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Finally, a True Elements Test: Mathis v. United States and the Categorical Approach

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MATHIS V. UNITED STATES AND THE CATEGORICAL APPROACH

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INTRODUCTION

The fate of defendants facing lengthy federal sentences based on recidivism often turns on what the U.S. Supreme Court calls the categorical approach.[1] This methodology dictates whether a prior conviction can serve as a predicate for imposing a longer, or enhanced, federal sentence.[2] Federal defendants might serve an additional decade, or longer, in prison based solely on having a prior conviction of a certain type. Under the Armed Career Criminal Act (ACCA), for example, people who commit a federal firearm offense serve a fifteen-year mandatory minimum sentence if they have three prior convictions for a "violent felony" or a "serious drug offense."[3]

The Court's recent jurisprudence on sentencing enhancements requires strict correspondence between the underlying predicate conviction and the federal statutory ground for imposing a longer sentence.[4] The Court's decisions come at a time when many have questioned the wisdom of mass incarceration.[5] Over the last five decades, the United States has

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1 For a description and history of the categorical approach, see *infra* Part I.

2 *See infra* note 3.

3 18 U.S.C. § 924(e)(1) (2012); *see* U.S. SENTENCING GUIDELINES MANUAL §§ 2K2.1, 4B1.1, 4B1.2 (U.S. SENTENCING COMM'N 2016) (providing for firearm and career offender enhancements to federal sentences).

4 *See infra* Section I.C.

5 In 1965, President Lyndon B. Johnson called for a "War on Crime," a pronouncement that ushered in a new era of law enforcement. James Vorenberg, *The War on Crime: The First Five Years*, ATLANTIC MONTHLY, May 1972, at 63. Many have critiqued the ensuing decades of mass incarceration. *See*, *e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2014); Elizabeth Hinton, *Why We Should Reconsider the War on Crime*, TIME (Mar. 20, 2015), http://time.com/3746059/war-on-crime-history/ [https://perma.cc/F2ZU-J5LQ]; Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the "War on Drugs" Was a "War on Blacks"*, 6 J. GENDER RACE & JUST. 381 (2002); Michael

become the world's largest jailer, with one in thirty-six adults incarcerated or under correctional supervision.[6] The United States' incarceration rate is at least three and a half times greater than that of Europe.[7] In taking great care to delimit the circumstances in which federal sentencing judges can lengthen sentences based on recidivism, the Court has softened the edges of harsh federal sentencing practices.

The Court's categorical approach for assessing the nature of a prior conviction for sentencing enhancement also governs most immigration cases involving removal for a criminal offense.[8] In the past, many lawfully present immigrants facing removal for a crime could apply for a discretionary waiver based on whether their individual equities outweighed their criminal histories.[9] Amendments to immigration law wrought by the Anti-Terrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act, however, both expanded the grounds for removal and cut back discretionary relief for immigrants with criminal records.[10] As

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Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004); SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1 (2013), http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf [https://perma.cc/3DKQ-V4BA]; Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, *in* THINKING ABOUT PUNISHMENT: PENAL POLICY ACROSS SPACE, TIME AND DISCIPLINE 81 (Michael Tonry ed., 2009).

[6] DANIELLE KAEBLE ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014 (2015), https://www.bjs.gov/content/pub/pdf/cpus14.pdf [https://perma.cc/SN3R-QS57]; Michelle Ye Hee Lee, *Yes, U.S. Locks People Up at a Higher Rate than Any Other Country*, WASH. POST (July 7, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/07/07/yes-u-s-locks-people-up-at-a-higher-rate-than-any-other-country/ [https://perma.cc/GUD6-TFQF].

[7] Ye Hee Lee, *supra* note 6.

[8] The statutory grounds for removal include both the grounds of inadmissibility and deportation. *See* 8 U.S.C. § 1182(a)(2) (2012) (criminal grounds of inadmissibility governing the admission of noncitizens into the United States); *id.* § 1227(a)(2) (criminal grounds of deportation governing the expulsion of noncitizens out of the United States).

[9] *See* 8 U.S.C. § 1227(c) (1995) (providing a broad discretionary waiver to deportation for lawful permanent residents); *In re* Marin, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978) (describing positive factors such as rehabilitation, family and community ties, and hardship).

[10] *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, §§ 321–34, 110 Stat. 3009-627–35 (codified as amended in scattered sections of 8 U.S.C. (2012)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78 (codified as amended at 8 U.S.C. § 1101(a)(43) (2012)). The Antiterrorism and Effective Death Penalty Act of 1996, the Anti-Drug Abuse Act of 1988, the Immigration Act of 1990, the Immigration and Nationality Technical Corrections Act of 1994, and the IIRIRA of 1996 expanded the definition of aggravated felony. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (codified as amended at 8 U.S.C. § 1101(a)(43)); Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (codified as

the Court has observed, "recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders."[11] By demanding that convictions used for removal strictly correspond to a federal removal ground, the Court has provided some convicted noncitizens with a defense against removal.

Adjectives invoked to describe the categorical approach include "perplexing," "counterintuitive," and "extremely complicated."[12] Courts complain of the amount of ink spilled on deciphering what the categorical approach requires in specific cases.[13] Practitioners spend hours training, researching, and writing to understand and apply the approach to their cases.[14] As mind-bending as it may be, the categorical approach is anything but abstract to those whose lives are at stake. In recognition of the importance of the categorical approach to noncitizens with a criminal record, the American Bar Association has "urge[d] U.S. immigration authorities to interpret immigration laws in accordance with the categorical approach."[15]

For years, commentators have argued that sentencing courts and immigration adjudicators should apply the categorical approach as a "true elements test."[16] Under an elements test,

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amended at 8 U.S.C. § 1101(a)(43)); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320–21 (codified as amended at 8 U.S.C. § 1101(a)(43)).

[11] Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

[12] Doug Keller, *Causing Mischief for* Taylor*'s Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 GEO. MASON L. REV. 625, 625 (2011); *see* Tijani v. Holder, 628 F.3d 1071, 1075 (9th Cir. 2010); Transcript of Oral Argument at 50, Descamps v. United States, 133 S. Ct. 2276 (2013) (No. 11-9540) (Alito, J.).

[13] *See* United States v. Aguila-Montes de Oca, 655 F.3d 915, 917 (9th Cir. 2011) (en banc) (stating, "In the twenty years since [the U.S. Supreme Court's decision in] *Taylor*," the Ninth Circuit has "struggled to understand the contours of the Supreme Court's" categorical approach, pronouncing that "over the past decade, perhaps no other area of the law has demanded more of [the court's] resources"), *abrogated by* Descamps v. United States, 133 S. Ct. 2276 (2013). At the 2016 Annual National Seminar, the U.S. Sentencing Commission noted that "[a]fter the Supreme Court's decision in Mathis v. United States, 136 S. Ct. 2242 (2016), courts continue to grapple with the categorical approach, including the means vs. elements test." U.S. SENTENCING COMM'N, CATEGORICAL APPROACH: 2016 ANNUAL NATIONAL SEMINAR (2016), http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/backgrounder_categorical-approach.pdf [https://perma.cc/593F-5DDA].

[14] For example, the Immigrant Defense Project has issued numerous practice advisories and other resources on the categorical approach. *See, e.g.*, IMMIGRANT DEF. PROJECT, USING AND DEFENDING THE CATEGORICAL APPROACH, http://www.immdefense.org/using-and-defending-the-categorical-approach/ [https://perma.cc/6YTC-HJBN].

[15] *See* COMMISSION ON IMMIGRATION CRIMINAL JUSTICE SECTION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION (AM. BAR ASS'N 2010), https://www.americanbar.org/content/dam/aba/migrated/Immigration_Consequences_of_Past_Criminal_Convictions_1.authcheckdam.pdf [https://perma.cc/JZ5Y-EAZV].

[16] *See, e.g.*, Rebecca Sharpless, *Toward a True Elements Test:* Taylor *and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979 (2008);

adjudicators look only to the constitutive legal elements of a criminal offense, as defined by statute or case law, to categorize a crime.[17] The elements of a criminal offense are those "necessary" facts about which jurors must agree in every case prosecuted under a statute.[18] Elements contrast with "means," which are different ways in which an individual can commit the elements of a crime.[19]

States enjoy wide latitude to decide whether terms used to describe a given criminal offense are elements or means.[20] A fact that constitutes an element in one state may be only a means in another. For example, two states might have drug statutes that each criminalize the "sale or delivery" of controlled substances as a first degree felony. These alternatives could denote either elements or means. Sale involves commercial dealing, whereas delivery does not because it includes social sharing.[21] In immigration law, commercial dealing is required for an offense to qualify as an "illicit trafficking" aggravated felony.[22] A conviction that includes social sharing does not necessarily involve commercial dealing and is not an aggravated felony. Suppose that, in one state, courts consider the statutory phrase "sale or delivery" to define two separate offenses. In contrast, the second state's judiciary regards the phrase "sale or delivery" as describing two different means of committing the offense of drug trafficking. Prosecutors in the second state have the option of listing "sale or delivery" as alternate means in a single count.[23] To convict, jurors need not agree about whether the defendant engaged in sale, which must involve a commercial transaction, or delivery, which does not. Because a conviction under the second state's "sale or delivery" statute would not necessarily involve commercial dealing, it would not qualify as an "illicit trafficking" aggravated felony.

