A Tribute to Judge Matthew J. Jasen

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A Tribute to Judge Matthew J. Jasen

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MATTHEW J. JASEN
ASSOCIATE JUDGE
NEW YORK STATE COURT OF APPEALS
1968-1985
A Tribute to Judge Matthew J. Jasen

I.

Those who study the New York Court of Appeals could justifiably conclude that Judge Matthew J. Jasen’s greatest achievement during the eighteen years he served the court as an associate judge was one or a combination of the 800 opinions he wrote. Those opinions have been lauded as models of clarity, style, and careful thought. And his accumulated work for the court does indeed represent a substantial judicial achievement, of which Judge Jasen, his former colleagues, and every citizen of our state can be justly proud.

On the occasion of his retirement, I noted a particular achievement of which he should also be most proud. He displayed a very special loyalty to his personal staff, including a succession of talented law clerks, rotated, according to his policy, every two years. Their accolades, based on intimate working knowledge and voiced with genuine sincerity, both to me and to the public, reciprocate that loyalty and speak very eloquently of his services as a judge of the court of appeals. They have served him well as he has served the law of this state well.

Judge Jasen has earned and received a proportionate share of the awards and honors from the legal and academic communities that go with service on our state’s highest court. They will no doubt be recounted elsewhere in the pages of this tribute in a volume of the law review of his alma mater. From my vantage point as a colleague on the great court, I can say with certainty that I was proud to be a part of the court of appeals as an associate judge and as chief judge during many years of Judge Jasen’s service and that I concur in the assessment of Judge Jasen by one of
Buffalo’s leading attorneys who said of him: “After family and church, the law has been the consuming passion of his life, as a student, lawyer, and judge.”

On behalf of the court of appeals, I thank the Buffalo Law Review for its rightful recognition of Judge Jasen’s important and lengthy service to the State of New York Court of Appeals.

—HONORABLE SOL WACHTLER
CHIEF JUDGE
STATE OF NEW YORK COURT OF APPEALS

II.

I am honored to join the Buffalo Law Review’s tribute to Matthew J. Jasen—distinguished jurist and great American—who, through a lifetime of tireless effort, has bequeathed us a great legacy of common sense jurisprudence, appreciation of our democratic form of government, and concern for basic human rights.

Because others in this tribute will undoubtedly relate about Judge Jasen’s contributions to the law and his judicial service, I thought it important to record his early years and times.

Judge Jasen was a young man when I first came to know him in 1949 during an interview seeking to apprentice with him upon my graduation from law school. In spite of his relative youth, it was obvious to me that here was an unusual man of great learning and intelligence who expressed mature judgment, not only on legal subjects, but, perhaps more importantly, on society and life generally. I was elated to be asked to join him in the practice of law and to be exposed to his wisdom and learning.

Enormously self-disciplined, he was possessed of unusual energy and a commitment to excellence. As a trial attorney, he soon gained recognition as one of the leading attorneys in the county. I recall vividly the ardor with which he represented his clients. There was a toughness of scrutiny and perseverance in him, but it was always marked with grace and fairness.

His practice flourished, requiring additional lawyers and staff each year and the formation of Jasen, Manz, Johnson and Bayger. In 1957, he was appointed by Governor Averell Harriman to the New York State Supreme Court. The following year, he was elected to a full term, being the first democrat in modern history
Recognizing his outstanding service as a trial justice, in 1967 all four major political parties nominated him for election to the court of appeals, where he served with great distinction until his statutorily mandated retirement on December 31, 1985.

I said at the outset that I would record Judge Jasen's early years and times, so I take you to the beginning. His parents were Polish immigrants who came to this country from Kalisz in Russian occupied Poland at the turn of the century to escape Russian tyranny and to seek liberty and freedom of opportunity in this country. They were a great influence on the judge. They imbued him with a strong sense of justice and fairness and with a concern for people's basic human rights that served him well throughout his career as a lawyer and judge.

Thus, it is understandable that his service to our country during World War II was marked with courage and distinction. He served for three years with the Seventh Army in Europe and participated in three major campaigns with a spearhead detachment as a military government officer, for which he was cited. After the war ended, he served for a time as President of the United States Security Review Board for the State of Baden-Württenberg, Germany. In 1946, at the age of 31, he accepted an appointment as United States Judge for the Third Military Government Judicial District at Heidelberg, Germany, having civil and criminal jurisdiction over all persons in the American occupied zone of Germany not subject to Military (courts martial) Law.

"It was," as Judge Jasen recalled in his remarks upon retiring from the court of appeals, "a tremendous challenge to administer justice to offenders of American law in that foreign land whose conception of justice was the ultimate result of a long evaluation of doctrines raising inhumanity to a level of a principle." Nevertheless, he succeeded in restoring to the German people in his district the rule of justice and equality before the law. Upon his resignation in the fall of 1945 to return to the practice of law in Buffalo, he was cited for his "high and distinguished service in the interest of justice."

During my long association with Judge Jasen, I recall many conversations about his ambitions and thoughts as a young lawyer. One such conversation stands out vividly in my mind because it illustrates his strong passion for justice and particularly a sense of
injustice that would not allow him to ignore wrongs, whether they infected the whole social order or merely some unfortunate individual. He told me that when he left law school during the great depression the thought of someday becoming a judge (let alone a judge of the New York State Court of Appeals) never passed his mind. But circumstances and time changed all that.

Towards the end of World War II, he was exposed at Dachau, Germany to a tragedy of universal implication—the horror of the Holocaust. Never in the history of mankind were so many innocent men, women, and children singled out for persecution and destruction by one mad man and his followers. This dark period in human history has never been forgotten by him; it has been his fervent hope that such a tragedy and miscarriage of justice may never again befall any group, race, or religion.

Being deeply moved by those events, he resolved to do his part to make sure our government never denied its citizens their basic human rights by assuring a strong and independent judiciary to prevent such a human tragedy from occurring here. More importantly, for more than forty years, he has been a human rights exponent, lecturing before high school, college, and civic groups about the Holocaust and genocide to advance respect for all people of the world. Recently, the New York State Education Department prepared a two-volume human rights series, "Teaching About The Holocaust And Genocide," in which extended excerpts from an address delivered by Judge Jasen on the subject were included as the rationale of the entire published series.

Judge Jasen is also a strong believer in democracy and does not hesitate to express on every appropriate occasion his great pride in our country and what it stands for. But he is equally critical of the apathy among many of our citizens who expect to reap the blessings of freedom and a democratic form of government without undergoing the fatigue of supporting it. He has truly been a missionary of democracy and human rights in our country, not only by his example as a believer and practitioner of justice and fairness to all who came before him, but also as an influential member for eighteen years on the premier state appellate court in the nation.

I salute Matthew J. Jasen, a superb judge who has made significant contributions to the law and to our judicial system. I also salute him as a concerned and caring human being, whose outspo-
ken support for democracy and human rights has focused for us a
better understanding of the need to preserve and pass on to the
generations who will follow us the heritage of individual human
freedom and equal justice under law.

This modest tribute to a dear friend and distinguished jurist
concerns only a part of an immensely productive life. There is
every reason to suspect that the years of "retirement"—an obvi-
ous misnomer in Judge Jasen’s case—will not temper his pursuit
of justice and his dedicated concern for his country and his fellow
man.

—HONORABLE VICTOR E. MANZ
FAMILY COURT OF THE STATE OF NEW YORK

III.

