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Mario M. Cuomo
Governor of New York

William J. Brennan Jr.
United States Supreme Court

Sol Wachtler
State of New York Court of Appeals

Stanley H. Fuld
State of New York Court of Appeals

Matthew J. Jasen
State of New York Court of Appeals

See next page for additional authors

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A Tribute to Chief Judge Charles S. Desmond

Authors

Mario M. Cuomo, William J. Brennan Jr., Sol Wachtler, Stanley H. Fuld, Matthew J. Jasen, Michael F. Dillon, Wade J. Newhouse, and Charles S. Desmond II

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A Tribute To Chief Judge Charles S. Desmond

I.

I am pleased to join in this special tribute to Chief Judge Charles S. Desmond, a distinguished lawyer and prominent jurist who devoted his entire adult life to the law and the improvement of our legal system. For myself and thousands of other lawyers and judges, Chief Judge Desmond served as a model of excellence, committed to the highest standards of jurisprudence.

I first came to know the Chief when I was a law clerk and he was an Associate Judge of the Court of Appeals. I remember him as a man of extraordinary intelligence, almost unique learning, and rock solid good judgment. He also was a man of firm unbending conviction who was not easily swayed by the winds of political opinion, but who was always tolerant of those who did not share his views.

Those of us who knew the Chief enjoyed his other splendid gifts: his sparkling wit, quick, incisive, and pleasant; his love of people; and his natural integrity of purpose and person.

Last year, I had the opportunity to speak at the St. Thomas More Guild luncheon in Buffalo honoring the Chief. I told the members of the Society that they could not have selected a more deserving honoree or a better example of the good influence that Thomas More can have on the society of lawyers.

The Chief reminds us of Thomas More, a complex man of action and a Christian mystic whose life presented a kind of ultimate reasonableness. Thomas More was intensely human and practical about life. He was not someone who gained heaven by spending his time resisting a close connection with the world, seeing it mostly as a series of moral obstacles. Rather, he taught us to love God not by turning away from the world but by actively and creatively engaging it.

The Chief followed in Thomas's tradition, living a rich and full life

in public and private service. He served on our State's highest court for twenty-six years, presiding as Chief Judge for six years. Following his mandatory retirement in 1966 when he reached age seventy, Judge Desmond returned to private practice and to teaching law. His dedication and commitment to excellence, and his distinguished work as a member of the bench and bar, live on to guide us in the future.

One of my own special memories of the Chief occurred on the day I became Governor of this great State. It was then that I had the honor of having the oath of office administered to me by the Chief.

I am grateful for the opportunity to have known this extraordinary person, one who shaped his career in accordance with the principles of St. Thomas More and enriched our lives through his enormous contributions to our State and our society.

—HONORABLE MARIO M. CUOMO
GOVERNOR OF NEW YORK

II.

Chief Judge Charles S. Desmond's death saddened his very large legion of friends and admirers. I counted myself very fortunate that he and I were warm and dear personal friends for many years. He left an indelible mark on the New York Court of Appeals, which he brilliantly served for nearly three decades, and on the nation and state, which were enriched by his lasting impact in shaping the development of the Rule of Law.

"It is our business," said Edmund Burke, "to bring the dispositions that are lovely in private life into the service and conduct of the commonwealth."¹ Chief Judge Desmond's career epitomized his adherence to that aphorism. The "dispositions that are lovely in private life": a zest for life, extreme kindness, compassion, respect for all human beings, a heart of flesh and not of stone, preeminent scholarship with uncompromising intellectual integrity, utter honesty and simplicity of spirit, a consummate lawyer with a passion for the law—these are the private virtues that transfigured Chief Judge Desmond's public acts.

