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***Mathis v. U.S.* and the Future of the Categorical Approach**

Evan Tsen Lee[†]

For federal public defenders and immigration clinicians, the U.S. Supreme Court's June 23rd decision in *Mathis v. United States*¹ was cause for celebration. As they had hoped, the Court strongly reaffirmed its 2013 decision in *Descamps v. United States*,² which had protected the "categorical approach" to determining which prior convictions qualify for federal sentencing enhancements or negative immigration treatment. In the vast majority of cases, the categorical approach is favorable to criminal defendants and immigration petitioners because it prevents the government from getting incriminating facts into evidence.³ Emphatic as the *Mathis* majority's support for the categorical approach may be, however, the concurring and dissenting opinions call the approach's future into serious question.⁴

As I wrote in my SCOTUSblog opinion analysis, it was more than a little surprising that Justices Stephen Breyer and Ruth Bader Ginsburg dissented in *Mathis* after having joined the *Descamps* majority.⁵ "The majority's approach, I fear, is not practical," Breyer wrote, joined by Ginsburg.⁶ Although he made a tepid attempt to distinguish *Mathis* from *Descamps*,

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1. 136 S. Ct. 2243 (2016).

2. 133 S. Ct. 2276 (2013).

3. See, e.g., *United States v. Moncrieffe*, 167 F.Supp.3d 383, 406 (E.D.N.Y. 2016) (stating that, because of a particular statute's structure, "the categorical approach must result in a favorable decision for defendant").

4. *Mathis*, 136 S. Ct. at 2258 (Kennedy, J., concurring); *id.* at 2258–59 (Thomas, J., concurring); *id.* at 2259–71 (Breyer, J., dissenting).

5. Evan Lee, *Opinion Analysis: Victory for the "Categorical Approach" in Immigration and Federal Criminal Sentencing—But for How Long?*, SCOTUSBLOG (June 24, 2016, 10:12 AM), <http://www.scotusblog.com/2016/06/opinion-analysis-victory-for-the-categorical-approach-in-immigration-and-federal-criminal-sentencing-but-for-how-long>.

6. *Mathis*, 136 S. Ct. at 2263 (Breyer, J., dissenting).

Breyer may have had second thoughts about the workability of lower federal courts having to determine when they must use the unadorned categorical approach, as opposed to when they may preface the categorical approach with what has come to be known as the “modified categorical approach” (MCA).⁷ The simple use of the categorical approach tends to be individual-friendly, whereas the effectively pre-emptive MCA tends to be government friendly.

Justice Samuel Alito has always opposed the categorical approach, dissenting alone in *Descamps*,⁸ so it was no surprise that he dissented in *Mathis*. If Breyer’s and Ginsburg’s dissent in *Mathis* is taken to mean that they no longer support the categorical approach (not a given), that would make three votes to do away with it. The vote for the petitioner in *Mathis* was five to three, with the swing vote cast by Justice Anthony Kennedy.⁹ If he had voted with the dissenters, the decision below would have been affirmed by an equally divided Court. Kennedy’s explanation for why he voted with the majority should greatly alarm supporters of the categorical approach.

According to Kennedy, the precedents clearly supported the decision in *Mathis*.¹⁰ But he urged Congress to overrule those precedents, and *Mathis* itself. “[T]oday’s decision is a stark illustration of the arbitrary and inequitable results produced by applying an elements based approach to this sentencing scheme,” he wrote.¹¹ “[C]ontinued congressional inaction in the face of a system that each year proves more unworkable should require this Court to revisit its precedent in an appropriate case,” he concluded.¹² Although he stopped short of saying that he would overrule the categorical approach entirely, rather than simply overrule the *Mathis-Descamps* method of

7. *Id.*; see also *Descamps*, 133 S. Ct. at 2281 (“We have previously approved . . . the ‘modified categorical approach’—when a prior conviction is for violating a so-called ‘divisible statute.’ That kind of statute sets out one or more elements of the offense in the alternative”); *Shepard v. United States*, 544 U.S. 13, 16 (2005) (holding that when employing the “modified categorical approach,” a court is permitted to consult “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented”).

