JUDGE CLYDE CAHILL: COURAGE AND ACTION

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ABSTRACT

In a democratic society, it is essential that a competent and independent judiciary act as a bulwark against any force that seeks to strip citizens of their fundamental rights. The essence of this judiciary is judges with an open and notorious commitment to both uphold and enhance the law. The Honorable Clyde S. Cahill was one such judge. This Article discusses the life and work of Judge Cahill and highlights how the Judge was a trailblazer that set a clear path to improving judicial outcomes. Judge Mason traces Cahill's life story from his early beginnings, growing up in a poor family, to his rise as a judge determined to bring fairness and equity to the judicial administration of criminal law and civil rights. Judge Mason focuses on specific findings and opinions of Judge Cahill which aimed to improve equal rights and due process at the trial level in our state and federal courts, including Judge Cahill's longstanding criticism of the racial implications of mandatory sentencing. The author illustrates Judge Cahill's persistence, suggesting that his visionary work serves as a model for what the judiciary in a democracy should be.

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INTRODUCTION

It is essential to our democracy that a competent and independent judiciary be available to all people as a bulwark against any force that seeks to strip any person or group of persons of their rights to life, liberty, or the pursuit of their happiness as those rights are set forth in the state and federal constitutions and laws.[1] The essence of such a judiciary will always be judges who accept and carry out this role with an open and notorious commitment to both uphold and enhance the law to guarantee equal protection and due process. The Mound City Bar Association has always advocated for and supported such judges.

The Honorable Clyde S. Cahill was such a judge throughout his career. He was determined to bring fairness and true equity to the judicial administration of criminal law and civil rights. His commitment to this was evident in his work both as a lawyer and as a judge in the state and federal courts. He spoke and wrote a truth in his body of work that was often ahead of then existing caselaw. He suffered criticism for his persistent expression of principles that both exposed weaknesses in the administration of justice and set a clear path to improving judicial outcomes. This Article discusses his body of work prior to becoming a judge and his visionary work in that role. This Article also discusses specific findings and opinions of Judge Cahill through which he sought to improve equal rights and due process at the trial level in our state and federal courts.

Clyde Cahill was born on April 9, 1923, in St. Louis, Missouri to Effie Sedona and Clyde S. Cahill, Sr.[2] His family was poor in a way that far fewer Americans today experience. Judge Cahill attended St. Louis public schools, including iconic Vashon High School.[3] Longtime family friend, James Joiner, a retired member of Teamsters Local 688, said of Cahill: "I attended Vashon with Clyde in those days when he had patches on his pants and cardboard in his shoes, making no statement. He was just poor."[4] During

1. *See, e.g.*, U.S. CONST. amend. XIV, §1.
2. *See Honorable Clyde S. Cahill Jr. Obituary*, OFFICER FUNERAL HOME, P.C., https://www.officerfh.com/obituary/5577521 [https://perma.cc/8PH6-MQJN] (last visited Aug. 6, 2021).
3. *Id.*
4. Jerry Berger, *Judge Cahill Gets Lawyers' Top Honor*, ST. LOUIS POST-DISPATCH, May 5, 1993, at F1.

World War II, he served in the U.S. Army Air Corps.[5] After the war, he returned to St. Louis, where he graduated from Saint Louis University in 1949 and Saint Louis University Law School in 1951.[6]

I. CAHILL AS A STUDENT ACTIVIST AND YOUNG LAWYER

Cahill did not wait until after graduation from law school to let his community know that he was going to be a force for the civil rights of Black people. In 1950, the *St. Louis Post-Dispatch* published a letter by Cahill discussing racial conditions in St. Louis.[7] He pointed out segregation in housing and overt racism against Black people in restaurants and movie theaters, as well as other private businesses.[8] He added that while serving in World War II, he observed even Nazi prisoners being treated better than he was. While the letter primarily was the cry of a third-year law student who was awakening to the reality of racism, Cahill, perhaps prophetically, articulated a theme that would turn out to be the foundation of his career.

After passing the bar, Cahill went into private practice working with other local Black lawyers who also became civil rights activists.[9] He immediately set out to attack racism as a civil wrong in criminal matters as well. Born in the last stages of Jim Crow laws, Judge Cahill recognized early in his career that he had to use his legal education and intellectual acumen to carry the fight for civil rights directly to judicial proceedings. His goal was to create effective change by being a change agent himself. He used his place as a lawyer to advocate for positive movements in the law that benefitted the goals of civil rights and racial equity.[10]

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5. *See Cahill, Clyde S., Jr.*, FED. JUD. CTR., https://www.fjc.gov/history/judges/cahill-clyde-s-jr [https://perma.cc/BW38-2VLW].

6. *Id.*

7. Clyde S. Cahill Jr., *A Student Body Champions Negroes*, ST. LOUIS POST-DISPATCH, Nov. 20, 1950, at 2B.

8. *See id.*

9. *Cahill, Clyde S., Jr.*, *supra* note 5.

