

THE HONORABLE MATTHEW J. JASEN

[This tribute was written for this dedication to Judge Jasen on the occasion of his ninetieth birthday, shortly before he passed away.]

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Judge Matthew J. Jasen reaches the age of ninety on December 13, 2005. As his last law clerk, it is my honor to provide this personal recollection of my tenure from mid-1984 through 1985. It has been two decades since my service with the Judge. It seems like yesterday. His accomplishments and integrity shine as brightly today as they did twenty years ago. As his law clerks can confirm, while we worked at the periphery of the adjudicatory process, clerking for the Judge was a watershed period in our lives. For most of us, we began work as young, recent graduates, and left the clerkship as lawyers, carrying with us the lessons of excellence that Judge Jasen taught by example. This is one law clerk's personal remembrance of a great man to whom all New Yorkers owe a great debt of gratitude. This is not a description or evaluation of the Judge's opinions; that has been done with great skill and insight by others.¹ This is my tribute.

THE INTERVIEW IN ALBANY

Albany in late summer is just about perfect. Warm days, cool nights, and the promise of a new school year. It was 1983 (my seventh year in Albany) and I was about to begin my final year at

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¹ *Buffalo Law Review* presented an excellent tribute to Judge Jasen upon his retirement from the court on December 31, 1985. See *A Tribute to Judge Matthew J. Jasen*, 35 BUFF. L. REV. 1-38 (1986). This tribute liberally draws upon the perceptive analyses of some of Judge Jasen's law clerks (Alan D. Scheinkman, Hon. Edward A. Sheridan, and Michael B. Powers) and Judge Jasen's colleagues (most notably Hon. Charles D. Breitel and Hon. Hugh R. Jones).

Albany Law School of Union University. At Albany Law School, the Judges of the Court of Appeals were and are revered. When appearing at the law school for moot court competitions, they were greeted like rock stars. This was especially true for the distinguished alumni of the law school who served on the Court of Appeals, particularly Hon. Lawrence H. Cooke (Chief Judge for part of my tenure) and Hon. Domenick L. Gabrielli. Relaxing in my apartment in Albany, I received a telephone call from Florence Wojtanik, Judge Jasen's secretary, and was invited to an interview with Judge Jasen. I was thrilled and unprepared.

First things first. I needed a decent suit, which I bought at Sherman's on State Street. Then, I consulted with some of the law school's respected faculty. In 1983, Professor David D. Siegel was the school's legendary New York Practice teacher and the preeminent commentator upon the civil jurisprudence of the Court of Appeals. He referred to Judge Jasen as "solid as a *rock*"—the word "rock" emphatically and perfectly articulated as a three syllable word—very high praise indeed considering the source. Professor Siegel also recalled that one of his finest students, Alan D. Scheinkman, had clerked for Judge Jasen. I also knew that Professor Michael J. Hutter, a star in the New York State legal community, had clerked for Judge Jasen in the 1970s. These former clerks were, to borrow Judge Jasen's phrase, "long-ball hitters."

Court of Appeals Hall on Eagle Street in Albany is, as my son John said on a recent visit, "awesome." My interview was not my first visit to the court. I worked part-time at the nearby Legislative Office Building and, at the suggestion of Barney Tansey (the court crier), occasionally attended oral arguments.² But this visit to the court was different. I was there on serious business.

Judge Jasen greeted me in his spacious, wood-paneled chambers. As one article on the Court of Appeals once described him, Judge Jasen was straight from Hollywood's "central casting"—handsome, with a full head of white hair, tanned complexion, and impeccably dressed in a conservative suit. He was busy and immediately cut to the chase. He explained, in his now familiar crisp, staccato delivery, that the court worked extremely hard and a clerkship with him would not be for the "faint of heart." He explained his

² For example, I attended the oral argument in *Fullilove v. Carey*, 399 N.E.2d 1203 (N.Y. 1979), and *Fullilove v. Beame*, 398 N.E.2d 765 (N.Y. 1979), on Wednesday, September 5, 1979. Mr. Tansey's suggestion was based on his anticipation that the cases would be "well argued" by two of the leading appellate advocates in the state, L. Kevin Sheridan and Shirley Adelson Siegel.

