1998

Judge Myron Bright

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It is only fitting and proper that a great law school should honor one of its most notable graduates, Myron Bright. It is my privilege to accept Dean Sullivan's kind invitation to write a short tribute to my friend and judicial colleague. In the fall of 1968, Myron Bright was appointed to the United States Court of Appeals for the Eighth Circuit by President Lyndon Johnson. Less than two years earlier, in December 1966, Gerald Heaney joined the court as the then new eighth judge. Some six months before that, in the fall of 1966, I was appointed to the court.

It was understandable that the three of us, appointed within that short span of time by the same President, would form an enduring bond of friendship, both on and off the court. None of us realized at the time that this friendship would continue for some thirty odd years, and the final chapter has yet to be written. We each came to the court directly from private practice, which engaged us in similar representations, and we shared common goals—primarily to strive for procedural fairness and equal justice under the law.

Bob Tucker, our former clerk of court, tells a humorous story. During the aftermath of the Little Rock school integration cases in the early 1970s, our court reaffirmed again and again the basic doctrine of *Brown v. Board of Education*[1] and applied its principles in varying cases. The school district challenged every proposed legal advance and continually litigated issues, hoping to find a panel of judges that would be sympathetic to its cause. As we prepared to hear one of these appeals, the attorney for the school board called Bob Tucker and asked which judges were sitting on the panel the day he was to argue a school board appeal. Tucker told the attorney that it would be Judges Heaney, Bright and Lay. The school

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1. 347 U.S. 483 (1954).

board attorney responded in turn, "Oh xxxx!" From that day on, Bob Tucker continued to refer to the panel of Judges Heaney, Bright and Lay as the "Oh xxxx!" panel.

The common faith the three of us shared first manifested itself in a dissent in which Judges Bright and Heaney joined me in recognizing that state prisoners did not lose their constitutional rights once incarcerated. The case was *Morrissey v. Brewer*.[2] Morrissey was a parolee. He was arrested by direction of his parole officer, taken from his home and family, and sent back to prison because his parole officer "thought" he had violated his parole. Morrissey did not receive any notice or hearing before he was sent back to the prison. His family and friends did not know where he was for over three days.

Our court heard the case en banc and the majority voted to uphold the old "hands off" doctrine, leaving state prisoners to be treated or mistreated at the discretionary whim of the state. Judge Bright, Judge Heaney and I dissented on the ground that we felt Morrissey as a "person" was deprived of "due process of law" by the "state." We urged that nothing could be plainer under the express terms of the Fourteenth Amendment.[3] We were elated when the Supreme Court in the next term reversed our en banc court and agreed with our dissent.[4] This was one of the first cases to recognize that a state prisoner's right to due process is not abandoned at the prison gate.

With the advent of the *Morrissey* case, a true kinship began between Judge Bright, Judge Heaney and me. I have previously written about Judge Heaney's lifelong pursuit of equal justice in the school integration cases.[5] On the other hand, Judge Bright became an early leader on our court and throughout the nation in carving out procedural fairness and substantive rights under the EEOC regulations and in Title VII and employment discrimination cases.[6]

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2. 443 F.2d 942 (8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972).

3. *See* 443 F.2d at 952 (Lay, J. dissenting).

4. *See Morrissey*, 408 U.S. 471.

5. *See* Donald P. Lay, *A Tribute to My Friend and Colleague: Judge Gerald W. Heaney*, 81 MINN. L. REV. 1095 (1997).

6. *See In re* Southwestern Bell Tel. Co. Maternity Benefits Litig., 602 F.2d 845 (8th Cir. 1979); Marshall v. Roberts Dairy Co., 572 F.2d 1271 (8th Cir. 1978); Meyer v. Missouri State Highway Comm'n, 567 F.2d 804 (8th Cir. 1977); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); DeGraffenreid v. General Motors Assembly Div., St. Louis, 558 F.2d 480 (8th Cir. 1977); Drake v. Southwestern Bell Tel. Co., 553 F.2d 1185 (8th Cir. 1977); Lacy v. Chrysler Corp., 533 F.2d 353 (8th Cir. 1976); EEOC v. Laclede Gas Co., 530 F.2d 281

Perhaps no Supreme Court case has been cited more in modern history than *McDonnell Douglas Corp. v. Green*.[7] This case has become the paradigm for both plaintiffs and defendants in handling employment discrimination cases. It has been applied in racial, gender, and age discrimination cases. Recognizing that direct discrimination can seldom be proven, the Supreme Court set out the basic requirements by which plaintiffs can make a prima facie case of employment discrimination. What is not well known is that the appeal originated in the Eighth Circuit, and the opinion was authored by Judge Bright.[8] I joined Judge Bright and wrote a concurring opinion. My predecessor, Judge Harvey Johnson of Omaha, had dissented. My reason for mentioning this case is that Judge Bright formulated the test the Supreme Court followed that has proven to be universally accepted throughout the country. Judge Bright wrote on the original appeal:

> When a black man demonstrates that he possesses the qualifications to fill a job opening and that he was denied the job, we think he presents a prima facie case of racial discrimination and that the burden passes to the employer to demonstrate a substantial relationship between the reasons offered for denying employment and the requirements of the job. . . .
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> . . . If McDonnell can demonstrate that Green's participation in the "stall-in" in some objective way reflects adversely upon job performance, McDonnell's refusal to rehire Green will be justified. But, if McDonnell's refusal to rehire Green rests upon management's personal dislike for Green or personal distaste for his conduct in the civil rights field, Green is entitled to some relief.[9]

Judge Bright has participated in hundreds of cases that have had an impact upon every phase and interest in our social, political and economic environment. He shares a common disdain with Judge Heaney and me for the inequities and harsh sentences that have evolved from the United States Federal Sentencing Guidelines.[10]

(8th Cir. 1976); Haire v. Calloway, 526 F.2d 246 (8th Cir. 1975); Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975); Tuft v. McDonnell Douglas Corp., 517 F.2d 1301 (8th Cir. 1975); United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973); Huston v. General Motors Corp., 477 F.2d 1003 (8th Cir. 1973); Green v. McDonnell Douglas Corp., 463 F.2d 337 (8th Cir. 1972); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970).

7. 411 U.S. 792 (1973).

8. *See Green*, 463 F.2d at 337.

9. *Id.* at 344.

10. *See* United States v. Hiveley, 61 F.3d 1358, 1363 (8th Cir. 1995)

Justice Hugo Black wrote in *Chambers v. Florida*, "Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[11] No judge has better epitomized this judicial philosophy than Myron Bright.

In thirty years time, Judge Bright has brought unusual humor and understanding to complex cases. I have been privileged to share many of his family experiences. His dear wife, Fritzie, shares Myron's compassion for equal justice and should share in this recognition as well.

From time to time, one wonders what makes a human being more caring and concerned about the rights and feelings of others. Perhaps it lies within the soul; yet surely life's experiences help mold such basic characteristics. Judge Bright grew up in a time when our government and the majority of our country were indifferent to the status of those who were elderly, female, handicapped, or belonged to a minority race. His early years provided first-hand observation of religious bias and prejudice. Myron became inculcated with tenets of fairness and justice by watching others practice unfairness and injustice. These experiences undoubtedly became affixed in his conscience and played a major role in developing his basic compassion for the fair treatment of others.

Our nation has been truly honored by having Myron Bright, rich in his heritage and experiences, as a judicial officer of the United States. I know I speak for all of his judicial colleagues in honoring him on this grand occasion.

(Bright, J., concurring).

11. 309 U.S. 227, 241 (1940).