10. *See, e.g.*, Ronald D. Willnow, *18 Negroes Refused Admission to Mississippi County Schools*, ST. LOUIS POST-DISPATCH, Nov. 26, 1961, at 22A; Richard P. Brandt, *Negro Group Seeking Charter For New National Bank Here*, ST. LOUIS POST-DISPATCH, April 23, 1964, at 6A; *HDC Plans to Stress Legal Rights of Poor*, ST. LOUIS POST-DISPATCH, Feb. 4, 1968, at 1, 21A; *Suit Threatened Over Census Method*, ST. LOUIS POST-DISPATCH, Jan. 27, 1970, at 3A; *Sues Over Jail Inmates' $1-a-Day Pay*, ST.

Cahill was in private practice until 1954, when he joined the staff of the Circuit Attorney's Office of the City of St. Louis.[11] In 1961, he left the Circuit Attorney's Office and returned to private practice while also serving as a special assistant circuit attorney until 1964.[12] He also engaged in litigation to fight racial segregation. When he discovered that the St. Louis School Board was manipulating school closings in a racially discriminatory manner, he publicly exposed the practice.[13] Cahill was especially active as a desegregation attorney. He was strong enough to legally confront rural school districts engaged in racial segregation, despite the backlash of those who would want him to sit down and be quiet, or even worse, afraid.[14]

Cahill successfully sued the Charleston Consolidated School District in *Davis v. Board of Education of Charleston School District*.[15] Charleston School District (Mississippi County) operated a dual school system in which students were assigned to different schools based on race.[16] Black students could apply to transfer to predominately white schools for their eleventh and twelfth grades for classes not offered at their own school.[17] But the court rejected the school board's attempt to use academic criteria, such as "scholastic aptitude" and "mental energy or ability of the pupil," as a basis for determining if a Black student could be admitted, while not requiring white students to show they met the same criteria.[18] The federal district court found this to be a clear violation of *Brown v. Board of Board of Education*[19] and rejected the School District's plan to integrate gradually over several years.[20] The court ordered the schools be immediately integrated, starting at the beginning of the next school year.[21]

LOUIS POST-DISPATCH, Oct. 24, 1971, at 3A; *Legal Group Joins Arrest Records Fight*, ST. LOUIS POST-DISPATCH, Mar. 18, 1973, at 24A.

11. *Cahill, Clyde S., Jr.*, *supra* note 5.
12. *Id.*
13. *See Brands Citizen School Report Segregation Aid*, ST. LOUIS POST-DISPATCH, May 2, 1963, at 1, 15A.
14. *See, e.g.*, Davis v. Bd. of Educ., 216 F. Supp. 295 (E.D. Mo. 1963).
15. *Id.*
16. *See id.* at 296–98.
17. *Id.* at 298.
18. *Id.* at 300.
19. Brown v. Bd. of Educ., 349 U.S. 294 (1955).
20. *Davis*, 216 F. Supp. at 299.
21. *Id.* at 300.

Cahill also successfully sued Pemiscott County on a similar issue.[22] While these cases were in his capacity as the Chief Legal Advisor to the Missouri NAACP, Cahill participated in litigation in other states, including Arkansas and Illinois, which furthered the cause of civil rights.[23] Beyond direct litigation, Cahill used his platform to attack publicly racial segregation in public schools. He openly opposed the building of new high schools that would only draw Black students and therefore perpetuate segregation.[24] When parents and supporters protested a bussing policy that would continue segregation in St. Louis, Cahill openly supported protesters on behalf of the NAACP.[25]

Even though racial segregation in schools dominated the public debate, Cahill understood the need for the NAACP to fight workplace racism as well. In 1965, Cahill was directly involved with the legal team that sued a major railroad company that was deliberately trying to reduce the number of Black railway workers.[26] In *Simon L. Howard v. St. Louis-San Francisco Railway Co. and the Brotherhood of Railway Trainmen*,[27] Cahill and his co-counsel represented a class of Black railway workers who were being discriminated against by the railroad company and the relevant labor union, the Brotherhood of Railway Trainmen.[28] The plaintiff class alleged that Black rail workers who should have been classified as "brakemen" were deliberately classified as "train porters" in a move that would result in this group of Black workers being eliminated from employment all together. The plaintiffs specifically alleged that the denomination of "train porter" applied only to Black rail workers and that it was therefore a racial classification and discrimination under the Railway Labor Act.[29]

In response, the Eighth Circuit stated, "We are aware that the attrition of railway passenger business has had an economic impact on train porters.

22. *Integration is Ordered in Pemiscott County*, ST. LOUIS POST-DISPATCH, June 29, 1963, at 7A.

23. Alvin A. Reid, *Judge Clyde Cahill Remembered for 'Character, Compassion'*, ST. LOUIS AM. (Dec. 14, 2010), http://www.stlamerican.com/news/local_news/judge-clyde-cahill-remembered-for-character-compassion/article_eb6e2290-f71e-5014-a940-9d14f8a97037.html.

24. *Brands Citizen School Report Segregation Aid*, *supra* note 13.

25. *Parents Block Busses at West End School in Segregation Protest*, ST. LOUIS POST-DISPATCH, June 7, 1963, at 1, 10A.

