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TRIBUTE TO JUDGE THEODORE MCMILLIAN

KAREN L. TOKARZ*

*Law and justice are so great, so grand, so deep and divine,
that men cannot easily understand them or appreciate their
dignity.¹*

Theodore McMillian is one of the rare human beings who understands, who has always understood, the dignity of law and justice, and the difference between the two. He is a remarkable person who has made unique and significant contributions to both law and justice. We pay tribute to him in this special symposium issue because of his extraordinary integrity, his inexhaustible courage, his noble humility, his unbounded compassion, and his abundant inspiration.

I was twenty-one, fresh out of college, in the summer of 1970 when I first met Judge McMillian. I had little clarity about my life's work; I knew only that I wanted "to do some good." When a fellow graduate told me she was applying for a job as a deputy juvenile officer at the St. Louis City Juvenile Court, I tagged along. Even on our first day, I had only the barest understanding of what the job

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1. Hon. Martin L.C. Feldman, *A Tribute to John Minor Wisdom*, 69 TULANE L. REV. 1421 (1995) (unattributed quote from Judge Martin Feldman's remarks at the dedication of the John Minor Wisdom Fifth Circuit Courthouse on June 20, 1994).

would entail. That day, I met Judge McMillian. He was not only the first judge, but the first lawyer, I ever met.

What an impact he made on my life. Over the next two and a half years, I watched him humbly confront his misconceptions, courageously challenge the status quo, and ultimately make unprecedented contributions to juvenile justice in Missouri when few people in the country recognized the unique and special needs of children and their rights to constitutional protection. From him, I learned about a world of law that protects the individual, the minority, and the powerless against the state, the majority, and those in power. From him, I learned about a world of law that couples intellect with compassion, courage of conviction with civility, and an awareness of the human condition with the sometimes harsh realities of the law. Because of him, I found my own life's work in law and justice.

* * *

Theodore McMillian was born in 1919 in a house near 14th Street and Chouteau just south of what is now downtown St. Louis. He was the oldest of ten children. His parents divorced when he was young and his father, a Baptist minister and foundry worker, moved to Chicago. But he did not lack for role models; he was raised by his working mother and grandmother and later his stepfather. He especially credits his grandmother for being an inspiration—placing breakfast on the warmer for her family before making her way to her job as a meat cutter at Swift Packing Company. No lessons were lost on Ted McMillian, who followed his grandmother's hardworking example to success at Vashon High School, an all-black St. Louis public high school, where he graduated in three-and-a-half years, president of his class, and a member of the National Honor Society. He went on to Lincoln University in Jefferson City, Missouri, the only public four-year institution of higher education in Missouri open to African-Americans, where he graduated Phi Beta Kappa. In his first year at Lincoln, McMillian washed dishes in the college kitchen to supplement his grandmother's contributions. But in his second year, having recognized McMillian's natural abilities, the school gave

him a job teaching freshman mathematics and a physics lab. He graduated in 1941 with degrees in mathematics and physics. He was the first in his family to graduate from college. Despite having a teaching certificate, the only employment McMillian could find was as a dining car waiter. Before he could save the money to enroll in the University of Chicago, he was drafted and sent overseas.

During the war McMillian again earned distinction and obtained the rank of Second Lieutenant in the Army Signal Corps. A senior officer advised him that his age and maturity would be an asset as a lawyer. Despite that advice, McMillian came out of the Army in 1946, determined to be a physicist or a physician. Only after being told that racial quotas would require a five year wait for medical school did McMillian apply to St. Louis University School of Law.

McMillian's law school career was characterized by the qualities that he has demonstrated throughout his life—intelligence, diligence, courage, and humility. He worked as a janitor before and after classes during law school to help support his wife, Minnie Foster, and young son. Despite his workload, he excelled in law school, graduating first in his class in 1949, and became the first African-American inducted into Alpha Sigma Nu, the national Jesuit Honor Fraternity. He was an associate editor of the *St. Louis University Public Law Review* and elected to the Order of the Woolsack.