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“awesome responsibility” as a member of a “court of last resort”—“we are the end of the road in almost all cases.” There was a “great burden” to “get it right” because further appeals to the Supreme Court were “very rare.” He described an “exhausting” workload. It was a clear and direct message that did not invite debate or comment: his law clerks are expected to meet an extraordinarily high standard and work ethic. I left the interview uncertain about my prospects; there were few questions and my listening skills were very much on display. In any event, soon thereafter, I accepted the offer from Judge Jasen without hesitation.

THE JASEN CHAMBERS: THE SETTING

Immediately after taking the bar examination in the summer of 1984, I moved to the Delaware District in the City of Buffalo to begin work with Judge Jasen. The Judge’s chambers were located in the Erie County Hall on Franklin Street—a magnificent example of High Victorian Gothic in downtown Buffalo.³ The building had an aura of history. It was the site of the trial of President William McKinley’s assassin, Leon Czolgosz, in 1901. It was built on the site of the surrender of the Village of Buffalo to the British in 1813. Judge Jasen made history on the Fourth Floor.

The “Jasen Chambers” was like a tiny, collegial law firm led by a senior partner with more than one-half century of experience and unassailable, confident judgment. When in Buffalo, Judge Jasen attended to myriad tasks—writings, motions, criminal leave applications (some of which were argued telephonically or in chambers), correspondence, and reading briefs and other professional materials. The work was unremitting, particularly for the Judge. Despite the press of official business, Judge Jasen was ready with wise counsel on all sorts of personal and professional matters. Judge Jasen has a mastery of the law (he wrote much of it), but he also understands *people*, and their real world challenges.

My senior clerk was Vincent Martin Bonventre, a constitutional scholar, straight shooter, and patient teacher. Like Judge Jasen, Vin has a rare gift for rigorously honest expression and penetrating legal analysis, matched only by a warm sense of humor. In Buffalo, the law clerks shared an office, which also functioned as a small law

³ Much of Buffalo’s architecture is a national treasure, and the Erie County Hall greatly enhances the downtown skyline. See BUFFALO ARCHITECTURAL GUIDEBOOK CORPORATION, BUFFALO ARCHITECTURE: A GUIDE 64–65 (Massachusetts Institute of Technology 1981) (1985).

library (and location for *Florence's* fabled "hot shot" coffeemaker). Vin had the choice desk from which he could watch the snow squalls roll off Lake Erie. From my desk, I could admire the Liberty Bank Building, which was crowned by two, reduced-in-scale replicas of Bartholdi's Statue of Liberty. The ethic and tradition of the Jasen Chambers was reinforced by my senior clerk.

There was a unique *esprit de corps* in chambers. Upon our return to Buffalo from Albany, we all tried to catch our breath. In truth, we were exhausted. And it was in Buffalo chambers that we had a chance to relax a bit and reflect upon the events of the day. Judge Jasen was warm, engaging, and interested in the law and beyond. He was immersed in the cases before the court, but was also proud of the basketball success of Canisius College (his alma mater) in 1985. He was swamped with a continuing flood of motions, briefs and other paperwork, but was thrilled when underdog Villanova upset Georgetown in the NCAA finals. When congratulating me on passing the New York State bar examination, the Judge was as pleased as I was relieved, and he directed Vin to arrange an appropriate celebration: "Now Vince, take him out and do it, but don't *overdo* it." He did and we didn't.

JUDGE JASEN'S WORK ETHIC

Judge Jasen's work ethic was exceptionally intense. In Albany, he was among the first to arrive at the Court in the morning (he had a light breakfast and read the *New York Times* before I arrived) and was among the last to leave in the evening. After a full day of conferences (with his colleagues in the morning and with his clerks while he ate lunch), oral arguments (seven or more per day), and dinner with his colleagues (at Albany landmarks such as "Jack's")—Judge Jasen would return to the court. In the evenings, he would draft by hand (on a yellow legal pad with a black felt tip pen), the case report that he would deliver the next morning in conference with his colleagues, which would usually serve as the first draft of his opinions. He took every case and motion seriously; there were no "unimportant" cases or motions. He handled emergency matters, called "red cards" because of the red index card affixed to the papers by the Clerk's Office. No one out-worked Judge Jasen, and Judge Jasen out-worked his law clerks.

