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## A Formulaic Recitation Will Not Do: Why the Federal Rules Demand More Detail in Criminal Pleading

Charles Hintz

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## Articles:

# A Formulaic Recitation Will Not Do: Why the Federal Rules Demand More Detail in Criminal Pleading

Charles Eric Hintz\*

### ABSTRACT

When a plaintiff files a civil lawsuit in federal court, her complaint must satisfy certain minimum standards. Specifically, under the prevailing understanding of Federal Rule of Civil Procedure 8(a), a complaint must plead sufficient factual matter to state a claim to relief that is plausible on its face, rather than mere conclusory statements. Given the significantly higher stakes involved in criminal cases, one might think that an even more robust requirement would exist in that

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Any errors are my own, and nothing herein is meant to suggest endorsement of the arguments in this Article by anyone other than me.

context. But in fact a weaker pleading standard reigns. Under the governing interpretation of Federal Rule of Criminal Procedure 7(c), indictments that simply parrot the language of a statute are often sufficient.

As this Article shows, however, that pleading balance is misguided. The drafters of Rule 7(c) designed the Rule to be at least as stringent as Rule 8(a), as demonstrated by the text of Rules 7(c) and 8(a), the history of American pleading, the original Advisory Committee Note to Rule 7(c), and the drafting history of the Criminal Rules. And the drafters' original design should govern today, notwithstanding the Supreme Court's amplification of the civil pleading standard in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. All of that means that our current pleading regime should be rethought, that criminal defendants should receive more protections and information about the case against them than they presently do, and that policy arguments—which seem to favor a stronger criminal pleading standard—are all the more critical.

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## I. INTRODUCTION

When a plaintiff files a civil lawsuit in federal court, her complaint must satisfy certain minimum standards. Specifically, under Federal Rule of Civil Procedure 8(a), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief,”<sup>1</sup> which has been interpreted to mean “sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face’” and *not* “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.”<sup>2</sup> If the plaintiff’s complaint fails to satisfy those requirements, the defendant may move to dismiss it and thereby potentially end the case.

Given the significantly higher stakes involved in criminal litigation, one might think that a stronger pleading standard would exist in that context—criminal defendants, one might argue, should be entitled to more protections and information about the case against them than their civil counterparts.<sup>3</sup> But in fact the opposite is true. Under the prevailing

1. FED. R. CIV. P. 8(a).

2. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

3. *Cf.*, e.g., James M. Burnham, *Why Don’t Courts Dismiss Indictments?*, 18 GREEN BAG 2d 347, 348–49, 351, 354–58 (2015); Russell M. Gold, Carissa Byrne Hessick & F.

interpretation of Federal Rule of Criminal Procedure 7(c), which requires that an indictment contain “a plain, concise, and definite written statement of the essential facts constituting the offense charged,”<sup>4</sup> indictments parroting the language of a statute are often sufficient.<sup>5</sup> Consequently, allegations devoid of particularized factual detail that would never sustain a civil complaint are frequently deemed adequate to allow a criminal prosecution to proceed to trial.<sup>6</sup> As one court put it well:

[A] civil complaint that merely recited the elements of the claims asserted and the approximate time and place that the claims arose would be summarily dismissed, for as the Supreme Court has explained, “a pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” But under controlling precedent, a criminal indictment need contain no more than this.<sup>7</sup>

The interpretation of Rule 7(c) as largely toothless, moreover, is firmly established. It was set by no less an authority than the Supreme Court.<sup>8</sup> Furthermore, under the shadow of that authority, lower courts have consistently rebuffed attempts to strengthen the criminal pleading standard.<sup>9</sup> And the Advisory Committee on Criminal Rules, the main

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Andrew Hessick, *Civilizing Criminal Settlements*, 97 B.U. L. REV. 1607, 1612–13, 1632–33, 1640–44 (2017); Robert L. Weinberg, *Applying the Rationale of Twombly to Provide Safeguards for the Accused in Federal Criminal Cases*, 7 ADVANCE 45, 51–52 (2013) [hereinafter Weinberg, *Applying Twombly*]; Robert L. Weinberg, *Iqbal for the Accused?*, CHAMPION, July 2010, at 31–32 [hereinafter Weinberg, *Iqbal*].

