworthy exception is

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90. 591 A.2d 1382 (N.J. Super. Ct. Law Div. 1991).

91. *See* N.J. STAT. ANN. § 2C:36-6 (West 1995).

92. *See id.* § 2C:2-11(c).

93. *See Sorge*, 591 A.2d at 1386-87 ("Defendants would have this court balance such social harm as may be engendered by needle exchanges against the social benefits to be gained in the struggle against AIDS. Such balancing is quintessentially a legislative function . . . . The court is simply not the place for that balance to be struck, given the extensive policy declarations by the Legislature with respect to the evils of drug abuse and drug-related crime."). The defendants were nonetheless acquitted after a bench trial before the Jersey City Municipal Court. The municipal judge found the balancing of evils argument convincing. *See* Kathleen Bird, *Despite Law, Needle Exchangers Acquitted*, N.J. L.J., Nov. 14, 1991, at 8.

94. In addition to *Sorge*, courts have passed on the de minimis claims under subsection (3) in only four cases. In three of those cases, subsection (3) was relied upon as an alternative ground. In two of those three cases, defendants' claims were summarily rejected as frivolous and the courts' opinions do not contribute anything of value to the interpretation of the statute. *See* State v. Brown, 458 A.2d 165, 172 (N.J. Super. Ct. Law Div. 1983); Scurfield Coal, Inc. v. Commonwealth, 582 A.2d 694, 698 (Pa. Commw. Ct. 1990). In the third case, the prosecution was dismissed under all three subsections of the New Jersey de minimis statute upon totally misguided analysis. The court's opinion includes only one conclusory sentence regarding subsection (3). *See* State v. Nevens, 485 A.2d 345, 345-47 (N.J. Super. Ct. Law Div. 1984). Other aspects of *Nevens* are discussed in *infra* note 115.

The fourth case discussing subsection (3), very recently decided by the Supreme

presented by a case decided recently by the Supreme Judicial Court of Maine, *State v. Kargar*.[95] The case arose as follows: A recent refugee from Afghanistan, Mohammed Kargar, and his family were babysitting a young female neighbor. In the presence of the neighbor, Kargar kissed his year-and-a-half-old son's penis. Subsequently, the girl told her mother what she had seen. The mother remembered that she had also seen Kargar kissing his baby's penis in the Kargar family photo album and reported him to the police. Kargar never disputed these facts; from the very first interview with the police, he maintained that kissing a young son's penis in his culture is an accepted expression of parental affection devoid of any sexual connotation. Kargar was charged on two counts of gross sexual assault. Kargar's defense moved to dismiss the prosecution under the Maine de minimis statute, arguing that in the defendant's culture, kissing one's young son's penis is a legitimate expression of parental affection and has no sexual connotation. The motion was supported by substantial cultural evidence. The trial court denied the motion and Kargar was convicted as charged. The trial court found as a matter of fact that the defendant's conduct involved no sexual feelings and was acceptable within his native culture, but considered these facts irrelevant. On appeal, the Maine Supreme Judicial Court vacated the conviction and remanded with instructions to dismiss under the Maine de minimis statute, section 12(1)(C), which was patterned after MPC section 2.12(3). The unanimous, well-reasoned opinion states that the trial court "erred *as a matter of law*" when it "found culture, lack of harm, and [defendant's] innocent state of mind irrelevant to its *de minimis* analysis."[96] The opinion correctly says that the trial court made an error because it focused exclusively on "whether the conduct met the definition of the gross sexual assault statute . . . . The focus is not on whether the conduct falls within the reach of the statute criminalizing it. If it did not, there would be no need to perform a *de minimis* analysis."[97] Then the court, very perceptively, using the broader context of the sexual assault statute and its recent legislative history, sought to divine what societal interest the statute sought to protect and what harm or

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Judicial Court of Maine, remarkable on its facts and for the court's analysis, is discussed at length above. *See* State v. Kargar, 679 A.2d 81 (Me. 1996).

95. 679 A.2d 81 (Me. 1996).

96. *Id.* at 83.

97. *Id.* at 84.

evil it sought to prevent. The opinion suggests that the harm to be prevented was victimization of children by sexual exploitation. Since the evidence clearly demonstrated that "there was nothing 'sexual' about Kargar's conduct,"[98] the de minimis claim was meritorious and should have been granted.

While the result reached in *Kargar* seems to be justified and much of its reasoning valid, the question remains whether subsection (1)(C) of the de minimis statute, chosen by the court as controlling, fits well the facts, evidence, and contentions of the case. It seems that two alternative theories of the de minimis defense should be considered.

First, Kargar's conduct was arguably within customary license, since it is accepted within his native country and recognized as normal in the communities of Afghan immigrants. Moreover, such customary behavior, as an expression of positive parental feelings and devoid of any sexual motives, is inoffensive to the values of the host country. Since the tradition-honored conduct of the minority group is also harmless from the point of view of the host country, it should be exempt from the reach of criminal law in the name of respect for the minority culture.

At least two plausible arguments against this theory can be made. First, creating a broad exemption for this kind of behavior, where the distinction between the harmless on the one hand and the harmful on the other turns upon inner motives of an actor, is risky. A customary license exemption in such cases carries the grave danger of sexual child abuse being disguised as an expression of parental love. A fact-specific inquiry, looking into motivation of specific individuals, is a safer course of action than a general validation of the custom. Second, as the facts in *Kargar* amply demonstrate, oral-genital contact between adults and minor children is a behavior too shocking for the population belonging to the dominant culture to be legitimized. Legitimizing such behavior in minority groups is likely to result in a backlash of resentment toward such groups as inferior and inevitably engender hostility and discrimination against their members. The *Kargar* court obliquely raised these issues.[99]

Regarding the second alternative theory, the main line of reasoning in the *Kargar* opinion suggests that the societal interest protected by the statute criminalizing sexual acts with mi-

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98. *Id.* at 85.

99. *See id.* ("Although it may be difficult for us as a society to separate Kargar's conduct from our notions of sexual abuse . . . .")

nors is children's freedom from sexual exploitation. Both trial and appellate courts in *Kargar* agreed that there was "nothing 'sexual' about Kargar's conduct" toward his baby son, "no sexual gratification," and "no victim impact."[100] It would logically follow that defendant's de minimis claim should have been granted under subsection (1)(B) of the Maine de minimis statute, since his conduct neither caused nor threatened the harm sought to be prevented by the law defining the crime. Instead the court elected to rely on the less definite subsection of the statute.

