THE SEPARATE OPINIONS OF JUDGE JAMES A. WYNN*

AISLINN R. KLOS**

America's courts are places of rules. There are rules of evidence, rules of procedure, local rules, sentencing rules, rules for litigants, rules for lawyers, and, of course, rules for the judges who administer all these rules. The necessity of rules for judges is obvious—imagine going up before a judge not trusting that the judge was bound to follow, at minimum, some basic rule of impartiality. Without that trust, despair. So, in furtherance of the integrity of the judiciary, in 1973 the national policy-making body for the federal courts, the Judicial Conference, drew up and wrote down the descriptively named "Code of Judicial Conduct for United States Judges."[1] The modern version of the Code provides, among other things, that a judge may engage in "extrajudicial activities" and speak and write on both legal and nonlegal subjects, but may not engage in such activities in a way that detracts from the dignity of the office or reflects adversely on the judge's impartiality.[2] In other words, there's a reason most federal judges aren't on Twitter.

But, despite what their lack of social media profiles would suggest, judges are people with thoughts and feelings and personal narratives that inform those thoughts and feelings. This is how it should be. Perhaps someday machine learning will achieve empathy, mercy, and farsighted vision. That day has yet to come. In the interim though, there is a tension in the judiciary; it is staffed with thinking, feeling, human beings, but in order to avoid any appearance of impropriety those individuals maintain a careful and dignified silence as to themselves. This silence can, in turn, shroud the humanity that is so fundamental to the fairness of justice. Humans speak constantly—with their voices, their pens, their hands, their faces, their keyboards as they furiously twitter away—but as compared to the general public, judges are taciturn. Nevertheless, speak they do.

* © 2022 Aislinn R. Klos.

** Aislinn R. Klos clerked for Judge Wynn from 2019–2020. She is currently an associate at Morgan, Lewis & Bockius LLP. The views expressed herein are solely those of the author and do not reflect the views of Judge Wynn or of Morgan, Lewis & Bockius LLP. The author thanks Laura Johnson and the other editors of the *North Carolina Law Review*, without whom this Essay would be twice as long and half as articulate. The author also thanks her former coclerks, Anna Collins Peterson, Richard Pell, and McKenna Jacquet-Freese, for their support in all things, in all ways, always.

1. CODE OF CONDUCT FOR U.S. JUDGES intro. (U.S. CTS. 1973).
2. CODE OF CONDUCT FOR U.S. JUDGES Canon 4 (U.S. CTS. 1973).

Judges speak, not in the brief unformed bursts characteristic of the twenty-first century, but through articles, books, and, chiefly, formal court opinions.[3] Of these media, the articles and books are optional, both for a judge to write and for an attorney to read, but the formal court opinions are mandatory—writing them is part of a judge's job, and attorneys are a captive audience. When it comes to how a judge speaks through a formal opinion, sometimes judges speak behind a per curiam veil, sometimes they speak on behalf of their colleagues, sometimes their colleagues speak on their behalf, and, sometimes, they speak alone. That last category, the category of speaking alone in so-called "separate opinions," illuminates a judge's philosophy and voice to a greater degree than any other form of opinion writing because, in these separate opinions, the judge's thoughts are less obscured by the thoughts of others. Furthermore, because separate opinions are generally ones which none of a judge's fellows have subscribed to, they are the place to look for the minority views that differentiate one judge from all the others.

This brings me to Judge Wynn, the central figure of this essay collection. I had the honor of clerking for Judge Wynn during the 2019–2020 term of the Fourth Circuit Court of Appeals. From that experience, I would characterize him as gregarious, kind, and *curious*. Having been a judge for over thirty years, Judge Wynn has written many, many opinions. But as many opinions as he has written, he has read even more opinions—an unfathomable number, I am sure. And so, I am not surprised that, having read so many opinions and having spent so many years listening to litigants tell all sides of every story, he wrote in his 2021 Madison Lecture that judicial activism—the boogeyman of court politics—was the failure to consider other views.[4] I understand that Madison Lecture as an expression of a judicial philosophy that turns on collecting and considering diverse and divergent ideas and then synthesizing them into a just result. For a judicial philosophy based on using diverse ideas to function, someone has to initially articulate those ideas. In the courthouse, that is Judge Wynn's job. Here in this essay collection it falls to me. Accordingly, I offer the following: a separate opinion on Judge Wynn's separate opinions.

3. Formal court opinions do sometimes circulate on Twitter, but the judges themselves are not the ones posting them there.

4. 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). Judge Wynn stated,

> In deciding a case, a court or judge engages in judicial activism when the court or judge eschews the use of a judicial delusional tool traditionally employed to adjudicate that type of case. . . . [S]imply ignoring without comment a well-established mediating principle generally applicable in the type of case at issue—or justifying the act of discarding a fundamental principle by relying on a legal or policy argument as to the undesirability of that principle—is a fundamentally activist enterprise.

Id.

This Essay proceeds in three parts. First, to provide context, I discuss some of the structural forces at work in an appellate judge's decision to write separately. Second, I address two cases where Judge Wynn wrote separate dissenting opinions: *United States v. Foster*[5] and *United States v. Surratt*.[6] At the Fourth Circuit, *Foster* and *Surratt* both resulted in panel opinions, highly contested en banc petitions, and then published orders with separate opinions attached. Both cases dealt with federal sentencing issues. Although highly technical and potentially obscure to civil practitioners, sentencing issues are constitutional in importance (and, indeed, are a paramount concern in criminal practice). In the aggregate, they are of unfathomable magnitude as they affect every single person convicted of a crime (or even just indicted) in the United States. But they are also uniquely individual to every defendant (and the people and communities harmed by their conduct, and then harmed by their subsequent absence). The complexity of the legal issues and individual interests in these cases provides a broad opportunity to explore how Judge Wynn differs from his colleagues in his application of legal rules to factual reality. Finally, I conclude with a reflection on how Judge Wynn's opinions in those two cases showcase Judge Wynn's desire to understand every case and party before him individually, and how this interest in his work lends itself to writing separate opinions.

I. WHY DO SEPARATE OPINIONS MATTER?

Why do separate opinions matter? More to the point, why do *Judge Wynn's* separate opinions matter? The short answer is that they matter because they are minority opinions—but this assertion makes no sense without, first, some context regarding how the federal iteration of the American legal system trends conservative at a structural level and limits opportunities for historically underrepresented groups to be heard, to be seen, and to effect change. Some separate opinions, including Judge Wynn's separate opinions, therefore can have scarcity value. This scarcity value is measured not in dollars but in judicial legitimacy. The foregoing conclusory statements require some support to survive dismissal, so, onwards.

Judges are opinionated. This is not surprising. Those who are not opinionated are not suited to being judges. Opining is, after all, the *sine qua non* of the bench, the *raison d'etre* of the judicial endeavor, the *whole enchilada* of the job. And opining *well*, as opposed to just plain opining, is how judges get written up in the caselaw books.

But, despite the importance of opining to a judge's job, the instances where a judge formally opines are surprisingly few. This is especially true for modern

5. 662 F.3d 291 (4th Cir. 2011); 674 F.3d 391 (4th Cir. 2012) (mem.).
6. 855 F.3d 218 (4th Cir. 2017) (en banc) (mem.).

judges sitting on multimember panels of an appellate court. On such courts (for example, as relevant to Judge Wynn, the North Carolina Court of Appeals, the Supreme Court of North Carolina, and the federal Fourth Circuit), no matter how many judges participate in deciding a case, if all judges agree on the outcome of the case, typically only one majority opinion will be written.[7] This opinion may be attributed to a single authoring judge with the others joining, or it may be issued "per curiam"—that is, on behalf of the court and without attribution to any specific judge.[8] A judge has the option of writing a separate opinion, either a dissent or a concurrence, in their own name,[9] but the culture of the courts considers such a separate opinion to be a deviation from the norm.

To illustrate the point, a bit of math is necessary. The Fourth Circuit Court of Appeals only publishes opinions for cases that the court hears oral arguments on.[10] In the years preceding the disruption of COVID-19, the Fourth Circuit typically heard oral arguments six weeks per year, not counting single-day special sessions.[11] Those weeks are not full five-day weeks; a full court week is usually only four days.[12] Every day of that four-day week, a judge with a full caseload will hear four cases.[13] So, 4x4x6=96 cases per year. But the court hears cases in panels of three.[14] So, assuming all cases are unanimous and opinion assignments are distributed evenly, 96/3=32 opinions. But! Sometimes cases settle between when they go on the oral argument calendar and when they would have been heard, and the Office of the Clerk of Court is not always able to get a replacement case on the schedule. Sometimes other changes in circumstance moot a case. Sometimes illness or accident interferes with the oral argument. And, if the court hears any cases en banc, then every active judge on the Fourth Circuit participates simultaneously and the oral argument takes

7. *Opinions*, SUP. CT. U.S., https://www.supremecourt.gov/opinions/opinions.aspx [https://perma.cc/G5KJ-TEBT].