8. *Descamps*, 135 S. Ct. at 2295–2303 (Alito, J., dissenting).

9. See *Mathis*, 136 S. Ct. at 2243.

10. *Id.* at 2258 (Kennedy, J., concurring).

11. *Id.*

12. *Id.*

determining when the MCA may be used, it is hard to see as a practical matter how the Court could do one without doing the other.¹³

Mathis thus raises two questions: First, how likely is the Court to scrap the categorical approach? Second, assuming that the Court does not scrap the categorical approach, should the Court instead scrap the modified categorical approach?

I. PREDICTION MODE: IS THE CATEGORICAL APPROACH IN TROUBLE?

The categorical approach will be in trouble if either of two scenarios occurs.¹⁴ One scenario occurs if enough Justices decide (A) that the administrative difficulties are irremediable, *and* (B) if they attribute those difficulties to the categorical approach rather than to the MCA. The second scenario occurs if enough Justices decide that the categorical approach results in an unjustifiable windfall for federal criminal defendants and immigrants.

These two predictive scenarios correspond to the two leading normative arguments for abolishing the categorical approach, one pragmatic and the other ideological. The pragmatic argument against the categorical approach is that it is too hard to apply—that lower federal court judges are completely confused.¹⁵ Justice Kennedy based his concurrence at least in part on the existence of confusion, and Justices Breyer and Ginsburg cited lack of practicality in their dissent. The ideological

13. This is why I also believe that Breyer's and Ginsburg's dissent in *Mathis* possibly means they no longer generally support the categorical approach. Both Justices have authored majority opinions in the past cutting into the categorical approach. *See generally* *Nijhawan v. Holder*, 557 U.S. 29 (2009) (Breyer, J.) (applying a circumstance-specific approach rather than a categorical approach to determine which prior convictions qualify as fraud involving at least \$10,000); *United States v. Hayes*, 555 U.S. 415 (2009) (Ginsburg, J.) (applying a circumstance-specific approach rather than a categorical approach to determine which prior convictions qualify as involving domestic violence).

14. In the lead-up to *Descamps*, immigration clinicians took their case in favor of the categorical approach to the law reviews. *See, e.g.*, Alina Das, *Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011); Jennifer L. Koh, *Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIG. L.J. 257 (2011); Rebecca A. Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979 (2008).

15. *See, e.g.*, Koh, *supra* note 14, at 278 (“[I]n the recidivist sentencing and immigration contexts . . . the doctrine suffers from incoherence and confusion . . . as the courts struggle to apply the categorical approach.”).

argument against the categorical approach is that it gives criminal defendants and immigrants an undeserved reprieve from the rightful consequences of their prior convictions.¹⁶ Justice Alito clearly believes this, and perhaps Justice Kennedy does too.

Let us consider the first predictive scenario, in which a sufficient number of Justices decides that this area of the law has become unworkable. The Justices in *Mathis* disagreed about whether it is unworkable, and I predict that this disagreement will persist for some time. The early decisions following *Mathis* suggest that lower courts are “getting it,” but the decisions are too few to draw any meaningful conclusions.¹⁷

It is undoubtedly true that many, perhaps most, federal judges are confused about this area. (I base this on a combination of formal opinions and informal conversations with judges.) But it is absolutely critical to see that judges are not confused about how the categorical approach works. They understand that, when most federal sentencing and immigration standards speak of a “conviction,” those standards do not refer to the facts that underlie the conviction, but rather to the essential elements of the statute of conviction. Judges generally know that the categorical approach does not permit them to look at the facts.¹⁸ They also generally understand that the application of the categorical approach to a given conviction under a given federal statutory standard (sentencing or immigration) is supposed to produce a binary result: either the conviction qualifies under the relevant standard or it does not. There is no in-between.

What confuses lower federal court judges is under what circumstances the *modified* categorical approach applies. Look-

16. Cf. Caleb E. Mason & Scott M. Lesowitz, *A Rational Post-Booker Proposal for Reform of Federal Sentencing Enhancements for Prior Convictions*, 31 N. ILL. U. L. REV. 339, 369 (2011) (stating that the fortuity of the state of conviction has far too great of an impact on whether or not that individual is subjected to sentencing enhancements).