Judge Matthew J. Jasen and I had not known one another un-
til we ran, I as a republican and he as a democratic nominee, as
candidates for the positions of associate judges of the New York
State Court of Appeals. Thereafter we served together as col-
leagues from 1968 to the end of 1978, when I retired for age. (I
had served as a member of the court during 1967 by appointment
to fill a vacancy.) Over the years we became and still are close
friends. If these betoken a bias on my part in his favor, so be it.

It is customary these days, to a tiresome degree, and most
often fruitlessly, to classify judges categorically by conclusory and
all too-encompassing labels: conservative—liberal, activist—re-
strained, pro-this—anti-that and the like. The stretching for facile
labels to achieve the nomenclature but not necessarily the sub-
stance of analysis is an obvious temptation. Often a flight from
thinking, it results inevitably in oversimplification and superficial-
ity. Most judges, indeed most people, do not classify so simply.
Certainly, that should be true of persons engaged in an analytical
profession in a very complicated world, and all the more of those
who serve in judicial roles.

So the better approach is to attempt to describe and assess the
whole man, and that also means the whole judge. A prefatory da-
tum is that Judge Jasen and I often disagreed on judicial issues, as
we also often did on non-judicial questions. It is also true that we
often agreed on judicial issues. I am delighted to say that the same
could be said of most of the judges with whom I have served both
in the appellate division and the court of appeals.

Indeed, the value and purpose of having a collegial court is that there be the mix of agreement and disagreement among the members of the court. It explains why, as one examines the levels of an appellate hierarchy, the several levels have larger numbers on their panels as the higher stages in the hierarchy are attained, typically: three, five, seven, and even nine, as in the highest court of the nation.

It is not good to have too much agreement in a court. It is a disabling defect to have too much disagreement in a court. It can even be disastrous.

What is the relevance of this discussion in evaluating the judicial service of Judge Jasen? 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 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.

Of course, Judge Jasen was not perfect. Indeed, a “perfect” member of a collegial court, if one there could be, would be an intolerable detriment—anywhere, except in a perfect “other” world.

The point is that Judge Jasen was a superb member of a collegial court—busy, hard working, and most often dealing with some of the very difficult juridical questions of its time. 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. This condition does not prevail at all times in all courts nor with all members of a court in any court. But the achievement of rational resolution of difficult questions and the high quality of such resolution is the make of a good or a great appellate court.

If these premises be true, then it is also true that Judge Jasen was an eminently valuable member of his court in the time of his service. The rational resolution of difficult issues can be discerned in the several opinions of the court in the same or in compared cases. Do the opinions of judges in disagreement meet one another or do they bypass one another? Do the opinions evidence that they have, in meeting, contributed to the resolution of the
issues? Or do they reveal rancor—manifest, flat rejection of one another and the contrary views expressed? Do the contrary opinions square off against one another? Or, on the contrary, do the members of the court, even in their contrary opinions, reflect the cross influence of different minds, of different backgrounds, and, yes, even of different philosophies? In short, does the disagreement display no more than views at sterile loggerheads, or does the resolution of the issues demonstrate that the process was enhanced by rational and fruitful disagreement?

By all of these tests, the members of the court and the public whom he served were well served by Judge Jasen. I certainly was, even when I thought he was wrong and I was right.

—Honorable Charles D. Breitel
Chief Judge, retired
State of New York Court of Appeals

IV.

It was my privilege to serve with Matt Jasen during the entire twelve years that I sat on the court of appeals; he was a member of the court before I came and for one year after I left. During that period he was a capital colleague.

I have never troubled to tally the instances in which we agreed. We were of the same view as to the proper disposition in many cases, either as members of the majority or as codissenters. In other cases we found ourselves in disagreement. Our shared views were the product of shared conviction as to the pertinent law and its application in the particular instance. There were never alliances of bargained accommodation on the court. Judge Jasen did not hesitate to speak forthrightly in conference and was consistently articulate and forceful in his writings. Perhaps more than any other judge on the court, he was reluctant, if he differed with the majority, to let his difference pass unwritten. His views were strongly stated in terms of deeply held principle, both of legal theory and of societal values. He regularly lifted up what he perceived to be the controlling principle and obliged the other members of the court to confront and publicly address his concern.

I am too close, both to Matt as a person and to the work of the court during the years we were together, to assay an evalua-
tion of the contributions that he made to the fabric of the law in various fields. That must be left to legal scholars and to the assessment of history.

I am confident, without waiting, however, to identify his significant contributions in expanding recognition of the standing of litigants to submit their contentions and disputes to judicial resolution, in developing the concepts of judicial regulation of land use, and in accepting judicial responsibility to mold and accommodate legal principles to the dynamics of society without delay awaiting legislative action. In the formulation and application of the criminal law, Judge Jasen was a great articulator of the interests of the victims of crimes and of society as a whole.

Judge Jasen was a great companion, utterly fair, insistent on the merit of his own views but never belligerent or combative for the sake of combat. It was a privilege and a pleasure to have served on the court when he was one of its members.

—HONORABLE HUGH R. JONES
ASSOCIATE JUDGE, RETIRED
STATE OF NEW YORK COURT OF APPEALS

V.

A great deal has happened since 20 N.Y.2d (1968) was bound and catalogued. The ensuing volumes have brought us to the present, and at 67 N.Y.2d (1985), it seems almost like middle age. Within the span, there is a vast body of decisional law and the abiding, forty-seven-volume presence of Judge Matthew J. Jasen, who retired from the New York Court of Appeals on December 31, 1985.

An author of almost 800 decisions covering eighteen years and forty-seven volumes has no place to hide amid those dark green books. But Judge Jasen was never one to hide, either by hedging or by throwing in with increasingly disparate majorities. There are, of course, landmark decisions which bear his name. He wrote for the court in prohibiting the use of polygraph evidence at trials and in sustaining the constitutionality of imposing criminal penalties against narcotics addicts. He afforded a qualified

privilege, denying absolute immunity for libel, to those who furnish communications to the district attorney. He rejected the concept of an action brought for "wrongful life," repudiated the adoption of one homosexual by another, enforced the sixth amendment right to effective assistance of counsel in cases of joint representation, and established requisites for guilty pleas. He sustained the concept of affirmative defenses in criminal cases. He defined the "threshold" in no-fault cases. Because they established law, these cases will spawn dozens of references in Shepard's. They will be cited as dispositive one-liners for years to come.

In other instances, Judge Jasen showed a practical, refreshing approach. Many of us have witnessed the pall that pervaded a courtroom when an attorney forgot to include a key component for a prima facie case in his opening statement. His opponent would pounce and move to dismiss. Hands were wrung. Why not let him reopen? Yes, of course, why not, said Judge Jasen. And why not have the "chain of evidence" go to its weight, rather than exacting a sometimes fanatical slavishness to unrealistic standards of admissibility.

These decisions, and others of renowned calibre, reveal only a glimpse of what Judge Jasen embodied. It is in dissent that we see so much more of him and of his practical, consistent philosophy, as sometimes expressed in lesser cases.

Most of us have never sat on seven-member tribunals of any sort, but it's one's guess that the sole dissenter's space must be, as

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10. For example, a future decision might cite Jasen as follows: "The plea allocution was proper. People v. Harris, 61 N.Y.2d 9."
Damon Runyon might put it, lonelier than somewhat. Yet, the views expressed by Judge Jasen in his dissents were highly deserving of expression, considering that they often reflected the voice of the populus.