To apply the categorical approach as an elements test is to look only to the elements to determine whether the offense

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Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011).

[17] Mathis v. United States, 136 S. Ct. 2243, 2247–50 (2016).

[18] *See In re* Winship, 397 U.S. 358, 364 (1970).

[19] Schad v. Arizona, 501 U.S. 624, 638–39 (1991) (plurality decision).

[20] *Id.* at 639 (A "state legislature's definition of the elements of the offense is usually dispositive." (quoting McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986))).

[21] *See* Moncrieffe v. Holder, 133 S. Ct. 1678, 1683 (2013) (recognizing that "distribution" includes distribution "for no remuneration").

[22] Illicit trafficking under 8 U.S.C. § 1101(a)(43)(B) (2012) requires commercial dealing. *See In re* Sanchez-Cornejo, 25 I. & N. Dec. 273, 274 (B.I.A. 2010) (citing *In re* Davis, 20 I. & N. Dec. 536, 541 (B.I.A. 1992)).

[23] For a discussion of how alternate means can be charged in a single count, see *infra* notes 115–116 and accompanying text.

triggers the federal consequence defined by federal sentencing or immigration law. Adjudicators cannot rely on non-element facts that might appear in a record of conviction to describe how the defendant was alleged to have committed the offense. In *Descamps v. United States* and *Mathis v. United States*, both ACCA opinions authored by Justice Kagan, the Supreme Court not only adopted an elements test but also declared that the Court had already done so over two decades ago. Justice Kagan wrote for the eight-to-one majority in *Descamps*: "Our caselaw explaining the categorical approach and its 'modified' counterpart all but resolves this case."[24] Three years later, in her opening paragraph in *Mathis*, she echoed the same sentiment: "For more than 25 years, our decisions have held that the prior crime qualifies as an ACCA predicate [offense leading to sentencing enhancement] if, but only if, its elements are the same as, or narrower than, those of the generic offense"—the offense described in the ACCA as triggering a longer sentence.[25] Disputing Justice Kagan's claim of settled law, Justice Breyer and Justice Ginsburg, two justices who had been in the majority in *Descamps*, dissented in *Mathis*.[26]

This article analyzes the trajectory of the Court's principal categorical approach decisions, using the *Mathis* dissent authored by Justice Breyer and joined by Justice Ginsburg, to explain an ambiguity in the Court's jurisprudence that the discussions of means and elements in *Descamps* and *Mathis* have now settled. Justice Kagan's oversimplification has led her not only to overstate the relationship between the Court's early and late categorical approach decisions but also to include dicta in *Mathis* that leaves room for confusion about how to apply the categorical approach in practice.[27] The dicta suggest that adjudicators can take a "peek" at the record of conviction to help determine whether state law has defined a fact as a means or an element.[28] This article argues that *Descamps* and *Mathis*, when properly interpreted, require the categorical approach to

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[24] Descamps v. United States, 133 S. Ct. 2276, 2283 (2013).

[25] Mathis v. United States, 136 S. Ct. 2243, 2247 (2016). The term "'generic' federal definition" means that the "offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison." Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013). A state conviction is a "categorical match with a generic federal offense only if a conviction of the state offense 'necessarily involved . . . facts equating to [the] generic [federal offense].'" *Id.* (alteration in original) (omission in original) (quoting Shepard v. United States, 544 U.S. 13, 24 (2005)).

[26] *Mathis*, 136 S. Ct. at 2259 (Breyer, J., dissenting).

[27] *See infra* Part IV.

[28] *Mathis*, 136 S. Ct. at 2256–57 (quoting Rendon v. Holder, 782 F.3d 466, 473–74 (9th Cir. 2015) (Graber, J., dissenting)).

operate as a true elements test and that the take a "peek" language in *Mathis* is inconsistent with the case's holding.

This article begins with a brief description of the origins of the categorical approach in the context of federal sentencing law. This description focuses on *Taylor v. United States, Shepard v. United States*, and their relationship to the Court's recent decisions in *Descamps v. United States* and *Mathis v. United States*.[29] Part II analyzes the jurisprudential divergence between the *Mathis* majority and Justice Breyer's dissent. The majority and the dissent disagree over what it means for a fact relating to a prior conviction to have been "necessarily" decided. Part III argues that, although *Taylor* and *Shepard* did not dictate the results in *Descamps* and *Mathis*, the latter cases were correctly decided. The statutory requirement that recidivist sentencing and deportation require a "conviction" compels their holdings. Moreover, the resolution of these cases avoids a serious constitutional issue and is fair and practical. Part IV argues that the dicta in *Mathis*, which suggests that adjudicators can take a "peek" at the record of conviction to help decide whether statutory alternatives are means or elements, is misguided and contradicts the *Mathis* holding.

I. A BRIEF HISTORY OF THE CATEGORICAL APPROACH

The Supreme Court has described states as the great laboratories of our nation's democracy.[30] In the realm of criminal justice, each state has the authority to define, and redefine, what counts as a crime.[31] This multiplicity makes it difficult to standardize the federal sentencing and deportation consequences of state offenses, however. Because state offenses are numerous and ever-changing, it is impractical for federal sentencing enhancement and federal deportation laws to cross-reference specific state criminal laws. Moreover, state labels for crimes cannot control the federal analysis, as states sometimes use different labels for the same offense.[32] Even when states use the same label, the elements of the offenses might differ.[33]

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[29] Taylor v. United States, 495 U.S. 575 (1990); Shepard v. United States, 544 U.S. 13 (2005); Descamps v. United States, 133 S. Ct. 2276 (2013); *Mathis*, 136 S. Ct. at 2243.

[30] *See* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting).

[31] *See supra* notes 20–23 and accompanying text.

[32] *See* Taylor v. United States, 495 U.S. 575, 588–89 (1990).

[33] *See* Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. REV. 1696, 1720–21 (1999) (describing how states use different labels for crimes and "define the requisite elements . . . differently").

In the face of these "vagaries of state law,"[34] federal courts seek a standardized way to categorize convictions for the federal purposes of recidivist sentencing and deportation.

The Supreme Court has adopted the categorical approach to ascertain whether a criminal conviction qualifies as a predicate offense for a federal consequence.[35] As explained below, adjudicators look at the elements of the conviction, not the way the crime was committed, and compare the elements with a generic definition contained in federal sentencing or immigration law.[36]

A. What the Jury "Necessarily Had to Find": Taylor v. United States

While the basic principles underlying the categorical approach first appeared in federal court immigration cases in the early twentieth century, the Supreme Court's first articulation appeared in *Taylor v. United States*, four years after Congress enacted the Career Criminals Amendment Act of 1986 (the Act) as part of the Anti-Drug Abuse Act of 1986.[37] Under the Act, federal defendants convicted of unlawful possession of a firearm faced an increased maximum possible sentence if they had three prior convictions of certain types, including "burglary."[38] In *Taylor,* the Court rejected the view of the lower court that "burglary" in the Act "means 'burglary' however a state chooses to define it."[39] Instead, the Court found that the Act required sentencing judges to employ a "generic" definition of burglary, which the Court defined as the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[40] Federal sentencing courts look "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions."[41] Based on the statute's use of the term "convictions," legislative history, and

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[34] *Taylor*, 495 U.S. at 588.

[35] *See infra* notes 37–49 and accompanying discussion.

[36] *See infra* Sections I.A–I.D.

[37] *Taylor*, 495 U.S. at 588; *see* Career Criminal Amendments Act of 1986, H.R. 4885, 99th Cong. (1986); Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207. In the 1914 immigration case *United States ex rel. Mylius v. Uhl*, the court of appeals asked whether the criminal conviction under review "necessarily involve[d] moral turpitude." United States *ex rel.* Mylius v. Uhl, 210 F. 860, 862 (2d Cir. 1914). For a history of the categorical approach in immigration law, see Sharpless, *supra* note 16, at 994–97; Das, *supra* note 16, at 1688–98.

[38] 18 U.S.C. § 924(e) (2012) (referencing 18 U.S.C. § 922(g) (2012) (unlawful possession of a firearm)).

[39] *Taylor*, 495 U.S. at 579, 592 (quoting United States v. Taylor, 864 F.2d 625, 627 (8th Cir. 1989)).