This auspicious beginning did not lead to immediate success for the young attorney. McMillian could not find a position with any of the established St. Louis law firms. He and Alphonse Lynch, the other African-American member of his class, set up their own practice, forced to locate their office on the periphery of the "legitimate" downtown legal establishment in the area reserved for law offices serving African-Americans. Work was slow for the two attorneys, and McMillian taught adult education classes and managed the old Aubert Theatre at night to support his family.

McMillian's fortunes changed in 1952 when he took a chance and ran with a reform slate against the long-time incumbent 19th Ward Democratic Committeeman Jordan Chambers. The ticket included Phil Donnelly for Governor and Ed Dowd, Sr. for St. Louis Circuit Attorney. Chambers and the other incumbents were recognized

machine politicians.² McMillian's role was to take votes away from the machine and help the reform ticket, a move that if it failed could have been political suicide. McMillian lost badly, but the ticket won, and McMillian's efforts were repaid the following spring. On the recommendation of Bob Dowd, Sr., who had been a classmate of McMillian's, newly-elected Ed Dowd (Bob's brother) hired McMillian as an Assistant Circuit Attorney.

While at the Circuit Attorney's office, McMillian once again left his mark. As the first African-American in the office, McMillian performed admirably, shouldering a heavy workload and obtaining a high conviction rate in his felony cases.³ He was promoted to Chief Trial Assistant. McMillian gained a reputation as a conscientious, hard working prosecutor who also showed respect for the civil rights of defendants. Soon he was called on to try the case of his life. State Representative John W. Green, a prominent St. Louis African-American politician, was indicted for using his position to sell paroles. When the young black assistant circuit attorney was assigned to the case, political commentators cried cover-up: Green had been a role model for McMillian and a supporter of the reform slate that resulted in McMillian's appointment to the Circuit Attorney's staff.⁴ McMillian, however, did his job, and the jury returned a guilty verdict in 20 minutes.

McMillian's success impressed Governor Donnelly. In March 1956, only months after the much-publicized trial, the Governor recognized McMillian's talents by appointing him to the St. Louis City Circuit Court—the first African-American appointed to the circuit court in Missouri. From his earliest years on the Missouri trial bench, McMillian showed the same toughness and compassion that

2. Chambers, an established figure among African-American Democrats in St. Louis, was known as the "Negro Mayor." See Marguerite Shepard, *'Do-Gooder' Who Knows the Score*, ST. LOUIS GLOBE-DEMOCRAT, Nov. 18, 1967.

3. McMillian's felony conviction rate was ninety percent. See James Deakin & Dan Ray, *Eagleton Backs McMillian for U.S. Judgeship*, ST. LOUIS POST-DISPATCH, June 8, 1978.

4. Of Green, McMillian later said "[I knew him] since I was a kid and had always kind of admired him. But I did my job." James Floyd, *Up the Hard Way*, ST. LOUIS GLOBE-DEMOCRAT, July 15, 1978.

characterized his days as a prosecutor. He ordered a special inquiry into violent crime in the City's housing projects and spear-headed a successful joint City-County program to permit indigents to sign their own bail bonds pending trial on criminal charges.

After several years on the trial bench, McMillian sought assignment to the Juvenile Court, not perceived as a particularly desirable post. He entered the Juvenile Court in August 1965 with a "no-nonsense" attitude, ready to stop "mollycoddling young hoodlums" and to reduce crime in the city. He initially expressed disdain for the "mishmash about [kids] being misunderstood, underprivileged, and under- or over-indulged."⁵ In less than a year, his increasing understanding of the problems of poverty, neglect, illiteracy, and related social problems led McMillian to change his attitude.⁶ He became a reformer. He publicly objected to sending children to adult-style correctional facilities that were overcrowded, lacked educational and vocational programs, and were dominated by brutal hierarchies among the detainees. He advocated major changes in the Missouri Juvenile Code and in the operation of the Juvenile Court.⁷ He sought to increase legal protections for children, especially victims of abuse and neglect; he pushed to reform the State's juvenile correctional facilities; he worked to develop community treatment programs; and he lobbied for the creation of family courts in urban areas.⁸

5. *A Judge for Teenage Crime*, ST. LOUIS GLOBE-DEMOCRAT, Sept. 1, 1965.