In spite of these imperfections, the *Kargar* decision should be hailed for several reasons. It is the first reported case in which cultural evidence was effectively used to support the de minimis defense. The appellate court showed proper sensitivity to the plight of a defendant coming from a radically different culture and threatened not only by undeserved stigma of shameful conduct, but also by the harsh collateral consequences of conviction under the U.S. immigration law.[101]

V. DE MINIMIS DOCTRINE IN JUDICIAL PRACTICE

A. In General

So far, the discussion has been largely abstract, addressing the conceptual structure of MPC section 2.12. This section of the article will survey the judicial practice prompted by the legislation patterned after Model Penal Code section 2.12.

As was noted at the outset, only five jurisdictions have adopted MPC section 2.12.[102] Criteria according to which courts are either required or authorized to dismiss a prosecution are adopted virtually verbatim from the Model Penal Code in the statutes of all five jurisdictions. Three jurisdictions, Hawaii, Maine and New Jersey, have changed the original mandatory MPC language "shall dismiss" to the discretionary phrase "may dismiss."[103] All the jurisdictions vest the authority to dismiss in the "court," with the exception of New Jersey, which vests the authority to dismiss in the "assignment judge."[104] Two states,

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100. *Id.*

101. The de minimis claim was granted although the offenses charged belong technically in the category of felonies. If convicted, Kargar would have been subject to deportation. *See id.*

102. *See supra* note 2.

103. *See supra* note 7.

104. *See infra* note 134 (regarding the authority of the assignment judge under New Jersey law).

Maine and Pennsylvania, have expanded the requirement that dismissals be supported by a written statement of reasons.[105] The New Jersey statute includes a requirement that the prosecutor be given "notice and an opportunity to be heard"; it also grants the prosecutor the right to appeal.[106] It appears that of the five jurisdictions, New Jersey imposes the most extensive restrictions upon application of the de minimis doctrine.[107]

The jurisprudence under de minimis provisions, judging by the reported decisions, has been anything but expansive. Given the length of time during which the relevant statutory provisions have been in operation[108] and the high volume of criminal prosecutions, particularly in cases eliciting less severe criminal sanctions, the number of decisions reported is surprisingly small. As of February 10, 1997, courts had passed upon de minimis issues in only about 40 cases. In some cases courts rested their decisions, for various reasons, on more than one subsection of their state's de minimis statute, failing to extensively discuss any one subsection of their statute.[109] Additionally, several of the cases discussing the de minimis doctrine did not decide any de minimis issues, but just commented or briefly mentioned the doctrine either in the form of dicta or in separate opinions.

In an overwhelming majority of cases reported, the courts passed on the de minimis issues under statutory provisions cor-

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105. The MPC requires a written statement of reasons only for dismissals under section 2.12(3), whereas the statutes of Maine and Pennsylvania require that dismissals under all subsections of their de minimis provisions be so supported. *See* ME. REV. STAT. ANN. tit. 17A, § 12(2) (West 1993); 18 PA. CONS. STAT. ANN. § 312(b) (West 1995).

106. *See* N.J. STAT. ANN. § 2C:2-11 (West 1995).

107. *See* State v. I.B., 547 A.2d 707, 709 n.2 (N.J. Super. Ct. App. Div. 1988). In addition, the judicial authority in New Jersey is split on the issue of whether the de minimis provision applies to juveniles: the intermediate appellate court decided in the negative, *see id.* at 709, while some trial courts have held otherwise, *see* State v. Ziegler, 544 A.2d 914 (N.J. Super. Ct. Law Div. 1988).

Moreover, the weight of authority seems to favor the proposition that the assignment judge while ruling on the de minimis motion must accept the allegation of the prosecution as true and is not allowed to engage in fact-finding. *See* New Jersey v. Bazin, 912 F. Supp. 106, 113 (D.N.J. 1995) (collecting authorities).

108. The effective dates of the respective provisions in the five jurisdictions are as follows: Hawaii, Jan. 1, 1973; Maine, May 1, 1976; New Jersey, Sept. 1, 1979; Pennsylvania, June 6, 1973; Guam, Jan. 1, 1978.

109. There are cases in which the court assessed the same conduct from several perspectives, for example under two or three subsections of the de minimis statute. *See* State v. Nevens, 485 A.2d 345 (N.J. Super. Ct. Law Div. 1984). There are also cases in which more than one alleged offense was evaluated under the de minimis doctrine either because one defendant was charged with multiple offenses, *see Bazin*, 912 F. Supp. 106, or a case involved more than one defendant, *see Nevens*, 485 A.2d 345.

responding with MPC section 2.12 subsection (2), mostly under the triviality clause.[110] Decisions under provisions patterned after subsections (1) and (3) are very few in number and unenlightening in substance. Cases dealing with extraordinary extenuations not "envisaged by the legislature" were discussed above.[111] Courts addressed claims that defendant's conduct was within a "customary license or tolerance" in just five cases. Only in a single such case was the defense granted;[112] in the remaining four cases, the defense was rejected.[113] The doctrinal value of these decisions is limited, however, either because the defense was frivolous on the facts and rejected out of hand,[114] or because the court's reasoning was flawed.[115] Despite the limited de minimis jurisprudence, the various opinions do address and reflect two important issues—the nature of the de minimis rule and the concept of triviality of "harm or evil."

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110. *See* cases cited *infra* note 137.

111. *See supra* discussion accompanying notes 90-101.

112. *See Nevens*, 485 A.2d at 347-48.

113. *See* State v. Okuda, 795 P.2d 1 (Haw. 1990); State v. Pleasant Hill Health Facility, 496 A.2d 306 (Me. 1985); State v. Hawkins, 485 A.2d 345 (N.J. Super. Ct. Law Div. 1984) (case consolidated with *Nevens*, 485 A.2d 345); Scurfield Coal, Inc. v. Commonwealth, 582 A.2d 694 (Pa. Commw. Ct. 1990).

114. *See* cases cited *supra* note 113.

115. In *Nevens*, 485 A.2d 345, the defendant, a customer of a buffet type restaurant, took some fruit out of the restaurant after paying for his meal and was arrested by security guards. Subsequently, Nevens was charged with theft and convicted by a municipal court judge. *See id.* It was undisputed that Nevens could have eaten as much fruit as he wanted if he had stayed inside the restaurant. It was also undisputed that he had paid for his meal. The defendant disclaimed any knowledge that this particular restaurant had a "take out policy" and in fact no signs to this effect were posted. The defendant appealed his conviction and moved that the Superior Court dismiss the complaint on the ground that the infraction was de minimis. The Superior Court dismissed the complaint based on all three subsections of the New Jersey de minimis statute, including a "customary license" clause. *See* N.J. STAT. ANN. § 2C:2-11(a) (West 1995).