In a tribute to Chief Judge Desmond, published twenty-two years ago,² I discussed a difference of view between Chief Judge Desmond and myself. While he recognized that federal courts sometimes have a role in

1. E. BURKE, THOUGHTS ON THE CAUSE OF THE PRESENT DISCONTENTS (1770).

2. 15 BUFFALO L. REV. 253 (1965).

state litigation, he was also an ardent believer that our federalism cannot function effectively unless every state has a strong state bench and a strong state bar. He therefore saw no justification for the federal habeas corpus remedy and proposed its outright repeal. This proposal arose from his conviction that the availability of the federal remedy implied the assumption that federal court protection was needed because of the inadequacy of state court protection of rights secured by the federal Constitution. I disagreed with him because, at that time, only a bare dozen states, including New York, provided a post-conviction remedy for state prisoners that was at least as broad in scope as the federal remedy.

Were he still living, I am sure he would insist that today there is certainly no justification for the federal habeas corpus remedy in light of the momentous development in constitutional jurisprudence effected by the increasing reliance of state courts upon state constitutional provisions to protect individual rights and liberties. The acknowledged leader of this trend is the court upon which Chief Judge Desmond left his mark. In *People v. P.J. Video, Inc.*,³ Chief Judge Wachtler and his colleagues had held that a magistrate erred in approving, as not violating the fourth amendment, a search warrant authorizing the seizure of video cassette films for use as evidence in an obscenity prosecution. The United States Supreme Court reversed, holding that the evidence satisfied the requirements of the fourth amendment. On remand, Chief Judge Wachtler's court turned to the question of whether article I, section 12 of the New York State Constitution imposed a more exact standard for the issuance of search warrants authorizing the seizure of allegedly obscene material; the court held that it does.⁴ Judge Simon's opinion for the Court of Appeals in that case was most informative:

In the past we have frequently applied the State Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the Federal Constitution in cases concerning individual rights and liberties [T]his court has adopted independent standards under the State Constitution when doing so best promotes "predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens In addition, we have sought to provide and maintain "bright line" rules to guide the decisions of law enforcement and judicial personnel who must understand and implement our decisions in their day-to-day operations

. . . .

3. 65 N.Y.2d 566, 483 N.E.2d 1120, 493 N.Y.S.2d 988 (1985), *rev'd sub nom.* *New York v. P.J. Video, Inc.*, 106 S.Ct. 1610 (1986).

4. *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986).

Our decision to rely on [the State Constitution], rather than the Supreme Court's Fourth Amendment pronouncement in this case, is motivated also by concerns of federalism and separation of powers One of the powers reserved to the States is the power to define what conduct shall be criminal within its borders The Supreme Court's decision in this case has, in effect, stated that certain elements of our statutory definition of a crime are not significant. We are not free to similarly ignore or recast the legislative mandate.⁵

This rebirth of interest in state constitutional law should be greeted, I suggest, with equal enthusiasm by all those who support our federal system—liberals and conservatives alike. Between 1970 and 1984, state courts, increasingly reluctant to follow the federal lead, have handed down over 350 published opinions holding that constitutional minima set by the United States Supreme Court were insufficient to satisfy the more stringent requirements of state constitutional law. The development and protection of individual rights pursuant to state constitutions presents, however, no threat to the enforcement of national standards; state courts must not provide a level of protection less than the federal Constitution. Nor should these developments be greeted with dismay by conservatives; the Brandeis state laboratories are once again open for business.

Lively, even acrimonious, debate about the proper role of judges in a democratic society is ever with us. The judge who believes that the judicial power should be made creative and vigorously effective is labeled "activist." The judge inclined to question the propriety of judicial intervention to redress even the most egregious failures of democracy is labeled "neutralist" or "passivist." The labels are not synonymous with "conservative" or "liberal"; where yesterday "activist" was pinned on liberals, today it is on conservatives. As often as not, however, such labels are used merely to express disapproval of a judge's particular decisions. If useful at all, the labels may be more serviceable to distinguish the judge who sees his role as guided by the principle that justice or righteousness is the source, the substance, and the ultimate end of the law, and the judge for whom the principle is that courts do not sit to administer justice, but to administer the law. Such legendary names as Justice Holmes and Judge Learned Hand have been associated with the latter view. Holmes's imaginary Society of Jobbists is limited to judges who hold a tight rein on humanitarian impulse and compassionate action, stochastically doing their best to discover and apply already existing rules. But judges acting on the former view believe that the judicial process de-

