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MY YEAR WITH JUDGE CUDAHY

*Judge Alok Ahuja**

INTRODUCTION

*For myself, I always write about Dublin, because if I can get to the heart of Dublin I can get to the heart of all the cities of the world. In the particular is contained the universal.*¹

—James Joyce

I had the privilege of serving as a law clerk for Judge Richard D. Cudahy from September 1988 to August 1989. My twelve-month tenure with Judge Cudahy was—and remains—enormously significant to me, both personally and professionally. The Judge was a kind and admirable man, an excellent teacher, and an invaluable mentor both during, and after, my clerkship year.

The training a judicial clerkship offers to new law school graduates is second-to-none. This was particularly true in Judge Cudahy's chambers. The Judge was deeply engaged in every appeal in which he participated, and carefully studied the briefs and other materials for every case.² He worked very closely with his law clerks. One of the perks of the job was the opportunity to sit with the Judge for several hours, with the door to his personal office closed against interruptions, to discuss the cases scheduled for oral argument on the following day. During these discussions, Judge Cudahy's deep knowledge of the practical and doctrinal aspects of the cases was evident. He gave detailed and thoughtful comments on the draft opinions we prepared, invariably focusing his attention on those passages of a draft which he knew would be cited back to the court as precedent in future cases.

Since becoming a state court appellate judge in 2008 (with Judge Cudahy's advice and assistance), I have harkened back to my experience with the Judge on innumerable occasions. I am continually surprised how frequently an episode from my clerkship gives me useful

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1. RICHARD ELLMANN, JAMES JOYCE 505 (Oxford Univ. Press revised ed., 1982) (citing ARTHUR POWER, FROM THE OLD WATERFORD HOUSE 63–64 (Mellifont Press 1949)).

2. I distinctly remember the Judge loaded down with the briefs which he would dutifully carry home on the train, to read overnight. The weight strained his shoulders enough that he was finally persuaded to use roller bags to carry home this night-time reading.

guidance for a difficult situation or decision I am facing in my own judicial work. Judge Cudahy truly was the kind of judge I aspire to be.³

Despite its significance to me, however, my clerkship year represents less than three percent of Judge Cudahy's thirty-five-year judicial career. The cases and issues the Judge addressed during that year were randomly assigned—they were not selected to reflect any overarching theme or design. Yet, even though Judge Cudahy's work in 1988–89 is only a small, random sample of his overall judicial output, his opinions during that year provide powerful illustrations of many of the fundamental attributes of his judicial philosophy and approach:

- his respect for litigants and for the judicial process;
- his desire to preserve access to the courts, particularly for the disadvantaged and for minority groups;
- his preference to address the merits of claims without unwarranted reliance on procedural technicalities;
- his desire to protect individual civil rights and civil liberties; and
- his sensitivity to the practical consequences of the court's decisions.

This Article reviews a number of Judge Cudahy's opinions issued in cases which were argued or decided during my clerkship year of 1988–89. My hope is that this review will serve as more than a selfish “trip down memory lane” of interest only to me, and perhaps my co-clerks. Instead, I hope that this review serves to exemplify and illuminate universal attributes of Judge Cudahy's approach to appellate judging.

I have limited my review, in large part, to Judge Cudahy's separate concurring and dissenting opinions. I have adopted this limitation for several reasons. Judge Cudahy issued *thirty* separate opinions in cases argued or decided between September 1, 1988, and August 30, 1989.⁴ Even though I was there at the time, I was surprised by the number of the Judge's separate opinions when compiling this review. Although

3. Apparently Judge Cudahy felt much the same way about his own clerkship experience with Judge Charles E. Clark on the Second Circuit in 1955–56. In a 2010 interview, Judge Cudahy described Judge Clark as “a very sound and courageous jurist,” whom he “held . . . in the highest regard.” *Collins Fitzpatrick's Interview of Judge Richard Cudahy*, *THE CIRCUIT RIDER: THE J. OF THE SEVENTH CIR. BAR ASS'N* 2, 10 (Nov. 2010). Judge Cudahy stated that he “really enjoyed that year with [Judge Clark] and learned a hell of a lot,” and that it was during his clerkship year that he first considered becoming a judge. *Id.*

4. These cases are listed in the Appendix to this paper.

many of these separate opinions are short (some only two to three sentences) the volume is remarkable.⁵

The large number of separate opinions is a function, at least in good measure, of the composition of the court at the time. Of the eleven active judges on the court during my clerkship year, seven were appointed by President Reagan⁶ and two by President Ford.⁷ Judge Cudahy, the sole Carter appointee to the court, and Judge Walter J. Cummings Jr., appointed by President Johnson, were the only active Seventh Circuit judges appointed by Democratic presidents. The composition of the court in 1988–89 represented a dramatic shift from the makeup of the court in 1979, when Judge Cudahy was appointed to a new ninth seat. At that time, he was the fourth appointee of a Democratic president, alongside five Republican appointees.⁸ While the political party of the president who appointed a particular judge may be only “a crude [proxy]” for “a judge’s ideological leanings,”⁹ it is undeniable that there were pronounced ideological differences among the members of the court in 1988–89; Judge Cudahy frequently found himself in the minority.¹⁰

Besides the fact that Judge Cudahy’s separate opinions provide a great deal of “grist for the mill,” those separate opinions—in which the members of the court were divided—also bring his personal approach into sharper focus. While Judge Cudahy wrote many separate

5. Based on a statistical analysis performed in 2012, Judge Richard Posner observed that “Judge Cudahy has been an unusually prolific judge, penning separate opinions at a higher rate than his colleagues both nationwide and on the Seventh Circuit.” Richard A. Posner, *A Heartfelt, Albeit Largely Statistical, Salute to Judge Richard D. Cudahy*, 29 *YALE J. ON REG.* 355, 355 (2012). The pace of Judge Cudahy’s separate opinions was at its height during my clerkship year. Between 1985 and 1989, Judge Cudahy wrote separate opinions in 14.8% of the cases on which he sat, dissenting in 8.6% of cases; these are the highest rates for any five-year period from 1979 through 2011. *Id.* at 359 tbl.2.

