A TRIBUTE TO JUDGE MATTHEW JASEN

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At the turn of the 20th century, Matthew Jasen's parents arrived on these shores as immigrants who fled Russian-occupied Poland. They could hardly have imagined that their son would leave a significant mark on New York law.

Matthew was born in 1915, and by the end of the 20th century—as Judge Jasen—he had written decisions appearing in forty-six separate volumes of the New York Reports. Those dark green cloth-bound books cover an important era of New York jurisprudence, from 1968 through 1985, and no one can examine these volumes without appreciating Judge Jasen's role in them.

Never florid or pretentious, Judge Jasen's opinions are marked by directness and common sense. In all, he wrote close to 900 published decisions, 430 for the Court of Appeals majority, 284 dissents, 52 concurrences, and over 100 as an Eighth District Supreme Court Justice. The ratio of dissents to majority opinions is revealing. Many of the dissents were in criminal cases where he would rule with the prosecution, often as the sole, and one might add, courageous voice, for that result.

But it would be a mistake to say that he was blindly prosecutorial—or without compassion. To the contrary, he had World War II experiences that revealed a good deal of human suffering, which must have played a part in shaping his kind and thoughtful outlook.

A number of his writings were prescient. In Tebbutt v. Virostek,1 he dissented from the majority’s holding that a mother may not recover for emotional distress resulting from the stillbirth of a child caused by a physician’s malpractice. Critical of the decision, he said that the majority was relegating the unborn child “to a juridical limbo, where the negligent acts, with fatal effects, performed upon the child are neither compensated nor deterred.” It took almost

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1 483 N.E.2d 1142 (N.Y. 1985).
twenty years, but in *Broadnax v. Gonzalez*,\(^2\) the Court of Appeals came to side with Judge Jasen, holding that “Tebbutt has failed to withstand the cold light of logic and experience.”

In *Heaney v. Purdy*,\(^3\) he joined in Judge Breitel’s dissent regarding what constitutes a favorable termination of a criminal case for purposes of a malicious prosecution action. Nineteen years later, in *Smith-Hunter v. Harvey*,\(^4\) the Court of Appeals recognized the virtues of the dissent in *Heaney*, just as a number of judges have recognized the merit in Judge Jasen’s dissent in *People v. Register*,\(^5\) dealing with depraved indifference murder.

And who can forget Judge Jasen’s scholarly treatment of attempted murder in *People v. Dlugash*?\(^6\) A jury found Dlugash guilty of murder for killing the victim. The defense? He was not guilty because the victim was already dead, having just been shot repeatedly by someone else at the scene before Dlugash shot the victim several times. The Appellate Division reversed the conviction and dismissed the indictment, concluding that the defendant, when he dispatched five rounds into the decedent, believed him to be dead and there was “not a scintilla of evidence to the contrary.”

Speaking for the Court of Appeals in reversing and finding Dlugash guilty of attempted murder, Judge Jasen delivered a comprehensive, historical account of the development of the law of attempt and the defense of impossibility. “Man dies but once” he wrote, but a defendant is not exonerated from attempted murder under these facts. I, for one, cannot think of writing anything on the subject of criminal attempt without turning to Judge Jasen’s wonderful treatment of the law, in *Dlugash*, dealing with Lady Eldon’s lace, picking empty pockets, and shooting stuffed deer.\(^7\)

Despite his achievements, Judge Jasen was a modest man. Until recently I did not know that after enlisting in the Army in 1943 he became an officer and took part in three major military campaigns, and that in a particularly memorable moment in his service, he

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\(^3\) 272 N.E.2d 550 (N.Y. 1971).

\(^4\) 734 N.E.2d 750 (N.Y. 2000).

\(^5\) 457 N.E.2d 704 (N.Y. 1983).


\(^7\) The subject invariably arises in Sherlock Holmes circles when contemplating what crime Colonel Sebastian Moran committed when, in “The Adventures of the Empty House,” he was set up to shoot at a dummy of Sherlock Holmes, believing it to be Holmes himself. *See Judge S. Tupper Bigelow, Was It Attempted Murder?*, 14 BAKER ST. J. 99 (No. 2, 1964). Yes, I say, along with Judge Jasen, it was attempted murder.
participated in the liberation of French prisoners of war from a Nazi internment camp. The moment was captured by a British photographer, picturing Judge Jasen in a *Life* magazine article. After the war, General Lucius D. Clay appointed him to the United States Military Government Court in Heidelberg, Germany, which, in a sense, launched his judicial career.

As a war veteran, a family man, and a great judge, he loved his country, he loved people, and he loved the law. “Man dies but once,” to quote him, but his legacy will always endure.