6. "Friday is adoption day at the Juvenile Court. If it wouldn't be for Friday, I might not come back on Monday. You see all these unwanted, unloved, unattended children. [At least on Friday] you see people who want children." Robert Teuscher, *The Trials and Tribulations of a Juvenile Judge*, ST. LOUIS GLOBE-DEMOCRAT, Dec. 24, 1966. McMillian explains his views, "What do you do with nine year old[s]; how do you help them? Put them in the penitentiary?" Terry Winkleman, *Court Appeal*, ST. LOUIS TIMES, Feb. 1996, at 14-15.

7. McMillian's role in the development of juvenile law in Missouri is especially poignant considering that his only child, Theodore McMillian, Jr., was a troubled youth who became a charge of the juvenile justice system, served time in the City workhouse, and was shot and killed at age 34.

8. See Sue Ann Wood, *Ground Broken for Boys Club: McMillian Wields Spade*, ST. LOUIS GLOBE-DEMOCRAT, Aug. 9, 1966; *Juvenile Court Judge Urges Police to Treat Ghetto Youths Humanely*, ST. LOUIS POST-DISPATCH, Apr. 27, 1969; Manual Chiat, *Broad Program Proposed to Reduce Juvenile Crime*, ST. LOUIS POST-DISPATCH, Oct. 19, 1969; *McMillian Indicts School at Boonville*, ST. LOUIS GLOBE-DEMOCRAT, Dec. 4, 1969 (deploring

During his six-and-a-half year tenure at the Juvenile Court, Judge McMillian initiated a number of local and national delinquency prevention and anti-poverty programs. He founded and served as President of the Herbert Hoover Boys & Girls Club of St. Louis. He served as the first Board Chairman for the fledgling Human Development Corporation, a position he held for over a decade beginning in 1965. He also served as president of the St. Louis Urban League and on the first national board of the OEO Legal Services Program.⁹

Even though he desired to continue his significant work at the Juvenile Court, McMillian was transferred to the Criminal Assignment Division in January 1972. He immediately embarked on reforms there as well. He proposed new plea bargaining policies and case handling procedures and advocated increased resources for adult prisons.¹⁰ Twice that year McMillian was among the nominees for the Missouri Court of Appeals sent to the governor by the Missouri Non-Partisan Court Plan Appellate Nominating Commission, and twice he was overlooked. On his third nomination in October 1972, McMillian succeeded. The sixteen-year veteran of the circuit court and long-time community leader was appointed by Governor Warren Hearnes to the Missouri Court of Appeals in St. Louis—the first African-American appointed to the appellate bench in Missouri.

During the next six years, McMillian served as the only person of color on the State appellate court. He continued to be a hard working, compassionate judge who voiced opposition to policies that offended his sense of justice. He often dissented from the court's majority

overcrowded conditions at state juvenile detention center and lack of rehabilitative educational and vocational opportunities); Phil Sutin, *Judge McMillian to Continue Assisting Delinquent Youths*, ST. LOUIS POST-DISPATCH, Nov. 21, 1971.

9. In October 1968, while serving at the Juvenile Court, Judge McMillian was given a one-day assignment on the Missouri Supreme Court—making him the first African-American to sit on that Court. It would be almost three decades before an African-American would be appointed to the Missouri Supreme Court. Judge Ronnie White was appointed to the Supreme Court by Governor Mel Carnahan in October 1995 and sworn in by Judge McMillian in January 1996. See Fred W. Lindecke, *Peers Laud 1st Black to Serve on Court*, ST. LOUIS POST-DISPATCH, Jan. 23, 1996, at 6A.