The reasoning is conceptually confused. The court first found that "Nevens did not intend to steal anything," and then reasoned that the infraction was de minimis, inter alia, because it was the defendant's "custom when he attends buffets in other Atlantic City Casino/Hotels to take some fruit when he leaves." *Nevens*, 485 A.2d at 347. There are at least two errors in this reasoning. First, if evidance showed the defendant did not entertain intent to steal, he should have been acquited because the state failed to prove one of the material elements of the crime of theft, and therefore the conviction should have been reversed for a legal insufficiency of evidence. Under the circumstances, the de minimis issue should never have heen reached. Secondly, for purposes of the customary license doctrine, the defendant's *personal* custom is hardly relevant.

B. The Nature of the De Minimis Rule: View from the Bench

There seems to be unanimity that the de minimis issues can be reached only after it is established that the defendant's conduct, as alleged or as proved, violated a specific statutory prohibition.[116] This analytically correct view, however, has not been consistently applied in individual cases.[117] Adding to the confused application of the de minimis doctrine, the state courts are strongly divided over whether the nature of the de minimis doctrine is discretionary or mandatory. Two competing theories have emerged from the jurisprudence of the state courts.[118]

According to the first view, de minimis is a substantive criminal law doctrine rather than merely a procedural device. It is a "defense"—a doctrine negating criminality of the conduct in question. Consequently, once it is found that the de minimis statutory criteria are met, the court is duty bound to dismiss a prosecution and the defendant has the corresponding right to have a prosecution dismissed.[119] Thus, it seems to follow unequivocally that technical violations committed under conditions spelled out in a de minimis statute are not crimes at all.

The alternative line of authority holds that de minimis statutes do not provide for a substantive criminal law defense but are rather grants of official discretion. Consequently, even in the presence of the de minimis statutory criteria, the defendant is not entitled to have a prosecution dismissed; the court is empowered, but not duty bound, to rule for the defense. Since de minimis conditions do not negate criminality, it follows that such infractions are still criminal in nature even if not prosecuted.[120]

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116. *See* State v. Kargar, 679 A.2d 81, 83-85 (Me. 1996); Commonwealth v. Bender, 375 A.2d 354, 359 (Pa. Super. Ct. 1977).

117. See, for example, the discussion of the *Nevens* case in *supra* note 115.

118. I am referring to cases decided by state courts of Hawaii, Maine, New Jersey and Pennsylvania and one U.S. District Court decision applying the New Jersey statute. My research failed to discover any relevant cases decided by the local courts of Guam.

119. *See* New Jersey v. Bazin, 912 F. Supp. 106, 113 (D.N.J. 1995); State v. Park, 525 P.2d 586, 591 (Haw. 1974); State v. Evans, 475 A.2d 97, 98-99 (N.J. Super. Ct. Law Div. 1984); Commonwealth v. Gemelli, 474 A.2d 294, 300 (Pa. Super. Ct. 1983); Commonwealth v. Jones, 363 A.2d 1281, 1285 (Pa. Super. Ct. 1976).

120. *See* State v. Reed, 881 P.2d 1218, 1231 (Haw. 1994); State v. I.B., 547 A.2d 707, 709 (N.J. Super. Ct. App. Div. 1988); State v. Smith, 480 A.2d 236, 238 (N.J. Super. Ct. Law Div. 1984); State v. Brown, 458 A.2d 165, 170 (N.J. Super. Ct. Law Div. 1983); *see also In re* Investigation into the Hamilton Township Bd. of Educ., 500 A.2d 744, 746 (N.J. Super. Ct. App. Div. 1985) ("The official wrongdoing for which the presentment reproves him *was criminal, even if de minimis* . . . ." (emphasis added)).

Cases belonging to this line often rely on the language as well as the legislative history of the respective provisions. In particular, they rely on the fact that the original MPC language "shall dismiss" was changed to the permissive "may dismiss" in their state statutes.[121]

Distinguishing which judicial actions exercise discretion and which merely apply the law is a philosophical question that often evades definite resolution. While most people would agree on how to classify polar paradigmatic situations, disagreements will still persist in a broad spectrum of cases in the middle. According to conventional wisdom, a discretionary situation occurs when a decision maker is free to choose between two or more alternative courses of action, any of which is legally correct. Thus, most would probably agree that a judge makes a discretionary decision when sentencing an offender under a statute providing for up to five years of imprisonment if he imposes a sentence within such statutory limits.[122] On the other hand, a judge "applying law" in a concrete case is apparently "bound" by an applicable legal rule and hence not free to make choices.

Reality, however, is more complex than the simplistic dichotomy suggested above. While applying law, courts are often free to choose between two or more alternative resolutions due to indeterminacy of the applicable rules, the absence of legal authority on point, or conflicting lines of authority. Therefore, what distinguishes discretionary decisions from decisions labeled as applications of law is the degree of freedom left to the decision maker, the criteria by which choices are made, and the manner in which those decisions are justified and reviewed by appellate courts. A wide scope of free choice and a wide space of "free play" with little or no normative constraints suggests that the judicial action is outside of the zone of law application and more closely resembles discretionary decision making. A perplexing case is

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121. *See Reed*, 881 P.2d at 1231; *I.B.*, 547 A.2d at 709. The legislative history sometimes sends equivocal signals. For example, the New Jersey Criminal Law Revision Commission Report is cited by both parties of the debate about the nature of the de minimis doctrine. Those courts which have adopted the view that the de minimis statute is not a "defense" but merely a grant of official discretion cite the Report for the proposition that the mandatory "shall" of MPC was deliberately changed to the permissive "may." *See I.B.*, 547 A.2d at 709; *Brown*, 458 A.2d at 175. On the other hand, the same document is cited as expressing that the New Jersey de minimis statute introduces a "new idea in substantive criminal law." *Bazin*, 912 F. Supp. at 114.