17. See, e.g., *Singh v. Att’y Gen.*, No. 15-2274, 2016 WL 5845692 (3d Cir. Oct. 6, 2016); *Gomez-Perez v. Lynch*, 829 F.3d 323 (5th Cir. 2016).

18. *Taylor v. United States*, 495 U.S. 575, 600 (1990) (“This question requires us to address a more general issue—whether the sentencing court in applying § 924(e) must look only to the statutory definitions of the prior offenses, or whether the court may consider other evidence concerning the defendant’s prior crimes. The Courts of Appeals uniformly have held that § 924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.”).

ing at the facts is a strong occupational proclivity for judges; it's what they do. Thus there is a powerful, non-ideological impulse driving their desire to apply the MCA. Before *Descamps*, many lower federal court judges could not have explained the purpose of the MCA.¹⁹ They only knew that it permitted them to look at the facts, which in most cases led to a conclusion that the individual had engaged in conduct that placed them within the relevant sentencing or immigration standard. Again, it cannot be sufficiently emphasized that this feels like the essence of “judging”—the application of a legal standard to specific facts, producing a conclusion. But this judicially intuitive view of the MCA is flatly incorrect. *Descamps* made clear what the Court first stated in the path-marking 1990 case of *Taylor v. United States*:²⁰ the MCA is used only for the limited purpose of determining under which portion of a statute the prior conviction was obtained.²¹ Unless a court can determine which part of a statute produced a given conviction, it cannot conclusively determine whether the conviction qualifies as, to give a few examples, a “violent felony” (federal sentencing)²² or an “aggravated felony”²³ or “crime involving moral turpitude” (immigration).²⁴ The MCA is *not* there to enable the judge to use the facts to settle the ultimate legal question, which is whether the conviction qualifies under the relevant standard.

19. See, e.g., *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (“The categorical and modified categorical frameworks, first outlined by the Supreme Court in *Taylor v. United States*, establish the rules by which the government may use prior state convictions to enhance certain federal sentences and to remove certain aliens. In the twenty years since *Taylor*, we have struggled to understand the contours of the Supreme Court’s framework.” (citation omitted)), *abrogated by* *Descamps v. United States*, 133 S. Ct. 2276 (2013).

20. *Taylor*, 495 U.S. at 600.

21. *Descamps*, 133 S. Ct. at 2281.

22. 18 U.S.C. § 924(e)(2)(B). Section 924(e)(2)(B) was found to be unconstitutionally vague in *Johnson v. United States*, 135 S. Ct. 2551 (2015).

23. 18 U.S.C. § 16. Section 16(b) has been held unconstitutional by several courts of appeal and the Supreme Court will hear a case on its constitutionality in the October 2016 term. See *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, No. 15-1498, 2016 WL 3232911 (U.S. Sept. 29, 2016); see also *Golicov v. Lynch*, No. 16-9530, 2016 WL 4988012 (10th Cir. Sept. 19, 2016); *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015).

24. 8 U.S.C. § 1182(a)(2)(A)(i)(I). Crimes involving moral turpitude have been subjected to wide-ranging criticism as well. See, e.g., *Arias v. Lynch*, No. 14-2839, 2016 WL 4468076, at *6 (Posner, J., concurring) (“It is preposterous that that stale, antiquated, and, worse, meaningless phrase should continue to be a part of American law.”).

That always remains a purely legal question, because it is categorical.

