JUDICIAL PRAGMATISM AND JUDICIAL CHOICE IN THE WORK OF JUDGE JAMES WYNN*

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INTRODUCTION

Judges and justices often argue that judicial philosophy, not partisan ideology, creates the divisions we sometimes see on multimember courts.[1] The concept of judicial philosophy, however, is an elusive one. Professor Stephen Carter once wrote that "trying to define it at all is . . . 'like trying to put handcuffs on an eel.'"[2] Even setting aside definitional difficulties, pinning down an individual judge's philosophy can be surprisingly difficult. After all, many judges do not directly explain their approach to judicial decision-making.[3] Further, no single decision or handful of decisions is necessarily representative

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1. *See, e.g.*, *What Justice Kagan Told ABA About Decision-Making, Politics, Pro Bono, More*, AM. BAR ASS'N (Nov. 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/november-2018/what-justice-kagan-told-the-aba-about-decision-making--politics-/ [https://perma.cc/NRQ3-JAA3] ("Although [Justice Elena Kagan] said the public suspects the [Supreme Court's] 5-4 decisions 'reflect the party of the president who nominated us,' in fact, when they rule on those cases, 'it's not because we're partisan in the way that people in Congress are partisan; it's because we have certain judicial philosophies . . . .'"); Chandelis Duster, *Justice Amy Coney Barrett Says Supreme Court is "Not a Bunch of Partisan Hacks*," CNN (Sept. 13, 2021, 9:45 AM), https://www.cnn.com/2021/09/13/politics/amy-coney-barrett-supreme-court-not-partisan/index.html [https://perma.cc/SML8-EKFT] (quoting Justice Amy Coney Barrett as emphasizing that Supreme Court justices are not "partisan hacks," but rather are separated by "judicial philosophies"). Interestingly, there is a division in the academic literature regarding the extent to which this is empirically true. *Compare* Daniel A. Farber, *Do Theories of Statutory Interpretation Matter? A Case Study*, 94 NW. U. L. REV. 1409, 1410, 1433 (2000) (comparing statutory-interpretation opinions by pragmatist Judge Richard Posner and textualist Judge Frank Easterbrook and concluding that "the effect [of different theories of interpretation] is quite limited," though acknowledging that the author "may be wrong in [his] evaluation of the effect of jurisprudential theories on Posner and Easterbrook, or in extrapolating to other judges"), *with* Francisco J. Benzoni & Christopher S. Dodrill, *Does Judicial Philosophy Matter?: A Case Study*, 113 W. VA. L. REV. 287, 289–90 (2011) (comparing a variety of opinions by two judges who were aligned ideologically but not in terms of judicial philosophy, Judge J. Harvie Wilkinson III—who "has a pragmatic streak"—and textualist Judge J. Michael Luttig, and concluding "that judicial philosophies do matter, at least in some cases").

2. Stephen Carter, *The Confirmation Mess*, 101 HARV. L. REV. 1185, 1190 (1988) (quoting HAROLD SCHONBERG, GRANDMASTERS OF CHESS 245 (rev. ed. 1981)).

3. *See, e.g.*, Benzoni & Dodrill, *supra* note 1, at 295.

of an appellate judge's philosophy. On any multimember court, an authoring judge must be willing to compromise at least somewhat with their colleagues. And all judges, both those who sit on multimember courts and those who decide cases alone, are limited by the manner in which the parties frame the case. Finally, even for judges who express commitment to a specific philosophy—such as textualism—the attendant principles will only provide guidance in a certain subset of cases.

This Essay, therefore, will not seek to capture all elements of the judicial philosophy of Judge James A. Wynn.[4] Rather, my goal is to explain what I see as a fundamental guiding principle in Judge Wynn's work—the concept of judicial choice—and how I think the background judicial philosophy of pragmatism informs that principle, both ex ante and ex post. That is, I will argue that judicial pragmatism informs Judge Wynn's emphasis on the idea of judicial choice as well as the decisions he makes in circumstances where judicial choice is to be employed.

Parts I and II describe, respectively, the philosophy of judicial pragmatism and the principle of judicial choice through the lens of Judge Wynn's approach to these concepts. In Part III, I provide a more in-depth overview of how these ideas apply in the work of Judge Wynn through an analysis of his celebrated opinion in *Nelson v. Freeland*.[5]

I. JUDICIAL PRAGMATISM

The judicial philosophy of pragmatism covers wide swaths of thought and scholarly debate. It is, almost by definition, idiosyncratic.[6] Yet the big-tent nature of the term does not render it meaningless. Plenty of judges and justices are unlikely to be described, or to describe themselves, as pragmatists.[7] So, while

4. Judge Wynn has served on the U.S. Court of Appeals for the Fourth Circuit since 2010. Before that, he spent two decades as an appellate judge on the state courts of North Carolina, including a brief stint on the Supreme Court of North Carolina in 1998 as an interim appointee. *See Judge James Andrew Wynn*, U.S. CT. APPEALS FOR FOURTH CIRCUIT, https://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-james-andrew-wynn [https://perma.cc/Q3XE-CJUG]; Sarah Lindemann Buthe, *Hon. James A. Wynn, Jr. Circuit Judge, U.S. Court of Appeals for the Fourth Circuit*, FED. LAW., Sept. 2011, at 14, 14. And prior to his state-court experience, he served as a military trial judge during his service with the U.S. Navy. Buthe, *supra*, at 14.

5. 349 N.C. 615, 507 S.E.2d 882, 882 (1998).

6. *E.g.*, Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1653 (1990) (labeling pragmatism as "an umbrella term for diverse tendencies in philosophical thought"); Joshua Ulan Galperin, *Trust Me, I'm a Pragmatist: A Partially Pragmatic Critique of Pragmatic Activism*, 42 COLUM. J. ENV'T L. 425, 433 (2017) (describing the term "pragmatism" as "a vague and unruly word").

7. *See* Duster, *supra* note 1 (quoting Justice Barrett as self-identifying as an "originalist" "and citing Justice Stephen Breyer as an example of 'pragmatism'"); Frank H. Easterbrook, *Pragmatism's Role in Interpretation*, 31 HARV. J.L. & PUB. POL'Y 901, 902–04 (2008) (arguing that pragmatism is the province of the political branches and originalism that of the judiciary); *see also* Benzoni & Dodrill,

the term is not as narrow a descriptor as some, it does provide some insight into how a judge is likely to approach a legal problem.

Judicial pragmatism is not merely "pragmatism" in the quotidian sense transported into the judicial context. In common parlance, pragmatism emphasizes "a practical approach to problems and affairs."[8] It is often contrasted with idealism and might also be put in opposition to creative or even intellectual approaches.[9] While this colloquial meaning has some applicability to judicial pragmatism, the fit is only partial. For example, judicial pragmatism tends to be anti-formalistic, but it cannot fairly be described as unidealistic, uncreative, or anti-intellectual.[10] For that reason, "[a]lmost uniformly, writers . . . are obliged to begin discussions of philosophical pragmatism by distinguishing it from vernacular pragmatism."[11]

Philosophical pragmatism is a school of thought that was popular in the United States in the late nineteenth and early twentieth centuries. Major proponents included Charles Sanders Peirce, William James, and John Dewey.[12] Philosophical pragmatism "starts with a critical approach to the very idea of truth and knowledge," rejecting the idea "that we can reason our way to absolute knowledge about the world, and about what is right and wrong."[13] Instead, to determine values, "[t]he pragmatist says that we look to social goals and our past experience and simply ask which efforts have worked in the past and which can plausibly work in the future."[14]

Legal pragmatism places some of the insights of philosophical pragmatism into a specific, judicial context.[15] Distilled to its simplest form, legal pragmatism reflects "[a] commonsense, practical, nonideological way of dealing with

supra note 1, at 289–90 (describing Judge Posner as a "devout pragmatist," Judge Wilkinson as having "a pragmatic streak," and Judges Luttig and Easterbrook as nonpragmatic textualists).

8. *Pragmatism*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/pragmatism [https://perma.cc/H9LF-98K6].

9. *Pragmatic*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/pragmatic [https://perma.cc/PX43-T7PG].

10. *See* Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 539 (2012) [hereinafter Posner, *The Rise and Fall of Judicial Self-Restraint*] (defining judicial pragmatists as "[j]udges who don't insist that a legalistic algorithm will decide every case"); *cf.* Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 446 (1990) (arguing that "pragmatism operates as a kind of exhortation" to prevent legal scholars from having their theories "*become*[] [their] reality" as opposed to "helping the scholar to understand or deal with experiential reality").