4. FED. R. CRIM. P. 7(c)(1).

5. See, e.g., *United States v. Resendiz-Ponce*, 549 U.S. 102, 109–10 (2007).

6. Compare, e.g., *United States v. Guler*, No. 1:07CV130 HEA, 2007 WL 4593504, at \*3, 5 (E.D. Mo. Dec. 21, 2007) (approving of the following indictment: “On or about the 13th day of July, 2007, in Shannon County, within the Eastern District of Missouri, the defendant, KARRIE L. GULER, knowingly did forcibly assault, resist, oppose, impede, intimidate, and interfere with Teresa McKinney, a Ranger with the National Park Service, while she was engaged in her official duties, in violation of Title 18, United States Code, Section 111”), with, e.g., 18 U.S.C. § 111(a) (imposing criminal liability upon “[w]hoever—(1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties”). Cf., e.g., *Parker v. Landry*, 935 F.3d 9, 13–14 (1st Cir. 2019) (“[T]he [civil] complaint must do more than merely parrot the contours of a cause of action.”); *United States v. Ranieri*, 384 F. Supp. 3d 282, 302 (E.D.N.Y. 2019) (indicating that, under the Racketeer Influenced and Corrupt Organizations Act, which imposes both criminal and civil liability, the “pleading standards are different” in civil and criminal cases (and the standard is weaker in criminal cases), even though “the same elements [must be proved] at trial”); *United States v. Arms*, No. 14-CR-78, 2015 WL 5022640, at \*3 (E.D. Wis. Aug. 24, 2015) (similar).

7. *United States v. Hansen*, 428 F. Supp. 3d 1200, 1203 (D. Utah 2019) (citation omitted).

8. See *Resendiz-Ponce*, 549 U.S. at 109–10.

9. See, e.g., *United States v. Vaughn*, 722 F.3d 918, 926 (7th Cir. 2013).

rulemaking body for the Federal Rules of Criminal Procedure, rejected a 2016 proposal to clarify that indictments should be subject to the same pleading requirements as civil complaints.<sup>10</sup>

Commentators have taken notice of the current balance between our civil and criminal pleading standards and started to present arguments as to why that balance is inappropriate, why the criminal pleading standard should be aligned with the civil standard, and why the criminal pleading standard ended up being as forgiving as it is.<sup>11</sup> More importantly for our purposes, however, they have begun to make textual and historical claims about the meaning of Rule 7(c). For example, some have suggested that Rule 7(c) requires more factual specificity than Rule 8(a) because Rule 7(c) refers to pleading “facts,” whereas Rule 8(a) does not.<sup>12</sup> Likewise, some have begun to observe that the drafters of Rule 8(a) omitted references to pleading “facts” that appeared in pre-Federal Rules civil pleading codes and that Rule 7(c)’s language is comparable to those codes.<sup>13</sup> Additionally, a commentator has noted that the original Advisory Committee Note to Rule 7(c) includes cross-references to Rule 8.<sup>14</sup> Finally, one scholar has indicated that the drafters of Rule 7(c) sought to adopt the pleading standard of the Civil Rules rather than a more stringent alternative.<sup>15</sup>

Those claims are powerful and suggest that Rule 7(c) should be understood differently than it is today. But the literature on the proper legal interpretation of Rule 7(c) is still in nascent and underdeveloped form. Commentators have generally raised these textual and historical claims in passing, without complete analysis, and/or in support of broader arguments, and no one has fully examined and synthesized the

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10. See *Minutes, Advisory Committee on Criminal Rules*, U.S. COURTS 19–21 (Apr. 18, 2016), <https://bit.ly/2QGBus8>; see also Letter from James M. Burnham to Hon. Donald W. Molloy, Chair, Advisory Committee on Criminal Rules 1–3 (Feb. 1, 2016), <https://bit.ly/3kjcZvD>.

11. See, e.g., Ion Meyn, *The Haves of Procedure*, 60 WM. & MARY L. REV. 1765, 1770–73, 1804–12 (2019) [hereinafter Meyn, *The Haves*]; Ion Meyn, *The Unbearable Lightness of Criminal Procedure*, 42 AM. J. CRIM. L. 39, 40–41, 55–57 (2014) [hereinafter Meyn, *Unbearable Lightness*]; Burnham, *supra* note 3, at 348–49; Gold et al., *supra* note 3, at 1612–13; Weinberg, *Applying Twombly*, *supra* note 3, at 49, 53; Weinberg, Iqbal, *supra* note 3, at 29–32.

12. See 5 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 19.1(d) n.41 (4th ed. 2020); Jesse Jenike-Godshalk, Comment, “Plausible Cause”?: How Criminal Procedure Can Illuminate the U.S. Supreme Court’s New General Pleading Standard in Civil Suits, 79 U. CIN. L. REV. 791, 806 (2010); Meyn, *The Haves*, *supra* note 11, at 1809–10; Weinberg, *Applying Twombly*, *supra* note 3, at 49; Weinberg, Iqbal, *supra* note 3, at 29.

13. See LAFAVE ET AL., *supra* note 12, § 19.1(d) & n.41; Weinberg, *Applying Twombly*, *supra* note 3, at 49; Weinberg, Iqbal, *supra* note 3, at 29.

14. See Jenike-Godshalk, *supra* note 12, at 806 & n.128.

15. See Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 715–16 (2017).

sources relevant to the meaning of Rule 7(c) to determine how the Rule should be interpreted today. This Article fills that gap, serving as the first scholarly assessment of how Rule 7(c) should be read in perspective of a thorough investigation of the Rule's text, history, context, and similar interpretive resources. It concludes that Rule 7(c) was originally designed to be at least as rigorous as Rule 8(a) and that the Rule should be so construed today.