6. Judges Richard Posner, John L. Coffey, Joel M. Flaum, Frank H. Easterbrook, Kenneth F. Ripple, Daniel A. Manion, and Michael S. Kanne. See Federal Judicial Center, *U.S. Court of Appeals for the Seventh Circuit: Judges*, <https://www.fjc.gov/history/courts/u.s.-court-appeals-seventh-circuit-judges> (last visited Feb. 20, 2018).

7. Judges William J. Bauer and Harlington Wood, Jr. Federal Judicial Center, *supra* note 6.

8. In 1979, the Court’s members were Johnson appointees Luther M. Swygert, Walter J. Cummings, Jr., and Thomas E. Fairchild; Nixon appointees Wilbur F. Pell, Jr., Robert A. Sprecher, and Philip W. Tone; and Ford appointees William J. Bauer and Harlington Wood, Jr. Federal Judicial Center, *supra* note 6. Judge Cudahy himself stated that “when I went on the court it was, at least to outward appearance, ideologically not necessarily liberal but leaning in that direction. It certainly had a bigger representation of not just only those appointed by Democrats but people with some apparently more liberal inclinations.” *Collins Fitzpatrick’s Interview*, *supra* note 3, at 19.

9. Posner, *supra* note 5, at 360.

10. Judge Posner has stated that, at the time of his appointment to the Court in 1981, Judge Cudahy “was indeed the most liberal active judge on the court, and I the most conservative.” Posner, *supra* note 5, at 361.

opinions, he used this device only when he felt strongly about an issue and had substantial reservations with the analysis and/or result that his colleagues had reached. These separate opinions provide fertile ground for studying his distinctive judicial philosophy.

Finally, Judge Cudahy's separate opinions are simply a pleasure to read. Generally, the majority opinions Judge Cudahy authored were drafted by his law clerks with his substantial input. He then edited and revised those drafts to produce a final opinion. By contrast, he wrote his separate opinions "from scratch," often on a legal pad or by live dictation to his long-time administrative assistant, Louise McMenamin. Although all of the opinions issued in his name are Judge Cudahy's, and Judge Cudahy's alone, his unique voice is most evident in his separate opinions.¹¹ It is noteworthy that, although he was often expressing strong disagreement with his colleagues, Judge Cudahy's separate opinions are not, on my reading, particularly strident or mean-spirited. Instead, many of them acknowledge the difficulty of the questions presented, express views which are somewhat tentative, and are written in relatively mild, measured tones.¹² I read several of Judge Cudahy's separate opinions before deciding to apply for a clerkship with him, and before our interview; I was excited for the chance to work with their author.

My review of Judge Cudahy's opinions is by no means a rigorous empirical analysis. Instead, I have chosen to highlight certain opinions which I believe most clearly illustrate various aspects of his judicial philosophy. I have tried to group those opinions, roughly, into several categories; but my attempted categorization is only an approximation, as the opinions are all "of a piece" and sound similar themes.

11. I regret that, on more than one occasion, I drafted lengthy, citation-heavy inserts for a short, elegant, and straightforward concurring or dissenting opinion which the Judge had drafted. Even today, those inserts, drafted by an over-eager new law graduate, stick out to me like the proverbial "sore thumb." See, e.g., *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1314–16 nn.1–5 (7th Cir. 1989) (Cudahy, J., concurring); *Free v. United States*, 879 F.2d 1535, 1537–38 n.1 (7th Cir. 1989) (Cudahy, J., concurring); *Shields v. Burge*, 874 F.2d 1201, 1212–13 (7th Cir. 1989) (Cudahy, J., concurring).

12. Judge Posner described Judge Cudahy's ability to disagree without being disagreeable in this way:

[D]espite our frequent disagreements, our personal and professional relations remained and still remain entirely cordial. Judge Cudahy deserves the primary credit. . . . It is not fun to be a dissenter, yet Judge Cudahy never allowed his feathers to be ruffled. He helped to establish what has proved to be a durable tradition in the Seventh Circuit, which is that disagreements are not personalized, and ideological and other clashes, even when they engage the deepest beliefs of the judges, do not produce anger, rancor, or incivility. This triumph of civility not only makes the lives of the judges more pleasant but also improves the quality of the court's work.

Posner, *supra* note 5, at 362–63.

II. THE APPELLATE PROCESS

I begin with three cases upon which I have heavily relied in forming my own views as to the proper role and function of an appellate judge. These three cases illustrate Judge Cudahy's commitment to reasoned decision-making, to performing his work with integrity, and to respecting the litigants appearing before the court.

