Celebrating Jack H. Friedenthal: The Views of Two Co-authors

Helen Hershkoff* and Arthur R. Miller**

*I. Knowing Jack****

A. Arthur

I met Jack long before he became *the* Jack whose half century of impressive academic work these essays commemorate. We were both first-year law students at the Harvard Law School in the fall of 1955 and assigned to the same section of approximately 140 students. We were very fortunate in having Benjamin Kaplan for the then typical full-year course in civil procedure: ninety hours. Obviously, we both fell in love with Ben—who was an incredibly effective teacher and a great role model—and with the subject. How else might one explain why Jack and I have devoted the better part of our professional lives to the field?

Back then, Jack wasn't Jack; we all called him Friede; I still do. But for purposes of these pages, I will bow to Helen's sense of decorum and refer to him as Jack (at least most of the time). There is no way, however, I can call him Professor Friedenthal, not after all these years.

Jack and I grew closer when we both were selected for membership on the *Harvard Law Review*. In those days, the *Review* was almost a 24/7 commitment. The cult-like tradition of that institution and the educational value of its rigorous work made classes seem secondary. We spent a lot of time together and I began to appreciate how lovely and principled this beanstalk of a kid from Denver was. (I grew up in Brooklyn and don't think I ever had met anyone from west of Ohio before law school.) I have a vivid recollection of spending

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some time in Jack's dorm room and getting to know his third-year roommate, Charles Heiken. Chuck was an MIT graduate and their room was dominated by a huge half sphere on the floor blaring gorgeous classical music. Heiken, who is now one of the nation's finest patent lawyers, had spent his undergraduate years at the feet of Amar Bose. It turned out, I was staring at and listening to the prototype of the speaker that began Bose and his fledgling company on its way to audio greatness.

Jack and I remained close throughout law school, spending our third year as officers of the *Review*. He went off to a teaching fellowship at Stanford Law School and I sold out to Wall Street. After all, they were paying the munificent sum of $5,500 a year at that time. Jack's job morphed into a faculty appointment and the rest is history.

A number of years later, Jack was growing professionally by leaps and bounds on the Stanford faculty and I had left practice to become a member of the Minnesota Law faculty. Roger Noreen, the beloved head of the law school division of West Publishing Company—no Thomson, no Reuters back then—approached us to do a civil procedure casebook. In many respects, it seemed like a dubious venture. There were a couple of excellent procedure casebooks on the market, including one by Benjamin Kaplan and Richard H. Field, also of the Harvard faculty. But West did not have a book and Roger convinced us that Western civilization could not survive without a procedure casebook with the West imprint on it.[1] I convinced Jack that we should bring in John J. Cound, my brilliant, encyclopedic colleague on the Minnesota faculty, as a co-author.[2] Unfortunately, Cound's writer's cramps required Friede and myself to carry most of the water. I have done better with recommendations since, convincing Jack to bring John E. Sexton[3] and, more recently, Helen Hershkoff, on as co-authors.

Our collaboration began around 1964. Natural predilection assigned Jack the pleading, joinder, discovery, trial, appeals, and former

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1 Those were the days when each of the three extant casebook publishers only would have one or two titles for the basic courses. Today's glut of books was many years away.

2 Through the sixth edition, the book was dedicated to our teachers Richard H. Field and Benjamin Kaplan, the authors of the then-dominant casebook in the field. Some mistook that to be a subliminal advertising message. (Dick Field once accusingly teased me for taking royalties from his pocket.) In truth, the dedication was a heartfelt expression of affection and gratitude to our teachers; that is my story and I always will stick to it.

3 Sexton was teaching civil procedure at NYU at the time. He has since served as dean of its law school and is now president of the university.

adjudication chapters; I grabbed all the jurisdiction and *Erie*[4] chapters as well as a few others. From the outset, we decided to degenderize the volume; it may have been the very first law school casebook to do so. As Helen describes below, the collaboration was at a distance, Jack at Stanford and then George Washington, and I at Minnesota, and then Michigan, and then Harvard, and now NYU. It is hard to believe that forty-five years later ten editions of the casebook have been published (eleven if you count the revised ninth edition demanded by the questionable 2007 restyling of the Federal Rules of Civil Procedure). In 1986, Jack and I teamed up with my former research assistant, Mary Kay Kane, past Dean of the Hastings Law School, to publish a one-volume text on civil procedure, a hornbook that has now gone through four editions.[5]

Friede is a wonderful collaborator. He always has done his work comprehensively right on schedule, bubbles with thoughts and ideas, and, unlike me, is constantly cheerful and optimistic. He is pathologically addicted to getting things precisely right and has a level of common sense about civil procedure that is quite extraordinary. Despite the rigors of being the Dean of The George Washington University Law School and other professional demands, he always completed his portion of what had to be done. In forty-five years of collaboration, and all the years of our friendship before that, we have never been cross with each other.

Jack is one of those people who is steady as a rock. That solidity has characterized our collaboration, and his application of analytical skills to the materials placed under his superintendency is truly special. It also has characterized his deanship, his star-quality teaching, and his personal life. He and his wonderful wife, Jo Anne—they met in law school—have been married for over fifty years.

I must confess to one difficulty I have had with Jack that fills me with envy. Being a sports nut, I begrudge his intimate and long-term involvement and position settling intramural disputes involving the folks at the National Football League. That has got to be the most wonderful counterpoint for his life of writing casebooks and law review articles. But I can't think of a nicer, more talented, and even-handed person to have that gig.

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4 Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

5 Jack and I also authored a one-volume casebook on pleading, joinder, and discovery in 1968, a book that probably has not seen the light of day outside the authors' offices. We also did countless editions of a student aide for civil procedure, sometimes captioned *Sum and Substance*, sometimes *Quick Review*.