[40] *Id.* at 599.

[41] *Id.* at 600.

the "potential unfairness of a factual approach," the Court found that "burglary" refers "to the elements of the statute of conviction, not to the facts of each defendant's conduct."[42] For example, under the Court's rule, if a state burglary statute did not require entry or remaining in "a building or structure," it would not qualify as federal burglary under the Court's generic definition.

Although the Court sought to avoid the practical difficulties of a sentencing court having "to determine what [the underlying criminal] conduct was," constitutional concerns lingered in the background.[43] Presaging Sixth Amendment concerns that later surfaced in the *Apprendi v. New Jersey* line of cases,[44] the Court posited: "If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?"[45] Despite this constitutional concern, the Court opened up the possibility of a sentencing court going "beyond the mere fact of conviction in a narrow range of cases where a jury was *actually required to find* all the elements of generic burglary."[46] To illustrate its point, the Court posited a hypothetical state burglary statute that criminalized unlawful entry into "an automobile as well as a building."[47] The Court reasoned: "[I]f the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that *the jury necessarily had to find* an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement."[48] In later cases, the justices would disagree about what it means to say that the jury *necessarily* had to find an element of a generic offense.[49]

B. Reviewing the Record of Conviction in Plea Cases: Shepard v. United States

The Court's next major development regarding the categorical approach came fifteen years later in *Shepard v.*

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[42] *Id.* at 600–01.

[43] *Id.* at 601.

[44] Apprendi v. New Jersey, 530 U.S. 466 (2000). In *Apprendi v. New Jersey*, the Court held that the Sixth Amendment requires that a jury, rather than a judge, find any fact that increases the maximum penalty for a crime. *Id.* at 490. *Apprendi* rendered unlawful the practice of judges finding facts that would lengthen a defendant's sentence. *Id.* at 491–92.

[45] *Id.*

[46] *Taylor*, 495 U.S. at 602 (emphasis added).

[47] *Id.*

[48] *Id.* (emphasis added).

[49] *See infra* Part II.

United States.[50] *Shepard* involved a federal enhancement under the ACCA, which imposes a minimum fifteen-year prison sentence on any defendant who possessed a firearm after three prior convictions of certain types, including a "violent felony."[51] Shepard had pled guilty to multiple state offenses, including burglary in Massachusetts. He was then convicted of the federal offense of being a felon in possession of a firearm and faced sentencing enhancement under the ACCA.[52] At issue was whether Shepard's prior plea to Massachusetts burglary qualified as a "violent felony" triggering enhancement.[53] Massachusetts law punished breaking and entering a "building, ship, vessel or vehicle," whereas federal generic burglary, defined in *Taylor*, only criminalized entry into a "building or structure."[54] The Court reaffirmed *Taylor*, stating that the categorical approach "refers to predicate offenses in terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes."[55] The Court extended *Taylor*'s holding to plea agreements and bench trials, rejecting the government's position that, in nonjury verdict cases, sentencing judges could look to alleged facts in documents like police reports to determine whether the conviction qualified as a generic offense.[56] While the Court permitted review of the record of conviction, it limited this review to only the charging document, plea agreement, and any factual basis admitted by Shepard and accepted by the judge.[57] In *Shepard*, the Court found that these documents were a close analogue to the documents found in jury verdict cases.[58] The Court remanded Shepard's case for the U.S. district court to review the record of conviction.[59] The practice of looking beyond the statute to the record of conviction later came to be known as the "modified categorical approach."[60]

As pointed out eleven years later by Justice Breyer in his *Mathis* dissent, the Court in *Taylor* and *Shepard* looked beyond the criminal statute to review the record of conviction documents

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[50] 544 U.S. 13 (2005).

[51] *See id.* at 15 (analyzing a sentencing enhancement under the ACCA, 18 U.S.C. § 924(e)).

[52] *Shepard*, 544 U.S. at 16.

[53] *Id.* at 15–16. A "violent felony" includes, among other offenses, a "burglary" offense committed by an adult that is "punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 924(e)(1)(B) (2012).

[54] *Shepard*, 544 U.S. at 15–18; MASS. GEN. LAWS ANN., ch. 266, § 16 (West 2000).

[55] *Shepard*, 544 U.S. at 19 (alteration in original).

[56] *Id.* at 16.

[57] *Id.*

[58] *Id.* at 19–20.

[59] *Id.* at 26.

[60] Descamps v. United States, 133 S. Ct. 2276, 2281 (2013).

without first asking whether the statutory alternatives were disjunctive *elements* that defined separate offenses or merely different *means* of committing an offense defined by a single set of elements.[61]

C. The Modified Categorical Approach: Descamps v. United States

In the 2013 case *Descamps v. United States*, the Court directly addressed the circumstances under which a sentencing judge may go beyond the statute of conviction to review the record of conviction under the modified categorical approach.[62] Descamps was convicted of being a felon in possession of a firearm under federal law, and the government sought to lengthen his sentence under the ACCA due to a prior California burglary offense.[63] Unlike generic federal burglary, California's burglary statute did not require an "unlawful" entry.[64] The Ninth Circuit had upheld the expansive review of record of conviction documents when interpreting the modified categorical approach in a prior, en banc decision.[65] The Supreme Court granted certiorari to resolve whether judges can look to the record of conviction when analyzing statutes that contain "a single, 'indivisible' set of elements sweeping more broadly than the corresponding generic offense."[66]

The Court held that because California's burglary statute did not "list[] potential offense elements in the alternative," but instead omitted the element of unlawful entry entirely, the sentencing judge had erred in reviewing the record of conviction under the modified categorical approach.[67] The modified categorical approach "serves [the] limited function" of determining the elements of a conviction when a statute is "divisible" (i.e., when it "list[s] potential offense elements in the alternative").[68] The Court invoked the elements/means distinction, stating that the "only facts the [sentencing] court can be sure the jury . . . found

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[61] Mathis v. United States, 136 S. Ct. 2243, 2260 (2016) (Breyer, J., dissenting).

[62] *Descamps*, 133 S. Ct. 2276.

[63] *Id.* at 2282.

[64] *Compare* CAL. PENAL CODE § 459 (West 2010) ("[e]very person who enters"), *with* Taylor v. United States, 495 U.S. 575, 599 (1990) (holding that the generic federal definition of burglary requires unlawful entry).

[65] United States v. Aguila-Montes de Oca, 655 F.3d 915, 917 (9th Cir. 2011) (en banc) (per curiam).

[66] *Descamps*, 133 S. Ct. at 2283.

[67] *Id.*

[68] *Id.* at 2283–84; *see id.* at 2284 (The modified approach is merely a "tool for implementing the categorical approach.").

are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances."[69]

Descamps was an eight-to-one decision, with only Justice Alito dissenting. Characterizing the majority opinion as resting on "highly technical grounds," Justice Alito preferred a "more practical reading."[70] Namely, "[w]hen it is clear that a defendant necessarily admitted or the jury necessarily found that the defendant committed the elements of generic burglary, the conviction should qualify."[71]

A footnote in Justice Kagan's majority opinion introduced ambiguity that led to a circuit split. Responding to Justice Alito's concern that "distinguishing between 'alternative elements' and 'alternative means' is difficult," Justice Kagan wrote that there is "no real-world reason to worry" because the record of conviction "would reflect the crime's elements."[72] Some courts interpreted this statement as blanket permission to review the record of conviction whenever a statute lists alternatives, even if they are means rather than elements.[73]

D. Elements or Means: Mathis v. United States

Three years later, the Court resolved the circuit split created by its footnote in *Descamps*. In *Mathis v. United States*, the Court held that a court may review the record of conviction only when a statute's list of alternatives defines *elements* of distinct offenses.[74] Courts cannot review the record of conviction when "a statute . . . lists multiple, alternative *means* of satisfying one (or more) of its elements," as defined by state law.[75] As explained above, elements are facts necessary to a conviction

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[69] *Id.* at 2288 (citing Richardson v. United States, 526 U.S. 813, 817 (1999)). The Court cited with approval its prior decisions in *Schad* and *Richardson*, both of which defined the difference between means and elements. *Id.* at 2298 (citing Schad v. Arizona, 501 U.S. 624, 636 (1991) (plurality); *Richardson*, 526 U.S. at 817).

[70] *Descamps*, 133 S. Ct. at 2295 (Alito, J., dissenting).

