2022

Judge Theodore McMillian: Beacon of Hope and Champion for Justice

Karen L. Tokarz
Washington University in St. Louis School of Law, tokarz@wustl.edu

JUDGE THEODORE MCMILLIAN: BEACON OF HOPE AND CHAMPION FOR JUSTICE

Karen Tokarz*

ABSTRACT

"Judge Theodore McMillian: Beacon of Hope and Champion for Justice" illuminates the heroic groundbreaking accomplishments of Judge McMillian, who was a trailblazer in Missouri courts. Judge McMillian was Missouri's first Black judge to sit on the state circuit court, state appellate court, and federal appellate court. Professor Tokarz traces Judge McMillian's early life and career to demonstrate his life-long dedication to challenging disparities in the community and in the legal system. She discusses the Judge's role on the St. Louis City Circuit Court, especially the Juvenile Court where he pushed for the expansion of constitutional rights for juveniles; his groundbreaking criminal justice and civil rights decisions on the Missouri Court of Appeals; and his contributions to anti-discrimination jurisprudence during his tenure on the Eighth Circuit Court of Appeals. She also notes his role as community leader, as a founder of the Herbert Hoover Boys Club, first board chair of the Human Development Corporation, president of the Urban League, and board member of the Office of Economic Opportunity Legal Services Program. Professor Tokarz draws from her own experience with Judge McMillian to illustrate his extraordinary integrity, unbounded compassion, and abundant inspiration

* Charles Nagel Professor of Public Interest Law & Policy; Director of Negotiation & Dispute Resolution Program; and Director, Civil Rights, Community Justice & Mediation Clinic, Washington University School of Law. This Article includes excerpts from earlier tributes to Judge McMillian authored by Professor Tokarz and from remarks presented by Professor Tokarz at the funeral of Judge McMillian at St. Alphonsus Rock Liguori Church, St. Louis, Missouri on January 23, 2006. The author thanks her current research assistant, Ryan Ellingson, JD'22, and her earlier research assistant, Richard Wartchow, JD'97, for their invaluable assistance. The author also thanks Rae Ensor, JD'22, Editor-in-Chief, and Christina Schrantz, JD'22, Managing Editor, for their tireless efforts on this volume.

to law students, lawyers, judges, and all who care about equal justice for all.

INTRODUCTION

It's more important to be human than to be important.[1]

Theodore McMillian was a rare human being who understood—always—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. We pay tribute to him in this special symposium volume celebrating the 100th anniversary of the Mound City Bar Association because of his extraordinary integrity, his inexhaustible courage, his noble humility, his unbounded compassion, and his abundant inspiration to law students, lawyers, judges, and all who care about law and justice. We pay tribute to him because he was a beacon of hope for others and a champion for justice for all.

I was twenty-one, fresh out of college, 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 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 year, I watched him humbly confront his misconceptions, courageously challenge the status quo, and ultimately make unprecedented contributions to juvenile justice in Missouri at a time when few people in the country recognized the unique and special needs of children and their rights to constitutional protection. In later years, I watched him make significant contributions in many other areas, especially criminal justice and civil rights. Throughout, I watched his

1. A sign that long hung in Judge McMillian's Eighth Circuit chambers that bore his credo. *See also* Jennifer A. Tyus, *A Tribute to the Honorable Theodore McMillian*, MOUND CITY BAR ASS'N: MOUND CITY NEWS, Feb. 2006, at 1MC, http://storage.cloversites.com/moundcitybarassociation/documents/Feb-March%202006%20Newsletter.pdf [https://perma.cc/SU8B-X469].

leadership and commitment to advance diversity in the profession and in the courts.

From him, I learned about a world of law that protects the individual, the minority, and the powerless against the state, the majority, and the powerful. From him, I learned about a world of law that couples intellect with compassion, 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.

* * *

Much of the previous scholarship on Judge McMillian focuses on his opinions while he was a judge on the Eighth Circuit Court of Appeals.[2] This Article supplements that literature with research on his early career experiences and community service, which shaped his judicial outlook. While Judge McMillian demonstrated certain qualities throughout his life—studiousness, grit, humility, and a concern for due process—his early life and career, especially his experience as a juvenile court judge, significantly influenced his perspectives on crime, punishment, civil rights, and the judicial role. Accordingly, Part I traces McMillian's early life and career up until his assignment to the St. Louis City Juvenile Court. Part II highlights Judge McMillian's career on the St. Louis City Circuit Court, in particular the Juvenile Court bench, and his famous switch-in-time from hardliner to activist. In Part III, this Article considers Judge McMillian's tenure on the Missouri Court of Appeals, with a focus on his opinions in criminal justice and civil rights. Finally, Part IV focuses on his tenure on the Eighth Circuit Court of Appeals, where he applied the lessons learned from his early life and career and his time as a juvenile judge.

2. *See* Karen Tokarz, *A Tribute to Judge Theodore McMillian*, 52 WASH. U.J. URB. & CONTEMP. L. 5 (1997) [hereinafter Tokarz, *McMillian Tribute*]; Karen Tokarz, *A Final Tribute to Theodore McMillian: A Man of Law and Justice*, 19 WASH. U.J.L. & POL'Y 13 (2005); Hon. David P. Lay, *The Significant Cases of the Honorable Theodore McMillian During His Tenure on the United States Court of Appeals for the Eighth Circuit 1978-1999*, 43 ST. LOUIS U.L.J. 1269 (1999); Hon. Joseph J. Simeone, *Judge Theodore McMillian—Symbol of America*, 43 ST. LOUIS U.L.J. 1301 (1999).

I. EARLY LIFE AND CAREER

Theodore McMillian was born in 1919 in a house at 14th Street and Papin, just south of downtown St. Louis.[3] He was the oldest of ten children.[4] His parents divorced when he was young and his father, a Baptist minister and foundry worker, moved to Chicago. But McMillian 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 in school and thereafter.

Race played a significant role in McMillian's education and early career. He attended Vashon High School, an all-Black St. Louis public high school, where he graduated in three-and-a-half years, was president of his class, and became a member of the National Honor Society.[5] He went on to Lincoln University in Jefferson City—the only public four-year college in Missouri that was open to Black students—where he graduated Phi Beta Kappa. In his first year at Lincoln, McMillian washed dishes in the college kitchen to supplement his grandmother's financial support. In his second year, McMillian's academic success earned him a job teaching freshman mathematics and a physics lab. In 1941, McMillian became the first in his family to graduate college when he completed degrees in mathematics and physics.[6] Despite having a teaching certificate, the only employment McMillian could find was as a Pullman porter.[7] As he was saving money to start a graduate program at the University of Chicago, McMillian was drafted to serve in World War II.

Like his education and early career, race also shaped McMillian's military experience. After earning his place as a Second Lieutenant,

---

3. *Governor Names M'Millian New Circuit Judge*, ST. LOUIS POST-DISPATCH, Mar. 17, 1956, at 1A.
4. *Id.*
5. *Id.*
6. *Graduates Pour from Colleges as Commencement Season Reaches Peak*, CHI. DEF., June 14, 1941, at 8.
7. William J. Shaw, *Why Judge McMillian Worries*, ST. LOUIS POST-DISPATCH MAG., Aug. 11, 1991, at 8, 9.