B. Helen

Long before I knew Jack Friedenthal, I knew of him. Probably all law students of my generation knew of Jack because we all knew someone in a first-year course who had been assigned to read Cound, Friedenthal, and Miller's *Civil Procedure: Cases and Materials*. Newly minted in 1968, the casebook already had gone through the first of its ten editions the year before I arrived at the Harvard Law School. The second edition (and I still have my copy) boldly announced that the study of civil procedure "should" be "exciting and entertaining," as well as an "intellectual experience."[6] The authors' use of the conditional auxiliary "should" struck me as a dare as much as a challenge. The authors disclaimed having "aimed at a 'hard' book,"[7] and I recall not knowing whether to disbelieve that statement or to be demoralized by it. Little did I anticipate that thirty years later I would be brought in to join Jack as a co-author on this by now long-running and distinguished text, a casebook that has become a classic by any measure. I am privileged to have been invited to work with Jack and to participate in this well-deserved celebration of his fiftieth anniversary as a law professor. I also am grateful for the chance to thank Jack publicly for his role in making the study of civil procedure—for me, as for so many other students—an exciting, entertaining, and intellectual experience.

Since joining the casebook team, I have had the pleasure of getting to know Jack through our collaborative work. Our relationship grows, but it grows from a distance. Jack works in Washington, D.C.; I work in New York. Technology has allowed us to prepare annual rule supplements and periodic new editions without ever meeting face to face. Working side by side requires energy and emotion, but it has advantages in developing trust and forging bonds. Jack has been masterful in hurdling the barriers of a virtual relation. Even in our routine phone calls and e-mails, Jack displays a unique brand of attentiveness and sensitivity, qualities that make clear why he was successful as Dean of The George Washington University Law School. Jack invariably opens a phone call with the greeting "Helen, Jack here. Can you talk?" and never presumes that his convenience ought to come first. He routinely inquires after my son and husband, and he gently urges me not to spend summer evenings working in my office.

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6 JOHN J. COUND, JACK H. FRIEDENTHAL & ARTHUR R. MILLER, CIVIL PROCEDURE: CASES AND MATERIALS, at xiv (2d ed. 1974).

7 *Id.*

He discusses the casebook—revisions to make, cases to edit, sections to remove, ways to improve and to adapt—with an open mind, receptive to possibilities, and treats me as if I have been a full partner on the project for the last forty years. Jack's instinctive egalitarianism, his thoughtfulness, and his uncommonly good sense are among his defining characteristics.

II. Celebrating Jack and His Work

The tributes in this volume celebrate Jack's multifaceted accomplishments in the five decades since his graduation from the Harvard Law School in 1958. Professor Friedenthal's work as a dean, as a special master settling disputes between the National Football League and the National Football League Players Association, and as a noted evidence scholar certainly deserves praise, but for us it takes a back seat to his important contributions to the world of civil procedure. It is a commonplace to say that law professors today are disaffected from legal practice and even ignorant of it.[8] Jack has defied that trend: he is the unusual scholar whose insights, predictions, and suggestions have produced meaningful and positive change for lawyers, courts, and litigants. He consistently has turned a practical eye toward recognizing a problem, identifying possible reforms, and assessing the real world benefits of choosing one solution rather than another. Jack's approach—methodical, incremental, and deeply respectful of institutional roles—reflects the humility that we have come to associate with this most exemplary of colleagues.

Jack's articles have touched on problems and concerns that continue to engage the study and practice of civil procedure. His writing on both California and federal practice have offered no-nonsense recommendations that consider the different and competing procedural needs of plaintiffs, defendants, and outsiders to a case. Quietly and without jargon, these recommendations raise foundational questions about the role of procedural rules in a complex and evolving society; they point us to roads not taken, highlighting the problems that expectedly—or unexpectedly—have persisted or emerged.

This *Festschrift* is not the occasion for a comprehensive review of Jack's work, but it does provide an opportunity for considering how Jack's scholarship over these last five decades has shaped and might

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8 *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK 205 (2008); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992). Indeed, the senior co-author of this piece believes that the gulf between the practicing and the academic wings of the legal profession never has been wider or deeper in his lifetime.

influence future developments in civil procedure. Although many different issues have been central to Jack's scholarship, we focus on three themes that weave through his writings: aggregation and the contest between efficiency and fairness; information disclosure and the tension between autonomy and accountability; and rulemaking and the demands of impartiality and expertise. Combined, these themes help us to appreciate the distinct but complementary roles that Jack ascribes to adjudication, and the importance he attaches to process goals in civil litigation as well as in civil society.

A. Aggregation, Efficiency, and Fairness

Fifty years ago, when Jack began his academic career, "aggregation" was a term as likely to be applied to the tax treatment of property interests as it was to the valuing of claims for purposes of the diversity jurisdiction.[9] Today, aggregation is the shorthand for discussing the bundling of claims and parties through such mechanisms as the class action, joinder rules, preclusion doctrine, and inter-suit injunctions.[10] The term has attained conceptual dominance among courts and commentators, a status that is reflected in the title of the project of the American Law Institute ("ALI") on aggregate litigation, commenced in 2003;[11] a decade earlier, a study of "complex litigation" commanded the ALI's attention.[12]

With hindsight, one can say that the emergence of aggregate litigation was just a matter of time, an inevitable byproduct of the "massification" of post-World War II society.[13] But in 1958, when Jack began his life in academe, the Federal Rules of Civil Procedure still embraced the concept of the "spurious" class action;[14] the device of interdistrict transfer was relatively novel—the multidistrict-litigation

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9 *See, e.g.*, Thomson v. Gaskill, 315 U.S. 442, 445–47 (1942) (diversity jurisdiction); Joseph J. French, Jr., *The Oil and Gas Property and Aggregation*, 36 TEX. L. REV. 745, 758 (1958) (tax treatment).

