

“HONOR THE CRAFT”: PERSONAL REFLECTIONS ON
THE JUDICIAL LEGACY OF THE HONORABLE
MATTHEW J. JASEN

*Michael J. Hutter**

In a letter to John Adams, written in 1813, Thomas Jefferson commented: “[T]here is a natural aristocracy among men. The grounds of this are virtue and talents.”¹ “The natural aristocracy,” he continued, “I consider as the most precious gift of nature for the instruction, the trusts, and government of society.”² Upon a consideration of the opinions of Judge Matthew J. Jasen, it cannot be doubted that Jefferson had in mind when writing that letter, a person such as Judge Jasen.

Judge Jasen served as an Associate Judge of the New York Court of Appeals from 1968 to the end of 1985, when he reached the mandatory retirement age of seventy. During the eighteen years he served the Court of Appeals as an Associate Judge, he authored over 800 decisions, spanning forty-seven volumes of the official New York reports, second series, 20 N.Y.2d to 67 N.Y.2d. Many of those decisions can be labeled as “landmark,” shaping the development of the law, not only in New York, but throughout the United States. They include *Credit Alliance Corp. v. Arthur Anderson & Co.*,³ which addressed the extent of an accountant’s liability to non-

* Professor of Law, Albany Law School. A.B. 1967, Brown University; J.D. 1970, Boston College Law School. Professor Hutter was a law clerk to Judge Jasen from 1970 through 1972. In 1998, he was one of seven persons recommended by the Commission on Judicial Nomination to Governor Pataki for appointment to the New York Court of Appeals. Professor Hutter currently serves as a member of the New York State Law Revision Commission and as Chair of the Board of Directors of the Capital Defenders Office.

¹ Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in 2 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 387, 388 (Lester J. Cappon ed., 1959).

² *Id.*

³ 483 N.E.2d 110 (N.Y. 1985). *Credit Alliance’s* standard and reasoning have been adopted by other state courts. See *Colonial Bank of Ala. v. Ridley & Schweigert*, 551 So. 2d 390 (Ala. 1989); *Idaho Bank & Trust Co. v. First Bancorp of Idaho*, 772 P.2d 720 (Idaho 1989); Walpert, Smullian & Blumenthal, P.A. v. Katz, 762 A.2d 582 (Md. 2000). A leading law school torts casebook includes *Credit Alliance* in its Misrepresentation chapter. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS 1032 (10th ed. 2000).

clients; *Sowa v. Looney*,⁴ which set forth the standard for admissibility of evidence at administrative proceedings; *People v. Haney*,⁵ the seminal decision upholding the prosecution of drivers of motor vehicles for criminally negligent homicide for death arising from their operation of motor vehicles; *Shaw v. Time-Life Records*,⁶ which delineated the standard of liability for an unfair competition claim under New York law; *People v. Schwartzman*,⁷ which set forth the permissible scope of cross-examination of a defendant in a criminal case regarding the defendant's commission of prior "bad acts" or criminal acts; *People v. Patterson*,⁸ which upheld New York's concept of affirmative defenses in criminal cases; *Licari v. Elliott*,⁹ which set the standard for determining on a summary judgment motion whether the plaintiff satisfied New York's No Fault Law threshold; *Abood v. Hospital Ambulance Service, Inc.*,¹⁰ which articulated the nature of the emergency warning to be implemented by ambulances or emergency vehicles in order for such vehicles to invoke the privilege to disregard Vehicle and Traffic Law provision; *Kelly v. Long Island Lighting Co.*,¹¹ which explained and

⁴ 244 N.E.2d 243 (N.Y. 1968). *Sowa* is cited as the standard for determining the admissibility of evidence in NEW YORK STATE DEP'T OF CIVIL SERV., MANUAL FOR ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS 201 (2002).

⁵ 284 N.E.2d 564 (N.Y. 1972). *Haney* has been deemed by an influential commentator to be one of the Court of Appeals' most significant criminal law decisions of the past fifty years. See Peter J. McQuillan, *Dramatic Changes Affected Procedural and Substantive Rules*, 73 N.Y. ST. B.J. 16, 18 (2001).