11. Galperin, *supra* note 6, at 434.

12. Michael Sullivan & Daniel J. Solove, *Can Pragmatism Be Radical? Richard Posner and Legal Pragmatism*, 113 YALE L.J. 687, 688 (2003) (reviewing RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003)).

13. Galperin, *supra* note 6, at 436.

14. *Id.* at 438.

15. Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 168 ("[L]egal pragmatists are distinguished by their orientation toward an American philosophical tradition tracing back to William James and John Dewey.").

problems and affairs generally," and "[t]he view that strict adherence to legal doctrine, though desirable, is less important than the practical consequences of a judicial decision."[16] The judicial pragmatist engages in "a relatively unstructured problem-solving process involving common sense, a respect for stare decisis, and a sense of social needs."[17] Professor Daniel Farber has noted that "pragmatism is, in part, a call for less obsession with theory and more attention to concrete practice."[18] Thus, "[p]ragmatism provides no reason to exclude consideration of original intent, precedent, philosophy, social science, or anything else that might be appropriate and helpful in resolving a hard case."[19] If and when these principles come into tension with one other, "the only recourse is to make the best decision possible under the circumstances" as informed "by the professional training and experienced judgment of the judge."[20] This description of pragmatism is quite close to Judge Wynn's description of the project of judging in his Madison Lecture, which he delivered at New York University School of Law in 2020 and which I discuss further in Part II.[21]

In a 1989 article about Justice Oliver Wendell Holmes's pragmatism, Professor Thomas Grey argued that "[a] central innovation of legal pragmatism"—first clearly articulated by the Justice—was a marriage between two theories that, in the nineteenth century, were regarded as "rivals."[22] On the one hand, historical jurisprudence understood the law as "constituted of practices—contextual, situated, rooted in custom and shared expectations."[23] Thus, "workable law must always be based in custom."[24] On the other hand, utilitarians viewed the law as "instrumental, a means for achieving socially desired ends, and available to be adapted to their service."[25] From a utilitarian perspective, those goals could only be frustrated by the "irrational custom, prejudice, and superstition" underlying the Anglo-American common-law system, so the rational jurist ought instead to "start from scratch . . . and build up a new body of law by rational inference from first principles."[26]

16. *Pragmatism*, BLACK'S LAW DICTIONARY (11th ed. 2019).

17. *Id.*

18. Farber, *supra* note 15, at 164.

19. *Id.* at 169.

20. *Id.*

21. *See* James Andrew Wynn, *When Judges and Justices Throw Out Tools: Judicial Activism in* Rucho v. Common Cause, 96 N.Y.U. L. REV. 607, 609–10 (2021) [hereinafter Wynn, *When Judges and Justices Throw Out Tools*] (arguing that judges must employ certain "tools" but that sometimes those tools still leave judges with discretion in deciding cases).

22. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 805 (1989).

23. *Id.*

24. *Id.* at 809.

25. *Id.* at 805.

26. *Id.* at 808–09.

In Professor Grey's telling, Justice Holmes found a way to bridge this divide, summarized in his maxim that "continuity with the past is no duty but only a necessity."[27] There could be no "start[ing] from scratch" in devising legal principles because "there was no ground zero to set out from; the only starting point was where you actually found yourself," which was inevitably historically and culturally situated.[28] And indeed, pragmatists acknowledge some value in continuity.[29] But even so, for pragmatists, custom—and the past as a general matter—ought not to be deified. As Professor Grey wrote, quoting Justice Holmes, "the discovery that new reasons have been invented to justify old practices that in fact survive merely by the force of social inertia should encourage lawyers to 'reconsider' and 'decide anew whether those reasons are satisfactory.'"[30] Thus, judicial pragmatists aim to understand the cultural and social moment in which the act of judging is performed in a way that is both backward- and forward-looking. They look back to understand the situation as it is, but also forward to understand the ramifications of their decisions and how they might be perceived in the future.

This emphasis on historical and cultural situatedness suggests a judge who is deeply connected to their community and its history.[31] And yet, at the same time, a hallmark of judicial pragmatism is declining to follow past practices when they become stale. At bottom, this view is based on what is perceived to be sensible. As Professor Steven Smith has noted, "it would seem irrational for an individual to choose to adhere to past practices when striking a new course would be more beneficial," and thus the same is true for communities.[32]

Judge Wynn's body of judicial work displays several markers of judicial pragmatism. His opinions tend to emphasize modern, scientific knowledge,

27. *Id.* at 809 (quoting OLIVER WENDELL HOLMES, *Law in Science and Science in Law*, *in* COLLECTED LEGAL PAPERS 210, 211 (1920)).

28. *Id.*; *see also* Sullivan & Solove, *supra* note 12, at 688 (reviewing RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003)) ("We do not get our ends from some a priori source; they emerge from experience. And our values originate not just from our own experience, but from collective social experience, which has a long history and is embodied in our current habits, customs, and traditions.").

29. *See* Smith, *supra* note 10, at 412–13 (collecting works from pragmatist scholars and arguing that pragmatism does rely on the past, both out of necessity and because it is "useful in promoting future goods").

30. Grey, *supra* note 22, at 811 (quoting OLIVER WENDELL HOLMES JR., THE COMMON LAW, at xvi (Harv. Univ. Press 2009) (1881)).

31. In this regard, Justice Holmes arguably failed to "adequately practic[e] the pragmatism he so eloquently preached." *Id.* at 788; *see also id.* at 845 (noting Justice Holmes's view of both facts and the people whose lives they affected as "sordid" (quoting OLIVER WENDELL HOLMES, *The Profession of the Law*, *in* COLLECTED LEGAL PAPERS 29, 29 (1920))); Farber, *supra* note 15, at 174. Professor Farber instead advances Justice Brandeis, whose penchant for facts is legendary, as the "paradigmatic pragmatist." *Id.*

32. Smith, *supra* note 10, at 419.

such as his reliance in *Common Cause v. Rucho*[33] on statistical evidence in concluding that North Carolina's 2016 congressional districts were impermissible partisan gerrymanders.[34] A positive judicial view of such evidence is by no means a given. For example, during oral argument for *Gill v. Whitford*[35]—the 2018 partisan-gerrymandering case that foreshadowed the Supreme Court's reversal of Judge Wynn's decision in *Rucho* the following year[36]—Chief Justice John Roberts and Justice Stephen Breyer both labeled similar statistical gerrymandering evidence as "sociological gobbledygook."[37] While they likely meant to indicate only that the evidence was difficult to parse—Chief Justice Roberts readily conceded that this take on the evidence "may be simply [attributable to his] educational background"[38]—the statement is nevertheless suggestive of a skeptical orientation among some members of the judiciary toward at least some forms of empirical evidence.

Another marker of the influence of judicial pragmatism in Judge Wynn's opinions is his demonstrated concern for the judicial role in protecting marginalized communities and noting the historical treatment of those communities, thus situating the opinion in its historical context and considering the ramifications of the opinion for the future of American society. In a 2021 interview, for example, Judge Wynn discussed three recent cases in which he had written majority or concurring opinions and stated that the "common thread" between the cases was that they each involved individuals who were members of groups suffering from the effects of irrational but longstanding

33. 318 F. Supp. 3d 777 (M.D.N.C. 2018) (three-judge panel), *vacated and remanded*, 139 S. Ct. 2484 (2019).

34. *Id.* at 870–76; *see also* ABA Ctr. for Hum. Rts., *The Arc of the Moral Universe: A Conversation with Judge James A. Wynn*, YOUTUBE, at 29:20–29:30 (Mar. 25, 2021), https://www.youtube.com/watch?v=olfKV2hs0rM&ab_channel=ABAROLI%26CHR [https://perma.cc/U7ZN-7HAG] [hereinafter *The Arc of the Moral Universe*] (referring to modern scientific understandings of HIV in discussing *Roe v. Department of Defense*, 947 F.3d 207 (4th Cir. 2020)).

35. 138 S. Ct. 1916 (2018).

36. *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019).