8. *Id.*

9. *Id.*

10. 4TH CIR. R. 36(a) ("The [c]ourt will publish opinions only in cases that have been fully briefed and presented at oral argument."). Oral argument is a necessary but not sufficient condition for publication; the judges who hear the case must also affirmatively decide the majority opinion ought to be published. *Id.*

11. 4TH CIR. R. 34(c).

12. *See, e.g.*, U.S. CT. OF APPEALS FOR THE 4TH CIR., ORAL ARGUMENT CALENDAR (10/26/2021 - 10/20/2021 SESSION) 1–12, https://www.ca4.uscourts.gov/cal/internetcalOct262021ric.pdf [https://perma.cc/5QG8-YNPT] (showing that hearings are scheduled from Tuesday through Friday).

13. 4TH CIR. R. 34(c).

14. FED. R. APP. P. 34(a)(2) ("Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary . . . ."); 4TH CIR. R. 34(c) ("The Court initially hears and decides cases in panels consisting of three judges with the Chief Judge or most senior active judge presiding. Each panel regularly hears oral argument in four cases each day during court week; additional cases are added as required.").

longer than a normal three-judge case.[15] So if there are, say, two en banc cases in one court week, that will consume an entire court day and knock off two normal cases.[16] (Also, there is not a one-in-three chance that any given judge will be writing the majority opinion for an en banc case.) In short, thirty-two opinions is more like a ceiling number than a yearly average.[17] While I was clerking with Judge Wynn for the 2019–2020 term of the Fourth Circuit, due to a confluence of scheduling issues, during one in-person court week he heard only two cases.[18] Remember: a full court week would be sixteen.

Suppose though that a judge did sit for ninety-six oral-argument cases in a year, every single one of which was selected for publication, and this hypothetical judge decided to write a dissent or concurrence in every single case they did not write the majority opinion for! But, really, don't suppose that—it's highly unlikely. In every case (where the plaintiff has standing), the litigants have something important on the line, but not every case is *Brown v. Board of*

15. In the usual case before a three-judge panel, each side is allowed twenty minutes for oral argument. 4TH CIR. R. 34(d). In certain types of cases (e.g., social security disability appeals), the time per side is shortened to fifteen minutes each. *Id.* Counsel do not have the right to take longer than their allotted time, but the court may preemptively allot more time, or a judge may hold a counsel over by continuing to ask questions beyond the time limit and demanding an answer. *Id.*

16. *See, e.g.*, U.S. CT. OF APPEALS FOR THE 4TH CIR., ORAL ARGUMENT CALENDAR (12/10/2019 - 12/12/2019 SESSION) 11, https://www.ca4.uscourts.gov/cal/internetcaldec102019ric.pdf [https://perma.cc/A2DQ-EJX8] (scheduling two en banc hearings for December 12, 2019, and no other cases for that day); U.S. CT. OF APPEALS FOR THE 4TH CIR., ORAL ARGUMENT CALENDAR (9/18/2019 - 9/20/2019 SESSION) 6, https://www.ca4.uscourts.gov/cal/internetcalsep182019ric.pdf [https://perma.cc/8UQP-C4HM] (scheduling two en banc hearings for September 19, 2019, and no other cases for that day); *cf.* U.S. CT. OF APPEALS FOR THE 4TH CIR., ORAL ARGUMENT CALENDAR (1/28/2020 - 1/31/2020 SESSION) 11–15, https://www.ca4.uscourts.gov/cal/internetcaljan282020ric.pdf [https://perma.cc/V8YU-C8BU] (scheduling one en banc hearing for January 30, 2020, and two cases per panel for the rest of that day).

17. Still assuming all opinions are unanimous, here's another way of approximating how many opinions per year a judge on the Fourth Circuit might write: The Fourth Circuit hears oral argument in about 450 cases per year. *FAQs - Statistics*, U.S. CT. APPEALS FOR FOURTH CIR., https://www.ca4.uscourts.gov/faqs/faqs---statistics [https://perma.cc/EVY4-QP7V]. The pool of whom those opinions might be distributed among is slightly higher than fourteen; at the time of this writing, there are fourteen active status judges, but there are also three senior status judges, and district court judges may sit and hear cases with the Fourth Circuit from time to time. Assuming equal distribution among just the fourteen active status judges, 450/14 = 32.14. Accounting for the senior status and district court judges lowers that number slightly. Plus, although there are only fourteen active status judges at this time, one seat on the court is vacant; a full Fourth Circuit is fifteen judges. So, again, thirty-two is a ceiling. The federal court management statistics indicate that from 2015 to 2018, the Fourth Circuit averaged around thirty-five signed majority opinions per active judge per year (both published and unpublished). *See* U.S. CTS., U.S. COURT OF APPEALS - JUDICIAL CASELOAD PROFILE *11 (2018), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0930.2018.pdf [https://perma.cc/KEA9-EYGL]. In prior years, the number was somewhat higher. *See id.* (showing an average of forty-two signed majority opinions per active judge in 2013 and forty-five in 2014).

18. I include the qualifier "in-person" because my clerkship year was the first year of the COVID-19 pandemic and, starting with the March 2020 court week, many cases were submitted on the briefs or rescheduled to later court weeks during the initial uncertainty surrounding how long the pandemic would last.

Education.[19] Plus, the realistic importance of a concurrence or dissent is limited. Even at the level of the U.S. Supreme Court, unless the case tied the Court in so many knots and confused the vote tally so badly that there were eight or nine separate opinions and some of those opinions harbored some narrow point on which a critical mass of justices obliquely agreed to in the other opinions, these separate writings have no binding, precedential force, and do not announce any law.[20] They may excite endlessly the court watchers, the pundits, the public, and especially the legal academy, but a lawyer in private practice—if they are willing to bill time for analyzing dissents, especially now that legal technology helpfully color codes where to stop reading—would be reluctant to write a citation in a brief that includes "(Minority View, J., dissenting)." Writing a concurrence is an admission that the majority wouldn't sign on to a point. And writing a dissent is an admission of defeat.

All that said, there *do* exist arenas where dissents are not entirely futile, and Judge Wynn in fact spent some two decades in one of them: the North Carolina Court of Appeals.[21] For those more familiar with the federal system, this explanation will start there. In the federal system, when a circuit court of appeals issues a decision, a losing party can either ask that court to reconsider or to hear the case en banc.[22] And, if the loser can't get what they want from the circuit court, they can ask the U.S. Supreme Court to take the case.[23] This is called petitioning for certiorari.[24] The big catch here is that the U.S. Supreme

19. 349 U.S. 294 (1955). The Fourth Circuit only publishes opinions for about sixty percent of cases it hears oral argument on while ninety-three percent of the court's opinions are unpublished. *FAQs - Statistics*, *supra* note 17.

20. *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).

21. Judge Wynn served as an associate judge on the North Carolina Court of Appeals from 1990–1998 and again from 1999–2010. *Judge James Andrew Wynn*, U.S. CT. APPEALS FOR FOURTH CIR., http://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-james-andrew-wynn [http://perma.cc/J697-XFCN]. In 1998, he served as an associate justice on the Supreme Court of North Carolina. *Id.*

22. FED. R. APP. P. 35(b).

23. SUP. CT. R. 10.

24. In the misty yesteryear of common-law tradition, a higher court could order a lower court to send its record up for review. The higher court did this by issuing the so-called "writ of certiorari," named based on its opening phrase, "[q]uia certis de causis certiorari velimus," or, roughly, "[b]ecause We wish to be informed for certain reasons." *See* EDITH G. HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY 178–79 (1963). As "certiorari" is a verb formed from a comparative, it can also be construed to mean, in English, "to be more fully informed" or "to be made more certain" instead of "to be informed." *See Certiorari*, BLACK'S LAW DICTIONARY (11th ed. 2019). "Velimus" is the subjunctive form of "volumus" which is used to reference the royal "we." *See Volumus*, BLACK'S LAW DICTIONARY (11th ed. 2019). Finally, the preposition "de" can be defensibly translated several ways, all of which convey the general meaning of "about," "concerning," or "affecting." *See De*, BLACK'S LAW DICTIONARY (11th ed. 2019). Thus, one text from 1920 gives a tortured English translation of "because concerning certain causes we are willing to be certified." FRED H. ABBOTT, CYCLOPEDIA OF

Court doesn't have to take the case if they don't want it. If the loser can't get at least four of the nine U.S. Supreme Court justices to vote amongst themselves to take the case, the circuit court is typically the end of the road.[25] In all of that, if the losing litigant petitioning for certiorari managed to get a circuit court judge to side with them and write a dissent, then that dissent is worth what it's worth—legally, nothing, but persuasively, maybe something if it was particularly well-written.