5. *Id.* at 303-08, 501 N.E.2d at 561-64, 508 N.Y.S.2d at 912-15 (citations and footnote omitted).

mands a good deal more of them than that. Because constitutions, statutes, and precedent rarely speak unambiguously, a just choice between competing alternatives has to be made to decide concrete cases. A distinguished law dean has gone to the heart of the problem in saying, "the judge's role necessarily is a creative one—he must legislate; there is no help for it . . . when the critical moment comes and he must say yea or nay, he is on his own; he has nothing to rely on but his own intellect, experience and conscience."⁶

Chief Judge Desmond emphatically affirmed that he was not a Jobbist in the area of equal rights for the disadvantaged. He was of the school that believes that law

constitutes . . . a recognition of human beings as the most distinctive and important feature of the universe which confronts our senses, and of the function of law as the historic means of guaranteeing that preeminence . . . jurisprudence [in a scientific age] asks, in effect, what is the nature of man and what is the nature of the universe with which he is confronted Why is a human being important; what gives him dignity; what limits his freedom to do whatever he likes; what are his essential needs; whence comes his sense of injustice.⁷

Thus, for Chief Judge Desmond, with respect to equal rights for the disadvantaged, a legal concept is most worthwhile when it becomes relevant to the homely experiences of individual human beings.

Chief Judge Desmond was indeed a great judge. As I said in my 1965 tribute, and repeat here, his career was wholly faithful to his own definition of the good judge. It is a most fitting epitaph:

For better or for worse we have committed ourselves, we have given our lives and such abilities as we have to furthering the great cause of justice. I like to think that we are something more than just work-a-day practitioners. I think we are keepers of a dream for our time, one of the oldest, the best dreams of the human race, a dream that was old when the world was young, a dream that will never die, a dream of open courts dispensing equal justice, the dream of peace and good will through law.⁸

—HONORABLE WILLIAM J. BRENNAN, JR.
JUSTICE
UNITED STATES SUPREME COURT

6. O'Meara, *Natural Law and Everyday Law*, 5 NAT. L.F. 83, 96-97 (1960) (footnotes omitted).

7. ABA Report on New Trends in Comparative Jurisprudence and Legal Philosophy 506 (1964).

8. Desmond, *Musings*, 54 L. LIBR. J. 29, 34 (1961).

III.

A lawyer since 1920, Charles S. Desmond, in addition to his practice, had been a member of the State Board of Social Welfare for four years, prior to being appointed to the State Supreme Court in 1940 by Governor Herbert Lehman. He took his place on the Court of Appeals as an Associate Judge in January 1941, and continued in that position until he assumed the office of Chief Judge in January 1960, which office he held until the end of 1966. He was the first Chief Judge of the Court of Appeals to also hold the title of Chief Judge of the State of New York. In 1965, a year before his retirement, the *Buffalo Law Review* paid tribute to Chief Judge Desmond in a commemorative issue that contained articles discussing developments in New York law during Chief Judge Desmond's twenty-five years of service on the New York Court of Appeals. These articles dealt with such topics as judicial administration, judicial selection and tenure, continuing education for appellate judges, and the teaching of trial advocacy. (15 Buffalo L. Rev. 253-395 (1965).)

On returning to private practice, Chief Judge Desmond continued his active interest in legal education, and it was a mark of his dedication and determination that even as he turned ninety last December he was gathering material and preparing his notes for the course in appellate procedure he planned to present at the Law School of the State University of New York at Buffalo.

During his lifetime of service to the people of the State, he was a constructive force in this court's interpretation of the law, and he will be remembered not only for his diligence and scholarship, but also for his humanity and warm and gracious personality.

Chief Judge Desmond was a dear friend to many of us who cherished his companionship and quick wit. He shall be sorely missed.

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

IV.

Charles S. Desmond was, in my judgment, a man for all seasons, and to compress into a few words the story of a life that could fill a volume is an impossible task. However, I welcome the opportunity to join in this tribute to a great person.

