First Draft of Report #34 - De Minimis Defense

SUBMITTED FOR ADVISORY GROUP REVIEW
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DISTRICT OF COLUMBIA CRIMINAL CODE REFORM COMMISSION
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This Draft Report contains recommended reforms to District of Columbia criminal statutes for review by the D.C. Criminal Code Reform Commission's statutorily designated Advisory Group. A copy of this document and a list of the current Advisory Group members may be viewed on the website of the D.C. Criminal Code Reform Commission at www.ccrc.dc.gov.

This Draft Report has two parts: (1) draft statutory text for an enacted Title 22 of the D.C. Code; and (2) commentary on the draft statutory text. The commentary explains the meaning of each provision, considers whether existing District law would be changed by the provision (and if so, why this change is being recommended), and addresses the provision's relationship to code reforms in other jurisdictions, as well as recommendations by the American Law Institute and other experts.

Any Advisory Group member may submit written comments on any aspect of this Draft Report to the D.C. Criminal Code Reform Commission. The Commission will consider all written comments that are timely received from Advisory Group members. Additional versions of this Draft Report may be issued for Advisory Group review, depending on the nature and extent of the Advisory Group's written comments. The D.C. Criminal Code Reform Commission's final recommendations to the Council and Mayor for comprehensive criminal code reform will be based on the Advisory Group's timely written comments and approved by a majority of the Advisory Group's voting members.

The deadline for the Advisory Group's written comments on this First Draft of Report #34 - *De Minimis* Defense, is March 1, 2019 (nine weeks from the date of issue, which includes a two-week extension from the initial deadline due to the federal shutdown). Oral comments and written comments received after March 1, 2019 may not be reflected in the next draft or final recommendation. All written comments received from Advisory Group members will be made publicly available and provided to the Council on an annual basis.

RCC § 215. DE MINIMIS DEFENSE.

(a) *De Minimis Defense Defined.* It is an affirmative defense to any misdemeanor or a Class 6, 7 or 8 felony that the person's conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances.

(b) *Relevant Factors.* In determining whether subsection (a) is satisfied, the factfinder shall consider, among other appropriate factors:

(1) The triviality of the harm caused or threatened by the person's conduct;

(2) The extent to which the person was unaware that his or her conduct would cause or threaten that harm;

(3) The extent to which the person's conduct furthered or was intended to further legitimate societal objectives; and

(4) The extent to which any individual or situational factors for which the person is not responsible hindered the person's ability to conform his or her conduct to the requirements of law.

(c) *Burden of Proof.* The defendant has the burden of proof and must prove all requirements of this affirmative defense by a preponderance of the evidence.

COMMENTARY

Explanatory Note. Section 215 establishes a *de minimis* defense for those actors whose conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction. Although, strictly speaking, such actors may satisfy the minimum requirements of liability for a given offense, section 215 precludes imposing a criminal conviction where doing so would clearly be unjust under the circumstances. Barring the imposition of criminal liability in these situations improves the proportionality of punishments.[1]

Subsection (a) sets forth the basic components of the *de minimis* defense. First, it establishes that the *de minimis* defense is an "affirmative defense," the procedural implications of which are addressed in subsection (c). Second, subsection (a) provides that the *de minimis* defense applies to all misdemeanors, but only to Class 6, 7, or 8

[1] The most direct way of avoiding the disproportionate punishment addressed by section 215 would be to draft criminal statutes to exclude such actors from liability in the first place. However, as a practical matter, drafting offenses that solely extend to actors whose conduct and accompanying state of mind are sufficiently blameworthy to warrant the condemnation of a criminal conviction, without also creating gaps in coverage, is extremely difficult. *See infra* note 5 and accompanying text. While the offenses in the RCC's Special Part have been drafted to exclude insufficiently blameworthy actors to the extent possible, application of the general *de minimis* defense specified in this section is essential to facilitating the overall proportionality of the RCC.

felonies. Third, subsection (a) establishes the crux of the *de minimis* defense, namely, excluding from criminal liability those persons whose "conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances."

Subsection (b) codifies the central criteria to be considered by the factfinder in determining whether the latter standard is met in a particular case. The first factor asks the factfinder to evaluate the triviality of the harm caused or threatened by the actor's conduct. The second factor asks the factfinder to evaluate the extent to which the actor was unaware that his or her conduct would cause or threaten that harm. The third factor asks the factfinder to evaluate the extent to which the actor's conduct furthered or was intended to further legitimate societal objectives. And the fourth factor asks the factfinder to evaluate the extent to which any individual or situational factors for which the actor is not responsible hindered the actor's ability to conform his or her conduct to the requirements of law.

In general, the greater the weight afforded to each of these criteria by the factfinder, the more likely it is that the *de minimis* standard set forth in subsection (a) will be met.[2] Note, however, that this list is not intended to be exhaustive; rather, these four factors exist "among other appropriate factors." What qualifies as an "appropriate factor[]" is to be determined by the court as a matter of law, in light of general principles of fairness and efficient judicial administration.[3]

The analytical framework established by subsections (a) and (b) limits criminal liability in two different types of situations. The first involves an actor who causes or threatens a harm so trivial that—mental state considerations aside—the condemnation of a criminal conviction would not be warranted under the circumstances.[4] This kind of situation is most likely to arise in the context of prosecutions for low-level offenses, which effectively draw the line between criminal and non-criminal conduct—for example, the misdemeanor versions of theft, destruction of property, assault, and drug possession. For offenses of this nature, it is difficult to draft the objective elements (or *actus reus*) in a manner that captures only those forms of conduct deserving of criminal

[2] Which is to say: the more trivial the harm caused or threatened by the person's conduct, the greater the extent of an actor's lack of awareness of the conduct's harmful nature, the greater the extent to which a person's conduct furthered or was intended to further legitimate societal objectives, and the greater the extent to which any individual or situational factors for which the person is not responsible hindered the person's ability to conform his or her conduct to the requirements of law, the more likely it is that the person's conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances.

[3] In light of these dual considerations, it *would* be appropriate for the court to exclude consideration of evidence potentially relevant to an actor's blameworthiness—for example, an abusive or deprived upbringing—where its "probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." *Moore v. United States*, 114 A.3d 646, 660 (D.C. 2015) (quoting Fed. R. Evid. 403) (Pryor, J., dissenting); *see generally* Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9 (1985). Conversely, given that RCC § 215 is focused on the blameworthiness of the defendant, it *would not* be appropriate for the court to allow consideration of evidence relevant only to offender dangerousness/risk of recidivism yet entirely detached from considerations of fairness, such as "socioeconomic status, gender, age, family, and neighborhood characteristics." Sonja B. Starr, *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination*, 66 STAN. L. REV. 803, 805 (2014).

[4] *See* RCC § 22E-215(b)(1) ("The triviality of the harm caused or threatened by the person's conduct . . .").

sanction without also extending to at least some forms of conduct that are insufficiently blameworthy to warrant the condemnation of a criminal conviction.[5] It is therefore necessary to provide actors who engage in such conduct with a means of escaping criminal liability in the event they are subject to a criminal prosecution.

Illustrative examples of these kinds of situations include: (1) a prosecution for fourth degree theft premised on the defendant's having intentionally stolen a single piece of chewing gum from a convenience store; (2) a prosecution for fifth degree assault premised on the defendant's having intentionally brushed up against co-riders on public transportation in an effort to be the first to the door; (3) a prosecution for fourth degree destruction of property premised on the defendant's having intentionally stepped on one flower in another person's garden; (4) a prosecution for misdemeanor drug possession premised on the defendant's having intentionally held a plastic bag with microscopic but measurable amounts of cocaine inside; or (5) a complicity-based prosecution for any of the above misdemeanors premised on the defendant's having purposely assisted or encouraged similar acts principally perpetrated by another.

The second situation to which the analytical framework established by subsections (a) and (b) applies involves an actor who causes or threatens a harm that, while not by itself *de minimis*, is accompanied by a state of mind that is insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances. This kind of situation is most likely to arise in the context of prosecutions for low to mid-level offenses which are committed in the presence of one or more mitigating circumstances that come close to, but ultimately fail to establish, a recognized justification or excuse defense—for example, duress,[6] insanity,[7] infancy,[8] entrapment,[9]

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[5] *See* OLIVER WENDELL HOLMES, THE COMMON LAW 108 (Boston, Little, Brown & Co. 1881) ("The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of a given act so different in different men. It does not attempt to see men as God sees them . . . .").