10. John J. Hynes, *Strategy of Plea-Bargaining Cast in New Light by Judge*, ST. LOUIS POST-DISPATCH, Apr. 23, 1972.

opinions, never hesitating to criticize decisions of trial judges or his fellow appellate judges. Despite his years as a prosecutor, he frequently voiced concern for the rights of defendants and prison inmates and often commented on the adverse social consequences of the law. Many of his noteworthy opinions, particularly those focusing on the rights of individuals in criminal cases, were filed as dissents.¹¹

Judge McMillian's Court of Appeals opinions demonstrate his concern for the court's role in dispensing justice. In one criminal case, for example, he dissented from a majority opinion upholding the state's 10-year minimum sentence for persons selling marijuana for a second time, describing the majority opinion as "legally logical, if philosophically unconscionable."¹² He argued that statutory minimum sentences are unconstitutional because they are "an intolerable usurpation of an inherent power of the court to grant probation."¹³ In another criminal case, McMillian dissented from a majority ruling that a man facing a second trial, after the jurors in his first trial were unable to reach a verdict, was not entitled to a transcript of the first trial.¹⁴ McMillian argued that the denial of a trial transcript to a criminal defendant for the purpose of impeaching an accuser's testimony in a second trial is a denial of equal protection to an indigent defendant.¹⁵ In several cases, McMillian criticized the United States Supreme Court's high standard of proof for criminal defendants alleging systematic exclusion of jurors based on race.¹⁶

11. For a detailed discussion of Judge McMillian's appellate court opinions, see Edward H. Kohn, *McMillian's Judicial Record Shows Liberal Versus Dissents*, ST. LOUIS POST-DISPATCH, Aug. 6, 1978.

12. *State v. Motley*, 546 S.W.2d 435, 441 (Mo. Ct. App. 1977) (McMillian, J., dissenting) (arguing that *State v. Burrow*, 514 S.W.2d 585 (Mo. 1974), which holds that subjecting marijuana sellers to penalties defined for sales of "narcotics" is not violative of due process, is not applicable in mandatory sentencing case).

13. *Id.* at 439.

14. *State v. Holland*, 534 S.W.2d 258 (Mo. Ct. App. 1975) (McMillian, J. dissenting) (arguing that denial of trial transcript to criminal defendant for the purpose of impeaching accuser's testimony in second trial was a denial of equal protection of indigent defendant).

15. *Id.* at 266.

16. See, e.g., *State v. Davis*, 529 S.W.2d 10, 16-17 (Mo. Ct. App. 1975) (McMillian, J.) (although denying appeal of a black defendant challenging the systematic exclusion of jurors based on race, McMillian presents an elaborate critique of the Supreme Court's standard as set out in *Swain v. Alabama*, 380 U.S. 202 (1965)). See also *State v. Pride*, 567 S.W.2d 426, 434

Judge McMillian's appellate opinions also demonstrate a keen understanding of the court's role as a hedge on State power. He dissented from a majority opinion that upheld the conviction of a man who was arrested without a warrant on a charge of stealing and subsequently subjected to a warrantless search for weapons.¹⁷ McMillian wrote, "[O]ur forefathers, 'after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.'"¹⁸ In yet another dissent in a criminal case, McMillian disagreed with the majority that a robbery confession had been made voluntarily when the defendant testified to police brutality and passed a polygraph test supporting his story. McMillian explained:

[T]he courts stand as the last buffer of protection between police tyranny and the individual rights of all of our citizens. . . . In a majority of the instances where charges are made, we, the court, because of the high regard we hold for our police department resolve these disputes in favor of the police. We do this not because the police are infallible, but because in most instances we have a one-against-one swearing contest between the police and the accused. Consequently, absent any evidence to the contrary, we presume our police to be acting in good faith and thus support their version. In this case, however, such is not the case.¹⁹

(Mo. Ct. App. 1978) (McMillian, J., dissenting) (asserting that denial of voir dire challenges of jurors who had "unpleasant encounters" with African-Americans denied defendant right of trial by impartial jury); *State v. Russ*, 574 S.W.2d 5, 7 (Mo. Ct. App. 1978) (McMillian, J., dissenting) (arguing that former police officer's assertion "I don't think so" when asked if he might be biased was not an unequivocal affirmation of neutrality and therefore denied defendant the right to trial by impartial jury).

17. *State v. Drake*, 512 S.W.2d 166, 174-78 (Mo. Ct. App. 1974) (McMillian, J., dissenting) (criticizing majority holding that proximity to crime scene and companion's prior record constituted probable cause as an unjustified expansion of permissible searches beyond the stop and frisk and plain view doctrines).