One of the first cases that comes to mind is *People v. Costales*. The police, armed with a valid search warrant, arrived to search an apartment. Costales, a latecomer, who apparently was jarred by the unexpected presence of the law, threw down his raincoat, which landed with a thud. The police picked it up and felt the outline of a gun in the pocket. Costales must have figured that if he threw the gun on the floor he would not be accountable for it, even though the cops saw him do it. According to the court of appeals, he was right, by a six-to-one vote. Judge Jasen was the one, and it is not telling tales out of school to suppose that a high proportion of the American population would agree with him. He was, in this sense, like the Broadway play of some years ago, "A Majority of One."14

H. Richard Uviller, Columbia Law School professor and constitutional law expert, puts it this way:

Judge Jasen has long occupied the seat of good sense on the state's high court. His contribution to the Court's literature has been characteristically clear and intelligible. Though respectful of the court's developed positions, Judge Jasen's opinions frequently circumnavigate swirling doctrinal currents that often seem to bedevil others. Judge Jasen, speaking the voice of reason and ordinary common sense, reassures the rest of us that law in this state is still in a healthy relationship to life. Moreover, to the extent that his approach contributed to the court's opus, Judge Jasen played a vital part in the evolutionary process of perpetual redefinition that is our cherished judicial mode of justice.

If the decisional law, particularly in criminal cases, seems to have undulated, it was without the subscription of Judge Jasen. For him, stare decisis was not easily brushed aside, it having been the basis for his concurrences in sixth amendment cases with which he plainly disagreed.15 Nevertheless, the doctrine could not,

in his view, be imposed as a barrier to what he regarded as common sense. In *People v. Knapp*, he wrote in dissent:

I believe that there comes a point at which an appellate court, such as ours, must recognize that the dictates of common sense and reason must be considered in striking a balance between a suspect's fundamental right to counsel and the fundamental duty of the police to aid persons in trouble, particularly those who may be the victims of violent crimes. A rule that turns criminals free can be justified by only clear and convincing evidence that its benefit to society outweighs its cost to society. 10

This dissent is one of the clearest manifestations of his judicial philosophy, and it is no coincidence that his stirring protest was prompted in a case in which sixth amendment restrictions were placed on the police who, with no constitutional exploitation in mind, were merely trying to locate and rescue a missing person. It would be a grave mistake to glibly pass off such language as the incantations of a tough, prosecution-minded judge. We have other evidence. These are the expressions of a judge aiming to adjust constitutional doctrines to accommodate crime victims who, in his view, are sacrificed by extravagant extensions of the Constitution. The evidence is Judge Jasen's consistent advocacy for victims of all types, be they crime victims, industrial accident victims, or children.

No Jasen decision is masked in obfuscation or asphyxiated in clouds of words. There is only clear thought and expression. The reader always knows what is at issue and how it is being decided. His opening paragraphs are elegant in their simplicity of style. Consider: "This appeal involves a mother's attempt to gain custody of her child since his birth in July, 1980."

Judge Jasen, writing for the court, first chronicled the birth mother's persistent attempts to retrieve the child, and then made this observation: "[P]etitioner's poverty and alienage must not be held against her. Such socioeconomic factors, unless sufficient to establish neglect or unfitness of the parent under the specific circumstances of a particular case, are irrelevant and impermissible considerations." 18 Custody was awarded to the birth mother.

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18. *Id.* at 430, 462 N.E.2d at 1170, 474 N.Y.S.2d at 452.
In the opening paragraph of *In re Aurora Corp. v. Tully*, he orients the reader: "We are asked to decide on this appeal whether §181 of the Tax Law impermissibly discriminates against foreign corporations in violation of the commerce clause of the United States Constitution."¹⁹

In *O'Toole v. Greenberg*, the opening sentence encapsulates the holding with an admirable economy of words. "A medical malpractice action brought by a husband and wife seeking recovery of the ordinary costs of raising a healthy, normal child, born after an unsuccessful birth control operation, does not state a legally cognizable claim."²⁰ If one wants to read on, one may, but many will have pretty well learned all they need to know.

In *Atkins v. Glens Falls City School District*, he zeroes in at the outset: "On this appeal, we are called upon to define the scope of the duty owed by a proprietor of a baseball field to the spectators attending its games."²¹ The specific point involved was whether an owner is liable for injuries sustained by a spectator who, while standing behind a three-foot-high fence along the third-base line, was struck by a foul ball. Judge Jasen, in exploring the issue, journeyed through sister-state decisions, analyzed the holdings, and shaped the rule. That the case divided the court, and was concededly close, does not detract from the directness of the holding: "[I]n the exercise of reasonable care, the proprietor of a ball park need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest."²²

Fifteen years ago, former New York Court of Appeals Judge Francis Bergan wrote a felicitous little volume titled *Opinions and Briefs,*²³ a tribute to the writing and style of former Chief Judge John T. Loughran, who served on the court of appeals from 1935 to 1953 (or, for the citation-minded, roughly from 264 N.Y. to 305 N.Y.). It is good to see that such concerns have been, and continue to be, important to judges. We speak of tempering justice with mercy, but we are also grateful to the draftsman whose words are mercifully concentrated. Judge Jasen is such a writer, and his style has epitomized the gentle admonitions of Judges Ber-
gan and Loughran: "One must learn somehow to state the vital issues simply..."  

Judge Jasen introduced his criminal-law decisions with this quality, whether it was a far-reaching case ("Presented for our determination on this appeal is the question whether the exclusionary rule proscribes the use of evidence at a parole revocation hearing when such evidence is determined by a court to be the fruit of an illegal search and seizure."), or one of lesser scope ("The issue on this appeal is whether a rubber boot used to stomp upon the head of a helpless victim is a dangerous instrument within the meaning of the Penal Law.").

His legal devotion to traditional family life and to children is a theme that also runs through his negligence decisions, medical malpractice opinions, and adoption cases. The theme is consonant with the writings of a judge who is much quicker to establish a loss of consortium cause of action to the wife of an injured harbor worker than to absolve a carrier from a duty to defend.

In short, the writings of Judge Matthew Jasen represent the unpretentious espousal of the American ideals that he, as the son of an immigrant European tailor, has come to cherish and protect. Those who would destroy or compromise them are on his wrong side. His is the heart and speech of a humanist who exalts our liberties and wants to see them intact.

One of his most eloquent discourses appears not in any New York Report, but in a school text, on the Holocaust.

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24. Id. at 4.
32. BUREAU OF CURRICULUM DEVELOPMENT, NEW YORK STATE DEP'T OF EDUC., TEACHING
Perhaps we ought to remember that democracies do not become Nazi-type countries in one day. Evil progresses cunningly. One by one, freedoms are suppressed—first against one group, then another by the method of divide and conquer. . . . We should pledge, in the spirit of universal humanism, to advance respect for and to observe the basic human rights for all peoples of the world. By so doing, we show our determination to save succeeding generations from the scourge of crimes against humanity.33

It is sad to see one as robust and productive as Judge Jasen retire from the court of appeals. For an instant, the mandatory age seventy retirement laws were struck down, until the case reached the court of appeals and these required departures were upheld.34 Judge Jasen wrote the opinion, at age sixty-nine.

—HONORABLE ALBERT M. ROSENBLATT
STATE OF NEW YORK SUPREME COURT

VI.

On December 31, 1985, the judicial service of Matthew J. Jasen, senior associate judge of the New York State Court of Appeals, drew to a close. Having attained age seventy earlier that month, the state constitution compelled his retirement after eighteen years on our state's highest court and more than twenty-eight years as a judge.

Judge Jasen served the people of New York with great distinction as both a trial and appellate jurist. His judicial tenure was marked by high industry and impeccable integrity, his judicial philosophy by a sage blend of legal scholarship, common sense, and practical experience. Lawyers and litigants came to know him for his even demeanor and abiding sense of fairness. He always gave them his best judgment, striving to do what was right, not what was expedient. One of the longest serving judges of the court of appeals in the last half-century, he was a stabilizing link between the present court and the court of Fuld and Breitel. He will be missed, but he leaves behind a judicial legacy of more than 800 opinions.