26. Howard v. St. Louis-S.F. Ry. Co., 361 F.2d 905 (8th Cir. 1966).

27. *Id.*

28. *Id.* at 906.

29. *Id.*

The membership of this craft has declined and the jobs of those remaining are in jeopardy. But other crafts in the railroad industry have experienced a similar fate."[30] Although this observation seems obvious on its face, the court clearly missed the critical point. The railroad and the union were engaging in the racially disparate policy that involved phasing out the position of "porter" while at the same time failing to transfer Black workers to another position, such as "brakeman." During this time, brakemen were systematically nearly all white. Accordingly, the railroad and the union were thereby deliberately reducing the actual number of Black railway workers. In fact, as was presented to the court below:

> In Paragraph 15 appellant alleged that on three specified dates in March, 1962, on March 23, 1960, and on other dates throughout the past 10 years, Frisco, with acquiescence and conspiratorial participation of Brotherhood, assigned white brakemen to duties usually performed by train porters; that appellees had thereby abrogated property and seniority rights of train porters.[31]

But, as too many Black lawyers were experiencing at the time, the Eighth Circuit court summarily dismissed the entire case presented by Cahill and his partners. In doing so, the Eighth Circuit explained:

> Appellant's brief in this court, has been of little assistance. Instead of pin-pointing the claimed errors of the District Court, appellant has approached the Paragraph 14 and 15 claims in vague generalities, and has cited abstract principles of law without demonstrating their applicability to the questions at hand. We have nonetheless examined the pleaded claims in the light in which they were apparently presented to the court below.[32]

Ultimately, it did not matter to the Eighth Circuit court that the Black railway workers and their attorneys could "see" this discrimination right before their eyes.[33] According to the court, the lack of a smoking gun

30. *Id.* at 909.
31. *Id.* at 910.
32. *Id.*
33. *See id.* at 910–12.

document or direct testimony from a Frisco or union executive exposing an explicit intent to get rid of as many Black railway workers as possible provided insufficient grounds to find racial discrimination.[34] The appellate court thereby agreed with the trial court's finding that "[t]he record fails to establish a pattern of discrimination, or collusive action between Frisco and Brotherhood. The few isolated incidents complained of involved emergency situations requiring the exercise of on-the-spot managerial discretion."[35]

While a more exhaustive analysis of this and similar cases may have obvious academic utility, the relevant conclusion that can be reasonably drawn is that the district and appellate courts dismissed the claims of Cahill and his colleagues as failing to "prove" discrimination, using language that demeaned the serious nature of the racial discrimination claim and demeaned the presentation of the lawyers representing the Black railway workers.

Perhaps Cahill's most high-profile work as a civil rights lawyer was as a part of the NAACP legal team representing demonstrators protesting racially discriminatory employment practices at the St. Louis Jefferson National Bank.[36] In 1963, he represented, along with civil rights icon Margaret Bush Wilson, nineteen people charged with contempt of court for violating a federal judge's order to stop protesting at the Jefferson National Bank and Trust Company in Saint Louis.[37] The bank had received a letter from the leader of the local chapter of the Congress on Racial Equality ("CORE"),[38] in which CORE specifically indicated that it intended to engage in "direct action," including "sit-ins, stand-ins and lie-ins which may interfere with the conduct of the business of the bank during critical hours of its operation."[39] The bank was given a temporary restraining order prohibiting conduct that would disrupt the business of the bank, but the protestors carried out their plan nonetheless.[40]

The petitioners contended that the state trial court "lacked jurisdiction to try them for criminal contempt and to find them guilty of such offense because the application for the contempt citation and the entire conduct of

34. *See id.*
35. *Id.* at 911.
36. *See* Curtis v. Tozer, 374 S.W.2d 557 (Mo. Ct. App. 1964).
37. *Id.*
38. *Id.* at 562.
39. *Id.*
40. *Id.* at 563–64.

the trial show that these proceedings were, in fact, for civil contempt."[41] Cahill and his co-counsels likewise argued on appeal that the trial court's order of contempt could not lead to criminal penalties, because the original petition for contempt was for civil, not criminal, contempt.[42] After extensive analysis of the procedural issues and an exhaustive exploration of the law, the court clarified its view of the correct posture of the case:

> Finally, we think it well to keep clearly in mind the precise legal point upon which we are ruling. This decision does not change, alter or modify the field of inquiry in *every* habeas corpus proceeding. It is elementary that this decision must be read in the light of the circumstances of the cases we are ruling, i.e., cases involving indirect criminal contempts.[43]

The court made it clear that the case would therefore turn on whether there was proof beyond a reasonable doubt to support the findings of criminal contempt against the several petitioners.[44] After a comprehensive opinion, fifteen of the demonstrators lost their petition for habeas corpus relief and four were ordered to be released.[45] However, the Jefferson Bank demonstration established the "Jefferson Bank 19" demonstrators as civil rights leaders both locally and nationally.[46] Similarly, Judge Cahill established his civil rights advocacy bona fides by his consistent, strong voice on behalf of the rights of Black citizens.