Those conclusions are important. First, they demonstrate that the existing pleading standard balance is misguided and should be rethought. Second, they suggest that criminal defendants should receive more safeguards and information about the case against them than they presently do.<sup>16</sup> Third, they render policy arguments all the more important. If we are to maintain a pleading regime that is questionable as a matter of law, it should at least be strongly supported by normative considerations. And if it is not or if those considerations cut in the other direction—which seems to be the case<sup>17</sup>—then the need for change is even more urgent and pronounced.<sup>18</sup>

This Article's analysis proceeds as follows. Part II describes the current state of pleading law, including an introduction to the prevailing pleading standards and an overview of recent efforts to alter the criminal standard. Part III examines the text of Rules 7(c) and 8(a), the history of American pleading, the original Advisory Committee Note to Rule 7(c), and the drafting history of the Criminal Rules, and it concludes that these sources together demonstrate that Rule 7(c) was designed to be at least as stringent as Rule 8(a) and that the Rule should be so interpreted today. Part IV engages with a host of counterarguments but ultimately finds them unpersuasive. Part V concludes.

## II. THE FEDERAL CIVIL & CRIMINAL PLEADING STANDARDS

Before exploring how Rule 7(c) should be interpreted, it is first necessary to understand the state of the law today. Consequently, this Part discusses the prevailing civil and criminal pleading standards, as well as recent attempts to strengthen the criminal standard.

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16. See *supra* note 3 and accompanying text.

17. See, e.g., Burnham, *supra* note 3, at 348–54, 357–62; Gold et al., *supra* note 3, at 1612–13, 1632–33, 1640–44; Meyn, *Unbearable Lightness*, *supra* note 11, at 55–57; Weinberg, *Applying Twombly*, *supra* note 3, at 48–52; Weinberg, Iqbal, *supra* note 3, at 29–32.

18. Although my conclusions amplify the importance of policy arguments, this Article does not focus on those arguments. Rather, it concentrates on ascertaining the best legal construction of Rule 7(c). That scope has been chosen because doing full justice to both the legal and normative issues requires examining them separately, and I plan to address the normative aspects of our criminal pleading system in later work.

### A. *The Civil Pleading Standard*

As introduced above, a federal civil action begins with the filing of a complaint, which describes the plaintiff's claim.<sup>19</sup> That document must meet certain minimum standards.<sup>20</sup> Those standards are established by Federal Rule of Civil Procedure 8(a), which says that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>21</sup> If the complaint violates that Rule, the defendant can move to dismiss it for "failure to state a claim upon which relief can be granted" pursuant to Rule 12(b)(6), thereby requiring the plaintiff to file a new complaint or terminating the action.<sup>22</sup>

For much of Rule 8(a)'s history, the civil pleading standard was governed by the Supreme Court's 1957 decision in *Conley v. Gibson*.<sup>23</sup> There, the Court interpreted Rule 8(a) to mean that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>24</sup> It made clear that Rule 8(a) does "not require a claimant to set out in detail the facts upon which he bases his claim" but rather just "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."<sup>25</sup> In short, the Court largely rejected "a call for the pleading of specific facts."<sup>26</sup> And many courts read *Conley* to mean that "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a

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19. See FED. R. CIV. P. 3, 8(a).

20. See *id.* R. 8(a).

21. *Id.*

22. *Id.* R. 12(b); see, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ríos-Campbell v. U.S. Dep't of Commerce*, 927 F.3d 21, 24 (1st Cir. 2019); *O'Boyle v. Real Time Resolutions, Inc.*, 910 F.3d 338, 346–47 (7th Cir. 2018).

23. See *Conley v. Gibson*, 355 U.S. 41, 45–48 (1957).

24. *Id.* at 45–46.

25. *Id.* at 47 (citation omitted).

26. A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 *How. L.J.* 99, 105 (2008); see also *Conley*, 355 U.S. at 47–48 ("[S]implified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."); cf. *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 5–6 (2009) [hereinafter *Access to Courts Hearing*] (statement of Stephen B. Burbank, Professor, University of Pennsylvania) ("[A] number of Supreme Court decisions including . . . *Conley v. Gibson*, embraced the concept of 'notice pleading,' permitting plaintiffs to allege very little in their complaints, and that in general terms." (citation omitted)).



plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery” or that “any statement revealing the theory of the claim w[ould] suffice unless its factual impossibility [were] shown from the face of the pleadings.”<sup>27</sup>

The *Conley* pleading standard, however, did not last. In *Bell Atlantic Corp. v. Twombly*, the Supreme Court forced the “no set of facts” language into retirement.<sup>28</sup> It concluded that that language could be, and had been, read too narrowly, that the import of *Conley* had been misunderstood, and that a literal understanding of *Conley* had been widely rejected.<sup>29</sup> Thus, it said, *Conley*’s “no set of facts” language “is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”<sup>30</sup>