McMillian attended the Army War College, where he was the only Black officer at officer training school.[8] The army refused to allow him to join the all-white officers' club and, instead, offered him his own club.[9] Instead of socializing alone, McMillian invited civilians to party with him.[10] After the war, he was transferred to Galveston for rest and relaxation where he found a segregated officers' beach.[11] "The funny thing was that the tide flowed through the black officers beach into the white section, a condition obviously overlooked by some white planner," he reminisced in a 1991 interview.[12] Still, it "was a bitter pill to swallow. I was good enough to fight and perhaps die for this country, but I was not accepted as a first-class citizen."[13]

During the war, a senior officer advised him that his age and maturity would be an asset as a lawyer. Nonetheless, McMillian left the Army in 1946 determined to become a physician.[14] However, racial quotas at St. Louis's medical schools, including Washington University, foiled this dream.[15] Instead of waiting five years for his turn, McMillian enrolled in St. Louis University School of Law ("SLU"), which had been recently integrated.[16]

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 janitor before and after classes during law school to help support his wife, Minnie Foster, and their young son.[17] Despite his workload, he excelled. He became the first Black student inducted into Alpha Sigma Nu, the national Jesuit Honor Fraternity.[18] He was an associate

8. *Id.* at 9.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* For more on the racial integration of St. Louis University, see *SLU Legends and Lore: The Heithaus Homily*, ST. LOUIS UNIV. (Feb. 26, 2020), https://www.slu.edu/news/2020/february/slu-legends-lore-heithaus-homily.php [https://perma.cc/Q454-W2C4].
17. *Governor Names M'Millian New Circuit Judge*, *supra* note 3, at 1A.
18. Shaw, *supra* note 7, at 9; *First Negro Named to Jesuit Honor Fraternity Here*, ST. LOUIS POST-DISPATCH, Feb. 19, 1949, at 3A.

editor of the St. Louis University Public Law Review and elected to the Order of the Woolsack Honor Society.

Despite these successes, McMillian could not escape the impact of race in law school and his early legal career. In one episode, a federal district judge rejected an invitation to speak at SLU, citing its inclusion of Black students among its student body.[19] McMillian graduated first in his class in 1949, yet none of St. Louis's all-white law firms would hire him due to his race.[20] Moving forward, McMillian and Alphonse Lynch set up their own practice.[21] The two—SLU's first and second Black graduates—were forced to locate their office on the periphery of the "legitimate" downtown legal establishment, in the area reserved for law offices serving the Black community.[22] Work was slow and often unglamorous for the two attorneys.[23] McMillian taught adult education classes and managed the old Aubert Theatre at night to support his family.[24]

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.[25] The ticket included Phil Donnelly for Governor and Edward Dowd, Sr. for St. Louis Circuit Attorney. Chambers and the other incumbents were recognized machine politicians.[26]

---

19. Shaw, *supra* note 7, at 10.

20. Greg Freeman, *Retiring Judge, 80, Is a Testament to the American Dream*, ST. LOUIS POST-DISPATCH, Mar. 23, 1999, at B1, B3. There is an error in the title of this article. While McMillian had taken senior status, he did not retire in 1999; he continued to serve on the court until his death in 2006. *See Correction*, ST. LOUIS POST-DISPATCH, Mar. 24, 1999, at B2.

21. Tokarz, *McMillian Tribute*, *supra* note 2, at 7.

22. See Tyus, *supra* note 1, at 1MC.

23. In one of the less glamorous episodes, McMillian was hired by Lon Hocker—then the General Counsel of the St. Louis Democrat—to prove that another attorney was soliciting clients in violation of the ethical rules. McMillian went to the St. Louis courthouse, where he engaged in conversation with the lawyer while posing as a person with a traffic ticket. Taking the bait, the lawyer offered to represent McMillian. When an ethics complaint was filed, the attorney accused Hocker and McMillian of entrapment. *Hocker Named in Bid to Entrap Woodward*, ST. LOUIS POST-DISPATCH, July 26, 1956, at 1A, 3A; *Hocker Denies Any Entrapment Effort*, ST. LOUIS POST-DISPATCH, July 27, 1956, at 10A; *Dowd Defends Hocker's Action Against Lawyer*, ST. LOUIS POST-DISPATCH, July 31, 1956, at 3A. The solicitation charge eventually stuck, and the attorney was suspended for three years. *See in re* Woodward, 300 S.W.2d 385 (Mo. 1957) (en banc).

24. *Governor Names M'Millian New Circuit Judge*, *supra* note 3, at 7A.

25. *Board of Election Commissioners' Notice of Primary Election*, ST. LOUIS POST-DISPATCH, July 14, 1952, at 9A.

26. 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.

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. While McMillian lost badly, the ticket won, and McMillian's efforts were repaid the following spring. On the recommendation of Robert Dowd, Sr., a law school classmate of McMillian's, newly elected Edward Dowd, Sr. (Robert's brother) hired McMillian as an Assistant Circuit Attorney. Appointed simultaneously, McMillian and George W. Draper II became the first Black prosecutors in the City of St. Louis.[27] While at the Circuit Attorney's office, McMillian performed admirably, shouldering a heavy workload and obtaining a high conviction rate in his felony cases.[28] He was promoted to Chief Trial Assistant and gained a reputation as a conscientious, hardworking prosecutor who showed respect for the civil rights of defendants.[29]

As Circuit Attorney, Dowd sought to reverse the perception that the justice system does not care about Black victims.[30] McMillian and Draper spearheaded the initiative to ensure homicides involving Black victims were as vigorously prosecuted as those with white victims.[31] The duo secured Missouri's first capital murder conviction in a case where both the defendant and victim were Black.[32]

Sometimes the job required McMillian to prosecute members of his own community. In one case, he obtained a guilty conviction against one of

27. *4 More Assistants Appointed by Dowd*, ST. LOUIS POST-DISPATCH, Dec. 31, 1952, at 3A. Prior to joining Dowd's office, Draper taught at Lincoln University with McMillian. He later moved to Washington, D.C., where he became a trial lawyer and then judge. His son—George W. Draper III—was appointed to the Missouri Supreme Court in 2011 and served as the court's first Black Chief Justice from 2019 to 2021. *See* Hon. Willie J. Epps, Jr. & Jonathon M. Warren, *Missouri's Black Judicial Pioneers: Leading and Presiding*, 67 WASH. U.J.L. & POL'Y 27 (2022) (also published in this volume). Technically, McMillian was the first Black judge to sit on the Supreme Court, when he was appointed to sit for a session while serving on the Missouri Court of Appeals.

28. McMillian's felony conviction rate was ninety percent. *Governor Names M'Millian New Circuit Judge*, *supra* note 3, at 7A.

29. Dowd described him as "one of the finest trial lawyers he had ever seen . . . . [Yet,] 'he has always remained a perfect gentleman—never let his successes go to his head.'" Shaw, *supra* note 7, at 10.

30. *First Death Penalty in All-Negro Case*, ST. LOUIS POST-DISPATCH, Dec. 17, 1953, at 16C.

31. *Id.*

32. *Id.* The conviction was upheld on appeal. *See* State v. Booker, 276 S.W.2d 104 (Mo. 1955) (en banc).

his former students.[33] In another, McMillian prosecuted State Representative John Green, a prominent Black politician from St. Louis, who had been indicted for using his position to sell influence with the Board of Probation and Parole.[34] When the young Black assistant circuit attorney was assigned to the case, political commentators cried cover-up because Green had been a role model for McMillian and supported the reform slate that thrust McMillian into the Circuit Attorney's office.[35] However, McMillian did his job, and the jury reportedly returned a guilty verdict in twenty minutes.[36]

II. ST. LOUIS CITY CIRCUIT JUDGE

McMillian's success impressed Missouri Governor Philip Donnelly. In March 1956, only months after the much-publicized Green trial, the Governor recognized McMillian's talents and appointed him to the St. Louis City Circuit Court—the first Black circuit court judge in Missouri.[37] From his earliest years on the Missouri trial bench, McMillian showed concern about criminal justice, juvenile justice, and civil rights. For example, troubled about high crime rates in public housing complexes, he empaneled a grand jury to conduct a special inquiry into violent crime in the city's housing projects.[38] He was also unafraid to break new ground, including one

33. *Ex-Student of Prosecutor Convicted, 2 Others Heard*, ST. LOUIS POST-DISPATCH, Apr. 9, 1954, at 2C.