10 *See generally* Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS., Summer 1991, at 5 (discussing the proliferation of aggregation in modern litigation).

11 *See* Am. Law Inst., Current Projects: Principles of the Law of Aggregate Litigation, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=7 (last visited Sept. 19, 2009).

12 *See* Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 234, 240–42, 268–72 (1991) (describing the ALI project on complex litigation).

13 Mauro Cappelletti, *Vindicating the Public Interest Through the Courts: A Comparativist's Contribution*, 25 BUFF. L. REV. 643, 645–46 (1976).

14 *See* Comment, *Procedural Devices for Simplifying Litigation Stemming from a Mass Tort*, 63 YALE L.J. 493, 509–16 (1954).

statute was years away;[15] and the surge in class-action filings had not yet occurred.[16] California's joinder provisions certainly had not yet made a leap into the future. Judge Charles E. Clark of the Second Circuit criticized the state for having attempted only a limited "essay into the most modern reform";[17] Professor Geoffrey Hazard saw in California's pleading rules "an incongruous coexistence of the ancient and the modern";[18] and Chief Justice Roger Traynor of the California Supreme Court called the state's system of civil procedure "a petrified forest."[19]

Into this forest Jack marched, surveying the field, devising tactics to uproot the old and decrepit, and planning thoughtful possibilities. In an article published in 1971 in the *Stanford Law Review*, Jack undertook to provide the California Law Revision Commission, newly established in 1953 and located at Stanford University, with background information for its review of the state's pleading rules.[20] Jack's focus was broad: the entirety of the outmoded provisions for joinder of claims in the California Code of Civil Procedure.[21]

At the time that the article was written, joinder of claims made by plaintiffs was dealt with in section 427 of the Code. This provision laid out nine "classes" of claims, e.g., injuries to character, injuries to person, and injuries to property, and only those claims within the same class could be joined.[22] California was a code state when it entered the Union,[23] and the artificial categories of both code and common-law procedure continued to rule joinder, creating a narrow and inefficient system. The provisions under which a defendant might bring a claim against a party were a similar morass. Section 442 allowed a defendant to assert a cross-complaint against any party—it was not

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15 Note, *Limitations on the Transfer of Actions Under the Judicial Code*, 64 HARV. L. REV. 1347, 1347 (1951); *see also* Multidistrict Litigation Act, Pub. L. No. 90-296, 82 Stat. 109 (1968) (codified at 28 U.S.C. § 1407 (2006)).

16 *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664, 669–71 (1979).

17 Charles E. Clark, Book Review, 8 UCLA L. REV. 994, 994 (1961).

18 Geoffrey C. Hazard, Book Review, 8 UCLA L. REV. 1012, 1013 (1961).

19 Roger J. Traynor, *The Unguarded Affairs of the Semikempt Mistress*, 113 U. PA L. REV. 485, 501 n.28 (1965).

20 Jack H. Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1 (1971).

21 *Id.* at 1 (proposing "change[s] that will [hopefully] result in a new set of consistent, coherent statutes").

22 CAL. CIV. PROC. CODE § 427 (West 1969), *repealed by* 1971 Cal. Stat. ch. 244, § 22, at 378.

23 *See* Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 465 (1997).

clear whether the party had to be an *existing* party—provided that claim arose out of the same transaction as the original claim.[24] However, if the defendant wished to bring a claim requesting money damages against the plaintiff, whether or not the claim arose out of the same transaction as the original claim, section 438 required that a counterclaim be brought.[25] Denominating separate categories for counterclaims and crossclaims is not in itself irrational, but each claim had different procedural rules that were unnecessarily complex and could confuse even the experienced California lawyer.

Jack pulled no punches in his characterization of the existing joinder regime: "California law with respect to joinder of claims, counterclaims, and cross-complaints," he wrote, "has developed in piecemeal fashion, resulting in a proliferation of confusing, inconsistent, and sometimes meaningless provisions."[26] He set as his goal the articulation of principles by which to evaluate the state's joinder rules and to propose guidelines for their reform. He made clear the ultimate aim of joinder rules: "[T]o enable courts to deal more efficiently with cases by disposing of more actions at one time and to make the prosecution and defense of multiple actions more economical for the parties."[27] He also acknowledged that joinder provisions, whether they are called consolidation, combination, aggregation, bundling, or something else, do not inevitably produce efficiency, rationality, or fairness. Every process has its limits, and it was critical to pay attention to the unintended consequences of any procedural rule change. Jack cautioned: "Joinder provisions should not be permitted to increase the overall costs of litigation or to so complicate a given case that the trier of fact cannot rationally decide it."[28]

Jack made two major suggestions for updating the rules for joinder of claims brought by plaintiffs. He urged eliminating section 427's limits based on classes, and substituting unlimited permissive joinder of claims.[29] Further, he urged the mandatory joinder of claims arising out of the same transaction to increase efficiency. He did not claim to be presenting a universal reform or one that should be transported to other states: elsewhere, a rule of compulsory joinder might not be

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24 CAL. CIV. PROC. CODE § 442 (West 1969), *repealed by* 1971 Cal. Stat. ch. 244, § 45, at 389.

