

Saint Louis University Law Journal

Volume 43
Number 4 *A Tribute to the Honorable Theodore
McMillian (Fall 1999)*

Article 9

1999

Judge Theodore McMillian—Symbol of America

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Recommended Citation

Honorable Joseph J. Simeone, *Judge Theodore McMillian—Symbol of America*, 43 St. Louis U. L.J. (1999).

Available at: <https://scholarship.law.slu.edu/lj/vol43/iss4/9>

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JUDGE THEODORE MCMILLIAN—SYMBOL OF AMERICA

THE HONORABLE JOSEPH J. SIMEONE*

In my memory's eye, I can still see, after a half century, the Saint Louis University Law School class of 1949. I can still see those young men (alas, there were no women) in front of me on the other side of the academic rostrum. I was in my twenties, and they were young, but mature and worldly men. Many had just returned from the big war. What a law school class of destiny - future judges, lawyers, businessmen and servicemen.¹ Future Judge Theodore McMillian sat in the front row - intense, studious and writing notes in green ink. We were all tyros of the law, trying to master the newly enacted Missouri Code of Civil Procedure. Ted had recently been discharged as a Lieutenant in the Signal Corps - he was part of that generation who served in those vast theaters of Europe and the Pacific, many of whom lie in distinguished graves, and who literally saved the world.

This law journal issue is dedicated to Judge McMillian, who has reached the milestone of four-score years and who has dedicated his energies, his skill and his life to the law and to the St. Louis community. How does one capture the life of Ted McMillian's eighty years in a few short paragraphs? It is impossible! What a gift to have lived through times that saw the beginnings of radio, the commercial development of modern travel, and the conquest of space. What a gift to have seen first hand the great changes of our time - for good or ill. Surely, the tone and tint of the world and America has totally changed - socially, culturally, technologically and legally. Truly a rare experience!

Several decades ago when television was in its infancy, there was a popular program called "I Led Three Lives" starring Richard Carlson (the present generation doesn't even know who he was). It told the story of an American, Herbert Philbrick, who led three separate lives during World War II. In some ways Judge McMillian, too, has led three separate lives; yet, like

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1. I recall them all: Lou Beck, Ray Bloemker, Fred Boehm, Bob Corley, Ken Crause, Jack Crouchet, Paul Dixon, Irv Dubinsky, Don Dues, Frank Flaiz, Jim Gallen, John Godfrey, John T.R. Godlewski, Ed Gray, Jim Hawk, Al Henke, Bill Hormberg, Al Lynch, Bill McCluggage, Ted McMillian, Ed O'Rourke, Phil Reither, Phil Sestric, and Bill Stiehl (a U.S. District Judge in East St. Louis). Sadly, many are dead now.

the Trinity, they were all woven into one great and extraordinary life – (1) a personal one, (2) a legal and judicial one, and (3) a life dedicated to the public and to the community.

First, his personal life. He was born on January 28, 1919 in a run-down neighborhood at 14th and Papin. His father was once a professional boxer. Like many of his generation he was born poor, and the product of a broken home. His mother remarried; his stepfather was good to him, and he had the guidance of his thrifty, sacrificing grandmother who urged him to get an education. In high school, a friend, Horatio McNeal, would talk about the honor roll and he listened. He worked after school at a grocery store and graduated from Vashon in three and one-half years. He attended Stowe Teachers College before going to Lincoln University. After graduation, he wanted to study physics, but first had to earn sufficient money to get a higher degree. He worked on the Frisco Railroad's dining car, but soon was drafted into the Army – a buck private. In 1943, he was commissioned a first lieutenant, married Minnie and ran the 93rd Division's Radio School. In the service, he inquired of a friend, a major, about becoming a lawyer; apparently his first interest in the law. In November, 1946, he was discharged and intent on being either a physicist or physician. Though he applied to medical school, he would not be able to enter until 1951. That is when he applied to the law school, and everything started from there. Life was not easy in law school either. Before classes began, he worked at a shoe company washing windows.

Knowing Ted, he may well be embarrassed by these remarks, but Ted's personal life and character are pole stars which we all could emulate. His personal life, although born with original sin, is *almost* without blemish. No one is perfect. Devoted to his family, he has had his share of tragedy. In this age of seeming incivility, he is civil to all he meets. In an age of rudeness, he is always kind, polite and compassionate. He is dedicated to his faith. In an age of violence, he is a peaceful, pleasant and personable man. Today, there seems to be a lack of courtesy among too many of us. Today, there seems to be no room for reason, compromise or gentleness. But Ted embodies all these humane characteristics.