122. *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 10 (1969).

presented by open-ended, amorphous statutory standards where the line between application of law and discretion is elusive. As Kent Greenawalt stated in his classic article:

> When authoritative standards yield no clear answers, when a judge must rely on debatable personal assessments to decide a case, and when more than one result will widely be regarded as a satisfactory fulfillment of his judicial responsibilities then it does not make good sense to say that a judge is under a duty to reach one result rather than another; as far as the law is concerned, he has discretion to decide between them.[123]

How would the de minimis statutes fare under this analysis? Are they sufficiently open ended or "soft-edged"[124] to classify as grants of discretion rather than substantive rules? Professor Greenawalt would most likely so conclude, but the conclusion almost certainly would be contested by legal philosophers like Ronald Dworkin.[125]

Without trying to resolve the unresolvable conceptual issue which divides the courts as well as academic writers, I would like to take a look at the practical side of the matter: how the courts deal with de minimis issues, and what, if any, is the practical "bite" of the theoretical distinction. One aspect of the distinction is the style of judicial reasoning in the de minimis cases. If the central characteristic of exercising discretion is autonomy of the decision maker, who is guided only by general ideas of what is "best for society" under the circumstances, this is not reflected in the judicial opinions under de minimis statutes. To

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123. Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359, 378 (1975).

124. Mirjan Damaška, Comment, *The Reality of Prosecutorial Discretion: Comments on a German Monograph*, 29 AM. J. COMP. L. 119, 121 (1981). Reflecting on the polar ideals of mandatory *(Legalitätsprinzip)* and discretionary *(Opportunitätsprinzip)* prosecution, as well as their operational meaning, Damaška aptly observes, "If substantive doctrines and crime definitions are soft-edged, ascertaining whether a happening constitutes a crime may involve a great deal of flexible prosecutorial judgment *before* the duty to press charges becomes operative." *Id.*

125. Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967). It should be noted that positive law prevailing in the United States so far is rather on Greenawalt's side. The void-for-vagueness doctrine developed under the Due Process Clauses of the Fifth and Fourteenth Amendments, attests to the proposition that at some point along the continuum, amorphous statutory standards lose their regulative/restraining significance. As a result, the agencies of enforcement and adjudication are left with de facto freedom to engage in standardless, discretionary decision making offensive to the Due Process Clauses. *See* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

the contrary, many of them are cast in terms characteristic of legal discourse,[126] invoking statutory language and history as reflective of the legislative purpose and policy as well as judicial precedent.[127] Regular invocation of precedent, and, in particular, efforts to follow it, should be emphasized for at least two reasons. First, a growing body of case law can transform initially amorphous statutory standards into more definitive ones.[128] Thus, what once might have been an exercise of discretion under general and vague statutory standards can become an application of law after the relevant jurisprudence acquires a "critical mass." Second, given the infinite variety of de minimis situations, flexible and ever-evolving judge-made law seems to be particularly suitable as a regulative device. Skeptics, in rebuttal, can raise two objections: (1) judicial opinions, no matter how legalistically crafted, are just a cover for de facto discretionary decisions; and (2) de minimis decisions are so strongly fact-bound that by their very nature they are devoid of any precedential value.[129]

One consequence of the autonomous nature of discretionary decision making is either an absence[130] or a narrow scope of appellate review. In the latter case, appellate review is conducted under the "abuse of discretion" standard. To win under this standard, the appellant has to show either that the court below relied on impermissible factors such as race, sex, religion, or ethnicity, or deviated substantially, and without good reason, from the established practice.[131] Beyond that, the decision below is immune from scrutiny even if deemed erroneous by the reviewing court. Most reported appellate decisions dealing with de minimis cases have declared that the review should be conducted

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126. *See* George P. Fletcher, *Some Unwise Reflections About Discretion*, 47 LAW & CONTEMP. PROBS., Autumn 1984, at 269, 283.

127. *See* New Jersey v. Bazin, 912 F. Supp. 106 (D.N.J. 1995); State v. Reed, 881 P.2d 1218 (Haw. 1994); State v. Sorge, 591 A.2d 1382 (N.J. Super. Ct. Law Div. 1991); State v. Downey, 576 A.2d 945 (N.J. Super. Ct. Law Div. 1988); State v. Brown, 458 A.2d 165 (N.J. Super. Ct. Law Div. 1983).

128. The U.S. Supreme Court has held more than once that criminal statutes can acquire constitutionally essential definiteness via authoritative interpretation by state courts. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 2.3, at 91 (2d ed. 1986).

129. *See* Commonwealth v. Eliason, 509 A.2d 1296, 1300 (Pa. Super. Ct. 1985) (Brosky, J., dissenting).

130. *See* Koon v. United States, 116 S. Ct. 2035, 2045 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.").

131. *See* State v. Akina, 828 P.2d 269, 271 (Haw. 1992).

under the abuse of discretion standard.[132] From such statements, one can infer that as a practical matter, appellate jurisprudence is solidly behind the discretionary theory of the de minimis doctrine.

However, a closer look reveals a more complex situation. In some instances, in spite of declarations to the contrary, appellate courts have substituted their own concept of a de minimis infraction for the one applied by the decision appealed from. Thus, operationally, the review was conducted de novo, as if such concepts as "trivial harm or evil" were concepts of substantive law and the trial court was duty bound to apply it "correctly."[133]

Another practical angle of the ongoing debate over the legal nature of the de minimis doctrine is illuminated by the procedural frameworks within which the de minimis provisions are applied. It stands to reason that were de minimis a substantive law doctrine, and, consequently, were the defendants entitled to dismissals as a matter of right, the doctrine should be applicable at every stage of regular judicial proceedings. The defendant should be able to litigate the issue to the fullest extent, including appellate and postappellate remedies. On the other hand, if a de minimis statute is merely a grant of discretionary power, perhaps predominantly instituted for the sake of economy and expediency, then its procedural deployment could only be as broad as administrative convenience would suggest. In this regard, one notices substantial procedural differences among the four states under consideration. As mentioned earlier, New Jersey represents the most restrictive variation; the authority to dismiss is vested exclusively in the assignment judge, rather than an ordinary trial court. Since the assignment judge is a judicial officer with substantial administrative responsibilities,[134] such exclusive allocation of power suggests that de minimis dismissals are viewed more as a "gate keeping" function than a regular adjudication.[135]

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132. *See* State v. Reed, 881 P.2d 1218 (Haw. 1994); State v. Akina, 828 P.2d 269, 271 (Haw. 1992); State v. Okuda, 795 P.2d 1 (Haw. 1990); State v. Park, 525 P.2d 586 (Haw. 1974); Commonwealth v. Jackson, 510 A.2d 1389, 1391 (Pa. Super. Ct. 1986); Commonwealth v. Houck, 335 A.2d 389, 391 (Pa. Super. Ct. 1975).