37. Transcript of Oral Argument at 40–41, Gill v. Whitford, 138 S. Ct. 1916 (2018) (No. 16-1161).

38. *Id.* at 40.

prejudices.[39] In one of those cases, *Grimm v. Gloucester County School Board*,[40] Judge Wynn wrote that a school board's policy of forbidding transgender children from using bathrooms consistent with their gender identities was "indistinguishable from the sort of separate-but-equal treatment that is anathema under our jurisprudence"—a particularly poignant statement coming from Judge Wynn, who spent his childhood being educated in segregated schools and was one of only two African American students in his law school class.[41] In other words, the historical groundedness of Judge Wynn's opinions takes on a deeper resonance when one considers that the history of racial oppression and exclusion to which he sometimes refers in opinions is one with which he is personally and intimately familiar.[42]

Relatedly, Judge Wynn has noted that future citizens will be reading his opinions and that he does not want them to look back "with shame upon the words that I've written."[43] Rather, he has expressed that his role is to follow the law as it is, but to occasionally write dissents speaking to what the law should be:

> I believe that if you write [a dissenting] opinion, you write it well, and you are true to the law and your own sense of what is right, then who knows, maybe in the future that dissenting opinion will be followed. . . .

39. *See The Arc of the Moral Universe*, *supra* note 34, at 27:20–30:20. The first of these cases, *Long v. Hooks*, involved "a Black man [who was] accused of raping a white woman [and was] tried in 1976 by an all-white jury." 972 F.3d 442, 471 (4th Cir. 2020) (en banc) (Wynn, J., concurring). Judge Wynn wrote a concurring opinion calling attention to these "historical facts," which he contended "len[t] gripping context to the egregious constitutional violations [under *Brady v. Maryland*, 373 U.S. 83 (1963), that lay] at the heart of th[e] case." *Long*, 972 F.3d at 471 (Wynn, J., concurring). The second case discussed in the interview was Judge Wynn's majority opinion in *Roe v. Department of Defense*, which involved two servicemen who "were discharged when the Air Force determined that their chronic but managed illness—HIV—ma[de] them unfit for military service." 947 F.3d at 212. Finally, Judge Wynn discussed his concurring opinion in *Grimm v. Gloucester County School Board*, 972 F.3d 586, 620–21 (4th Cir. 2020) (Wynn, J., concurring). That case is described more fully in the body of this Essay.

40. 972 F.3d 586.

41. *Id.* at 620 (Wynn, J., concurring); *see The Arc of the Moral Universe*, *supra* note 34, at 42:35–44:25, 57:00–57:03.

42. Judge Wynn's grandfather was born into slavery, James A. Wynn Jr., State v. Mann*: Judicial Choice or Judicial Duty?*, 87 N.C. L. REV. 991, 991 n.** (2009) [hereinafter Wynn, *Judicial Choice*], and Judge Wynn himself was born "two months to the day" before *Brown v. Board of Education* was decided in 1954, *The Arc of the Moral Universe*, *supra* note 34, at 41:40–42:00 (Professor Michael Tigar speaking). He grew up living and working on his family's farm in eastern North Carolina, in a rural community that remained segregated well after *Brown*. Judge Wynn was educated at first in segregated schools and, as a teenager, lived through their desegregation. He remembers the community's support for and pride in the sit-ins taking place elsewhere in the state, and feeling a compulsion to pursue higher education in order to make good on the opportunities opened up by the efforts of civil rights leaders. *See The Arc of the Moral Universe*, *supra* note 34, at 42:00–52:05, 55:30–57:10; Buthe, *supra* note 4, at 14.

43. *The Arc of the Moral Universe*, *supra* note 34, at 30:55–31:05.

> My role as a judge is to do what I believe is right and to faithfully apply the law.[44]

Finally, Judge Wynn has made clear the admiration he holds for the work of attorneys like Charles Hamilton Houston, who he has described as "[p]erhaps the greatest sociological engineer of the twentieth century."[45] Houston is representative of the idea of sociological jurisprudence, a legal movement that was extremely influential in the first half of the twentieth century[46] and which Roscoe Pound "frequently described . . . as the application of pragmatism to law."[47] The sociological-jurisprudence movement emerged as a response to formalist views of judges as mere discoverers of law, seeing judging instead as an active practice involving application of principles derived from "moral philosophy, history, and a societal consensus."[48] It held particular appeal for civil rights attorneys like Houston because the "racial caste system produced a concomitant lack of black political efficacy," meaning appeals to the political branches to eliminate Jim Crow laws were a nonstarter.[49] Instead, Houston and his peers used the courts strategically to undermine the logic of Jim Crow and, ultimately, of *Plessy v. Ferguson*.[50] By using sociological jurisprudence to craft the legal charge that ultimately led to *Brown v. Board of Education*,[51] Houston became "the chief architect of the legal assault on Jim Crow laws."[52] Sociological jurisprudence complements judicial pragmatism: both are concerned with the role of the judge in history and with the application of moral principles to the law. For these reasons, it is my view that Judge Wynn can fairly be described as a judicial pragmatist.

44. The Honorable David R. Stras, the Honorable Diane S. Sykes & the Honorable James A. Wynn Jr., *Panel Discussion: Judges' Perspectives on Law Clerk Hiring, Utilization, and Influence*, 98 MARQ. L. REV. 441, 446 (2014) (quoting Judge Wynn); *cf.* James A. Wynn Jr., *As a Judge, I Have To Follow the Supreme Court. It Should Fix This Mistake*, WASH. POST (June 12, 2020), https://www.washingtonpost.com/opinions/2020/06/12/judge-i-have-follow-supreme-court-it-should-fix-this-mistake/ [https://perma.cc/42BV-AWEF (dark archive)] (arguing that "[e]liminating the defense of qualified immunity would improve our administration of justice and promote the public's confidence and trust in the integrity of the judicial system," while noting that he must continue to apply the doctrine of qualified immunity "because judges apply the law as it is, not as they believe it should be").

45. James A. Wynn Jr. & Eli Paul Mazur, *Ground to Stand On: Charles Hamilton Houston's Legal Foundation for Dr. King*, N.C. ST. BAR J. 6, 6 (2004).

46. Brian Z. Tamanaha, *Sociological Jurisprudence Past and Present*, 45 LAW & SOC. INQUIRY 493, 493 (2020).

47. David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 989 (1996) (citing Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 464 (1909)).

48. RONALD D. ROTUNDA, JOHN E. NOWAK, VIKRAM D. AMAR, AKHIL REED AMAR & STEVE G. CALABRESI, TREATISE ON CONSTITUTIONAL LAW § 23.3 (5th ed. 2021).

49. Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 37 (1998).

50. 163 U.S. 537 (1896); Fairfax, *supra* note 49, at 37–40, 43.

51. 347 U.S. 483 (1954).

52. Fairfax, *supra* note 49, at 18.

Importantly, such pragmatism is not without limitations. In his Madison Lecture, Judge Wynn argued that judges are constrained by certain "tool[s]" and that judicial activism arises when judges discard those tools.[53] Judicial tools include "faithfully follow[ing] controlling precedent; decid[ing] only those issues that are raised by the parties; and treat[ing] similarly situated parties the same way."[54] Similarly, Professor Farber has argued that Justice Louis Brandeis represents "a compelling counterexample" for "those who fear that pragmatism is incompatible with respect for the conventional legal process" because Justice Brandeis married "strong views about social reform" and a tendency "to bring unconventional and 'nonlegal' material into his opinions" with "sensitivity to the limits of the judicial function" and "excellence in judicial craftmanship."[55] Even Judge Richard Posner—who has put forth a vision of judicial pragmatism that gives judges a particularly robust role vis-à-vis the parties and the other branches of government[56]—has noted that

> [t]he pragmatic judge is a *constrained* pragmatist. He is boxed in, as other judges are, by norms that require of judges impartiality, awareness of the importance of the law's being predictable enough to guide the behavior of those subject to it (including judges!), and a due regard for the integrity of the written word in contracts and statutes.[57]

Ultimately, Judge Wynn has explained that his "job is to make an informed judicial choice" after narrowing the issues down to the point where law—that is, the "tools" of the judicial trade—supports both sides of the dispute.[58] Precisely what Judge Wynn means by "judicial choice" is the topic of Part II of this Essay.

53. Wynn, *When Judges and Justices Throw Out Tools*, *supra* note 21, at 609.

54. *Id.* at 645 (footnote omitted); *see also The Arc of the Moral Universe*, *supra* note 34, at 33:40–33:45 (Judge Wynn noting his view that "rules and procedures" must be "applied . . . equally").