Cahill understood that his gravitas as a civil rights lawyer also could also be an effective way to use the press to enlighten the white community about the effects of racism on Black citizens. Notably, he once publicly conveyed the difficulty that Black Missourians experienced in navigating

41. *Id.* at 568.
42. *Id.*
43. *Id.* at 576 (emphasis in original).
44. *Id.* at 581.
45. *Id.* at 606.
46. *See, e.g.*, Tim O'Neil, *1963: Protests at Jefferson Bank Lead to Major Changes in Hiring Practices in St. Louis*, ST. LOUIS POST-DISPATCH (Aug. 31, 2020), https://www.stltoday.com/news/archives/1963-protests-at-jefferson-bank-lead-to-major-changes-in-hiring-practices-in-st-louis/article_d6be4178-cc1f-527a-a0d0-fd78a720456e.html [https://perma.cc/FY5M-R464]; *Jefferson Bank Protests Remembered*, ST. LOUIS AM. (Aug. 23, 2013), http://www.stlamerican.com/news/community_news/jefferson-bank-protests-remembered/article_73068a00-0ada-11e3-80e9-001a4bcf887a.html [https://perma.cc/5P23-Q788].

the racism in society, which was especially prevalent in the rural areas of Missouri and other states.

> While no one has ever personally bothered me in any way, there is immediately this fear of physical violence when you go into the area. You can sense it. You don't believe you're in the State of Missouri any longer. You feel as if you're traveling in Mississippi, Alabama, South Carolina, any of those places. You know you're not going to be received in a friendly manner. If you stop at a filling station for gasoline, of course, you get that, but you don't attempt to use the restroom without fear of being insulted or having problems of one kind or another. It's a very real thing. [47]

Even contemporary journalists find that the aura of racism still engulfs the rural south:

> Although the trend is changing, black people have been stealing away from the South for decades. It's a place that represents bondage, lynching, and the humiliation of second-class citizenship. Down here, you're constantly faced with physical reminders — the flag, Confederate statues — of our nation's bigotry. Even today, the stigma of entrenched racism remains.[48]

In 1967, Cahill returned to public service as general manager of the Human Development Corporation of Metropolitan St. Louis (HDC), started by his colleague, Judge Theodore McMillian.[49] The HDC gave him the opportunity to be a leader in providing social services. Cahill served in this position until 1972.[50] He also led the Legal Aid Society of the City and County of St. Louis, providing legal services to financially underprivileged

47. Roy J. Harris, *The Plight of the Negro In Outside Missouri: Many Places Bar Him*, ST. LOUIS POST-DISPATCH, July 7, 1963, at 1B.

48. Jemar Tisby, *I'm a Black Man Who Moved to the Deep South. Here's What It's Teaching Me About Race*, VOX (Jan. 4, 2019), https://www.vox.com/first-person/2017/10/31/16571238/black-man-deep-south-race [https://perma.cc/W7X9-MR7M].

49. *See Clyde S. Cahill Is Appointed New General Manager of HDC*, ST. LOUIS POST-DISPATCH, Oct. 28, 1967, at 3A; Robert Adams, *Cahill Cool, Innovative Poverty War General*, ST. LOUIS POST-DISPATCH, Apr. 6, 1969, at 22A.

50. *See Cahill, Clyde S., Jr.*, *supra* note 5.

litigants.[51] During this period, Cahill often spoke out publicly about how racism was hurting the Black community. He not only criticized the quality and overcrowding of public schools, he also spoke about the impact of white parents rejecting bussing Black students to white schools: "the disease of bigotry still infects many parents."[52] Cahill attacked media bias in the coverage of the Black Community: "The greatest single shortcoming of the mass media is not the inaccurate reporting of rights . . . but it is the failure of the mass media, and especially the newspapers, to report the day-to-day happenings in the Negro community."[53] He also spoke out against the long-running misconduct and brutality of too many police officers against Black people.[54]

Cahill early on tackled a problem that festered in the judicial system until it was nationally exposed in the aftermath of the protest over the killing of Michael Brown in Ferguson, Missouri: how municipal courts were using incarceration to force poor people, mostly Blacks, to pay draconian fines and fees.[55] Cahill, as leader of the Legal Aid Society, sued in 1971 to reduce the costs charged to defendants who wanted a jury trial in municipal court.[56] Cahill specifically attacked the punitive fees people faced if they wanted to challenge municipal charges in a case in which a defendant was required to deposit $144 per day for a jury trial (amounting to $12 per juror).[57] However, Cahill pointed out that jurors were only paid $3 each day, so the maximum deposit should be $36 per day.[58] Cahill similarly fought a policy in St. Louis that incarcerated indigent defendants who could not pay their fines.[59] These defendants were "allowed" a $1 credit towards their fines per day of work at the Workhouse.[60]

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51. *Cahill Appointed Director of Legal Aid Society Here*, ST. LOUIS POST-DISPATCH, Jan. 17, 1971, at 1, 13A.

52. *Cahill Assails City's Schools*, ST. LOUIS POST-DISPATCH, June 1, 1969, at 7C.

53. *Cahill Assails Reporting of Negro News*, ST. LOUIS POST-DISPATCH, June 26, 1968, at 3A.