18. *Id.* at 178 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

19. *State v. Hamell*, 561 S.W.2d 357, 369 (Mo. Ct. App. 1977) (McMillian, J.,

In the summer of 1978, Judge McMillian was one of five nominees put forth by an eleven-member commission for an opening on the Eighth Circuit Court of Appeals created by William Webster's departure to head the Federal Bureau of Investigation. The panel of nominees included Bob Dowd, Sr., McMillian's former law school classmate and fellow Judge on the Missouri Court of Appeals, and Edward Foote, Dean of Washington University School of Law. McMillian was selected by President Jimmy Carter in August 1978 and confirmed by the Senate the following month—the first African-American appointed to the Eighth Circuit Court of Appeals.

During his almost two decades on the Eighth Circuit, Judge McMillian has served as the only person of color on that court. He has written almost 1,000 opinions, about one-quarter of which are dissents. McMillian's friend and colleague on the Eighth Circuit bench, Chief Judge Richard Arnold, says of McMillian:

His votes and writings never fail to reflect a concern for the individual, and a realization that the principal purpose of the judiciary is to protect citizens from their government. . . . [H]is approach always includes an awareness of the special place in American thought and history that the avoidance of discrimination on any irrelevant ground should enjoy.²⁰

Many of Judge McMillian's opinions, especially in the area of civil rights, cut paths later chosen by either the Supreme Court or Congress. I have selected a sample of his opinions which illustrate his concern for the First Amendment rights of students, his commitment to constitutional protection for criminal defendants, and his sensitivity to discrimination in the workplace—opinions which reflect his courage to see beyond the majoritarian view, his commitment to the Bill of Rights, and his ability to scrutinize the intrusion of the State through the eyes of the "outsider."

Judge McMillian's dissent in *Florey v. Sioux Falls School*

dissenting).

20. Richard S. Arnold, Letter in Support of the Nomination of Theodore McMillian for ABA Award (Mar. 1, 1993) (on file with the author).

District,²¹ one of his early opinions on the federal appellate court, shows his deep respect for the fundamental First Amendment rights of students. Keenly aware that “the relationship between religion and public education” is “one of the most sensitive areas of constitutional law,”²² McMillian strongly disagreed with the majority holding that the school board’s adoption of a policy permitting Christmas assemblies and other observances of religious holidays did not violate the establishment or the free exercise clauses. While acknowledging that a Christmas assembly with Christmas carols and religious material is a traditional feature in many public schools, McMillian argued that “widespread observance or mere longevity of custom does not insulate it from constitutional scrutiny.”²³ In his view, the observance of particular Christian or Jewish religious holidays, but not others such as Muslim, North American Indian, or Hindu holidays, does not advance the secular purposes of student knowledge and appreciation of religious and cultural diversity.²⁴ Rather, he suggested that “the observance of the holidays of religions less familiar to most American public school children . . . would seem more likely to increase student knowledge and promote religious tolerance.”²⁵ Even assuming the observance of religious holidays does advance secular goals, Judge McMillian concluded that “those secular goals can be achieved in public education without the ‘observance’ of religious holidays. . . . In any case, the observance of religious holidays as a means of accomplishing the secular goals of knowledge and tolerance clearly discriminates against non-belief.”²⁶

Judge McMillian’s concern for the First Amendment rights of students surfaces again in his dissent in *Bystrom v. Fridley High*

21. 619 F.2d 1311, 1320 (8th Cir. 1980) (McMillian, J., dissenting).

22. *Id.*

23. *Id.* at 1323 (internal quotations omitted).

24. *See id.* at 1324.

25. *Id.* at 1324.

26. *Id.* *See also* Franklin v. Lockhart, 890 F.2d 96, 97 (8th Cir. 1989) (reinstating complaint filed by prisoner required to handle manure and dead animals allegedly in violation of his Muslim religion).