34. State v. Green, 305 S.W.2d 863, 865 (Mo. 1957).

35. 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.

36. Shaw, *supra* note 7, at 11.

37. *See Governor Names M'Millian New Circuit Judge, supra,* note 3, at 1A. *See also* Epps & Warren, *supra* note 27, at 38–40.

38. The grand jury ultimately recommended that the housing authority hire more guards. *See Calls for Probe of City Housing Project Crimes*, ST. LOUIS POST-DISPATCH, Sept. 14, 1959, at 1A; *Guard Shortage Hit in Report on Crime Rate in Public Housing*, ST. LOUIS POST-DISPATCH, Dec. 4, 1959, at 1A; *Public Housing Agency to Study Proposal for More Guards*, ST. LOUIS POST-DISPATCH, Dec. 5, 1959, at 1A.

high-profile case in which he ruled a political candidate had a Fourteenth Amendment right to run for office without joining a political party.[39]

Taking a cue from U.S. Supreme Court Justice William O. Douglas,[40] Judge McMillian partnered with St. Louis County Judge Noah Weinstein in a campaign to reform the use of bail in St. Louis. McMillian argued: "The bail bond system was not intended to be a punishment. A defendant of average circumstances would be unable to raise a $25,000 bond, which would be set only as a means of keeping him off the street. This is presuming that the defendant is guilty."[41] Ultimately, they were able to push a modest reform through, and fifty indigent defendants were released in the first few months of the program.[42]

After several years on the trial bench, McMillian sought assignment to the Juvenile Court, which was 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 reduce crime in the city.[43] He initially expressed disdain for the "mishmash about [kids] being misunderstood, under-privileged, and under- or over-indulged."[44] Indeed, one of his first acts as a juvenile judge was to certify four teenagers to be tried as adults.[45]

---

39. Preisler v. City of St. Louis, 322 S.W.2d 748, 749 (Mo. 1959); *Judge Rules out Office Petitions*, AFRO-AMERICAN, July 5, 1958, at 9. McMillian was ultimately reversed by the Missouri Supreme Court on appeal. *Preisler*, 322 S.W.2d at 751–52. Paul W. Preisler, the plaintiff in the case, was a serial plaintiff seeking to push various public rights through the court system. Ultimately, his most famous case was *Preisler v. Mayor of St. Louis*, 303 F. Supp. 1071 (E.D. Mo. 1969), which applied "one-person, one-vote" to local elections.

40. Bandy v. United States, 82 S. Ct. 11, 13 (1960) (Douglas, J., in chambers) ("[N]o man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on 'personal recognizance' where other relevant factors make it reasonable to believe that he will comply with the orders of the court.").

41. *McMillian for City-County Rule Allowing Indigents to Avoid Bail*, ST. LOUIS POST-DISPATCH, Feb. 11, 1963, at 3A.

42. *Freedom Without Bail*, ST. LOUIS POST-DISPATCH, Oct. 26, 1963, at 4A.

43. *A Judge for Teenage Crime*, ST. LOUIS GLOBE-DEMOCRAT, Sept. 1, 1965, at 12A; Theodore McMillian, *Early Modern Juvenile Justice in St. Louis*, FED. PROBATION, Dec. 1999, at 4.

44. *Judge to Be Stern with Delinquents*, ST. LOUIS POST-DISPATCH, Aug. 31, 1965, at 3C.

45. *4 Robbery, Rape Suspects to Be Tried as Adults*, ST. LOUIS POST-DISPATCH, Sept. 14, 1965, at 3A. At the time, McMillian commented, "[t]hese defendants may be juveniles, but the crimes they are accused of are adult crimes. If they are to get relief, they will have to get it in the circuit courts." *Id.* McMillian was criticized at the time. *See Judge McMillian's Philosophy*, ST. LOUIS POST-DISPATCH, Sept. 15, 1965, at 2D (Judge McMillian's reasoning "raise[s] the serious question whether he believes in the concept of juvenile court.").

In less than a year, McMillian's increasing understanding of the problems of poverty, neglect, illiteracy, and related social problems appeared to change his attitude.[46] He came to believe that "[t]he children brought into [his] court [were] the product of social and community problems" and advocated for reforms that focused on rehabilitation.[47] When asked about his change of heart, McMillian described his earlier hardline stance as "utterly asinine."[48]

McMillian 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 detainees. He advocated major changes in the Missouri Juvenile Code and in the operation of the Missouri juvenile courts. 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.[49]

One of Judge McMillian's first forays into reforming the juvenile court came after the Missouri Supreme Court's 1966 decision in *State v. Arbeiter*.[50] The court held that the juvenile code prohibited the police from interrogating a minor offender before bringing him before the juvenile

---

46. "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. 24-25, 1966, at 1. McMillian explained his views: "What do you do with nine year old[s]; how do you help them? Put them in the penitentiary?" Terry Winklemann, *Court Appeal*, ST. LOUIS TIMES, Feb. 1996, at 14–15.

47. Cleon Swayzee II, *Juvenile Code Is Falling Short in Rehabilitation, McMillian Says*, ST. LOUIS POST-DISPATCH, Feb. 12, 1967, at 3A.

48. *Id.*

49. *See, e.g.*, Sue Ann Wood, *Ground Broken for Boys Club: McMillian Wields Spade*, ST. LOUIS GLOBE-DEMOCRAT, Aug. 9, 1966, at 3A; *Urges Police to Treat Ghetto Youths Humanely*, ST. LOUIS POST-DISPATCH, Apr. 27, 1969, at 19A; Manuel Chait, *Broad Program Proposed to Reduce Juvenile Crime*, ST. LOUIS POST-DISPATCH, Oct. 19, 1969, at 1C; *McMillian Indicts School at Boonville: Trains for Crime, Judge Says*, ST. LOUIS GLOBE-DEMOCRAT, Dec. 4, 1969, at 3C (deploring over-crowded 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, at 16A.

50. State v. Arbeiter, 408 S.W.2d 26 (Mo. 1966).

court.[51] Taking the lead in implementing *Arbeiter* locally, Judge McMillian introduced a new set of pre-trial due process rights into the juvenile justice system.[52] Under the new system, police were required to immediately transfer arrested minors to the juvenile court, which would remain open around-the-clock. At the court, one of McMillian's deputies would advise the child on his or her rights and make an initial competency determination.[53] The police pushed back against the reforms, arguing they were too burdensome, inefficient, and socially dangerous, but McMillian won out after the St. Louis Circuit Attorney and City Counselor endorsed the reforms.[54]

Judge McMillian's due process reforms were vindicated the following spring when the U.S. Supreme Court extended many constitutional due process protections to juveniles.[55] Both Judges McMillian and Weinstein praised the Court's decision, but noted that St. Louis City and County juvenile courts were already in compliance.[56] The decision reinforced the need for lawyers equipped to operate within the juvenile system, so the duo started teaching a course on the juvenile courts and the special needs of juvenile defendants.[57] McMillian started appointing private attorneys to represent indigent juvenile defendants.[58] The practice had the side effect of

51. *Id.* at 29. By deciding the case on statutory grounds, the court avoided deciding whether police practice rose to the level of a constitutional due process violation. *See* Gallegos v. Colorado, 370 U.S. 49 (1962).

52. *Change in Police Treatment of Juvenile Suspects Urged*, ST. LOUIS POST-DISPATCH, Oct. 17, 1966, at 15A.

53. *Judge Urges More Police at Juvenile Court*, ST. LOUIS POST-DISPATCH, Oct. 27, 1966, at 9A.