54. *See HDC Head for Study of Police*, ST. LOUIS POST-DISPATCH, Sept. 17, 1968, at 1; *Police Backed, Assailed*, ST. LOUIS POST-DISPATCH, Sept. 7, 1969, at 1.

55. ArchCity Defenders, Municipal Courts White Paper (2014). Available at https://www.archcitydefenders.org/wp-content/uploads/2019/03/ArchCity-Defenders-Municipal-Courts-Whitepaper.pdf [https://perma.cc/NTR5-JYAR].

56. *See Seeks Jury Trial in City Court*, ST. LOUIS POST-DISPATCH, Oct. 21, 1971, at 16A.

57. *Id.*

58. *Id.*

59. *Sues Over Jail Inmates' $1-a-Day Pay*, ST. LOUIS POST-DISPATCH, Oct. 24, 1971, at 3A.

60. *Id.* The Workhouse is St. Louis's medium security jail, nicknamed as such because detainees were required to work off their fines and fees. *Id. See also What's the Workhouse? Here's*

Cahill also was an early critic of the bond system used in St. Louis trial courts. In a newspaper column in 1973, Cahill argued that mandatory bail requirements "discriminate against the poor and create a lack of respect for the law."[61] Cahill added:

> [Cash bonds] are the creation of a gaslight era when we did not have modern methods of communication. . . . There is no real reason for people to run anymore. When they do skip court dates, it's usually because they get the dates or times mixed up. What we need is for the people in authority to use some backbone. The judge and the police are not bound by outdated rules.[62]

II. THE SOCIAL JUSTICE WARRIOR BECOMES A JUDGE

Judge Cahill was sworn in as a Circuit Judge in 1975, and he became the third Black judge to hold this position in the 22nd Judicial Circuit of Missouri.[63] Judge Theodore McMillan, the first Black Circuit Judge in Missouri, had been appointed to the Missouri Court of Appeals.[64] The stage was set for Cahill to put his concerns about fair and racially equitable justice into play. He now had a judicial seat to advance positive movements in the law to support civil rights and racial equality.

In 1979, in *Washington v. Sears, Roebuck & Co.*,[65] Judge Cahill had his first clash between his desire to be a relatable judge, who helped jurors

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What You Need to Know about St. Louis' Medium Security Institution, ST. LOUIS PUB. RADIO (July 26, 2017), https://news.stlpublicradio.org/government-politics-issues/2017-07-26/whats-the-workhouse-heres-what-you-need-to-know-about-st-louis-medium-security-institution#stream/0 [https://perma.cc/6TYF-QYND].

61. William Freivogel, *Revising the Bail Bond System Appears Exercise in Futility*, ST. LOUIS POST-DISPATCH, Aug. 19, 1973, at 22A.

62. *Id.*

63. *See* Tommy Robertson & Carter Stith, *New Court Appointees Do Not Believe In Labels*, ST. LOUIS POST-DISPATCH, Jan. 12, 1975, at 4G.

64. *See Judge McMillian Named To Appeals Court Here*, ST. LOUIS POST-DISPATCH, Oct. 24, 1972, at 1, 8A. For more on Judge McMillian, see Karen Tokarz, *Judge Theodore McMillian: Beacon of Hope and Champion for Justice*, 67 WASH. U.J.L. & POL'Y 359 (2022) (also published in this volume).

65. Washington v. Sears, Roebuck & Co., 585 S.W.2d 137 (Mo. Ct. App. 1979).

better understand their role, and the more stoic expectations of the Missouri Court of Appeals. At trial, Judge Cahill made additional comments to the jurors to help them understand the jury instructions. The plaintiff appealed, arguing these comments constituted reversible error, and the Court of Appeals agreed.[66] On appeal from Judge Cahill's decision, the Court of Appeals initially took a velvet hammer approach to their reprimand by suggesting that "good" comments should be directed to the appropriate committee:

> Plaintiff first complains the trial court erred by embellishing pattern instruction MAI 2.01. The cautionary instruction, as embellished, is set out in full in an appendix to this opinion.
>
> Most of the comments of the experienced trial judge were not prejudicial to either party. Indeed, most of his comments were good and probably helpful to the understanding of the jury. The Missouri Supreme Court Committee on Civil Jury Instructions would do well to consider some of his comments.[67]

The ruling did not deter Judge Cahill. Instead, he continued his practice of helping jurors better understand the required jury instructions. That same year, in *State of Missouri v. Willie M. Ward*,[68] the Court of Appeals thinned the velvet on the hammer as it sought to curb Cahill's enthusiasm.[69]

> In his next point, the defendant objects to certain comments made by the trial court during its reading of MAI-CR 2.01 and 2.02. The record shows that the trial court interrupted his reading of each instruction once to explain in simplified terms the rationales underlying some of the rules stated in the instructions and also to explain certain other trial events and procedures not covered by the instructions. He also made a few similar comments between readings of the two

66. *Id.* The court held that the jury instruction at issue must be given exactly as written, and it should not be "embellished." *Id.* at 138.
67. *Id.* at 138.
68. State v. Ward, 588 S.W.2d 728 (Mo. Ct. App. 1979).
69. *Id.*