Matthew J. Jasen was born 70 years ago to immigrant parents

in Buffalo, New York. He worked his way through Canisius College and the University of Buffalo Law School, working full time as a postal clerk while simultaneously pursuing his legal education. Admitted to the bar in 1940, he entered the private practice of law. Following the outbreak of World War II, he attended the Civil Affairs School of Harvard University, and thereafter served with the Seventh Army in Europe as a military government officer attached to a spearhead detachment. In 1946, after serving as President of the United States Security Review Board for the State of Baden-Württemberg, at age 31, he was appointed United States Military Government Judge for the Third Judicial District, Heidelberg by General Lucius D. Clay, Military Governor of Germany. He was the youngest judge then serving in military government in Germany.

A witness to the aftermath of the Holocaust, Judge Jasen was horrified by the atrocities committed by the Nazis in their persecution of minorities and political dissidents. He was deeply shaken by the realization that the Nazis had manipulated law to obtain power and to enforce their edicts, and that the German judiciary and lawyers had failed to uphold the fundamental law. There, in post-war Germany, he resolved to devote his life to upholding the rule of law, not the rule of man, and preserving the civil liberties and fundamental rights of all the people.

After three years of judicial service in Germany, he returned to his native Buffalo and established a law firm that quickly became noted as one of Buffalo's leading trial firms. This array of talent did not go unnoticed; eventually all of the members of that firm would ascend to the bench.

In 1957, Matthew Jasen was appointed by Governor W. Averell Harriman to fill a vacancy on the New York State Supreme Court, Eighth Judicial District. He was elected to a full term the following year, becoming the first democrat elected to the supreme court in that district in almost twenty years. During his ten year tenure on the supreme court, Judge Jasen authored over 200 published opinions. He was a well-regarded trial justice who treated lawyers and their clients with thoughtfulness and respect. He proved that civility and court administration were not mutually exclusive, guiding the matters assigned to him to disposition without inordinate delay or procrastination. He relished the work of the special term, enjoying the opportunity to pass upon mo-
tions that presented interesting questions of the law. During his tenure on the supreme court, he served for a time as administrative judge for the eighth district, using that opportunity to innovate and modernize calendar procedures to expedite trials and reduce clogged calendars.

In 1967, Judge Jasen and Judge Charles D. Breitel were endorsed by all four major political parties for vacancies on the court of appeals. The two, who were to serve together on the court for ten years, developed a close personal and professional relationship that continues to this day. Charles Breitel became chief judge in 1974 and was the first chief judge to exercise detailed responsibility for court administration throughout the state. Judge Jasen, as senior associate judge, was an able right hand, attending administrative board meetings and offering advice and assistance. When Judge Jasen was feted by the Bar Association of Erie County upon his retirement in December 1985, his friend, Charles Breitel, retired chief judge, was a featured speaker.

Judge Jasen brought energy, independence, and integrity to his court of appeals service. Year in and year out, he would be a leader, and often the leader, in number of opinions authored. Those opinions are remarkable not just for their quantity but for their quality. They reflect clarity of thought and lucidity of prose. Always mindful of the pressures on the trial bench and bar, Judge Jasen, as his opinions for the court reflect, strove to quickly hone in on the crux of the appeal, to clearly state the points decided, and to discuss the practical means by which future cases might be handled.

As a trademark, the first paragraph of a Jasen opinion invariably would identify the key issues and their resolutions, with the reader thus able to grasp at a glance the significance of the case. His opinions for the court stressed the precise issue decided, identified precedent that was not affected by the decision, and warned the reader as to issues not reached by the court.

The leading opinions authored by Judge Jasen for the court of appeals span the breadth of the substantive and procedural law of New York. They include such important issues as: the extent of an accountant’s liability to non-clients;¹ the effect of the accept-

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JUDGE MATTHEW J. JASEN

interest, and the minimal intrusion into personal privacy. In *People v. Nicolletti*, the failure of the police to seal wiretap recordings should not have been admitted as evidence against the defendant because of the grave risks of "diabolical fakery." He declined to sanction unbridled judicial power in criminal cases either. Thus, in *People v. Douglass*, he authored the opinion for the court declaring that trial judges have no inherent authority to dismiss misdemeanor complaints on the grounds of "calendar control" or "failure to prosecute."

The Jasen voice in criminal cases was a voice of reasonableness and balance in a quest for substantial justice. In *People v. Knapp*, in dissent, he urged that the "dictates of common sense and reason must be considered in striking a balance between a suspect’s fundamental right to counsel and the fundamental duty of the police to aid persons in trouble," and that "[a] rule that turns criminals free can be justified only by clear and convincing evidence that its benefit to society outweighs its cost . . . ."

Another notable example is *People v. Patterson*. The defendant, relying upon a United States Supreme Court decision apparently on point, urged that New York’s affirmative defense of extreme emotional disturbance, which would allow the defendant the opportunity to reduce a murder to manslaughter, was an unconstitutional attempt to reduce, if not entirely shift, the burden of proof in criminal cases. Judge Jasen, writing for a four-to-three majority, upheld the conviction, finding that New York’s allowance to the defendant of an opportunity to reduce a murder to manslaughter operated only after the crime had first been proved and, thus, did not shift the burden of proof. This approach was reasonable; the legislature had afforded murderers an opportunity to obtain a reduction in severity of crime by proving a mitigating circumstance, and, it was feared, requiring the prosecution to disprove the mitigating circumstance in the first instance would lead

12. Id. at 253, 313 N.E.2d at 338, 356 N.Y.S.2d at 858 (quoting Lopez v. United States, 375 U.S. 427, 478 (1963) (Brennan, J., dissenting)).
14. Id. at 200, 456 N.E.2d at 1181, 469 N.Y.S.2d at 59.
16. Id., 441 N.E.2d at 1063, 455 N.Y.S.2d at 545.
JUDGE MATTHEW J. JASEN

the legislature to do away with the opportunity for mitigation entirely. While noted commentators predicted that the position staked out by Judge Jasen would be rejected by the Supreme Court in view of the sweeping, broad language of its prior precedent, the Jasen opinion was vindicated when the Supreme Court affirmed, substantially adopting his theory and distinguishing its prior broad precedent.19

The Jasen voice of reason spoke out in favor of the defendant whose fundamental right had, in his opinion, been violated. In People v. Murray,20 in a dissent joined by two other judges, he urged that a defendant could not be properly convicted of a felony murder where the defendant’s confession to the underlying felony had not been properly corroborated. As a matter of fairness to defendants, he maintained that a felony murder conviction could not stand where there had been no satisfactory proof of the felony. Similarly, in People v. Miller,21 Judge Jasen, for a unanimous court, held that a defendant, raising self-defense in a murder prosecution, was entitled to have the jury consider proof of the victim’s violent character of which the defendant had knowledge.

Many of the court of appeals’ common law decisions involve considerations of stare decisis. Well aware that what was proper and just in one era might be inappropriate and harsh in another, Judge Jasen was never one who favored a slavish and blind application of older cases. However, as a legal scholar, Judge Jasen also was cognizant that much could be learned from our legal forebears and that, indeed, respect for law and the ability to guide people in reliance upon settled authority would be diminished if precedents were allowed to shift back and forth, depending upon the idiosyncratic approaches of the seven individuals who were serving on the court at the times of decision.