[6] *See* WAYNE R. LAFAVE, 1 SUBST. CRIM. L. § 6.8 (3d. ed. 2018) ("A person's unlawful threat (1) which causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law, and (2) which causes the defendant to engage in that conduct, gives the defendant the defense of duress (sometimes called compulsion or coercion) to the crime in question unless that crime consists of intentionally killing an innocent third person."); *McCrae v. United States*, 980 A.2d 1082, 1086–87 (D.C. 2009) ("A duress instruction is appropriate if the evidence is sufficient for a reasonable jury to find that the defendant participated in the offense as the result of a reasonable belief that he would suffer immediate serious bodily injury or death if he did not participate in the crime.").

[7] LAFAVE, *supra* note 6, at 1 SUBST. CRIM. L. § 7.1(a) ("[I]n recent years a substantial minority of states have adopted the Model Penal Code approach, which is that the defendant is not responsible if at the time of his conduct as a result of mental disease or defect he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law."); *Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("To establish a *prima facie* case, the defendant must present sufficient evidence to show that at the time of the criminal conduct, as a result of a mental illness or defect, he lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law . . . If a defendant fails to establish a prima facie case, the trial court is justified in not presenting the issue to the jury.").

[8] LAFAVE, *supra* note 6, 2 SUBST. CRIM. L. § 9.6 ("At common law, children under the age of seven are conclusively presumed to be without criminal capacity, those who have reached the age of fourteen are treated as fully responsible, while as to those between the ages of seven and fourteen there is a rebuttable presumption of criminal incapacity. Several states have made some change by statute in the age of criminal responsibility for minors."); *see also* D.C. Code § 16-2301(3) (defining "child" for jurisdictional purposes).

necessity,[10] or self-defense.[11] In these situations, the binary, all-or-nothing nature of general criminal defenses fail to account for the continuous, graduated nature of culpability assessments. Specifically, a defendant who causes or threatens a minor or modest harm under one or more mental state-based mitigating circumstances which fail individually to establish a general defense may still be insufficiently blameworthy to warrant the condemnation of a criminal conviction.

The following examples are illustrative. A fourth degree theft prosecution is brought against a depressed and recently unemployed parent who makes a spur of the emoment decision to steal one hundred dollars in groceries from a supermarket in order to feed her hungry children. A third degree criminal damage to property prosecution is brought against a local artist who paints a small mural of a beloved children's book on a privately-owned wall near a local elementary school for the children's own enjoyment, which costs the owner five hundred dollars to repaint. A third degree robbery prosecution—premised on a accomplice theory of liability—is brought against a teenager who assists his older brother's non-violent theft of a convenience store after the older brother threatened to destroy the teenager's computer should he decline to participate in the criminal scheme. Or a fifth degree assault prosecution is brought against a parent who, after being subjected to repeated racial slurs and profanities in the presence of his children for no reason other than the color of her skin, firmly shoves the antagonist who falls to the ground due to the force of the push.

In these kinds of situations, an actor may satisfy the minimum requirements of liability for an offense under the RCC, yet due to his or her conduct and accompanying state of mind nevertheless be insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances. Where this is the case, the RCC provides such actors with an affirmative defense subject to resolution by juries or, in a bench trial, judges.

Subsection (c) establishes that the burden of proof for this affirmative defense lies with the defendant, and is subject to a preponderance of the evidence standard. This means that the defendant possesses the burden of raising this affirmative defense at trial.

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[9] LAFAVE, *supra* note 6, at 2 SUBST. CRIM. L. § 9.8(a) ("Entrapment is the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."); *Daniels v. United States*, 33 A.3d 324, 327 (D.C. 2011) ("A jury may be instructed on the affirmative defense of entrapment when there is sufficient evidence of government inducement of the crime and a lack of predisposition on the part of the defendant to engage in that criminal conduct.").

[10] LAFAVE, *supra* note 6, at 2 SUBST. CRIM. L. § 10.1 ("For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, he is by virtue of the defense of necessity justified in violating it."); *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) ("In essence, the necessity defense exonerates persons who commit a crime under the 'pressure of circumstances,' if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law."); *see also Emry v. United States*, 829 A.2d 970, 972 (D.C. 2003) (medical necessity to possession of marijuana).

[11] LAFAVE, *supra* note 6, at 2 SUBST. CRIM. L. § 10.4 ("One who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger."); *Swann v. United States*, 648 A.2d 928, 930 (D.C. 1994) (To raise self-defense in a homicide case, the defendant: (1) "must have an actual belief both that he or she is in imminent danger of serious bodily harm or death and in the need to use deadly force in order to save himself or herself"; and "in addition to such an actual belief, the defendant's belief must be objectively reasonable.").

Once appropriately raised, the defendant then bears the burden of persuading the fact finder that the elements of this affirmative defense have been met by a preponderance of the evidence.

Procedurally, the applicability of a *de minimis* defense should be treated no differently than any other affirmative defense under District law.[12] For example, a defendant seeking to raise a *de minimis* defense would have the burden of producing some evidence to justify presenting the issue to the jury, and the sufficiency of that evidence would be a threshold question for the court.[13] And even if the defendant met his or her initial burden, the judge would still have the power to exclude proffered evidence that was likely to confuse the jury or waste time.[14] Where the *de mimimis* defense is properly raised, the defendant should be able to argue for it in closing, and the court would thereafter instruct the jury on the elements of the *de minimis* defense.[15] Finally, if the judge erred in excluding evidence or in instructing the jury, the defendant should challenge these rulings on appeal.[16]

Relation to District Law. Section 215 changes current District law by establishing a *de minimis* defense for those actors whose conduct and accompanying state of mind are insufficiently blameworthy to warrant the condemnation of a criminal conviction. Barring the imposition of criminal liability under these circumstances improves the proportionality of District law.

While current District case law does not recognize a *de minimis* defense, it provides some support for its adoption. Specifically, the D.C. Court of Appeals (DCCA) has, in two cases, recognized the potential benefits of a *de minimis* defense.

The first case, *Dunn v. United States*,[17] involved an animal rights activist convicted of simple assault based on his slight, non-harmful shoving of a security guard, which occurred during a protest.[18] On appeal, the defendant argued that the misdemeanor

[12] *See, e.g.,* D.C. Code § 22-3611(b) (providing, with respect to penalty enhancement for crimes committed against minors, that it "is an affirmative defense that the accused reasonably believed that the victim was not a minor at the time of the offense," which "defense shall be established by a preponderance of the evidence"); D.C. Code § 22-3601(c) (same for penalty enhancement for crimes committed against senior citizen victims).

[13] *Pegues v. United States*, 415 A.2d 1374, 1377–78 (D.C. 1980) ("If [the defendant raising an affirmative insanity defense] fails to present a *prima facie* case, the judge is justified in removing the issue from the jury.") (citing *Cooper v. United States*, 368 A.2d 554, 559-60 (D.C. 1977)).

[14] *See, e.g., Pegues v. United States*, 415 A.2d 1374, 1378 (D.C. 1980) ("We agree with the trial judge that allowing appellant to present his proffered testimony [regarding affirmative defense of insanity] to a jury would have been a 'waste of time,' and, consequently, find no abuse of discretion in his refusal to allow the defense.") (citing *Clyburn v. United States*, 381 A.2d 260, 264 (D.C. 1977)).

[15] *See, e.g., Adams v. United States,* 558 A.2d 348, 349 (D.C.1989) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."). A jury determination in favor of the defendant should result in an acquittal, which would be unreviewable. *See, e.g., Farina v. United States*, 622 A.2d 50, 60 (D.C. 1993) ("Jury acquittals are unreviewable and unreversible.") (citing *United States v. Dougherty*, 154 U.S.App.D.C. 76, 93, 95, 473 F.2d 1113, 1130, 1132 (1972)).

[16] *See, e.g., Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("This court reviews a trial court's decision to deny presentation of testimony in support of an insanity defense for abuse of discretion.") (citing *Pegues*, 415 A.2d at 1378).