25 CAL. CIV. PROC. CODE § 438 (West 1969), *repealed by* 1971 Cal. Stat. ch. 244, § 41, at 389.

26 Friedenthal, *supra* note 20, at 1.

27 *Id.*

28 *Id.*

29 *Id.* at 2–7.

needed to incentivize the consolidating of claims, because principles of res judicata and collateral estoppel might do the work. California, however, continued to rely in its preclusion law on the narrow "primary right" theory, so Jack had to place greater weight on joinder.[30] Turning to claims interposed by defendants, Jack offered a few key suggestions for modernizing the code, not the least of which was simply harmonizing and making identical the rules for joinder of claims by defendants and plaintiffs.[31]

These recommendations were complemented by those made in an earlier article in which Jack addressed the 1957 amendment to section 442 of the California Code of Civil Procedure.[32] Section 442 dealt with the right of a defendant to seek affirmative relief based on claims "relating to or depending upon" the transaction or other events "to which the action relates."[33] Prior to 1957, courts permitted a defendant to assert a claim only against a party to the original action or against an "outsider" deemed indispensable.[34] The 1957 amendment had inserted language to read "any person, whether or not a party to the original action,"[35] and California courts read this language broadly to allow a defendant to bring claims against any outsider.[36] The Law Revision Commission had recommended the change to the legislature, and Jack argued that the courts' interpretation exceeded the Commission's authority and intention.[37] Moreover, it went beyond any sensible reform. Jack raised two practical objections, grounded in the effects a broad judicial interpretation would have on small claimants.

First, Jack expressed concern that the courts' approach could create a system in which small claims that ordinarily would be brought in municipal court would instead become triable in superior court.[38] Jack recognized that prejudice in this situation could flow both to plaintiff and to defendant. Due to the significantly higher cost of litigating claims in the superior court and the slower trial calendar, the change

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30 *Id.* at 11–17.

31 *Id.* at 35.

32 Jack H. Friedenthal, *The Expansion of Joinder in Cross-Complaints by the Erroneous Interpretation of Section 442 of the California Code of Civil Procedure*, 51 CAL. L. REV. 494 (1963).

33 CAL. CIV. PROC. CODE § 442 (1954), *repealed by* 1971 Cal. Stat. ch. 244, § 45, at 389.

34 *Id.* at 494–95.

35 1957 Cal. Stat. ch. 1498, § 1, at 2824.

36 Friedenthal, *supra* note 32, at 498.

37 *Id.* at 499–500.

38 *Id.* at 500–01. California trial courts subsequently have been reorganized and consolidated. *See* Harry N. Scheiber, *Innovation, Resistance, and Change: A History of Judicial Reform and the California Courts, 1960-1990*, 66 S. CAL. L. REV. 2049, 2076–78 (1993).

in forum from a municipal to a superior court placed small claimants at a serious disadvantage.[39] A plaintiff who filed a small claim in the municipal court would face automatic transfer to the superior court in which the defendant filed a third-party claim; a defendant who was sued in superior court and wished to assert a small transactionally related claim against an outsider that otherwise could be heard in municipal court would face consolidation in superior court. Prejudice in these situations was not hypothetical or abstract. In addition to calendar congestion in the superior court, its pretrial procedures would generate unexpected expense; the parties and witnesses would have to travel farther for trial; and the costs of discovery were likely to be higher for a small claim that is consolidated with one that has higher stakes.[40] As Jack explained:

> If only the small claim was being entertained, only major witnesses, if any, would be deposed. The cost of attending a large number of depositions would soon exceed the entire amount involved in many small claims. Thus, in a complex case a litigant on a small claim must simply forego attendance and hope that his interests will not be prejudiced by his absence.[41]

The second problem Jack identified would arise in impleader situations.[42] Because there is no dedicated impleader statute in California, defendants wishing to bring an indemnity claim against a third party would have to do so under section 422, which created the threat of collusion because the outsider could not challenge the plaintiff's claim. But permitting the third party to defend against a plaintiff's claim created a different problem of potential prejudice to plaintiff who, as Jack emphasized, "suddenly finds himself confronted with a much more formidable foe than the one against whom he brought suit."[43]

Having identified a set of procedural harms, Jack proposed a solution to the specific problem at hand. An easy reform would have been simply to transplant a provision mirroring Federal Rule 14.[44] Jack favored the federal approach, which placed the decision for or

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39 Friedenthal, *supra* note 32, at 501.

40 *Id.*

41 *Id.*

42 *Id.* at 502.

43 *Id.* at 503.

44 *Id.* At the time, Federal Rule 14 provided:

> Before the service of his answer a defendant may move ex parte or, after the service of his answer, on notice to the plaintiff, for leave as a third-party plaintiff to

against allowing a new party to be added within the discretion of the trial court as opposed to allowing a defendant to add parties as a right.[45] But he recognized that the different institutional context of the California judiciary, including the existence of superior and municipal courts, rendered the federal solution not "completely satisfactory," and so he further suggested that if the addition of a party would cause the case to be moved from municipal court to superior court, the superior court should determine whether to allow joinder or not.[46]

One year after publication of Jack's comprehensive article in the *Stanford Law Review*,[47] the California legislature thoroughly revised the state's code of civil procedure.[48] Jack's influence is evident throughout this overhaul, and committee reports for many of the new provisions cite his analysis and support his recommendations.[49] In both of his articles, Jack offered a microcosm of current debates about aggregation and how to balance the competing demands of systemic efficiency with litigant autonomy. He was careful to ground his criticisms in the practical problems presented by the existing rules, while keeping in mind principles that provided normative guideposts. Above all, Jack showed attention to the possible effects of joinder rules in a state as large and unique as California, where smaller parties would face great hardship if forced to defend or prosecute unexpectedly larger lawsuits at a distance from their homes or businesses. And he placed great reliance in the discretion of the trial judge to apply the joinder rules in a fair and economical way.

Jack returned to many of these themes later in his career. In 1999, he authored a short book review, *Tackling Complex Litigation*, that provided the occasion for musing about the future of civil procedure.[50] Jack resisted the idea that complex litigation is unique in its calling into question "the fundamentals of our adjudicatory system."[51]

> serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

FED. R. CIV. P. 14(a) (1959) (amended 1966).