⁶ 341 N.E.2d 817 (N.Y. 1975). A leading law school intellectual property law casebook includes *Shaw* in its Trademarks chapter. EDMUND W. KITCH & HARVEY S. PERLMAN, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION 172 (5th ed. 1998).

⁷ 247 N.E.2d 642 (N.Y. 1969), *cert. denied*, 396 U.S. 846 (1969). *Schwartzman* is consistently cited as controlling precedent in New York evidence texts. See ROBERT A. BARKER & VINCENT C. ALEXANDER, EVIDENCE IN NEW YORK STATE AND FEDERAL COURTS §§ 608.2, 609.1, 611.3 (student ed. 1996); MICHAEL M. MARTIN ET AL., NEW YORK EVIDENCE HANDBOOK: RULES, THEORY, AND PRACTICE §§ 6.10.2, 6.10.4.1, 6.12.1, 6.12.2 (2d ed. 2003); RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 6-305 (11th ed. 1995).

⁸ 347 N.E.2d 898 (N.Y. 1976), *aff'd sub nom.* *Patterson v. New York*, 432 U.S. 197 (1977). Commentators have observed that Judge Jasen's opinion was substantially adopted by the United States Supreme Court and that it paved the way for a more reasonable approach to the utilization of the insanity defense as an affirmative defense. See Alan D. Scheinkman & Edward A. Sheridan, *A Tribute to Judge Matthew J. Jasen*, 35 BUFF. L. REV. 14, 18-19 (1986); Robert A. Barker, *1991 Survey of New York Law: Evidence*, 43 SYRACUSE L. REV. 397, 399 (1992).

⁹ 441 N.E.2d 1088 (N.Y. 1982). *Licari's* influence can be seen simply by reason of the over 650 judicial references to it recorded in Shepard's as of January 1, 2006.

¹⁰ 283 N.E.2d 754 (N.Y. 1972). The *Abood* decision has been applauded as reflecting sound policy. See William Samore & Robert J. Tymann, *1972 Survey of New York Law: Torts*, 24 SYRACUSE L. REV. 551, 577-78 (1973).

¹¹ 286 N.E.2d 241 (N.Y. 1972). In *Dole v. Dow Chemical Co.*, 282 N.E.2d 288 (N.Y. 1972), decided two months before *Kelly*, the Court of Appeals abolished the "active-passive" dichotomy for determining indemnification claims in favor of the apportionment rule, acting,

implemented the newly enunciated rule permitting apportionment of damages among joint or concurrent tortfeasors; *People v. Davis*,¹² which upheld as constitutional the imposition of criminal sanctions against narcotics addicts; and *People ex rel. Scarpetta v. Spence-Chapin Adoption Service*,¹³ which addressed the issue of when a mother could regain her child after voluntarily surrendering the child to an authorized adoption agency. These decisions, which reflect merely one person's review of the numerous vital decisions authored by Judge Jasen, surely warrant Judge Jasen's inclusion in Thomas Jefferson's natural aristocracy.

Yet, it is the nature of a Jasen opinion which leads one to conclude that Judge Jasen is the epitome of a Jeffersonian natural aristocrat. These opinions bespeak a person devoted to the law, striving to do what he deemed to be right and not what would be popular or expedient. Ultimately, they reveal a judge honoring the craft of appellate decision-making at its highest level. The craft, as practiced by Judge Jasen, and subsequently revered by the bench and bar, warrants the accolade of Judge Jasen as a Jeffersonian natural aristocrat.

During the two years (1970–1972) I was privileged to serve as one of Judge Jasen's law clerks, I witnessed and experienced first hand this honoring of the craft of appellate decision-making. Perhaps what is most remarkable is that this ability and skill was present and observable to me, as Judge Jasen was entering only his third year of service. It was then honed over the next thirteen years. In this essay, I will make two observations on Judge Jasen's honoring of the craft.¹⁴

The hallmark of a well-crafted appellate decision is “clear thought and expression [with] [t]he reader always know[ing] what is at issue and how it is being decided.”¹⁵ In that regard, the decision will state

as is generally acknowledged now, at the urging of Judge Jasen.