Although the MCA's limited purpose should have been clear long ago,²⁵ the Court used *Descamps* to reiterate the point.²⁶ *Descamps* therefore constituted a major step forward in the Court's MCA jurisprudence. But *Descamps* effectively shifted the locus of uncertainty from the *purpose* of the MCA to its proper *occasion*. *Descamps* said that courts must use the MCA when the underlying statute is "divisible," and that they may not use it when the statute is "indivisible."²⁷ But courts have struggled with figuring which statutes were divisible.²⁸ In my view, there were multiple causes for this confusion. First, it was unclear from Supreme Court opinions whether the litmus test for divisibility was essential elements or means of commission. The Court has now resolved that confusion in favor of elements.²⁹ Second, however, it was also unclear how to determine whether a given statutory term constitutes an element or a means, and that confusion may well continue to a significant degree after *Mathis*. Is "elementness," to coin an ugly term, a function of the requirement of jury unanimity? Of the requirement of specificity in pleading? Of the structure of the statutory text (e.g., separate subsections versus enumeration within a single sentence versus cross-referencing to another statute)? Third, in the immigration area, at least, the proper applicability of the MCA was grossly distorted by the Attorney General's decision in a case called *In re Silva-Trevino*.³⁰ The decision has

25. In no small part because of cases like *Aguila-Montes* and *In re Silva-Trevino*. See *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011), *abrogated by* *Descamps v. United States*, 133 S. Ct. 2276 (2013); *In re Silva-Trevino*, 24 I. & N. Dec. 687 (Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Att'y Gen. 2015).

26. *Descamps*, 133 S. Ct. at 2281 ("[T]he modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction.").

27. *Id.* at 2281–82.

28. See, e.g., *United States v. Mathis*, 786 F.3d 1068, 1074 (8th Cir. 2015) (stating that the Court found that the "means/elements distinction . . . was explicitly rejected in *Descamps*" but that this was a matter of contention between the circuit courts), *overruled by* *Mathis v. United States*, 136 S. Ct. 2243 (2016).

29. *Mathis*, 136 S. Ct. at 2256.

30. 24 I. & N. Dec. 687 (Att'y Gen. 2008), *vacated*, 26 I. & N. Dec. 550 (Att'y Gen. 2015).

since been abrogated in light of *Descamps*, but the damage will take long to repair.

So, is the categorical approach in trouble? If so, it will not be because of problems in administering the categorical approach itself. As I have pointed out, the real problem is administering the MCA, not the categorical approach.³¹ But some Justices may believe that the categorical approach cannot stand without the availability of the MCA. They may well ask how a court can apply the categorical approach if it cannot first determine which portion of the statute of conviction is involved. Yet there is a simple response to this: if the government cannot carry its burden of showing that the conviction satisfies the relevant sentencing or immigration standard, then the conviction simply does not qualify. Imagine the following rule: in any case where it is ambiguous which portion of a statute generated the conviction in question, the conviction simply does not qualify. In other words, if the conviction's statutory etiology is unclear from the face of the pleadings, the conviction does not apply. That is a perfectly coherent rule. That rule would be easy to apply.

Of course, such a rule would lead to more convictions being disqualified than at present, which brings us back to the ideological argument against the categorical approach. Determining whether convictions qualify on a categorical, rather than factual, basis leads to a "windfall" for federal criminal defendants and immigrants.³² In a case where a look at the facts clearly indicates that the defendant's underlying conduct "fits" the relevant standard, why should the defendant or immigrant escape his just deserts merely because some hypothetical defendant could be convicted under that statute for conduct that would not fit the standard? The categorical approach judges a person not on what *he* did, but on what some imaginary person might do.

31. It is true that the "least culpable conduct" form of the categorical approach, which is controlling in most sentencing and immigration standards, has an inherently arbitrary stopping point to it. Under this mode of analysis, judges must imagine the least culpable conduct that nonetheless violates the statute of conviction, in order to determine whether it meets the relevant sentencing or immigration standard. But the arbitrariness of the least culpable conduct test is not what prompted the Court to grant certiorari in *Descamps* and *Mathis*; it was uncertainty about when courts may use the MCA that drove those decisions.

32. See *supra* note 16 and accompanying text.

To understand the “windfall” argument more concretely, let’s look at *Mathis* itself. Mathis faced a federal mandatory minimum sentence based on prior convictions in Iowa for “burglary.”³³ The federal generic standard for “burglary” is an unprivileged entry into a fixed structure with the intent to commit a felony therein.³⁴ To qualify as burglary under federal sentencing law, the entry may not be into anything that moves, such as a car, boat, or plane.³⁵ The problem in Mathis’s situation was that the Iowa burglary statute includes cars, boats, and planes.³⁶ A person can be convicted of burglary in Iowa for breaking into a car with the intent to commit a felony therein. So, did Mathis’s “burglary” convictions qualify?