54. *Police to Seek Legal Opinion on Juveniles*, ST. LOUIS POST-DISPATCH, Oct. 26, 1966, at 21A; *What Police Think*, ST. LOUIS POST-DISPATCH, Dec. 14, 1966, at 2C; *Corcoran Backs Judge's Order on Juveniles*, ST. LOUIS POST-DISPATCH, Nov. 10, 1966, at 25A; *New Procedures on Juveniles Are Put in Effect by Police*, ST. LOUIS POST-DISPATCH, Nov. 17, 1966, at 3A.

55. *In re* Gault, 387 U.S. 1, 31–57 (1967) (holding the juvenile defendants must be 1) provided adequate notice of the charges they face, 2) informed about their right to counsel and their right to remain silent, and 3) provided the opportunity to cross examine witnesses against them).

56. *Juvenile Court Ruling Had Been Complied With in City, County*, ST. LOUIS POST-DISPATCH, May 16, 1967, at 3A. In contrast, local police criticized the Court for upending the design of the juvenile system. *Decision on Juveniles Called Meat Ax Instead of Scalpel*, ST. LOUIS POST-DISPATCH, May 18, 1967, at 8B. For more information on the import of procedural due process into the Missouri juvenile justice system, see DOUGLAS E. ABRAMS, A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI 150–59 (2003).

57. James W. Singer, *Charting a New Course in Juvenile Law*, ST. LOUIS POST-DISPATCH, Jan. 19, 1968, at 2N.

58. ABRAMS, *supra* note 56, at 156.

increasing the bar's exposure to the special problems facing juveniles and garnering support for juvenile court reform.[59] Eventually, the Missouri State Public Defenders took over representation of indigent juveniles.[60]

Judge McMillian pushed for substantive changes to the way juvenile crime was understood and treated. He introduced programs geared towards understanding the individual circumstances and treatment needs of defendants. He hired caseworkers and a psychologist for the City Juvenile Court to identify the problems facing individual defendants.[61] He also introduced family counselors and better training so that court staff could better meet the needs of juveniles.[62]

Outside of his courtroom, Judge McMillian publicly pushed for reforms in various segments of the juvenile justice system in Missouri. For example, while addressing a joint meeting of the Missouri Police Chiefs' Association and Juvenile Officers' Association, McMillian urged police to put themselves in the shoes of the teenage suspect and hold their fire.[63] Judge McMillian also implored educators to focus on the needs of urban youth and encourage the creativity of children.[64]

Additionally, McMillian sought reform of and reinvestment in Missouri's juvenile treatment programs. During McMillian's term, juvenile judges had two options once they found that a child had committed an offense: they could release the child to his or her parents or send the child to a juvenile treatment facility (the Reform School for Boys at Boonville or the State Industrial School for Girls at Chillicothe).[65] The Boonville facility was notoriously overcrowded, understaffed, and punitive in nature.[66] In 1969, a federal study described the facility as a "quasi-penal-military"

---

59. *Id.*
60. *Id.*
61. *Judge M'Millian Praised for Gains*, *supra* note 3, at 4H.
62. *Id.*
63. *Urges Police to Treat Ghetto Youths Humanely*, *supra* note 49, at 19A ("In the juvenile's mind, there's no doubt about the flashing light and the pursuing cry of the siren. To him, that's the hunter after his quarry, and the instinct too often is to flee. I sometimes think that if a man were to sit down and devise an angry, menacing combination, he couldn't do much better than that alarming Nazi sound now in use in some police departments and that dragon's breath of a light. Especially when it's backed up by fire that can end a boy's life.").
64. *City Officials Are Criticized*, ST. LOUIS POST-DISPATCH, May 23, 1969, at 17D; *Advice to Teachers by Juvenile Judge*, ST. LOUIS POST-DISPATCH, May 26, 1971, at 7A.
65. ABRAMS, *supra* note 56, at 98, 198.
66. *Id.* at 198.

institution that caused more harm to its detainees than good.[67] The limited training programs offered at the rural facility emphasized agricultural skills—an ill-fit to the needs of teens returning to St. Louis and Kansas City.[68] To make matters worse, housing discrimination and racial harassment in Boonville impeded the facility's ability to recruit and retain Black employees, so the staff was almost all white.[69]

Recognizing these shortcomings, McMillian embarked on a multiyear campaign to persuade state and local authorities to reform Boonville and invest in treatment programs that meet the diverse medical, educational, and vocational needs of Missouri's delinquent youth.[70] Specifically, he proposed the creation of low and medium security juvenile facilities in the St. Louis region, where students would receive modern vocational training.[71] When possible, juvenile offenders would be bused to area public schools, allowing them to complete their formal education with a degree of normalcy.[72] McMillian also proposed the creation of halfway houses in the community for low-level offenders whose problems derived from unstable home environments.[73]

Judge McMillian's leadership on juvenile justice was quickly recognized by his peers both locally and nationally. In 1967, he and Judge Weinstein testified before the Missouri legislature about proposed amendments to the juvenile code.[74] The following year, he was elected by his peers as the president of the Missouri Council of Juvenile Court Judges.[75] He frequently spoke publicly about the plight of juvenile

67. *Id.*

68. McMillian, *Early Modern Juvenile Justice in St. Louis*, *supra* note 43, at 5 ("Imagine city kids being taught farming and how to milk a cow. Girls were taught domestic skills such as hair-dressing and sewing.").

69. *Proposes Juvenile Institution Here*, ST. LOUIS POST-DISPATCH, Aug. 20, 1971, at 7A ("Blacks don't want to live in Boonville because they'll get their heads knocked in.").

70. *See, e.g.*, Swayzee, *supra* note 47; Chait, *supra* note 49, at 3C.

71. Chait, *supra* note 49.

72. *Id.*

73. *Id.*

74. *Juvenile Aid Funds Needed, Judges Assert*, ST. LOUIS POST-DISPATCH, Feb. 8, 1967, at 18A.

75. *Judge Gets Post*, ST. LOUIS POST-DISPATCH, June 16, 1968, at 3B.

defendants[76] and the deficiencies in the juvenile court system.[77] He also started a police outreach program to connect at-risk youths to recreational, vocational, and educational opportunities with the goal of redirecting their energy away from crime and developing individual relationships with police officers.[78]

A consistent theme throughout Judge McMillian's juvenile justice reform advocacy was the importance of targeting rehabilitation to the needs of the individual juvenile.[79] Thus, he pushed for a variety of training and counseling programs tailored to the different needs of the juveniles in the system. He also resisted efforts to curb judicial discretion in ways that would reduce the flexibility of juvenile judges to prescribe the proper treatment for the juvenile offender.[80] Judge McMillian believed that the acute attention to punishing juvenile crime was misplaced:

> Juvenile delinquency is an enigma which consumes the very vitality of the city. As this malignancy spreads, it creates heightened fear and anxiety among the citizenry. Not only are the numbers of youthful criminals multiplying, but also the kinds of serious offenses are increasing. [Still,] it remains most important to realize that delinquency and crime are symptoms of deeper problems, and while the symptoms can be alleviated, a long-range comprehensive and broad programs will be required to cure the multitude of underlying causes found in the city.[81]

Judge McMillian blamed juvenile delinquency on gross racial inequities in education, policing, housing, and employment, and devoted

---

76. *KSD-TV Will Examine Plight of "The Hurt Child" Friday*, ST. LOUIS POST-DISPATCH, Aug. 18, 1968.

77. *Juvenile Court Setup Assailed by McMillian*, ST. LOUIS POST-DISPATCH, May 10, 1968, at 13A ("I feel very strongly that every penitentiary and adult correctional institution in America is crammed with the failures of the juvenile court justice system.").

78. *New Effort to Improve Ties Between Police, Juveniles*, ST. LOUIS POST-DISPATCH, May 29, 1968, at 7C.