These simple personal characteristics spill over into his *second*, legal and judicial, life. After being admitted to the Missouri Bar in 1949, he and his friend, Al Lynch, opened a law office which represented many clients from 1949 through 1953. In 1953 he joined the staff of the Circuit Attorney's Office under the direction of Ed Dowd. Ed's brother, Bob, who was Ted's friend, helped him get that job. There he tried many cases and developed trial expertise. In March, 1956, he was appointed by Governor Donnelly to the circuit bench for the City of St. Louis, and served in that capacity until 1972. While a circuit judge, he served in various divisions, but he was most proud of serving as the juvenile court judge from 1965 to 1971. There he tried to help young kids in trouble. The more he found out about young people in trouble,

the more he realized that often the trouble was not their making. He urged reform and suggested a Missouri Youth Authority to administer a system of training schools throughout the state.

In 1972, he was appointed by Governor Hearnes to the Missouri Court of Appeals, St. Louis District. There, we served together – with chambers next door to each other. Ted, Judge George F. Gunn and I opened up a division in St. Louis County, and the three of us have often said these were our happiest days.

In the circuit attorney's office, he honed his skills as a trial lawyer, as a circuit judge he ruled wisely, and he wrote scholarly as a state appellate judge. From his first opinion in the Missouri Court of Appeals, *Fowler v. Laclede Gas Co.*,² to his last on that court,³ there were 261 opinions in between.⁴

On September 23, 1978, he was appointed to the Eighth Circuit by President Carter. There he has served since. Since 1978, he has written over a thousand opinions, the first being *United States v. Hauck*,⁵ and *Doe v. LaFleur*,⁶ his latest.⁷ Some of his opinions, written for the Court, *en banc*, or

2. 488 S.W.2d 934 (Mo. App. 1972).

3. *State v. Carter*, 571 S.W.2d 779 (Mo. App. 1978) (a robbery case).

4. During Judge McMillian's tenure on the Missouri Court of Appeals, he wrote a total of 263 opinions in all areas of the law. The list is too long to put in this short space, but *see, e.g.*, *Speedy v. State*, 571 S.W.2d 747 (Mo. App. 1978); *State v. Lewis*, 571 S.W.2d 125 (Mo. App. 1978); *Neal v. State*, 569 S.W.2d 388 (Mo. App. 1978); *McNeal v. Bequette*, 571 S.W.2d 657 (Mo. App. 1978); *State Farm Mutual Auto. Ins. Co. v. McBride*, 489 S.W.2d 229 (Mo. App. 1972); *Weaver v. Disabled American Veterans*, 490 S.W.2d 341 (Mo. App. 1973); *Weber v. Les Petite Academies, Inc.*, 490 S.W.2d 278 (Mo. App. 1973); *Cole v. Cole*, 516 S.W.2d 518, 521-22 (Mo. App. 1974) (dealing with the sufficiency of briefs) (Simeone, J., concurring); *Twellman v. Lindell Trust Co.*, 534 S.W.2d 83 (Mo. App. 1976).

5. 586 F.2d 1296 (8th Cir. 1978) (defendant sent threatening letter to a state magistrate judge who previously had prosecuted the defendant).

6. 179 F.3d 613 (8th Cir. 1999) (a prisoner case). The list of problems Judge McMillian has addressed is obviously too long to cite in an article. *But see e.g.*, *United States v. Pitts*, 173 F.3d 677 (8th Cir. 1999) (search warrants); *Pertuis v. Apfel*, 152 F.3d 1006 (8th Cir. 1998) (social security disability benefits); *Little Rock Family Planning Servs. v. Dalton*, 60 F.3d 497 (8th Cir. 1995) (public funds for abortions); *McCurry v. Allen*, 606 F.2d 795 (8th Cir. 1979) (collateral estoppel).