The first case is *United States v. Pino-Perez*,¹³ which was decided en banc on a 9–3 vote. This case raised a fascinating issue involving the intersection of two statutes: a 1970 statute, 21 U.S.C. § 848, establishing harsh punishment for persons found to be “kingpins” of drug distribution networks, and 18 U.S.C. § 2(a), “which dates back to 1909,”¹⁴ rendering any person who aids and abets another in committing a crime “punishable as a principal.” The question presented in *Pino-Perez* was whether an individual who aided and abetted another in operation of an illegal drug-distribution enterprise, by supplying the enterprise with large quantities of cocaine, could himself be prosecuted as a “kingpin.” The case resulted in a majority opinion by Judge Posner, a dissent by Judge Easterbrook, and a separate dissenting opinion by Judge Cudahy.

Judge Cudahy joined in Judge Easterbrook's dissent, which argued that the “kingpin” statute should not be extended to accomplices.¹⁵ However, he also wrote a short, separate dissent. In preparing for argument, Judge Cudahy and the law clerk working with him, now Professor Elizabeth Mertz, discovered that the statutory interpretation issue was not the only claim raised by *Pino-Perez* on appeal. In addition, he had made a more mundane claim: that the proof at his trial had varied from the facts alleged in the indictment that charged him.

Judge Cudahy's separate dissent, which rejected *Pino-Perez*'s additional variance argument, began with this observation:

I write separately to address the problem that occupied most of the defendant's brief, and which has been dealt with summarily by the majority: whether changes between the indictment and the proof at trial varied or amended the indictment in this case. This court addresses many claims that we conclude to be without merit; it has been our custom to state some reason for our conclusions, even if the reasoning can be summarized in a sentence or two. This procedure seems basic in most cases to the legitimacy of the system.¹⁶

13. 870 F.2d 1230 (7th Cir. 1989) (en banc).

14. *Id.* at 1233–34.

15. *Id.* at 1240–41 (Easterbrook & Cudahy, JJ., dissenting in part).

16. *Id.* at 1241 (Cudahy, J., dissenting in part).

It is noteworthy that the two principal opinions in *Pino-Perez*, majority and dissent, were written by judges who were also prominent academics. Plainly, the relationship between the “kingpin” statute and the “aiding and abetting” statute presented a challenging question of statutory construction that is well-suited for scholarly discussion. Judge Cudahy’s separate opinion emphasizes an equally important point, however: appeals are not simply academic exercises. Instead, appeals are prosecuted by actual litigants, who have a direct and vital interest in a case’s outcome. The litigants’ arguments, however prosaic, may entitle them to meaningful relief—in this case, a new trial if the variance claim succeeded. Judge Cudahy deeply believed that every one of the arguments raised by the parties deserved a respectful and reasoned discussion, even if that discussion was brief. The few quoted sentences capture an essential aspect of appellate “due process”—the issuance of reasoned decisions.¹⁷

Another opinion expressing a fundamental principle of appellate judging is only three sentences long. In *Cartwright v. American Savings & Loan Association*,¹⁸ the district court, after a bench trial, rejected the plaintiff’s claim that a lender had denied her credit based on her race and sex. The majority opinion in *Cartwright* characterized the plaintiff’s discrimination claims as “specious,” the “product of our overly litigious society.”¹⁹ Although Judge Cudahy concurred in affirmation of the defense verdict, he wrote separately to distance himself from the majority’s pejorative comments. Judge Cudahy’s opinion read in its entirety:

17. See, e.g., Amanda Frost, *Keeping up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 560–63 (2005); Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish?*, 44 AM. U. L. REV. 757, 775–81 (1995).

18. 880 F.2d 912 (7th Cir. 1989).

19. *Id.* at 927. After describing the conflicting evidence at trial, and explaining that the district court had resolved the factual disputes in the defendant’s favor, the majority closed with these observations:

In our view, [loan officer] Louis Green offered Mrs. Cartwright valuable, sound financially reasoned, well-intentioned advice, for which she should have been appreciative. . . . Lenders should be commended, rather than sued, for advising borrowers of their various options and the economic realities of the day. . . . American Savings and Mary Cartwright had been doing business together since 1965. . . . If for seventeen years American Savings saw no reason to discriminate against Mary Cartwright because of her race, sex or the location of her property, it is specious to allege that it would discriminate against her in 1982. . . .

We also feel compelled at this juncture to express our belief that this case is yet another product of our overly litigious society, where lawsuits result from every real or imagined slight. . . . The[] facts [of this case] simply do not warrant the expense and diversion of private, public and judicial resources this suit has occasioned.

Id. at 926–27.