[17] 976 A.2d 217 (D.C. 2009).

[18] Specifically, the defendant "moved his hands only five to six inches in striking" the victim. *Id.* at 222.

assault conviction should be overturned "because his violation of the law, if any, was *de minimis*."[19] The DCCA ultimately declined the defendant's invitation to accept this kind of "*de minimis* defense" to assault through "judicial decree."[20] In so doing, however, the *Dunn* court observed that:

> Similar minor violations of the assault statute may well happen every day, yet it is exceedingly rare for the U.S. Attorney's Office to get involved. Why, then, should Dunn not be able to argue that his shove was too minor to warrant a criminal penalty?
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> The answer is that [the defendant] fails to cite any authority for a *de minimis* defense in the District. Some jurisdictions have recognized *de minimis*-type defenses, but they have done so through legislation[]. New York, for instance, has a statute that permits trial judges to dismiss certain criminal charges where "some compelling factor, consideration or circumstances clearly demonstrat[es] that conviction or prosecution of the defendant . . . would constitute or result in injustice." N.Y. Crim. Proc. Law § 170.40(1) (1979). And a few other states have adopted provisions based on Model Penal Code § 2.12 (2001), which "authorizes courts to exercise a power inherent in other agencies of criminal justice to ignore merely technical violations of law." *Id.*, Explanatory Note; *see* Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense,* 1997 B.Y.U. L. REV. 51 & n. 2; *see, e.g.*, N.J. Stat. Ann. 2C:2-11 (2005); Me. Rev. Stat. Ann. 17-A, § 12 (2006); 18 Pa. Cons. Stat. § 312 (1998). The D.C. Council, however, has not joined ranks with the "very limited" number of states that have adopted the defense. Pomorski, 1997 B.Y.U. L. Rev. 51.[21]

Accordingly, while recognizing the potential merits of a *de minimis* defense, the *Dunn* court nevertheless concluded that it "lack[ed] the power to give [defendant] the relief that he seeks" in the absence of explicit legislative authorization.[22]

The second relevant case, *Watson v. United States*,[23] involved a simple assault conviction arising from a marital dispute. After an aggravating experience at the DMV, the defendant and his wife engaged in a "heated conversation" in the parking lot during which "his wife flipped open her mobile telephone to make a call, and he grabbed the phone's flip top to stop her, accidently breaking it loose."[24] The defendant was thereafter prosecuted for simple assault.[25]

At trial, and after the close of the government's case, the defendant submitted a motion for judgment of acquittal, which the court ultimately denied finding that the government had established a *prima facie* case of simple assault:

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[19] *Id.*
[20] *Id.*
[21] *Id.* at 222-23.
[22] *Id.* at 223.
[23] 979 A.2d 1254 (D.C. 2009).
[24] *Id.* at 1255.
[25] *Id.*

> [W]hile [the trial judge] had difficulty determining exactly what had occurred outside the DMV, appellant's own testimony about grabbing and breaking the mobile telephone was enough to establish an assault under [prior DCCA precedent]. The [trial judge] further found that [the defendant's] grabbing of the telephone was deliberate, that it occurred in the context of an argument, that it was unprovoked, and that it constituted a battery in that it was a touching without consent.[26]

Next, the defendant appealed his conviction for simple assault to the DCCA, "arguing that the government failed to prove the elements of assault beyond a reasonable doubt."[27] All three of the judges on the panel rejected this argument; however, one of the three—Judge Schwelb—wrote a separate opinion concurring in the judgment but dissenting in part from the analysis.[28]

In his separate opinion, Judge Schwelb argued that the defendant's conduct "was, at most, a *de minimis* and inconsequential violation of the assault statute," such that it was "disproportionate and unjust to saddle [the defendant] with a criminal conviction under all of the circumstances of this case."[29] However, "[i]n light of [the DCCA's] recent decision in *Dunn v. United States,*" Judge Schwelb ultimately concluded that this "court lacks the power, in the absence of statutory authorization, to vacate Watson's conviction on *de minimis* grounds."[30] Nevertheless, Judge Schwelb also thought it important to explain why he believed that it would be "appropriate to propose a legislative remedy for this type of situation."[31] Specifically, Judge Schwelb suggested that:

> [T]he Council of the District of Columbia consider adopting the approach of the Model Penal Code (MPC) § 2.12 (2001), as several other jurisdictions have done, *see* Brent G. Filbert, Annotation: *Defense of*

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[26] *Id.*
[27] *Id.* at 1256.
[28] *See id.* at 1258.
[29] *Id.*
[30] *Id.* The defense originates from the common law maxim "de minimis non curat lex," which means that "the law does not concern itself with trifling matters." 68 A.L.R. 5th 299 (1999); *see Watson*, 979 A.2d at 1258 n.1.
[31] *Id.* On this point, Judge Schwelb observed that:

> Although proposing a legislative remedy to a problem raised in a particular case goes beyond a judge's conventional responsibilities, courts (or concurring or dissenting judges) occasionally do so in the interests of justice. "We have heretofore deemed it appropriate in an opinion to suggest statutory changes." *Zalkind v. Scheinman*, 139 F.2d 895, 898 n. 3(b) (2d Cir.1943) (Frank, J., joined by Learned Hand, J.) (citations omitted); *see also Moravian School Advisory Bd. v. Rawlins*, 70 F.3d 270, 279 (3rd Cir. 1995) (Becker, J., concurring in part and dissenting in part); *Am. Mach. & Metals, Inc. v. De Bothezat Impeller Co., Inc.*, 173 F.2d 890, 893 (2d Cir.1949) (Frank, J., dissenting); *Parke-Davis & Co. v. H.K. Mulford Co.*, 189 F. 95, 115 (C.C.S.D.N.Y. 1911) (Learned Hand, J.).

Watson, 979 A.2d at 1258 n.2.

> *Inconsequential or De Minimis Violation in Criminal Prosecution*, 68 A.L.R. 5th 299 (1999 & Supp. 2006), and that District of Columbia courts be authorized to dismiss criminal charges where the circumstances "clearly demonstrat[e] that conviction or prosecution of the defendant . . . would constitute or result in injustice." N.Y. Crim. Proc. Law § 170.40(1) (1979) (quoted in *Dunn*, at 223).[32]

In support of this proposal, Judge Schwelb's separate opinion provides a comprehensive overview of national legal trends relevant to adoption of statutory *de minimis* provisions, beginning with the basis for many such provisions, Model Penal Code § 2.12, which "provides in pertinent part as follows":

> *De Minimis* Infractions.
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> The Court shall dismiss a prosecution[33] 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 . . . .[34]

From there, Judge Schwelb's separate opinion proceeds to observe that:

> The exercise by a court of the power to dismiss a prosecution by resort to the maxim "*de minimis non curat lex*" is judicial in nature, and the vesting of that authority in the judicial branch does not contravene the doctrine of separation of powers. *State v. Park*, 55 Haw. 610, 525 P.2d 586, 592 (1974).

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[32] *Id.* at 1258–59. Judge Schwelb's separate opinion caught the eye of at least one commentator, who summarized it accordingly:

> [I]n a recent District of Columbia case, one concurring judge wished that the court were able to dismiss on grounds that the prosecution was *de minimis*. Give us what Hawaii and New Jersey have, he urged the legislature, as he was forced to go along with the affirmation of a conviction for snatching at a cell phone at the end of a long hot day at the Department of Motor Vehicles. "*De minimis non curat lex*" read the heading of his opinion, but his call to reclaim this principle went unheeded.

Anna Roberts, *Dismissals As Justice*, 69 ALA. L. REV. 327, 338 (2017).

[33] As Judge Schwelb observes: "The statutes of at least two states provide that the court 'may' rather than 'shall' dismiss a prosecution if the conditions set forth in those statutes are met. *See* N.J. Stat. Ann. § 2C:2.11[]; Haw. Rev. Stat. § 702-236(1)." *Watson*, 979 A.2d at 1265 n.15.

[34] *Watson*, 979 A.2d at 1265.