In stark contrast, when a litigant loses at the North Carolina Court of Appeals and wants to go up to the Supreme Court of North Carolina for another shot, having a dissent can make all the difference. In the North Carolina system, a dissent from a judge of the court of appeals gives the losing party the *right* to appeal—it strips the higher court of the power to reject the case.[26] This North Carolina practice may have had a great impact on Judge Wynn's attitude towards separate opinions, even after he moved to the federal Fourth Circuit where dissents do not enjoy the same tangible consequence. In his time on the North Carolina Court of Appeals, from time to time, the Supreme Court of North Carolina, upon taking one of the cases where he had dissented, would issue short, per curiam opinions to the effect of, "[f]or the reasons given in Judge Wynn's dissenting opinion, we reverse the decision of the Court of Appeals."[27] In other words, North Carolina's highest court would adopt wholesale Judge Wynn's reasoning, feeling there was nothing more to be said.[28] In some of these cases, it is possible that Judge Wynn's decision to write a dissent and the way in which he wrote it was a "but-for" cause of a litigant achieving a just result. The Supreme Court of North Carolina may not have even taken the case if Judge Wynn had not dissented.[29] These experiences on the state bench

MICHIGAN PRACTICE IN CIVIL ACTIONS AT LAW IN COURTS OF RECORD WITH COMPLETE FORMS UNDER THE JUDICATURE ACT 271 (1920).

25. *See* Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 560 (1957) (Harlan, J., concurring) (discussing the "rule of four").

26. N.C. R. APP. P. 14(b)(1).

27. *See, e.g.*, Hale v. Afro-Am. Arts Int'l, Inc., 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993).

28. *See, e.g.*, Tucker v. Westlake, 352 N.C. 146, 146, 529 S.E.2d 454, 454 (2000) (per curiam) ("The decision of the Court of Appeals is reversed for the reasons stated in Judge Wynn's dissenting opinion."); Mellon v. Prosser, 347 N.C. 568, 568, 494 S.E.2d 763, 764 (1998) (per curiam) ("That part of the opinion of the majority in the Court of Appeals remanding this action . . . for joinder . . . is reversed for the reasons set forth in the dissenting opinion of Judge Wynn."). *Compare* State v. Jones, 133 N.C. App. 448, 465–84, 516 S.E.2d 405, 416–28 (1999) (Wynn, J., concurring in part and dissenting in part), *with* State v. Jones, 353 N.C. 159, 174, 538 S.E.2d 917, 928 (2000) (affirming in part and reversing in part).

29. *See* Sarah Lindemann Buthe, *Spotlight on Judges Series: Judge James A. Wynn, Jr.*, CASETEXT (Nov. 1, 2006), https://casetext.com/analysis/spotlight-on-judges-series-judge-james-a-wynn-jr [https://perma.cc/5RJ4-QKSA] ("I also think the right of the party to appeal based on a dissent is very powerful. We are the only appellate court that I know of with that power. This is particularly important because only one panel binds all other panels . . . .").

reinforced for Judge Wynn the importance of speaking up and speaking out when he was right, *especially* when no one else agreed.

So, returning to the question posed at the top of this section: Why does all of this separate opinion stuff matter? Put simply, when Judge Wynn writes separately, he writes as a minority. He writes as a minority in a basic numerical sense insofar as his view has not garnered a majority vote from his colleagues. And he also writes as a minority in the sense that his life experiences and his personal narrative have not led him to share the opinions of others who also hold judicial office. Their life experiences and personal narratives have led them elsewhere—based on the patterns of life that those other judges have come to recognize, they may notice and focus on different facts in a case, and they may find certain inferences from those facts more natural. Because Judge Wynn is in the minority in that latter experiential sense, he will often also be a minority in the former numerical sense on some issues. And for as long as he remains a minority in that experiential sense, he will stay in the minority in the numerical sense on those issues. But that he is in the minority in the numerical sense does not then reflect back to invalidate the life that he has lived that brought him to his conclusions. His narrative remains valid and crucial to achieving a just result for those who have come under the power of the courts despite the uncanny ability of those courts to shape reality to match their perceptions.

There is a certain school of thought that multimember appellate courts should issue unanimous or near-unanimous opinions in order to bolster their legitimacy. U.S. Supreme Court Chief Justice John Roberts is a proponent of this view. In July 2006, at the close of his first term at the U.S. Supreme Court, he gave an interview in which he indicated his intention to discourage his colleagues at the Court from writing separate opinions.[30] He believed that "every justice should be worried about the Court acting as a Court and functioning as a Court, and they should all be worried, when they're writing separately, about the effect on the Court as an institution."[31] To be clear, Chief Justice Roberts's view is more nuanced than "dissent-is-bad," and he has also explained that in his opinion "[d]ivision should not be artificially suppressed."[32] But however strongly or weakly stated, a majoritarian orientation towards judicial opinion writing does not necessarily enhance legitimacy; indeed, the American free speech tradition recognizes the importance of loud, vibrant dissent. A preference for only unanimous opinions reduces opportunities for

30. *See generally* Jeffrey Rosen, *Roberts's Rules*, ATLANTIC (Jan./Feb. 2007), https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/ [https://perma.cc/8YKX-PQ6V (dark archive)] (discussing Chief Justice Roberts's goal of promoting unanimity on the U.S. Supreme Court and his distaste for separate opinions).

31. *Id.*

32. Associated Press, *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES (May 22, 2006), https://www.nytimes.com/2006/05/22/washington/22justice.html [https://perma.cc/Q44B-WBB4 (dark archive)].

speech and hides minority voices when speech does occur, but, as the George Floyd protests of 2020 proved to all, many modern Americans are disturbed by the degree to which the judicial system neither reflects nor represents them. This lack of trust that the judiciary represents the people it serves casts doubt on judicial legitimacy; although an independent branch staffed with unelected officials, the federal judiciary is still part of a government that is supposed to be of the people, by the people, and for the people. A preference for majority-only opinion writing logically exacerbates the problem of nonrepresentation and disproportionately unequal representation.

The interplay between inequality and majority-only opinion writing can be seen by considering simplified court practices. Suppose two things: (1) equal distribution of majority opinion writing with no dissents or concurrences on a multimember court and (2) a court of eight men and one woman. After one complete round of opinion writing, there will be eight opinions by men and one opinion by a woman. After two complete rounds, there will be sixteen opinions by men and two opinions by a woman. So far so good? This isn't good if what we're interested in is equality of voice and representation, given that women are roughly half of the population but only one-ninth of this court. But now add the concept of precedent (which is qualitative to a degree that makes simple modeling difficult). After the first round and going into the second round, the pool of precedent that could impact or control future cases is made up of eight opinions by men and one opinion by a woman. As the system continues to run, if we assume that each subsequent round presents some distribution of both novel and precedent-dependent issues, the proportion of opinions where the controlling precedent was set by a woman dwindles over time. The intensity of this effect varies depending on the method used to model the role of precedent, but in general after every round the views of women—assuming the even greater simplification that the one woman on this nine-member court represents the views of all women—are at risk of becoming progressively less influential.[33]

33. One could argue that it does not matter who authors an opinion if everyone agrees on the outcome. This argument would say that the woman's opinion is fully represented in her male colleague's work because she agrees with the conclusion—the ultimate impact is the same because the holding is the same. However, a singular focus on a narrow holding or outcome of a case is contrary to how the practice of law plays out in the real world. Much of the litigator's art, especially once a case reaches an appellate court, turns on construing nuances in opinions. Consider statutory interpretation cases where the result turns on Congress's use of an "and" versus an "or"—then consider the free-wheeling complexity of court opinions divining the meaning of the U.S. Constitution. All of the words leading up to the holding of the case matter (to an extent sometimes understood only by those who come upon them years after they are written), and it is improbable that any two equally capable writers working at the level of a judge presiding over a case would produce exactly the same text. The differences between texts would be attributable to the differences between the writers; no two people are exactly the same, and the writers are the sums of their entire lives, including all the parts of those lives that have occurred entirely on account of, e.g., the writer's gender assigned at birth. The more complex the case, the more opportunities judges have to diverge in how they explain the reasoning

Not to mention the one woman can never take a sick day or a dud case lest the representation of women become further diluted.

This demographic erasure problem appears even worse when one considers the issue mentioned earlier in this part—a judge who is a member of a traditionally underrepresented demographic may be more likely to reach a conclusion in a case contrary to the conclusion reached by a bloc of judges who belong to traditionally overrepresented demographics. A judge who is a minority in the demographic sense is thus more likely to be a minority in the judicial voting sense as well. In other words, the starting assumption that in each round all opinions are unanimous majority opinions might be giving some unrealistic extra influence to the minority voice. And another exacerbating factor is that the American legal system is not a blank slate. It is a centuries-old system inherited from medieval England.[34] With that extensive history in mind, it is only extremely recently that any nonwhite or nonmale judges have weighed in on issues, and they have done so in the binding shadow of rules developed hundreds of years ago. In short, minority representation in the law is starting at a deficit and the system's design tends to perpetuate established inequality.[35]

One important long-term solution to the demographic legitimacy crisis is, of course, to appoint and elect more judges from traditionally underrepresented groups. The bench needs, in various combinations, more nonwhite, nonmale, noncisgender, nonheterosexual judges from diverse socioeconomic backgrounds at all levels of the judiciary to demonstrate to the American people that the courts are democratic rather than oligarchic. But this will not happen overnight.