> instructions and following completion of their reading. The instructions were read in their entirety and verbatim, and it appears from the record that the court interspersed its own commentary in such a manner that it would have been clear to the jury when the prepared instructions were being read as opposed to when the court was speaking extemporaneously. It also appears that the trial court's own comments were largely duplicative of information already in the jurors' possession in the form of the Handbook of Information for Jurors approved by the Missouri Bar that is distributed to prospective jurors in that circuit.[70]

However, the Court of Appeals made it clear that their patience with Cahill was wearing thin.[71] In an admonition to Cahill, the Court said:

> Although we do not address this point on the merits, we find it appropriate to repeat our admonition in *Washington v. Sears, Roebuck and Co.* . . . to the effect that such oral digressions by trial judges during readings of the approved form instructions must not continue. The fact that this case is before us now on this very ground is apt illustration of the problem we sought to cure in Washington—the deluge of appeals that is inevitable so long as these discursive ventures during the reading of instructions continue.[72]

With these words, the Court of Appeals made clear that Cahill needed to stop. Nonetheless, Cahill persisted in clarifying the jury instructions for the jury, with the intent to help the jurors better understand their role and how to best do their duty. This did not sit well with the Missouri Supreme Court the following year in *State of Missouri v. Charles L. Cross*.[73] The Court noted that the transcript of the trial showed that Cahill's instructions, including his personal explanations, went on for ten pages.[74] Specifically, the Court noted:

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70. *Id.* at 730.
71. *See id.*
72. *Id.*
73. State v. Cross, 594 S.W.2d 609 (Mo. 1980) (en banc).
74. *Id.* at 609.

> The court's desire to inform the jurors of the routine they would be required to follow, particularly where they were to be sequestered in a trial which would last several days, is commendable and understandable, but the impromptu or extemporaneous remarks, comments and instructions delivered in this case went much further and are not acceptable. Instructions MAI-CR 1.02, 1.06, 2.01 and 2.02 had already been read. These, of course, are in writing and MAI-CR 1.06, 2.01 and 2.02 go to the jury room with the jurors. MAI-CR 1.06 prescribes the order of trial. MAI-CR 2.01 sets forth the duties of the judge and jury. MAI-CR 2.02 relates to evidence and rulings of the court. They have no place for departures such as took place in the present case.[75]

The Court added:

> Trial courts should abide by MAI-CR 1.02, 1.06, 2.01 and 2.02, in starting jury trials. Perhaps there are circumstances where minor deviations from the prescribed course would be justified. If so, we make no attempt at delineation here, except to say the present example is not one which can be approved.[76]

Still undeterred, Cahill continued to help his juries better understand the all too often convoluted wording of jury instructions. In *State of Missouri v. Paul Behrman*,[77] the court found that, while Judge Cahill had appropriately read preliminary jury instructions MAI-CR 1.06, 2.01 and 2.02, he:

> interspersed explanatory comment with the text of the instructions as they were being read. The trial court's comments cover some twenty-four pages of the transcript. Defense counsel objected to the court's remarks after they were given to the jury. This issue involving the same practice was considered by the Missouri Supreme Court in *State v. Cross*, 594 S.W.2d 609 (Mo.banc 1980). There the

75. *Id.* at 610.
76. *Id.*
77. State v. Behrman, 613 S.W.2d 666 (Mo. Ct. App. 1981).

> court held such deviations from the written instructions were reversible error. No exception can apply here.[78]

Judge Cahill made similar comments to jurors in another case and was similarly reversed in *Doris A. Duebelbeis v. Michael V. Dohack*.[79] The Missouri Court of Appeals ruled that "[t]he judgment must be reversed and the case remanded for new trial."[80]

III. CAHILL ADVANCES TO THE FEDERAL JUDICIAL STAGE

No doubt Judge Cahill never expected to be a federal judge. As a state trial judge, he openly defied the Missouri Court of Appeals and the Missouri Supreme Court, and he was comfortable in his defiant role. History, however, has a way of opening unexpected doors. In 1980, President Jimmy Carter nominated him to become a United States District Judge for the Eastern District of Missouri.[81] He was confirmed by the U.S. Senate on May twenty-first of the same year.[82] His relationship with the courts above him remained uneventful. In 1990, he said that setting aside his social activist background while on the district court was "the most frustrating thing" he had to do.[83]

But Cahill found an outlet for his activist drive a few years later as he began his efforts to challenge mandatory sentencing guidelines, especially after he took senior status in 1992. Frankie Muse Freeman, a civil rights icon in her own right, spoke of the moment in the February 2005 issue of the Mound City Bar Association Newsletter: "On March 1, 1994, I received a call from Judge Cahill informing me that he was sharing with me a copy of his findings and conclusions of law, filed Feb. 11, 1994, in the case of *United States of America vs. Edward James Clary*, Cause No. 89-167-

78. *Id.* at 667.
79. Duebelbeis v. Dohack, 615 S.W.2d 488 (Mo. Ct. App. 1981) (citing *Cross*, 594 S.W.2d at 610).
80. *Id.* at 489.
81. *Carter Names Judge Cahill To Federal District Court*, ST. LOUIS POST-DISPATCH, Apr. 2, 1980, at 1B; *Cahill, Clyde S., Jr.*, *supra* note 5.
82. *Senate Votes Cahill to U.S. Court Seat*, ST. LOUIS POST-DISPATCH, May 22, 1980, at 8A; *Cahill, Clyde S., Jr.*, *supra* note 5.
83. *Cahill Was Social Activist*, ST. LOUIS POST-DISPATCH, Apr. 15, 1990, at 6B.