55. Farber, *supra* note 15, at 178.

56. *E.g.*, Posner, *The Rise and Fall of Judicial Self-Restraint*, *supra* note 10, at 554–55 (arguing that "[l]egalists like Justice [Antonin] Scalia plow new constitutional ground in the belief that they have the key to understanding what the Constitution 'really' means" and that "[p]ragmatists don't deceive themselves in that manner, but on occasion, and sometimes rather frequently, they plow new constitutional ground anyway, by acknowledging and embracing the role of occasional legislator").

57. RICHARD A. POSNER, HOW JUDGES THINK 13 (2008). Judge Posner has at other times, however, described a much less constrained version of judicial pragmatism. *E.g.*, Adam Liptak, *An Exit Interview with Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/us/politic/judge-richard-posner-retirement.html [http://perma.cc/9SXS-CQ8D (dark archive)] (quoting Judge Posner as describing his brand of judicial pragmatism as leading him to give "very little attention to legal rules, statutes, [or] constitutional provisions" and to see binding precedents as "often extremely easy to get around"). That form of pragmatism would be "activist" under Judge Wynn's definition. Wynn, *When Judges and Justices Throw Out Tools*, *supra* note 21, at 645–46 (noting, among other principles, that "courts should faithfully follow controlling precedent").

58. The Honorable David R. Stras et al., *supra* note 31, at 452 (quoting Judge Wynn); *see also The Arc of the Moral Universe*, *supra* note 34, at 1:06:23–1:06:55.

II. JUDICIAL CHOICE

Around the year 1830, census records report that roughly one-third of the hundreds of thousands of residents of North Carolina were held in bondage through chattel slavery.[59] Though the institution of slavery would endure in the United States for several more decades, it was already thoroughly under attack by abolitionists both within and outside the country.[60] Indeed,

> [s]everal legal scholars have . . . posited that the unrelenting march and progression of the law—the precedents being set every day by judges in courts around the country—made slavery, and the position that African American men and women were mere property rather than sentient beings, increasingly untenable and unlikely to be sustained.[61]

Nevertheless, in 1829, the Supreme Court of North Carolina handed a decisive legal victory to slavery and its profiteers. The opinion, *State v. Mann*, was authored by Judge Thomas Ruffin, himself a slaveowner who "was regarded even by his contemporaries as particularly brutal in his ownership of slaves."[62] *Mann* remains "perhaps [his] best-known opinion, both for its impact on the law of slavery at the time and its cold treatment of the slave as mere property with 'no will of his own' and 'no appeal from his master' to the courts."[63]

Mann was a criminal appeal brought from the conviction of defendant John Mann, the "leaseholder" of an enslaved woman named Lydia, for assault and battery upon her.[64] Lydia had fled from the defendant's "brutal whipping."[65] He demanded she stop her flight; when she did not, he shot her in the back, wounding her.[66] The trial court instructed the jury to return a guilty verdict if it concluded that "the punishment inflicted by the defendant was cruel and

59. *Nineteenth-Century North Carolina Timeline*, N.C. MUSEUM HIST., https://www.ncmuseumofhistory.org/learning/educators/timelines/nineteenth-century-north-carolina-timeline [http://perma.cc/8UU7-RRAN] (reporting North Carolina's 1830 census data as recording a total population of 737,987 and an enslaved population of 245,601).

60. *See, e.g.*, *Abolitionism*, ENCYC. BRITANNICA (Sept. 13, 2021), https://www.britannica.com/topic/abolitionism-European-and-American-social-movement [https://perma.cc/VS37-MLCL].

61. Wynn, *Judicial Choice*, *supra* note 42, at 992.

62. Press Release, N.C. Jud. Branch, Supreme Court To Remove Portrait of Chief Justice Thomas Ruffin from Its Courtroom (Dec. 22, 2020), https://www.nccourts.gov/news/tag/press-release/supreme-court-to-remove-portrait-of-chief-justice-thomas-ruffin-from-its-courtroom [https://perma.cc/9BR6-KSV2] [hereinafter Supreme Court To Remove Portrait of Chief Justice Thomas Ruffin].

63. Wynn, *Judicial Choice*, *supra* note 42, at 993 (quoting State v. Mann, 13 N.C. (2 Dev.) 263, 266–67 (1829)); *see also* Eric L. Muller, *Judging Thomas Ruffin and the Hindsight Defense*, 87 N.C. L. REV. 757, 761–62 (2009) (describing *Mann* as "perhaps the coldest and starkest defense of the physical violence inherent in slavery that ever appeared in an American judicial opinion").

64. Muller, *supra* note 63, at 772.

65. Supreme Court To Remove Portrait of Chief Justice Thomas Ruffin, *supra* note 62. The *Mann* introduction euphemistically refers to this whipping as "chastise[ment]." *Mann*, 13 N.C. (2 Dev.) at 263.

66. *Mann*, 13 N.C. (2 Dev.) at 263.

unwarrantable, and disproportionate to the offense committed by [Lydia]."[67] The jury did so.[68] But the Supreme Court of North Carolina reversed that verdict unanimously, suggesting that its "hands were tied: regardless of 'the feelings of the man[,] . . . the duty of the magistrate' meant that [the court] could not 'avoid any responsibility which the laws impose[d].'"[69] Indeed, Judge Ruffin wrote that it would be "*criminal*" for the court to do so.[70] And he frankly acknowledged that the obedience of the enslaved population could be procured "only [with] uncontrolled authority over the body"—that is, that "[t]he power of the master must be absolute, to render the submission of the slave perfect."[71] Accordingly, the court "[could] not allow the right of the master to be brought into discussion in the Courts of Justice."[72]

Writing one hundred and eighty years later, Judge Wynn critiqued this indisputably "unconscionable" decision in an essay published in this Law Review.[73] He did so not only with the benefit of nearly two centuries of reflection; he also evaluated the extent to which *Mann* rested on "flawed" legal reasoning in its own time.[74] Judge Wynn concluded that even the legal framework in existence in 1829 did not compel the result. In other words, Judge Ruffin was wrong to claim that he had no choice—that it was his *duty* to overturn the jury's conviction of Mann for using deadly force against Lydia. Faced with multiple legally justifiable options, Judge Ruffin and his colleagues *chose* the path that cut off criminal sanctions for violence against enslaved persons by their "owners," even while purporting to acknowledge that enslaved individuals were "part[] of [their] people."[75]

Judge Wynn pointed out that an earlier case, *State v. Hale*,[76] had concluded that battery by a stranger against a slave *was* an indictable offense.[77] The

67. *Id.*

68. *Id.*

69. Wynn, *Judicial Choice*, *supra* note 42, at 994 (quoting *Mann*, 13 N.C. (2 Dev.) at 264). Judge Ruffin's purported hand-wringing in this case—his claim that he "[could] not but lament" "[t]he struggle" in his "breast" regarding the outcome of the case, *Mann*, 13 N.C. (2 Dev.) at 264—should be taken with more than a grain of salt. Judge Ruffin "was an active participant in the slave trade, and a slave owner himself, with a documented record of cruelty that stood out as egregious even in its time." ADVISORY COMM'N ON PORTRAITS, REPORT AND RECOMMENDATION TO THE SUPREME COURT OF NORTH CAROLINA 6 (Dec. 14, 2020), https://www.nccourts.gov/assets/inline-files/Advisory-Commission-on-Portraits-Report-and-Recommendation-web.pdf [https://perma.cc/ELQ6-6TT7]; *see* Muller, *supra* note 63 (collecting historical evidence documenting Judge Ruffin's cruelty as well as his significant financial stake in the institution of slavery).

70. *Mann*, 13 N.C. (2 Dev.) at 264 (emphasis added).

71. *Id.* at 266.

72. *Id.* at 267.

73. Wynn, *Judicial Choice*, *supra* note 42, at 991–92.

74. *Id.*; *accord* Sally Greene, State v. Mann *Exhumed*, 87 N.C. L. REV. 701, 706 (2009) (arguing "that neither facts nor precedent appear to have dictated the reversal" in *Mann*).

75. *Mann*, 13 N.C. (2 Dev.) at 267.

76. 9 N.C. (2 Hawks) 582 (1823).