In the interim, one stopgap is for the judges who are already on the bench representing those groups to make a point of speaking and being heard. As long as they are disproportionately few, in current practice, their views will be disproportionately underrepresented. They cannot rely on broad agreement among their colleagues to validate their opinions. In order to push the project of justice forward as much as they can, they must not only seize upon opportunities to write and publish opinions, even nonbinding separate opinions, but also seek out those opportunities. The point is not necessarily to

supporting the outcome, even when they agree on the contours of that reasoning. Accordingly, absent extensive in-chambers collaboration in drafting an opinion, it is illogical to say that where two judges agree on an outcome the written opinion of one of those two judges is a full substitute (i.e., is a complete equivalent in all the ways that matter for the future of the law) for the written opinion of the other, and this is especially true for high-profile, high-impact cases.

34. Herbert Pope, *The English Common Law in the United States*, 24 HARV. L. REV. 6, 9 (1910).

35. To be clear, simple-majority voting on low-headcount panels with an odd number of judges and *stare decisis* are also eminently practical features of a system striving to maintain rule of law in an efficient and predictable manner. The need for stability and predictability in the administration of the law tends to support an argument that the structural conservatism of the American legal system is a feature, not a bug. Whether bug or feature, however, the conservatism of the system is in tension with society's tendency to evolve and mature. This tension is susceptible to no easy resolution.

purposefully interject certain views; rather, the point is natural and authentic expression based on the life experience that the judge brings to the bench. In the end, no amount of compromise or collaboration on a majority opinion published under another's name can substitute for the authentic view of someone whose roots are those of an outsider to power.

II. THE MAN, THE MYTH, THE OPINIONS

A. United States v. Foster

This Essay now turns to a case where Judge Wynn wrote not one, but two dissents: *United States v. Foster*.[36] *Foster* was a criminal case about a convicted defendant's sentence. At a jury trial, Mr. John Joel Foster was found guilty of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1).[37] After that jury finding, the case moved to the sentencing phase. During sentencing an issue arose: Mr. Foster had several prior convictions for Virginia burglary; depending on what kind of burglaries they were, pursuant to the Armed Career Criminal Act ("ACCA"),[38] Mr. Foster's sentence might have been subject to a mandatory minimum of fifteen years in prison.[39] The legal question was whether all three of the prior burglaries qualified as "violent felonies" for purposes of federal sentencing.[40] The practical significance was thirteen years.

36. Judge Wynn wrote a dissent from the original appellate decision, United States v. Foster, 662 F.3d 291, 298–301 (4th Cir. 2011) (Wynn, J., dissenting), and wrote an additional dissent from the subsequent denial of rehearing en banc, United States v. Foster, 674 F.3d 391, 407–09 (4th Cir. 2012) (Wynn, J., dissenting) (mem.).

37. *See Foster*, 662 F.3d at 292 (majority opinion).

38. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185 (codified at 18 U.S.C. § 924(e)).

39. *Foster*, 662 F.3d at 291–92.

40. *Id.* at 292. Under 18 U.S.C. § 924(e), a person convicted of violating 18 U.S.C. § 922(g) (which makes unlawful the possession of firearms by certain persons, including, significantly, those "who ha[ve] been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year") is subject to a mandatory minimum sentence of fifteen years if that person has three previous convictions for "a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). The ACCA defines "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id. at § 924(e)(2)(B).

The use of prior convictions ("predicate offenses") to trigger enhancements during sentencing in a later criminal proceeding is common in sentencing statutes, but some statutes like the ACCA have generated much angst because they do not use clear definitions of what will count as a triggering predicate offense. Notably, in 2015 the U.S. Supreme Court held that the final clause in § 924(e)(2)(B) ("or otherwise involves conduct that presents a serious potential risk of physical injury to another"), known as the Act's "residual clause," was unconstitutionally vague. Johnson v. United States, 135 S. Ct. 2551, 2563 (2015). In *Foster*, Mr. Foster had a prior conviction for "burglary" under Virginia law,

Because the district court found that one of the burglaries was such a "violent felony" and the other two were not, it sentenced Mr. Foster to twenty-seven months in prison instead of the fifteen-year mandatory minimum.[41] The government appealed.[42]

When the case came before the original Fourth Circuit panel, it caused a panel split. Judge Agee and Senior Judge Hamilton said the particular burglary in question had been a violent felony.[43] Judge Agee wrote a majority opinion.[44] Senior Judge Hamilton wrote a concurring opinion agreeing with Judge Agee's analysis.[45] Judge Wynn wrote a dissent.[46]

At issue in *Foster* was a legal doctrine (the "modified categorical approach") governing when and how a federal sentencing court can draw inferences about a particular defendant's prior encounters with criminal courts.[47] The point of argument in *Foster* was how much "common sense" was permissible under this doctrine when the court wanted to determine if two burglarized businesses, "Corner Market" and "Sunrise-Sunset Restaurant," were "buildings or

and the legal question before the Fourth Circuit was whether this conviction for Virginia "burglary" was a federal generic "burglary" under § 924(e)(2)(B) as case law had come to understand the latter crime. *Foster*, 662 F.3d at 293 ("[A] person has been convicted of burglary . . . if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure with intent to commit a crime." (quoting Taylor v. United States, 495 U.S. 575, 599 (1990))); *see also Taylor*, 495 U.S. at 580–92 (discussing variation among state-law definitions of "burglary" and holding that the federal sentencing enhancement must use a uniform definition).

41. *Foster*, 662 F.3d at 293.

42. *Id.*

43. *Id.* at 291 ("We address in this case whether John Joel Foster's prior convictions . . . qualify as violent felonies under the ACCA. The district court found that they do not. We disagree . . . [and] therefore vacate Foster's sentence and remand this case for resentencing.").

44. *Id.* ("Judge Agee wrote the majority opinion, in which Senior Judge Hamilton joined.").

45. *Id.* ("Senior Judge Hamilton wrote a concurring opinion."); *id.* at 297 (Hamilton, J., concurring) ("I concur in Judge Agee's thorough and convincing opinion.").

46. *Id.* at 291 (majority opinion) ("Judge Wynn wrote a dissenting opinion.").

47. *Id.* at 293 ("In cases where, as here, the defendant pled guilty to the prior offense, a federal sentencing court may consider certain court documents, including but not limited to the indictment, a transcript of the plea colloquy and/or the written plea agreement."). In *Taylor v. United States*, 495 U.S. 575 (1990), the U.S. Supreme Court endorsed the so-called "categorical approach" of determining whether a state conviction for "burglary" (the predicate offense) would be considered a "burglary" for sentencing purposes under § 924(e)(2)(B). *Id.* at 600. The categorical approach is based on comparing the elements of the state "burglary" to the federal "burglary" and looks "only to the statutory definition of the prior offenses, and not to the particular facts underlying those convictions." *Id.* In addition to endorsing this elements-based approach, however, *Taylor* also authorized federal courts to consider, in the "narrow range of cases where a jury was actually required to find all the elements of generic burglary" whether "the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant." *Id.* at 602. Use of the indictment, charge, and other record evidence is particularly relevant where a state statute is divisible (meaning it allows conviction based on proof of alternative elements). *See* Descamps v. United States, 570 U.S. 254, 257 (2013) (discussing the "modified categorical approach").

structures affixed to the land."[48] Only if the burglarized businesses were such landlocked buildings would the prior burglaries be deemed "violent felonies" and the statutory sentencing enhancement apply.[49] Mr. Foster had pleaded guilty to the burglaries under a Virginia state statute that allowed for conviction if a defendant broke and entered either certain buildings affixed to land *or* if the defendant broke and entered various structures that were not affixed to land, such as boats, railroad cars, and automobiles being used as dwelling places.[50] Statutes constructed with such alternative elements for conviction are considered divisible; where a criminal statute is divisible, if one of the alternative elements would cause the crime to constitute a "violent felony" but another would not, then a sentencing court must determine which of the alternatives the defendant was convicted of in order to calculate the appropriate sentence.[51] This determination requires consideration of more than just the elements of the crime of conviction, thus it is termed the "modified categorical approach" (as opposed to the plain "categorical approach," under which a court can determine that an indivisible crime is or is not a "violent felony" based only on the fact of conviction).[52]

So what was Mr. Foster convicted of? Breaking into buildings affixed to land or boats? Because he pleaded guilty in 1992 rather than insisting on a jury trial, this case was a double whammy under the modified categorical approach. Had Mr. Foster gone to trial in 1992, that would have created a court record that included documents such as the jury charge or verdict sheet which might have conclusively proved the matter one way or the other.[53] But he hadn't, so the court had to both determine what happened in 1992 and do it without resort to what would normally be the best evidence.