I concur in the result and in the analysis because the issues primarily involve questions of fact and the district court's fact-finding is not clearly erroneous. I should prefer, however, not to address the general question who is the more deserving or meritorious litigant. This is a question we have neither the capability nor the obligation to answer.²⁰

In its few words, this short opinion reflects an appreciation of the differing roles of trial and appellate judges, and a respect for the litigants who appear before the court. Judge Cudahy avoided using his lofty perch as a federal appellate judge to form, or express, moral judgments of the parties who appeared before him. He did not believe that it was his job to decide which litigant was “the good guy,” and which was “the bad guy.” To the extent such characterizations were relevant, they were issues for the trial court, not the court of appeals. An appellate court is poorly positioned to determine the relative moral worth of the litigants and should not base its decisions on its intuition as to which party is “in the right.”²¹

A third similar case is a matter in which Judge Cudahy did not even participate. *City of Milwaukee v. Yeutter*²² involved a claim by the City of Milwaukee that the United States was unlawfully failing to direct freight traffic through the Port of Milwaukee—to the Port's substantial economic harm. Among other things, the appeal presented issues under the obscure “Port Preference Clause” in the United States Constitution.²³ When Judge Cudahy was assigned to the panel that would hear the case, he read the briefs and talked to me about the case on multiple occasions, which was well out of the ordinary routine of our oral argument preparations since argument was still weeks away. Seeing Judge Cudahy's interest, I took the briefs home over the weekend and studied the case so that I would be prepared to discuss it with him on Monday morning. That morning, however, his assistant came into my office and asked for the briefs, stating curtly that Judge Cudahy had recused himself. The Judge and I did not discuss the case again.

20. *Id.* at 927–28 (Cudahy, J., concurring).

21. Judge Cudahy once told me that he disliked it when counsel introduced their clients to the court during argument. Although he was keenly aware that his decisions involved real people, I assume that the practice made him uncomfortable because it invited him to draw some sort of conclusion based on brief observation of an individual in the rarefied atmosphere of an appellate courtroom. Following Judge Cudahy's example, I strive not to look at individual parties when they are introduced by counsel in the courtroom, as tempting as it may be.

22. 877 F.2d 540 (7th Cir. 1989).

23. U.S. CONST. art. I, § 9, cl. 6 (“No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.”).

I learned later that Judge Cudahy had served on the Board of Harbor Commissioners for the Port of Milwaukee years before becoming a judge, where his work included promoting the Port's development.²⁴ He had no direct involvement in the dispute underlying the appeal, which would have *required* his recusal. Nevertheless, Judge Cudahy had evidently concluded that his heightened and unusual interest in the case, stemming from his extra-judicial work on the Port's behalf, made it inappropriate for him to participate. He insisted on exercising the considerable power he had been given with integrity and impartiality.

III. ACCESS TO THE COURTS

Several of Judge Cudahy's separate opinions from 1988–89 express his concern for preserving access to the courts, particularly for minorities and other disadvantaged groups.

In *Easter House v. Felder*,²⁵ an en banc case decided by a 9–2 vote, the majority reversed a judgment on a jury verdict in favor of a private adoption agency, which had alleged an official conspiracy to deprive the agency of its operating license. Although the majority held that state officials' actions were "random and unauthorized," and therefore could not support a claim of denial of procedural due process, Judge Cudahy dissented. He closed his opinion with two sentences which captured his belief that the courts should be open to litigants, of whatever class, to air their grievances: "As courthouse doors continue inexorably to swing shut, the protection of citizens against abuses of power shrinks to the point of disappearance. This seems to be the message of today's decision."²⁶

In another case, *Free v. United States*,²⁷ Judge Cudahy concurred in the denial of *in forma pauperis* status to a prison inmate who was seeking to appeal the dismissal of his Federal Tort Claims Act claim, which alleged that prison officials had destroyed his property in the course of searching his cell.²⁸ Judge Cudahy agreed with his colleagues that the prisoner's claim on appeal, which asked the court to

24. See *Collins Fitzpatrick's Interview*, *supra* note 3, at 13 (Judge Cudahy describes his service on "the Harbor Commission" in the 1960s).

25. 879 F.2d 1458 (7th Cir. 1989) (en banc), *vacated*, 494 U.S. 1014 (1990).

26. 879 F.2d at 1484 (Cudahy, J., concurring in part and dissenting in part).

27. 879 F.2d 1535 (7th Cir. 1989).

28. Judge Posner's opinion describes the inmate's claim to be that, "during a shakedown search of his cell, prison guards either negligently or intentionally destroyed various items of personal hygiene, including toothpaste and baby powder." *Id.* at 1535. As I recall it, Free's *pro se* complaint was more colorful: he alleged that, during a search, prison guards had gratuitously "squeezed his toothpaste into the shitter."

reweigh the evidence, was frivolous. Nevertheless, he refused to join Judge Posner's opinion, which advocated that Congress establish an exclusive administrative process to resolve such claims.²⁹ Instead, he wrote a concurrence arguing that prisoner claims did not impose a disproportionate burden on the federal judiciary. He closed by emphasizing the importance of giving prisoners *some* avenue to have their claims considered by a judge who was independent of the prison bureaucracy:

[P]risoners' property claims, though tenuous and of slight apparent significance to those of us outside the walls, no doubt loom larger in the context of a lifetime at Marion. Today, while interest in prisoners apparently continues its steady decline, we should be vigilant not to engage in wholesale or indiscriminate disparagement of their grievances.³⁰

Judge Cudahy also issued, or joined in, separate opinions in three cases involving the imposition of sanctions in civil cases under Federal Rule of Civil Procedure 11, or the denial of *in forma pauperis* status based on a finding that an appeal was frivolous. In one case, Judge Cudahy joined an opinion arguing that the Court should apply de novo review to a district court's determination that an individual filing was frivolous.³¹ In another, he argued that an appeal of the *amount* of Rule 11 sanctions was not *per se* sanctionable without a separate finding that the *challenge to the amount* of the sanction was frivolous.³² In the third case, he argued that a finding of frivolousness must take account of the position of the litigant at the time of filing, rather than the hindsight view of an appellate court after the merits have been

29. *Id.* at 1536 ("Congress should give serious consideration to creating an exclusive rather than merely a preliminary administrative remedy for small tort claims by federal prisoners."); *id.* at 1538–40 (Coffey, J., concurring). The suggestions made by Judges Posner and Coffey presage provisions of the Prison Litigation Reform Act of 1994, 110 Stat. 1321.