COLLEGIALITY

Judge Jasen accorded the views of his colleagues' respectful consideration. As former Chief Judge Breitel stated: "His mind and understanding were always reachable, even if at the inception of the discussion he and others were at the opposite poles of contention."⁴ This assessment is undoubtedly correct. I recall an occasion where Judge (now Chief Judge) Judith S. Kaye—brilliant and urbane—visited with Judge Jasen in Albany to discuss a difficult case. Only Judge Jasen and Judge Kaye know what was discussed. But after she left, Judge Jasen told Vin and myself that he was going to "re-work" the case—by which he meant that he would start from scratch, re-read the briefs, notes from oral argument, memoranda, and draft opinions, and reconsider his own views on the case. That he would undertake such an eleventh hour reconsideration was evidence of the consummate respect he has for Chief Judge Kaye and the judicial process.

A COURAGEOUS JUDICIAL LEGACY

Against this backdrop, Judge Jasen's work at the Court of Appeals yielded an extraordinary and courageous judicial legacy. He has written on virtually every substantive area of New York law, including important questions of state constitutional law.⁵ Because of Judge Jasen's service to the State of New York, society's powerless—most notably children—are safer and better protected. Mothers suffering injuries through torts are better compensated. The interests of the victims of violent crimes are duly considered and protected. Indeed, as noted by the Honorable Hugh R. Jones: "Judge Jasen was a great articulator of the interests of the victims of crimes and of society as a whole."⁶

Judge Jasen expressed his views with passion and courage. Former Chief Judge Charles D. Breitel offered these observations at the time of Judge Jasen's retirement from the Court:

It is because in his intensity of application in expressing both agreement and disagreement, stubbornly and vehemently, he made an outstanding and characteristic contribution to the

⁴ Hon. Charles D. Breitel, *A Tribute to Judge Matthew J. Jasen*, 35 BUFF. L. REV. 5, 6 (1986).

⁵ See, e.g., *Maresca v. Cuomo*, 475 N.E.2d 95, 100 (N.Y. 1984) (sustaining the validity of state constitutional mandate compelling judicial retirement at age seventy).

⁶ Hon. Hugh R. Jones, *A Tribute to Judge Matthew J. Jasen*, 35 BUFF. L. REV. 7, 8 (1986).

court on which he served. Stubborn and vehement, yes, but confident, firm, and, when appropriate, courageous in debating his positions. Perhaps, most important, disinterested but not uninterested, and little influenced by the popularity or unpopularity of the views he propounded.⁷

Judge Jasen recognized “the moral consequences of judicial action, as well as inaction and silence” and his writings—particularly the lone dissents—are a testament to the Judge’s “fidelity to the rule of law.”⁸

THE “GREAT DISSENTER”

Judge Jasen has been referred to as a “great dissenter.”⁹ Alan D. Scheinkman, a law clerk to Judge Jasen in the 1970s, and Edward A. Sheridan have observed: “That appellation he should bear with honor, for it reflects the independence, the courage, and the strength of character he brought to his judging.”¹⁰ Michael B. Powers, a law clerk to Judge Jasen in the early 1980s, made the good point that Judge Jasen—while referred to as a “great dissenter”—“did not dissent more frequently than his colleagues.”¹¹ “[T]he greatness of Judge Jasen’s dissenting opinions [is due to] . . . the scholarly, insightful, and powerful way in which his dissents were composed and because of the effort and courage required to author them.”¹²

Over the years, Judge Jasen’s opinions struck familiar themes—respect for Supreme Court and other controlling precedent—protection of society’s powerless—respect for the rule of law and its equal application to all three branches of government. When these matters were at stake, and his view did not garner a majority, he dissented. He did not “slough off” hard decisions, or “paper over” material differences of opinion—he dissented, with passion, often in what he termed “full blown” dissents.

These dissents were profiles in courage: one Judge, often standing alone, speaking truth to power, without regard for the personal or political consequences. First and foremost, the dissents represented

⁷ Breitel, *supra* note 4, at 6.

⁸ Hon. Matthew J. Jasen, Remarks at the Ceremony Marking Retirement of Senior Associate Judge Matthew J. Jasen (Dec. 17, 1985), 66 N.Y.2d vii, ix (1985).