*School, Independent School District No. 14.*²⁷ Again, McMillian strongly disagreed with the majority which endorsed the school administration's regulations and prohibition of an underground student newsletter from school property. For McMillian, the intrusion on students' exercise of their First Amendment rights was clear and warranted particularly careful scrutiny for vagueness and overbreadth. He said:

The variety of protected student conduct and speech that school authorities have sought to regulate, from armbands to underground newspapers, forcefully reminds us that the courts must vigilantly protect the first amendment rights of students to challenge authority, to question social values, to criticize and disagree, to attack the status quo, and, most fundamentally, to express themselves freely and vigorously, even if such expression does not reflect the level of civil discourse that we would prefer.²⁸

Judge McMillian's majority opinion in *United States v. Childress*,²⁹ handed down in 1983, demonstrates his continuing concern for the rights of criminal defendants. *Childress* presaged the landmark holding of the United States Supreme Court in *Batson v. Kentucky*³⁰ in 1986, which held that a prosecutor's use of peremptory challenges to exclude jurors solely because of their race violates the Fourteenth Amendment.³¹ Writing for the majority in *Childress*, Judge McMillian reluctantly acknowledged, as he had in numerous earlier state court opinions, the precedent of *Swain v. Alabama*,³² which imposed in his view an "insurmountable" burden on criminal defendants seeking to prove systematic exclusion of blacks from juries through the government's use of peremptory challenges. *Childress*, however, provided McMillian an opportunity to sharpen

27. 822 F.2d 747, 759 (8th Cir. 1987) (McMillian, J., concurring and dissenting).

28. *Bystrum*, 822 F.2d at 763-64.

29. 715 F.2d 1313 (1983).

30. 476 U.S. 79 (1986).

31. *Id.* at 89.

32. 380 U.S. 202 (1965) (holding that showing that an identifiable group in a community is under represented by as much as 10 percent in constitution of petit juries is insufficient to prove purposeful discrimination based on race).

his criticism of the heavy burden of proof imposed by *Swain*. He noted:

Although case law repeatedly describes the defendant's burden of proof as "not insurmountable," defendants in state and federal courts have been overwhelmingly unable to establish a prima facie case of systematic exclusion. Our research indicates that a defendant has successfully established systematic exclusion in only two cases since *Swain* was decided in 1965.³³

Judge McMillian's exacting research of the numerous cases presenting this issue between 1965 and 1983 and his detailed criticism of the Supreme Court's test presented a persuasive case for overruling *Swain*.³⁴ Three years later, Justice Marshall's concurring opinion in *Batson* echoed Judge McMillian's analysis in *Childress*, referencing all of the same cases and statistics cited by Judge McMillian as evidence of the impossible burden placed on defendants under *Swain*.³⁵ Disappointed in the ultimate effect of *Batson*, McMillian later co-authored a law journal article highlighting what he viewed as "*Batson's* ineffectiveness in combating racial discrimination" and advocating the elimination of peremptory challenges altogether.³⁶

Judge McMillian's commitment to the protection of individuals from inappropriate government intrusion, despite the heavy price that society sometimes must pay for its civil rights and civil liberties, is

33. *Childress*, 715 F.2d at 1316 (citations omitted).

34. McMillian extrapolated and criticized all of the reasons he felt precipitated the "remarkable lack of success" by defendants under the *Swain* burden. First, according to Judge McMillian, the Supreme Court failed to explain what it meant by "systematic exclusion over a long period of time" or to define the elements of a prima facie case. *Id.* at 1316. Second, defendants are "unlikely to have either the time or resources to compile and analyze the raw data necessary to a statistical attack on the prosecution's use of peremptory challenges." *Id.* at 1317. Third, information about the "racial identity of prospective jurors and about the government's use of peremptory strikes in other trials" is often unavailable to defendants. *Id.* Fourth, "even assuming the existence and availability of data, statistical analysis may prove problematical." *Id.*

35. *Batson*, 476 U.S. 79, 102 (1986).