The *Twombly* decision replaced *Conley*’s pleading standard with a requirement that a complaint contain “enough facts to state a claim to relief that is plausible on its face,” that is, enough “to raise a right to relief above the speculative level.”<sup>31</sup> It said that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”<sup>32</sup> And the Court rejected the view “that the Federal Rules somehow dispensed with the pleading of facts altogether.”<sup>33</sup> Rather, a more stringent standard was needed to “reflect[] the threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief’” and “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”<sup>34</sup>

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27. *Twombly*, 550 U.S. at 561–62 (first alteration in original); see *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1288–89 (11th Cir. 2010); see also, e.g., *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 714 (7th Cir. 2006) (“It is enough to name the plaintiff and the defendant, state the nature of the grievance, and give a few tidbits (such as the date) that will let the defendant investigate.”); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2241 & n.17 (1989) (explaining that the effect of *Conley* was to allow “[p]leading in general terms,” such that a plaintiff could “prosecute another party without having to explain exactly why the party is being charged”).

28. See, e.g., *Twombly*, 550 U.S. at 561–63; Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 113 (2009); *Access to Courts Hearing*, *supra* note 26, at 7 (statement of Stephen B. Burbank).

29. See *Twombly*, 550 U.S. at 561–63.

30. *Id.* at 563.

31. *Id.* at 555, 570.

32. *Id.* at 555 (alteration in original).

33. *Id.* at 555 n.3.

34. *Id.* at 555, 557 (second alteration in original) (citation omitted); see also *id.* at 555 n.3 (“While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant ‘set out *in detail* the facts upon which he bases his claim,’

Shortly after *Twombly*, the Supreme Court refined its new understanding of Rule 8(a) in *Ashcroft v. Iqbal*.<sup>35</sup> First of all, it clarified that *Twombly*'s approach was universal and not, as some anticipated or believed, limited to specific contexts.<sup>36</sup> Additionally, the Court explained that, under *Twombly*, Rule 8(a) “does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation,” “‘naked assertion[s]’ devoid of ‘further factual enhancement,’” or “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.”<sup>37</sup> Indeed, it maintained, “Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”<sup>38</sup> Accordingly, it determined that, in deciding motions to dismiss, courts should functionally ignore allegations that “are no more than conclusions” by refusing to “assume their veracity,” in contrast to “well-pleaded factual allegations,” which should be taken as true and evaluated to “determine whether they plausibly give rise to an entitlement to relief.”<sup>39</sup> And the Court made clear that that “plausibility” standard is met only if the complaint contains “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>40</sup>

In sum, under the prevailing civil pleading regime, legal conclusions—for example, allegations merely tracking the language of a cause of action—cannot satisfy Rule 8(a). Rather, factual allegations sufficient to plausibly warrant relief are necessary.

### B. *The Criminal Pleading Standard*

Although there are differences, federal criminal and civil cases are instituted similarly.<sup>41</sup> On the criminal side, often after several preliminary

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Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.” (citation omitted)).

35. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678–80 (2009).

36. See, e.g., *id.* at 684; *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting); *Starr v. County of Los Angeles*, 659 F.3d 850, 851–52 (9th Cir. 2011) (O’Scannlain, J., dissenting from denial of reh’g en banc); *Access to Courts Hearing*, *supra* note 26, at 8, 11 (statement of Stephen B. Burbank); Burbank, *supra* note 28, at 114–15.

37. *Iqbal*, 556 U.S. at 678 (first alteration in original) (citations omitted).

38. *Id.* at 678–79.

39. *Id.* at 679.

40. *Id.* at 678.

41. See, e.g., Edward J. Imwinkelried, *The Right to “Plead Out” Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 EMORY L.J. 341, 353 (1991).

steps,<sup>42</sup> the government files a “pleading . . . initiat[ing] the formal charge against the accused,” which, in felony prosecutions, is termed an “indictment” or “information.”<sup>43</sup> That pleading, similar to a civil complaint, must satisfy certain requirements. Specifically, under Federal Rule of Criminal Procedure 7(c), “[t]he indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged.”<sup>44</sup> If an indictment or information fails to satisfy Rule 7(c), the defendant may move to dismiss it for “lack of specificity” under Rule 12(b)(3)(B)(iii) or “failure to state an offense” under Rule 12(b)(3)(B)(v).<sup>45</sup> Such a dismissal would either require a new pleading or terminate the prosecution.<sup>46</sup>

The Supreme Court’s criminal pleading jurisprudence has not shifted as markedly as its civil pleading jurisprudence, so we can begin with the Court’s most recent decision interpreting Rule 7(c), *United States v. Resendiz-Ponce*, issued in 2007.<sup>47</sup> The question the Court decided was whether an indictment for attempted unlawful reentry was defective if it failed to allege “any specific overt act that is a substantial step toward the completion of the unlawful reentry” and, instead, simply stated that the defendant “attempted” to reenter the country at a particular time and place.<sup>48</sup> It held that such an indictment was not defective.<sup>49</sup>

In reaching that decision, the Court made several points regarding the criminal pleading standard. Specifically, it said that “an indictment parroting the language of a federal criminal statute is often sufficient.”<sup>50</sup> Additionally, the Court explained:

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42. See, e.g., 1 ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE §§ 41, 71, 91, 121 (4th ed. 2021).