[71] *Id.*

[72] *Id.* at 2285 n.2. She added: "When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense." *Id.*

[73] *Compare* United States v. Mathis, 786 F.3d 1068 (8th Cir. 2015), *overruled by* Mathis v. United States, 136 S. Ct. 2243 (2016) (citing to footnote 2 of *Descamps* to permit review of the record of conviction whenever statutory alternatives are listed), United States v. Ozier, 796 F.3d 597 (6th Cir. 2015) (same), and United States v. Trent, 767 F.3d 1046 (10th Cir. 2014) (same), *with* Rendon v. Holder, 764 F.3d 1077 (9th Cir. 2014) (barring review of the record of conviction when the statutory alternatives are elements rather than means), and Omargharib v. Holder, 775 F.3d 192 (4th Cir. 2014) (same).

[74] *Mathis*, 136 S. Ct. at 2249 (citing *Schad*, 501 U.S. at 636 (plurality opinion)) (discussing the difference between elements and means).

[75] *Id.* at 2248 (emphasis added).

about which jurors must agree to convict a defendant.[76] In contrast, means are facts describing how the crime was committed.[77] Jurors might disagree about means but still convict. Building off the Court's burglary hypothetical in *Taylor*, consider two states that criminalize unlawful entry into an "automobile or structure" under their burglary statutes.[78] The first state might consider this phrase to define alternate elements, such that the prosecutor must charge one or the other, but not both, in the same count.[79] To convict, jurors must agree whether the entry was to a structure or conveyance. In contrast, the second state could regard "automobile or structure" as defining different ways of committing a single location element of burglary. Under *Mathis*, review of the conviction record under the modified categorical approach would only be permissible in the first case.[80] Only the first state regards the statutory alternatives as distinct elements.

Mathis was an ACCA sentencing enhancement case involving predicate convictions for Iowa burglary. Mathis had pled guilty to the federal offense of being a felon in possession of a firearm. The government sought the ACCA's fifteen-year minimum penalty because Mathis had previously been convicted five times for burglary under Iowa law.[81] Iowa's burglary statute is broader than generic burglary because it criminalizes unlawful entry into places other than structures, such as a "land, water or air vehicle."[82] Under Iowa case law, this disjunctive phrase designated alternate means rather than alternate elements.[83] Although the record of conviction stated that Mathis had entered a structure (a "house and garage"), the Court found that the sentencing court was prohibited from reviewing the record because the statute contained only a single set of elements and was therefore not divisible into multiple offenses.[84]

The Court easily answered the question of whether Iowa treats the alternatives in its burglary statute as elements or

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[76] *See supra* note 18 and accompanying text.

[77] *See supra* note 19 and accompanying text.

[78] *See* Taylor v. United States, 495 U.S. 575, 602 (1990) (positing hypothetical state burglary statute that includes "entry of an automobile as well as a building").

[79] *See infra* notes 115–116 for a discussion of how alternate elements cannot be charged in the same count.

[80] *See Mathis*, 136 S. Ct. at 2251–54 (holding that the modified categorical approach does not apply when statutory alternatives are means rather than elements).

[81] *Id.* at 2250.

[82] IOWA CODE § 702.12 (2013).

[83] *See Mathis*, 136 S. Ct. at 2256 (citing State v. Duncan, 312 N.W.2d 519, 523 (Iowa 1981)).

[84] *Id.* at 2256–57.

means, as the highest Iowa court had supplied a definitive answer to this question.[85] In dicta, however, the Court suggested that federal courts might assess state law by looking beyond state court legal interpretations to how prosecutors charge offenses as a matter of practice.[86] As discussed below, the suggestion that federal courts take a "peek" at the record of conviction to see how the prosecutor actually charged the crime is misguided. It threatens to erode the Court's holding that the modified categorical approach turns on the purely legal question of whether state law defines a statutory alternative as an element or means.[87]

In addition to arguing that the result in *Mathis* was dictated by "25 years" of cases, Justice Kagan, writing for the majority, gave three reasons for the Court's decision.[88] First, Congress used the term "conviction" in the ACCA instead of "conduct."[89] Second, going beyond the elements of the conviction would raise the Sixth Amendment issue first identified by the Court in *Taylor*.[90] Third, a reliance on facts that are only means rather than elements would be unfair to defendants.[91] Defendants may have no reason to contest means, or non-element facts because jurors need not agree about them to convict. In plea cases, non-element facts can be irrelevant to the resolution of the case.[92]

Mathis was a five-to-three decision with two dissents written by Justice Breyer and Justice Alito.[93] Justice Breyer, joined by Justice Ginsburg, rejected the majority's elements test, arguing that the "elements/means distinction . . . should not matter for sentencing purposes."[94] Rather, in cases where alternate means are listed in the statute, the sentencing court should review the record of conviction and ask whether the jury "necessarily found" the fact that makes the offense fit the generic federal definition.[95] When a burglary defendant is charged only with entering a structure, a jury would have to find this fact to

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[85] *Id.* at 2256 ("This threshold inquiry—elements or means?—is easy in this case, as it will be in many others.").

[86] *Id.* at 2256–57 (suggesting that federal judges can take a "peek" at the record of conviction documents (quoting Rendon v. Holder, 782 F.3d 466, 473–74 (9th Cir. 2015))).

[87] *See infra* Part IV.

[88] *Mathis*, 136 S. Ct. at 2247, 2252–54.

[89] *Id.* at 2252.

[90] *See id.* at 2252; *see also supra* notes 43–45 and accompanying text.

[91] *See Mathis*, 136 S. Ct. at 2253.

[92] *Id.* at 2253.

[93] *Id.* at 2247.

[94] *Id.* at 2259 (Breyer, J., dissenting).

[95] *Id.* at 2266.

convict. In Justice Breyer's view, it did not matter that the prosecutor in *Mathis could have* charged house or vehicle as alternate means.[96] It only mattered that the prosecutor in Mathis's case *actually* charged him with entering a house.[97] Explaining away the Court's repeated use of the term "elements" in its prior precedent, Justice Breyer argued that the Court was using the term "to refer to the matter at issue" and was not employing it in a technical sense to draw a distinction with means.[98]

Both Justice Breyer and Justice Ginsburg were in the majority in *Descamps*. They justified their dissent from the *Mathis* majority by pointing to the fact that *Descamps* involved a statute that was missing an element entirely, while *Mathis* involved an express list of statutory alternatives.[99] The California statute in *Descamps* was silent as to whether the entry element of burglary had to be unlawful, such that both lawful and unlawful entries could qualify.[100] In contrast, the Iowa statute in *Mathis* listed alternate means by which the location element of burglary could be satisfied (structure or vehicle).[101] For Justices Breyer and Ginsburg, recourse to the record of conviction in cases involving overbroad elements like *Descamps* constitutes impermissible fact-finding because in no sense did the jury "necessarily" find the fact that triggers enhancement.[102] But, for them, the same concern does not exist in cases like *Mathis* where the statute expressly lists alternatives, and only one alternative appears in the record of conviction.[103]

The next section illuminates the difference between the *Mathis* majority and the dissent.

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[96] *Id.*

[97] *Id.*

[98] *Id.* at 2265.

[99] *Id.* at 2266.

[100] Descamps v. United States, 133 S. Ct. 2276, 2282 (2013).

[101] *Mathis*, 136 S. Ct. at 2246, 2265–66 (drawing a distinction between *Descamps* where the "statute made no distinction" between alternatives and the statute in *Mathis* that listed "several statutory alternatives").

[102] *See id.* at 2259–66 (Breyer, J., dissenting).

[103] Although Justices Breyer and Ginsburg cite to footnote two of the *Descamps* majority opinion as support for their position, that footnote makes no distinction between statutes that contain a list of alternatives and statutes with overbroad elements. *Id.* at 2264; *Descamps*, 133 S. Ct. at 2285 n.2 (discussing statutory "lists"). Nor did the Court's plurality decision in *Schad*, upon which the *Descamps* majority relied. *Descamps*, 133 S. Ct. at 2298 (citing Schad v. Arizona, 501 U.S. 624 (1991) (plurality)). *Schad* is a leading case on the difference between means and elements. *See supra* note 19 and accompanying text. Justice Breyer and Ginsburg give no explanation for why *Descamps* would have cited to *Schad* if the means/elements distinction were irrelevant to the divisibility inquiry, as they contend.

II. WHAT THE JURY "NECESSARILY" DECIDED

The *Mathis* majority and the Breyer dissent diverged on the issue of what it means for a fact to be necessarily decided. The majority accused the dissent of permitting judges to rely on "extraneous" facts—facts not necessary for the conviction, facts that the defendant may not have had the incentive to dispute at trial.[104] The dissenters, in contrast, contended that they *were requiring* sentencing judges to characterize a prior conviction based only on what the jury had necessarily found (or what the jury would have necessarily found if the case had proceeded to trial).[105] In other words, both sides believed that they were faithfully applying the *Taylor* rule that the characterization of a prior conviction must only rely on the "necessarily" found, or essential, facts.[106]

The true disagreement was about what it means to say that the jury necessarily decided an essential fact. Putting aside for the moment the question of whether Justice Breyer's dissent properly distinguished *Descamps*, Justice Breyer argued that when a statute lists alternatives and the prosecutor chooses to charge only one of them (as in *Mathis*), the jury would *have* to find the charged alternative to convict in that particular case.[107] In so arguing, Justice Breyer implicitly based his conclusion on criminal procedure rules regarding variances—material differences between the alleged facts in the charging document and the case at trial.[108] If the prosecutor charges a case one way but then presents it to a jury in another, the defendant may object, and the judge must decide whether there is a variance. If so, the court either permits the prosecutor to amend the charging document or declares a "fatal variance" and acquits the defendant.[109] Justice Breyer believed that the proper focus is what was necessarily decided *in the particular case*.