133. *See* State v. Schofill, 621 P.2d 364 (Haw. 1980).

134. *See* N.J. COURT RULES 1:33-4.

135. *See supra* notes 104-107 and accompanying text (regarding other restrictive features of the New Jersey procedure).

C. The Concept of Triviality of "Harm or Evil" in Judicial Decisions

The bulk of reported cases have been decided under the de minimis proper parts of the statutes, that is, under their "triviality of harm or evil" clauses.[136] This group, which consists of some three dozen decisions, conveys how courts construe and apply general and value-laden statutory language. Generally, courts have adopted rather narrow views of "triviality," which is, to some extent, reflected in numbers: triviality-based claims were granted in only eight cases, but were rejected in twenty-seven.[137]

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136. For a discussion of MPC section 2.12(2)'s "triviality of harm or evil" clause, see *supra* Part III.B.

137. Almost all successful claims under the triviality clauses were made by defendants charged either with misdemeanors under state statutes or with violations of local ordinances. Prosecutions have been dismissed in cases dealing with a variety of conduct. *See* State v. Akina, 828 P.2d 269 (Haw. 1992) (giving shelter to a runaway teenager ("custodial interference")); New Jersey v. Bazin, 912 F. Supp. 106 (D.N.J. 1995) (verbal harrassment); State v. Zarrilli, 523 A.2d 284 (N.J. Super. Ct. Law Div. 1987) (taking a single sip of beer by an underage boy attending a church function); State v. Smith, 480 A.2d 236 (N.J. Super. Ct. Law Div. 1984) (shoplifting three pieces of bubble gum worth 15¢); State v. Nevens, 485 A.2d 345 (N.J. Super. Ct. Law Div. 1984) (taking fruit from the premises of a buffet-type restaurant after paying for the meal); Commonwealth v. Moll, 543 A.2d 1221 (Pa. Super. Ct. 1988) (damaging a drainage pipe belonging to the town to prevent flooding of the defendant's land (mischief)); Commonwealth v. Jackson, 510 A.2d 1389 (Pa. Super. Ct. 1986) (riot and failure to disperse by prison inmates upon official order); Commonwealth v. Houck, 335 A.2d 389 (Pa. Super. Ct. 1975) (verbal harrassment—calling the victim on the phone "morally rotten" and "lower than dirt").

Defendants' motions to dismiss under the triviality clauses of the de minimis statutes were denied in cases dealing with equally diverse conduct. *See* State v. Cavness, 911 P.2d 95 (Haw. Ct. App. 1996) (trespass—refusal to leave the land of another upon several requests by the owners, their attorney, and the police); *Bazin*, 912 F. Supp. 106 (simple assault); State v. Ornellas, 903 P.2d 723 (Haw. Ct. App. 1995) (same); State v. Downey, 576 A.2d 945 (N.J. Super. Ct. Law Div. 1988) (same); State v. Reed, 881 P.2d 1218 (Haw. 1994) (possession or distribution of small amounts of illegal hard drugs); State v. Schofill, 621 P.2d 364 (Haw. 1980) (same); State v. Vance, 602 P.2d 933 (Haw. 1979) (same); State v. Brown, 458 A.2d 165 (N.J. Super. Ct. Law Div. 1983) (same); Commonwealth v. Vickers, 394 A.2d 1027 (Pa. Super. Ct. 1978) (same); State v. Ziegler, 544 A.2d 914 (N.J. Super. Ct. Law Div. 1988) (possession of drug paraphernalia and marijuana); State v. Pleasant Hill Health Facility, 496 A.2d 306 (Me. 1985) (theft over $1000); State v. Stern, 484 A.2d 38 (N.J. Super. Ct. App. Div. 1984) (theft by deception under $200); Commonwealth v. Matty, 619 A.2d 1383 (Pa. Super. Ct. 1993) (theft of services of $32); Commonwealth v. Gemelli, 474 A.2d 294 (Pa. Super. Ct. 1984) (theft of firearms by the police chief); Commonwealth v. Campbell, 417 A.2d 712 (Pa. Super. Ct. 1980) (retail theft of merchandise valued at $1.59); Commonwealth v. Moses, 504 A.2d 330 (Pa. Super. Ct. 1986) (robbing a 10-year-old boy of 35¢); State v. Johnson, 653 P.2d 428 (Haw. Ct. App. 1982) (negligent vehicular homicide); State v. Sorge, 591 A.2d 1382 (N.J. Super. Ct. Law Div. 1991) (distribution of hypodermic needles); State v. Hawkins, 485 A.2d 345 (N.J. Super. Ct. Law Div.

Most interesting are the suggested criteria for assessing the triviality of the harm or evil caused or threatened by the defendant's conduct. In a small number of cases, courts have used a laundry list of factors to assess triviality. *State v. Park*[138] illustrates this broad, almost all-inclusive approach. In *Park*, the trial court's dismissal of charges as de minimis was held erroneous because the decision below was made without proper inquiry into the factual circumstances of the case. The case was remanded for further proceedings with directions to consider the following factors as relevant to the ultimate assessment of triviality:

> [T]he background, experience and character of these defendants-appellees which may indicate whether they knew of, or ought to have known, the requirements of HRS § 11-193 (Supp. 1972); the knowledge on the part of these defendants-appellees of the consequences to be incurred by them upon the violation of the statute; the circumstances concerning the late filing of these statements of expenses; the resulting harm or evil, if any, caused or threatened by these infractions; the probable impact of these violations upon the community; the seriousness of the infractions in terms of the punishment, bearing in mind, of course, that the punishment can be suspended in proper cases; the mitigating circumstances, if any, as to each offender; the possible improper motives of the complainant or the prosecutor; and any other data which may reveal the na-

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1984) (consolidated with *Nevens*, 485 A.2d 345) (swindling and cheating at casino gaming); Commonwealth v. Miller, 560 A.2d 229 (Pa. Super. Ct. 1989) (failure to appear at preliminary hearing (obstruction of justice)); Commonwealth v. Buck, 618 A.2d 1047 (Pa. Super. Ct. 1993) (failure to attach a tag to a deer carcass); Commonwealth v. Guthrie, 616 A.2d 1019 (Pa. Super. Ct. 1992) (driving 1.1 miles into Pennsylvania with a suspended license); Commonwealth v. Eliason, 509 A.2d 1296 (Pa. Super. Ct. 1986) (driving an unregistered three-wheeler with a suspended license for eight seconds); Commonwealth v. Hashem, 525 A.2d 744 (Pa. Super. Ct. 1987) (aiding drug dealers to escape criminal prosecution and conviction (obstruction of justice)); Scurfield Coal, Inc. v. Commonwealth, 582 A.2d 694 (Pa. Commw. Ct. 1990) (one incident of air pollution); Commonwealth v. Dodge, 429 A.2d 1143 (Pa. Super. Ct. 1981) (prostitution); Commonwealth v. Larsen, 682 A.2d 783 (Pa. Super. Ct. 1996) (manipulation of prescription drugs).