30. 879 F.2d at 1538 (Cudahy, J., concurring).

31. *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 940–41 (7th Cir. 1989) (en banc) (Flaum, J., concurring). The Supreme Court ultimately rejected the approach advocated by Judge Flaum in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

32. *Borowski v. DePuy, Inc.*, 876 F.2d 1339, 1343 (7th Cir. 1989) (Cudahy, J., concurring in part and dissenting in part) ("Simply because a party has engaged in frivolous conduct, it can hardly be said that the party's good-faith contest of what the frivolous conduct cost the opposition is itself frivolous."). On this issue, Judge Cudahy's position was vindicated in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), which held that:

Rule[] 11 and [Federal Rule of Appellate Procedure] 38 are better read together as allowing expenses incurred on appeal to be shifted onto appellants only when those expenses are caused by a frivolous appeal, and not merely because a Rule 11 sanction upheld on appeal can ultimately be traced to a baseless filing in district court.

Id. at 407.

resolved.³³ In all three cases, the Judge argued for limitations on the circumstances in which Rule 11 sanctions could be awarded, or in which particular proceedings could be denominated frivolous. What these opinions share in common is a hesitance to harshly label a litigant's position, as well as a desire not to chill individuals from pursuing sincere legal claims in court, even if those claims are ultimately found to lack merit.

A final opinion addressing access-to-justice issues was Judge Cudahy's dissent in *Gomez v. Chody*,³⁴ in which the plaintiffs argued that they were evicted from an apartment complex because they were Hispanic. Following the district court's grant of summary judgment to the defendants, the plaintiffs discovered evidence of admissions of discriminatory animus by two management employees of one of the named defendants. The district court refused to vacate its judgment based on the new evidence, and the majority affirmed. Judge Cudahy disagreed. He explained:

This is a close question and I am very much aware that the discretion of the trial judge is (and ought to be) particularly broad with respect to motions for a new trial based on newly discovered evidence. But here the new evidence of boasting by building management personnel of kicking out the "spics" and "wetbacks" was dynamite. As [the district judge] appears to concede, had it been available in time, it would easily have defeated summary judgment.

.....

Under these circumstances, where the district court has recognized that the new evidence would have prevented the grant of summary judgment, no defensible purposes are served by denying the plaintiffs' motion for a new trial. After all, the Federal Rules of Civil Procedure were promulgated "to secure the *just*, speedy, and inexpensive determination of every action." Rule 1 (emphasis added). Since the majority's resolution of the appeal in Number 87-3131 cannot be reconciled with this overriding purpose, I respectfully dissent from affirmance of the new trial ruling.³⁵

Judge Cudahy would not have allowed procedural technicalities to prevent the plaintiffs from receiving a meaningful hearing on their claims of race-based discrimination.

IV. CIVIL RIGHTS/CIVIL LIBERTIES

During the year that I clerked for him, Judge Cudahy also issued several separate opinions involving civil rights and civil liberties is-

33. *Flick v. Blevins*, 887 F.2d 778, 782-83 (7th Cir. 1989) (Cudahy, J., concurring in part and dissenting in part).

34. 867 F.2d 395 (7th Cir. 1989).

35. *Id.* at 406, 409 (Cudahy, J., concurring in part and dissenting in part).

sues, in which he argued that the court's majority had failed to give adequate protections to the persons claiming deprivation of their rights.

For example, in the en banc case of *Easter House v. Felder*,³⁶ Judge Cudahy dissented from the majority's reversal of a judgment for a private adoption agency, which asserted that it had been denied its due process rights when state officials conspired to deprive it of an operating license. The majority held that the state officials' actions were "random and unauthorized" from the State's perspective, and therefore could not support a claim for denial of procedural due process. Judge Cudahy dissented, and decried the majority's sharp limitation of due process claims against State agencies.

The majority here now says that the conspiratorial acts of the person who was *de facto* the ultimate decisionmaker (Felder) are "random and unauthorized" from the perspective of the "state". Who or what is the "state"? According to the majority, it is the legislature. And the acts of senior officials, which are alleged to be "unauthorized" by statute or regulation, are unforeseeable and hence not actionable. . . . Admittedly this rule has the virtue of drawing a bright line, although at the expense of withdrawing any civil rights remedy for the overwhelming bulk of official misconduct under color of state law that involves property. In theory some state remedies remain but the majority "flies low" over these—reinforcing the impression that they have slight practical significance.³⁷

In another case, *Shields v. Burge*,³⁸ Judge Cudahy concurred in the affirmance of summary judgment granted against a state police officer who claimed that his constitutional rights were violated during his employer's investigation into allegations of workplace misconduct. One of the plaintiff's claims was that his supervisors had pressured plaintiff's psychologist to change his diagnosis of plaintiff's need for a medical leave of absence. The majority held that the right to be free from state interference in a psychologist-patient relationship was not clearly established at the time, and that the defendants were accordingly entitled to qualified immunity. Although Judge Cudahy agreed with that conclusion, he wrote separately to discuss the plaintiff's right of privacy in his relationship with the mental health professionals treating him.