45 Friedenthal, *supra* note 32, at 503–04.

46 *Id.* at 504.

47 Friedenthal, *supra* note 20.

48 *See generally* 1971 Cal. Stat. ch. 244, 372–94.

49 *See, e.g.*, S. Legislative Comm. Comment on 1971 Addition, CAL. CIV. PROC. CODE § 427.10 (West 2004); Law Revision Comm. Comment on 1971 Addition, CAL. CIV. PROC. CODE § 428.20 (West 2004).

50 Jack Friedenthal, *Tackling Complex Litigation*, 74 NOTRE DAME L. REV. 1301, 1308–10 (1999) (reviewing JAY TIDMARSH & ROGER H. TRANSGRUD, COMPLEX LITIGATION AND THE ADVERSARY SYSTEM (1998)).

51 *Id.* at 1309–10.

"Most of the issues arise in less complicated cases," Jack emphasized, "but escape deep scrutiny because they do not have the impact that they do when an entire action may be unmanageable unless they are resolved."[52] All cases, Jack insisted, large and small, call into question the proper functioning of the existing procedural system. "Those of us who have been studying our procedural system for years," Jack wrote, "have tinkered with it to eliminate perceived faults, but have left it largely intact."[53] Had the time come, he asked, "to rethink the fundamentals of our system and to address the need for more than just incremental change"?[54] Jack invited the reader to join him in a thought experiment that anticipated many innovations later considered by scholars and legislatures. In particular, Jack wrote:

> One can envision a new federal regime encompassing complex cases with minimal diversity and venue requirements, nationwide service of process, special rules for removal of individual state actions that should be part of a unified federal complex litigation case, and an altered 28 U.S.C. § 1407 that permits cases to be sent to a single court not only for pretrial proceedings, but for trial as well.[55]

Jack urged "further study," not to forestall reform, but to ensure due regard for the pragmatic considerations—factors such as institutional capacity, litigant resources, and lawyer strategy—that might undermine the proper functioning of even a well-designed procedural rule.[56]

B. Information Disclosure, Autonomy, and Accountability

Jack's approach to the reform of the California joinder rules reflected the widely-shared insight that adjudication plays a dual role in American society: it serves the private interest, ensuring compensation and redress, and it serves a public interest, enforcing laws and promoting trust. Joinder rules can serve the public interest by facilitating the litigating of small claims that, combined, create larger deterrent effects; in this way, joinder also promotes the private interest by overcoming collective-action problems and reducing litigation costs. Jack recognized, however, that joinder rules, unless thoughtfully devised and applied, could work unintended but predictable negative consequences for discrete categories of litigants. In California, the

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52 *Id.* at 1308.

53 *Id.* at 1308–09.

54 *Id.* at 1309.

55 *Id.* at 1310 (footnote omitted).

56 *Id.*

courts' broad interpretation of section 422 threatened a contest between the public aim of efficiency and the private litigant's interest in knowing, up front, how much litigation will cost. Rules that were designed to ensure access paradoxically could burden access and render access illusory if the real world expenses of litigation exceeded the expected benefits of a final judgment.

Jack's writing about discovery has identified and explored a similar conflict between the public benefits and private dangers of the litigation process—in this context, potential problems raised by rules that allow access to information through discovery. In a series of articles, Jack investigated a number of practical problems with the then-existing federal disclosure process: these issues related to the use of an adverse party's expert information;[57] the U.S. Supreme Court's adoption of amended discovery rules concerning the scope of relevance;[58] and the use of confidentiality agreements that seal discovery material from the public's eye.[59] Jack's role in securing amendment of the Federal Rules regarding expert disclosure is justly famous.[60] As with his discussions of joinder, Jack's close analysis of particular discovery issues provided a window into more general concerns relating to the scope of information access and the role of judicial discretion in regulating such access; Jack played a role in devising solutions to some of the problems he identified; and Jack framed his discussion in ways that have encouraged careful analysis of issues that continue to resist reform.

In 1962, the University of Chicago published Thomas S. Kuhn's *The Structure of Scientific Revolution*,[61] a groundbreaking book that, among other things, influenced a change in attitudes toward the role of science in adjudication. Since then, it has become commonplace for commentators to link the judicial role with advances in science and technology; it is widely acknowledged that expert information plays a

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57 Jack H. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962).

58 Jack H. Friedenthal, *A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure*, 69 CAL. L. REV. 806 (1981).

59 Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL'Y 67 (2000).

60 A highly regarded treatise acknowledges that Jack's article *Discovery and Use of an Adverse Party's Expert Information* "has been much quoted by federal and state courts and has been especially influential." 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2029 n.12 (2d ed. 1994).

61 THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). The book was published earlier as a monograph in the *International Encyclopedia of Unified Science*.

critical role in ensuring the integrity and accuracy of judicial decision-making.[62] Judge Posner explains:

> We live in an age of breakneck technological change that will thrust many difficult technical and scientific issues on judges, for which very few of them (of us, I should say) are prepared, because of the excessively rhetorical emphasis of legal education and the weak scientific background of most law students.[63]

However, when Jack began his teaching career, expert information had not yet assumed a major role in civil litigation. The Federal Rules had effectively punted on the disclosure of expert witness information.[64] Indeed, in 1946, the Advisory Committee on Civil Rules recommended amending Rule 26 to insulate expert reports entirely from discovery, and a number of state judicial systems adopted expert discovery bans based on the federal proposal.[65] Federal courts were divided—some might say divided bitterly—over the question of whether to permit discovery from experts. Law reviews and treatises frequently recount the conflict between the district courts of Ohio and Massachusetts on this issue, concerning depositions of two experts working on the same case.[66]

Writing even before the adoption of Federal Rule of Evidence 705 in the 1970s, Jack trained his eye on litigation practice in both federal and state courts and identified an emerging problem that he pithily described in the title of the article: *Discovery and Use of an Adverse Party's Expert Information*. Published in 1962, just a few years after Jack began law teaching, *Discovery and Use* became one of the definitive articles on expert discovery and a key source relied

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62 *See, e.g.*, David L. Faigman, *Judges as "Amateur Scientists,"* 86 B.U. L. Rev. 1207, 1207 (2006) ("The role of the judge in the twenty-first century cannot be understood without due consideration of the place of science and technology.").