43. *Id.* § 121. “An indictment is a criminal charge returned to the court by a grand jury,” whereas “[a]n information is a criminal charge prepared by the prosecutor.” *Id.*

44. FED. R. CRIM. P. 7(c)(1).

45. *Id.* R. 12(b)(3); see, e.g., *United States v. Carter*, 465 F.3d 658, 662 (6th Cir. 2006) (per curiam); *United States v. Tull*, Crim. No. 15-622(SDW), 2018 WL 1128771, at \*1 (D.N.J. Mar. 1, 2018); *United States v. Adcox*, Criminal Action No. CR 15-00036, 2017 WL 2489998, at \*2 (W.D. La. June 7, 2017); *United States v. Cook*, Crim. No. 16-50-SLR, 2017 WL 106303, at \*1 (D. Del. Jan. 11, 2017); *United States v. Murgio*, 209 F. Supp. 3d 698, 705–06 (S.D.N.Y. 2016).

46. See, e.g., *United States v. Slough*, 679 F. Supp. 2d 55, 58 (D.D.C. 2010).

47. See *United States v. Resendiz-Ponce*, 549 U.S. 102, 109–10 (2007); *Hamling v. United States*, 418 U.S. 87, 117 (1974) (reaching a similar conclusion to *Resendiz-Ponce*); *United States v. Debrow*, 346 U.S. 374, 377–78 (1953) (same).

48. *Resendiz-Ponce*, 549 U.S. at 104–05, 107 (citation omitted).

49. See *id.* at 107, 111.

50. *Id.* at 109. The Court acknowledged that “there are crimes that must be charged with greater specificity,” but it treated that exception as a narrow one applicable only in unique circumstances—not there present—where guilt turns “crucially upon . . . a specific identification of fact.” *Id.* at 110 (citation omitted).

[T]he Federal Rules “were designed to eliminate technicalities in criminal pleadings and are to be construed to secure simplicity in procedure.” While detailed allegations might well have been required under common-law pleading rules, they surely are not contemplated by Rule 7(c)(1), which provides that an indictment “shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.”<sup>51</sup>

In sum, unlike in the civil context, an indictment that is largely conclusory and just tracks the language of a statute is generally adequate under the Federal Rules.<sup>52</sup> Accordingly, the Federal Rules demand much less of criminal pleadings than civil ones, and pleadings that would certainly fail as civil complaints are often deemed sufficient as indictments.<sup>53</sup>

### C. Attempts to Raise the Criminal Pleading Standard

*Resendiz-Ponce* was decided months before *Twombly* and years before *Iqbal*.<sup>54</sup> Consequently, there have been numerous attempts to align the criminal pleading standard with the *Twombly-Iqbal* civil standard. All have been unsuccessful.

Most of those efforts have involved litigation. Criminal defendants have repeatedly argued that indictments should have to comply with *Twombly* and *Iqbal*.<sup>55</sup> Lower courts have generally rejected those arguments on the grounds that binding decisions hold to the contrary and

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51. *Id.* (citations omitted).

52. *See id.* at 107–09.

53. *See supra* notes 6–7 and accompanying text.

54. *See Ashcroft v. Iqbal*, 556 U.S. 662, 662 (2009) (decided May 18, 2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 544 (2007) (decided May 21, 2007); *Resendiz-Ponce*, 549 U.S. at 102 (decided January 9, 2007).

55. *See, e.g.*, *United States v. Gerebizza*, 720 F. App'x 302, 305 (7th Cir. 2017) (per curiam); *United States v. Vaughn*, 722 F.3d 918, 926 (7th Cir. 2013); *United States v. Hansen*, 428 F. Supp. 3d 1200, 1201–03 (D. Utah 2019); *United States v. Bundy*, No. 2:16-cr-00046-PAL-GMN, 2017 WL 387204, at \*6 (D. Nev. Jan. 11, 2017), *adopted by amended order*, 2018 WL 523352, at \*1 (Jan. 23, 2018); *United States v. Coley*, No. CR415-187, 2016 WL 743432, at \*1–3 (S.D. Ga. Feb. 23, 2016), *adopted*, 2016 WL 1032876, at \*1 (Mar. 14, 2016); *United States v. Hossain*, No. 2:13-cr-00119-GMN-GWF, 2014 WL 4354121, at \*3 n.1 (D. Nev. June 23, 2014), *adopted*, 2014 WL 4354125, at \*1–4 (Sept. 2, 2014); *United States v. Calvente*, No. S3 12 Cr. 732(WHP), 2013 WL 4038952, at \*2 n.1 (S.D.N.Y. July 26, 2013); *United States v. Castillo Madrigal*, No. 12-cr-62-bbc-04, 2013 WL 12099089, at \*1–2 (W.D. Wis. Jan. 30, 2013), *adopted*, 2013 WL 12099088, at \*1 (Feb. 21, 2013); *United States v. Homaune*, 898 F. Supp. 2d 153, 164 (D.D.C. 2012); *United States v. Mensah*, No. 12-CR-0071-003-CVE, 2012 WL 2466393, at \*2 (N.D. Okla. June 27, 2012); *United States v. Lockhart*, No. 11-cr-90-wmc, 2012 WL 12888034, at \*1–2 (W.D. Wis. Jan. 17, 2012); *United States v. Northcutt*, No. 07-60220-CR, 2008 WL 162753, at \*2 (S.D. Fla. Jan. 16, 2008).