The majority, in contrast, took *Taylor*'s phrase the "jury necessarily had to find" as describing what a jury must find in

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104 *Mathis*, 136 S. Ct. at 2248.

105 *See id.* at 2266 (Breyer, J., dissenting).

106 Taylor v. United States, 495 U.S. 575, 597, 602 (1990).

107 As discussed above, Justice Breyer's attempt to distinguish *Mathis* as limited to cases involving an "explicit[] list" of alternatives fails to account for *Descamps*'s discussion of *Schad*. *See supra* note 103.

108 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 19.6(a) (5th ed. 2000) ("A variance arises when the proof offered at trial departs from the allegations in the indictment or information."); *see* Berger v. United States, 295 U.S. 78, 82 (1935) (characterizing the inquiry as "whether there has been such a variance as to 'affect the substantial rights' of the accused").

109 *See* Paul M. Coltoff et al., 42 C.J.S. INDICTMENTS § 280 (2017).

every case prosecuted under the criminal statute at issue.[110] While it may be true that, in an individual case, the jury could not have convicted without deciding a particular fact, the majority's test for whether such a fact is truly "necessary" is whether it *could* have been charged in the alternative in the same count (e.g., in an Iowa burglary case, "a house, a building, a car, or a boat" each could have been charged).[111] "Necessary," in this view, means "in all possible cases," not just the case at hand. A fact is not truly necessary or essential to an offense unless the prosecutor must prove it in *every* case. Only elements are truly necessary.

To make this disagreement concrete, consider Florida's theft statute, which makes it a crime to "temporarily or permanently" take another's property.[112] Only permanent takings qualify as a "crime involving moral turpitude" and trigger the federal consequence of deportation.[113] The Florida Supreme Court has found that the statutory phrase "temporarily or permanently" refers to alternate means of committing the crime, rather than alternate elements.[114] Alternate means can be charged in the same count, unlike alternate elements.[115] A prosecutor thus has the option of charging the offense using the phrase "temporarily or permanently" in a single count. If a prosecutor opts to charge the case as a "permanent" taking, Justice Breyer would argue that the jury would necessarily have to decide whether the taking was permanent (if the case proceeds to trial).[116] In such a case, he would find it appropriate to rely on the record of conviction under the modified categorical approach, even though "permanent" is not an element. The conviction would count as a permanent taking and trigger the federal consequence. In contrast, the *Mathis* majority would

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[110] *Mathis*, 136 S. Ct. at 2253 (quoting *Taylor*, 495 U.S. at 602).

[111] *Id.* at 2255–56.

[112] FLA. STAT. § 812.014 (2016).

[113] *See In re* Grazley, 14 I. & N. Dec. 330, 333 (B.I.A. 1973). Recently, the BIA held that temporary takings can involve moral turpitude if they substantially erode the owner's property right. *In re* Diaz-Lizarraga, 26 I. & N. Dec. 847, 854–55 (B.I.A. 2016); *In re* Obeya, 26 I. & N. Dec. 856, 859 (B.I.A. 2016). Florida's statute, however, sweeps broadly and includes de minimis takings. *See, e.g.*, State v. Dunmann, 427 So. 2d 166, 167 (Fla. 1983) (joyriding is criminalized under the theft statute); Peoples v. State, 760 So. 2d 1141, 1143 (Fla. Dist. Ct. App. 2000) (borrowing a fire extinguisher constitutes theft).

[114] *See* Daniels v. State, 587 So. 2d 460, 462 (Fla. 1991).

[115] *See Schad*, 501 U.S. at 631 (citing Andersen v. United States, 170 U.S. 481 (1898)). The prohibition on charging duplicate offenses in the same count stems from a long line of due process cases. *See* 1A CHARLES ALAN WRIGHT ET AL., FED. PRAC. & PROC. CRIM. § 142(1), Westlaw (database updated Apr. 2017) (collecting cases).

[116] *Mathis*, 136 S. Ct. at 2243, 2260 (Breyer, J., dissenting) (discussing how a jury must find a fact to convict if it is charged as the sole means of commission among statutory alternatives).

contend that, even if the jury had made the "permanent" finding in the case at hand, this finding is irrelevant because "permanent" was not required. A prosecutor could have proven "temporary" and still secured a conviction. Moreover, depending on the jurisdiction's rules about variances, jurors could have disagreed about whether the taking was permanent or temporary and still reached a unanimous verdict. For the majority, the prosecutor must always be required to charge (and the jury must always find) "permanent" for the conviction to result in removal. "Permanent" must be an element of the offense of theft to be relevant.

The dispute between the *Mathis* majority and Justice Breyer's dissent is thus a disagreement about the correct level of analysis: When deciding whether to deport or lengthen a sentence based on a defendant's prior conviction, do adjudicators look at what was necessarily decided in the actual defendant's prior case (an inquiry that could involve both means and elements) or do they look at what must necessarily happen in all cases involving the same offense (an inquiry into elements only)? One place to look for the answer is in Justice Kagan's "25 years" of precedent.[117] As discussed above, *Taylor* barred sentencing judges from holding minitrials about the nature of the conduct underlying a conviction and held that recourse to the record of conviction was appropriate in cases involving statutory alternatives to determine what the jury "necessarily" found.[118] Although the Court used the term "element" twelve times, it did not discuss the means versus elements distinction.[119] Nor did the Court specify that its use of the term "necessarily" referred to what happens in all cases, as opposed to the case at hand.[120] As Justice Breyer pointed out in his *Mathis* dissent, the Court has used the term "elements" interchangeably with statutory "definition."[121] As discussed above, in dicta, the Court in *Taylor* sanctioned review of the record to categorize a conviction under a hypothetical burglary statute written in the disjunctive.[122] But it did so without stating whether the possible statutory alternatives were means or elements.

For its part, *Shepard* is also not particularly helpful in settling the dispute between the *Mathis* majority and the dissent about what it means to say a fact was necessarily found.

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117 *Id.* at 2247.

118 *See supra* Section I.A.

119 *See* Taylor v. United States, 495 U.S. 575, 578–602 (1990).

120 *See id.*

121 *Mathis*, 136 S. Ct. at 2265 (Breyer, J., dissenting).

122 *See supra* notes 47–49 and accompanying text.

As discussed above, the Court in *Shepard* extended *Taylor* to cases involving pleas and rejected the government's suggestion that sentencing judges could look at police reports in plea cases.[123] The Court used the word "elements" in its analysis but again made no contrast with means.[124] The Massachusetts burglary statute at issue was written in the alternative, and the Court reviewed the record of conviction without first specifying whether the statutory alternatives were elements or means.[125] As Justice Alito later noted in his dissent in *Descamps*, the Massachusetts burglary statute likely would not be divisible under the *Descamps* majority's rule.[126]

Three basic possibilities exist for the ambiguity in *Taylor* and *Shepard* about whether the term "necessarily" refers to what happened in a particular case (which could include means) or what must happen in all cases (which must be an element). The Court could have (1) assumed that the different statutory alternatives it discussed were elements rather than means (the *Mathis* majority's reading); (2) intentionally not addressed whether alternatives had to be elements because the Court thought it did not matter for sentencing purposes (Justice Breyer's view); or (3) simply failed to resolve the ambiguity because the difference between elements and means was not raised as an issue (perhaps the most likely). Only in *Descamps* did the Court expressly invoke the contrast between means and elements.[127] The upshot is that contrary to Justice Kagan's contention, *Taylor* and *Shepard* did not "all but resolve[]" *Descamps*.[128] *Descamps*, however, did all but resolve *Mathis*.

III. WHY *DESCAMPS* AND *MATHIS* ARE CORRECT

The Court's use of the term "elements" in its categorical approach jurisprudence for the last twenty-five years may not be the best justification for the holdings of *Descamps* and *Mathis*. But the holdings are nonetheless correct. Categorizations of convictions, as opposed to conduct, must focus on what the prosecution must prove in every case, not just the particular case at hand. The distinction between elements and means corresponds to the difference between convictions and conduct,

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123 *See supra* Section I.B.