> The purpose of a *de minimis* statute is to remove "petty" infractions from the reach of the criminal law. *In re R.W.,* 855 A.2d 107, 109 (Pa. Super. Ct. 2004). Under these provisions, dismissal of a prosecution by the court is contemplated where no harm was done by the defendant either to the victim or to society. *Commonwealth v. Moses,* 350 Pa.Super. 231, 504 A.2d 330, 332 (1986). Dismissal is appropriate where the matter is too trivial to warrant the condemnation of a conviction, for "mere trifles or technicalities must yield to practical common sense and substantial justice." *State v. Brown,* 188 N.J.Super. 656, 458 A.2d 165, 169 (1983) (citation omitted). "The Legislature in recognition of the serious consequences which may attend a conviction has granted this dismissal option to avoid an injustice in a case of technical but trivial guilt." *Smith, supra* note 10, 480 A.2d at 241.
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> The *de minimis* doctrine is designed to provide the court with discretion similar to that exercised by the police, prosecutors and grand jurors, who constantly make decisions as to whether it is appropriate to seek a conviction under the particular circumstances. *State v. Wells,* 336 N.J.Super. 139, 763 A.2d 1279, 1281 (2000). That discretion is appropriately exercised by the court, which is the institution best equipped to resolve such issues impartially. In exercising its discretion, the court may consider a wide variety of "attendant circumstances." *Park,* 525 P.2d at 591; *Cabana,* 716 A.2d at 579 (defendant's conduct "under the de minimis statute is not viewed in isolation, but coupled with the surrounding circumstances which play an integral part herein to explain the what, why and how of defendant's intent.").[35]

Judge Schwelb's separate opinion also specifically focuses on the New Jersey Law Revision Commission's recommendation to adopt that state's *de minimis* statute, which highlighted that:

> [T]he police, prosecutors and grand jurors must frequently deal with the question whether particular conduct merits prosecution and conviction. The Commission surmised that some judges may also decline to convict defendants for technical violations if the conviction would bring about an absurd result. The Commission continued:
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> > The drafters of the MPC summarize all of this as a "kind of unarticulated authority to mitigate the general provisions of the criminal law to prevent absurd applications." In order to bring this exercise of discretion to the surface and to be sure that it is exercised uniformly throughout the judicial system, [the *de minimis*] Section of the Code has been included.[36]

[35] *Watson,* 979 A.2d at 1265–66.
[36] *Watson,* 979 A.2d at 1267.

Based on the above analysis, Judge Schwelb's separate opinion proceeds to argue that the record in the *Watson* case itself "reflects the soundness of a policy which would permit a court to act as a gatekeeper, and, at least, to give serious consideration to vacating Watson's conviction."[37] In so doing, Judge Schwelb was careful not to "criticize the government for initiating the prosecution, for the accusation directed at Watson by his wife was not *de minimis*, and probable cause existed for charging an assault based on arm-twisting and the like."[38] Nevertheless, Judge Schwelb asserted that "once the judge had made his findings and rejected Ms. Sellers-Watson's most serious allegations, it was at least arguably unjust and disproportionate to burden Watson with a criminal conviction."[39]

With that in mind, and in closing, Judge Schwelb's separate opinion again specifically:

> recommends a legislative remedy in this case . . . because, in [his] view, the adoption of the relevant provisions of the MPC (or of the Hawaii and New Jersey variations of the MPC) would promote justice by protecting citizens from significant burdens attendant upon a criminal conviction when they have committed, at most, trifling and essentially harmless violations of the law. "Proportionality is of consummate importance in judicious adjudication." *Allen v. United States*, 603 A.2d 1219, 1227 (D.C. 1992) (*en banc*), *cert. denied* 505 U.S. 1227, 112 S.Ct. 3050, 120 L.Ed.2d 916 (1992).[40]

Consistent with the above considerations of District law, national legal trends, and policy analysis, legislative adoption of a *de minimis* defense is both appropriate and necessary under the circumstances.[41] And compelling considerations of legislative

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[37] *Id.*
[38] *Id.*
[39] *Watson*, 979 A.2d at 1267-68.
[40] *Id.*
[41] It should be noted that while only "four states (Hawaii, Maine, New Jersey, and Pennsylvania) and Guam enacted statutes based on MPC 2.12," "[f]ifteen states and Puerto Rico have enacted statutes that give the courts power to dismiss a prosecution in furtherance of justice." Roberts, *supra* note 32, at 332 (collecting citations).

For a sense of the range of conduct to which *de minimis* statutes apply, consider the following dismissals; *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 harassment—calling the victim on the phone "morally rotten" and "lower than dirt"); *see also State v. Cabana*, 315 N.J. Super. 84, 716 A.2d 576 (Law Div. 1997), *aff'd without opinion*, 318 N.J. Super. 259, 723 A.2d 635 (App. Div. 1999) (defendant's conduct in striking a fellow politician's

drafting further bolster this conclusion. Ideally, for example, the District's criminal statutes should be drafted sufficiently narrow as to exclude *de minimis* conduct from criminal liability in the first place. However, as a practical matter, drafting offenses that solely extend to actors whose conduct and accompanying state of mind are sufficiently blameworthy to warrant the condemnation of a criminal conviction, without also creating gaps in coverage, is extremely difficult. Therefore, while the offenses in the RCC's Special Part strive to achieve that goal to the extent possible, the employment of a *de minimis* defense is essential to facilitating the overall proportionality of District law.

Section 215 is both based on, and in important ways departs from, the Model Penal Code approach—codified in § 2.12—advocated for by Judge Schwelb in *Watson*. For example, like the Model Penal Code approach, section 215 provides a basis for exoneration where the defendant engaged in conduct "too trivial to warrant the condemnation of conviction."[42] Unlike Model Penal Code § 2.12, however, the RCC approach to *de minimis* does two critical things. First, section 215 explicitly clarifies that mental state considerations are a central part of the *de minimis* analysis—whereas the Model Penal Code approach is unclear as to the relevance of issues of culpability. And second, section 215 reframes the *de minimis* analysis as an affirmative defense to be adjudicated by the factfinder under a preponderance of the evidence standard—in contrast to the general grant of judicial discretion under Model Penal Code § 2.12 to vacate convictions on the courts own initiative. Both of these departures, as explained below, are justified by compelling policy considerations as well as considerations of current District law.[43]

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chin while waving a flier during a confrontation was an "offensive touching" not sufficiently serious to warrant prosecution for a simple assault).

[42] Model Penal Code § 2.12(2).

[43] The analysis here focuses on Model Penal Code § 2.12(2). It should be noted, however, that this section of the Model Penal Code incorporates two additional grounds for dismissal. The first arises where 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 . . . ." Model Penal Code § 2.12(1). And the second arises where the defendant's conduct "presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense." Model Penal Code § 2.12(3).

Section 215 does not codify either of these alternative grounds for dismissal for two reasons. First, the intended meaning of, and interaction between, these additional grounds for dismissal are both unclear and the subject of some dispute. *See, e.g.*, PAUL H. ROBINSON, 1 CRIM. L. DEF. § 67 (2d ed. 2018). Second, and perhaps more important, section 215 is sufficiently capacious to capture relevant fact patterns addressed by these alternative grounds of dismissal.

For example, Model Penal Code § 2.12(1) would provide a defense to a neighbor who had previously been allowed to use a landowner's yard as a shortcut in the event that the landowner unexpectedly decided to revoke the privilege and accuse the neighbor of trespass on the basis that the neighbor's prior usage was within "customary license or tolerance." *See* Model Penal Code § 2.12 cmt. at 402-03; Commentary on Del. Reform Code § 209(a). And Model Penal Code § 2.12(3) would provide a defense to a charge of impersonating a public servant for an individual who chooses to dress up as a police officer on Halloween on the basis that such conduct "cannot reasonably be regarded as envisaged by the legislature in forbidding the offense." *See* Model Penal Code § 2.12 cmt. at 404; Commentary on Del. Reform Code § 209(c). However, section 215 would also provide a defense in these situations since the "conduct and accompanying state of mind" of both the neighbor and Halloween-goer quite clearly are "insufficiently blameworthy to warrant the condemnation of a criminal conviction under the circumstances." RCC § 22E-215(a). In this way, section 215 strives to articulate the overarching principle, which ties paragraphs 1, 2, and 3 of Model Penal Code § 2.12 together.