63 Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. Rev. 1049, 1049 (2006).

64 *See generally* Jeremiah M. Long, *Discovery and Experts Under the Federal Rules of Civil Procedure*, 38 F.R.D. 111 (1966) (noting that that Federal Rules were vague as to limitations upon expert discovery and criticizing the reasoning under which judges routinely held experts to be outside discovery).

65 *See* James L. Hayes & Paul T. Ryder, Jr., *Rule 26(b)(4) of the Federal Rules of Civil Procedure: Discovery of Expert Information*, 42 U. Miami L. Rev. 1101, 1108–09 (1988).

66 *See, e.g.*, Long, *supra* note 64, at 140 n.142; Joseph M. McLaughlin, *Discovery and Admissibility of Expert Testimony*, 63 Notre Dame L. Rev. 760, 763 (1988). *Compare* Cold Metal Process Co. v. Aluminum Co. of Am., 7 F.R.D. 425, 428 (N.D. Ohio 1947), *aff'd sub nom.* Sachs v. Aluminum Co. of Am., 167 F.2d 570 (6th Cir. 1948) (per curiam) (permitting deposition), *with* Cold Metal Process Co. v. Aluminum Co. of Am., 7 F.R.D. 684, 686 (D. Mass. 1947) (prohibiting deposition).

upon by the Advisory Committee in its adoption of Federal Rule 26(b)(4).[67] *Discovery and Use* is vintage Friedenthal: straightforward, meticulous, and clear in its explanation of why existing judicial practices undermined the principles that ought to govern expert disclosure—the attorney-client privilege, the work-product protection, and fairness. In particular, Jack argued, courts were ignoring in their decisions a fundamental distinction between information that an expert acquires through communications with the client and information from third-party sources.[68] Commentators often emphasize the importance of Jack's analysis in persuading the Advisory Committee to authorize discovery from experts and in helping to draw clear distinctions among the different roles that experts play in the course of a civil proceeding.[69]

Jack's article did more, however, than justify access to expert material to benefit the individual litigant. He also made clear the significance of such access in preserving the integrity of judicial decisionmaking. Pointing to "the ever-increasing dissatisfaction with the honesty and reliability of expert testimony," Jack underscored the problem of allowing unbridled license, as he put it, to an "'advocate-expert' who by stretching some facts and ignoring others creates a case for his client where none should exist."[70] Cross-examination, properly informed by discovery material, not only leveled the playing field between litigants, and so served an important private interest, but also ensured "that judicial decisions be based on the true facts," and so bolstered the public interest, as well.[71] Yet, in classic Friedenthal fashion, Jack did not brush away all objections to expert disclosure; rather, he called for "[c]areful study," especially of state litigation practice, to assess whether concerns about litigation abuse were "realistic, and if so, whether the evil cannot be controlled."[72]

Almost four decades since the amendment of Federal Rule 26 to enlarge access to expert information, the debate about discovery has changed in important ways. The senior author of this piece, a former

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67 *See* Hayes & Ryder, *supra* note 65, at 1107 (identifying the sources relied on by the Advisory Committee). The history and current state of expert discovery in the federal courts is discussed in 8 WRIGHT, MILLER & MARCUS, *supra* note 60, §§ 2029–2034.

68 *See* Friedenthal, *supra* note 57, at 469.

69 *See, e.g.*, Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U. L.Q. 19, 32–33 (1990).

70 Friedenthal, *supra* note 57, at 485–86.

71 *Id.* at 487.

72 *Id.* at 488.

Reporter to and then member of the Advisory Committee, has pointed to the "180 degree shift" in discovery practice starting with the principle of proportionality.[73] Richard Marcus has spoken of "a significant retrenchment from the broadest views of discovery."[74] And recently the Supreme Court openly (and surprisingly) questioned whether case-management techniques are sufficient to control perceived abuses in the discovery process.[75] On a related front, commentators disagree on whether parties ought to be allowed to use confidentiality and settlement agreements to shield discovery material from public access even where the information might implicate important health and safety concerns. Congress currently is weighing proposed "Sunshine in Litigation" legislation,[76] and some states already have imposed limits on the courts' powers to enter protective orders or to approve party-drafted confidentiality agreements.[77]

Jack entered this debate in 2000 with an article that broadly considered whether the courts should block "free public access to information developed in civil cases."[78] Acknowledging strong disagreement on both sides of the aisle, Jack's article is a model of calm, clear thinking, setting out a framework, synthesizing arguments, and suggesting principles to guide future consideration. Jack argued that the answer to the question he set ultimately turns less on "the practical effects of disclosure" than on "philosophical concepts of the role of the courts" and "belief as to the fundamental nature and purposes of a court system regarding civil disputes."[79] Jack insisted that courts "ought not" to base decisions about confidentiality "on abstract theories," but instead must consider the different contexts in which decisions need to be made.[80] Just as *Discovery and Use* carefully parsed the different roles of the expert witness, finely calibrating when

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73 ARTHUR R. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 32–33 (1984).