A leading example of the application of stare decisis was People ex rel. Scarpetta v. Spence-Chapin Adoption Service,22 the so-called Baby Lenore case. Though much popular sentiment was expressed on behalf of the adoptive parents, Judge Jasen, writing for

the court, held for the natural mother in a decision based upon long-standing common law principles. Indeed, the case demonstrated Judge Jasen's commitment to apply the law, unswayed by the shifting winds of popular opinion.

Judge Jasen consistently urged respect for the limitations imposed upon state and local government by the state constitution. In *Maresca v. Cuomo*, he authored the opinion sustaining the validity of the state constitutional mandate of compelled judicial retirement at age 70. Though the case did not reach the court until December 29, 1984, and had to be decided in two days time lest there be confusion and uncertainty over the terms of offices of the retired judges and their successors, the Jasen opinion spanned over ten printed pages and referred to nearly fifty prior cases, legal treatises, and law review articles. In short, a masterful job, under severe time constraints.

Of course, as is inevitable on a collegial court, there were occasions when Judge Jasen disagreed with the approach taken by a majority of his colleagues. Unlike some, however, Judge Jasen was not reluctant to separately—and respectfully—point out that disagreement. Because he chose to state his deeply held views, some have termed him a "great dissenter." That appellation he should bear with honor, for it reflects the independence, the courage, and the strength of character he brought to his judging. In many instances, his separate views were subsequently vindicated and became the law.

For example, in dissent, in *Lutheran Church v. City of New York*, he, joined by Chief Judge Breitel, protested the decision of the majority to permit the destruction of the landmark Morgan Mansion and urged support for historic preservation. That view subsequently found expression by the court of appeals and the United States Supreme Court in the case that preserved Grand Central Station from material alteration. In a concurring opinion in *Codling v. Paglia*, he urged the abandonment of the harsh contributory negligence principle and the adoption of comparative fault, stating: "[the] notion of fundamental fairness does not

require an all-or-nothing rule which exonerates a very negligent defendant for even the slightest fault of his victim." 27 This view was accepted by the legislature in 1974 by the enactment of CPLR Article 14-A.

In *In re Daniel C.*, 28 Judge Jasen, in dissent, urged that the rights of natural parents could not be properly terminated through their consent to an adoption where the consequences of the consent were not properly explained and the forms were misleading. In *In re Sarah K.*, 29 the majority read into the statute and urged legislative reform precisely along the lines advocated by Judge Jasen in his *Daniel C.* dissent. In *People v. Ferber*, 30 Judge Jasen dissented from the holding that New York’s criminal laws against child pornography were violative of the federal Constitution and was vindicated by the Supreme Court’s reversal. 31

In a steady stream of dissents in his early years on the court of appeals, Judge Jasen disagreed with decisions overturning administrative discipline and discharge of public employees. 32 In *Pell v. Board of Education*, 33 his view became the law of the state as the court of appeals, overturning its prior line of decisions, set forth revised guidelines for the lower courts in reviewing administrative discipline of public employees.

Yet another instance where a Jasen dissent was vindicated came after the judge’s retirement from the bench. In *People v. P.J. Video, Inc.*, 34 a six-judge majority of the court of appeals ruled that the police had failed to show probable cause before obtaining a warrant to search for and seize what the police asserted were pornographic movies. The majority held the police to a “higher standard” of probable cause because books and movies were involved,

27. *Id.* at 346, 298 N.E.2d at 631, 345 N.Y.S.2d at 473.
as distinguished from weapons or controlled substances. Judge Jasen, "disturbed by the majority's departure from the traditional principles governing judicial review of a warrant issued upon probable cause," filed a sole dissent. On April 22, 1986, the United States Supreme Court, liberally citing and quoting from the Jasen dissent, reversed the judgment of the court of appeals. The Supreme Court declared that no "higher standard" of review was required and that, under the "standards of probable cause used to review warrant applications generally," the warrant had, as Judge Jasen had previously articulated, been properly issued. 

Judge Jasen's separate opinions are a testament to his courage, for he did not hesitate to express strong opinions on sensitive cases. In People v. Mackell, he refused to accede to the majority's refusal to review, on technical jurisdictional grounds, the reversal of the criminal conviction of a former district attorney. He urged that the matter be reviewed by the court. Following the Mackell decision, the relevant criminal procedure law provision was amended to expand the criminal jurisdiction of the court. In another instance, Judge Jasen dissented from the decision sustaining the constitutionality of legislation by which the state made borrowings in order to advance funds to New York City and its municipal assistance corporation during the city's fiscal crisis. Judge Jasen asserted that the legislation violated the state constitutional prohibitions against the loan of state credit to municipalities.

Matthew Jasen is a remarkable man and a truly great judge; a realist, yet an idealist, a force for justice. His voice and role on the court was a vital and special one, and one that will be missed. His wisdom, his spirit, and his courage have greatly enriched our law. His words, spread out over forty volumes of the official New York reports, will be permanently preserved to guide future generations of lawyers and judges. While Judge Jasen has retired from

35. Id. at 569-70, 483 N.E.2d at 1123, 493 N.Y.S.2d at 991.
36. Id. at 579, 483 N.E.2d at 1129, 493 N.Y.S.2d at 997 (Jasen, J., dissenting).
38. Id. at 1615.
judicial service, he has not retired from the law. He will be continuing his distinguished legal career as counsel to the prominent Buffalo, New York firm of Moot & Sprague.

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VII.

Judge Matthew J. Jasen's distinguished judicial career spanned more than three decades. He served as a United States military government judge in Heidelberg, Germany, following World War II, as a justice of the New York State Supreme Court, Eighth Judicial District from 1957 to 1967, and as a judge of the New York Court of Appeals from 1967 through 1985. Judge Jasen authored more than 800 published opinions in his career as a judge, approximately 650 as a judge on the court of appeals.

During my two year tenure as one of Judge Jasen's law clerks, I came to respect and admire his ability, courage, and integrity. I also developed a deep personal affection for the man and an enduring respect for his judicial abilities.

Others have accurately described his capabilities. In their tribute, two of my fellow law clerks, Professor Alan Scheinkman and Commissioner Edward Sheridan, have aptly described Judge Jasen as a man of wisdom, spirit, and courage, as a truly great judge, a realist, a legal scholar, an idealist, a force for justice, and a remarkable man. They and others have accurately characterized his opinions as masterful and courageous. Chief Judge Wachtler, in his parting remarks to Judge Jasen on behalf of the Court, described Judge Jasen's opinions as "models of clarity, scholarship and independence of thought."1 I share these thoughts and feelings as do so many others.

While I could devote all of this article and more to describing Judge Jasen’s attributes by relating my personal feelings and ex-

periences as one of his law clerks, I have chosen not to do so. This article will focus instead on a unique aspect of Judge Jasen's tenure at the Court of Appeals—his dissenting opinions. A review of selected Jasen dissents will not only illustrate the remarkable foresight and ability of the man but also the utility and persuasive power of the dissenting opinion and the need to encourage judges to publish dissenting opinions where justice requires.

I have heard Judge Jasen described as a "great dissenter." This is unquestionably a true statement. However, the greatness of Judge Jasen's dissenting opinions is not due to their quantity, as statistics show he generally did not dissent more frequently than his colleagues, but rather because of the scholarly, insightful, and powerful way in which his dissents were composed and because of the effort and courage required to author them.

Available statistics make clear that Judge Jasen was not a prolific dissenter. Those same statistics show that he was one of the leading authors of majority opinions. In each of the eleven of the fifteen years for which statistics are available, Judge Jasen authored either the most or more majority opinions than all but one or two of his colleagues. In two of those years, he carried the


court more often than any other judge. In 1969, he and Judge Scileppi led the court with twenty-six majority opinions each. In only one year, his first on the court of appeals, did he author the fewest majority opinions.