Judge Desmond, the 28th Chief Judge of the New York Court of

Appeals—and, incidentally, the first Chief Judge of the State of New York—was elected to the Court in 1940. For some twenty years, from 1946 to December 31, 1966, we served and sat on that Court together. He brought to the Court and to its conferences and consultations not only dedication and skill but also rare wisdom and fresh insights, products of his firmly held belief that the dictates of common sense were compatible with the principles of the common law. To quote from one of his opinions, “We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice. . . . [W]e abdicate our own function, in a field peculiarly nonstatutory, when we refuse to reconsider an old and unsatisfactory court-made rule.” (*Woods v. Lanctet*, 303 N.Y. 349, 355, 102 N.E.2d 691, 694 (1951).)

Nor did Judge Desmond limit himself to the work of the Court, demanding though it was. Not only did he teach at the University of Buffalo Law School and serve on the faculty of the Institute of Judicial Administration’s Annual Appellate Judges Seminar in New York City, but he also wrote two books, one published in 1949, entitled *Sharp Quillets of the Law*, and the other, *Through the Courtroom Window*, ten years later. Prefacing the latter volume with a quotation—“We in the court see life through a thousand windows—a thousand windows that bring us in touch with as many facts of human experience”—he selected a large number of cases decided by the Court of Appeals over the years. In his introduction to the earlier volume, Harrison Tweed, one of New York’s outstanding lawyers, stated, “I am glad that Judge Desmond wrote this book. It brings the law down to earth. . . . The cases collected by Judge Desmond represent the raw material which goes into the judicial hopper and constitutes the stuff the law is made of.”

In short, Chief Judge Desmond, throughout his service on the bench, conducted himself with *éclat* and distinction, and happily, after leaving the Court, continued to be blessed with those priceless attributes of talented youth, keen intellect, tireless energy, and infectious enthusiasm. In point of fact, he—just as had Chancellor James Kent, following his constitutionally mandated retirement in 1823—retained those qualities for another twenty years, and into his nineties, and remained active in both public service and private practice.

I conclude with what I said at the ceremony marking his retirement: “The sorrow which we experience, our sense of loss . . . is tempered a bit by the opportunity it affords us to pay tribute to those rare qualities

which have distinguished you as a man and as a jurist and to give voice to our deep admiration and warm affection for you.”

—HONORABLE STANLEY H. FULD
CHIEF JUDGE, RETIRED
STATE OF NEW YORK COURT OF APPEALS

V.

On February 9, 1987, the remarkable career of Charles Stewart Desmond came to an end. To honor a man who died at ninety is not an occasion for mourning in the usual sense. It is a time for words which bear affectionate witness to a memorable episode in the changing of the seasons. As my warm personal friend for more than forty years, I shall miss him.

Those of us who knew him shared the privilege of being in the presence of a good man, whose life among us was, and will remain, an inspiration, not only for the superlative quality of his work, but also for the warmth and grace of his being. In his fourscore and ten years, he participated fully in the passions and actions of his time and brought great honor to himself, his profession, and his community. All of us who knew him will remember him as a fair and gracious person with an innate sense of justice and a feeling of compassion for his fellowman. To have shared his fellowship was a blessing.

An outstanding jurist and a great humanitarian, he was a shining symbol of justice. As a judge of the Court of Appeals for twenty-six years, six as Chief Judge, he displayed not only dedication and skill, but also rare wisdom and fresh thoughts, the products of his firmly held and oft expressed belief that the dictates of common sense are compatible with the principles of the common law. His judicial service was at a time when the winds of change were blowing most fiercely and when the general unrest besetting society reflected itself in the courts. His pragmatic opinions, pithily phrased in a vigorous and forceful style, penetrated to the very heart of a case and were responsive to the problems of a changing society. Although he was a pragmatist, he was not governed by the tactics of expediency. His objective as judge was for justice and righteousness to prevail within the compass of legal principle. And he succeeded magnificently.

His freely given counsel and aid to younger lawyers over the years became a legend during his lifetime. This legend will grow as lawyers continue to tell of his many acts of kindness and generosity.