124 *See* Shepard v. United States, 544 U.S. 13, 19 (2005).

125 *Id.* at 20–21.

126 Descamps v. United States, 133 S. Ct. 2276, 2297 (2013) (stating that "the Court assumes that 'building' and the other locations enumerated in the Massachusetts statutes [in *Shepard*], such as 'vessel,' were alternative elements, but that is questionable").

127 *See supra* Section I.C.

128 *Descamps*, 133 S. Ct. at 2283.

as those terms are used in the relevant sentencing and immigration statutes. Even if ambiguity exists on this point, the statutory interpretation norm of avoiding constitutional questions would require this interpretation.[129] While it is true that there may be challenges when implementing the *Mathis* decision, this unfortunate reality is equally true of the approach outlined in Justice Breyer's dissent.[130] In the absence of wholesale revision to federal enhancement statutes and immigration law, determining the nature of prior convictions will always involve some measure of complexity.[131]

A. Conduct Versus Conviction

As noted above, the Supreme Court has justified the categorical approach on the grounds that Congress used the word conviction rather than conduct in the relevant sentencing and immigration statutes.[132] Under the norms governing statutory interpretation, different words must be given different meanings.[133] While both the *Mathis* majority and the dissent agree that there is a difference between the use of the statutory terms conviction and conduct, they disagree about what that difference is.

Their disagreement, in part, collapses into their disagreement about what constitutes a necessarily decided fact. For the *Mathis* majority, the conviction/conduct distinction lines up with the distinction between what is necessarily decided in all cases (the elements) and all other facts (including means).[134] For Justice Breyer, the conviction/conduct distinction lines up with the distinction between facts necessarily decided in a given case, including elements and specified statutory means, and truly irrelevant facts (i.e., facts other than specified statutory means).[135] In other words, sentencing judges do not violate the

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[129] Under the doctrine of constitutional avoidance, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909). For a discussion of the difference between avoiding a constitutional question and avoiding unconstitutionality, see Caleb Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 HARV. L. REV. FORUM 331 (2015).

[130] *See infra* Section III.D.

[131] Complexity is distinct from indeterminacy. Rebecca Sharpless, *Clear and Simple Deportation Rules for Crimes: Why We Need Them and Why It's Hard to Get Them*, 92 DENV. U. L. REV. 933, 939–41 (2015).

[132] *See supra* note 89 and accompanying text.

[133] NORMAN J. SINGER, SUTHERLAND'S STATUTES AND STATUTORY CONSTRUCTION §§ 46.06, 194 (6th ed. 2000) ("The use of different terms within related statutes generally implies that different meanings were intended.").

[134] *See* Mathis v. United States, 136 S. Ct. 2243, 2251–52 (2016).

[135] *Id.* at 2260–61 (Breyer, J., dissenting).

prohibition on inquiring into conduct if they only rely on what was necessarily decided in the particular prior criminal case. In the Florida theft example above, Justice Breyer would argue that judges cannot be characterized as inquiring into "conduct" if a defendant was actually charged with a "permanent" taking, even if "permanent" is not an element of the offense.[136]

The *Mathis* majority is correct. As discussed above, the *Mathis* dissent's position is premised on stringent rules regarding variances between what is charged and what is proven at trial.[137] If a single means is charged, Justices Breyer and Ginsburg assume it must be proven at trial.[138] But this assumption is unwarranted. Courts are split on the question of when a variance between the means named in a charging document and the one proved at trial is fatal.[139] For example, in the Florida theft example above, there is no guarantee that a trial judge would declare a fatal variance if the prosecutor charged a permanent taking but proved a temporary one at trial. The dissent's confidence that variances will result in failed convictions is misplaced. The only way to be sure that a fact was necessarily found is if it is an element—a fact that must be proven in all cases.[140]

The dissent's position is also contrary to the longstanding legal understanding of what a conviction is, especially as it contrasts with conduct. The legal term conviction is defined in terms of its constitutive elements.[141] At no point does Justice Breyer directly address why the term should not have this traditional meaning.

In sum, to talk about a conviction, as opposed to conduct, is to talk about the elements of the offense—what a prosecutor must prove in every case. The conviction/conduct distinction is

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[136] *See supra* notes 112–116 and accompanying text.

[137] *See supra* notes 108–109 and accompanying text.

[138] *See supra* note 116 and accompanying text.

[139] *See* Coltoff et al., *supra* note 109, § 286 ("According to some authority, when a crime can be committed by several acts, a variance between the act named in the indictment and the act proved is not fatal. However, there is also authority that where an offense may be committed in various ways, the evidence must establish it to have been committed in the mode charged in the indictment." (footnote omitted)).

[140] While courts disagree on the circumstances in which different means can be alleged than are proven at trial, there is no disagreement that alternate elements cannot be charged in the same count. *See supra* notes 115–116 and accompanying text. Nor can one offense be charged and another proven at trial. To the extent that prosecutors violate this rule, it is subject to challenge. As discussed above, prosecutorial practice does not establish whether alternatives are means or elements, only state law does. To the extent that the *Mathis* dicta about taking a "peek" at the record of conviction suggest otherwise, this is incorrect. *See infra* Part IV.

[141] *See In re* Winship, 397 U.S. 358, 364 (1970) ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

best understood as a restatement of the elements/means distinction. As explained below, the norm of statutory construction that requires courts to avoid constitutional questions supports this view.

B. The Apprendi *Problem*

The real source of Justice Breyer's hostility to a true elements test may be his underlying disagreement with *Apprendi*. In *Apprendi v. New Jersey*, the Court held that the Sixth Amendment's guarantee of a trial by jury requires that any fact that raises the maximum possible penalty for a crime, other than the fact of a prior conviction, must be decided by the jury, not a judge.[142] Justice Breyer—an author of the federal sentencing guidelines—dissented in *Apprendi* on the grounds that "[a] sentencing system in which judges have discretion to find sentencing-related factors is a workable system and one that has long been thought consistent with the Constitution" and "the Constitution treat[s] sentencing *statutes*" the same.[143]

Rather than reiterate his opposition to *Apprendi*, Justice Breyer brushed off the *Apprendi* issue presented in *Mathis*. In his view, when the assessment of what the jury necessarily found in an individual case is easy, there is no *Apprendi* problem because the judge is not making an independent finding.[144] Thus,

> [w]here, as [in *Mathis*], the State charges only one kind of "occupied structure"—namely, entry into a "garage"—[*Apprendi*'s] criterion is met. The State must prove to the jury beyond a reasonable doubt that the defendant unlawfully entered a garage. And that is so, whether the statute uses the term "garage" to refer to a fact that is a means or a fact that is an element.[145]

Drawing this inference from the record of conviction is not as easy as Justice Breyer suggests, however. As discussed above, courts disagree about when a variance between a charging document and judgment is fatal.[146] There is no guarantee that

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[142] Apprendi v. New Jersey, 530 U.S. 466, 490 (N.J. 2000).

[143] *Id.* at 559 (Breyer, J., dissenting). Justice Breyer was chief counsel of the Senate Judiciary Committee and helped Congress adopt a bill that became the Sentencing Reform Act of 1984. *See* Linda Greenhouse, *Guidelines on Sentencing Are Flawed, Justice Says*, N.Y. TIMES (Nov. 21, 1998), http://www.nytimes.com/1998/11/21/us/guidelines-on-sentencing-are-flawed-justice-says.html [https://perma.cc/7Z4E-Y258]. He served from 1985 to 1989 "as one of the original members of the United States Sentencing Commission." *Id.* For a discussion by Justice Breyer regarding the drafting of the sentencing guidelines, see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises on Which They Rest*, 17 HOFSTRA L. REV. 1 (1988).

[144] Mathis v. United States, 136 S. Ct. 2243, 2265 (2016) (Breyer, J., dissenting).

[145] *Id.* at 2265.

[146] *See supra* notes 108–109, 139–140 and accompanying text.

the prosecutor must prove "garage" at trial if "garage" is charged. Under Justice Breyer's approach, judges would have to research state law to be sure that the conviction comes from a jurisdiction that has a strict law forbidding variance between a charged means and evidence at trial. Even if a jurisdiction has strict rules on variances, judges would still have to review the entire record of conviction to see if the initial charging document was amended and to ensure that the judgment reflects the same charge as the charging document. It is thus burdensome to answer a basic question raised by Justice Breyer's position: What counts as a sufficiently easy inference? The mere possibility that the factual determination of what was necessarily found can sometimes be difficult proves that the inquiry goes beyond the simple "fact" of conviction. An *Apprendi* problem exists if judges are making inferences, even ones that appear simple. Moreover, the vast majority of criminal cases result in a plea rather than a jury verdict.[147] Thus, to talk about what the jury necessarily found is by definition theoretical, as the jury decides nothing in plea cases.