“How could they not qualify?” asked the federal prosecutor. The record clearly indicated that Mathis had broken into buildings, not cars or boats.³⁷ The lower courts agreed, saying that the MCA applied to the Iowa burglary statute whether “vehicles” was an essential element or merely a means of commission.³⁸ It was this lower court holding that the Supreme Court reversed in *Mathis*, reiterating the point made in its precedents, that the MCA only applies where the statutory term in issue is an element, and not if it is merely a means of commission.³⁹ Mathis, therefore, escaped a mandatory minimum sentence on the technicality that Iowa law treats the places of burglaries as means rather than elements, which surely has nothing to do with his dangerousness, his moral desert, or anything else connected to the facts of his situation. It thus feels like a windfall. This was the main point of Justice Alito’s dissent and Justice Kennedy’s concurrence in *Mathis*.

The remainder of this Essay will be devoted to showing why the windfall argument is mistaken. To (sort of) keep my promise of a prediction, though, I think the categorical approach is one of the many doctrines whose fate turns on the Justice appointed by President-elect Trump. I count Alito as a sure vote to overrule the categorical approach based on the windfall rationale. His dissenting opinions in *Mathis* and

33. *United States v. Mathis*, 786 F.3d 1068, 1070 (8th Cir. 2015), *overruled by Mathis v. United States*, 136 S. Ct. 2243 (2016).

34. *Id.* at 1072.

35. *See id.*

36. *Id.* at 1074.

37. *Id.* at 1073.

38. *Id.*

39. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

Descamps leave little doubt about that. I view Kennedy as the next most likely to vote for overruling the categorical approach. I would rate Breyer and Ginsburg as slightly more likely than not to overrule the categorical approach, but their views may be complicated by the possibility of other ways of applying the MCA. Thomas, Kagan, and Sotomayor would seem to be sure votes to retain the categorical approach—Thomas on Sixth Amendment grounds,⁴⁰ Kagan and Sotomayor based on *stare decisis*. (Kagan and Sotomayor may also be sympathetic to the categorical approach because it abates some of the harshness of the INA.) Roberts is a shaky vote to retain the categorical approach; if I had to guess, I think he would be swayed by *stare decisis*. That would leave it up to Justice Scalia’s replacement,⁴¹ so I shall go no further with my prediction.

II. NORMATIVE MODE: ABOLISH THE MCA

Even if *Mathis* does not clear up the confusion over when the modified categorical approach may be applied, the correct remedy is not to abolish the categorical approach. The correct remedy is to abolish the modified categorical approach. The latter exists because a court cannot apply the categorical approach to a prior conviction unless it can ascertain what the conviction was for. In *Mathis*, the conviction was for burglary in Iowa, which could be an intrusion into a house, car, boat, or plane to commit a crime.⁴² Yet under the ACCA, “burglary” only includes intrusion into a fixed structure. Thus, the lower federal courts used the modified categorical approach to “peek” at the facts,⁴³

40. See *Johnson v. United States*, 135 S. Ct. 2551, 2563–73 (Thomas, J., concurring).

41. Justice Scalia was an adamant defender of the categorical approach. See Andrea Sáenz, *Justice Scalia’s Crimmigration Legacy*, CRIMMIGRATION (Feb. 16, 2016, 4:00 AM), <http://crimmigration.com/2016/02/16/justice-scalias-crimmigration-legacy> (“Scalia was an extremely reliable vote for the ‘categorical approach’ . . .”).

42. *Mathis*, 786 F.3d at 1073.