De Minimis *and Culpability*. The Model Penal Code approach to the *de minimis* defense does not explicitly make any mention of mental state-based considerations, instead placing a singular focus on harm. Specifically, Model Penal Code § 2.12 directs the court to:

> dismiss a prosecution if, having regard to the *nature of the conduct* charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's *conduct* . . . . did not actually cause or threaten *the harm or evil* sought to be prevented by the law defining the offense or did so only to an extent *too trivial* to warrant the condemnation of conviction.[44]

In contrast, RCC § 22E-215(a) emphasizes the blameworthiness of the defendant's "*conduct* and *accompanying state of mind*." This dual focus is likewise reflected in the analytical factors specified in RCC § 22E-215(b): while the first of these factors focuses on harm, the latter three revolve around mental state considerations. As the proposed statute reads:

> In determining whether subsection (a) is satisfied, the factfinder shall consider, among other appropriate factors:
>
> (1) The triviality of the *harm* caused or threatened by the person's conduct;
>
> (2) The extent to which the person was *unaware* that his or her conduct would cause or threaten that harm;
>
> (3) The extent to which the person's conduct furthered or was *intended to further legitimate societal objectives*; and
>
> (4) The extent to which any individual or situational factors for which the person is not responsible *hindered the person's ability to conform his or her conduct to the requirements of law*.[45]

The more expansive dual emphasis reflected in the CCRC approach is justified by both intuitive notions of fairness as well as District law's codification and judicial endorsement of those intuitions. On a basic level, for example, it seems clear that an actor's state of mind is critical to determining whether his or her criminal conduct does, in fact, "warrant the condemnation of conviction." To illustrate, consider the following question: is stealing an apple from a grocery store *de minimis* conduct? The answer to this question would seem to depend upon various psychological facts accompanying the grocery theft, which go above and beyond the intent to steal required for a theft conviction.

[44] *Id.* (italics added).
[45] RCC § 22E-215(b) (italics added).

For example, where someone premeditatedly steals an apple for the purpose of making the store's owner feel unwelcome in the neighborhood (or to send some other toxic message to either the owner or the community), then it seems arguable that such conduct could be sufficiently blameworthy to warrant the condemnation of conviction. But if, in contrast, the taking was a spur of moment decision committed by an emotionally distraught parent who had recently been fired from her job by an abusive boss and sought to feed her hungry child, then it seems arguable that the condemnation of a conviction would not be warranted under the circumstances.

What explains this intuitive difference? Insofar as community sentiment is concerned, the public's assessments of blameworthiness and deserved punishment seem to revolve around, and ultimately account for, four basic mental criteria: (1) awareness of wrongdoing; (2) motivations for wrongdoing; (3) the rational capacities of a wrongdoer; and (4) the extent to which a decision to engage in wrongdoing is freely made (i.e., un-coerced).[46] Viewed from this perspective, it would appear that the relevant distinctions to be made in the above theft hypothetical are that: (1) the first actor's motivations seem particularly blameworthy—whereas the second actor's motivations are praiseworthy; and (2) the first actor's decision was deliberative and uncoerced—whereas the second actor's decision was both rash and influenced by the emotional pull of a hungry child and recent unemployment.[47]

The same spectrum of psychological blameworthiness reflected in community sentiment also pervades District law. This correspondence is perhaps most apparent in the context of general justification and excuse defenses—for example, duress,[48]

[46] *See, e.g.*, Michael Serota, *Proportional Mens Rea and the Future of Criminal Code Reform*, 52 WAKE FOREST L. REV. 1201, 1205 (2017) (collecting and synthesizing public opinion surveys).

[47] Which is to say, the second actor possessed a diminished capacity for reason and/or self-control.

[48] *McCrae v. United States*, 980 A.2d 1082, 1086–87 (D.C. 2009) ("A duress instruction is appropriate if the evidence is sufficient for a reasonable jury to find that the defendant participated in the offense as the result of a reasonable belief that he would suffer immediate serious bodily injury or death if he did not participate in the crime.").

insanity,[49] entrapment,[50] necessity,[51] or self-defense[52]—which rely on one or more of these four mental criteria to provide the basis for complete exoneration.[53]

Less obvious, but just as important, is that District law also recognizes the salience of these mental criteria where they fall short of establishing a complete justification or excuse defense. This is reflected in the well-established mitigation principle, which, as the DCCA explained in its *en banc* decision in *Comber v. United States*, is "predicated on the legal system's recognition of the weaknesses or infirmity of human nature . . . as well as a belief that those who [act] under extreme mental or emotional disturbance for which there is reasonable explanation or excuse are less morally blameworthy than those who [act] in the absence of such influences."[54]

The District's mitigation principle accounts for a broad range of mental state-related considerations in two different contexts.[55] The first is that of offense grading, and is reflected in the District's law of homicide, which recognizes that "a homicide constitutes voluntary manslaughter where the perpetrator kills with a state of mind which, but for the presence of legally recognized mitigating circumstances, would render the killing murder."[56]

Generally speaking, these "legally recognized mitigating circumstances" fall into two different categories: imperfect justifications and partial excuses.[57] With respect to

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[49] *Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("To establish a *prima facie* case, the defendant must present sufficient evidence to show that at the time of the criminal conduct, as a result of a mental illness or defect, he lacked substantial capacity to recognize the wrongfulness of his act or to conform his conduct to the requirements of the law . . . If a defendant fails to establish a prima facie case, the trial court is justified in not presenting the issue to the jury.").

[50] *Daniels v. United States*, 33 A.3d 324, 327 (D.C. 2011) ("A jury may be instructed on the affirmative defense of entrapment when there is sufficient evidence of government inducement of the crime and a lack of predisposition on the part of the defendant to engage in that criminal conduct.").

[51] *Griffin v. United States*, 447 A.2d 776, 777 (D.C. 1982) ("In essence, the necessity defense exonerates persons who commit a crime under the 'pressure of circumstances,' if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law."); *see also Emry v. United States*, 829 A.2d 970, 972 (D.C. 2003) (medical necessity to possession of marijuana).

[52] *Swann v. United States*, 648 A.2d 928, 930 (D.C. 1994) (To raise self-defense in a homicide case, the defendant: (1) "must have an actual belief both that he or she is in imminent danger of serious bodily harm or death and in the need to use deadly force in order to save himself or herself"; and "in addition to such an actual belief, the defendant's belief must be objectively reasonable.").

[53] *See generally* Serota, *supra* note 46, at 1205; David O. Brink & Dana K. Nelkin, *Fairness and the Architecture of Responsibility*, *in* OXFORD STUDIES IN AGENCY AND RESPONSIBILITY 285 (David Shoemaker ed., 2013).

[54] *Comber v. United States*, 584 A.2d 26, 41–42 (D.C. 1990) (*en banc*); *see, e.g., Brown v. United States*, 619 A.2d 1180, 1181 (D.C. 1992); *Swann*, 648 A.2d at 931 (D.C. 1994).

[55] *See generally* Carissa Byrne Hessick & Douglas A. Berman, *Towards A Theory of Mitigation*, 96 B.U. L. REV. 161 (2016) (imperfect defenses and partial excuses, as well as the mitigation principle they comprise, are pervasive in the criminal law: they cohere with traditional theories of punishment, represent lay and judicial intuitions of justice, and are reflected in a wide range of penal policies).

[56] *Comber*, 584 A.2d at 42-43.