In two reported cases, courts refused to rule upon the merits of de minimis claims because of the factual controversy. *See* State v. Evans, 475 A.2d 97 (N.J. Super. Ct. Law Div. 1984); State v. Hegyi, 447 A.2d 1369 (N.J. Super. Ct. Law Div. 1982). In *State v. Park*, the Supreme Court of Hawaii refused to rule on the merits of a de minimis claim because of an insufficient record. A trial court's decision to dismiss the prosecution on the de minimis ground was reversed as premature, and the case was remanded with the instructions to investigate a broad range of facts having a bearing on the de minimis claim. *See Park*, 525 P.2d at 591-92.

138. 525 P.2d 586 (Haw. 1974).

> ture and degree of the culpability in the offense committed by each defendant-appellee.[139]

There are several notable features of this all-inclusive laundry list. First, most of the items on the list are either only loosely related or entirely unrelated to the language of the relevant statutory provision.[140] Second, some of these factors, even taken individually and separately, are open ended.[141] Third, at several junctions, the court refers to the subjective elements of the defendant's conduct. Finally, there is no indication what relative weight should be attached to each of these numerous factors in making an overall judgment about triviality of the defendant's conduct. The omnibus, all-inclusive approach represented by the *Park* decision dissolves already amorphous statutory standards into nothingness. At the practical level, the *Park* court directs the lower courts to dismiss the prosecution as de minimis if in their judgment dismissal is what the defendant deserves under all the circumstances. The omnibus approach has had very limited practical following in later cases.[142]

An overwhelming majority of courts have taken a much more restrictive approach: they have primarily focused on the objective factors directly related to the defendant's offending conduct and, particularly, the conduct's consequences for the societal interests involved.[143] Decisions in this current of jurisprudence give

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139. *Id.* at 591.

140. For example, "the possible improper motives of the complainant or the prosecutor" seem to have no bearing upon triviality of harm or evil caused or threatened by the defendant's conduct. *Id.*

141. For example, "[t]he mitigating circumstances . . . as to each offender." *Id.*

142. One should distinguish between following the lead of the *Park*-type approach at the rhetorical level on the one hand and its practical applications on the other. Illustrative of the latter is a New Jersey case, *State v. Smith*, 480 A.2d 236 (N.J. Super. Ct. Law Div. 1984). In this case, the assignment judge first declared that "'sympathetic considerations'" have "'no part'" in de minimis cases. *Id.* at 238 (quoting State v. Brown, 458 A.2d 165, 173 (N.J. Super. Ct. Law Div. 1983)). He then proceeded to consider a broad range of mitigating factors having nothing to do with "harm or evil" caused by the defendant's conduct, such as the defendant's clean police record, his being a conscientious college student, the negative publicity which he had already suffered, as well as the impact of conviction on his career prospects. *See id.* As a practical matter, the court followed an open-ended, "omnibus" approach, the disclaimer notwithstanding. *See id.* at 239. In *Brown*, however, the court ostensibly endorsed the *Park* approach, but in fact disregarded the defendant's personal history and instead, focusing on the seriousness of the crime charged, rejected the de minimis claim. *See* State v. Brown, 458 A.2d 165, 172-73 (N.J. Super. Ct. Law Div. 1983).

143. Several opinions explicitly turned down defendants' invitations to consider factors either totally unrelated or only remotely related to the offending conduct in question and its consequences. *See, e.g.*, State v. Downey, 576 A.2d 945, 949 (N.J.

primary consideration to the nature and degree of the objective harm either actually caused or merely risked by the defendant's conduct. As the court stated in *State v. Zarrilli*,

> The protection to which society is entitled is provided by a dismissal only when the offense is truly "trivial." Consequently, it is public risk that determines what is trivial. The one question to be asked and answered in response to a *de minimis* motion is therefore:
>
> What is the risk of harm to which society is exposed by defendant's conduct?[144]

The *Zarrilli* court also pointed out several "subordinate factors" to be taken into account while assessing harmfulness of the offending conduct, since these factors "may reveal an unacceptable social risk."[145] In particular, the court listed the following factors:

(a) . . . Possession of a small amount of cocaine in a prison setting is a circumstance strongly inhibiting a dismissal.
(b) The existence of contraband.
(c) The amount and value of property involved.
(d) The use or threat of violence.
(e) The use of weapons.[146]

This assessment of "harm and evil" is two-fold. Courts first consider the importance of the type of societal interest violated by the defendant's conduct. Thus, for example, protection of life and limb as well as bodily integrity is given high priority. If the defendant's conduct violated one of the interests of paramount importance, that alone, according to some courts, dooms a de minimis claim regardless of concrete facts of the individual case. Thus, in *State v. Johnson*,[147] the defendant, who was convicted of negligent (vehicular) homicide, challenged his conviction, inter alia, on the de minimis ground. In response, the Intermediate

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Super. Ct. Law Div. 1988) ("[D]efendant's background has little value in determining whether a violent offense is trivial. A physical assault is a physical assault."); State v. Zarrilli, 523 A.2d 284, 288-89 (N.J. Super. Ct. Law Div. 1987) ("Deterrence is a sentencing concern. It is one of the purposes of punishment. It does not measure triviality . . . . Arguably, the minor misconduct of a 'bad actor' is of greater concern to society than the same act committed by an innocent because it is more likely to lead to serious criminal activity. That argument is at best tenuous . . . .").

144. *Zarrilli*, 523 A.2d at 288.
145. *Id.*
146. *Id.*
147. 653 P.2d 428 (Haw. Ct. App. 1982).