77. Wynn, *Judicial Choice*, *supra* note 42, at 995 (citing *Hale*, 9 N.C. (2 Hawks) at 586).

prosecutor cited *Hale*, and Judge Ruffin acknowledged that precedent but distinguished *Mann* on the facts.[78] But he did not have to do so; in Judge Wynn's words, "The *Hale* court employed language that Judge Ruffin could have seized upon to reach a different outcome in *Mann*, by focusing on the behavior of the perpetrator, rather than the identity of the victim."[79]

Further, Judge Wynn pointed out that a statute limiting even "the owner's 'full dominion' over the slave was enacted twelve years before *Mann* and expressly provided that the killing of a slave by any person was a homicide, as at common law."[80] Yet, by reversing Mann's conviction, Judge Ruffin "made the judicial choice to arrest that erosion" of the legal underpinnings of slavery.[81]

To drive the point home, Judge Wynn authored and appended to his essay an imagined dissent from the majority in *Mann*. He did so to demonstrate "how a judge with a different judicial philosophy might have employed" *Hale*, "and thus, the common law existing at the time in North Carolina, including the ongoing existence of slavery as an institution," to disagree with "the result Judge Ruffin claim[ed] he was 'compelled' to reach."[82] Judge Wynn's dissent emphasized the purpose of criminal law—"to protect not only individual citizens but also the fabric of our society as a whole"—and the corresponding statement in *Hale* that "a human being, although the subject of property, should be so far protected as the public might be injured through him."[83] It also noted that the North Carolina General Assembly had criminalized the killing of a slave. The dissent concluded that "depraved indifference toward human life—and cruel and deliberately barbarous actions that reflect such an attitude—will not be tolerated in our society, and certainly not by our courts and common law."[84]

The state of the law in 1829 is difficult to stomach. And Judge Wynn made clear that he was under no illusions about what a majority opinion that took the view of his proposed dissent would have accomplished—at most, it may have "moved society . . . one small step forward in its treatment of slaves."[85] But by evaluating the law of North Carolina in 1829 on its own terms, Judge Wynn made a powerful point: Judge Ruffin and his colleagues were in no way required to overturn the verdict of twelve white men convicting one of their own for

78. *Mann*, 13 N.C. (2 Dev.) at 263–64.

79. Wynn, *Judicial Choice*, *supra* note 42, at 995.

80. *Id.* at 996 n.29 (citing Act of 1817, ch. 18, 1817 N.C. Pub. Laws 18, 18–19 (providing that "the offence of Killing a Slave shall hereafter be denominated and considered homicide, and shall partake of the same degree of guilt when accompanied with the like circumstances that homicide now does at common law")).

81. *Id.* at 996.

82. *Id.*

83. *Id.* at 1004 (quoting State v. Hale, 9 N.C. (2 Hawks) 582, 585 (1823)).

84. *Id.* at 1005.

85. *Id.* at 999.

shooting an enslaved woman in the back as she fled.[86] They made a choice to do so.

Judge Wynn authored his critique of *Mann*, a common-law case, while serving on the North Carolina Court of Appeals, a common-law court. And the common law arguably gives judges a particularly strong ability to exercise choice. But, even after his appointment to the federal bench, Judge Wynn has continued to emphasize the distinction between cases where judges are truly *bound* to reach a certain outcome and those where they must exercise discretion—that is, where they must make a judicial choice.

Judge Wynn explored this theme in his Madison Lecture.[87] As discussed above, the lecture focused on Judge Wynn's definition of judicial activism, which he defines as "when [a] court or judge eschews the use of a judicial decisional tool traditionally employed to adjudicate that type of case," especially when they do so without being transparent about that decision.[88] But in putting forth that definition, Judge Wynn acknowledged that "there necessarily are times when judges must rely on their own policy preferences to decide a case."[89] While he did not use the phrase "judicial choice," the idea was the same: judges are obligated to use the "tools" applicable to the case at hand, or at least to explain why they are not using those tools.[90] But, once all tools are exhausted, the judge will have narrowed in on the judicial choice confronting him or her: in Justice Benjamin Cardozo's words, "Wide enough in all conscience is the field of discretion that remains."[91] The discretion inherent in judging makes clear the importance of judicial tools that *cabin* discretion, but, in many cases, that discretion—the "judicial choice"—remains.

86. While Mann's conviction is no doubt noteworthy, scholar Sally Greene has persuasively argued that it is not as surprising as we might think. Greene, *supra* note 74, at 722 n.99, 726 n.121. The jurors were likely made up of slave "*owners*," not "leaseholders" like Mann, and therefore were more sympathetic to the position of Lydia's "owner," whose guardian swore out the bill of indictment against Mann. *See id.* at 705 ("Understanding that hirers lacked the self-interest in a slave's welfare that came as a function of ownership, [landed slaveowners] depended on the law to sanction the punishment of those who abused the privilege. The conviction of John Mann for a battery upon a hired slave was the right result from the standpoint of the very class to which Ruffin belonged."). Greene argues that, despite these facts, Judge Ruffin's personal stake in the institution of slavery led him to seek to strengthen that institution by widening the class of people "with an unqualified right of discipline over slaves." *Id.* at 748; *see* State v. Mann, 13 N.C. (2 Dev.) 263, 264 (1829) (claiming that the court was "compelled to express an opinion upon the extent of the dominion of the master over the slave in North Carolina"). Yet this strategy arguably backfired, as *Mann*'s "shockingly frank depiction of slavery's dependency on the 'absolute' physical power of one body over another became a rallying cry against the entire institution" among abolitionists. Greene, *supra* note 74, at 752.

87. Wynn, *When Judges and Justices Throw Out Tools*, *supra* note 21.

88. *Id.* at 609.

89. *Id.* at 610.

90. *Id.* at 629.

91. *Id.* at 608 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921)).

Certainly, there can be no dispute that the vast majority of cases can be resolved without the need to make a judicial choice—they are "instances where the law is explicit, black-lettered, and judges are left with little discretion."[92] Yet, as Judge Wynn put it in his 2002 E. Harold Hallows Fellow Lecture at Marquette University Law School, "the most important cases consistently involve issues in which the law supports both sides of a controversy."[93] In those cases, judges are faced with a "judicial choice" and must rely on their experiences on and off the bench to reach a just result.[94]

Nearly a century ago, former Fifth Circuit Judge Joseph Hutcheson Jr. explained an arguably similar concept, which he termed the judicial "hunch":

> [W]hen the case is difficult or involved, and turns upon a hairsbreadth of law or of fact . . . , I, after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way.[95]

92. James Andrew Wynn Jr., *Judging the Judges*, 86 MARQ. L. REV. 753, 756, 760 (2003) [hereinafter Wynn, *Judging the Judges*]. Nationally across federal courts of appeals, roughly two-thirds of written decisions are unsigned, per curiam opinions. *U.S. Court of Appeals - Judicial Caseload Profile*, U.S. CTS. (Dec. 31, 2020), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile1231.2020.pdf [https://perma.cc/J8CQ-4PAL]. While per curiam opinions can include concurrences and dissents and may consider difficult questions, because they are frequently reserved for straightforward cases where little analysis is needed, they are a useful proxy for the relative ease of cases. *See* 21 C.J.S. *Courts* § 232 (2021). Another such indicator is that "[m]ore than 80 percent of federal appeals are decided solely on the basis of written briefs," while "[l]ess than a quarter of all appeals"—generally, those presenting more complex or novel questions—"are decided following oral argument." *Appellate Courts and Cases – Journalist's Guide*, U.S. CTS., https://www.uscourts.gov/statistics-reports/appellate-court-and-cases-journalist-guide [http://perma.cc/KCF2-XBDK]. Further, even at the Supreme Court, which largely selects its own docket of presumably close calls, over forty percent of cases in recent terms have been decided unanimously. *See* SCOTUSBLOG, STAT PACK FOR THE SUPREME COURT'S 2020–21 TERM 3 (2021), https://www.scotusblog.com/wp-content/uploads/2021/07/Final-Stat-Pack-7.6.21.pdf [https://perma.cc/CM9B-273U].

93. Wynn, *Judging the Judges*, *supra* note 92, at 760.

94. *Cf.* James Andrew Wynn Jr. & Eli Paul Mazur, *Judicial Diversity: Where Independence and Accountability Meet*, 67 ALB. L. REV. 775, 775, 783 (2004) [hereinafter Wynn & Mazur, *Judicial Diversity*] (arguing that because judges must rely on life experiences in making decisions, a diverse judiciary is crucial).