A number of opinions deal with civil liberties – he has participated in over 100 civil rights decisions. *See e.g.*, *Scusa v. Nestle U.S.A., Co.*, 181 F.3d 958 (8th Cir. 1999) (holding that giving a fellow employee a “cold shoulder” for six months is not sufficient to establish a hostile work environment). *See Deborah A. Fauver, Shunning by Co-workers Does Not Establish Hostile Work Environment*, ST. LOUIS DAILY REC., June 25, 1999, at 1. *See also Florey v. Sioux Falls Sch. Dist.* 49-5, 619 F.2d 1311, 1320 (8th Cir. 1980) (McMillian, J., dissenting), *cert. denied*, 449 U.S. 987 (1980); *Mergens v. Board of Educ. of the Westside Community Sch. (Dist. 66)*, 867 F.2d 1076 (8th Cir. 1989), *aff'd*, 496 U.S. 226 (1990); *Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14*, 822 F.2d 747, 759-64 (8th Cir. 1987) (McMillian, J., dissenting); *United States v. Childress*, 715 F.2d 1313 (8th Cir. 1983) (*en banc*), *cert. denied*, 464 U.S. 1063 (1984) (*Batson* issue); *Moylan v. Maries County*, 792 F.2d 746 (8th Cir. 1986) (hostile environment

in which he dissented, include some very interesting issues. In *Nichols v. Bowersox*,⁸ several prisoners sought habeas corpus relief, which was dismissed by the District court.⁹ Nichols was in prison because of a conviction for first degree murder.¹⁰ He filed his petition for habeas corpus through the prison mail system, but the petition was dismissed because it was untimely filed.¹¹ Under the Anti-terrorism and Effective Death Penalty Act of 1996 there is a one year period of limitation for filing.¹² The Court, per Judge McMillian, held that the prison mailbox rule, which would establish the date of filing when the petition is deposited, applied and that the petitions were timely filed.¹³

In *United States v. Lee*,¹⁴ the defendant was convicted of conspiracy to violate civil rights after he burned a cross on a hill near an apartment complex in which a number of black families resided.¹⁵ The majority held that, under recent Supreme Court decisions, the defendant had a First Amendment right of expression and remanded the case for more specific instructions to be given to the jury.¹⁶ The Court stated: "Although there is an important governmental interest in protecting the exercise of the black residents' right to occupy a dwelling free from intimidation, we cannot say that . . . the governmental interest is unrelated to the suppression of free expression."¹⁷

Judge McMillian dissented.¹⁸ He stated:

In the present case Lee was not prosecuted and convicted for expressing an idea or a philosophical point of view. He was prosecuted and convicted because he conspired to threaten and intimidate the African-American residents of the . . . [a]partments in the exercise of their federally-guaranteed housing rights. Such conduct is not protected by the First Amendment . . .¹⁹

sexual harassment case); *Hillhouse v. Harris*, 715 F.2d 428, 430 (8th Cir. 1983) (McMillian, J., concurring specially) (threatening to hold the Secretary of Health and Human Services in contempt for refusing to follow, under its non-acquiescence policy, the law as laid down by the courts).

For a complete analysis of his civil liberties opinions, see the letter of Mark Levison, then President of the Bar Association of Metropolitan St. Louis, to the American Bar Association dated March 11, 1993 recommending Judge McMillian for the Thurgood Marshall Award.

7. *LaFleur* is the latest as of the writing of this article; Judge McMillian continues to author opinions.

8. 172 F.3d 1068 (8th Cir. 1999) (en banc).

9. *Id.* at 1069-70.

10. *Id.* at 1070.

11. *Id.*

12. *Id.* at 1071, citing 28 U.S.C. § 2244(d)(1) (1994 & Supp. III 1997).

13. *Nichols*, 172 F.3d at 1077.

14. 6 F.3d 1297 (8th Cir. 1993).

15. *Id.* at 1297.

16. *Id.* at 1298-304.

17. *Id.* at 1301.

18. *Id.* at 1308-12.

19. *Lee*, 6 F.3d at 1308.