I think that state tinkering with the intimate bond of psychotherapy may well have constitutional dimensions.

. . . .

36. 879 F.2d 1458 (7th Cir. 1989) (en banc), *vacated*, 494 U.S. 1014 (1990).

37. 879 F.2d at 1481 (Cudahy, J., concurring in part and dissenting in part).

38. 874 F.2d 1201 (7th Cir. 1989).

[P]sychiatric treatment involves the most intimate and personal aspects of one's personality—aspects which *define* the individual in a unique and spiritual way. Since the state may not control one's thought processes directly, it may not, without a compelling interest, interfere with the psychiatric treatment that is needed for a healthy mental and emotional life.³⁹

Judge Cudahy's opinion in *Shields v. Burge* is in many ways a modest affair. He did not dispute the conclusion that the defendants were immune from civil liability for their alleged attempt to manipulate the course of treatment suggested by the plaintiff's psychologist, because a constitutional right to be free from such interference was not clearly established. Yet he wrote separately to give credence to the plaintiff's contention that a constitutional right to privacy could extend to a psychologist-patient relationship.⁴⁰

I also worked with Judge Cudahy on a case that is a notable counter-example with respect to his desire to protect individual civil liberties. In *Schail v. Tippecanoe County School Corp.*,⁴¹ Judge Cudahy wrote the opinion for a unanimous panel, upholding a public high school's policy requiring students to agree to submit to random urinalysis for drugs as a condition of participation in athletic programs. This opinion illustrates that Judge Cudahy was not doctrinaire. He was keenly aware of, and concerned by, the drug abuse that was sweeping through schools in the late 1980s. In *Schail*, whatever his personal inclinations, Judge Cudahy sought to faithfully apply the Supreme Court's school search precedent.⁴²

39. *Id.* at 1211, 1213–14 (Cudahy, J., concurring).

40. In two additional cases, Judge Cudahy argued for broader protections for those alleging race or gender-based discrimination. *Malhotra v. Cotter & Co.*, 885 F.2d 1305, 1314–17 (7th Cir. 1989) (Cudahy, J., concurring) (arguing that Supreme Court's refusal to recognize race-based harassment claims under 42 U.S.C. § 1981 in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), did not bar a race-based *retaliation* claim under the statute), *superseded by statute on other grounds*, *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1119–20 (7th Cir. 1992); *Torres v. Wisconsin Dep't of Health & Senior Servs.*, 859 F.2d 1523, 1533–35 (7th Cir. 1988) (en banc) (Cudahy, J., dissenting) (arguing that state corrections officials had failed to establish that being female was a "bona fide occupational qualification" to serve as a corrections officer in a female prison, justifying explicit discrimination against male officers). Additionally, in *Spencer v. Lee*, he joined a dissent written by Judge Cummings, which argued that a complaint filed under 42 U.S.C. § 1983 should not have been dismissed on the basis that an involuntary commitment initiated by a private physician and a private hospital could not constitute "state action." 864 F.2d 1376, 1385–94 (7th Cir. 1989) (en banc) (Cummings, J., dissenting).

41. 864 F.2d 1309 (7th Cir. 1989).

42. At the time, I strongly disagreed with the approach Judge Cudahy adopted in *Schail*, and went so far as to draft a dissent to the majority opinion he had asked me to prepare, in the vain hope that it might persuade him to change his mind. (The folly of youth!) The Judge accepted and reviewed the draft dissent with good humor, although his position remained unaltered. I received a letter from Judge Cudahy six years later, informing me that in *Vernonia School District v. Acton*, 515 U.S. 646 (1995), the Supreme Court had adopted the same analysis as his

V. APPRECIATION FOR PRACTICAL CONSEQUENCES
OF THE COURT'S DECISIONS

I would like to close by discussing a series of cases in which Judge Cudahy issued opinions emphasizing the practical consequences of particular decisions.

In a case I cannot resist quoting, Judge Cudahy dissented from the majority's holding that where a plaintiff prevailed on one legal theory which granted him all of the relief he was seeking, the judgment was not final and appealable until all alternate theories pleaded by the plaintiff had likewise been resolved. Judge Cudahy vehemently disagreed. He explained,

The majority here asserts a novel and startling conclusion—that although plaintiff has won decisively on one theory, all other possible theories supporting its claim must be pursued to conclusion in the district court before judgment is appealable under Rule 54(b). What the majority seems to ignore here is the basic proposition that to “win” a plaintiff need prevail on only one theory, while to “win” a defendant must prevail on all the theories proposed by the plaintiff.

• • • •

[The majority's approach] seems more likely to impose totally redundant and indefensible burdens on appellate and trial courts alike, which will have to pursue consideration of multiple theories in the many cases where one would suffice. It effectively requires the plaintiff to fire additional bullets into the corpse of a defendant he has already killed.⁴³

In another case, the court faced a Title VII challenge to a battery manufacturer's “fetal protection policy,” which barred women of childbearing age from certain employment positions involving lead exposure. The court's en banc majority affirmed the grant of summary judgment to the employer, on the basis that sex constituted a “bona fide occupational qualification” for the positions in which lead exposure was unavoidable (a decision the Supreme Court later reversed).⁴⁴ Judge Cudahy dissented. Among other things, he noted that the case was being decided by a court made up entirely of males, who might not fully appreciate the case's real-world context:

It is a matter of some interest that, of the twelve federal judges to have considered this case to date, none has been female. This may

opinion. My only rejoinder was to express surprise that the Judge was boasting that his opinion had foreshadowed a 6–3 decision authored by Justice Scalia.