Appellate Court of Hawaii did not mince any words: "Under the circumstances of a case where a death results from one's negligence, we deem it an assault on good sense to argue that the violator's actions were de minimis."[148]

Only after a claim has passed muster at the abstract level does the analysis shift to the factual level, with the quantitative aspects of the specific harm assuming primary importance. While assessing the importance of the type of societal interest violated, courts regularly look to the statutory classification of the offense[149] as well as the severity of the statutory penalty for guidance. In this connection, a number of courts have confronted the issue of whether crimes considered "serious" by legislative standards could nonetheless be deemed trivial under concrete circumstances for de minimis purposes. So far, the answer has been almost uniformly negative as reflected in the disposition of individual cases as well as supporting reasoning. In practically all cases where defendants were charged with felonies or other serious offenses, their de minimis/triviality claims failed.[150] Moreover, these claims were essentially rejected as a matter of law rather than on factual analysis. The courts reasoned that the very concepts of trivial felony or trivial high misdemeanor are internally contradictory. Illustrative of this approach is *State v. Schofill*,[151] where the indictment charging the defendant with a drug-related offense was dismissed by the trial court, inter alia, as de minimis. The state supreme court reversed with the following justification: "Promoting a dangerous drug in the first degree . . . is a Class A felony, punishable by imprisonment for a period of 20 years. Traffic in narcotics can hardly be said to be a de minimis offense."[152] Similarly, in *State v. Brown*, the court stated, "Mere possession of cocaine is a high misdemeanor. Unlawful possession of it in any amount is a serious, not a trivial offense."[153]

Although the approach taken by the courts at first glance has a strong appeal (indeed, one can ask, how a serious crime can at the same time be trivial), it is not as compelling as it appears.

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148. *Id.* at 436-37.

149. For example, "felony," "high misdemeanor," "disorderly conduct," etc.

150. *See supra* note 137.

151. 621 P.2d 364 (Haw. 1980).

152. *Id.* at 370.

153. 458 A.2d 165, 173 (N.J. Super. Ct. Law Div. 1983); *accord* Commonwealth v. Vickers, 394 A.2d 1027, 1030 (Pa. Super. Ct. 1978) ("The charge of selling heroin is such a serious offense that the *de minimis* rule cannot properly be applied to it.").

The concept of trivial felony is not necessarily internally contradictory considering that the rationale of the de minimis doctrine is overcoming the conflict between the formal, legal assessment of general classes of conduct on the one hand, and the substantive assessment of concrete, individual acts on the other. Conduct which as a general rule is highly dangerous to society may not be dangerous at all, or may represent sub-minimal, trivial danger in exceptional, individual circumstances. One can assume that in the area of felonious conduct such exceptions would be less prevalent; that is, it would be more difficult for the defendant to demonstrate that his particular act falls within the exception. Nonetheless, such a possibility should not be ruled out entirely. Remarkable dictum from *State v. Vance*[154] illustrates this point:

> The evil sought to be controlled by the statutes mentioned above is the use of narcotic drugs and their sale or transfer for ultimate use. Where the amount of narcotics possessed is an amount which can be used as a narcotic, the probability of use is very high and the protection of society demands that the possession be proscribed. However, where the amount is microscopic or is infinitesimal and in fact unusable as a narcotic, the possibility of unlawful sale or use does not exist, and proscription of possession under these circumstances may be inconsistent with the rationale of the statutory scheme of narcotics control. Thus, the possession of a microscopic amount in combination with other factors indicating an inability to use or sell the narcotic, may constitute a de minimis infraction within the meaning of HRS § 702-236 and, therefore, warrant dismissal of the charge otherwise sustainable under HRS § 712-1243.[155]

The dictum is notable because it admits at least a theoretical possibility of applying the de minimis doctrine in felony cases, thus going against the dominant current of the judicial opinions. The conclusion is reached via perceptive analysis of the societal interests protected by the statute proscribing possession of narcotics and, correspondingly, the "evil" sought to be controlled.[156]

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154. 602 P.2d 933 (Haw. 1979). In *Vance*, the defendants were convicted under HAW. REV. STAT. § 712-1243 which prohibited the knowing possession of "any dangerous drug in any amount." The Hawaii Supreme Court affirmed, holding, inter alia, that "the possession of .7584 gram of white powder containing cocaine and the possession of three tablets of secobarbital" was not de minimis. *Vance*, 602 P.2d at 944.

155. *Vance*, 602 P.2d at 944. The dictum was quoted approvingly in State v. Reed, 881 P.2d 1218, 1231 (Haw. 1994).

156. The hypothetical situation posed in the *Vance* dictum does not, strictly

Not only the "war on drugs," but also other strongly pronounced social policies have visibly influenced judicial approaches to the concept of triviality of harm. In three cases involving charges of simple assault, de minimis claims were rejected with the explanation that violence, even in its minor manifestations, must not be condoned.[157] As the *Downey* court stated:

> [C]ourts have not taken an expansive view of the scope of *de minimis* statutes. That caution is especially warranted in the present case which involves a direct intentional physical attack upon another. Even under an expansive reading of the *de minimis* statute, such behavior should not be classified as trivial.[158]

A strong policy against drunk-driving serves as another example. In *Commonwealth v. Guthrie*,[159] the defendant, whose license had been suspended in Pennsylvania for driving under the influence, mistakenly crossed from Maryland to Pennsylvania and was arrested after driving only for about one mile within the latter state. A conviction for driving with a suspended license followed. On appeal, the defendant challenged the conviction on the de minimis ground. The appellate court found the challenge without merit:

> "Section 1543(b) was enacted in coordination with the new Drunk Driving Law as a part of the legislature's broad response to the serious problem of intoxicated drivers. . . ." The legislature's intent, in enacting 75 Pa. C.S.A. § 1543(b), was to strictly enforce DUI suspensions, in direct response to a severe threat to public safety. Regardless of how close to state lines appellant was or whether appellant's act of driving to Pennsylvania was unintentional, this court will not undermine our state's policy against drunk driving by declaring appellant's acts "de minimis."[160]

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speaking, fall within the triviality clause. Under the hypothetical set of facts the "harm or evil" sought to be prevented would be rather entirely absent. *See also* State v. Zarrilli, 523 A.2d 284, 287 (N.J. Super. Ct. Law Div. 1987) ("The *de minimis* statute applies to *all prohibited conduct*. It is not limited to specified crimes or disorderly offenses." (emphasis added)).

157. *See* New Jersey v. Bazin, 912 F. Supp. 106, 114 (D.N.J. 1995); State v. Ornellas, 903 P.2d 723, 728 (Haw. Ct. App. 1995); State v. Downey, 576 A.2d 945, 948 (N.J. Super. Ct. Law Div. 1988).

158. *Downey*, 576 A.2d at 948. This language was quoted approvingly in *Bazin*, 912 F. Supp. at 114.

159. 616 A.2d 1019 (Pa. Super. Ct. 1992).

