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## Final Tribute to Judge Theodore McMillian: A Man of Law and Justice

Karen L. Tokarz<sup>\*</sup>

Theodore McMillian was a rare human being who understood—who always understood—the dignity of law and justice, and the difference between the two. He was a remarkable person who made unique and significant contributions to both law and justice. His death on January 18, 2006, was a loss to the City of St. Louis where he lived and worked, to the state and federal courts for which he served, and to all who knew and loved him.

I was twenty-one, fresh out of college, when I first met Judge McMillian in the summer of 1970. I had little clarity about my life's work. I knew only that I wanted to “do some good.” I tagged along when a fellow graduate told me she was applying for a job as a deputy juvenile officer at the St. Louis City Juvenile Court. On our first day, I met Judge McMillian. He was not only the first judge, but the first lawyer, I ever met.

What an impact he had 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 right to constitutional protection. Because of him, I and so many others found our life's work. Because of him, I, Dorothy McMurtry, Anna Forder, John Rippey, Doug Muxlow and dozens of

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<sup>\*</sup> Professor of Law and Director of Clinical Education and Alternative Dispute Resolution Programs, Washington University School of Law. This tribute includes excerpts from an earlier tribute to Judge McMillian, published in the Washington University *Journal of Urban and Contemporary Law*, and from remarks presented by Professor Tokarz at the funeral of Judge McMillian, St. Alphonsus Rock Church, St. Louis, Missouri, January 23, 2006. See Karen Tokarz, *A Tribute to Judge Theodore McMillian*, 52 WASH. U. J. URB. & CONTEMP. L. 5 (1997).

others decided to go to law school to follow in his footsteps. He provided us a path, a vision, a role model, and a hero.

Theodore McMillian was born in 1919 in a house near 14th Street and Chouteau, about six blocks from the federal courthouse in 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 credited 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, the first in his family to graduate from college; however, 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 demonstrated throughout his life—intelligence, diligence, courage, and humility. He worked as a train porter and as a janitor

during law school to help support his wife, Minnie Foster, and his 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 was 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, but were 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. 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, 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. 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.

McMillian’s success impressed Governor Phil M. Donnelly, who, in March, 1956, appointed McMillian 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 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, under-privileged, and under- or over-indulged." 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. 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. 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.

During his six-and-a-half year tenure on 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.

Although 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 for increased resources for

adult prisons. In October, 1972, the sixteen-year veteran of the circuit court and long-time community leader was appointed by Governor Warren E. 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's appellate court. He continued to be a hard working, compassionate judge who voiced opposition to policies that offended his sense of justice. His appellate opinions demonstrated a keen understanding of the court's role as a hedge on State power. Many of his noteworthy opinions, particularly those focusing on the rights of individuals in criminal cases, were filed as dissents.

In the summer of 1978, Judge McMillian was one of five nominees put forth by an eleven-member commission to fill an opening on the U.S. Circuit Court of Appeals for the Eighth Circuit 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 the 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 most of his almost three decades on the Eighth Circuit, Judge McMillian served as the only person of color on that court. He wrote over 1200 opinions, about one-quarter of which were dissents. Many of Judge McMillian's opinions, especially in the area of civil rights, cut paths later chosen by either the Supreme Court or Congress. His opinions revealed his concern for the First Amendment rights of citizens, his commitment to constitutional protection for criminal defendants, and his sensitivity to discrimination in the workplace—opinions which reflected 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.

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In the face of death, we try to be stoic. But it seems almost impossible to be stoic about Judge McMillian's death. He was not *ever* supposed to die. He was supposed to live forever—to share with us forever his extraordinary integrity, his inexhaustible courage, his noble humility, his unbounded compassion, his unfailing honesty, and his abundant inspiration.

It is not so much a question of where we will find the “strength” to go on without him; rather, it is of where we will find the “hope.” Lacking role models or mentors, Judge McMillian was driven throughout his life by an internal sense of equality, and was sustained by an astounding courage of conviction to be who he was, to do all he did—mostly on his own, mostly as the frontrunner—always as the “beacon of hope” for the rest of us.

From him, we 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, we 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.

From him, we learned that “It’s more important to be human than to be important.”

From him, we learned about the dignity of law and justice, and the difference between the two.

Surely, Judge McMillian's human decency and commitment to equal justice will endure because he infused the law in Missouri, in this circuit, and in this country with his conscience and his courage.

Surely, Judge McMillian's human decency and commitment to equal justice will endure because he influenced so many institutions, locally and nationally, through his work for the community, for children, for the poor, and for those who needed protection.

Surely, Judge McMillian's human decency and commitment to equal justice will endure because he inculcated his values into the hearts and minds of so many family members, friends, colleagues, litigants, lawyers, judges, students, court staff and law clerks, and so many folks he never knew, but who knew him. One need only look around his church to see his enduring impact!

Judge McMillian was a quiet man, who did not seek rewards. He sought only to serve his fellow man and woman in the best way possible. Rather than giving him our accolades today, the better gift that we can give to him is our commitment to continue his life's work: to sharing our humanity, to teaching tolerance, to promoting equal justice, and to protecting civil rights and civil liberties for all.

In the search for goodness and fairness in this world, there has rarely been a mind as keen, a heart as big, or a soul as passionate as that of the man we celebrate and mourn today—Theodore McMillian.