[57] Imperfect justifications typically arise when the person is *unreasonably mistaken* as to the *facts* bearing on the triggering or necessity conditions that, if true, would otherwise provide the actor with a complete justification defense to his or her criminal conduct. That the factual mistakes motivating commission of the crime are unreasonable means that the person is still culpable for his or her conduct. However, because his or her conduct is motivated by a legally-recognized purpose, his or her culpability is substantially less than it would be in the typical case (and, therefore, he or she is entitled to lessened punishment). Partial excuses

imperfect justifications, the DCCA has determined that an intentional killing is not malicious, and therefore cannot constitute murder, if it is motivated by a *bona fide* belief in the need to use defensive force to protect against death or serious bodily injury regardless of whether: (1) the "killing is committed in the [unreasonably] mistaken belief that one may be in mortal danger" and/or (2) "the belief [in] the need to resort to force [is] objectively unreasonable."[58] With respect to partial excuses, in contrast, the DCCA has recognized that a person who intentionally causes the death of another has not acted maliciously if he or she "has been provoked or is acting in the heat of passion, with the latter including fear, resentment and terror, as well as rage and anger."[59]

The second context in which the District's mitigation principle operates relates to determinations of threshold liability, and is reflected in various statutory property crimes. Specifically, the District's destruction of property[60] and arson[61] statutes incorporate the mental state of "malice," which is understood by the DCCA[62] and Redbook[63] to require proof of "the absence of mitigating circumstances" as that concept has developed in the homicide context.[64] Notably, however, there are no "'in between'" offenses, such as "voluntary property destruction" or "voluntary arson," in the context of property crimes.[65] This means that someone who intentionally destroys or burns property may not be convicted of *any grade of the District's current destruction of property or arson offenses* when the conduct occurs in the presence of mitigating circumstances—whereas, in the homicide context, such circumstances merely provide the basis for *reducing*

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cover situations where the accused's capacity for reason and/or self-control is diminished enough to lessen his or her blameworthiness for causing some criminal harm, but not enough to exonerate him or her completely. *See generally* DOUGLAS HUSAK, PARTIAL DEFENSES, IN THE PHILOSOPHY OF CRIMINAL LAW 311 (2010); Paul H. Robinson et al., *The American Criminal Code: General Defenses*, 7 J. LEGAL ANALYSIS 37, 72 (2015).

[58] *Swann*, 648 A.2d at 930–33. "These principles," in turn, "are recognized in the standard instruction relating to mitigating circumstances as they apply to imperfect self-defense." *Id.*; *see* D.C. Crim. Jur. Instr. § 4.202 ("Mitigating circumstances . . . exist when a person actually believes that s/he is in danger of serious bodily injury, and actually believes that the use of force that was likely to cause serious bodily harm was necessary to defend against that danger, but one or both of those beliefs are not reasonable.").

[59] *Comber*, 584 A.2d at 41.

[60] D.C. Code § 22-303 (penalizing an actor who "maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property . . . .")

[61] D.C. Code § 22-301 (penalizing an actor who "maliciously burn[s] or attempt[s] to burn [a qualifying structure] . . . .").

[62] *See, e.g., Brown*, 584 A.2d at 539 ("Although provocation is a matter usually connected with the law of homicide, we have held that the malice required . . . as an element of the charge of malicious destruction of property is the same as the malice required to make out a case of murder . . . Thus, provocation is a proper defense to the charge of malicious destruction of property, and we look to the doctrine of provocation as it has developed in the context of homicide, and elsewhere, to guide us in deciding this case.") (citing *Carter v. United States*, 531 A.2d 956, 963 (D.C. 1987) (rejecting the contention that "the malice involved in malicious destruction of property is somehow different from that malice which must be proven in murder cases" and noting that "the malice involved in both [MDP and arson] is the same"));

[63] Commentary on D.C. Crim. Jur. Instr. § 5.400 ("It is clear from the cases that the malice involved in malicious destruction of property is the same as the malice needed for murder.").

[64] *Comber v. United States*, 584 A.2d 26, 43 n.21 (D.C. 1990) ("[A] voluntary manslaughter conviction may not be predicated upon a mental state other than one which would, in the absence of mitigating circumstances, render a killing murder.")

[65] LAFAVE, *supra* note 6, at 2 SUBST. CRIM. L. § 10.4.

murder to manslaughter.[66] Although the defendant may have intentionally caused a serious harm to property, the partially justified or excused nature of the conduct does not—according to the logic inherent in these current District property statutes—support a criminal conviction.[67]

A similar (though less sweeping) logic animates section 215, which—through the legal framework established in subsection (b)—broadly incorporates the kinds of mitigating circumstances relevant to homicide and property crimes under District law into the *de minimis* analysis. In so doing, section 215 decidedly does *not* make the complete absence of mitigating circumstances an element as is otherwise the case in the context of the District's murder, destruction of property, and arson statutes. But it does provide the defendant with an opportunity to persuade the factfinder, in appropriate cases, that his or her conduct and relevant mitigating circumstances are insufficiently blameworthy to warrant the condemnation of a criminal conviction.[68]

Whether the dual consideration of harm and culpability in section 215 actually constitutes a departure from the Model Penal Code approach to *de minimis* is unclear. For example, it has been observed that while "the major emphasis" of the case law interpreting Model Penal Code-based *de minimis* statutes has been on the "objective harmfulness of the conduct charged to the social interest protected by the statute in question," numerous decisions also extend "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."[69] And such an approach also appears to be supported by Judge Schwelb's opinion in *Watson*, which recognizes that a defendant's conduct "under the *de minimis* statute is not viewed in isolation, but coupled with the surrounding circumstances which play an integral part herein to explain the what, why and how of *defendant's intent*."[70]

The Hawaii Supreme Court's decision in *State v. Park*, cited repeatedly by Judge Schwelb, is illustrative. In that case, the court interpreted Hawaii's Model Penal Code-based *de minimis* statute to implicitly incorporate critical culpability-based factors, such as:

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[66] *See* cases cited *supra* notes 56-64.

[67] *See* cases cited *supra* notes 60-64. *Cf.* ROBINSON, *supra* note 43, at 2 CRIM. L. DEF. § 123 ("[I]f mitigation is universally considered appropriate in the homicide context, one might question "why this policy should apply only to a charge of murder"?)

[68] For discussion of a specific "'insufficient culpability' defence" that would provide the jury with "the power to reject a criminal prosecution" if, after considering "relevant [*mens rea*] factors, the defendant is insufficiently culpable to deserve punishment," see Kenneth W. Simons, *Understanding the Topography of Moral and Criminal Law Norms, in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 228, 250-51 (R.A. Duff & Stuart P. Green eds., 2011).

[69] Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the "De Minimis" Defense*, 1997 B.Y.U. L. REV. 51, 94–98 (1997); *see also* Roberts, *supra* note 32, at 375–76 ("The traditional view within criminal law is that defendants' alleged motives are irrelevant to the question of liability. [Yet there exists a large] body of case law challenges that view. Again and again, one finds judges moved to dismiss in light of their assessment of defendants' motives. When those motives are ones esteemed as noble—when, for example, they are focused on the welfare of children—courts show no hesitation in deeming motive a ground for dismissal.").

[70] *Watson*, 979 A.2d at 1265–66 (quoting *State v. Cabana*, 315 N.J. Super. 84, 88, 716 A.2d 576, 579 (Law. Div. 1997), *aff'd sub nom. State (Harris) v. Cabana*, 318 N.J. Super. 259, 723 A.2d 635 (App. Div. 1999)).

> the background, experience and character of [an actor] which may indicate whether they knew of, or ought to have known, the requirements of [the prohibition violate[d]; the knowledge on the part of [an actor] of the consequences to be incurred by them upon the violation of the statute; [] the mitigating circumstances, if any, as to [an actor]; [] and any other data which may reveal the nature and degree of the culpability in the offense committed by [the actor].[71]

This kind of "comprehensive approach" to interpreting the Model Penal Code's *de minimis* provision rests upon the well-founded belief that—as one commentator phrases it—"the antisocial substance of criminal behavior is inseparable from the mental attitude of the actor," such that "[n]ot only must the objectively harmful effects of the act be considered, but also its inner antisocial tendency."[72] Section 215 accords with this perspective by explicitly codifying a comprehensive approach to *de minimis* that "combines the societal-harm analysis of the objective approach with consideration of the mental elements of the defendant's conduct" on the basis that the latter is "inseparable from the concept of crime as an antisocial act."[73]

De Minimis *and Procedure.* The second way that section 215 differs from the Model Penal Code approach to *de minimis* advocated for by Judge Schwelb relates to procedure. For example, although the precise mechanics of Model Penal Code § 2.12 are

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[71] *State v. Park*, 55 Haw. 610, 616–17, 525 P.2d 586, 591 (1974). New Jersey applies a similar approach under which courts are to "consider[] the following factors in evaluating a *de minimis* application":

> (a) Defendant's background, experience and character as indications of whether he or she knew or should have known the law was being violated;
>
> (b) Defendant's knowledge of the consequences of the act;
>
> (c) The circumstances surrounding the offense;
>
> (d) The harm or evil caused or threatened;
>
> (e) The probable impact of the violation on the community;
>
> (f) The seriousness of the punishment;
>
> (g) Possible improper motives of the complainant or prosecutor; and
>
> (h) Any other information which may reveal the nature and degree of culpability.