36. Theodore McMillian & Christopher J. Petrini, *Batson v. Kentucky: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 374 (1990).

reflected in *United States v. Dixon*.³⁷ In *Dixon* the Eighth Circuit held that the double jeopardy clause barred re-prosecution of the defendants when, over defense counsel's objection, the trial court declared a mistrial because of a news report which appeared after the jury was sworn but before they were admonished not to listen to television news reports about the case.³⁸ McMillian noted the court's refusal to poll the jurors, give a cautionary instruction, or pursue less drastic alternatives.³⁹ Writing for the majority in *Dixon*, Judge McMillian ordered the release of several defendants whom the panel determined had been placed in double jeopardy:

We discharge our constitutional duty with solemnity and full recognition that one or more of the defendants may indeed be guilty of the serious offenses charged in their respective indictments. . . . While it is regrettable when serious charges of criminal conduct go untried, such a result is necessary in this case to protect the right of all citizens not to be twice put in jeopardy for the same offense, a right "that was dearly won and one that should continue to be highly valued." Despite the heavy price that vindication of our constitutional liberties occasionally exacts on society, we are confident that it is one that is worth paying because the treasured freedoms guaranteed in the Bill of Rights must be upheld in individual cases in order to be secured for the enjoyment of all.⁴⁰

Judge McMillian's numerous employment discrimination opinions have contributed to the development of constitutional and statutory law designed to eradicate discrimination in the workplace. His opinions reflect his sensitivity to the struggles of women, racial minorities, individuals with disabilities, older workers, and other "outsiders" for equal employment opportunity.

Moylan v. Maries Co.,⁴¹ a sexual harassment case, was a precursor to the United States Supreme Court's decision in *Meritor v. Vinson*.⁴²

37. 913 F.2d 1305 (8th Cir. 1990).

38. *Id.* at 1311.

39. *Id.* at 1313-15.

40. *Id.* at 1315 (quoting *Green v. United States*, 355 U.S. 184, 198 (1957)).

41. 792 F.2d 746 (8th Cir. 1986).

42. 477 U.S. 57 (1986).

Writing for the majority in *Moylan*, a case of first impression in the Eighth Circuit, Judge McMillian recognized a Title VII⁴³ cause of action for hostile environment sexual harassment without requiring the female plaintiff to prove that quid pro quo submission to the sheriff's advances was a condition of her employment. Noting that sexual harassment can be as demeaning and disconcerting as racial harassment, McMillian recognized that without such a cause of action an employer could create an intimidating or offensive work environment with impunity.⁴⁴ Later that year, *Meritor v. Vinson* was handed down by the United States Supreme Court, confirming McMillian's view that Title VII creates a cause of action for hostile work environment harassment.

Judge McMillian's opinion for the panel in *Hicks v. Brown Group, Inc.*,⁴⁵ issued prior to the passage of the Civil Rights Act of 1991,⁴⁶ addressed the issue of whether a racially discriminatory employment termination is actionable under 42 U.S.C. § 1981. McMillian concluded in the affirmative, setting forth an extensive legislative analysis of the Thirteenth Amendment, the Fourteenth Amendment, and the Reconstruction Era Civil Rights Acts in support. According to McMillian, this conclusion was not only historically, but also logically sound: "[D]iscriminatory discharge goes to the very existence and nature of the employment contract. A discriminatory discharge completely deprives the employee of his or her employment, the very essence of the right to make employment contracts."⁴⁷ However, the Eighth Circuit court en banc later reversed, with Judge McMillian and Judge Gerald Heaney as the lone dissenters.⁴⁸ Judge McMillian's position was ultimately vindicated when Congress enacted the Civil Rights Act of 1991, amending

43. 42 U.S.C. § 2000e (1994).

44. *Moylan*, 792 F.2d at 746 n. 1 & 748 (citing *Bundy v. Jackson*, 641 F.2d 934, 943-45 (D.C. Cir. 1981) and *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

45. 902 F.2d. 630 (8th Cir. 1990), *vacated*, 499 U.S. 914 (1991), *on remand*, 946 F.2d 1344 (8th Cir. 1991), *vacated*, 503 U.S. 901 (1992), *on remand*, 982 F.2d 295 (8th Cir. 1992) (en banc), *cert. denied*, 511 U.S. 1068 (1994).

46. Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991).

47. *Hicks*, 902 F.2d at 638-39.