48. *See Foster*, 662 F.3d at 298 (Wynn, J., dissenting); *see also id.* at 301 ("The 'common-sense approach' adopted by the majority essentially shifts the burden of proof from the Government to Defendant."); *id.* at 297 (Hamilton, J., concurring) ("I write separately to make three observations concerning the use of common sense in ACCA cases."). When *Foster* was decided by the Fourth Circuit, the use of common sense to identify buildings or structures affixed to the land in predicate offenses was topic of controversy for federal courts. *See, e.g.*, Shepard v. United States, 544 U.S. 13, 29 (2005) (O'Connor, J., dissenting) ("[T]he Court refuses to accept one additional, commonsense inference, based on substantial documentation and without any evidence to the contrary: that petitioner was punished for his entries into *buildings*.").

49. *Foster*, 662 F.3d at 293 ("The district court reasoned that because the convictions could not be found to have taken place in buildings or structures, those convictions did not qualify as violent felony offenses under the ACCA.").

50. *Id.* at 293–94 (describing the elements of the Virginia statute Mr. Foster was convicted of in 1992).

51. *See* U.S. SENT'G COMM'N, CATEGORICAL APPROACH: 2016 ANNUAL NATIONAL SEMINAR *1–2 (2016), https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/backgrounder_categorical-approach.pdf [https://perma.cc/XRE2-RTB8].

52. *See id.*

53. *Foster*, 662 F.3d at 292 n.1 (noting that the 1992 convictions were obtained by plea).

Now, Judge Wynn has a taste for facts. This leads to a keen awareness of what is or *isn't* in a record. The record in *Foster* did not directly state what kind of structures "Corner Market" and "Sunrise-Sunset Restaurant" were.[54] Playing a process of elimination game, the *Foster* majority cited a statute to explain why the establishments were not food trucks, but it then also concluded they were not businesses selling food from a railroad car or a river craft because those possibilities were simply too "remote."[55] Judge Wynn was not willing to go that far, and so he dissented.[56] With thirteen years on the line, what if these businesses *had* been river craft establishments?[57] The sentence would be predicated on a judicial shrug. A man would spend over a decade in prison based on some close-enough-for-government-work first-instance fact-finding by an appellate court. And his friends and family would spend over a decade without him. The majority opinion in *Foster* sharply implied that Judge Wynn's dissenting position required "cast[ing] logic aside" and applying "divorced-from-reality, law-school-professor-type hypothetical that bear no resemblance to what actually goes on."[58] But it was really the opposite. An abstract legal doctrine controlled the case, but, in reality, there was an irreplaceable piece of a human life at stake.

Judge Wynn's concern for conclusively determining what the "Corner Market" and "Sunrise-Sunset Restaurant" were reflects another consideration that can push a judge to write separately. Dissents present opportunities to highlight any factual errors in the majority opinion. An opinion that gets its facts wrong is nonsensical and out of touch with reality. Facts, after all, are what reality is made from.

Water is wet. The sky is blue. If the U.S. government wrongfully deports a noncitizen, it will facilitate their return and restore their immigration status.[59] Those first two are facts. The third, on the other hand, is something that the U.S. Department of Justice told the Supreme Court was a fact that then made

54. *Id.* at 293 ("The parties agree that because the applicable Virginia statute is broader than 'generic burglary' as defined by the Supreme Court in *Taylor*, we should review *Shepard*-approved documents 'to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense.'" (quoting Shepard v. United States, 544 U.S. 13, 26 (2005))).

55. *Id.* at 294–95, 294 n.4.

56. *See id.* at 300 (Wynn, J., dissenting).

57. At oral argument, one judge on the panel asked, "Where in Lee County, Virginia would you find a ship?" Counsel for Mr. Foster answered, "The Powell River might accommodate a small boat, your honor, but I don't believe it would accommodate a ship." Oral Argument at 21:00, *Foster*, 662 F.3d at 293 (No. 10-5028), https://www.ca4.uscourts.gov/Oaarchive/mp3/10-5028-20110923.mp3 [https://perma.cc/CBS9-K4WD]. The court's entertainment of whether or not the geography of the original convictions was inhospitable to certain possibilities demonstrates at work the temptation to expand the record when applying common sense.

58. *Foster*, 662 F.3d at 296 (quoting United States v. Rainer, 616 F.3d 1212, 1216 (11th Cir. 2010)).

59. Nken v. Holder, 556 U.S. 418, 435 (2009).

its way into a published, precedential opinion binding on every federal court in the country—*Nken v. Holder*.[60] Unlike a fact, it is not—in fact—true.[61] And, unfortunately, the Supreme Court's recitation of this not-fact misled lower courts into taking it at face value and denying relief to noncitizens facing deportation, all in reliance on a policy that never existed.[62] One way to prevent errors such as the one that occurred in *Nken* is for parties to take their duty of candor to the court seriously. Another way is for judges who agree to let one another know about mistakes quietly. And still another is for a dissenting judge to, well, write a dissent.

More so than judges who concur, judges who dissent are particularly incentivized to review records with fine-toothed combs. (Also, a dissent, unlike a majority opinion, has more latitude to fact-check using nonrecord sources.) Thus, an alert dissent can sometimes stop mistakes from ever making it to print. And, at the very least, a dissent that attends to the facts as they are, with as little inference and varnish as possible, can slow the replication of errors by serving as a warning to other courts that misinformation lurks about. Thus, separate opinions can be a vehicle for setting the record straight and preserving it for the future.

Returning to *Foster*, Judge Wynn wrote a forceful dissent focusing on what the court actually knew (and didn't know) about "Sunrise-Sunset Restaurant" and "Corner Market."[63] Par for the course so far. Then, after the majority and dissenting opinions were filed, the defendant moved for a rehearing en banc.[64] Again, there's nothing unusual about a losing defendant asking for a rehearing. The incentives are all aligned in that direction. The twist in *Foster* came when the Fourth Circuit denied rehearing on a seven-to-seven vote.[65] *That* was an unusual outcome.

As background, normally a litigant disappointed by a panel decision can petition the Fourth Circuit for a rehearing en banc (that is, a hearing before the full court rather than a three-member panel).[66] When the court sits en banc and speaks with the voice of the full court, the resulting decision has greater weight than the decision of a panel.[67] Only a circuit court sitting en banc (or, of course,

60. 556 U.S. 418 (2009); Nancy Morawetz, *Convenient Facts:* Nken v. Holder*, the Solicitor General, and the Presentation of Internal Government Facts*, 88 N.Y.U. L. REV. 1600, 1602 (2013).

61. *See* Morawetz, *supra* note 60, at 1602; *see also* Ryan Gabrielson, *It's a Fact: Supreme Court Errors Aren't Hard To Find*, PROPUBLICA (Oct. 17, 2017, 8:00 AM), https://www.propublica.org/article/supreme-court-errors-are-not-hard-to-find [https://perma.cc/YF82-ZVEF].

62. Morawetz, *supra* note 60, at 1644.

63. *See Foster*, 662 F.3d at 298–301 (Wynn, J., dissenting).

64. United States v. Foster, 674 F.3d, 391, 391 (4th Cir. 2012) (mem.) ("Appellee has filed a petition for rehearing en banc.").

65. *Id.* ("Because the poll on rehearing en banc failed to produce a majority of judges in active service in favor of rehearing en banc, the petition for rehearing en banc is denied.").

66. FED. R. APP. P. 35(b).

67. 4TH CIR. R. 35(c).

the Supreme Court) can overturn a precedential decision reached by a prior panel of that circuit court.[68] Because rehearing en banc is reserved for those cases that involve a "question of exceptional importance"[69] or instances where en banc consideration is "necessary to secure or maintain uniformity of the court's decisions,"[70] such a proceeding is rarely granted. The Fourth Circuit will grant a petition for a rehearing en banc only if a majority of active judges vote to grant it.[71] A seven-to-seven even split is uncommon because the Fourth Circuit normally has fifteen judges.[72] When the *Foster* vote was taken, however, one seat was vacant due to the death of Judge M. Blane Michael (Judge Stephanie Thacker received her commission for that seat shortly after *Foster*).[73] Thus, the seven-to-seven vote was particularly heart-wrenching because of the attendant what-ifs—what if there had been a fifteenth judge and an eighth vote in favor of rehearing? For better or for worse, a judge's vote whether to grant rehearing en banc is often considered a signal of the position the judge will take on the merits at that rehearing; the even split and the empty seat lent a sense that the case was both immensely important and *so close* to reversal, if only circumstances had been different.

The ensuing judicial scuffle over the vote produced another four separate opinions, all attached to the order denying rehearing.[74] All told, there had been seven opinions authored by six different judges on a case that never reached formal en banc review.[75] In his dissent from the denial of rehearing en banc, Judge Wynn counted that, at that point, *ten* of the fourteen judges had either authored or joined opinions expressing views on the merits of the case.[76] Posing a rhetorical question, Judge Wynn wondered whether, if the remaining judges had joined any of those opinions, the denial of rehearing en banc would have the same precedential force—force generated by the effect of speaking as a full court and force enough to override prior panel decisions—as an actual en banc

68. *See, e.g.*, Bright v. Gallia County, 753 F.3d 639, 655 (6th Cir. 2014).

69. FED. R. APP. P. 35(a)(2).

70. FED. R. APP. P. 35(a)(1).

71. *See* 4TH CIR. R. 35(b); *see also* FED. R. APP. P. 35(a).