¹² 306 N.E.2d 787 (N.Y. 1973), *cert. denied*, 416 U.S. 973 (1974). It has been pointed out that *Davis* and its progeny have prevented the undercutting of efforts to enforce laws criminalizing drug sales and possession. See David Robinson, Jr., *Powell v. Texas: The Case of the Intoxicated Shoeshine Man: Some Reflections a Generation Later by a Participant*, 26 AM. J. CRIM. L. 401, 449 & n.347 (1999).

¹³ 269 N.E.2d 787 (N.Y. 1971), *cert. denied*, 404 U.S. 805 (1971). *Scarpetta* is included in the adoption chapters of the two leading law school family law casebooks. See JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW* 1353 (2d ed. 1985); D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 1134 (2d ed. 2002).

¹⁴ Judge Jasen's opinions and his legacy are explored in length in an issue of the *Buffalo Law Review*, published upon his retirement. See *A Tribute to Judge Matthew J. Jasen*, 35 BUFF. L. REV. 1–38 (1986).

¹⁵ Hon. Albert M. Rosenblatt, *A Tribute to Judge Matthew J. Jasen*, 35 BUFF. L. REV. 8, 11

the precise issue presented by the appeal and articulate explicitly how that issue is being decided, discuss fully the pertinent precedent and why or why not it is applicable, especially addressing the parties' relied-upon precedent, and, lastly, caution the reader as to issues not reached.¹⁶ All of this must be done with "clarity of thought and lucidity of prose."¹⁷ Any shortcoming or failure as to these qualities leads to confusion regarding the meaning of the decision, inevitably sowing the seeds for further litigation, and can give rise to questions concerning the legitimacy of the decision itself.

Suffice it to say, a Jasen opinion never lacked these qualities as they are uncluttered with legal jargon and bereft of ambiguity, logically framed and directly expressed.¹⁸ The reason is that Judge Jasen was aware of these qualities and through preparation and prodigious hard work made every effort they were attained in his opinions. I can offer my personal experience in support of this observation.

I accepted Judge Jasen's offer to be his law clerk on December 9, 1969, a date I will never forget as it was a joyous day for me for other reasons, the birth of my daughter Elizabeth. Within two weeks, and continuing on a regular basis through mid-July 1970, I received my first "Jasen-gram"—a package containing the decisions of the Court of Appeals just handed down along with a note "FYI, MJJ." In speaking with Judge Jasen about why I was receiving these decisions, I was informed that I was to review them so that I could be fully conversant and knowledgeable about the court's present work. Judge Jasen also told me to consider these decisions, not just as to what they held, but for how their holdings were expressed, noting the presence/absence of the aforementioned qualities of a well-written appellate decision. He emphasized that I should consider fully, which when translated meant "study," the opinions of Chief Judge Stanley Fuld and Associate Judge Charles Breitell. They were the masters, related Judge Jasen. It was unmistakably clear to me that he had studied their decisions, so I did likewise.

Upon the start of my clerkship in August, 1970, and encountering the then crushing load of the Court of Appeals, I was exposed to how Judge Jasen put his knowledge of how to craft an opinion into play,

(1986).

¹⁶ See BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 9–50 (1921).

¹⁷ Scheinkman & Sheridan, *supra* note 8, at 16.

¹⁸ See Samore & Tymann, *supra* note 10, at 578 (commenting upon a Judge Jasen decision as "intelligent and well-reasoned").

namely, by exhaustive research, and meticulousness in the drafting of the opinion. When an opinion was assigned to him to write or he was contemplating the writing of a dissent, my co-clerk Robert Madden in my first year, and Tad Crawford in my second year, were assigned on a rotating basis to work with him on the preparation of the opinion. We were encouraged by Judge Jasen to speak frankly with him about his views as well as ours. Lengthy arguments would ensue, followed by extensive research. In a pre-Westlaw, Lexis-Nexis, and Google world, this generally meant considerable time in the State Law Library and the Erie County Supreme Court Library, seeking out legislative history, out-of-print legal reference materials or anything that would shed light on the issue we were considering. We were cautioned as well by Judge Jasen to read all cases cited by the attorneys in their briefs and be fully conversant with them. All of our research was then discussed and debated with Judge Jasen. An initial draft opinion would be prepared by the assigned law clerk or Judge Jasen, with the drafts circulated among all of us. The editing and rewriting process would continue unabated, right up to, and sometimes continuing through, the court's conferences. This process was guided throughout by Judge Jasen's twin concern that the opinion was understandable and would not confuse lawyers and trial judges when applying it, and thoroughly addressed the issue(s) presented so that no one could criticize it for gaps in reasoning.