⁹ Alan D. Scheinkman & Edward A. Sheridan, *A Tribute to Judge Matthew J. Jasen*, 35 BUFF. L. REV. 14, 20 (1986).

¹⁰ *Id.*

¹¹ Michael B. Powers, *A Tribute to Judge Matthew J. Jasen*, 35 BUFF. L. REV. 23, 24 (1986).

¹² *Id.*

the Judge's forward-looking appeal to the reason of a higher court (the U.S. Supreme Court, on federal constitutional questions), or a future Court of Appeals (on state law issues). In some cases, vindication for Judge Jasen's dissenting view came quickly.¹³ In other cases, ultimate vindication would take a generation.¹⁴ The dissents demonstrated that the Judge was a farsighted tactician—they set forth arguments that swayed the outcome of cases long after he left the bench. Setting aside the merits of the cases (upon which reasonable minds might differ), Judge Jasen's dissents represent a hallmark of the Judge's deeply principled jurisprudence and an enduring symbol of judicial independence.

RETIREMENT FROM THE COURT: "A JURIST OF INESTIMABLE
CHARACTER, COMPETENCE AND COMMITMENT"

One of the most memorable aspects of my clerkship was the opportunity to see the statewide outpouring of affection and admiration for the Judge upon his retirement from the Court of Appeals in 1985. As the Judge's last law clerk, I had a front row seat for celebrations honoring Judge Jasen and recalling his remarkable contribution to the State of New York and the law.

On November 9, 1985, an intimate gathering of the Judge's law clerks and their spouses was held at the 38th Floor restaurant of the landmark Marine Midland Center in Buffalo; the spirits were high, the speeches were heartfelt, and we were bound by a shared admiration for Judge Jasen. Later that month, Governor Mario M. Cuomo joined the chorus with an alliterative flourish:

Judge Jasen has held judicial office for 30 years and he served with distinction on the Court of Appeals since 1968 . .

. .

He is rightly regarded by present and past members of the court, the bench and the bar as a jurist of inestimable character, competence and commitment. On behalf of the people of the State of New York, I thank Judge Jasen for his exemplary public service and wish him continued success in what we are sure is a long and fruitful career that lies ahead of him.¹⁵

¹³ See, e.g., *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986), *rev'g* *People v. P.J. Video, Inc.*, 483 N.E.2d 1120 (N.Y. 1985).

¹⁴ See, e.g., *Tebbutt v. Virostek*, 483 N.E.2d 1142 (N.Y. 1985), *overruled by* *Broadnax v. Gonzalez*, 809 N.E.2d 645 (N.Y. 2004).

¹⁵ Dave Ernst, *Cuomo Praises Nominee to State Court of Appeals*, BUFF. NEWS, Nov. 28,

There were also private and public events in Albany to mark the occasion of the Judge's retirement, including a ceremony in the Conference Room of the Court of Appeals on December 17, 1985 (filmed by public television), and a family gathering at the University Club.

Most notably, on December 11, 1985, the Bar Association of Erie County held a Testimonial Dinner and Reception in honor of Judge Jasen at the Hyatt Regency Hotel in Buffalo. The dinner was attended by the entire Court of Appeals, former judges of the Court of Appeals (including former Chief Judge Charles D. Breitell), Judge Jasen's successor, Hon. Stewart F. Hancock, Jr., and the leaders of the Buffalo bar, including Philip H. Magner, Jr. and Michael B. Powers. The Bar Association collected some of the prevailing observations about Judge Jasen:

"A man who is, above all else, principled and humane."

"He is the voice of the powerless."

"A common sense approach is his hallmark."

"A Jasen opinion is crystal clear, not only to legal scholars but, more importantly, to the average citizen. He encourages public understanding and respect of the law."

"He will withstand any pressure for a moral purpose. He has the rare ability to voice a lone dissent when he feels that justice is in question."¹⁶

It should come as no surprise that these comments still ring true today. It is with affection, admiration, and gratitude that I extend my warmest personal regards to Judge Jasen on the occasion of his ninetieth birthday.

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1985 (quoting Governor Mario Cuomo).

¹⁶ *Legal Community to Honor Judge Jasen on Distinguished Career*, THE BULLETIN, Nov. 1985, at 1. *The Bulletin* is the official monthly publication of the Bar Association of Erie County, New York.