72. *Judges of the Court*, U.S. CT. APPEALS FOR FOURTH CIR., https://www.ca4.uscourts.gov/judges/judges-of-the-court [https://perma.cc/NX7P-ZSAL].

73. *Judge Stephanie D. Thacker*, U.S. CT. APPEALS FOR FOURTH CIR., https://www.ca4.uscourts.gov/judges/judges-of-the-court/judge-stephanie-d-thacker [https://perma.cc/TUB8-3NYE].

74. United States v. Foster, 674 F.3d 391, 391 (4th Cir. 2012) (mem.). In the denial of a rehearing en banc, Judge Wilkinson filed an opinion concurring and Judges Motz, Davis, and Wynn each filed their own dissenting opinion. *Id.*

75. *See id.*; *see also* United States v. Foster, 662 F.3d 291, 291 (4th Cir. 2011).

76. *Foster*, 674 F.3d at 408–09 (Wynn, J., dissenting) ("[T]en judges have now expressed their opinions on the merits of the underlying appeal, not just on the decision to deny rehearing. That leaves the order denying a rehearing en banc essentially affecting only the remaining five judges who have neither written nor joined an opinion . . . .").

decision.[77] Nevertheless, Judge Wynn had arguments to make and points to highlight and thus entered his (second) dissent in that case, focusing this time on the procedural hurdle of the en banc vote rather than the merits.[78] Insofar as he was taking a second bite at the apple, he was taking his second bite from a new part of the apple.[79]

B. United States v. Surratt

In *Foster*, Judge Wynn was in good company when he dissented from the denial of rehearing en banc—six of the fourteen active judges of the court were also in favor of granting a rehearing en banc.[80] This bounty of allies gave his dissent (and the dissents of the other judges) force because strength in numbers matters in an arena where victory is always assured to the side with a simple majority. But dissents are usually written and entered alone. If a dissent garners a joinder on a three-judge panel, it becomes the majority opinion instead. Only in the context of an en banc proceeding do dissents become group endeavors. Thus, from this observation about power and possibility, as significant as it was in *Foster* that other judges dissented alongside Judge Wynn, it was equally significant in another en banc sentencing case (one that actually went before the full court instead of faltering at the polling stage), *United States v. Surratt*,[81] that Judge Wynn dissented alone.[82]

Before the en banc Fourth Circuit, *Surratt* was about the habeas petition of a prisoner, Mr. Raymond Surratt.[83] The conviction and imprisonment of Mr. Surratt had a long and complicated history, over which, at some point or another, it raised every sort of procedural question a criminal case and

77. *Id.* at 409 ("I suppose if those five judges were to align themselves with any of the opinions arising from this poll, this Court would effectively have conducted an en banc review—only without having given the parties access to the full Court via oral argument to express their views.").

78. *Id.* at 407 ("I write now not to address why I believe the panel majority was incorrect; rather, I write to point out why this case is particularly well suited to be considered by the full Court, irrespective of whether one agrees or disagrees with the panel majority opinion.").

79. In *Doe v. Fairfax County School Board*, 10 F.4th 406 (4th Cir. 2021) (mem.), Judge Wynn recently addressed the practice of dissenting from orders denying rehearing en banc in a concurring opinion with respect to such an order. *Id.* at 406–13 (Wynn, J., concurring). He presented two types of such dissents: dissents that address questions of appellate procedure and dissents that go to the underlying merits of the case. *See id.* at 406–09. Applying that dichotomy here, his second dissent in *Foster* was of the former type, *Foster*, 674 F.3d at 407–09, and the dissents in *Fairfax County* were of the latter type, *Fairfax Cnty. Sch. Bd.*, 10 F.4th at 407. The juxtaposition of his separate opinions in *Foster* and *Fairfax County* shows a consistent judicial philosophy that often favors separate opinions, but applies a limiting principle that the opinion should come from a judge fully versed in the case and address a question actually presented to the court.

80. *Foster*, 674 F.3d at 391.

81. 855 F.3d 218 (4th Cir. 2017) (en banc) (mem.).

82. *Id.* at 220–33 (Wynn, J., dissenting).

83. United States v. Surratt, 797 F.3d 240, 244 (4th Cir. 2015), *appeal dismissed*, 855 F.3d 218 (4th Cir. 2017) (en banc) (mem.).

subsequent civil collateral attack could raise. The significance of this case was that it involved an acknowledged error that resulted in a sentence of life in prison[84]—the second most severe criminal sentence in the United States. And the error had been no fault of the defendant, his counsel, the prosecution, or even the sentencing judge. Rather, the error was attributable entirely to the Fourth Circuit.[85] Mr. Surratt was effectively a victim of the court. The question for the Fourth Circuit was whether it would take responsibility and remedy the injustice it caused.

In 2005, Mr. Surratt was convicted of crack cocaine distribution.[86] Also in 2005, courts, at the direction of Congress, applied a racist sentencing scheme where persons convicted of crack cocaine offenses (typically Black) received far harsher sentences than persons convicted of powder cocaine offenses (typically white).[87] Specifically, sentences were based on drug quantity, and the amount of powder cocaine to crack cocaine for an equivalent sentence worked out to a ratio of about 100-to-1.[88] Compounding matters for Mr. Surratt, in 2005 there was binding (but erroneous) precedent in the Fourth Circuit related to calculating the appropriate federal sentence for a defendant who had certain prior North Carolina convictions.[89] The effect of this erroneous precedent for Mr. Surratt was to increase his federal sentence.[90] Between these two factors, Mr. Surratt was subject to a *mandatory minimum sentence of life imprisonment*.[91]

But years later, in *United States v. Simmons*,[92] the Fourth Circuit admitted its mistake and overruled its bad precedent.[93] And around the same time,

84. *Id.*

85. *Surratt*, 855 F.3d at 220–21.

86. *Id.* at 222 ("In 2005, Petitioner pled guilty to conspiracy to possess with intent to distribute more than 50 grams (1.76 ounces), but less than 150 grams (5.29 ounces), of crack cocaine in violation of the Controlled Substances Act, 21 U.S.C. §§ 841(b)(1), 846.").

87. For a contemporary and concise discussion of the racial disparities in sentencing for crack versus powder cocaine offenses that existed at the time of Mr. Surratt's original sentencing, see DEBORAH J. VAGINS & JESSELYN MCCURDY, ACLU, CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW i–10 (2006), https://www.aclu.org/sites/default/files/field_document/cracksinsystem_20061025.pdf [https://perma.cc/BJ2A-A28E]. Although crack and powder cocaine are essentially the same drug in terms of makeup and effects, "[b]ecause of its relative low cost, crack cocaine is more accessible for poor Americans, many of whom are African Americans," but "powder cocaine is much more expensive and tends to be used by more affluent white Americans." *Id.* at i. "In 1986, before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11% higher than for whites. Four years later, the average federal drug sentence for African Americans was 49% higher." *Id.* at i–ii.

88. United States v. Wirsing, 943 F.3d 175, 177–80 (4th Cir. 2019) (discussing the history of the cocaine sentencing disparity).

89. *See* United States v. Simmons, 649 F.3d 237, 240–50 (4th Cir. 2011) (en banc).

90. *Surratt*, 855 F.3d at 223–27.

91. *See id.* at 229.

92. 649 F.3d 237 (4th Cir. 2011) (en banc).

93. *See id.* at 241.

Congress enacted the Fair Sentencing Act,[94] which aimed to partially correct the sentencing disparities between crack cocaine and powder cocaine offenses, reducing the 100-to-1 ratio to an 18-to-1 ratio.[95] Just as the old Fourth Circuit error and the crack cocaine disparity had worked together to result in a mandatory minimum life sentence, the new Fourth Circuit rule combined with the Fair Sentencing Act might have potentially reduced Mr. Surratt's sentence.[96] Between them, Mr. Surratt's correct sentence would not be mandatory life but instead 120–137 months in prison (roughly ten to eleven years).[97] Had he originally been sentenced to that range, he would have been able to leave prison in 2016 at the latest, and likely earlier if he was sentenced at the lower end of that range, credited for good behavior in prison, or both.

On account of the change in law, both Mr. Surratt *and the government* agreed that the original life sentence was unlawful.[98] The problem for Mr. Surratt, however, was that statutory restrictions on federal courts' habeas power (i.e., the power to hear the petition of a prisoner and correct a conviction or sentence) made it procedurally difficult, if not impossible, to get in front of a court authorized to help him.[99] The trouble was the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[100] This law "create[d] a maze of Kafkaesque procedures that create the danger of an incarcerated person's [habeas] petition being thrown out at every turn for a failure to follow even the

94. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (codified as amended in scattered sections of 21 and 28 U.S.C.).

95. Dorsey v. United States, 567 U.S. 260, 269 (2012) ("In 2010, Congress . . . enacted the Fair Sentencing Act into law. The Act increased the drug amounts triggering mandatory minimums for crack trafficking offenses . . . [and] had the effect of lowering the 100-to-1 crack-to-powder ratio to 18 to 1.").