that no authority supports a heightened criminal pleading standard.<sup>56</sup> Those courts, however, have also raised substantive legal arguments against amplifying the criminal pleading standard, including: (1) that nothing in *Twombly* or *Iqbal* suggests those decisions apply to criminal cases;<sup>57</sup> (2) that a defendant challenging the sufficiency of an indictment must establish prejudice to prevail;<sup>58</sup> (3) that a defendant who wants more detail about his case may seek a bill of particulars;<sup>59</sup> (4) that Rule 8(a) requires a “showing” that the pleader is entitled to relief, whereas Rule 7(c) does not;<sup>60</sup> (5) that the Criminal Rules were designed to reduce technicalities, procedural complexity, and detailed allegations;<sup>61</sup> and (6) that criminal and civil procedure are just different, regarding, for example, the protections defendants receive and the burdens of moving past the pleadings into discovery.<sup>62</sup>

Another attempt at altering the criminal pleading standard involved a proposal to the Advisory Committee on Criminal Rules.<sup>63</sup> In 2016, a

56. See, e.g., *Gerebizza*, 720 F. App'x at 305; *Vaughn*, 722 F.3d at 926; *Hansen*, 428 F. Supp. 3d at 1202–03; *United States v. Adcox*, Criminal Action No. 15-00036, 2017 WL 2489998, at \*4 (W.D. La. June 7, 2017); *Coley*, 2016 WL 743432, at \*2; *Calvente*, 2013 WL 4038952, at \*2 n.1; *Castillo Madrigal*, 2013 WL 12099089, at \*1–2; *Homaune*, 898 F. Supp. 2d at 164; *Mensah*, 2012 WL 2466393, at \*2; *Lockhart*, 2012 WL 12888034, at \*1–2; *Northcutt*, 2008 WL 162753, at \*2.

57. See *Coley*, 2016 WL 743432, at \*1–2; *Castillo Madrigal*, 2013 WL 12099089, at \*1.

58. See *Castillo Madrigal*, 2013 WL 12099089, at \*2.

59. See *Vaughn*, 722 F.3d at 926. “A bill of particulars is a formal written statement by the prosecutor providing details of the charges against the defendant” that a defendant can seek if the indictment, though legally sufficient, does not provide enough information “to enable [her] to prepare adequately for trial.” LEIPOLD, *supra* note 42, § 130.

60. See *Coley*, 2016 WL 743432, at \*3.

61. See *id.* at \*1 & n.2; see also *United States v. Resendiz-Ponce*, 549 U.S. 102, 110 (2007) (making the same point).

62. See *Vaughn*, 722 F.3d at 926; *United States v. Bundy*, No. 2:16-cr-00046-PAL-GMN, 2017 WL 387204, at \*6 (D. Nev. Jan. 11, 2017), *adopted by amended order*, 2018 WL 523352, at \*1 (Jan. 23, 2018); *Coley*, 2016 WL 743432, at \*3; *Castillo Madrigal*, 2013 WL 12099089, at \*2.

63. The Advisory Committee on Criminal Rules is the main rulemaking body for the Federal Rules of Criminal Procedure. That Committee is accountable to the Standing Committee on Rules of Practice and Procedure, which is overseen by the Judicial Conference of the United States and which ultimately makes recommendations to the Supreme Court. See, e.g., Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 892 (1999). Rules are developed as follows:

A proposed rule is first considered by the Advisory Committee. If the Advisory Committee approves the proposal, it is then reviewed by the Standing Committee and finally by the Judicial Conference before being forwarded to the Supreme Court. If the Supreme Court concurs, the proposal is transmitted to Congress, which then has roughly seven months to exercise a veto. In the absence of a veto, the proposed rule goes into effect.