95. Joseph C. Hutcheson Jr., *The Judgment Intuitive: The Function of the Hunch in Judicial Decision*, 14 CORNELL L.Q. 274, 278 (1929). Professor Mark Modak-Truran has justified Judge Hutcheson's judicial "hunch" through reference to James's pragmatic philosophy, although he is careful to note that he does not claim Judge Hutcheson himself was a *judicial* pragmatist. *See* Mark Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. RICH. L. REV. 55, 58, 68, 80 (2001) (noting that "the idea that judges should decide cases based on hunches must be given an adequate epistemological justification" and arguing that "William James's pragmatism provides a compelling epistemological justification for the hunch theory of judicial decision making and saves the hunch from arbitrariness," while noting that James's pragmatism would give a "second disciplining pragmatic condition" that "is absent from Hutcheson's account," namely, that subsequent to the hunch-based decision, "we must use

That said, it is my view that Judge Wynn's notion of "judicial choice" focuses more on pragmatic principles, including value-laden ones like "justice," than on intuition alone. Thus, while both Judge Hutcheson and Judge Wynn agree that judges are not automatons,[96] Judge Wynn explicitly ties that claim to a normative view of courts as institutions that enact justice. As he said in a recent interview, "What is a court for, if you cannot do justice? If you're just going to follow something rotely, you don't really need judges, you could put [the issues] in a computer and the computer would give you . . . the rote answer every time."[97]

It is my contention that judicial choice and judicial pragmatism go hand-in-hand in Judge Wynn's philosophy and work.[98] One leads to another. Pragmatism points to the question, what is the judicial choice here? That such a question arises from the pragmatic outlook aligns with both a pragmatic view of close legal questions, as Judge Wynn has argued with regard to *Mann*, and with what we know about how cognition actually works.[99] Put differently, to acknowledge the reality of judicial choice is to acknowledge that judges are, in close cases, more than mere umpires, tasked with discovering an objective reality (ball or strike?) that they may discern if they can only see clearly enough. Rather, in many cases, the court's decision is the product of some *choice* made once the interpretive tools have been exhausted and the court is left with discretion to select from a menu of rational and legally justifiable outcomes.[100]

Then, in actually making a judicial choice, Judge Wynn appears to be guided by principles of judicial pragmatism. His opinions evince a proclivity to ask questions like: What makes sense in today's world? What are the

the pragmatic method to test [judicial] decisions in accordance with their consequences" (footnotes omitted)).

96. *See* Mark Modak-Truran, *supra* note 95, at 57 (noting that Judge Hutcheson "argued that law cannot be reduced to logic and that judges are not technicians mechanically applying the law"); *The Arc of the Moral Universe*, *supra* note 34, at 33:27–33:40.

97. *The Arc of the Moral Universe*, *supra* note 34, at 33:27–33:40.

98. I am not the first to note the connection between these ideas. Indeed, Judge Wynn has drawn this connection before. *See* Wynn & Mazur, *Judicial Diversity*, *supra* note 94, at 788–89 (noting that, "on a pragmatic level, the process of judging ultimately is reducible to judicial choices" (citing RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 71 (2003))). And, as noted, Professor Modak-Truran has looked to pragmatic philosophy to justify Judge Hutcheson's related notion of the judicial "hunch." Mark Modak-Truran, *supra* note 95, at 58.

99. As neuroscientific research has demonstrated, judges are not simply input/output machines, but rather bring to their decision-making their emotions and cognitive biases. *See generally* Anna Spain Bradley, *The Disruptive Neuroscience of Judicial Choice*, 9 U.C. IRVINE L. REV. 1 (2018) (arguing that judges, like all humans, are incapable of entirely setting aside their biases, emotions, and empathy in rendering decisions). That insight runs counter to some of the usual narratives about judging. *E.g.*, *id.* at 3 ("[T]he legal profession remains committed to a longstanding view that judges are largely exempt from [bias].").

100. *E.g.*, *id.* at 49 ("[E]ven if one believes that judges interpret law rather than make it, the act of interpretation is filled with the capacity to shape law through a series of decisions and choices.").

ramifications likely to be, especially for those lacking political power?[101] How can the life experiences that he and his panel colleagues "each . . . bring[] to the bench" inform the court's decision?[102]

Numerous decisions authored by Judge Wynn in his more than thirty-year judicial career could provide examples of judicial choices guided by judicial pragmatism.[103] But I have selected for deeper consideration the Supreme Court

101. *E.g.*, Wynn, *Judging the Judges*, *supra* note 92, at 756, 758 ("The judiciary, as envisioned in *The Federalist*, and as reaffirmed by Chief Justice John Marshall in *Marbury v. Madison*, has the duty of protecting the people from the arbitrary and capricious acts of majoritarian rule that violate the Constitution . . . . Judicial independence is vital because when it is your day in court you will look to the judge to protect your rights and not merely enforce the representations of the state." (footnote omitted) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803))); Wynn & Mazur, *Judicial Diversity*, *supra* note 94, at 777 ("In [our] system of government, the judiciary is a constitutional priesthood loyal to the sovereign will—the Constitution—in the face of majoritarian excess, executive encroachment, and legislative self-aggrandizement.").

102. Wynn & Mazur, *Judicial Diversity*, *supra* note 94, at 783 (arguing that judicial diversity is important in part because judges come to the act of judging with "a sum of life experience," which, "[i]n American society," is "inextricably bound to race, ethnicity, and gender," such that "the absence of diversity creates . . . a judicial partiality to the values and stories of the groups [that are] overrepresented").

103. *See, e.g.*, State v. Jones, 133 N.C. App. 448, 473–78, 516 S.E.2d 405, 421–24 (1999) (Wynn, J., concurring in part and dissenting in part) (dissenting from the majority's decision to apply the felony-murder rule to deaths resulting from the defendant's reckless, intoxicated driving, on the theory that the defendant had committed an assault with a deadly weapon (his car), and therefore could be held liable for felony murder, which carried a possible death sentence; and explaining the unacknowledged ramifications of the majority's opinion for *all* drivers, not just intoxicated ones, calling attention to the harms the majority's view visited on both the defendant's due process rights (lack of fair notice) and the separation of powers (stretching the felony-murder statute to arenas never contemplated by the legislature)), *aff'd in part, rev'd in part*, 353 N.C. 159, 538 S.E.2d 917 (2000) (invoking the reasoning, and even an example, from Judge Wynn's partial dissent); Broderick v. Broderick, 175 N.C. App. 501, 504–07, 623 S.E.2d 806, 807–09 (2006) (Wynn, J., concurring in the result) (concurring "most reluctantly" in the result by "declining to decide the merits of th[e] appeal" where the appellant had not fully complied with the strictures of Rule 10 of the North Carolina Rules of Appellate Procedure, as required by binding precedent, but writing separately "to urge our Supreme Court to abolish assignments of error under" the rules in order to prevent legal technicalities from getting in the way of the court's role; to ensure consistency, as the North Carolina Court of Appeals had been "anything but consistent" in how strictly it applied the Rules of Appellate Procedure; and to align North Carolina's rules "with the Federal Rules of Appellate Procedure, the Local Rules of Appellate Procedure for the United States Court of Appeals for the Fourth Circuit, and the appellate rules of other state courts, which do not require parties to file assignments of error on appeal"); United States v. Foster, 674 F.3d 391, 409 (4th Cir. 2012) (Wynn, J., dissenting from the denial of rehearing en banc) (pointing out that between panel opinions, various opinions concurring or dissenting from the denial of rehearing en banc, and other judges joining those opinions, "ten [out of fifteen] judges have now expressed their opinions on the merits of the underlying appeal, not just on the decision to deny rehearing," meaning that the Court was rapidly approaching "effectively hav[ing] conducted an en banc review—only without having given the parties access to the full Court via oral argument to express their views"); Wilson v. Flaherty, 689 F.3d 332, 345, 348 (4th Cir. 2012) (Wynn, J., dissenting) (vigorously dissenting in a case where the petitioner had made a strong case for his actual innocence as to the underlying offenses, but where the majority nevertheless denied him relief from the lifelong restrictions on his liberty imposed because of those convictions; and criticizing the majority opinion

of North Carolina case of *Nelson v. Freeland*,[104] for two primary reasons. First, it is one of Judge Wynn's most enduringly well-known opinions from his time on the state courts of North Carolina—one which left an indelible mark on the jurisprudence of his home state.[105] Second, and more fundamentally, because it involved a common-law court deciding a common-law question, it presents a particularly stark example of a court faced with a clear judicial choice, for which pragmatic considerations necessarily guided the decision-making process.