96. *See* Miller v. United States, 735 F.3d 141, 147 (4th Cir. 2013) (holding *Simmons* applies retroactively and vacating a conviction); *Dorsey*, 567 U.S. at 281 (holding the Fair Sentencing Act applies where a sentence is imposed post-Act for pre-Act conduct).

97. United States v. Surratt, 855 F.3d 218, 223 (4th Cir. 2017) (en banc) (Wynn, J., dissenting) (mem.).

98. *Id.* ("Commendably, . . . *the government agreed that Petitioner was entitled to relief under Section 2241 and supported resentencing*.").

99. *See Habeas Corpus*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/habeas_corpus [https://perma.cc/FL76-BXCS] (June 2017). For those unfamiliar with habeas corpus, a bit of drastically simplified background: A state or federal prisoner who has run out of direct appeals of their criminal conviction (i.e., they have appealed their plea or trial as far as they can up the judicial totem pole) still has a shot at liberty. *Id.* Such a prisoner can go to a federal court and institute a civil suit (a "collateral" suit not formally part of the underlying criminal case) seeking additional review of the case. *See id.* There are technical differences in how this plays out between state versus federal prisoners, but this all goes back to the writ of habeas corpus. The writ of habeas corpus is a method of challenging the legality of imprisonment (or a death sentence) that dates back to thirteenth-century England and is enshrined in the U.S. Constitution. *Id.*

100. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 34 U.S.C.).

most minute rule—regardless of whether their claims have merit."[101] One way AEDPA cut off review of convictions and sentences was by restricting the conditions under which a prisoner can bring "second or successive" petitions.[102] For most prisoners, after the conclusion of their first petition, Congress generally shuts and bars the federal courthouse doors. This was the bind that Mr. Surratt faced in 2012 when he tried to challenge his 2005 sentence based on *Simmons* (decided in 2011)—Mr. Surratt had already used up his first bite at the apple in 2008.[103] Indeed, when Mr. Surratt sought habeas relief, the district court denied it, and a panel of the Fourth Circuit affirmed.[104] He was stuck with his unlawful life sentence.

Hope for Mr. Surratt reignited when the full Fourth Circuit quickly agreed to review the case en banc.[105] The principle issue the parties and court addressed during the en banc proceeding was whether Mr. Surratt's case might fall under 28 U.S.C. § 2255(e), specifically the statute's "savings clause,"[106] which allows petitioners who have already used up their first petition to still seek habeas relief under certain circumstances.[107] However, ten months after the en banc court heard oral argument—but before the en banc court issued its opinion—President Barack Obama commuted Mr. Surratt's sentence to 200 months as part of a broader effort to ameliorate the old crack cocaine/powder cocaine sentencing disparity.[108] Because of the executive commutation, the en banc court voted to dismiss Mr. Surratt's appeal as moot rather than proceed

101. Brian Stull & Tammie Gregg, *The Unhappy 25th Birthday of Two Tough-on-Crime Era Laws That Have Deadly Consequences for Incarcerated People*, ACLU (Apr. 27, 2021), https://www.aclu.org/new/capital-punishment/the-unhappy-25th-birthday-of-two-tough-on-crime-era-laws-that-have-deadly-consequences-for-incarcerated-people/ [https://perma.cc/77CT-QV6T].

102. *See* 28 U.S.C. § 2255(h).

103. United States v. Surratt, 797 F.3d 240, 244–47 (4th Cir. 2015), *appeal dismissed*, 855 F.3d 218 (4th Cir. 2017) (en banc) (mem.).

104. *Id.* at 244 ("We are not unsympathetic to [Surratt's] claim . . . . However, Congress has the power to define the scope of the writ of habeas corpus, and Congress has exercised that power here to narrowly limit the circumstances in which a § 2241 petition may be brought.").

105. Oral argument before the original panel was held January 27, 2015. U.S CT. OF APPEALS FOR THE 4TH CIR., ORAL ARGUMENT CALENDAR (01/27/2015 - 01/29/2015 SESSION) 1, https://www.ca4.uscourts.gov/cal/internetcaljan272015ric.pdf [https://perma.cc/U6DJ-B9FD]. The court published the panel decision shortly after on July 31, 2015. *See Surratt*, 797 F.3d at 241. On December 2, 2015, the court granted a rehearing en banc. *Id.* The Fourth Circuit then heard the case en banc on March 23, 2016. U.S. CT. OF APPEALS FOR THE 4TH CIR., ORAL ARGUMENT CALENDAR (3/21/2016 - 3/24/2016 SESSION) 9, https://www.ca4.uscourts.gov/cal/internetcalmar222016ric.pdf [https://perma.cc/VAB5-G9P6].

106. *See generally* Oral Argument, United States v. Surratt, 855 F.3d 218 (4th Cir. 2017) (en banc) (mem.) (No. 14-6851), https://www.ca4.uscourts.gov/Oaarchive/mp3/14-6851-20160323.mp3 [https://perma.cc/L8AH-79JD] (showing that both parties argued jurisdictional issues related to the "savings clause").

107. *See, e.g.*, Farkas v. Butner, 972 F.3d 548, 555 (4th Cir. 2020).

108. *See Surratt*, 855 F.3d at 224 (Wynn, J., dissenting) ("Petitioner's commutation was part of a broader effort by the President to commute the sentences of inmates sentenced in accordance with the severe mandatory minimums and unjust powder-to-crack quantity ratio . . . .").

with issuing its pending opinion.[109] The thinking was that Mr. Surratt was, at that point, serving an "executive" rather than a "judicial" sentence, and thus the court could not interfere.[110] Although this thinking was absurd—the executive branch has no power to freely impose sentences—Judge Wynn stood alone in dissenting.[111]

Mr. Surratt was thirty years old when he was sentenced in 2005 to life in prison.[112] Between 2005 and when the Fourth Circuit dismissed his appeal as moot, twelve years passed—that is, 144 months. Applying the changes in law, his recommended sentence should only have been 137 months, at most.[113] A commutation of 200 months was still *years* more than Mr. Surratt should have been sentenced to. And, had the Fourth Circuit held that the revised sentence should have applied instead, Mr. Surratt would have been freed immediately since he had already served seven months over the new maximum. In other words, when the Fourth Circuit decided that Mr. Surratt's appeal was moot, that decision was the difference between staying in prison for several more years and going free.

The truly galling thing about the *Surratt* case is that during the three years that it sat on the Fourth Circuit's docket waiting to be addressed, the government had supported resentencing Mr. Surratt to a lesser term.[114] The case was adversarial only because the Fourth Circuit appointed independent counsel to argue that Mr. Surratt should spend his life in prison.[115] And the ten months between oral argument and the commutation without an opinion from the en banc court? In 2017, the year the Fourth Circuit failed to decide *Surratt*, ten months was longer than the average appeal took *from filing to disposition*.[116] Had the opinion timely gone out the door, mootness would never have been on the table. In Judge Wynn's view, the court had bent over backwards to keep

109. *Id.* at 219 (majority opinion) (ordering appeal dismissed as moot).

110. *See id.* at 221 (Wynn, J., dissenting) (explaining the reasoning of the majority).

111. *See id.* at 219 (majority opinion).

112. *See* Ann E. Marimow, *N.C. Man Serving Life for Nonviolent Crime Among Hundreds Granted Early Release*, WASH. POST (Jan. 25, 2017), https://www.washingtonpost.com/local/public-safety/nc-man-wrongly-given-life-sentence-is-among-hundreds-granted-early-release/2017/01/25/f4959cd8-e311-11e6-a453-19ec4b3d09ba_story.html [https://perma.cc/R7NC-KJ9E (dark archive)].

113. *Surratt*, 855 F.3d at 223 (Wynn, J., dissenting).

114. United States v. Surratt, 797 F.3d 240, 270 (4th Cir. 2015) (Gregory, J., dissenting) ("Surratt asks to be resentenced. Remarkably, the government *agrees* with Surratt. Both parties agree that Surratt is legally ineligible to spend the rest of his life in prison."), *appeal dismissed*, 855 F.3d 218 (4th Cir. 2017) (en banc) (mem.).

115. *Surratt*, 855 F.3d at 220 (Wynn, J., dissenting) ("[W]hen Petitioner, *with the government's support*, sought collateral relief on the grounds that his unlawful life sentence constituted a fundamental defect of constitutional dimension, we actively appointed independent counsel to argue that Petitioner should spend his life in prison.").

116. U.S. CTS., U.S. CT. OF APPEALS - JUDICIAL CASELOAD PROFILE *12 (2017), https://www.uscourts.gov/sites/default/files/fcms_na_appprofile1231.2017.pdf [https://perma.cc/S5W7-5EQ3].

Mr. Surratt in prison despite knowing his sentence was unjust.[117] And, as he saw things, the court's motive was selfish. During the en banc oral argument, he made a cutting remark: "The court doesn't like the fact it's getting ready to do some more work, so let's look at procedural rules and stick to them right to the 'T' and make sure we don't get a flood[] of work based upon an interpretation we made wrong."[118] And, in his written dissent from the dismissal, he said this and more.