At the same time, he generally did not dissent more frequently than the other members of the Court. In nine of the fifteen years surveyed, the number of dissenting opinions authored by Judge Jasen was equaled or surpassed by two or more of his colleagues. In only four of those fifteen years did he author more dissenting opinions than his colleagues. In two of those four years, he wrote the most majority opinions as well.

Judge Jasen's dissenting opinions, as well as his majority writings, have become notable for their quality and persuasive effect. They have been and remain important tools for change and demonstrate the utility of dissenting opinions generally. Before analyzing Judge Jasen's dissents in defense of dissenting opinions, it is necessary to briefly review the criticism and support most often directed at the published minority view.

Dissents have been criticized as "useless," "undesirable," an "exercise in futility," and a "'cloud' on the majority decision that detracts from the legitimacy that the law requires and from the prestige of the institution that issues the law." The dissent has been criticized as a device which "'cancels the impact of monolithic solidarity on which the authority of a bench of judges so
largely depends.' "11 The legal philosopher H.L.A. Hart wrote of dissents: "A supreme tribunal has the last word in saying what the law is and, when it has said it, the statement that the court was 'wrong' has no consequences within the system: no one's rights or duties are thereby altered."12 Not all writers share these critical views. In fact, such criticism does not withstand analysis.

In defense of dissents, one writer has characterized the dissenting opinion as a form of civil disobedience which has a variety of important consequences.13 Among those consequences, the dissent provides "hope of a future remedy for a present wrong."14 Others agree that an important, perhaps primary, objective of a dissenting opinion is "the remedy of a perceived wrong."15 Phrased differently, it has been labeled a "corrective."16

It has also been said that the most enduring dissents are those in which the authors speak as "prophets with honor;"17—those that reveal "the perceived congruence between the Constitution and the 'evolving standards of decency that mark the progress of a maturing society,'"18 those that "soar with passion and ring with rhetoric," and those that seek to "sow seeds for future harvest."19

Justice William J. Brennan has described five types of dissents: the corrective; the damage control mechanism; the guide to lower courts, state courts, and litigants; the seed for future consideration, and; the persistent reminder of an unbending position.20 Each of these types of dissent plays a critical role in our civil and criminal justice systems. It is, however, the rare judge who is able to blend elements of each type into a single persuasive opinion. Judge Jasen has mastered that task.

This multi-faceted dissent demonstrates that the issues have been thoroughly argued, that the merits have been debated, and

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14. Id. at 307.
15. Id. at 309.
17. A. Barth, Prophets With Honor: Great Dissents and Dissenters in the Supreme Court (1974).
19. Id. at 431.
that the positions of each side have been fully considered. It in-
sures that the merits of each position have been wrung from the
case and that each view is laid bare and held up for review and
further debate by other courts, the bar, and the public. It is at
once an internal mechanism that keeps the majority in check and
a public declaration that insures an open system of justice. It
fosters public confidence in a system in which all views are subject
to public scrutiny and criticism.

The dissent is also a statement of personal conviction—a
voice crying in the darkness to be heard and recognized. Accord-
ing to Chief Justice Charles Evan Hughes, "A dissent . . . is an
appeal to the brooding spirit of the law, to the intelligence of a
future day." The dissent is a statement of a view that has been
rejected by some and, therefore, seeks acceptance by future gen-
erations. As Justice Benjamin Cardozo so eloquently stated:

The voice of the majority may be that of force triumphant, content with the
plaudits of the hour, and recking little of the morrow. The dissenter speaks
to the future, and his voice is pitched to a key that will carry through the
years. Read some of the great dissents . . . and feel after the cooling time of
the better part of a century, the glow and fire of a faith that was content to
bide its hour. The prophet and martyr do not see the hooting throng. Their
eyes are fixed on the eternities.

Nevertheless, some maintain that conflicting views ought to
be suppressed. I submit, however, that unanimity for the sake of
unanimity and at the expense of honestly held conflicting opinions
is anathema to our system of an open and free society. It is a de-
ception upon the public to quash a differing view and deliver an
opinion represented as unanimous. Chief Justice Hughes stated
the principle well:

[U]nanimity which is merely formal, which is recorded at the expense of
strong, conflicting views, is not desirable in a court of last resort, whatever
may be the effect upon public opinion . . . . This is so because what must
ultimately sustain the court in public confidence is the character and inde-
pendence of the judges. They are not there simply to decide cases, but to
decide them as they think they should be decided, and while it may be re-

21. As Karl Llewellyn once said, the dissenter "rides herd on the majority." K. LLEW-
24. See supra notes 6-8 and accompanying text; L. HAND, THE BILL OF RIGHTS 72
grettatable that they cannot always agree, it is better that their independence should be maintained and recognized than that unanimity should be secured through its sacrifice.26

Referring to the old practice of the Kings Bench in England, Thomas Jefferson warned of the dangers of suppressing a minority view: "An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning."26 Surely this is not what our system of law seeks or ought to seek. As Justice Douglas once wrote, "It is the right of dissent, not the right or duty to conform, which gives dignity, worth and individuality to man."27

Fortunately, during the last twenty years, the New York Court of Appeals has been blessed with such able chief judges as Desmond, Fuld, Breitel, Cooke, and Wachtler who have not sought to suppress firmly held dissenting views. Indeed, each has at times been an active dissenter in his own right. This philosophy of encouraging debate is certainly responsible, at least in part, for the high regard in which opinions of the court of appeals are held and for the court being, as Judge Jasen has often called it, the preeminent state court in the country.

The words and ideas of Jefferson, Hughes, Douglas, Brennan, and Cardozo argue forcefully in favor of dissents. The effectiveness of the dissenting opinion in exposing a perceived wrong and bringing about corrective action is nowhere better demonstrated than by the dissenting opinions of Judge Jasen.

Unless compelled by statute, stare decisis, or constitutional restraints, Judge Jasen refused to permit substantial injustice to go without remedy because of overly technical interpretations of the court's jurisdictional limitations. For example, in People v. Mackell,28 the court refused to review a determination of the appellate division simply because that court stated in its order that its decision was "on the law and the facts." If the order had recited that the decision was "on the law," the court of appeals would have

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25. C. Hughes, supra note 22, at 67-68.
Judge Matthew J. Jasen reviewed it. Judge Jasen chastised the court for holding that "the use of these three technical words divests the court of jurisdiction to review the merits." 9 Using pointed language, Judge Jasen warned of the long-term dangers of the majority's view: "[T]he majority's decision threatens the efficacy and vitality of the appellate process itself since the court will now honor recitals in appellate division orders designed to insulate law decisions from further review." 30 Judge Jasen courageously noted that the defendants involved were public officials who ought not to escape punishment on a "technic-ality totally unsupported by the record." 31

The cry was heard. In 1979, the legislature amended the statute to permit the court of appeals to look behind the words of an appellate division order to determine for itself whether a question of law was involved and could be reviewed. 32

In People v. Linzy, 38 the court of appeals struggled with the statutory requirement that a rape victim's testimony concerning the identity of her assailant must be corroborated. The majority criticized the rule but nevertheless applied it rigidly and reversed the defendant's conviction, paying only passing attention to arguably significant corroborative evidence.