In a high-profile case, *Laws v. Armontrout*,²⁰ the defendant, a state prisoner, sought habeas corpus in the District Court.²¹ Laws and two others, robbed and killed an elderly couple after tying them up and threatening to cut off their fingers.²² After the robbery, the couple's house was burned.²³ The District Judge granted the writ but the Court of Appeals reversed.²⁴ Judge McMillian dissented contending that counsel's failure to discover and introduce certain psychiatric evidence and the defendant's experience in Vietnam warranted the granting of the writ.²⁵

*Whiteside v. Scurr*²⁶ presented the age-old hypothetical debated in ethics classes in law schools: what is to be done when an attorney has a firm factual basis from confidential communications to believe that the client is about to commit perjury, and threatens to testify against the client? The majority of the court, per Judge McMillian, held that under such circumstances, the attorney may not disclose the contents of the communications to the trier of facts; to do so would allow the lawyer to depart from the role of an advocate and become an adversary to the interests of the client.²⁷ This would result in such a client losing the effective assistance of counsel.²⁸

This second life – that of advocate and especially judge – is perhaps Judge McMillian's greatest contribution. Other than residency requirements of a District Judge,²⁹ there do not seem to be any particular qualifications to being a federal judge.³⁰ Society expects its judges to be learned in the law, and to have wisdom, knowledge, patience, courtesy, mercy and consideration. We expect our judges to be just and tactful, to be free from even the appearance of impropriety and their personal behavior to be beyond reproach. How much can we, as a society, expect? With all these attributes and all these characteristics, we should not make such men and women judges; in my church, we would canonize them.³¹

There is a small book by Judge Botein that discusses the role and characteristics of a good judge.³² The judge is perched up on a vantage spot

20. 863 F.2d 1377 (8th Cir. 1988).

21. *Id.* at 1378.

22. *Id.* at 1379.

23. *Id.*

24. *Id.* at 1378.

25. *Laws*, 863 F.2d at 1394-98.

26. 750 F.2d 713 (8th Cir. 1984) (en banc).

27. *Id.* at 714.

28. *Id.*

29. 28 U.S.C. § 134(b) (1994 & Supp. III 1997).

30. *But see* MO. CONST. art. V, § 21 (proscribing the requirements for Missouri state court judges).

31. Judge McMillian has a portrait of St. Thomas More in his office.

32. BERNARD BOTEIN, TRIAL JUDGE: THE CANDID, BEHIND-THE-BENCH STORY OF JUSTICE BERNARD BOTEIN 1 (1952).

overlooking the arena, aloof from the passions of the case, walled off from the parties, and must play an impartial role – be considerate and gentle, yet stern when necessary. In the courtroom the judge has great power, even broader than the President; when the judge enters, everyone rises, and lawyers are deferential. The judge is the showcase of our legal system. The least error a judge may commit is to be wrong on the law. The ordinary citizen does not care much whether the decision fits neatly in a legal precedent category; what the citizen is concerned about is whether in a particular case, the citizen receives what he believes to be a fair hearing, and a just decision that analyzes the facts and the law. And, as Lord Devlin puts it, the judge is the “guardian” of the law and is the person in charge of the maintenance of the “fabric” of the law.³³ As an appellate judge, when the parties are faceless and not before the court, and where the clash of fire or the intensity of the combat are not preserved on a cold written page, the judge must decide and justify that decision in a reasoned legal opinion, written often in the middle of the night, with sweat and sometimes tears.

All this is what Ted McMillian has done in the last fifty years of the 20th century.

The third quintessence of Judge McMillian’s life is his service to his beloved community. He has served on numerous boards of civic organizations. He was the first board chairman of the Human Development Corporation in President Johnson’s war on poverty from 1965 to 1977. He was a member of the Board of Catholic Charities of the City of St. Louis and a member of the Executive Committee of the St. Louis Crime Commission, and he is a past president and founder of the Herbert Hoover Boys and Girls Club of St. Louis.³⁴ How did he find the time? How many lives did he touch and improve in all these endeavors?

Not only has he been active in civic affairs, but he has also given of his talents to his alma mater. Recently he served on the selection committee to choose a new Dean of the Law School, and over the years has served as faculty member of the law school³⁵ and has contributed to various law journals.³⁶

33. See, e.g., PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1977); *THE JUDGE* (1979).

34. These are but a few. Over the years he has served as a board member or president of the National Council of Juvenile Court Judges, the American Judicature Society, the John Jay Steering Committee of the Academy of Criminal Justice, the Missouri Council of Law Enforcement, the National Council on Crime and Delinquency, the Missouri Social Welfare Association, the Urban League, the President’s Council of Saint Louis University, and the Advisory Council of the Danforth Foundation.

35. He has also lectured at the University of Missouri, Webster University, the National College of Juvenile Justice, and the National College of State Trial Judges.