79. James W. Singer, *Charting a New Course in Juvenile Law*, ST. LOUIS POST-DISPATCH, Jan. 19, 1968, at 2N.

80. *See, e.g.*, Edward H. Thornton, *Judges Say New Bills Threaten Juvenile Code*, ST. LOUIS POST-DISPATCH, Mar. 4, 1971, at 1A, 13A; Sally Thran, *Parent Liability Law Called Unenforceable*, ST. LOUIS POST-DISPATCH, Mar. 11, 1971, at 3A.

81. Chait, *supra* note 49, at 1C.

himself to community service geared towards solving these underlying conditions.[82] He was one of the original founders of the Herbert Hoover Boys Club, a community center with health and recreational amenities designed to give at-risk youth a productive outlet for their energy.[83] McMillian was the first Board Chairman of the Human Development Corporation, the local apparatus for The War on Poverty.[84] He also served as President of the St. Louis Urban League, President of the National Council of Juvenile Court Judges, and member of the first national board of the Office of Economic Opportunity Legal Services Program.[85]

While Judge McMillian was not able to achieve all of the large-scale reforms of the juvenile justice system he sought during his tenure as a juvenile judge, the substance of his proposals—a focus on rehabilitation geared towards the individual needs of the juvenile defendant—animated his continued push for reforms.[86] Some of those reforms were catalyzed by a 1971 report of the Missouri Law Enforcement Assistance Council, on which McMillian sat as a member.[87] Today, the "Missouri Model" is heralded for its focus on "(1) continuous case management, (2) decentralized residential facilities, (3) small-group, peer-led services, and (4) a restorative rehabilitation centered treatment environment."[88]

---

82. *See Judge Cites Black Anger*, ST. LOUIS POST-DISPATCH, Mar. 28, 1969, at 6A.

83. *See Plans for New Boys Club on North Side Announced*, ST. LOUIS POST-DISPATCH, Jan. 17, 1966, at 3A; *Boys' Club Is Dedicated, Cited as Deterrent to Delinquency*, ST. LOUIS POST-DISPATCH, June 19, 1967, at 5A. In 1996, the club opened up to girls. *See Herbert Hoover's Club for Boys—And Girls*, ST. LOUIS POST-DISPATCH, Mar. 5, 1996, at 6B.

84. *See 4 Board Members to Be Added by Antipoverty Agency Here*, ST. LOUIS POST-DISPATCH, Sept. 13, 1965, at 1A, 4A. McMillian was forced to resign from his position at HDC when he joined the Eighth Circuit Court of Appeals due to conflicts issues. *See* Yvonne Samuel, *Judge's Role as HDC Head Is Studied*, ST. LOUIS POST-DISPATCH, Jan. 25, 1979, at 1E. *See also* Hon. David C. Mason, *Judge Clyde Cahill: Courage and Action*, 67 WASH. U.J.L. & POL'Y 221, 229–30 (2022) (also published in this volume).

85. For a full list of civic organizations Judge McMillian was involved in, see *Judge Theodore McMillian*, ST. LOUIS AM. (Feb. 2, 2006), http://www.stlamerican.com/news/obituaries/judge-theodore-mcmillian/article_66d373ae-9db0-5443-8024-34e00cb2bd36.html [https://perma.cc/WR2C-YP3J].

86. ABRAMS, *supra* note 56, at 203–21.

87. *Id.* at 205.

88. Beth H. Huebner, *The Missouri Model: A Critical State of Knowledge*, *in* REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 411, 416 (Richard J. Bonnie et al. eds., 2012); *see also* ABRAMS, *supra* note 56, at 203–21. *But see* Mae C. Quinn, *The Other "Missouri Model": Systemic Juvenile Injustice in the Show-Me State*, 78 MO. L. REV. 1193 (2013) (decrying disinvestment in schools

Eventually, McMillian fell victim to social backlash against juvenile crime. Starting in early 1969, St. Louis was shocked by a perceived spike in violent juvenile delinquency, although this perception was not backed up by data.[89] Predictably, political leaders reacted to the public outcry by rushing to sharpen the juvenile code and punish parents for the crimes of their children.[90] While these legislative efforts were not successful,[91] the tide was turning against Judge McMillian.[92] Despite their desire to continue their work in the St. Louis City and County's Juvenile Courts, both Judges McMillian and Weinstein were reassigned to other court divisions by a vote of their colleagues in the fall of 1971.[93] Echoing McMillian's words six years earlier, the new St. Louis City juvenile judge promised to stop "coddling" juveniles and take a hard line on juvenile crime.[94]

---

and communities, due process failures, and the disproportionate number of juveniles tried as adults); Rachel Lippmann, *Despite Positive Reputation, Missouri's Juvenile Justice System Has Serious System Problems*, ST. LOUIS PUB. RADIO (Oct. 5, 2015, 9:19 PM), https://news.stlpublicradio.org/government-politics-issues/2015-10-05/despite-positive-reputation-missouris-juvenile-justice-system-has-serious-systemic-problems [https://perma.cc/LQB7-G6G8].

89. William Freivogel, *Data Dispute Judge's Stand*, ST. LOUIS POST-DISPATCH, Feb. 23, 1975, at 3D; *see also* Connie Rosenbaum, *Challenge of Delinquency*, ST. LOUIS POST-DISPATCH, Aug. 29, 1971, at 1A, 6A (discussing selective enforcement).

90. In the spring of 1971, the Missouri General Assembly sought to revise the juvenile code to lower the maximum age to fifteen, introduce prosecutors to juvenile court, and authorize the police to interrogate juveniles prior to their initial appearance at juvenile court. *See Housewives Near Goal of Tighter Youth Code*, ST. LOUIS POST-DISPATCH, June 13, 1971, at 4A. Locally, St. Louis City passed an ordinance that fined parents for "failing to exercise reasonable care" over their children. *See* Sally Thran, *Parent Responsibility Bill Signed by Mayor*, ST. LOUIS POST-DISPATCH, Mar. 25, 1971, at 1A.

91. After being passed between the House and Senate, the bill amending the juvenile code stalled and the General Assembly adjourned before passage. *See Assembly Adjourns; Medicaid Bill Passed*, ST. LOUIS POST-DISPATCH, June 16, 1971, at 1A, 4A. The parental responsibility ordinance passed, but proved ineffective due to practical enforcement challenges. *See* Connie Rosenbaum, Editorial, *Parental Penalty Laws Fail to Achieve Results*, ST. LOUIS POST-DISPATCH, Sept. 9, 1971, at 1E, 6E.

92. Judges McMillian and Weinstein publicly opposed both legislative efforts and sought to steer the public debate towards increasing the resources available to the juvenile court and corrections system. *See* Edward H. Thornton, *Judges Say New Bills Threaten Juvenile Code*, ST. LOUIS POST-DISPATCH, Mar. 4, 1971, at 1A, 13A; Sally Thran, *Parent Liability Law Called Unenforceable*, *supra* note 80, at 3A.

93. *McMillian Loses Juvenile Court Post*, ST. LOUIS POST-DISPATCH, Nov. 20, 1971, at 1A; Connie Rosenbaum, *Assails Shifting Juvenile Judges*, ST. LOUIS POST-DISPATCH, Nov. 19, 1971, at 1B.