State v. Halloran, 446 N.J. Super. 381, 386–87, 141 A.3d 1216, 1219–20 (Law. Div. 2014) (collecting cases); *see also Cabana*, 315 N.J. Super. at 88 (New Jersey's *de minimis* statute clearly "contemplates" a "threshold consideration of criminal culpability" which is "dependent upon the state of mind of the actor and [requires] a fact-sensitive analysis on a case by case basis.").

[72] Pomorski, *supra* note 69, at 98 ("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.").

[73] *Id.*

the subject of some confusion and debate, it is relatively clear that the *de minimis* analysis set forth in the Model Penal Code is intended to be the province of trial judges, and is applicable at the earliest stages of legal proceedings.[74] Under section 215, in contrast, the *de minimis* analysis is treated as a true affirmative defense subject to resolution by juries (or a judge in a bench trial) at the close of evidence. There are a few different reasons for this departure.

First, and most fundamental, is that in those situations where the defendant has the right to jury adjudication, the jury—in contrast to the judge—is the decisionmaker best situated to resolve *de minimis* claims.[75] This is because, at the heart of *de minimis* claims, is the following question: was the defendant's conduct and accompanying state of mind sufficiently blameworthy to warrant the condemnation of a criminal conviction? And the appropriate basis for resolving this kind of question is a "shared community sense" of justice, which juries are both appropriately constructed and well-equipped to draw upon.[76] As the U.S. House of Representatives has observed: "[T]he jury is designed not only to understand the case but also to reflect the community's sense of justice in deciding it."[77]

This is to be contrasted with "the criminal court judge," who "may be one of the persons in the community least able to represent the community's normative judgment at all reliably."[78] Here, for example, is how one commentator has summarized this judicial shortcoming:

> Magistrates and judges are not typical members of the community. They differ significantly from the general population in education, intelligence, economic status, and political views. Further, their judgments are likely to be distorted by the experience of becoming a lawyer and judge; common sense may be the first casualty of legal training. Moreover, the criminal court judge is exposed to a daily parade of the worst side of human behavior. Such exposure is likely to alter the judge's perceptions about the standard of unacceptable conduct.
>
> Beyond a judge's atypical qualities and experience, he or she is at a disadvantage compared to a juror in making normative judgments because of the judge's isolated position when deciding cases. Where a shared community normative judgment is at issue, the process of expression, reaction, and response to others is critical, and much of one's judgment on such matters depends upon one's assessment of others' reactions. Juries, in contrast, are ideally suited in these respects for

[74] *Id*. at 101.
[75] This does not mean, however, that juries *must* resolve *de minimis* claims. The same constitutional and pragmatic considerations that limit the defendant's right to a jury trial in general may also support, in relevant cases, judicial factfinders resolving *de minimis* claims in bench trials.
[76] Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 460 (1988).
[77] H.R. Rep. No. 1076, 90th Cong., 2d Sess. 8 (1968) (the House Committee Reports accompanying the Federal Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53 (codified at 28 U.S.C. §§ 1861-1871 (1982))).
[78] Robinson, *supra* note 76, at 460.

> making normative judgments. Some writers suggest that, although magistrates would be more reliable at the sometimes technical job of factfinding, we use a lay jury system because of the importance of the more reliable normative judgments that the jury provides.[79]

None of which is to say, of course, that juries are perfect venues of legal decisionmaking—or that judges don't have comparative strengths as decisionmakers. For example, it has also been observed that: (1) "jurors generally lack the education and training that a judge has"[80]; (2) that "[j]uries are likely to be less consistent than judges"[81]; and (3) that juries (unlike judges) lack access to "tools that increase the likelihood that their normative judgments will reflect what the legislature intended," such as "[l]egislative histories, official commentaries, and prior case law applying a statute."[82] Nevertheless, there also exist mechanisms for compensating for the comparative shortcomings of juries. For example:

> If a jury is an inherently better normative decisionmaker but lacks the explanations and guidance available to judges, the better approach may be to leave the normative judgments to the jury but to have the jury instructions include the available guidance information. Such detailed jury instructions may not be appropriate in all cases but may be justified where a vague standard presents the central issue in a case. To avoid improper delegation of the criminalization authority to the courts, it would be best to have the criminal code, rather than the individual judge, provide the additional explanation or guidance that is to be given to the jury. Such guidance might take the form of a series of illustrative applications of the provision or a description of the factors to be considered and their interrelation.[83]

Section 215 has been drafted in a manner consistent with this analysis. Specifically, it authorizes factfinders to conduct the *de minimis* evaluation, such that in those situations where a defendant exercises his or her right to jury adjudication, juries will be the institutional decisionmaker empowered to resolve *de minimis* claims. And the multi-factor analysis contained in RCC § 22E-215(b) affords all factfinders the same legal guidance for resolving such claims.[84] This ensures that juries have access to the

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[79] *Id.*

[80] *Id. See, e.g., In re Boise Cascade Securities Litigation*, 420 F. Supp. 99 (W.D. Wash. 1976) (striking jury demand on ground that trial to the court assured greater fairness and thereby furthered due process requirements of fifth and fourteenth amendments); *but see Zenith Radio Corp. v. Matsushita Electrical Industrial Co.*, 478 F. Supp. 889, 935 (E.D. Pa. 1979) ("A jury, applying its collective wisdom, judgment and common sense to the facts of a case . . . is brighter, more astute, and more perceptive than a single judge.").

[81] Robinson, *supra* note 76, at 460.

[82] *Id.* ("Each of these mechanisms can give judges a greater opportunity to understand the intended concept and its application and thereby increase the reliability and consistency of the judgment.").

[83] *Id.*

[84] One commentator provides a different approach to codifying relevant factors, which reads:

same tools for rendering *de minimis* judgments consistent with legislative intent that would otherwise be available to judicial decisionmakers.[85]

Considerations of current District law provide further support for allocating authority to resolve the *de minimis* defense to juries (again, where legally available). This is because the *de minimis* defense is closely related to existing general defenses—for example, self-defense, duress, necessity, insanity, and entrapment—as well as partial defenses—for example, the absence of mitigating circumstances—all of which are the province of the jury under current District law.[86]

Specifically, these District-recognized defenses cover situations where the defendant has committed the *actus reus* of a crime and perhaps also has the narrow *mens rea* (i.e., the purpose, knowledge, recklessness, or negligence) necessary to establish affirmative liability, but is not punished because his actions were justified or excused, whether fully or (in the case of mitigating circumstances) partially. So it is with many instances of *de minimis* conduct: the defendant has satisfied the elements of the crime, but due, at least in part, to the presence of justifying or excusing conditions, the defendant is insufficiently blameworthy to warrant the condemnation of a criminal conviction.[87] Given this fundamental similarity, then, the *de minimis* defense is best adjudicated in the same manner, and by the same decision maker.

Maintaining this consistency of treatment also offers practical benefits in that there already exists an established body of procedural/evidentiary rules governing affirmative defenses in the District.[88] For example, consistent with these rules, *de minimis* claims would be subject to the following procedural framework:

> (1) A defendant seeking to raise a *de minimis* defense would have the burden of producing some evidence to justify presenting the issue to the

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> In evaluating whether an actor's conduct caused or threatened a harm or evil that is 'too trivial to warrant the condemnation of criminal conviction,' the decisionmaker should consider, among other things, the following factors:
>
> (a) the nature and degree of tangible harms caused or threatened,
>
> (b) the nature and degree of intangible harms and evils caused or threatened,
>
> (c) the nature and degree of a disruption of the social order caused or threatened, and
>
> (d) the potential that allowing a defense in this instance would undercut the criminal law's condemnation of related, more serious conduct.

Robinson, *supra* note 76, at 433–34.

[85] *See also* Pomorski, *supra* note 69, at 99 (noting that "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").

[86] *See* sources cited *supra* notes 6-11 and sources cited *infra* notes 88-92; *see also Bethea v. United States*, 365 A.2d 64, 90 (D.C. 1976) ("Properly viewed, the concepts of both diminished capacity and insanity involve a moral choice by the community to withhold a finding of responsibility and its consequence of punishment.").