*Id.*; see also *How the Rulemaking Process Works*, U.S. COURTS, <https://bit.ly/3sCJCr9> (last visited Apr. 26, 2021) (providing a similar overview of the rulemaking process). The

formal recommendation was submitted to the Committee proposing that “Federal Rule of Criminal Procedure 12(b)(3)(B)(v)—governing dismissal of an indictment for failure to state an offense”—be altered “to clarify that the standard for dismissal of a criminal indictment is meant to be consistent with the standard for dismissal of a civil complaint under Federal Rule of Civil Procedure 12(b)(6).”<sup>64</sup>

When the Committee took up the proposal, a number of members expressed interest.<sup>65</sup> Nevertheless, several legal arguments were raised against it, including: (1) that criminal pleading practices are set by court decisions that uphold bare-bones indictments; (2) “that minimal pleading in criminal cases is hundreds of years old, not something new,” and that the proposal seemed like a “return to the old common law pleading rules”; and (3) that “this proposal seeks to create new substantive rights, which is beyond the authority of the Rules Committee.”<sup>66</sup> After brief discussion, the Chairman summarily quashed the measure.<sup>67</sup>

### III. RULE 7(C) SHOULD BE INTERPRETED TO BE AT LEAST AS STRINGENT AS RULE 8(A)

The current pleading regime subjects indictments to much lighter scrutiny than civil complaints. And that regime is deeply entrenched, supported, as it is, by Supreme Court decisions, lower courts, and the Advisory Committee. Nevertheless, it is ill-advised: as this Part explains, the drafters of Rule 7(c) fashioned the Rule to be at least as stringent as Rule 8(a), and that original design should govern our interpretation of Rule 7(c) today.

#### A. *Rule 7(c) Was Designed to Be at Least as Stringent as Rule 8(a)*

When the Advisory Committee on Criminal Rules assembled in the 1940s to design a new set of criminal procedure rules for the federal courts, it could have created any system it thought prudent—within statutory and constitutional limits. Notwithstanding that range of choice, however, the drafters crafted Rule 7(c) to be at least as stringent as Rule 8(a).

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rulemaking process has also changed over time. For example, the Advisory Committee originally reported to the Supreme Court directly. See, e.g., *Preface to 1 DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE* xi–xvi (Madeleine J. Wilken & Nicholas Triffin eds., 1991) [hereinafter *DRAFTING HISTORY*].

64. Letter from James M. Burnham to Hon. Donald W. Molloy, *supra* note 10, at 1.

65. See U.S. COURTS, *supra* note 10, at 19–21.

66. *Id.* at 20.

67. See *id.* at 21.

The literature has begun to highlight some of the sources that are suggestive of that fact.<sup>68</sup> But to fully understand Rule 7(c)'s original design, it is necessary to consider the sources holistically and examine them thoroughly. Thus, this Section first offers a detailed description of (and some observations about) the relevant sources—the text of Rule 7(c) and Rule 8(a), the history of pleading in the United States, the original Advisory Committee Note to Rule 7(c), and the drafting history of the Criminal Rules—and then analyzes their meaning and implications for Rule 7(c) as a whole.

## 1. The Sources Relevant to the Original Design of Rule 7(c)

### a. The Text of Rule 7(c) & Rule 8(a)

To understand Rule 7(c), the first source to consider is the text of the Rule and its civil counterpart, Rule 8(a). Rule 7(c) provides that “[t]he indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged.”<sup>69</sup> And Rule 8(a) states that “[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>70</sup>

Those provisions will be analyzed below, but it is important to highlight two key points at this juncture. First, Rule 7(c) requires pleading “essential facts,” but Rule 8(a) makes no reference to facts whatsoever. Second, both Rule 7(c) and Rule 8(a) read effectively the same today as they did originally.<sup>71</sup>

### b. The History of American Pleading

The second source to consider is the history of pleading in the United States. This Subsection first describes the history of civil pleading, then discusses the history of criminal pleading, and finally explains the historical relationship between civil and criminal pleading rules.

#### *i. Civil Pleading*

The history of American civil pleading begins with the common law.<sup>72</sup> At common law, the ultimate objective of pleading was to narrow

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68. See *supra* notes 12–15 and accompanying text.

69. FED. R. CRIM. P. 7(c)(1).

70. FED. R. CIV. P. 8(a).

71. See FED. R. CRIM. P. 7(c) (1946); FED. R. CIV. P. 8(a) (1938).

72. See, e.g., James V. Bilek, Comment, Twombly, Iqbal, and Rule 8(c): Assessing the Proper Standard to Apply to Affirmative Defenses, 15 CHAP. L. REV. 377, 379–80 (2011).

the issues for trial.<sup>73</sup> To facilitate that narrowing, and for a host of other reasons, “highly technical rules” developed that, for centuries, elevated pleading to the status of “a science to be formulated and cultivated.”<sup>74</sup> As one early-twentieth-century treatise explained:

[Common law pleading was characterized by] the extreme nicety, precision, and accuracy which were demanded by the courts in the framing of allegations, in averring either the facts from which the primary rights of the parties arose, or those which constituted the breach of such rights, in the use of technical phrases and formulas, in the certainty of statement produced by negating almost all possible conclusions different from that affirmed by the pleader, in the numerous repetitions of the same averment, and finally in the invention and employment of a language and mode of expression utterly unlike the ordinary spoken or written English, and meaningless to any person but a trained expert.<sup>75</sup>