CR."[84] She added, "[i]n the more than 58-page document, Judge Cahill made a comprehensive historical analysis of the development of the sentencing guidelines and concluded that the crack-cocaine statute was in violation of the Equal Protection Clause."[85]

The explosion of fear and rage that rose from the introduction of crack cocaine in the 1980s led to harsh penalties for the sale or possession of crack.[86] These attitudes were fueled, in part, by gang violence over drug selling territory and the ease of "cutting" pure cocaine into many more doses of crack cocaine.[87]

> Crack cocaine . . . is derived from powder cocaine. . . . The powder cocaine is simply dissolved in a solution of sodium bicarbonate and water. The solution is boiled and a solid substance separates from the boiling mixture. This solid substance, crack cocaine, is removed and allowed to dry. . . . One gram of pure powder cocaine will convert to approximately 0.89 grams of crack cocaine.[88]

This drug usage and related gang violence led to sentencing guidelines that doomed handlers and users of crack cocaine to sentences one hundred times greater than that given to handlers and users of pure powder cocaine.[89] Following the wording of the Anti-Drug Abuse Act of 1986,[90] the Sentencing Commission set forth guidelines for first time offenders as follows:

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84. Frankie M. Freeman, *A Tribute to Hon. Clyde Cahill*, MOUND CITY BAR ASS'N: MOUND CITY NEWS, Feb. 2005, at 1MC (available at http://storage.cloversites.com/moundcitybarassociation/documents/Feb.%202005%20Newsletter.pdf [https://perma.cc/X5M4-54EB]). For more about Frankie M. Freeman, see Hon. Nicole Cobert-Botchway, *Frankie Muse Freeman, Esquire: The Legacy of the First Female United States Commissioner of Civil Rights and Presidential Scholar Commissioner*, 67 WASH. U.J.L. & POL'Y 15 (2022) (also published in this volume).

85. Freeman, *supra* note 84, at 1MC, 13MC.

86. Melissa C. Brown, *Equal Protection in a Mean World: Why Judge Cahill Was Right In* United States v. Clary, 11 NOTRE DAME J.L & POL'Y 307, 312 (1997).

87. *Id.*

88. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 14 (1995).

89. *See* Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U.J. URB. & CONTEMP. L. 121, 122 (1994).

90. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207.

Five-Year Mandatory Minimum	
Crack: 5 grams	Powder: 500 grams
Value: $225 to $750	Value: $32,500 to $50,000
Number of doses: 10-50 or more	Number of doses: 2,500 to 5,000
Ten-Year Mandatory Minimum	
Crack: 50 grams or more	Powder: 5,000 grams or more[91]

Judge Cahill observed from the bench the obvious impact of these guidelines. He noted that Black defendants, who were the primary users and handlers of crack cocaine, were receiving far harsher sentences than white defendants using or handling the same amount of powder cocaine. In *United States v. Clary*,[92] Judge Cahill made the point with "crystal" clarity:

> Before this Court are two different sentencing provisions contained within the same statute for possession and distribution of different forms of the same drug. The difference–the key difference–is that possession and distribution of 50 grams of crack cocaine carries the same mandatory minimum sentence of 10 years imprisonment as possession and distribution of 5000 grams of powder cocaine. Both provisions punish the same drug, but penalize crack cocaine 100 times more than powder cocaine![93]

Judge Cahill directly attacked the implicit racial bias that led to such a clear racially disparate impact. He wrote:

> Having clearly stated the Court's conviction that crime cannot be reduced without stern and prompt punishment as well as long range plans to reduce criminal activities, the Court now feels emboldened to express a viewpoint designed to eliminate the disproportional punishment for crack, which would enhance the credibility of the

91. *See id.* § 1002 (amending 21 U.S.C. § 841(b)(1)).
92. United States v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994), *rev'd*, 34 F. 3d 709 (8th Cir. 1994), *cert. denied*, 513 U.S. 1182 (1995).
93. *Id.* at 770 (emphasis in original).

> government among black citizens and help restore their faith in believing that equal justice is for all.[94]

Judge Cahill articulated judicial notice of a historic fact:

> That black people have been punished more severely for violating the same law as whites is not a new phenomenon. A dual system of criminal punishment based on racial discrimination can be traced back to the time of slavery. In order to understand the role that racism has played in enacting the penalty enhancement for using crack cocaine, one must first take note of America's history of racially tainted criminal laws, particularly drug laws. *Race has often served as a significant contributing factor to the enhancement of penalties for crime*.[95]

With these words, Judge Cahill injected the concept of how implicit racial bias drives systemic racism in criminal law and processes into the judicial and legal conversation on sentencing.[96] Having raised the issue, he now had to deal with it. And he did.