43. *Indiana Harbor Belt Ry. Co. v. Am. Cyanamid Co.*, 860 F.2d 1441, 1446–48 (7th Cir. 1988) (Cudahy, J., dissenting).

44. *Int'l Union, United Auto. Workers v. Johnson Controls, Inc.*, 886 F.2d 871 (7th Cir. 1989) (en banc), *rev'd*, 499 U.S. 187 (1991).

be quite significant because this case, like other controversies of great potential consequence, demands, in addition to command of the disembodied rules, some insight into social reality. What is the situation of the pregnant woman, unemployed or working for the minimum wage and unprotected by health insurance, in relation to her pregnant sister, exposed to an indeterminate lead risk but well-fed, housed and doctored? Whose fetus is at greater risk? Whose decision is this to make? We, who are unfortunately all male, must address these and other equally complex questions through the clumsy vehicle of litigation. At least let it be complete litigation focusing on the right standard.⁴⁵

Judge Cudahy's appreciation of the practical consequences of a decision could lead him to advocate for judicial restraint. For example, in *Rutan v. Republican Party of Illinois*,⁴⁶ Judge Cudahy argued that federal courts should refuse to become embroiled in challenges to political patronage-based hiring practices. He explained:

It seems to me that removing politics from the dispensation of government jobs is too daunting a task even for such all-purpose problem-solvers as the federal courts. At least the task should not be undertaken without some clearer signal from the Supreme Court. . . . Patronage hiring practices are of great antiquity. There may be *some* good in them in *some* circumstances but, most importantly, rooting them out is something the federal courts could not accomplish without incurring staggering and, I should think, clearly disproportionate costs.⁴⁷

Notably, the Supreme Court did not share Judge Cudahy's concerns when it reviewed the case. In a 5-4 decision by Justice Brennan, the Supreme Court in fact extended the prohibition on politically-motivated employment decisions to include hiring decisions.⁴⁸ Apparently, Justice Brennan held in higher regard the capability of those "all-purpose problem-solvers," the federal courts, to address claims of politically-motivated hiring decisions.

A final example: in *American Bank & Trust Co. v. City of Chicago*,⁴⁹ Judge Cudahy agreed with his colleagues that a union should not be permitted to intervene in a lawsuit questioning whether a real-estate developer could use polyvinyl chloride ("PVC") plumbing materials in its construction projects. Although Judge Cudahy agreed that the City of Chicago adequately represented the Union's interests, he emphasized the practical consequences of the litigation for the Union's members:

45. 886 F.2d at 902 (Cudahy, J., dissenting).

46. 868 F.2d 943 (7th Cir. 1989) (en banc).

47. *Id.* at 958 (Cudahy, J., concurring in part and dissenting in part).

48. 497 U.S. 62 (1990).

49. 865 F.2d 144 (7th Cir. 1989).

[T]he Union here represents the individuals who would have to work with PVC if it were legalized and would immediately absorb any adverse health impacts associated with it. The Union, whose members will be installing PVC, has an interest at least as direct as the developers in whose projects PVC may be used. The Union's interest is quite different from that of a public interest group seeking to advance public policy goals. It is a disservice to the language to maintain that a union of employees who handle and install a building material alleged to be a threat to their health do not have a "direct interest" in whether they will be required to handle the material.⁵⁰

VI. CONCLUSION

My year with Judge Cudahy was merely a sliver of his judicial career—one ring in the trunk of a large tree. His separate opinions during that year are an even smaller subset. Yet these opinions, representing such a small percentage of Judge Cudahy's overall judicial output, highlight many of the most important strands of his judicial philosophy. I hope that my review of those decisions has provided some insight into the work of this remarkable judge.

50. *Id.* at 149 (Cudahy, J., concurring) (citations omitted); *see also* *Lomas & Nettleton Co. v. Wiseley*, 884 F.2d 965, 973 (7th Cir. 1989) (Cudahy, J., dissenting) (dissenting from majority's reversal of a judgment setting aside a sheriff's sale of real property based on a grossly inadequate price, and stating, "By reversing the district court's judgment in this case, the majority renders the sheriff's sale as arbitrary and capricious as a lottery, whereby those lucky enough to be in attendance may take advantage of the careless mistakes of others more interested in the property"); *Cent. States Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1158 (7th Cir. 1989) (en banc) (Cudahy, J., concurring in part and dissenting in part) ("[H]ere is a case where a miniscule employer's effort to help three superannuated truckdrivers has brought down on his head the full fury of a rule that knows no exceptions. A Gerber with his handful of trucks is no match for adversaries with platoons of accountants, actuaries and lawyers out to maximize his liabilities (in a good cause, no doubt). Yet, it seems to me that the Gerbers of the world (as the majority refers to them) . . . deserve some consideration in preserving a common-sense balance."); *Beloit Corp. v. NLRB*, 857 F.2d 1154, 1161 (7th Cir. 1988) (Cudahy, J., dissenting) (arguing that the Board reasonably determined that certain laid-off employees had a "reasonable expectation of recall" and were therefore entitled to vote in union-representation election; "if the Board's approach is not followed, there is no substitute methodology by which laid-off workers may secure representation. The choices therefore are either to support the Board or to deny all representation to those who have a legitimate concern about working conditions in jobs to which they are likely to return").