III. JUDICIAL PRAGMATISM AND JUDICIAL CHOICE IN *NELSON V. FREELAND*

The facts were exceedingly simple. The defendants were a married couple who owned their home. The husband asked the plaintiff to pick him up at his house on the plaintiff's way to a business meeting they were both attending. The homeowner inadvertently left a stick lying on his porch. The plaintiff tripped over the stick, was injured in the fall, and sued the couple for his injuries.[106]

The legal question, in Judge[107] Wynn's view, should be equally simple: a jury would need to determine whether the homeowner acted according to the standard of care a reasonable person would have used.[108]

And yet, the premises-liability trichotomy—classifying individuals present on another's property as invitees, licensees, or trespassers, and granting to each group a different standard of care—rendered what should have been an easy case hopelessly complex. While the plaintiff was plainly not a trespasser, it was not clear which of the other categories applied. Had the plaintiff come to the homeowner's house for business purposes, since they were attending a business meeting together? Or was he there out of friendship, as he was doing the homeowner a favor by driving him to the meeting? The premises-liability trichotomy, Judge Wynn noted, "has created dissension and confusion amongst the attorneys and judges involved."[109] And no wonder, because in the preceding three and a half decades, the Supreme Court of North Carolina had "waded

for "blindly adhering to formalist procedural concerns," arguing that those concerns "should yield to the correction of fundamentally unjust punishments").

104. Nelson v. Freeland, 349 N.C. 615, 616, 507 S.E.2d 882, 882–83 (1998).

105. *See* sources cited *infra* note 139.

106. *Nelson*, 349 N.C. at 616, 507 S.E.2d at 882–83.

107. Because Judge Wynn was sitting on the Supreme Court of North Carolina at the time he authored the majority opinion in *Nelson*, the appropriate title here would be "Justice." *Id.* at 615, 507 S.E.2d at 882. For consistency, however, I have continued to use the title of "Judge" while discussing *Nelson*.

108. *Id.* at 617, 507 S.E.2d at 883.

109. *Id.* at 616, 507 S.E.2d at 883.

through the mire of" the trichotomy no fewer than fourteen times, with no advances in clarity.[110]

Enough was enough. Judge Wynn's opinion swept aside the tortured scheme and replaced it with a far simpler arrangement: either an injured plaintiff had permission to be on the property, or they did not. If they did, they were owed a duty of reasonable care.

Judge Wynn's opinion represents a clear judicial choice. While Judge Wynn wrote for a four-justice majority, the three other justices concurred only in the result, agreeing that the lower courts erred in granting summary judgment to the defendants. The three concurring justices thought it "unnecessary" and "inadvisable" to reach the question of whether the trichotomy should be abolished, given that the parties had not briefed the issue and that summary judgment was improper in any event.[111] But the majority viewed this as a moment of judicial choice under the common-law system. And in making the choice, Judge Wynn was pragmatic: "Given that we are convinced that the common-law trichotomy is no longer viable, we should put it to rest."[112]

The opinion opened by explaining the trichotomy and how it affected tort cases. Landowners, and occupiers like tenants, owed the greatest duty of care to invitees—individuals who entered another's land on an express or implied invitation for mutual benefit, such as store customers. Landowners were required to use ordinary care to keep their property reasonably safe for invitees and to warn them of hidden dangers that were discoverable through reasonable inspection and supervision of the land.

One step down on the rung of duty was that owed by landowners to licensees—individuals who entered another's land on an express or implied invitation *only* for their own benefit, such as social guests. Landowners owed licensees a "significantly less stringent" duty of care than they owed to invitees.[113] Their duty was only to refrain from willfully injuring the licensee and from wantonly and recklessly putting the licensee in danger. "Thus, a licensee enter[ed] another's premises at his own risk and enjoy[ed] the license subject to its concomitant perils."[114]

Finally, trespassers—individuals who entered another's land without permission—were owed a very limited duty of care. The landowner's duty was only to refrain from willfully or wantonly injuring the trespasser.

Judge Wynn's opinion acknowledged the historical vintage of these categories, noting that they had been "entrenched in this country's tort-liability

110. *Id.* (collecting cases).
111. *Id.* at 634, 507 S.E.2d at 893 (Mitchell, C.J., concurring in the result).
112. *Id.* at 633, 507 S.E.2d at 893 (majority opinion).
113. *Id.* at 618, 507 S.E.2d at 884.
114. *Id.*

jurisprudence since our nation's inception."[115] But, in his view, pure appeal to tradition was insufficient; efficacy mattered. To that end, the opinion turned to describing "the modern trend of abolishing the common-law trichotomy in favor of a reasonable-person standard."[116] Judge Wynn noted that, over the second half of the twentieth century, many states had modified or abandoned the traditional premises-liability scheme, viewing it as based on societal assumptions that no longer applied and noting that it sometimes mandated deeply unjust results.[117]

At the same time, the opinion used that half-century of data to showcase the pitfalls of "attempt[ing] to salvage the trichotomy by engrafting into it certain exceptions and subclassifications which would allow it to better congeal with our present-day policy of balancing land-ownership rights with the right of entrants to receive adequate protection from harm."[118] Judge Wynn collected eleven different "exceptions and subclassifications" applicable in North Carolina—"distinctions between active and passive negligence; situations where a landlord has control over a common way; actions involving police officers; failure to warn of a known defect; work by an independent contractor; obvious versus nonobvious dangerous conditions; invitee exceeding the scope of his invitation; minor and incidental benefits; conditions diverting the injured party's attention; known or knowable criminal activity; and the attractive-nuisance doctrine"—and noted that they were "just a sample."[119] He pointed to the U.S. Supreme Court's recognition that those modifications only made the situation worse because they "produced confusion and conflict."[120] And he expanded on this comment, noting that the modifications "forced courts to maneuver their way through a dizzying array of factual nuances and delineations" while employing "rationales teetering on the edge of absurdity" simply to avoid unjust results.[121]

Judge Wynn then collected several illustrations of this conundrum. For example, the North Carolina Court of Appeals had previously reached the perplexing conclusion that the injured plaintiff was an invitee when, on request—but without remuneration—he assisted a neighbor with moving a boat.[122] Recall that invitees, such as store customers, were afforded the highest level of protection. Though the act was not a business transaction, the court of

115. *Id.*

116. *Id.*

117. *Id.* at 618–23, 507 S.E.2d at 884–87.

118. *Id.* at 618–19, 507 S.E.2d at 884.

119. *Id.* at 630, 507 S.E.2d at 891 (citations omitted).

120. *Id.* at 619–20, 507 S.E.2d at 884–85 (quoting Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 631 (1959)).

121. *Id.*

122. *Id.* at 629, 507 S.E.2d at 891 (citing Crane v. Caldwell, 13 N.C. App. 362, 438 S.E.2d 449 (N.C. Ct. App. 1994)).

appeals reasoned that it went beyond ordinary friendly relations between neighbors—despite earlier precedent establishing that a plaintiff who helped a neighbor carry meat into his home was a *licensee*, and thus subject only to the intermediate level of protection applicable to social guests.[123] Judge Wynn's opinion noted that, reading the two opinions together, "one [was led] to believe that neighbors regularly carry meat into each others' homes, but do not help each other move things"—the point being, of course, that this idea was absurd.[124] Meanwhile, the court of appeals had also held that parents who, on request, entered their son's house to check on his freezer were invitees.[125] No overarching principle could be deduced from such a hodgepodge of decisions.[126]

This background established, Judge Wynn next described the significant strides other jurisdictions had made toward abolishing the common law's premises-liability scheme altogether. For example, England—where the scheme originated—had abolished the trichotomy by statute more than forty years earlier.[127] In the following decades, a growing judicial movement in the United States had, at a minimum, abolished the licensee-invitee distinction. California was the first to do so, in 1968, and it was soon joined by a crescendo of other jurisdictions—including seven in the five years before *Nelson*—totaling just under half of the states, plus the District of Columbia.[128] Nearly half of those jurisdictions had fully abolished the trichotomy.[129]

In other words, the opinion hinted, judicial repudiation of the trichotomy in North Carolina would not be some unprecedented step, or an act of throwing the baby out with the bathwater. Rather, states had tried, for decades, to update the ancient common-law rule, to no avail—and many jurisdictions had already recognized the futility of trying to map the old scheme onto modern life.