74 Richard Marcus, *Only Yesterday: Reflections on Rulemaking Responses to E-Discovery*, 73 FORDHAM L. REV. 1, 7 (2004).

75 *See* Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1967 & n.6 (2007).

76 Sunshine in Litigation Act of 2009, H.R. 1508, 111th Cong. (2009); Sunshine in Litigation Act of 2009, S. 537, 111th Cong. (2009).

77 We include a copy of the proposed legislation in our 2009 Supplement. *See* JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON & HELEN HERSHKOFF, 2009–2010 CIVIL PROCEDURE SUPPLEMENT: FOR USE WITH ALL PLEADING AND PROCEDURE CASEBOOKS 445–46 (2009).

78 Friedenthal, *supra* note 59, at 67.

79 *Id.* at 69.

80 *Id.* at 76–77.

and what information ought to be disclosed, so Jack's public access analysis illuminated a current unresolved problem by making plain that the different contexts in which the problem might arise—for example, whether government action is involved or whether the materials have been used at trial—could affect the court's decision. Although Jack put normative considerations in the foreground, offering a "set of principles" for guidance, he never lost sight of the real-world setting in which procedural rules operate.[81]

C. Rulemaking, Impartiality, and Expertise

Turning again to 1958, when Professor Friedenthal began his academic career, Congress that year directed the Judicial Conference to take up the role of the Rules Advisory Committee that the Supreme Court had discharged two years earlier.[82] The Judicial Conference proceeded to establish a new Rules Advisory Committee, and until 1973, when Congress and the Court struggled over the Federal Rules of Evidence, the judiciary exercised a virtual monopoly over the rulemaking process in the federal system.[83] The model of court rulemaking, an artifact of the Rules Enabling Act of 1934,[84] garnered praise during the first forty years of its life for displaying impartiality and reflecting great procedural expertise.[85] Two years after Congress and the Court clashed over the Rules of Evidence, Jack published an article in the *Stanford Law Review*, describing what he called "a contemporary crisis" in the rulemaking power of the Supreme Court.[86] Commentators routinely cite Jack's article; it was reprinted in a collection by Stanford Law School faculty that includes classics by other luminaries such as Anthony G. Amsterdam, Barbara Allen Babcock,

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81 *Id.* at 97–98. One of the authors has a somewhat different view of the subject, *see* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, *passim* (1991) (arguing against rules and statutes that would create a presumption of public access), but nevertheless has a deep respect for Jack's views.

82 Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. § 331 (2006)); *see* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1006 (3d ed. 2002).

83 *See* Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1187 (1996).

84 Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. § 2071 (2006)).

85 *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 893–99 (1999).

86 Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

Paul Brest, and Thomas G. Grey.[87] Moreover, its argument displays intellectual staying power: Richard Marcus, for example, cast the article as one of three perspectives framing his recent excellent discussion of rulemaking reform.[88] Professor Marcus described *The Rulemaking Power* as defending a model of judicial rulemaking identified with "giants" such as Jeremy Bentham, David Dudley Field, and Roscoe Pound;[89] Jack's goal, Professor Marcus argued, "was to ensure that giants would continue to manage and direct the rulemaking process so that the legacy of reform from the era of Charles Clark could be preserved."[90] By these lights the Friedenthal model calls for greater judicial supervision of the rulemaking process: "substantive involvement by Supreme Court Justices was key to achieving these goals."[91]

All writing of course relies on heuristics. But there is a danger in reducing Jack's article to a nostalgic effort at elite restoration. Unquestionably, Jack believed that the Supreme Court had fallen down on the job in its approval of the Evidence Rules; the Justices had failed to insist that proposed changes be justified adequately, and they had acquiesced in last minute insertions that deprived the public of any opportunity to comment.[92] And Jack knew firsthand the perils of legislative rulemaking, for he worked and studied in California, where the state constitution's assignment of such power to the legislature elicited concerns of factional partisanship.[93] Vesting rulemaking power in judges, especially judges with lifetime tenure, made sense, Jack said, because they "are less susceptible to many of the political pressures that can affect the actions of elected officials" and thus can resist "special interest opposition."[94]

But Jack offered no starry-eyed defense of federal judicial rulemaking; to the contrary, he saw "inherent dangers" in such a process given the pressures of court dockets and the distance of appellate

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87 *See* STANFORD LEGAL ESSAYS (John Henry Merryman ed., 1975). Jack's article begins on page 149.

88 Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 903–05 (2002).

89 *Id.* at 901, 905.

90 *Id.* at 905.

91 *Id.*

92 Friedenthal, *supra* note 86, at 677.

93 *See generally* Koppel, *supra* note 23 (discussing the problems stemming from the California legislature's primary role in promulgating procedural rules); Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991) (discussing the dangers of factionalism in federal rulemaking).

94 Friedenthal, *supra* note 86, at 674.

judges from trial practice.[95] Appellate judges inevitably rely on the work of drafting committees, law-revision commissions, and scholars, and so run the risk of becoming, as Justice Douglas cautioned in his dissent from the Supreme Court's approval of the Federal Rules of Evidence, "merely the conduit to Congress."[96] Moreover, commissions do not inevitably close the information gap between an appellate court and trial practice: to the contrary, Jack warned, commissions are "usually composed chiefly of legal scholars and senior lawyers, whose work sometimes reveals an ignorance of the day-to-day practice of attorneys actively engaged in litigation."[97] Jack made clear that the legitimacy of judicial rulemaking turns not only on its insulation from special-interest factions, but also on an expertise that draws power from both practical know-how and philosophical ideals. Jack quoted with approval from Justice Douglas's dissent:

> We are so far removed from the trial arena that we have no special insight, or meaningful oversight to contribute. The Rules of Evidence—if there are to be some—should be channeled through the Judicial Conference whose members are much more qualified than we to appraise their merits when applied in actual practice.[98]

Jack's concerns about judicial rulemaking give deeper understanding to his earlier criticism of decisions—as, for example, the California court's broad interpretation of section 442—that effectively but unilaterally rewrote a procedural rule.[99] On their own, appellate judges are not well placed to make de facto amendments of this sort. Rather, they must be open to those who have firsthand experience with how procedural rules work in practice. Jack returned to this problem in a later article about discovery,[100] in which he criticized the concurring Justices in *Herbert v. Lando*[101] for subjecting relevancy under Federal Rule 26 to a balancing test. As Jack pointed out,

> to the extent that the lack of opportunity for full discovery would, as a practical matter, result in the inability of a party

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95 *Id.* at 675–76.