43. See *Rendon v. Holder*, 782 F.3d 466, 474 (9th Cir. 2015) (Kozinski, J., dissenting) (“*Descamps* permits us to peek at the Shepard documents in order to determine which approach to use. If those documents show that a statutory term was an element of the offense, we may employ the modified categorical approach and use the documents to determine whether a defendant committed a state crime falling within the ambit of the relevant federal statute. But if the *Shepard* documents instead show that the statutory alternative was simply a means of committing the offense, then we are not permitted to further use those documents to determine whether the defendant in fact committed an offense falling within the federal definition.”).

which showed that Mathis had intruded into houses, not cars, boats, or planes—and thus they upheld Mathis’ mandatory minimum sentence.⁴⁴

The *Mathis* majority ultimately held that the lower federal courts should not have used the modified categorical approach because, under Iowa case law, the place of a burglary is not an essential element but merely a means of committing an element.⁴⁵ For the moment, however, the critical point is simply that none of this would matter if the Court were simply to abolish the modified categorical approach. The Court could simply adopt the following rule, foreshadowed above: *in any given case where it is not possible to determine which portion of a statute gave rise to a conviction, the conviction may not be used to support an enhanced sentence or a negative immigration consequence*. In other words, under my proposed rule, where a court cannot apply the categorical approach without first accessing the modified categorical approach, the case is at an end. The government loses.

How can I say so casually that the government should lose such a case? In the vast majority of these sentencing enhancement and immigration cases, the prior conviction *factually* qualifies under the relevant standard. Yet to view these results as a windfall is to lose perspective entirely. Every prior conviction has already been punished—an undeniable fact that is effectively obscured by the wholesale judicial acceptance of the anti-recidivist agenda. I understand that for reasons of historical accident and administrative pragmatism, the Court has long held that it does not violate double jeopardy for government to enhance criminal sentences based on the fact of a prior conviction.⁴⁶ A fortiori, it is not unconstitutional for the United States to deport someone for a prior conviction, even though the person has already been punished for it. I will not here attempt to mount a full case for the unconstitutionality of using prior

44. *Mathis*, 786 F.3d at 1073.

45. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

46. *Witte v. United States* 515 U.S. 389, 400 (1995) (“In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense ‘is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,’ but instead as ‘a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.’” (citing *Gryger v. Burke*, 334 U.S. 728, 732 (1948)); see also *Spencer v. Texas*, 385 U.S. 554, 560 (1967); *Oyler v. Boles*, 368 U.S. 448, 451 (1962); *Moore v. Missouri*, 159 U.S. 673, 677 (1895).

convictions to support secondary punishments,⁴⁷ but I will strongly assert that this practice awards a windfall to the government. How does one explain to the average American that, after he has served his full punishment for a conviction, he can be given two times, or three times, or even ten times the normal sentence for some future crime based on the same conviction? How does one explain that this is not “double punishment” and therefore does not constitute double jeopardy?

Suppose a person committed a burglary and was given a suspended sentence, serving no prison time. Further suppose that, within the period of probation, he commits another burglary. No one has a problem with him being made to serve a full sentence under those circumstances. Now suppose he commits a petty theft after the probationary period for the burglary has lapsed. May he be made to serve the original sentence for the burglary? Clearly not; that would be double jeopardy. Then why may he be given a long sentence for the petty theft—perhaps even more severe than the sentence for the original burglary—on the ground that he had a prior conviction for burglary? It will not do simply to say that he is not being punished for the burglary, but rather for being a “repeat offender,” when (in this case) his repeat offender status stems solely from the burglary. From a logical standpoint, this is bootstrapping of the worst kind. This is every bit as difficult for the layperson to understand as it is for a layperson to understand that not all “burglaries” are “burglary,” or to say that the burglary of a house cannot be legally treated as the burglary of a house if it was achieved under a statute that also covers the burglaries of cars and boats.

This, finally, brings us back to what appears to be the real reason that the categorical approach seems to be losing favor on the Court. Some of the Justices (Alito and Kennedy, at least) think that it gives defendants and immigrants a windfall.⁴⁸ But this is mistaken. If one insists on using the language of moral desert here, the categorical approach deprives the government

47. Such an argument may be grounded in the fact that the distinction between increased sentences as mere “enhancements” rather than “additional punishments” “ceases to make sense as the length of recidivism enhancements increases to the point where the triggering conduct cannot support the severity of the sentence.” Nathan H. Seltzer, *When the Tail Wags the Dog: The Collision Course Between Recidivism Statutes and the Double Jeopardy Clause*, 83 B.U. L. REV. 921, 935 (2003).