160. *Id.* at 1021 (quoting Commonwealth v. Hoover, 494 A.2d 1131, 1133 (Pa. Super. Ct. 1985)) (footnote and citations omitted); *accord* Commonwealth v. Eliason, 509 A.2d 1296 (Pa. Super. Ct. 1986).

Besides the type and degree of the harm or evil brought about by the defendant's conduct, some cases also consider modalities of the act charged as well as other attendant circumstances as relevant factors. In *Downey*, the court emphasized that the assault was committed in public, in a "hyperintense" and hatred-laden atmosphere created by the defendant.[161] In *Sorge*, the triviality claim was found without merit, inter alia, because the defendant's actions were organized and systematic.[162] In *Ornellas*, the court pointed out that the assault could not be considered de minimis since it was committed "without any apparent provocation and in the immediate presence of a police officer."[163] Overall, the major emphasis of the judicial opinions has been on the *objective* harmfulness of the conduct charged to the social interest protected by the statute in question. Nonetheless, some courts have reached beyond the objective aspect of the offending conduct and have also found subjective, mental elements to have bearing on the issue of triviality of harm or evil. These cases seem to suggest that the antisocial substance of criminal behavior is inseparable from the mental attitude of the actor. Not only must the objectively harmful effects of the act be considered, but also its inner antisocial tendency.

In *Downey*, the court emphasized that an "*intentional* physical attack upon another . . . should not be classified as trivial."[164] The court also pointed out that defendant Downey *deliberately* created a "hyperintense" atmosphere "filled with hate and anger."[165] This approach was endorsed in *Bazin*, where in a lengthy and learned opinion U.S. Magistrate Judge Kugler quoted the *Downey* court: "'[C]ourts have not taken an expansive view of the scope of the *de minimis* statute. That caution is especially warranted in the present case which involves a direct *intentional physical attack* upon another.'"[166] In *Ornellas*, the court pointed out that the assault was committed "without any apparent provocation,"[167] a clear suggestion that not only the actor's intent, but

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161. *See Downey*, 576 A.2d at 948.
162. *See* State v. Sorge, 591 A.2d 1382, 1384 (N.J. Super. Ct. Law Div. 1991).
163. State v. Ornellas, 903 P.2d 723, 728 (Haw. Ct. App. 1995).
164. *Downey*, 576 A.2d at 948 (emphasis added).
165. *Id.*
166. New Jersey v. Bazin, 912 F. Supp. 106, 115 (D.N.J. 1995) (alteration in original) (second emphasis added) (quoting *Downey*, 576 A.2d at 948).
167. *Ornellas*, 903 P.2d at 728.

also his or her motivation should have a bearing on the triviality issue.

Thus, in jurisprudence developed under the de minimis statutes, one can distinguish three approaches to the concept of triviality of harm or evil caused or threatened by the defendant's conduct. First is the unfocused, open-ended omnibus approach, which encompasses all possible mitigating factors, even including factors totally unrelated to the conduct in question. This approach, clearly at odds with the "plain meaning" of the triviality clauses, tends to dissolve already amorphous statutory criteria into nothingness. Functionally, it amounts to a grant of broad, as well as unstructured, discretionary power to dismiss prosecutions. A second approach is the objective approach, which focuses the attention of the decision maker primarily on the type as well as the degree of harm to the societal interests caused or threatened by the defendant's conduct. This approach seems to dominate the jurisprudence of the four states. Third is the comprehensive approach, which combines the societal-harm analysis of the objective approach with consideration of the mental elements of the defendant's conduct as inseparable from the concept of crime as an antisocial act. Under this approach, for example, the "evil" of an assault committed intentionally is greater than the "evil" of an assault committed recklessly. By the same token, the "evil" of an unprovoked assault is greater than the "evil" of an assault provoked by the victim, even though the objective harm in all the above cases may be exactly the same.

VI. CONCLUSION

The MPC section 2.12, misleadingly entitled "De Minimis Infractions," is a collection of doctrines. Three of them, as codified, in subsections (1) and (2) have more or less definite contours. Subsection (3) is a completely open-ended provision, which has yet to be fleshed out by judicial interpretation.

Subsection (1), which codifies the customary license doctrine, has been largely neglected by the criminal defense bar and the courts. The situation is paradoxical since the doctrine has great potential as a much-needed vehicle of accommodation between official, majoritarian norms reflected in statutory provisions on the one hand and local, unofficial customary rules on the other. The utility of this vehicle is particularly pronounced for customs of various minority cultures which are often radically different from the dominant culture of the host country. The issue has

been extensively debated in academic literature devoted to "cultural defense."[168] Surprisingly, participants in this debate have entirely ignored the MPC customary license doctrine as a useful framework for such accommodation. Properly understood, the customary license doctrine should be instrumental in focusing the attention of courts as well as law enforcement agencies on the predicament of defendants accused of behavior which, in their own radically different cultures, is acceptable. At the same time, it marks the outer limits of accommodation by delegitimatizing customary practices incompatible with fundamental values of democratic societies while validating other customary practices in the name of cultural autonomy and diversity.[169]

The two doctrines codified in MPC section 2.12, subsection (2) should be put to broader and more structured uses. The doctrines can and should serve two important functions. First, they should serve as a vehicle of decriminalization in cases where the conduct charged is either harmless or where the harm caused or threatened is not significant enough to justify a stigma of criminal conviction. Since American law has been notoriously troubled by overcriminalization, the decriminalizing potential of the two doctrines should be put to its fullest use. Second, the doctrines can serve as an important check on overbroad discretionary powers of prosecutors, as well as police, who exercise de facto power of decriminalization by a practice of selective enforcement or nonenforcement. The troublesome feature of these discretionary practices is that they are usually pursued ad hoc, in a haphazard manner, without substantive or procedural regularity or even publicly stated policy. Transformation of these chaotic administrative practices into substantive-law doctrines that vest the decision-making authority with courts places the whole operation within the framework of legal discourse much more compatible with the legalistic ethos than the low-visibility bureaucratic behavior immune from public scrutiny. As Justice Frankfurter put it in another context: "Only the court, through the gradual evolution of explicit standards in accumulated precedents, can do this with the degree of certainty that the wise administration of criminal justice demands."[170]

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168. *See* discussion accompanying *supra* notes 54-56.

169. *See* discussion accompanying *supra* notes 57-58.

170. Sherman v. United States, 356 U.S. 369, 385 (1958) (Frankfurter, J., concurring in result).