[87] *See* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 312 (1996).

[88] *See, e.g., McCrae v. United States*, 980 A.2d 1082, 1086–87 (D.C. 2009); *but see Comber v. United States*, 584 A.2d 26, 41 (D.C.1990) (*en banc*) ("government bears the ultimate burden of persuasion" to disprove defenses of justification, excuse, and mitigation).

> factfinder, and the sufficiency of that evidence would be a threshold question for the court.[89]
>
> (2) Even if the defendant met his initial burden, the judge would still have the power to exclude proffered evidence that was likely to confuse a jury or waste time.[90]
>
> (3) Where the defense is properly raised, the defendant would be able argue for *de minimis* in closing, and the court would instruct a jury on the elements of the *de minimis* defense.[91]
>
> (4) If the judge erred in excluding evidence or in instructing a jury, the defendant would be able to challenge those rulings on appeal.[92]

This established process is in stark contrast to the procedural uncertainty and novelty inherent in Model Penal Code § 2.12, which appears to grant judges broad discretion to dismiss charges as they see fit. This kind of approach raises significant questions about "the legal nature of the *de minimis* doctrine," which in turn has lead to "substantial procedural differences" in its statutory implementation.[93] These differences include: whether the *de minimis* analysis is mandatory or discretionary[94]; the point at

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[89] *Pegues v. United States*, 415 A.2d 1374, 1377–78 (D.C. 1980) ("If [the defendant raising an affirmative insanity defense] fails to present a *prima facie* case, the judge is justified in removing the issue from the jury.") (citing *Cooper v. United States*, 368 A.2d 554, 559-60 (D.C. 1977)); *see also* Commentary on Del. Reform Code § 209(c) (observing "that the defendant bears the burden of persuasion and must prove [the *de minimis* defense] by a preponderance of the evidence").

[90] *See, e.g., Pegues*, 415 A.2d at 1378 ("We agree with the trial judge that allowing appellant to present his proffered testimony [regarding affirmative defense of insanity] to a jury would have been a 'waste of time,' and, consequently, find no abuse of discretion in his refusal to allow the defense.") (citing *Clyburn v. United States*, 381 A.2d 260, 264 (D.C. 1977)).

[91] *See, e.g., Adams v. United States*, 558 A.2d 348, 349 (D.C.1989) ("As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor."). A jury determination in favor of the defendant should result in an acquittal, which would be unreviewable. *See, e.g., Farina v. United States*, 622 A.2d 50, 60 (D.C. 1993) ("Jury acquittals are unreviewable and unreversible.") (citing *United States v. Dougherty*, 154 U.S.App.D.C. 76, 93, 95, 473 F.2d 1113, 1130, 1132 (1972)).

[92] *See, e.g., Bell v. United States*, 950 A.2d 56, 66 (D.C. 2008) ("This court reviews a trial court's decision to deny presentation of testimony in support of an insanity defense for abuse of discretion.") (citing *Pegues*, 415 A.2d at 1378).

[93] Pomorski, *supra* note 69, at 98. As one commentator observes:

> On one view, for example, *de minimis* is a substantive law doctrine, such that defendants should be entitled to dismissals as a matter of right, applicable at every stage of regular judicial proceedings (i.e., the defendant should be able to litigate the issue to the fullest extent, including appellate and postappellate remedies). On another view, in contrast, the *de minimis* statute is merely a grant of discretionary power, perhaps predominantly instituted for the sake of economy and expediency, such that it's procedural deployment could only be as broad as administrative convenience would suggest.

Id.

[94] ROBINSON, *supra* note 43, at 1 CRIM. L. DEF. § 67 ("[U]nder Model Penal Code § 2.12 the court is directed to 'dismiss a prosecution' when the requirements of the defense are met. It can thus provide not

which the *de minimis* analysis is applied[95]; governing standards of legal review on appeal[96]; and the appropriate judicial officer vested with the authority to dismiss charges.[97]

Another notable difference is reflected in the fact that whereas Model Penal Code § 2.12 requires the court to file a written statement when dismissing a prosecution in only some instances, "[a] few jurisdictions have extended this to require a written statement of reasons for a dismissal under any ground."[98] And at least one other state provides for an entirely different oversight process entirely: "No doubt in response to concerns over the broad authority that the defense vests in the judiciary," the New Jersey *de minimis* statute "substitutes for the written reasons provision a requirement of notice to the prosecutor, who then has a right to a hearing on the matter and an appeal of any dismissal."[99]

Treating the *de minimis* defense as a regular affirmative defense thus avoids the need to resolve these difficult procedural issues, let alone create entirely new processes of review to deal with the manner in which it is adjudicated. Instead, all relevant *de minimis* issues will be subject to the same procedural and evidentiary framework to which all other comparable affirmative defenses are subject, and for which the District's juries—where legally available—are best situated to adjudicate.

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Viewed collectively, then, both compelling policy considerations and current District practice support adoption of section 215, which, in contrast to Model Penal Code § 2.12: (1) explicitly clarifies that mental state considerations are a central part of the *de minimis* analysis; and (2) reframes the *de minimis* analysis as an affirmative defense to be adjudicated by the factfinder under a preponderance of the evidence standard.[100]

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just a defense to conviction, but also a bar to prosecution. However, some jurisdictions have altered the Model Penal Code's 'shall dismiss' to a permissive 'may dismiss,' in an attempt to give the court broader discretion in the matter.") (collecting statutes).

[95] Pomorski, *supra* note 69, at 89 ("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. This analytically correct view, however, has not been consistently applied in individual cases.") (collecting citations).

[96] Pomorski, *supra* note 69, at 88-89. ("Most reported appellate decisions dealing with *de minimis* cases have declared that the review should be conducted under the abuse of discretion standard . . . . 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.")

[97] Pomorski, *supra* note 69, at 89; *see id.* ("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, [] while some trial courts have held otherwise . . . .") (collecting cases).

[98] *Id.*

[99] ROBINSON, *supra* note 43, at 1 CRIM. L. DEF. § 67.

[100] One other distinction between Model Penal Code § 2.12 and section 215 that bares notice relates to the types of offenses to which they apply. On the one hand, Model Penal Code § 2.12 appears to make available a *de minimis* defense for any criminal charge—without regard to offense severity. *See, e.g.*, Roberts, *supra* note 32, at 380 ("While one might assume from their name that *de minimis* dismissals are limited to 'minor' alleged offenses, none of the *de minimis statutes* exclude any particular type of charge from their coverage."); *State v. Zarrilli*, 523 A.2d 284, 287 (Law. Div.), *aff'd*, 532 A.2d 1131 (App. Div.

1987) ("The *de minimis* statute applies to *all* prohibited conduct."); Martin H. Belsky, Joseph Dougherty & Steven H. Goldblatt, *Three Prosecutors Look at the New Pennsylvania Crimes Code*, 12 DUQ. L. REV. 793, 807 (1974) (noting that "[de minimis] Section 312 gives the judiciary power to dismiss any prosecution at any stage or for any crime."); *see also State v. Fitzpatrick*, 772 A.2d 1093, 1096 (Vt. 2001) (suggesting that "serious" charges do not preclude an in furtherance dismissal). In contrast, section 215 applies to all misdemeanors but only certain classes of felonies. *See* RCC § 22E-215 ("It is an affirmative defense to any misdemeanor or a Class 6, 7 or 8 felony . . . .").

This departure from the Model Penal Code approach rests upon the belief that the elements for higher felonies under the RCC are sufficiently serious to preclude the possibility of committing such offenses in a way that does not "warrant the condemnation of a criminal conviction." RCC § 22E-215(a). Moreover, as applied, this departure from the Model Penal Code approach may not be of much significance given that "[i]n practically all cases where defendants were charged with felonies or other serious offenses, their de minimis/triviality claims failed . . . as a matter of law rather than on factual analysis." Pomorski, *supra* note 69, at 94; *compare id.* at 95 ("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."); *State v. Vance*, 61 Haw. 291, 307, 602 P.2d 933, 944 (1979) (admitting at least a theoretical possibility of applying the *de minimis* doctrine in felony cases).