48. See *Descamps v. United States* 133 S. Ct. 2276, 2295–2303 (Alito, J., dissenting); *supra* notes 10–13 and accompanying text.

of *its* windfall. The government's windfall under current law is being allowed to impose multiple punishments for the same crime.

The precedents, of course, say otherwise. Courts have consistently rejected constitutional challenges to sentencing enhancements based on prior convictions.⁴⁹ More specifically, they have rejected constitutional challenges to mandatory minimums based on prior convictions.⁵⁰ This would seem to follow logically from the Supreme Court's holding that it does not violate the Double Jeopardy Clause for a legislature to impose multiple punishments for a single crime.⁵¹ The only way that the Court could get to these conclusions was for it essentially to treat the Double Jeopardy Clause as only prohibiting multiple *prosecutions* for the same crime, and not multiple *punishments*. And that is, in reality, what the Court has done.

Carissa Byrne Hessick and F. Andrew Hessick have made a compelling argument that, correctly interpreted, the Double Jeopardy Clause prohibits sentencing enhancements based on prior convictions.⁵² "[T]he right against double jeopardy ought to limit the government's ability to increase punishments for recidivists," they assert.⁵³ "At the core of the prohibition on double jeopardy is a limitation on the government's ability to impose repeated punishment against one individual for a single offense."⁵⁴ They demonstrate that the rhetoric of Supreme Court decisions has supported the notion that double jeopardy includes multiple punishments, not just multiple prosecu-

49. See *Spencer v. Texas*, 385 U.S. 554 (1967); see also *Parke v. Raley*, 506 U.S. 20, 26 (1992) ("[W]e have repeatedly upheld recidivism statutes 'against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities.'" (citations omitted)); *North Carolina v. Pearce*, 395 U.S. 711, 723 (1969) (holding that double jeopardy principles do not pose a barrier to imposing a greater sentence on reconviction).

50. See, e.g., *United States v. Reynolds*, 215 F.3d 1210, 1214 (11th Cir. 2000), cert denied, 531 U.S. 1000 (2000) ("[E]very circuit to consider the issue has held that [ACCA's mandatory minimum sentence] is neither disproportionate . . . nor cruel and unusual punishment.").

51. See *Albernaz v. United States*, 450 U.S. 333, 344 (1981).

52. Carissa Byrne Hessick & F. Andrew Hessick, *Double Jeopardy as a Limit On Punishment*, 97 CORNELL L. REV. 45 (2011).

53. *Id.* at 46.

54. *Id.* at 47. A previous commentator noted, "Tension undoubtedly exists between recidivist statutes and the Double Jeopardy Clause." Seltzer, *supra* note 47, at 946.

tions.⁵⁵ They further demonstrate, however, that the Court has subtly but surely shifted to an understanding of double jeopardy that includes only multiple prosecutions.⁵⁶ This shift was in large part a judicial response to the perceived societal need for recidivist punishments in the face of increased crime.

This is not the place for a full review of the merit in the Hessicks' claim.⁵⁷ All matters of constitutional interpretation call for a full exposition of textual, historical, and precedential materials. (Although, in my view, the Hessicks do demonstrate convincingly that history alone does not preordain a finding that the Double Jeopardy Clause covers only multiple prosecutions.)⁵⁸ I will confine my analysis to the "windfall" claim that Justice Alito, and perhaps Justice Kennedy, advance as against the categorical approach. In short, my argument is that the constitutionally and morally suspect status of punishment based on prior convictions negates the windfall argument against the categorical approach, and therefore that the decision of whether to abrogate or retain the approach should turn on pragmatic rather than moral considerations.

If one believes, as I do, that it is *at least* questionable whether the government should be constitutionally and morally permitted to punish a person more than once for the same crime—with subsequent punishment often much more severe than the original one⁵⁹—then the government has no moral

55. Justices Scalia and Thomas have called for the Court to openly reject the idea that the clause covers multiple punishments based on the textualist claim that "jeopardy" denotes only the harm of having to defend serial prosecution rather than the harm of serial penal coercion. See *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 804–05 (1994) (Scalia, J., dissenting).