Characterizing the majority's decision as "an abandonment of fairness" and "an outright injustice," Judge Wynn wrote a scathing opinion laying out how the government and courts had layered abuse after abuse on Mr. Surratt.[119] He'd been sentenced under bad precedent—and only the Fourth Circuit was to blame. And he'd been sentenced under an extreme crack cocaine/powder cocaine disparity.[120] And then, when everyone, including the government who originally prosecuted Mr. Surratt and wanted to correct his sentence, recognized the injustice, the court appointed someone to argue against Mr. Surratt and the government, then shrugged and decided that fixing this travesty was just simply out of their power.[121] Even when the en banc court seemed like it might finally provide relief, it delayed and delayed and delayed until an excuse to get rid of the case presented itself.[122] The court found that excuse in a commutation—an executive action meant to be one of *mercy*, not to *keep* Mr. Surratt in prison for several more years. At bottom, there was still a man in prison who shouldn't have been there.[123]

"It used to be a big thing, [the] liberty of a human being," Judge Wynn observed during the en banc oral argument.[124] The court was faced with a fundamental question: What kinds of injustice, and how much injustice, should a court tolerate as a cost of doing business? Some tolerance is necessary as a practical matter to keep a system moving, but too much tolerance renders the judicial endeavor futile. AEDPA had increased the criminal justice system's tolerance for error and measured the increase in procedural terms, generally limiting prisoners to one petition only.[125] Mr. Surratt's situation was blatantly unjust to a degree that everyone involved in the case recognized it as unjust, but

117. *See Surratt*, 855 F.3d at 220–22 (Wynn, J., dissenting).

118. Oral Argument, *supra* note 106, at 33:01.

119. *Surratt*, 855 F.3d at 220–27 (Wynn, J., dissenting).

120. *Id.* at 222.

121. *Id.* at 220–21, 226 n.1.

122. *Id.* at 233 ("In declaring this matter now moot, after years of delay, we do little to enhance the public's confidence and trust in the integrity of the judicial process.").

123. *Id.* at 221 ("[T]he disposition of Petitioner's appeal *will likely determine whether Petitioner remains in prison or is released* . . . .").

124. Oral Argument, *supra* note 106, at 32:24.

125. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, and 34 U.S.C.).

he fell within AEDPA's procedural tolerance unless the savings clause applied.[126] But the court—which undeniably had created the error that cost Mr. Surratt potentially decades of liberty—struggled to articulate and agree on how the savings clause could apply to Mr. Surratt without also opening the door to many prisoners whose situations were less extreme and who therefore would not fall within the judges' natural sense of what the system's tolerance should be. Throughout the en banc oral argument, many judges repeatedly asked "what is the limiting principle?"[127] In search of such a limiting principle, towards the end of the en banc oral argument, several judges expressed interest in whether the fact Mr. Surratt's sentence was a mandatory life sentence might distinguish it from other sentences and potentially disturb only a small subset of other prisoners' sentences.[128]

Eventually, of course, President Obama commuted Mr. Surratt's sentence such that he was no longer serving a mandatory life sentence.[129] But, in Judge Wynn's view, mandatory life was not the hook that should permit a petitioner like Mr. Surratt to invoke the savings clause.[130] After all, if the fact Mr. Surratt's sentence was a mandatory life sentence, rather than some term of years, had been the critical point for Judge Wynn, the commutation should have mollified him. Instead, he insisted that Mr. Surratt's sentence should be reduced further.[131]

Ultimately though, no other judge joined Judge Wynn's dissent.[132] It is impossible to speculate what the court would have done had President Obama not commuted Mr. Surratt's sentence. But based on the observation that, as a practical matter, the commutation shortened Mr. Surratt's sentence and so reduced the severity of the injustice by degree, Judge Wynn's lone dissent suggests that his personal sense of what kind of error and how much of it the court system should tolerate is less forgiving than that of some of his colleagues. Even if some of those colleagues agreed with Judge Wynn privately, they did not join him publicly. Indeed, two of his colleagues wrote brief concurrences approving of the court's decision to dismiss the case as moot.[133] But dissenting

126. *Surratt*, 855 F.3d at 224 (Wynn, J., dissenting).

127. Oral Argument, *supra* note 106, at 1:13:30 ("One [theme of this argument] is, what is the limiting principle? . . . We've thrashed around about a limiting principle and whether it should be limited to a life sentence or whether it should be broader, and if it should be broader, how much broader it ought to be.").

128. *See id.* at 1:32:20.

129. PRESIDENT BARACK OBAMA, EXECUTIVE GRANT OF CLEMENCY *12 (Jan. 18, 2017), https://www.justice.gov/pardon/file/993786/download [https://perma.cc/BC39-PE2K].

130. *See Surratt*, 855 F.3d at 223–33 (Wynn, J., dissenting).

131. *Id.* at 227.

132. *See id.* at 219 (majority opinion).

133. *Id.* ("Judge Wilkinson and Judge Motz wrote separate opinions concurring in the decision to dismiss the appeal as moot.").

alone was fine by Judge Wynn. This dissent was about saying what was right. And so, Judge Wynn did just that.

III. JUDGE WYNN

To wrap this up, I want to briefly return to a point from earlier: some cases are more complex and controversial than others. Many appeals end with unanimous decisions.[134] The federal district courts are staffed with competent attorneys and the judges who head them are lawyers at the peak of the profession. Further, appellate standards of review, like abuse of discretion, favor affirmance. Dissents are an exception, not a rule. But they are an utterly fascinating exception because they highlight points of difference in a landscape that generally trends towards uniformity and provide invaluable windows into who appellate judges are and how they think. So, what do Judge Wynn's dissents in *Foster* and *Surratt* say about him?

In *Foster*, Judge Wynn's panel dissent focused on facts—what was in the record and what wasn't in the record. What had been proved and what hadn't. In that case he demonstrated an affinity for the concrete, for reality. He rejected the government's invitation to engage in judicial speculation.[135] Then in his dissent from the court's order denying rehearing en banc, he shifted gears from a fact-focused analysis of the record to a procedural argument about the operations of the court,[136] but still one grounded in the practical and still one concerned with the circumstances in which judges interject their opinions into a case. Later, in *Surratt*, Judge Wynn homed in on how the petitioner had been given a staggeringly excessive sentence because of an error committed by the Fourth Circuit itself.[137] And when the rest of the court voted that the case was mooted by the President's partial commutation, he stuck to his guns.[138] The injustice before him was more than just the number of months of liberty Mr. Surratt had lost. The court wronged Mr. Surratt, and the court needed to take responsibility for its mistake and correct it.

In some ways Judge Wynn's positions in these two cases were opposites. In *Foster*, he would have preferred the court not draw any strained inferences

134. Even at the U.S. Supreme Court, a plurality of cases end in unanimous decisions. Sarah Turberville & Anthony Marcum, *Those 5-to-4 Decisions on the Supreme Court? 9 to 0 Is Far More Common.*, WASH. POST (June 28, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/06/28/those-5-4-decisions-on-the-supreme-court-9-0-is-far-more-common/ [https://perma.cc/ZW3S-J7SS (dark archive)] ("[S]ince 2000 a unanimous decision has been more likely than any other result—averaging 36 percent of all decisions. Even when the court did not reach a unanimous judgment, the justices often secured overwhelming majorities, with 7-to-2 or 8-to-1 judgments making up about 15 percent of decisions.").

135. *See supra* notes 54–57 and accompanying text.

136. *See supra* notes 76–79 and accompanying text.

137. *See supra* notes 113–23 and accompanying text.

138. *See supra* notes 109–11 and accompanying text.

based only on the names of businesses—in other words, that the court not act.[139] But in *Surratt* he would have preferred the court intervene and order Mr. Surratt resentenced.[140] What Judge Wynn's dissents have in common across both cases, however, is a preference for accuracy and a corresponding low tolerance for error. In *Foster*, Judge Wynn wanted the critical facts proved directly and cleanly. In *Surratt*, Judge Wynn wanted a fair, guidelines sentence, not a presidential approximation. Such a preference for accuracy lends itself to a keen sense of how far from the mark the court has landed in doing justice, which in turn can function as a measure of how much can or should be said in a dissent—and, indeed, what to say at all (which is at least half the battle).

The bottom line of this Essay is that there aren't many judges—or people—like Judge Wynn. And there is only one Judge James A. Wynn of the Fourth Circuit Court of Appeals in all the world, which is really a shame for the world. But, while the world has only a single Judge Wynn, it does have a great many opinions authored by Judge Wynn. Each of those opinions was written for a reason, and each one contributes in its own way to the greater project of justice in the American courts. And so those opinions are one reason—one reason of many—to celebrate Judge Wynn's career and future. Some, but not all, of those other reasons are set out in the other essays in this collection.

139. *See supra* notes 54–57 and accompanying text.

140. *See supra* notes 113–23 and accompanying text.