While he was adamant in support of his beliefs, and was firm of purpose, his never failing courtesy and charity of thought and action marked his truly gentle nature. Possessed of a keen intellect, tireless energy, and infectious enthusiasm, he was a man to respect and to like, and those of us whose lives he touched with grace and spirit remember all of his fine qualities. The strength of his character and purpose was a compelling inspiration. By virtue of his extraordinary gifts, he had attained a national recognition.

The body of a great man has been buried, but his spirit will remain with each of us. He deserves to be remembered, in Aristotle's phrase, as a "great-souled person."

—HONORABLE MATTHEW J. JASEN
JUDGE, RETIRED
STATE OF NEW YORK COURT OF APPEALS

VI.

"This is my law school," he would proudly proclaim each year as he lauded the performance of the finalists in the Moot Court competition named in his honor at the University of Buffalo. It was an obvious boast by Chief Judge Charles S. Desmond, intended to convey his satisfaction with the high quality of advocacy he had just witnessed. During the last decade of his life, I sat with the Chief as a judge of that competition. It was always clear that his respect for the institution was exceeded only by his genuine affection for its students. It is right, therefore, that the *Buffalo Law Review*, a student publication, pays tribute in this way to the school's most distinguished graduate.

It is one of the great joys of my life that I was privileged to share Judge Desmond's friendship. I first came to know him in 1952 when his younger brother, Edward, a distinguished lawyer, brought us together over lunch. There I was, a yearling in the practice of law, dining and chatting with an Associate Judge of the Court of Appeals. I was in awe of him then and I remained so for the next thirty-five years. To be in his company and to share conversation with him was a delightful experience.

This remarkable, unique man never grew old, even as his body gave way to the years. He was ever young and up to date, whether the subject be law, politics, or other current events. He did not live in the past, except to apply its experience to the present and the future. He spoke often and reverently about his parents and the politics he learned from his father. Inevitably he would apply those lessons to a contemporary concern.

He exuded paternal love when he spoke of his children, and he revelled in the progress and accomplishments of his grandchildren. His love and affection for every member of his family was returned with abundance.

He suffered much tragedy in his lifetime, accepting all of it as part of God's plan. He lost his wife, Helen, after a beautiful 30-year marriage. A few years ago, he was stunned by the untimely and tragic death of his only son, Ryan, who bore Helen's surname. Ryan was an accomplished trial lawyer to whom, following his death, the Law School Alumni Association posthumously presented a special award. The Chief was there to accept the award and said of Ryan: "He loved his family; he loved his town of Eden; he loved his country; he loved his church; he loved the law and lawyers; and he was faithful to all." Those words were true of Ryan; they are equally true of Chief Judge Desmond.

From the moment he was called upon to deliver the commencement speech to his grade school graduating class, it was clear that Charles S. Desmond would rise above his peers. When he began his service on the highest court of our state, he was the youngest person ever to sit on that honored bench. He was the first ever to serve as Chief Judge of the State of New York, and during his 26-year tenure, the Court of Appeals was often viewed as the finest common law court in the nation. That reputation was made and enhanced by the Chief, as he consistently applied his belief, so often expressed, that "the dictates of common sense are compatible with the principles of the common law."

Charles S. Desmond was, as the Buffalo News recently editorialized, "a judicial statesman." He was a master in the use of words, insisting always upon precision of language—particularly so in the art of opinion writing. Contemporary judges, especially those bent upon writing law review articles as decisional pieces, can learn much from a review of Judge Desmond's work. His opinions, more than 450 in number, are models of clarity and eloquent simplicity. He wrote exactly what he meant to say, sprinkled occasionally with just enough of the Latin to provide emphasis and to reflect his liberal arts, Jesuit training. It was his firm and correct belief that the law should evolve on a case-by-case basis and that the court's role in that process was to decide the issue before it, and to do so in clear, unequivocal language.

It is never to be doubted that every word in a Desmond opinion was his, for he wrote precisely as he spoke: with poetic elegance. Many years ago he said of judges:

For better or worse, we have given our lives and such abilities as we have to furthering the great cause of justice . . . I think we are keepers of a dream

for our time, one of the oldest, the best dreams of the human race, a dream that was old when the world was young, a dream that will never die, a dream of open courts dispensing equal justice, the dream of peace and good will through law.