A second hallmark of a well-crafted appellate decision is its principled following of established precedent, utilizing a common sense balancing of the various interests involved to extend or limit the precedent;¹⁹ or, where it is justifiable, rejecting the precedent because it is "found to be analytically unacceptable, and, more important, out of step with the times and the reasonable expectations of members of society."²⁰ All of this is achieved in a "disinterested but not uninterested [manner], and little influenced by the popularity or unpopularity of the views [the author] propounded."²¹ As others have commented,²² Judge Jasen's opinions consistently show his fealty to this judicial hallmark, which Judge Jasen himself calls his "fidelity to the rule of law."²³

¹⁹ *People v. Hobson*, 348 N.E.2d 894, 900–01 (N.Y. 1976).

²⁰ *Id.* at 901.

²¹ Hon. Charles D. Breitel, *A Tribute to Judge Matthew J. Jasen*, 35 *BUFF. L. REV.* 5, 6 (1986).

²² See source cited *supra* note 14.

²³ Hon. Matthew J. Jasen, Remarks at the Ceremony Marking Retirement of Senior

This aspect of honoring the craft is most noticeable in several dissenting and concurring opinions Judge Jasen authored.²⁴ They demonstrate an unwavering commitment to follow the law unless, as he would demonstrate, common sense shows otherwise, i.e., that the established precedent was unjustifiable. I do not suggest at all that Judge Jasen was merely substituting his personal views for views he disagreed with. He clearly was not, as he would be quick to point out and demonstrate.²⁵ Rather, Judge Jasen was acting consistent with practicing the craft at its highest level by showing that the law should be “based upon an appropriate and common sense balancing of the rights and interests of all concerned.”²⁶

What is most remarkable about these dissenting and concurring opinions is that the views Judge Jasen expressed therein have been in large measure vindicated by subsequent developments. For example, his view, as expressed in *Codling v. Paglia*,²⁷ that New York’s contributory negligence rule was contrary to notions of fairness was accepted by the New York legislature by the enactment of CPLR Article 14-A;²⁸ his view, as expressed in *People v. Linzy*,²⁹ that the corroboration requirements in sex cases imposed by statute and as construed by the courts were highly questionable and should be relaxed or abolished was adopted by the legislature by its amendment of Penal Law § 130.16, which eliminated the corroboration requirement for nearly all sex crimes;³⁰ his view, as expressed in *People v. Paddock*,³¹ that there were no constitutional prohibitions that would prevent comment upon a motorist’s failure to submit to a blood test and that a New York statute construed to preclude comment was wrong, prevailed when the legislature amended Vehicle and Traffic Law § 1194(2) to adopt it;³² his view, as expressed in *Bovino v. Scott*³³ and consistently adhered to in later

Associate Judge Matthew J. Jasen (Dec. 17, 1985), in 66 N.Y.2d vii, ix (1985).

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

²⁵ See *Byrn v. New York City Health & Hosps. Corp.*, 286 N.E.2d 887, 891 (N.Y. 1972) (Jasen, J., concurring), *cert. denied*, 410 U.S. 904 (1973).

²⁶ Scheinkman & Sheridan, *supra* note 8, at 17.

²⁷ 298 N.E.2d 622, 631 (N.Y. 1973) (Jasen, J., concurring).

²⁸ 1975 N.Y. Laws 94–95.

²⁹ 286 N.E.2d 440, 445 (N.Y. 1972) (Jasen, J., dissenting).

³⁰ 1974 N.Y. Laws 33.

³¹ 272 N.E.2d 486, 487 (N.Y. 1971) (Jasen, J., concurring).