Judge Jasen dissented, boldly calling for "outright repeal of all corroboration requirements in sex cases." 34 Judge Jasen railed at the injustice of a system that relies on existing safeguards to protect the rights of persons accused of murder, robbery, and burglary but that imposes a unique and difficult corroboration requirement where a person is accused of rape. This dissent implicitly rejected the suggestion in the corroboration rule that the testimony of sex crime victims, usually women, is inherently suspect and not worthy of belief in the absence of independent corroborating evidence. Judge Jasen argued for a relaxed construction of the corroboration rule. He then described in some detail the significant corroborating evidence offered by the prosecution.

29. Id. at 66, 351 N.E.2d at 688, 386 N.Y.S.2d at 41.
30. Id.
31. Id.
34. Id. at 107, 286 N.E.2d at 445, 335 N.Y.S.2d at 52.
and voted to affirm.

In 1974, Judge Jasen's message and similar pleas from others became law. The legislature amended section 130.16 of the New York Penal Law to eliminate the corroboration requirement in nearly all sex crimes cases. Approving the new legislation, Governor Malcom Wilson expressed what Judge Jasen had implied two years before:

Furthermore, the implicit suggestion in the corroboration rule that the testimony of women, who are most often complainants in sex cases, is inherently suspect and should not be trusted without the support of the independent evidence, is without justification and contrary to our strong belief in the principle of complete equality for women in our society. 3

In a case that came to the court of appeals in 1971, the court reversed an appellate division decision confirming a determination of the superintendent of the New York State Police that a police officer should be dismissed from service for shoplifting. 36 Judge Breitel dissented in an opinion in which Judge Jasen concurred. The dissent pointed out the practical and constitutional limits on the court's power to judge the credibility of witnesses and review factual questions. It urged judicial restraint and deference to the agency's internal decision-making procedures.

This was a principle like so many others that Judge Jasen refused to abandon. He reaffirmed his commitment to it two months later in his dissent in Picconi v. Lowery, 37 and two months after that in Short v. Looney. 38 Judge Jasen humbly acknowledged that supervisory personnel, not the courts, are best qualified to monitor and discipline employees and called for an end to de novo type judicial review of sanctions and penalties imposed by governmental agencies on their workers.

Finally, in Pell v. Board of Education, 39 the court heeded Judge Jasen's call for corrective action. The court embraced the reasoning of his dissents, unanimously overturned its prior line of decisions, and adopted a new position. The new position mirrored that propounded by Judge Jasen over the years. In fact, three of

Judge Jasen's dissenting opinions were cited in support of the Pell decision.

Judge Jasen appealed for corrective action once again in his dissent in People v. Griffin. In that case, the court held improper the identification by a witness of a composite sketch prepared by a third party from a description given by the witness. Judge Jasen argued that the witness was merely testifying to her previous identification as permitted by then section 393-b of the New York Code of Criminal Procedure. He pointed out that identification of a sketch prepared shortly after a crime from the witness' own description "eliminates the danger present in other extrajudicial identifications . . . that the person or photograph selected was suggested to the witness by others present at the identification." Judge Jasen's foresight and reasoning did not go unnoticed. In its proposed code of evidence, the law revision commission, citing the Griffin dissent, criticized the majority rule as "unwarranted" and recommended adoption of a more liberal identification rule.

Similarly, in his dissent in Caprara v. Chrysler Corp., Judge Jasen disagreed with the majority's holding that evidence of a post-accident design change could be admitted in evidence to prove a manufacturing defect. The dissent, which was co-authored with Judges Jones and Meyer, focused on three issues. It warned of the dangers of weakening the policy of excluding such evidence in order to avoid deterring manufacturers from taking subsequent remedial measures. It argued that such evidence has no relevance to the issue whether a product was defective at the time of manufacture. The dissent also discussed at length the extremely prejudicial nature of such evidence.

Judge Jasen pointed out with characteristic clarity and common sense that jurors "can hardly be expected to look beyond the admission which they will believe to be implicit in defendant's having made a design change . . . . To admit evidence of subse-

41. Id. at 95, 272 N.E.2d at 480, 323 N.Y.S.2d at 968.
42. CODE OF EVIDENCE FOR THE STATE OF NEW YORK § 803 comment at 185 (Proposed Draft 1982) (N. Y. S. Law Revision Comm'n) [hereinafter CODE OF EVIDENCE].
44. Id. at 131-32, 417 N.E.2d at 554, 436 N.Y.S.2d at 259-60.
45. Id. at 130, 417 N.E.2d at 523, 436 N.Y.S.2d at 259.
46. Id. at 135, 417 N.E.2d at 556, 436 N.Y.S.2d at 262.
quent change on a less limited basis in strict liability cases generally is to make every manufacturer the insurer of the safety of his product.” This would be “tantamount to imposing absolute liability on manufacturers for all product-related injuries.”

The law revision commission agreed and has proposed the following rule for “subsequent remedial measures”:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event, or to prove a defect in a product. Evidence of subsequent measures may, however, be admissible when offered to impeach or as proof on such issues, if controverted, as ownership, control or feasibility of precautionary measures.

The commission, citing Judge Jasen’s dissent in Caprara, commented that

This section rejects the holding in the Caprara decision. In the Commission’s opinion, no distinction between strict products liability actions and negligence actions justifies the admission of evidence of subsequent remedial measures in strict products liability actions . . . . It is to be noted that the section is consistent with the trend of recent cases prohibiting the admission of such evidence.

Judge Jasen’s protest also was embraced by the Second Circuit in Cann v. Ford Motor Co. That court, citing Judge Jasen’s Caprara dissent, rejected plaintiff’s argument that evidence of subsequent remedial measures should be admissible in strict products liability actions under section 407 of the Federal Rules of Evidence. The court noted, as had Judge Jasen, that the rule of exclusion “represents a common sense recognition that people are loath to take actions which increase the risk of losing a lawsuit.”

The Caprara dissent exemplifies the utility of a dissenting opinion. The opinion framed the issues with precision and articulated an opposing view in a persuasive manner. This dissent provided a blueprint for the Second Circuit in rejecting the Caprara majority view and for the law revision commission in demanding

48. CODE OF EVIDENCE, supra note 42, § 407.
49. Id., comment at 59-60.
50. 658 F.2d 54 (2d Cir. 1981).
51. Id. at 60.
corrective legislative action.

A question of statewide constitutional import arose in 1970 in *Simonson v. Cahn* when the court was called upon to examine the role a grand jury should play in our criminal justice system. The court, in a four-two decision, held that a defendant could not waive indictment by a grand jury and proceed to trial on a district attorney's information.

Judge Jasen disagreed with the majority's paternalistic approach. In his dissent, he noted that as far back as 1681 the grand jury has been viewed as a protection for the individual, not for the public. Noting that similar individual constitutional rights have been held waivable, he argued: "It is totally unreasonable to hold that an accused may not knowingly and intelligently waive a rule which was made for his own protection."

After legislative action and submission of the question for statewide vote, article 1, section 6 of the New York State Constitution was amended as of January 1, 1974, and Judge Jasen's dissenting position became law.

The foresight demonstrated by Judge Jasen in *Simonson v. Cahn* is becoming even more evident today as the grand jury system comes under severe criticism. Chief Judge Wachtler aptly summarized the system's efficacy when recently remarked that a prosecutor could obtain an indictment against a ham sandwich if he chose to.

As Judge Jasen foresaw sixteen years ago, it would be a curious rule indeed if a defendant were not allowed to waive a requirement designed solely for his protection which, in effect, provides almost no protection at all. Fortunately, Judge Jasen had the courage to bring the problem to light so that corrective action could be taken.