Judge Wynn's opinion then turned to face squarely the question at hand: What would North Carolina do? The answer, in Judge Wynn's view, depended on weighing the "advantages and disadvantages" of the common-law system.[130] Therefore, he first rewound the clock to understand the history and purpose underlying the trichotomy before considering whether to abandon it.

As Judge Wynn explained, although the trichotomy emerged in England in the nineteenth century, it was shaped by much more ancient, feudal concerns: protecting powerful landowners from incursions on their supremacy by juries, who were more likely to be composed of potential land *entrants* than land*owners*,

123. *See* Beaver v. Lefler, 8 N.C. App. 574, 174 S.E.2d 806 (1970).
124. *Nelson*, 349 N.C. at 629, 507 S.E.2d at 891.
125. *Id.* at 630, 507 S.E.2d at 891 (citing Briles v. Briles, 43 N.C. App. 575, 259 S.E.2d 393 (1979)).
126. *Id.* ("Logically, [*Briles*] cannot be reconciled with *Crane* and *Beaver*.").
127. *Id.* at 620, 507 S.E.2d at 885 (citing Occupier's Liability Act 1957, 5 & 6 Eliz. 2 c. 31 (Eng.)).
128. *Id.*, 507 S.E.2d at 886–87 (collecting cases).
129. *Id.* (collecting cases).
130. *Id.* at 623, 507 S.E.2d at 887.

and who therefore were unlikely to be concerned about protecting landowners' authority over their land. Moreover, at the time of the trichotomy's emergence, the principle of negligence—foundational to modern tort law—was barely in its infancy. And while other areas of tort law absorbed negligence principles once they were established, premises liability had maintained its feudal structure.[131]

Judge Wynn argued that these origins alone suggested reason to abandon the trichotomy. Jurors in the United States today are much more likely to be landowners than were those in nineteenth-century England, so "it is unlikely that they would be willing to place a burden upon a defendant that they would be unwilling to accept upon themselves."[132] And courts trust modern jurors to apply principles of negligence in virtually every other area of tort law, undermining any concerns about their ability to do so with respect to premises liability.[133]

Common sense provided other reasons to alter the liability scheme. First, negligence was a more "[]predictable" standard for landowners to apply, and the simpler legal system provided by negligence made legal consequences clearer, whereas the "complexity" of the trichotomy was shown by the sheer number of exceptions and the frequent inability of even "experienced" judges to agree on the proper categorization of plaintiffs.[134] Second, modern land ownership involves smaller parcels than the vast feudal estates of centuries past, reducing landowners' monitoring costs.[135] Third, the trichotomy simply defies normal expectations about interpersonal relationships: it is unclear why a social guest should be afforded less care than a business guest, and the dividing line between those categories is often murky.[136]

Thus, as Judge Wynn noted, "the trichotomy often forces the trier of fact to focus upon irrelevant factual gradations instead of the pertinent question of whether the landowner acted reasonably toward the injured entrant."[137] Under the trichotomy, plaintiffs were subject to a lottery of categorization—a lottery that was "essentially an attempt to transmute propositions of fact into propositions of law," and that "has only distracted the jury's vision away from the proper consideration of whether the defendant acted reasonably."[138]

For all those reasons, Judge Wynn's majority opinion concluded that—despite the strong pull of stare decisis—it was time to modify the trichotomy in North Carolina by abolishing the distinction between licensees and invitees

131. *Id.* at 623–24, 624 n.3, 507 S.E.2d at 887–88, 888 n.3.
132. *Id.* at 625, 507 S.E.2d at 888.
133. *Id.*
134. *Id.* at 626–30, 507 S.E.2d at 888–91; *see id.* at 631, S.E.2d at 892.
135. *Id.* at 626, 507 S.E.2d at 889 (citing Mounsey v. Ellard, 297 N.E.2d 43, 51 (Mass. 1973)).
136. *Id.* at 629–31, 507 S.E.2d at 890–92.
137. *Id.* at 628, 507 S.E.2d at 890.
138. *Id.*

while retaining a separate category for trespassers. Thus, after *Nelson*, landowners in North Carolina owed a straightforward standard of reasonable care toward all those lawfully on their land. And the plaintiff in *Nelson* was entitled to a jury trial during which the jury would determine whether the homeowner had shown him reasonable care.[139]

The justices of the Supreme Court of North Carolina, led by Judge Wynn, made the judicial choice in *Nelson v. Freeland* to eliminate an element of the common law that no longer served a useful function. They did not overturn precedent lightly; rather, the opinion expressed numerous, considered reasons for doing so, noting in particular the changed social circumstances. *Nelson* thus represents an example of a pragmatic decision that respects, but does not automatically bow to, historical tradition. And the decision to reach the issue in the first place—to make that judicial choice—was also pragmatic, taking into consideration what would be helpful to future courts, litigants, and landowners. *Nelson* thus provides a prime example of how judicial choice and judicial pragmatism intersect and feed into each other in Judge Wynn's body of judicial work.

CONCLUSION

Defining the judicial philosophy of any single judge is not easy, and no one term will capture all elements of that philosophy. Nevertheless, I have endeavored in this Essay to explore Judge Wynn's judicial philosophy over his decades-long career on the bench through his concept of "judicial choice" and the related concept of judicial pragmatism. I have argued that Judge Wynn's

139. *Nelson* remains good law in North Carolina. And it has had broad impact beyond the state's borders. Just seven months after Judge Wynn filed his opinion in *Nelson*, the Supreme Court of Appeals of West Virginia unanimously agreed to eliminate the invitee-licensee distinction in that state for essentially the same reasons as those given in *Nelson*. Mallet v. Pickens, 522 S.E.2d 436, 445–46 (W. Va. 1999) (citing *Nelson*, 349 N.C. at 631, 507 S.E.2d at 892). Since then, the Supreme Courts of Iowa and the U.S. Virgin Islands also each relied on *Nelson* in unanimously abolishing the invitee-licensee division in their jurisdictions. *See* Machado v. Yacht Haven U.S.V.I., LLC, S. Ct. Civ. No. 2012-0137, 2014 WL 5282116, at *5 (V.I. Oct. 16, 2014); Koenig v. Koenig, 766 N.W.2d 635, 638 (Iowa 2009). Meanwhile, dissenting and concurring justices in the highest courts of Kentucky, Mississippi, and Iowa (before the latter's subsequent decision to abandon the common-law rule) cited *Nelson* while urging their colleagues to follow the lead of Judge Wynn and others who had eliminated the invitee-licensee distinction. *See* Smith v. Smith, 563 S.W.3d 14, 19–22 (Ky. 2018) (Minton, C.J., dissenting); Handy v. Nejam, 111 So. 3d 610, 615–20 (Miss. 2013) (Kitchens, J., dissenting); Benham v. King, 700 N.W.2d 314, 321–23 (Iowa 2005) (Wiggins, J., concurring specially); Pinnell v. Bates, 838 So. 2d 198, 202–05 (Miss. 2002) (McRae, P.J., dissenting); Alexander v. Med. Assocs. Clinic, 646 N.W.2d 74, 80–85 (Iowa 2002) (Lavorato, C.J., concurring specially). Internationally, writers from other common-law countries have cited the opinion in discussing these issues. *See* Avihay Dorfman & Assaf Jacob, *The Fault of Trespass*, 65 U. TORONTO L.J. 48, 95, 95 n.174 (2015) (writers from Israeli universities writing in a Canadian publication); Low Kee Yang, *Occupiers' Liability After* See Toh*: Change, Uncertainty and Complexity*, 2013 SING. J. LEGAL STUD. 457, 459, 459 n.11 (2013) (Singapore). The case has also become a staple in tort-law classrooms, having been cited in at least one general tort-law textbook. *See* JAMES UNDERWOOD, TORT LAW: PRINCIPLES IN PRACTICE (2d ed. 2018).

philosophy is one that is practical and historically aware, and that looks for the decision point where the "tools" that must guide the judicial hand have run their course and the judge must, instead, exercise his or her discretion. It is at those points that Judge Wynn's view of the courts as a place to "do justice" shines through.[140]

140. *The Arc of the Moral Universe*, *supra* note 34, at 33:27–33:30.