The problem disappears only if judges limit themselves to the legal inquiry of what elements constitute the offense. Because a prior conviction is the totality of its elements, it follows that any fact beyond the elements of the prior conviction requires a jury verdict and cannot be decided by a judge. Stated another way, a judge cannot impose a federal consequence—like a longer prison term or deportation—based on the means of commission, even if it is listed in the criminal statute and even if found by the jury. In *Mathis*, the burglary conviction could not serve as a basis for the sentencing enhancement, even though the prosecutor charged the unlawful entry as into a "garage" and the jury at trial would have been required to find "garage" to convict.[148]

Although Justice Breyer presented his position as complying with *Apprendi,* he, in fact, proposed an entirely new rule. In essence, he urged the Court to replace *Apprendi*'s phrase "the fact of a prior conviction"[149] with the fact of any element or means necessarily found by the jury. Of course, Justice Breyer might respond by arguing that the term "conviction" does not refer only to elements, but also to necessarily decided means. But this point circles us back to the

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[147] Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

[148] *Mathis*, 136 S. Ct. at 2257.

[149] Apprendi v. New Jersey, 530 U.S. 466, 490 (N.J. 2000) (employing the phrase "the fact of a prior conviction").

above discussion of whether the conviction/conduct distinction tracks the elements/means one.

Apprendi's "prior conviction" exception relied on the "certainty that procedural safeguards attached to any 'fact' of prior conviction."[150] In the proceedings relating to the prior conviction, defendants were entitled to the full array of procedural protections, including trial by jury on every fact necessary to the charged offense.[151] For the reasons discussed above, however, these "procedural safeguards" did not necessarily apply to alleged facts that were not elements of the offense.[152] The only way for recidivist sentencing to be based on procedurally safeguarded facts is for sentencing judges to engage in the purely legal inquiry of reviewing the elements of the prior conviction. In *Mathis*, the judge could not lawfully lengthen a federal sentence under the ACCA based on the Idaho burglary conviction because there was no "certainty" that a jury would have found the fact that made the Idaho offense fit the definition of federal generic burglary (i.e., entry into a structure rather than a nonstructure, like an automobile).[153]

It is far from clear that the prior conviction exception to *Apprendi*'s general rule even applies to cases like *Descamps* and *Mathis*. The prior conviction exception stems from the Court's pre-*Apprendi* decision in *Almendarez-Torres v. United States*, a case in which the nature of the conviction was uncontested.[154] In contrast, Descamps and Mathis had contested the nature of their prior records.[155] Moreover, as the Court emphasized in *Apprendi*, the holding in *Almendarez-Torres* was, "at best," an exception to the general rule that a jury must find any fact that increases the maximum penalty for a crime.[156] The days may be numbered for the prior conviction exception. As the Court acknowledged, "it is arguable that *Almendarez-Torres* was

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[150] *Id.* at 488.

[151] *See* Duncan v. Louisiana, 391 U.S. 145, 149–50 (1968) (right to jury trial in criminal cases).

[152] *See supra* notes 146–149 and accompanying text.

[153] *See supra* notes 81–84 and accompanying text.

[154] *Apprendi*, 530 U.S. at 488 (The defendant in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), "had *admitted* the three earlier convictions for aggravated felonies—all of which had been entered pursuant to proceedings with substantial procedural safeguards of their own—no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court.").

[155] Descamps v. United States, 133 S. Ct. 2276, 2282 (2013); Mathis v. United States, 136 S. Ct. 2243, 2250 (2016).

[156] *Apprendi*, 530 U.S. at 487.

incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested."[157]

The Sixth Amendment problem identified by Justice Stevens, writing for the majority almost three decades ago in *Taylor*, is thus significant.[158] Even if ambiguity exists about whether the term conviction means the sum of the elements of an offense, courts must avoid a statutory interpretation that presents a serious constitutional question. The categorical approach is not based solely on Congress's use of the word conviction or the impracticality of judges delving into the underlying conduct.[159] The Court in *Descamps* and *Mathis* was wise to steer clear of the Sixth Amendment issue.

The *Apprendi* problem not only affects federal sentencing cases but immigration cases as well. Although the Sixth Amendment right to a trial by jury does not apply in civil immigration cases, the Supreme Court has held that terms common to both federal recidivist sentencing statutes and immigration law must have the same meaning.[160] The same categorical approach applies in both the federal sentencing and immigration contexts.[161] Any interpretation dictated by the cannon of avoiding a constitutional question in the sentencing context thus applies with equal force in the immigration context.[162]

C. Extraneous Facts

The *Mathis* majority defended its means/elements categorical approach on the basis that it was fairer to defendants than the method proposed by the dissent. The Court noted that defendants have no incentive to dispute "extraneous facts"

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[157] *Id.* at 489–90 (footnote omitted). Supporting this prediction is the fact that Justice Thomas, who was in the majority in *Almendarez-Torres*, has since changed his position and disagrees with the "prior conviction" exception to the *Apprendi* rule. *Id.* at 520–21 (Thomas, J., concurring).

[158] *See supra* notes 43–45 and accompanying text.

[159] *See supra* note 42 and accompanying text.

[160] *See* Turner v. Rogers, 564 U.S. 431, 441 (2011) ("[T]he Sixth Amendment does not govern civil cases."). Terms that appear in both the INA and the federal criminal code "must [be] interpret[ed] . . . consistently, whether [the Court] encounter[s] its application in a criminal or noncriminal context." Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004).

[161] *See* Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013) (citing to both immigration and criminal sentencing cases when explaining the categorical approach); *Leocal*, 543 U.S. at 11 n.8 (The term "crime of violence" in 18 U.S.C. § 16 means the same in both criminal and noncriminal contexts.); *In re* Chairez-Castrejon, 26 I. & N. Dec. 349, 353–54 (2014), *vacated in part by In re* Chairez-Castrejon, 26 I. & N. Dec. 478 (2015) (recognizing that the categorical approach is the same in both contexts).

[162] *See* Clark v. Martinez, 543 U.S. 371, 385–85 (2005) (holding that a statutory interpretation based on constitutional avoidance applies in all cases, even those not presenting a constitutional problem).

because they, by definition, do not affect the possible sentence.[163] This dissent did not dispute this point but argued that defendants do have the incentive to dispute a fact that is a means when it is the only alternative charged.[164] In this scenario, the alternate means ceases to become extraneous, and the defendant had better dispute the alleged means if he or she hopes to prevail.

The dissent's observation may be true in cases that proceed to trial. But an overwhelming number of cases result in plea agreements.[165] As the *Mathis* majority points out, in plea cases, the defendant has no incentive to dispute the facts that are not elements because they are irrelevant to the sentence. They would only become relevant later in federal recidivist sentencing or immigration proceedings. The lack of incentive to contest non-element facts weighs in favor of the *Mathis* majority's approach requiring that the nature of a prior conviction turn only on its elements.

D. Practicality

Justice Breyer's *Mathis* dissent characterized the assessment of prior state convictions under the majority opinion as "a time-consuming legal tangle."[166] Because "there are very few States where one can find authoritative judicial opinions that decide the means/element question," Justice Breyer suggested that "[t]he parties will have to look to other state cases to decide whether that fact is a 'means' or an 'element.'"[167]

While it is true that researching state law can be complex, courts already must inquire into whether a fact is a means or an element to perform other, standard legal inquiries. As Justice Thomas has noted: "Courts have long had to consider which facts are elements in order to determine the sufficiency of an accusation."[168] The Court, when previously addressing the difference between elements and means, had no concerns about the viability of the endeavor of discerning means from elements in state law.[169]

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[163] *See supra* notes 91–92, 104 and accompanying text.

[164] *See supra* notes 105, 107–109 and accompanying text.

[165] *See supra* note 147 and accompanying text.

[166] Mathis v. United States, 136 S. Ct. 2243, 2264 (2016).

[167] *Id.*

[168] Apprendi v. New Jersey, 530 U.S. 466, 500–01 (2000) (Thomas, J., concurring). This inquiry is also central to the double jeopardy analysis.

[169] Schad v. Arizona, 501 U.S. 624, 636 (1991) (The "question whether statutory alternatives constitute independent elements of the offense . . . is a substantial question of statutory construction.").

Moreover, Justice Breyer's suggestion that adjudicators look to the law of other states is also misplaced, as states are separate sovereigns when it comes to defining the elements of offenses. The better rule is to resolve any ambiguity in favor of the defendant according to the longstanding rule of lenity.[170] Finally, Justice Breyer underestimates the amount of time his version of the modified categorical approach would require. As discussed above, even apparently easy cases may not be that simple. Evaluating a record of conviction requires not only reviewing documents other than the charging document but also researching state law on variances.