Judge Jasen's dissents have been embraced by the public as well as the judiciary and legislature. One dissenting opinion that has gained great notoriety is that written in *People v. Rogers*. In *Rogers*, a robbery suspect was arrested and given Miranda warnings both at the time of his arrest and again at police headquarters. He then informed the police that he was represented by

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53. *Id.* at 6-7, 261 N.E.2d at 249-50, 313 N.Y.S.2d at 101-03.
54. *Id.* at 7, 261 N.E.2d at 250, 313 N.Y.S.2d at 103.
counsel on an unrelated charge but was willing to speak with police, which he did. Defense counsel called later and directed the police to cease questioning. The police asked no further questions regarding the robbery but spoke with the defendant about unrelated matters. After all questioning ceased, the defendant uttered an inculpatory statement which he later sought to suppress.

The court, in a five-two opinion, suppressed the statement, holding that a defendant represented by counsel on a pending matter cannot be questioned on an unrelated matter even if he agreed, in the absence of counsel, to such questioning.

Judge Jasen vehemently disagreed with the majority’s view of New York’s right to counsel rule vis-a-vis the rights and duties of the state to investigate and prosecute criminal conduct. After an enlightened discussion of the constitutional and practical bases for his position, Judge Jasen acknowledged the importance of fostering and retaining the respect of “the average citizen” in our criminal justice system. He wrote:

To require a police officer to prevent a prisoner from volunteering a statement, or to prevent the officer from divulging statements spontaneously made to him would stretch the comprehension of the average citizen to the breaking point. Our decisions must appear to be rational, fair as well as practical, if the courts are to retain the respect of the people. The admonition of Justice Cardozo is particularly appropriate under these circumstances—'[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament.’ (Snyder v. Massachusetts, 291 U.S. 97, 122.)

Judge Jasen’s scholarly yet common sense approach to the Rogers case and his balanced sensitivity to both defendants and the police inspired a book titled Outrage. The book portrays a fictional crime and trial centered around the Rogers decision and, more particularly, Judge Jasen’s dissent. The book was adapted into a play which opened in Washington, D.C., in December 1982. It later became a made-for-television movie which was shown nationally in March 1986.

The effect of Judge Jasen’s dissent in Rogers, of course, cannot be measured with certainty. However, this author could find no jurisdiction, state or federal, that has adopted the Rogers rule.

56. Id. at 178, 397 N.E.2d at 716, 422 N.Y.S.2d at 25 (quoting People v. Kaye, 25 N.Y.2d 139, 145, 250 N.E.2d 329, 332, 303 N.Y.S.2d 41, 46 (1969)).

57. H. Denker, Outrage (1982).
To the contrary, it appears that every jurisdiction that has considered the issue has agreed with Judge Jasen’s dissenting view. Perhaps, without the enlightened dissenting opinion of Judge Jasen, other jurisdictions may have been less cautious.

During his eighteen years at the court of appeals, Judge Jasen did not shirk his duty to disagree when constitutional guarantees or matters of public policy were at stake. In his remarks to the court upon his retirement, Judge Jasen expressed deep gratitude for having had the “opportunity to discharge [his] constitutional oath and voice [his] opinion when convinced that the fundamental law of our Constitution required a given result.” When he voiced those opinions, others, including the United States Supreme Court, listened and were moved to act.

The Supreme Court recently reversed a decision of the New York Court of Appeals that had upheld a statute prohibiting the sale of alcoholic beverages by distillers to wholesalers except in accordance with a price schedule filed with the state liquor authority. The Supreme Court, like Judge Jasen, saw that the practical effect of the New York statute would be to force distillers to abandon promotional allowances in order to comply with lowest price laws in New York and elsewhere, thereby impermissibly burdening interstate commerce. The statute was held unconstitutional, assuring a more open market for free trade and its attendant benefits to the consuming public.

Perhaps the most forceful of Judge Jasen’s dissenting opinions are those that deal with pornography and the protection of chil-

58. In Brewer v. Williams, 430 U.S. 387 (1977), the Supreme Court made clear that under the federal Constitution, a defendant could waive his right to counsel without an attorney being present. See also Moran v. Burbine, 106 S. Ct. 1135 (1986).


In *People v. Ferber*, the court of appeals struck down a statute prohibiting promotion of a sexual performance by a child. The majority was primarily concerned with the potential chilling effect the statute might have on various first amendment rights. Judge Jasen, however, recognized that the statute was not designed primarily to restrict the type of film or literature the public could view. He viewed the case as one primarily concerned with a state's interest in protecting children from "the severe emotional and psychological damage . . . which will result from this base and degrading sexual exploitation . . . ." Judge Jasen argued that, on balance, the slight speculative burden on genuine first amendment rights was insufficient to prevent the state from passing legislation to protect children from sexual abuse.

The Supreme Court reversed, without a single dissent. The Court agreed with Judge Jasen that "the States are entitled to greater leeway in the regulation of pornographic depictions of children."

By recognizing the larger and more serious implications of the *Ferber* case and by having the courage to take a bold stand on the issues it involved, Judge Jasen, and ultimately the Supreme Court, struck an appropriate balance between true first amendment rights and the compelling interest of a state in protecting its children.

In a more recent case, *People v. P.J. Video, Inc.*, the court of appeals held that information submitted by police to establish probable cause for seizing pornographic movies was inadequate. The information submitted consisted of five affidavits of a police officer who viewed the films and described in graphic detail various acts of oral and anal sodomy, incestuous intercourse, and onanism. The majority held that there is a "higher standard" for evaluating a warrant to seize books and films rather than drugs.

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64. 458 U.S. 747, 756 (1982).
and weapons. Applying this "higher standard," it found that there was no probable cause for the search.

Judge Jasen dissented. As is his trademark, he framed the issue as he saw it at the outset of his opinion: "[W]hat is before us is not whether the defendants are guilty beyond a reasonable doubt . . . but rather, simply whether the magistrate, in issuing the warrant to seize the movies, had probable cause to believe that they were obscene." He acknowledged the thorough description of both the content and character of the films. In doing so, Judge Jasen drew a blueprint upon which a higher tribunal could correct the majority's perceived error.

The Supreme Court granted certiorari and reversed in a six-three decision. Like Judge Jasen, the Court rejected the idea of a "higher standard" and applied the general probable cause standard of review to the affidavits presented in support of the warrant application. The Court held that it is "clear beyond peradventure that the warrant was supported by probable cause." The Court then took the unusual step of quoting verbatim a substantial portion of Judge Jasen's dissenting opinion and, following that, said: "We believe that the analysis and conclusion expressed by [Judge Jasen] are completely consistent with our statement in Gates that 'probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.'"

While it is often difficult to assess the impact of a dissenting opinion, there can be little doubt that Judge Jasen's dissent in People v. P.J. Video, Inc. carried significant persuasive influence with the majority at the Supreme Court.

These are but a few of many examples of Judge Jasen's wisdom, courage, and foresight as expressed in dissent. They not only speak volumes as to the ability and integrity of the man, they also forcefully demonstrate the persuasive influence a well reasoned and skillfully crafted dissenting opinion can have on the dis-

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66. Id. at 573, 483 N.E.2d at 1125, 493 N.Y.S.2d at 993.
67. So convinced of the correctness of his position was Judge Jasen that he annexed as an appendix to the dissent copies of the affidavits submitted by the police in support of the warrant application.
68. 106 S. Ct. 1610 (1986).
69. Id. at 1610.
70. Id. at 1616.
71. Id.
senter's own court, higher courts, legislative bodies, scholars, and the public.

—MICHAEL B. POWERS, ESQ.
PHILLIPS, LYTLE, HITCHCOCK, BLAINE & HUBER