Judge Desmond was committed to the rule of law, applied fairly and temperately to ensure equal justice for the meek as well as the mighty. This gentle man contributed greatly to the cause of peace and good will, and thereby kept faith with the dream of which he spoke. We would do well to emulate his example.

—HONORABLE MICHAEL F. DILLON
PRESIDING JUSTICE
STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION, FOURTH DEPARTMENT

VII.

Judge Charles S. Desmond was one of the most distinguished graduates of the University of Buffalo Law School. He had a long and distinguished career in both private practice and public service prior to his election to the Court of Appeals. He served for more than a quarter of a century on that Court, and served as Chief Judge from 1960 through 1966. His reputation as a judge and judicial administrator will be attested to by others in this Tribute. During that period he remained a loyal and interested alumnus of the Law School. This loyalty continued to be equally strong after the Law School and the University of Buffalo were absorbed into the State University of New York during the 1960s.

Shortly after his retirement from the Court of Appeals, Judge Desmond joined the faculty of the Buffalo Law School, in January of 1967. From that time until his death, just over twenty years later, he taught a course in Appellate Advocacy and was a counselor and advisor to the Law School's Moot Court Board. Indeed, in honor of those services, the Moot Court Board named the annual intramural appellate advocacy competition after him.

During that twenty year period, which others might call "retirement," Judge Desmond's Appellate Advocacy course was ranked high by students. They benefited from his extraordinary experiences and responded to his genuine interest in them and their careers.

Others in this Tribute will attest to his extraordinary personal characteristics and community services, as well as his contributions as judge. I would emphasize his long time relation with the Buffalo Law School, as

student, alumnus, teacher, and loyal supporter. Those relationships have made the Law School a better place than it would otherwise have been.

WADE J. NEWHOUSE
PROFESSOR OF LAW
STATE UNIVERSITY OF NEW YORK AT BUFFALO

VIII.

I am honored to join the *Buffalo Law Review's* tribute to my grandfather, Charles S. Desmond. Although the recent death of my grandfather has been an emotionally trying period for me, I realize that I have been extremely fortunate to have been close to him for my twenty-four years.

Because others in this Tribute will undoubtedly describe the "Chief's" contributions to the law and his judicial service, I would like to relate a couple of stories that are illustrative of the kind of man my grandfather was.

The Chief genuinely cared about people; he devoted his life to assisting others. An example of this occurred just two days before the Chief passed away. I was at the hospital visiting the Chief when the phone rang. It was Governor Mario Cuomo. Because of his deteriorating physical condition, the Chief did not have the strength to hold the phone and could barely speak. But he insisted upon speaking to the Governor. They spoke briefly, and the Chief ended the conversation by saying, "Mario, if you need anything, don't hesitate to call." That statement exemplifies the way the Chief lived his life. He was always willing to help others, regardless of the situation.

Another story deals with the seminar he taught at the Law School. Although his health had not been good, the Chief insisted upon conducting his seminar in 1987. No one even attempted to dissuade him; it was obvious that his mind was made up. On February 5, 1987, the Chief had his driver bring him to the Law School for his afternoon seminar, and I met him at the entrance. He had become so weak that it was necessary for me to carry him to the classroom where the students and his guest speaker were waiting. I tried to convince my grandfather that he should go home and get some rest, but he insisted that he had a duty to his students and refused to return home before the end of class, which came as no surprise to me. After the class ended, a friend helped me carry the Chief to my car, and I drove him home. The next day the Chief had to be taken to the hospital. One of his main concerns at the hospital

was whether he would be able to make it to his Wednesday seminar. As fate would have it, he would not return to the classroom. The Chief passed away February 9, 1987.

This short story further illustrates the manner in which Charles S. Desmond lived his life. He always found time to help students, counsel young lawyers, and contribute his knowledge and experience to a myriad of educational and charitable causes.

I will always miss the Chief, but his example lives on forever as a testimony to his eternal ideals, values, and principles.

CHARLES S. DESMOND II
THIRD YEAR LAW STUDENT
STATE UNIVERSITY OF NEW YORK AT BUFFALO