94. Robert Christman, *New Juvenile Judge Opposed to Coddling*, ST. LOUIS POST-DISPATCH, Nov. 28, 1971, at 14A.

While Judge McMillian moved on from the Juvenile Court, juvenile justice remained important to him throughout the rest of his life.[95] To be sure, Judge McMillian left his mark on the juvenile justice system, but his experience there likewise changed him as a judge and as a person.[96] Prior to his time in the Juvenile Court, he was focused on deterrence and victim vindication.[97] While on that court, he shifted to a more nuanced philosophy of the purpose of punishment, with a greater empathy for all parties caught up in crime and the criminal justice system. Judge McMillian came to appreciate the complex social, economic, and psychological roots of crime. In the end, McMillian believed that punishment, if it is to serve any purpose at all, must serve rehabilitative ends.[98]

Judge McMillian recommitted himself to his community charitable work targeting the underlying causes of juvenile crime[99] and embarked on reforms in his new court assignment, the Criminal Assignment Division. There, he proposed new plea-bargaining policies and case handling procedures and advocated increased resources for adult prisons.[100] However, his time in the new court was short-lived. Just ten months after his reassignment, Judge McMillian received his first appellate post. Governor Warren Hearnes appointed Judge McMillian to the Missouri Court of Appeals in October 1972.[101]

---

95. *See, e.g.*, *Lectures*, ST. LOUIS POST-DISPATCH, Sept. 21, 1978, at 13C (advertising a discussion led by Judge McMillian titled "Who Should Supervise Juvenile Court").

96. 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 and served time in the City jail. *See Theodore M'Millian Jr. Seized on Drug Charge*, ST. LOUIS POST-DISPATCH, Dec. 31, 1966, at 3A; *McMillian's Son Arrested on Street*, ST. LOUIS POST-DISPATCH, Sept. 16, 1968, at 9A. His son was shot and killed in 1972, the same year that Judge McMillian was appointed to the Missouri Court of Appeals. *See Son of Judge Killed by Woman*, ST. LOUIS POST-DISPATCH, July 1, 1972, at 3A.

97. *E.g.*, *Death Penalty Opinions Vary Among Leaders of Bench, Bar*, ST. LOUIS POST-DISPATCH, Jan. 24, 1963, at 3A ("Capital punishment is a deterrent — it protects society against horrendous types of crimes. When crimes of this nature are committed there is a tendency on the party of too many people to think only of the culprit. They forget about the victim and the effect on his family and relatives.").

98. *E.g.*, *infra* notes 103–06 and accompanying text.

99. Sutin, *supra* note 49, at 16A.

100. John J. Hynes, *Strategy of Plea-Bargaining Cast in New Light by Judge*, ST. LOUIS POST-DISPATCH, Apr. 23, 1972, at 1B. For a history on the move to openness in plea bargaining, see William Ortman, *When Plea Bargaining Became Normal*, 100 BOS. U.L. REV. 1435 (2020).

101. *McMillian Nominated 3rd Time*, ST. LOUIS POST-DISPATCH, Oct. 21, 1972, at 1A; *Judge McMillian Named to Appeals Court Here*, ST. LOUIS POST-DISPATCH, Oct. 24, 1972, at 1A, 8A.

III. MISSOURI COURT OF APPEALS JUDGE

During the next six years on the Missouri Court of Appeals, 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 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 he 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.[102]

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 ten-year minimum sentence for persons selling marijuana for a second time, describing the majority opinion as "legally logical, if philosophically unconscionable."[103] He argued that statutory minimum sentences are unconstitutional because they are "an intolerable usurpation of an inherent power of the court to grant probation."[104] That same year, in a lengthy concurring opinion, he objected to the practice of sentencing prisoners to terms multitudes longer than they could possibly live.[105] This opinion illustrates the evolution of Judge McMillian's view on the purpose of punishment:

> In my opinion, a good sentence should call for the minimum amount of custody or confinement which is

---

102. For a detailed discussion of Judge McMillian's Missouri appellate court opinions, see Edward H. Kohn, *McMillian's Judicial Record Shows Liberal Views, Dissent*, ST. LOUIS POST-DISPATCH, Aug. 6, 1978, at 1C.

103. 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).

104. *Id.* at 439.

105. *See* State v. Kennedy, 513 S.W.2d 697, 701–02 (Mo. Ct. App. 1974) (McMillian, J., concurring).

> consistent with the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant. Stated another way, the best correctional system should attempt to divert as many offenders as possible out of the system; or, those offenders found to be in need of correctional processes or therapy should be detained for the minimum time possible; or, those offenders found to be dangerous should be held on to as long as possible, but not in excess of thirty years.[106]

McMillian also retained his strong concern for procedural due process. In another criminal case, a juvenile defendant facing a second trial sought to use the transcript from the first trial to impeach a witness.[107] The trial court denied the request because it would take too long to prepare the transcript.[108] On appeal, the majority held that the defendant had no constitutional right to the transcript because there were sufficient alternatives present.[109] In his dissent, McMillian rejected the idea that either the judge's notes from the first trial or an examination of the court reporter could be a sufficient alternative to the actual transcript.[110] More pointedly, Judge McMillian criticized the majority and the trial court for prioritizing efficiency over justice:

> The silent issue that was not addressed by the majority opinion is dramatized by the unsworn, unproven, self-fulfilling prophecy of the trial judge, "[T]hey couldn't have the transcript prepared even if they had money to pay for it within time—retrial of this case." Stated another way, the court was more interested in case movement than it was in the quality of the trial. Hopefully, the time will never come when we, as jurists, because of the pressure from

106. *Id.* at 702.
107. State v. Holland, 534 S.W.2d 258, 261 (Mo. Ct. App. 1975).
108. *Id.*
109. *Id.* at 263–64.
110. *Id.* at 266 (McMillian, J., dissenting).

> overloaded trial calendars and dockets will sacrifice, for speed, the quality of justice that we attempt to dispense.[111]

Occasionally while on the Missouri Court of Appeals, McMillian had the opportunity to advance procedural protections for juvenile defendants. In one of his first opinions, McMillian wrote for a unanimous panel to reverse the conviction of a juvenile offender that relied on a video confession obtained by the police before the child could talk to a parent or lawyer.[112] In another case, McMillian dissented from the majority's holding that juvenile defendants are not entitled to preliminary hearing, as is constitutionally required for adults.[113] This defeat was short-lived. The following year, McMillian was one of the drafters of the first set of state-wide rules for the juvenile court system.[114] A requirement that juveniles receive a preliminary hearing was one of several procedural protections included in the new rules.[115]

Judge McMillian's appellate opinions also demonstrated a keen understanding of the court's role as a hedge against State overreach of power. He dissented from a majority opinion that upheld the conviction of a man that was arrested without a warrant on a charge of stealing and subsequently subjected to a warrantless search for weapons.[116] McMillian wrote, "our 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.'"[117] In yet another dissent in a criminal case, McMillian disagreed with the majority that a robbery confession had been made voluntarily when the defendant

---

111. *Id.* Senator Eagleton quoted this dissent during McMillian's senate confirmation hearing following his nomination to the Eighth Circuit. *See* Thomas F. Eagleton, *Tribute to Judge Theodore McMillian*, 52 WASH. U.J. URB. & CONTEMP. L. 27, 28 (1997); Gerald M. Boyd, *Words of Praise Flow at McMillian Hearing*, ST. LOUIS POST-DISPATCH, Aug. 25, 1978, at 8A.

112. *See* State v. White, 494 S.W.2d 687 (Mo. Ct. App. 1973).

113. *See Juvenile's Release Refused by Court*, ST. LOUIS POST-DISPATCH, Mar. 29, 1975, at 3A.

114. *See* Ted Gest & James E. Ellis, *Altered Rules on Youths Aim at Adult Treatment*, ST. LOUIS POST-DISPATCH, Apr. 23, 1976, at 3C.

115. *Id.*

116. 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).

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

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.[118]

In several cases, McMillian also criticized the United States Supreme Court's high standard of proof for criminal defendants challenging systematic exclusion of jurors based on race.[119] He would continue this criticism in his next judicial appointment.

IV. EIGHTH CIRCUIT COURT OF APPEALS JUDGE

When President Carter came into office in January 1977, he sought to diversify the federal bench.[120] At the time, 97% of federal appeals court judges and 94% of federal district court judges were white men.[121] He also aimed to bolster the independence of the judiciary by eliminating the

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

119. *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 (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).