36. See Hon. Theodore McMillian, *In Defense of Affirmative Action*, 54 WASH. U.J. URB. & CONTEMP. L. 39 (1998); Julie Tang & Hon. Theodore McMillian, *Eighth Circuit Employment Discrimination Law: Hicks & Its Impact on Summary Judgment*, 41 ST. LOUIS U. L.J. 519 (1997); Hon. Theodore McMillian, *Some Things Never Change*, 40 ST. LOUIS U. L.J. 3 (1996); Hon.

Because of all of his worldly activities he has received many awards and honors. There are so many he needs five walls to put up his plaques. Among them are Alpha Sigma Nu, the National Jesuit Honor Society; the Alumni Merit Award from his alma mater; the Award of Honor from the St. Louis Lawyer's Association; a Doctor of Humanities degree from the University of Missouri and a Doctor of Laws from St. Louis University and Harris-Stowe College.³⁷

Surely he has left his imprint on this community. His unselfish sacrifices have made the St. Louis Community a little better. He has uplifted the poor and the underprivileged. Can one contribute any more?

And in living all three aspects of his long life, he has made – and continues to make – a lasting impact on the law and the community. He has always recognized that the law substitutes orderly ritual for “the rule of tooth and claw”³⁸ and that the law in a civilized community gives society a means, forged by centuries of experience, to resolve disputes. That is all we have “standing between us and the tyranny of . . . unbridled, undisciplined feeling.”³⁹

Judge McMillian has, in my opinion, always believed in the Constitution, and writes in green ink in order to remind himself that the Constitution is “color blind” and that religion, race, or national origin are wholly irrelevant. He believes, in my opinion, in the high ideals and goals of that everlasting document and in the deep abiding faith of the framers – that the individual is entitled to limited freedom without undue interference by the government. He believes, as did the framers, in the great hope of our future and in shaping a better society and a better country.

The shadows are now lengthening and the twilight of our lives has descended upon both of us. But with all of his lifelong activities, he can look back, and in the quiet of the night recall the words of Judge Learned Hand:

A judge's life, like every other, has in it much of drudgery, senseless bickerings, stupid obstinacies, captious pettifogging. . . . These take an inordinate part of his time; they harass and befog the unhappy wretch, and at times almost drive him from that bench. . . . But there is something else that makes it . . . a delectable calling. For when the case is all in, and the turmoil

Theodore McMillian, *The Civil Rights Act of 1991 – One Step Forward on a Long Road*, 22 STETSON L. REV. 69 (1992); Hon. Theodore McMillian, *Reflections Upon the Retirement of Justice Marshall*, 35 HOW. L.J. 3 (1991); Hon. Theodore McMillian & Christopher J. Petrini, *Batson v. Kentucky: A Promise Unfulfilled*, 58 UMKC L. REV. 361 (1990); Hon. Theodore McMillian & Dorothy Lear McMurtry, *The Role of the Defense Lawyer in the Juvenile Court – Advocate or Social Worker?*, 14 ST. LOUIS U. L.J. 561 (1970).

37. He is also the 1992 recipient of the Bar Association of Metropolitan St. Louis Foundation Award and in 1996 the recipient of an Honorary Diplomat of the American Board of Trial Advocates.

38. LEARNED HAND, *THE SPIRIT OF LIBERTY* 87 (1974).

39. Felix Frankfurter, *Between Us and Tyranny*, TIME, Sept. 7, 1962, at 15.

stops, and after he is left alone, things begin to take form. From his pen or in his head, . . . out of the murk the pattern emerges, . . . the expression of what he has seen and what he has therefore made, the impress of his self upon the not-self, upon the hitherto formless material . . . over which he has now become the master. That is a pleasure which nobody who has felt it will be likely to underrate.⁴⁰

History will judge Ted McMillian on the “content of his character,” and, when all is said and done, he can look back on these eighty years and repeat to himself those holy words written two thousand years ago:

I have fought a good fight, I have finished my course, I have kept the faith: Henceforth there is laid up for me a crown of righteousness, which the Lord, the righteous judge shall give me at that day: and not to me only, but unto all them also that love his appearing.⁴¹

Ted McMillian is truly a symbol of all that is right about those “spacious skies” and “purple mountains” of “America the Beautiful.”⁴²

40. HAND, *supra* note 38, at 43.

41. *Timothy* 4:7.

42. Words by Katherine Lee Bates, Music by Samuel A. Ward (1893, 1895).