In his forty-nine-page decision in *Clary*, Judge Cahill took his readers through the history of racism in a prose more akin to a long academic essay than a court opinion.[97] He painstakingly laid out the link between slavery, black codes, the era of Jim Crow, and the national response to the crack epidemic.[98] In so doing, he clearly made the case that the sentencing standards for crack and powder cocaine are racially disparate and that this disparity was motivated by implicit bias and systemic racism.[99] This unique, but obvious, judicial finding compelled the next step in his opinion. Starting with *Yick Wo v. Hopkins*,[100] Judge Cahill pointed out that even then "[t]he Supreme Court ruled that the effect of a law may be so harsh or adverse in

94. *Id.* at 773.
95. *Id.* at 774 (emphasis added).
96. *See id.*
97. *See generally id.*
98. *See id.* at 774–76.
99. *See id.*
100. Yick v. Hopkins, 118 U.S. 356 (1886).

its weight against a particular race that an intent to discriminate is not only a permissible inference, but a necessary one."[101]

Judge Cahill then leveled at the U.S. Congress a direct finding of racially discriminatory legislation by highlighting:

> Objective evidence supports the belief that racial animus was a motivating factor in enacting the crack statute. Congress' decision was based, in large part, on the racial imagery generated by the media which connected the "crack problem" with blacks in the inner city. Congress deviated from procedural patterns, departed from a thorough, rational discussion of the "crack issue" and reacted to it in a "frenzy" initiated by the media and emotionally charged constituents. Under *Arlington*, all of these factors may be considered by the Court to infer intent.[102]

Judge Cahill, however, did not limit his critical findings to just Congress. In analyzing racially disparate prosecutorial practices in the office of the U.S. Attorney for the Eastern District of Missouri, Judge Cahill concluded:

> This Court has known and respected the staff of the United States Attorney's Office for many years, and does not believe that overt racism would influence their decisions. The national statistics comport with the data from the Eastern District of Missouri. What is more likely is that the subliminal influence of unconscious racism has permeated federal prosecution throughout the nation. *After all, even U.S. prosecutors are not immune from unconscious racism*.[103]

Judge Cahill was clear eyed about the fact that a decision declaring the cocaine sentencing racial disparity unconstitutional would expose him to the same appellate admonition that he suffered as a state trial judge, but, true to his character, he was not deterred. He stated:

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101. *Clary*, 846 F. Supp. at 787.
102. *Id.* (citing Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977)).
103. *Id.* at 791 (emphasis added).

> This Court knows that its decision today will be unpopular with many and, indeed, may seem senseless to some. The Court also knows that its opinion may not be politically correct, or in keeping with the majority of opinions currently controlling the law. But just as the laws on civil rights and discrimination took many years to change (more than 50 years elapsed between *Plessy v. Ferguson* (1897) and *Brown v. Board of Education* (1954), it may take time for equality under these laws to be fully honored.[104]

Thus, Cahill rendered his ultimate decision:

> In summary, the Court, after careful consideration, reluctantly concludes that the pertinent sections of 21 U.S.C. § 841 which mandate punishment to be 100 times greater for crack cocaine than for powder cocaine are constitutionally invalid, both generally and *as applied* in this case. The Court finds that there is no material difference between the chemical properties of crack and powder cocaine, and that they are one and the same drug. The Court further finds that this defendant has been denied equal protection of the laws when the punishment assessed against him is 100 times greater than the punishment assessed for the same violation but involving powder cocaine.
>
> . . . .
>
> Therefore, this Court concludes that the disproportionate penalties for crack cocaine as specified in all of the pertinent sections of 21 U.S.C. § 841 violate the Equal Protection Clause of the U.S. Constitution generally and as applied in this case. The Court further holds that the prosecutorial selection of cases on the basis of race is constitutionally impermissible as applied to this defendant in this case.[105]

104. *Id.* at 794.
105. *Id.* at 796–97 (emphasis in original).

CONCLUSION

The legal impact of Judge Cahill's decision is not credited in caselaw or statute. However, scholar and law professor Melissa Brown pointed out the importance of Judge Cahill's opinion in her work, *Equal Protection in a Mean World: Why Judge Cahill Was Right in United States v. Clary*.[106] Professor Brown suggests in her article that it should come as no surprise that the genius of a Black man is obscured by those who would plagiarize Cahill's critical thinking.

Judge Cahill did not always stand alone, but he was a leader and his career was consistently and valiantly one that put equal protection of the law as a guiding principle. The best way to understand this courageous jurist lies in his judicial philosophy, articulated in his *Clary* opinion: "The old cliche of fools rushing in where angels fear to tread may be applicable here, but a judge's conscience must always respond to the call of the Constitution. Truth must be recognized and respected though the heavens fall."[107]

This author humbly adopts that opinion.

106. Brown, *supra* note 86.
107. *Clary*, 846 F. Supp. at 794.