120. Carl Tobias, *Rethinking Federal Judicial Selection*, 1993 BYU L. REV. 1257, 1259 (1993).

121. *Id.*

patronage system and replacing it with merit selection.[122] To accomplish both, President Carter established judicial nominating commissions in each circuit tasked with creating a short-list of nominees.[123] Carter encouraged the commissions to consider female and minority attorneys.[124] Still, Democratic senators retained significant influence over selection of the ultimate nominee.[125]

The first opportunity to use the nominating commission locally occurred when William Webster left the Eighth Circuit to join the Federal Bureau of Investigation in the spring of 1978.[126] That summer, the eleven-member commission selected five nominees, including Judge McMillian; Robert Dowd, Sr., McMillian's former law school classmate and colleague on the Missouri Court of Appeals; and Edward Foote, Dean of Washington University School of Law.[127] Ultimately, Senator Eagleton endorsed Judge McMillian, making his nomination all but inevitable.[128] On August 3, 1978, President Carter nominated Theodore McMillian to become the first Black judge on the Eighth Circuit.[129] He was swiftly confirmed by the U.S. Senate the following month.[130]

For the third time in his career, Judge McMillian was appointed as the first person of color on a court, and he would serve as the only person of color on the Eighth Circuit throughout his almost thirty-year tenure. McMillian was ecstatic—"It's too good to be really true. . . . [W]hen you think that a kid who was born at 14th and Papin, black, would be sitting on

---

122. *Id.* Many senators—including Senator Eagleton—resisted the end of the patronage system. *See* Robert Adams, *Eagleton Turns Down Selection by Merit of Court Appointees*, ST. LOUIS POST-DISPATCH, Mar. 20, 1977, at 13A.

123. Tobias, *supra* note 120, at 1259–60; Exec. Order No. 11,972, 42 Fed. Reg. 9,659 (Feb. 14, 1977), *amended by* Exec. Order, No. 12,059, 43 Fed. Reg. 20,949 (May 11, 1978), *terminated by* Exec. Order 12,305, 46 Fed. Reg. 25,421 (May 5, 1981).

124. Tobias, *supra* note 120, at 1260.

125. *E.g.*, *Lawyers Push for Black Judge*, ST. LOUIS POST-DISPATCH, Jan. 24, 1978, at 1B (noting Eagleton's informal influence on the judicial selection process).

126. Edward H. Kohn & Dana L. Spitzer, *Judicial Panel: Democrats All*, ST. LOUIS POST-DISPATCH, Apr. 21, 1978, at 3C.

127. James Deakin, *Eagleton Backs McMillian for U.S. Judgeship*, ST. LOUIS POST-DISPATCH, June 8, 1978, at 1.

128. *Id.* at 1A, 3A.

129. *See* Gerald M. Boyd, *McMillian Nominated to Federal Judgeship*, ST. LOUIS POST-DISPATCH, Aug. 3, 1978, at 1A, 8A.

130. *See McMillian Nomination Approved by Senate*, ST. LOUIS POST-DISPATCH, Sept. 23, 1978, at 3A.

the second highest court in the land—it's fantastic."[131] Ever the advocate for progress, McMillian publicly professed his hope to use his position to establish equal justice for all:

> I am looking forward to meeting the rest of the members of the court. Hopefully, I'll be able to continue the same impartiality and hard work and to concern myself with issues and not personalities. I want to be able to help the unfortunates, impoverished and disenchanted—those that need equal justice under the law. I am convinced the only way that we can remove rioting from the streets and disrespect for the law is to assure everyone that justice can and will be found in the courts.[132]

In another interview, he noted optimistically, "I've dissented a lot on constitutional rights, but . . . in time, [my opinions] will become law."[133]

Many of Judge McMillian's subsequent Eighth Circuit opinions over the next thirty years, especially in the areas of civil rights and criminal justice, cut paths later chosen by either the U.S. Supreme Court or Congress. His opinions consistently reflected his concerns for civil rights, his commitment to constitutional protection for criminal defendants, and his sensitivity to discrimination in the workplace. His opinions 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."

For example, Judge McMillian's dissent in *Florey v. Sioux Falls School District*,[134] one of his early opinions on the federal appellate court, showed 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,"[135] McMillian

131. Paul Wagman, *McMillian Termed Ideal Choice for Appellate Post*, ST. LOUIS POST-DISPATCH, June 9, 1978, at 1B.

132. Boyd, *supra* note 129, at 1A, 8A.

133. George E. Curry, *McMillian: Hard Worker, Sensitive to Plight of Poor*, ST. LOUIS POST-DISPATCH, Aug. 4, 1978, at 3B.

134. Florey v. Sioux Falls Sch. Dist., 619 F.2d 1311, 1320 (8th Cir. 1980) (McMillian, J., dissenting).

135. *Id.*

strongly disagreed with the majority, which held 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."[136]

In his view, the observance of particular Christian or Jewish religious holidays, but not others such as Muslim, Native American, or Hindu holidays, did not advance the secular purposes of student knowledge and appreciation of religious and cultural diversity.[137] 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."[138] Even assuming the observance of religious holidays did 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."[139]

Judge McMillian's concern for the First Amendment rights of students surfaced again a few years later in his dissent in *Bystrom v. Fridley High School*.[140] Again, McMillian strongly disagreed with the majority, which endorsed the school administration's regulations banning 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

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

137. *See id.* at 1324.

138. *Id.*

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

140. Bystrom v. Fridley High School, 822 F.2d 747, 759 (8th Cir. 1987) (McMillian, J., concurring in part and dissenting in part).

> 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.[141]

Judge McMillian's majority opinion in *United States v. Childress*,[142] handed down in 1983, demonstrated his continuing concern for the rights of criminal defendants. *Childress* presaged the 1986 landmark holding of the U.S. Supreme Court in *Batson v. Kentucky*,[143] which held a prosecutor's use of peremptory challenges to exclude jurors solely because of their race violates the Fourteenth Amendment.[144] 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*,[145] 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 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.[146]

---

141. *Id.* at 763–64.

142. United States v. Childress, 715 F.2d 1313 (8th Cir. 1983).

143. Batson v. Kentucky, 476 U.S. 79 (1986).

144. *Id.* at 89; *see* Lisa Van Amburg, *A Case Study of the Peremptory Challenge*, 18 ST. LOUIS U.L.J. 662 (1974).

145. Swain v. Alabama, 380 U.S. 202, 208–09 (1965) (holding that showing an identifiable group in a community is underrepresented by as much as ten percent in constitution of petit juries is insufficient to prove purposeful discrimination based on race), *overruled by Batson*, 476 U.S. 79.

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

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 argument for overruling *Swain*. McMillian extrapolated and criticized all four 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.[147] Second, he asserted that defendants are unlikely to have either the time or resources to compile and analyze the raw data necessary to mount a statistical attack on the prosecution's use of peremptory challenges. Third, he argued that 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. And fourth, he posited that "even assuming the existence and availability of data, statistical analysis may prove problematical."[148]

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*.[149] 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.[150]

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, was reflected in *United States v. Dixon*,[151] handed down in 1990. In *Dixon*, the Eighth Circuit held that the double jeopardy clause barred re-prosecution of the defendants when, over objection, the trial court declared a mistrial because of a news report that appeared after the jury was sworn in but before they were

147. *Id.*
148. *Id.* at 1317.
149. *Batson*, 476 U.S. at 102 (Marshall, J., concurring).
150. Theodore McMillian & Christopher J. Petrini, Batson v. Kentucky*: A Promise Unfulfilled*, 58 UMKC L. REV. 361, 374 (1990).
151. United States v. Dixon, 913 F.2d 1305 (8th Cir. 1990).

admonished not to listen to television news reports about the case.[152] McMillian noted the court's refusal to poll the jurors, give a cautionary instruction, or pursue less drastic alternatives.[153] Writing for the majority in *Dixon*, Judge McMillian ordered the release of several defendants who had been re-tried:

> 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.[154]

During his time on the Eighth Circuit, Judge McMillian occasionally had the opportunity to weigh in on contentious reproductive rights issues. In *Goodwin v. Turner*, a prisoner sought the Federal Bureau of Prison's help in transferring a vial of semen to his non-incarcerated wife.[155] The Bureau rejected his request and the majority found that rejection reasonable.[156] In dissent, McMillian expertly dissected the majority's misapplication of the *Turner* balancing test and argued that the Bureau violated the prisoner's fundamental right to procreate.[157] In *Little Rock Family Planning Services v. Dalton*, handed down a few years later in 1995, McMillian wrote for the

152. *Id.* at 1311.
153. *Id.* at 1313–15.
154. *Id.* at 1315 (quoting Green v. United States, 355 U.S. 184, 198 (1957)).
155. Goodwin v. Turner, 908 F.2d 1395, 1396–97 (8th Cir. 1990).
156. *Id.* at 1399–400.
157. *Id.* at 1401–02 (McMillian, J., dissenting) (citing Turner v. Safley, 482 U.S. 78 (1987)).

majority, which found that the 1994 Hyde Amendment preempted state laws that sought to limit federal funds to abortion.[158] Thus, states could not limit the use of Medicaid funds to pay for abortions to save the life of the woman or in the case of incest or rape.[159]

Judge McMillian's numerous employment discrimination opinions while on the Eighth Circuit evidenced his foresight and contributed to the development of constitutional and statutory law designed to eradicate discrimination in the workplace. His opinions reflected his sensitivity to the struggles of women, including pregnant women; racial minorities; individuals with disabilities; older workers; and other "outsiders" for equal employment opportunity.

Moylan v. Maries Co.,[160] a sexual harassment case, was a precursor to the United States Supreme Court's significant decision in *Meritor v. Vinson*.[161] Writing for the majority in *Moylan*, a case of first impression in the Eighth Circuit, Judge McMillian recognized a Title VII[162] 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.[163] Later that year, the United States Supreme Court decided *Meritor v. Vinson*, confirming McMillian's view that Title VII creates a cause of action for hostile work environment harassment.[164]

Judge McMillian's opinion for the panel in *Hicks v. Brown Group, Inc.*[165] in 1990, issued prior to the passage of the Civil Rights Act of 1991,[166]

158. Little Rock Fam. Plan. Servs. v. Dalton, 60 F.3d 497 (8th Cir. 1995) *rev'd in part per curiam*, 516 U.S. 474 (1996).

159. *Id.* at 502–03.

160. Moylan v. Maries Co.,792 F.2d 746 (8th Cir. 1986).

161. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

162. 42 U.S.C. §§ 2000e to 2000e-17.

163. *Moylan*, 792 F.2d at 749 (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)).

164. *Meritor*, 477 U.S. 57.

165. Hicks v. Brown Group, Inc., 902 F.2d. 630 (8th Cir. 1990), *vacated mem.*, 499 U.S. 914 (1991), *remanded to* 946 F.2d 1344 (8th Cir. 1991), *vacated mem.*, 503 U.S. 901 (1992), *remanded to* 982 F.2d 295 (8th Cir. 1992) (en banc), *cert. denied*, 511 U.S. 1068 (1994).

166. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

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 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."[167]

The Eighth Circuit court *en banc* later reversed, with Judge McMillian and Judge Gerald Heaney as the lone dissenters.[168] However, Judge McMillian's position was ultimately vindicated when Congress enacted the Civil Rights Act of 1991, amending Section 1981 to clarify the intended breadth of the statute.[169]

Judge McMillian's dissent in *Chambers v. Omaha Girls Club, Inc.*,[170] an early case in his tenure, is among those of his opinions that I view as most illuminating of his progressive understanding of bias and discrimination in the workplace. When I taught Employment Discrimination, I would assign both the majority opinion and McMillian's dissent in *Chambers* to my Employment Discrimination class. And each year, I thought of him fondly as my students debated not only the legal issues in the case, but the cultural assumptions inherent in the district court and majority appellate opinions.

Chrystal Chambers was an unmarried Black woman who was terminated because of her pregnancy.[171] She filed suit under Title VII asserting a "combination of race and sex discrimination."[172] 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 Black girls and young women between the ages of eight and eighteen. The

167. *Hicks*, 902 F.2d at 638–39.

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

169. 42 U.S.C. § 1981(b).

170. Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 705 (8th Cir. 1987) (McMillian, J., dissenting).

171. *Id.*

172. *Id.* at 700 (majority opinion).

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.[173] The court stated in passing that the role model rule "presumably" was also a bona fide occupation qualification.[174] The Eighth Circuit majority endorsed the district court's conclusions as to both defenses.[175]

Judge McMillian strongly disagreed with the majority on both points, citing the language of the Pregnancy Discrimination Act, an amendment to Title VII of the Civil Rights of 1964, and the Equal Employment Opportunity Commission Guidelines as support. McMillian noted discrimination based on pregnancy constitutes per se discrimination under Title VII and 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 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.[176]

Judge McMillian's views were subsequently upheld in a myriad of later interpretations of the Pregnancy Discrimination Act, Title VII of the Civil Rights Act, and the intersectionality of race and sex discrimination in employment.

These court cases provide a mere glimpse of Judge McMillian's contributions to federal discrimination jurisprudence. During his almost three decades on the Eighth Circuit, he wrote over 1,500 opinions, including

---

173. Chambers v. Omaha Girls Club, 629 F. Supp. 925, 947–48 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987).

174. *Id.* at 951 n.51.

175. *Chambers*, 834 F.2d at 705 (McMillian, J., dissenting).

176. *Id.* at 708.

240 separate concurrences or dissents.[177] McMillian's friend and colleague on the Eighth Circuit, Chief Judge Richard Arnold, captured the role that McMillian played on the court:

> His votes and writings never fail(ed) 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 include(d) an awareness of the special place in American thought and history that the avoidance of discrimination on any irrelevant ground should enjoy.[178]

* * *

CONCLUSION

In addition to his jurisprudence, Judge McMillian acknowledged and endorsed the need for diversity in the profession and on the courts. In 1991, Judge McMillian wrote a tribute to one of his heroes, U.S. Supreme Court 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 inescapable component of judicial decision-making. Justice Marshall

177. In total, McMillian authored 1280 majority opinions, 56 concurrences, 152 dissents, and 32 opinions in which he concurred in part and dissented in part.

178. Richard S. Arnold, Letter in Support of the Nomination of Theodore McMillian for ABA Award (Mar. 1, 1993).

> 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.[179]

What Judge McMillian said of Justice Marshall, we can also say of McMillian. Judge McMillian was 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.

I had the privilege of speaking at Judge McMillian's memorial service in January 2006 at St. Alphonsus Rock Liguori Church in St. Louis. I noted then that, while lacking role models or mentors in the legal profession and on the court, Judge McMillian seemed driven throughout his life by an internal sense of equality and 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—providing a beacon of hope and a champion for justice for those who would come after him.

Surely, as I proffered that day, Judge McMillian's human decency and commitment to equal justice will endure because he infused the law in St. Louis, in Missouri, and in this country with his conscience and his courage. 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. 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.

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 accolades, the better gift that we can give to him is our commitment to continue his life's work, to share our humanity, to teach

---

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

tolerance, to promote equal justice, to protect civil rights and civil liberties for all, and to follow the ethic that he embraced:

> I think I'd like to be looked on not for anything I've accomplished or for any material things that I have gathered. Instead, I'd like to be remembered for how many times I was able to look over my shoulder and give a helping hand to someone behind me, to pull him up or her up so he, too, could participate in the American dream.[180]

180. Freeman, *supra* note 20, at B1.