APPENDIX

Separate Opinions Issued by Judge Cudahy between September 1, 1988 and August 30, 1989, or Issued in Cases Argued during that Period

1. Trautvetter v. Quick, 916 F.2d 1140 (7th Cir. 1990) (Cudahy, J., concurring)
2. United States v. Binkley, 903 F.2d 1130 (7th Cir. 1990) (Cudahy, J., concurring in part and dissenting in part), *abrogated by* Abuelhawa v. United States, 556 U.S. 816 (2009)
3. United States v. Briscoe, 896 F.2d 1476 (7th Cir. 1990) (Cudahy, J., concurring)
4. *In re Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 891 F.2d 159 (7th Cir. 1989) (Cudahy, J., dissenting)
5. Flick v. Blevins, 887 F.2d 778 (7th Cir. 1989) (Cudahy, J., concurring in part and dissenting in part)
6. Int'l Union, United Auto. Workers v. Johnson Controls, Inc., 886 F.2d 871 (7th Cir. 1989) (en banc) (Cudahy, J., dissenting), *rev'd*, 499 U.S. 187 (1991)
7. Malhotra v. Cotter & Co., 885 F.2d 1305 (7th Cir. 1989) (Cudahy, J., concurring), *superseded by statute on other grounds*, Rush v. McDonald's Corp., 966 F.2d 1104, 1119–20 (7th Cir. 1992)
8. Lomas & Nettleton Co. v. Wiseley, 884 F.2d 965 (7th Cir. 1989) (Cudahy, J., dissenting)
9. Free v. United States, 879 F.2d 1535 (7th Cir. 1989) (Cudahy, J., concurring)
10. Cartwright v. Am. Sav. & Loan Ass'n, 880 F.2d 912 (7th Cir. 1989) (Cudahy, J., concurring)
11. Easter House v. Felder, 879 F.2d 1458 (7th Cir. 1989) (en banc) (Cudahy, J., concurring in part and dissenting in part), *vacated for reconsideration in light of* Zinermon v. Burch, 494 U.S. 113 (1990). *See* 494 U.S. 1014 (1990) (mem.), *on remand*, 910 F.2d 1387 (7th Cir. 1990) (Cudahy, J., dissenting).
12. Borowski v. DePuy, Inc., 876 F.2d 1339 (7th Cir. 1989) (Cudahy, J., concurring in part and dissenting in part)
13. United States v. Agyemang, 876 F.2d 1264 (7th Cir. 1989) (Cudahy, J., concurring)
14. Shields v. Burge, 874 F.2d 1201 (7th Cir. 1989) (Cudahy, J., concurring)
15. McDonald v. Krajewski, 874 F.2d 454 (7th Cir. 1989) (Cudahy, J., concurring)

16. *United States v. Peden*, 872 F.2d 1303 (7th Cir. 1989) (Cudahy, J., concurring in part and dissenting in part)
17. *Cent. States Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1158 (7th Cir. 1989) (en banc) (Cudahy, J., concurring in part and dissenting in part)
18. *United States v. Pino-Perez*, 870 F.2d 1230 (7th Cir. 1989) (en banc) (Cudahy, J., dissenting in part)
19. *Infinity Broad. Corp. of Ill. v. Prudential Ins. Co. of Am.*, 869 F.2d 1073, 1079 (7th Cir. 1989) (Cudahy, J., dissenting)
20. *Rutan v. Republican Party of Ill.*, 868 F.2d 943 (7th Cir. 1989) (Cudahy, J., concurring in part and dissenting in part)
21. *Bolden for Bolden v. Bowen*, 868 F.2d 916 (7th Cir. 1989) (Cudahy, J., concurring)
22. *Singh v. Moyer*, 867 F.2d 1035 (7th Cir. 1989) (Cudahy, J., dissenting in part)
23. *Gomez v. Chody*, 867 F.2d 395 (7th Cir. 1989) (Cudahy, J., concurring in part and dissenting in part)
24. *Weidner v. Thieret*, 866 F.2d 958 (7th Cir. 1989) (Cudahy, J., concurring)
25. *Am. Nat'l Bank & Trust Co. of Chi. v. City of Chicago*, 865 F.2d 144 (7th Cir. 1989) (Cudahy, J., concurring)
26. *Moore v. United States*, 865 F.2d 149 (7th Cir. 1989) (Cudahy, J., dissenting)
27. *Ind. Harbor Belt Ry. Co. v. Am. Cyanamid Co.*, 860 F.2d 1441, 1446–48 (7th Cir. 1988) (Cudahy, J., dissenting)
28. *Torres v. Wis. Dep't of Health & Senior Servs.*, 859 F.2d 1523 (7th Cir. 1988) (en banc) (Cudahy, J., dissenting)
29. *Hernandez v. Cepeda*, 860 F.2d 260 (7th Cir. 1988) (Cudahy, J., concurring)
30. *Beloit Corp. v. NLRB*, 857 F.2d 1154, 1161 (7th Cir. 1988) (Cudahy, J., dissenting)