³² 1973 N.Y. Laws 602. It should also be noted that several state courts and legislatures shared Judge Jasen’s view. See *District of Columbia v. McConnell*, 464 A.2d 126 (D.C. Ct. App. 1983); *McCambridge v. State*, 698 S.W.2d 390 (Tex. Ct. App. 1985); *People v. Taylor*, 250 N.W.2d 570 (Mich. Ct. App. 1977).

³³ 239 N.E.2d 345, 347 (N.Y. 1968) (Jasen, J., dissenting).

decisions,³⁴ that appellate courts should not engage in *de novo* review of sanctions imposed by state or municipal agencies on their employees was adopted by the Court of Appeals itself in *Pell v. Board of Education*;³⁵ his view, as expressed in *Tebbutt v. Virostek*,³⁶ that it is “unjust and unwise” to preclude a mother’s recovery for emotional distress resulting from the stillbirth of her child where the child died as a result of a physician’s malpractice, was adopted by the Court of Appeals in *Broadnax v. Gonzalez* which overruled *Tebbutt*;³⁷ and his view, as expressed in *Simonson v. Cahn*,³⁸ that it is unreasonable to hold that a person cannot knowingly and intelligently waive indictment by a grand jury and proceed to trial on a criminal information was validated by voter approval of an amendment to Article 1, section 6 of the New York State Constitution permitting such a waiver.³⁹ As aptly stated by one of Judge Jasen’s law clerks, these dissenting and concurring opinions “forcefully demonstrate the persuasive influence a well reasoned and skillfully crafted dissenting opinion can have on the dissenter’s own court, higher courts, legislative bodies, scholars, and the public.”⁴⁰ Surely, the craft has been honored by Judge Jasen.

In the years after my clerkship and upon my continuation of reading the “Jasen-gram” package, now on the court’s web page, I started to think about what life experiences of his led to the way he approached his craft. There are several. Certainly, his military service in Germany during and after World War II, especially his service as United States Judge for the Third Military Government Judicial District at Heidelberg, Germany, where he was exposed to the horrors of Nazi Germany, imbued in him his strong passion for justice and the obligation to achieve fairness. Judge Jasen’s active trial practice and service as a trial judge prior to his election to the Court of Appeals would have impressed upon him the need for clarity in appellate decisions as he could see first hand the mischief and unnecessary work that would be created for the trial bar and bench from an unclear and/or poorly reasoned appellate decision. In my view, while these two life experiences are important, it was

³⁴ *Picconi v. Lowery*, 272 N.E.2d 77, 78 (N.Y. 1971) (Jasen, J., dissenting); *Short v. Looney*, 272 N.E.2d 892, 893 (N.Y. 1971) (Jasen, J., dissenting); *Tannenholz v. Waterfront Comm. of New York Harbor*, 282 N.E.2d 888, 889 (N.Y. 1972) (Jasen, J., dissenting).

³⁵ 313 N.E.2d 321 (N.Y. 1974).

³⁶ 483 N.E.2d 1142, 1148 (N.Y. 1985) (Jasen, J., dissenting).

³⁷ 809 N.E.2d 645 (N.Y. 2004).

³⁸ 261 N.E.2d 246, 249–50 (N.Y. 1970) (Jasen, J., dissenting).

³⁹ N.Y. CONST. art. 1, § 6. Voters passed the amendment on November 6, 1973.

⁴⁰ Powers, *supra* note 24, at 37–38.

Judge Jasen's love for the Court of Appeals, an institution that he reveres, that led him, if not drove him, to "practice the craft" at its highest level. In doing so, Judge Jasen served the court, and only the court, in order to ensure that its status as the pre-eminent state court in the United States would continue.

I have no doubt that no person is irreplaceable. However, there are gifted men and women who leave a particular mark upon an institution and the broader society, members of Jefferson's "natural aristocracy." They are models for others to emulate. Such a man was Judge Matthew J. Jasen. I am but one upon whom he has left his mark. From him I learned to love and serve the law. Whatever success I have achieved in my academic and professional life is due in large measure to my association since 1970 with Judge Jasen. I knew, of course, that the clerkship would be wonderful in the literal sense of that word. What I did not know was that I would begin a friendship with a man who remains a model for us all. I never expect to see his particular type of wisdom and ability duplicated.