96 *Id.* at 676 (quoting Order Approving the Federal Rules of Evidence, 34 L. Ed. 2d lxvi (1972) (Douglas, J., dissenting)).

97 *Id.*

98 *Id.* at lxvi n.25.

99 *See* Friedenthal, *supra* note 32.

100 Jack H. Friedenthal, Herbert v. Lando*: A Note on Discovery*, 31 STAN. L. REV. 1059 (1979).

101 Herbert v. Lando, 441 U.S. 153, 177–99 (1979) (Powell, J., concurring and Brennan, J., dissenting in part).

> to present important evidence at trial, the Court would have created a de facto privilege in violation of the spirit, if not the letter, of congressional statutes that prohibit creation of new privileges without an Act of Congress, and that mandate that state rules of privilege are to apply to federal cases decided on the basis of state law.[102]

Jack expressed the concern that the Justices were changing the discovery rules in order "to provide in a backhanded manner the protection which they refused to grant openly as a matter of privilege and substantive right."[103] Jack's argument that the Court impermissibly went outside democratic channels by manipulating procedure to achieve a substantive result is all the more prescient given our own "contemporary crisis" of rulemaking reflected in the Court's radical reinterpretation of Federal Rule 8 and the Rule 12(b)(6) motion to dismiss in the *Twombly* and *Iqbal*[104] opinions.

In *Twombly*, the Court suddenly departed from its prior stance that only the rulemaking process and Congress can change the Federal Rules. Although *Twombly* did not alter the words of Rule 8(a)(2) itself, it substantially changed the provision's understood meaning, something the Court had refused to do on its own in previous decisions.[105] Although we have not parlayed with Jack on this subject, we suspect that he would agree that amendment by judicial fiat is a piecemeal process of revision that threatens to undermine the overall coherence of the Federal Rules and to create inconsistencies of application. Commentators already have raised questions about how the Court's new approach to pleading will work alongside the established interpretations and language of Rules 8(f), 9(b), 11(b), 12(e), and 15.[106]

Moreover, we think that Jack would agree that amendment through the rulemaking structure provides an opportunity for democratic participation and has the necessary resources for empirical

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102 Friedenthal, *supra* note 100, at 1063–64 (footnote omitted).

103 *Id.* at 1065.

104 Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007); Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).

105 *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513–15 (2002); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168–69 (1993).

106 *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431, *passim* (2008); Arthur R. Miller, *Access v. Efficiency: Reflections on the Consequences of* Twombly *and* Iqbal, GCP, July 30, 2009, http://www.globalcompetitionpolicy.org/index.php?&id=1787&action=907. Professor Miller's developed views on this subject will be published in a 2010 paper currently titled *Pleading and Pretrial Motions—What Would Judge Clark Do?*, prepared for the 2010 Litigation Review Conference of the Federal Rules Advisory Committee.

study, allowing changes to be based on information, not merely ideological rhetoric and guesswork. The Court's legislative decisions in *Twombly* and *Iqbal* demonstrate a dangerous disregard for these virtues of the type Jack deplored in his *Stanford* article.[107] The Court's actions, not surprisingly, have generated some support for congressional restoration of the notice pleading system. Thus, Senator Arlen Specter already has introduced legislation that would reinstate the former practice,[108] which might be a sound way to enable the established rulemaking apparatus to study and to propose a balanced solution that counteracts the polarization currently marring the Court's decisions on pleading.

III. Thanking Jack

Contemporary writing about civil procedure at times displays an urgency born of pessimism. Procedure's "exquisite chaos," as Stephen Subrin beautifully has written, threatens to eclipse its "exquisite order."[109] According to some, federal rulemaking is "not dead yet,"[110] but that disclaimer betrays a collective anxiety—not only about the rules, but also about the values and goals that those rules reflect. Neither of us has ever asked Jack about his sense of the future, but we suspect an abiding optimism informs his fifty years of studying civil procedure; the reformist impulse that drives him to consider possibilities both invigorates and reassures him. As Jack explained in his book review concerning complex litigation, "innovations may . . . ultimately be shown to be unwise and may never come to fruition. Just looking at them seriously, however, builds confidence in the current system and helps to ensure that it is the best we can provide."[111] Jack's writing about civil procedure has avoided grand theory, resisted simplistic characterization, and remained purposeful in its efforts at social improvement. Each of us always looks forward to our next conversation with this wonderful colleague, and a continuation of what has largely been a virtual relationship that always enriches and sustains. When Jack next telephones one of us, and invariably poses a question that makes us stop and think, as he has so many times in the past, whichever of us is on the call mentally will be thankful for Jack's giving us so many years of collaboration at its very best.

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107 *See* Friedenthal, *supra* note 100.

108 Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009).

109 Stephen N. Subrin, *Teaching Civil Procedure While You Watch It Disintegrate*, 59 BROOK. L. REV. 1155, 1189 (1993).

110 Richard Marcus, *Not Dead Yet*, 61 OKLA. L. REV. 299, 300 (2008).

111 Friedenthal, *supra* note 50, at 1310.