48. *Hicks*, 982 F.2d at 298 (Heaney, J. and McMillian, J., dissenting).

Section 1981 to clarify the intended breadth of the statute.⁴⁹

Judge McMillian's dissent in *Chambers v. Omaha Girls Club, Inc.*,⁵⁰ is among those of his opinions that I view as most illuminating. Each year, I assign both the majority opinion and McMillian's dissent in *Chambers* to my Employment Discrimination class. And each year, I think fondly of him as my students heatedly debate not only the legal issues in the case, but the cultural assumptions inherent in the district court and majority appellate opinions.

Chrystal Chambers, an African-American, unmarried pregnant woman who was terminated because of her pregnancy, filed suit under Title VII asserting a "combination of race and sex discrimination." The district court determined that Chambers, an arts and crafts instructor at the Girls Club, was a "negative role model" for members of the Girls Club, primarily African-American girls and young women between the ages of eight and eighteen. The district court then held that the Club's role model rule was justified as a business necessity, thus relieving the employer from liability under Title VII.⁵¹ The court stated in passing that the role model rule "presumably" was also a bona fide occupation qualification.⁵² The Eighth Circuit majority endorsed the district court's conclusions as to both defenses.⁵³

Judge McMillian strongly disagreed with the majority on both points, citing the language of the Pregnancy Discrimination Amendment to Title VII and the Equal Employment Opportunity Commission Guidelines as support. McMillian noted that discrimination based on pregnancy constitutes per se discrimination under Title VII and that the employer has the heavy burden of establishing a reasonable, factual basis to support its asserted affirmative defenses. Pointing out the absence of evidence in this case supporting a relationship between the employment of an unwed

49. 42 U.S.C. § 1981(b) (1994).

50. 834 F.2d 697, 705 (8th Cir. 1987) (McMillian, J., dissenting).

51. *Chambers*, 629 F. Supp. 925, 947-48 (D. Neb. 1986).

52. *Id.* at 941 n.51.

53. *Chambers*, 834 F.2d at 705.

pregnant instructor and prevention of teenage pregnancies, McMillian concluded:

Neither an employer's sincere belief, without more, (nor a district court's belief), that a discriminatory employment practice is related and necessary to the accomplishments of the employer's goals is sufficient to establish a BFOQ or business necessity defense. The fact that the goals are laudable and the beliefs sincerely held does not substitute for data which demonstrate a relationship between the discriminatory practice and the goals.⁵⁴

* * *

Because he has infused the law in this State and in this Circuit with his conscience and his courage, Judge McMillian's commitment to civil rights and civil liberties will endure. This commitment will endure as well because he has influenced so many institutions, locally and nationally, through his work for the community, the poor, and the underprivileged and because he has inculcated his spirit into the minds and hearts of so many colleagues, clients, students, and law clerks, including those whose comments are included in this tribute.

Not long ago, Judge McMillian wrote a tribute to one of his heroes, Justice Thurgood Marshall, in which he stated:

Justice Marshall brought both personal and professional diversity to the Supreme Court. I think the law and the Court benefitted from this diversity, and I think it is a mistake to underestimate the effect of these personal and professional differences on the Court. Judges tend to be more alike, both personally and professionally, than many of us would like to acknowledge. At all judicial levels, differences of opinion help focus the issues, clarify one's reasoning, and sharpen the analysis. Despite the abstract terms in which legal issues are often phrased, people and their many problems are at the heart of the law, and one's personal experience is an important and

54. *Id.* at 708.

inescapable component of judicial decision-making. Justice Marshall was not only the first minority justice, he was also a non-Establishment Justice. He was not an insider; his background was not one of advantage, privilege, or wealth. What is fair and just in any given situation depends upon one's perspective, and Justice Marshall's perspective was different from that of his colleagues.⁵⁵

What McMillian said of Marshall, we can also say of McMillian. Judge McMillian is not an insider, and at each step in his career, his experience and his perspective were different from those of his colleagues. Law and Justice are the better for it.

55. Hon. Theodore McMillian, *Reflections Upon the Retirement of Justice Marshall*, 35 How. L.J. 3, 4 (1991).