56. Hessick & Hessick, *supra* note 52, at 49 (noting a "modern shift in interpreting the Double Jeopardy Clause as primarily a prohibition on multiple prosecutions rather than also as a robust prohibition on multiple punishments").

57. Some eminent scholars have disagreed with the proposition that double jeopardy covers multiple punishments. See, e.g., George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827.

58. Hessick & Hessick, *supra* note 52, at 49.

59. Michael R. Schechter, Note, *Sentencing Enhancements Under the Federal Sentencing Guidelines: Punishment Without Proof*, 19 N.Y.U. REV. L. & SOC. CHANGE 653, 654 (1992) ("For instance, a sentencing guideline might force a judge to increase a defendant's sentence from five years to ten years once the prosecution showed that the defendant used an uzi instead of a switchblade during an assault."). Of course, in the case of immigration cases, the results can be devastating. See *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation "may result . . . in loss of both property and life, or of all that makes life worth living"); see also Erica Steinmiller-Perdomo, Note, *Con-*

standing to claim that the categorical approach results in a windfall to criminal defendants and immigrants.⁶⁰ It is true that someone in the position of Mathis benefits from the categorical approach's focus on the acts of hypothetical actors rather than on his own acts. Mathis ultimately escaped a severe mandatory minimum sentence because the Iowa burglary statute can be used to prosecute people who break into cars and boats, even though Mathis himself unquestionably broke into fixed structures. But this is only an undeserved moral windfall if one accepts the underlying moral premise that Mathis, who was already punished for his burglaries, should be punished again, and much more severely. If the community's moral compass suggests that people should be punished on the basis of their own acts and not those of hypothetical actors, then I would strenuously argue that it also holds that people should not be punished twice for the same crime. The metaphor of social contract is often invoked, in literature and political dialogue, to recognize that a person who has "paid his debt to society" by serving out his punishment should be treated like anyone else. The notion of punishing for prior convictions is akin to saying that a debtor can be made to pay the same debt over and over again.

To be sure, moral analysis resists precise calibration. But it is critical to see that this moral claim against recidivist punishment is, in this situation, a moral *counterclaim*. The claim that criminal defendants and immigrants often receive a "windfall" from categorical analysis is a moral claim. It is certainly not based on positive law—quite the contrary, since categorical analysis is the law. It can perhaps be recast as some kind of specious claim about "legislative intent," as in, "surely Congress cannot have wanted defendants and immigrants with prior convictions to escape sentencing enhancements and removal based on what hypothetical actors might have done." But this will not do, as it can just as easily be argued that "surely Congress cannot have wanted people to be punished multiple

sequences Too Harsh for Noncitizens Convicted of Aggravated Felonies?, 41 FLA. ST. U. L. REV. 1173, 1187–88 (detailing the harsh consequences for immigrants who have been convicted of an aggravated felony).

60. In terms of whether negative immigration consequences constitute "punishment," I follow the Supreme Court's holding in *Jordan v. DeGeorge*, 341 U.S. 223, 243 (1951) ("Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation.").

times for the same crime even when it is not clear that their prior convictions qualify under the relevant statutes.”

This brings us to my ultimate argument. The MCA allows multiple punishment even when it is not clear that their prior convictions qualify. If the “divisibility” test of *Descamps* and *Mathis* does not succeed in clearing matters up, then the MCA will be used in some cases where the statutes are indivisible, which is illegal. If one does not believe that the test of divisibility can be administered successfully, then the proper remedy is to abrogate the MCA, not the categorical approach. The categorical approach is easy to apply, and it does not lead to a *net* moral windfall for anyone. The MCA, on the other hand, leads to some cases where people are being illegally punished for the same crime twice because courts are confused about whether statutes are divisible or indivisible. Time will tell whether the divisibility jurisprudence of *Descamps* and *Mathis* is working, as a practical matter. If it works, then the status quo should stand. If it does not, then the MCA should be overruled. The result—that fewer people will be punished twice for the same crime—is something American society can live with.