IV. *MATHIS*'S TAKE A "PEEK" DICTA IS INCONSISTENT WITH ITS HOLDING

Although Justice Breyer downplayed the practical difficulty of his test for when the modified categorical approach applies, he correctly identified the concern that few state courts have rendered definitive rulings on whether alternatives are elements or means. As mentioned above, eager to allay concerns about the possible inconclusiveness and difficulty of the elements/means inquiry, the *Mathis* majority suggested, in dicta, that the answer in ambiguous cases can involve taking a "peek" at the record of conviction.[171] According to Justice Kagan, "if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself…for 'the sole and limited purpose of determining whether [the listed items are] element[s] of the offense.'"[172]

The take a "peek" suggestion was not only unnecessary to the *Mathis* holding but inconsistent with it. The idea that adjudicators can research state law by looking at the record of conviction in a particular case misapprehends the nature of the means/elements question. The means/elements inquiry is not factual. In holding that the modified categorical approach turns on whether listed statutory alternatives are means or elements, the Court acknowledged that state law controls whether a fact is

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[170] Abramski v. United States, 134 S. Ct. 2259, 2274 (2014); United States v. Santos, 553 U.S. 507, 519 (2008); United States v. Bass, 404 U.S. 336, 347–48 (1971). Immigration law also has a cannon of statutory construction that requires courts to resolve ambiguity in deportation statutes in favor of the immigrant. Leocal v. Ashcroft, 543 U.S. 1, 12 n.8 (2004); INS v. St. Cyr, 533 U.S. 201, 320 (2001) (citing INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987)).

[171] Mathis v. United States, 136 S. Ct. 2243, 2256–57 (2016) (citing Rendon v. Holder, 782 F.3d 466, 473–74 (9th Cir. 2015) (Graber, J., dissenting)). This suggestion qualifies as dicta because Idaho law provided a definitive answer to the means/element question in Mathis's case. *Id.* at 2256.

[172] *Id.* (alterations in original) (quoting *Rendon*, 782 F.3d at 473–74).

a means or element.[173] By definition, the inquiry into state law is legal, not factual.

Whether state prosecutors charge in the alternative as a matter of practice is a question of fact that has no bearing on the legal question of whether state law treats the alternatives as means or elements. Because prosecutors could be routinely mischarging an offense, the record of conviction is irrelevant to settling the means versus elements question.

Even if the question of what state law requires were evidentiary rather than legal, no inference could be drawn from charging documents that list only one alternative. A simple example illustrates this point. Assume in the Florida theft example above that state law is silent as to whether the phrase "temporary or permanent" defines alternate means or alternate elements. In the face of this uncertainty, an immigration judge peeks at the charging document in various cases to see how Florida prosecutors actually charge the theft offense. The judge finds that the offense is sometimes charged as "permanent." What inference, if any, should the judge draw? The answer is none at all. The fact that a prosecutor charges a single statutory alternative is indeterminate. The prosecutor could have been prosecuting a single alternative because the alternatives are elements, which must be charged separately. Or, the prosecutor could have chosen to prosecute the case by charging only one of two alternate means.

The converse of this scenario, however, cuts in favor of the immigrant facing deportation. If theft is charged in a single count as "temporary or permanent," this practice indicates that the prosecutor was treating the alternatives as means rather than separate offenses. As explained above, two offenses cannot be charged in the same count.[174]

Mathis must be read as requiring courts to engage in the purely legal inquiry of whether state law treats alternatives as means or elements. To interpret the take a "peek" dicta in *Mathis* as sanctioning an evidentiary inquiry into prosecutorial practice conflicts with the Court's holding that the modified categorical inquiry is an elements test. Moreover, by permitting review of the record of conviction, it threatens to collapse the difference between the *Mathis* majority and Justice Breyer's dissent. In the absence of definitive state law that treats the

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[173] *Mathis*, 136 S. Ct. at 2256.

[174] *See supra* note 115.

alternatives as separate elements, statutory alternatives must be construed as means (thus making the statute indivisible).[175]

The *Mathis* holding requires sentencing enhancement and deportation to function like "an on-off switch."[176] Either every conviction under a statute can be used as a predicate offense for enhancement or deportation, or none can. In this view, it would be theoretically possible (though time-consuming) to make a list of all the separate state and federal offenses that could serve as ACCA or deportation predicate offenses. Statutes containing language in the alternative would have to be analyzed to see if they define means or elements. Alternatives that carry different sentences would be easy, as these must be elements. If no controlling state decision holds that an alternative is an element, the presumption must be that it merely states an alternate means. Such a list would be possible because the *Mathis* methodology does not turn on anything specific about an individual case. The only purpose of individual records of conviction is to tell a sentencing or immigration judge what statutory offense was at issue, which would then enable consultation of a list.[177]

Under the *Mathis* dissent's view, and under the take a "peek" dicta, no comprehensive list would be possible. Because the dissent would have the analysis focus on what was necessarily decided in a particular case and permit review of the record of conviction whenever alternatives are listed, it would not be possible to generate a list that included statutes written with alternatives (as many are). As discussed above, whether a conviction could serve as a predicate for ACCA enhancement or deportation would turn on how the prosecutor opted to charge the individual case, among other things. Moreover, if adjudicators were able to look at the record of conviction to determine the means/elements question, the individual record of conviction could affect the outcome of this determination, thus preventing the generation of a list that is valid in all cases. Because the *Mathis* majority paves the way

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[175] *See* Brief of the National Ass'n of Federal Defenders and the National Ass'n of Criminal Defense Lawyers as Amici Curiae in Support of Petitioner at 22, Mathis v. United States, 136 S. Ct. 2243 (Feb. 29, 2016) ("[I]f there is no clear legal assurance that a statutory definition would 'necessarily require an adjudicator to find the generic offense,' courts must presume that a defendant has not been 'convicted of' that generic offense." (quoting Descamps v. United States, 133 S. Ct. 2276, 2287 (2013))).

[176] *Descamps*, 133 S. Ct. at 2287 (citing Taylor v. United States, 495 U.S. 575, 601 (1990)) (stating "no one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case." (quoting *Taylor*, 495 U.S. at 601)).

[177] *Id.* at 2285.

for the creation of a list, which could then be mechanically applied to individual cases, its approach would generate more determinate results than that of the dissent, which would rely more on the review of individual documents.

The concern behind Justice Breyer's objection to the *Mathis* holding may be that many attempts at sentencing enhancements will fail, as ambiguity about whether a fact is a means or an element under state law should be resolved in favor of the defendant.[178] But this concern distills down to either an objection to *Apprendi*—which Justice Breyer believes was wrongly decided—or an objection to the presumption of innocence and requirement that guilt be proven beyond a reasonable doubt—core constitutional principles that the Court since its earliest days has defended.[179]

CONCLUSION

The Court's path to *Descamps* and *Mathis* may not have been as predetermined by prior precedent as Justice Kagan would have liked, but these decisions have cemented the categorical approach as a true elements test. Properly interpreted, and ignoring the take a "peek" dicta, these cases stand as a bulwark against government overreach in recidivist sentencing and deportation proceedings. In an era in which people on both sides of the political spectrum criticize the United States as overly punitive, an elements test ameliorates harsh sentencing and deportation laws and practices by ensuring a strict correspondence between the offense in question and the federal sentencing or immigration consequence.

Congress could respond by amending the law to mandate that recidivist sentencing and deportation turn on conduct rather than a conviction. Justice Kennedy has invited Congress to do just this.[180] But such a change in course would not only involve time-consuming "minitrials"[181] on the nature of the prior conduct but, in the sentencing context, it would squarely present the Sixth Amendment issue. Only a true elements test for recidivist sentencing satisfies the Sixth Amendment requirement that a jury decides all facts—apart

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[178] *See supra* note 175 and accompanying text.

[179] Apprendi v. New Jersey, 530 U.S. 446, 555 (Breyer, J., dissenting); Estelle v. Williams, 425 U.S. 501, 503 (1976) ("The presumption of innocence . . . is a basic component of a fair trial under our system of criminal justice.").

[180] Mathis v. United States, 136 S. Ct. 2243, 2258 (2016) (Kennedy, J., concurring).

[181] Moncrieffe v. Holder, 133 S. Ct. 1678, 1690 (2013) (citing Chambers v. United States, 555 U.S. 122 (2009)).

from the fact of a prior conviction—that raise the maximum possible sentence.[182]

To date, Congress has not accepted Justice Kennedy's invitation to revisit the basis for recidivist sentencing. It could be that the political will for such a move does not exist. If and when the political winds change, the constitutional challenge—with roots at least as far back as *Taylor*—will prove a formidable barrier. For now, *Descamps* and *Mathis* correctly interpret federal sentencing enhancement statutes, and by extension deportation provisions, to mandate a true elements test.

[182] *See supra* Section III.B.