Furthermore, although the common law was said to require pleading “the material, issuable *facts* constituting the cause of action,”<sup>76</sup> it often actually required alleging fictions, conclusions, and generalities.<sup>77</sup> Put another way, “common law pleading [came] in large measure to consist of formal general statements which did not set forth the details of the pleader’s case.”<sup>78</sup>

Frustrations with those and other aspects of common law pleading ultimately led to a desire for reform.<sup>79</sup> In the United States, that desire culminated in a new code of procedure in New York—termed the “Field

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73. See, e.g., CHARLES E. CLARK, *CLARK ON CODE PLEADING* 12–13 (2d ed. 1947); Bilek, *supra* note 72, at 379–81.

74. CLARK, *supra* note 73, at 12–15; see also, e.g., Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J. L. & PUB. POL’Y 1107, 1112–13 (2010).

75. JOHN NORTON POMEROY, *CODE REMEDIES: REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION ACCORDING TO THE REFORMED AMERICAN PROCEDURE – A TREATISE ADAPTED TO USE IN ALL THE STATES AND TERRITORIES WHERE THAT SYSTEM PREVAILS* § 403 (5th ed. 1929).

76. *Id.* § 402.

77. See, e.g., Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 259 (1926); James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on Iqbal, a Day in Court and a Decision According to Law*, 114 PENN ST. L. REV. 1257, 1274 (2010); Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform*, 57 COLUM. L. REV. 518, 520 (1957); CLARK, *supra* note 73, at 225; POMEROY, *supra* note 75, §§ 404–05.

78. Clark, *supra* note 77, at 259.

79. See, e.g., ARPHAXED LOOMIS, DAVID GRAHAM & DAVID DUDLEY FIELD, *FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS*, Leg. 71, 1st Sess., § 118 cmt. (N.Y. 1848); CLARK, *supra* note 73, at 17, 21–22, 225–26; Clark, *supra* note 77, at 259; Maxeiner, *supra* note 77, at 1272–73; Schwartz & Appel, *supra* note 74, at 1114–15; Bilek, *supra* note 72, at 379–81.



Code” because it “was in large measure the work of David Dudley Field”—and the idea of “code pleading” spread widely to other American jurisdictions.<sup>80</sup>

The codes ushered in numerous paradigm-shifting changes, but one of the most important was that they replaced the technical, complex, and opaque common law system of “issue pleading” with “fact pleading,” under which pleadings were just to state the actual ultimate facts and not evidence or legal conclusions.<sup>81</sup> As one prominent treatise-writer put it, under the codes, only “dry, naked, actual facts” should be pleaded, and “[e]very attempt to combine fact and law, to give the facts a legal coloring and aspect, [or] to present them in their legal bearing upon the issues rather than in their actual naked simplicity” would constitute “an averment of law instead of fact” and thus violate the principles of code pleading.<sup>82</sup>

The reformers used distinctive language to reflect their move to fact pleading. The Field Code “required that the complaint contain ‘[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition.’”<sup>83</sup> Similar language was adopted by other code states.<sup>84</sup>

The codes, however, faced their own problems. For example, because they focused on alleging “facts,” there arose serious “practical difficult[ies] in distinguishing between allegations of ultimate fact . . . and legal conclusions,” which, in turn, led to the resurgence of complexity and technicality in pleading.<sup>85</sup> Commentators, accordingly, began to take issue with code pleading. For example, one writer lamented:

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80. CLARK, *supra* note 73, at 21–24; *accord, e.g.*, Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1038 (1982); Maxeiner, *supra* note 77, at 1271, 1273–74; Schwartz & Appel, *supra* note 74, at 1114–16; Weinstein & Distler, *supra* note 77, at 520; Bilek, *supra* note 72, at 381; *see also* LOOMIS ET AL., *supra* note 79, § 118 cmt.

81. *See, e.g.*, CLARK, *supra* note 73, at 22–23, 225; Clark, *supra* note 77, at 259–62; Maxeiner, *supra* note 77, at 1273–74; Schwartz & Appel, *supra* note 74, at 1114; Bilek, *supra* note 72, at 381–82.

82. POMEROY, *supra* note 75, § 423; *see also, e.g.*, Charles E. Clark, Comment, *Pleading Negligence*, 32 YALE L.J. 483, 484 (1923); David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 476 (2010); Clark, *supra* note 77, at 261.

83. Schwartz & Appel, *supra* note 74, at 1115–16 (alteration in original) (citation omitted); *accord, e.g.*, Marcus, *supra* note 82, at 476.

84. *See, e.g.*, CLARK, *supra* note 73, at 210–11, 210 n.2, 225–27, 227 n.54; POMEROY, *supra* note 75, §§ 401, 411; *see also* Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 447 (2010).

85. Schwartz & Appel, *supra* note 74, at 1116; *accord, e.g.*, Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 438 (1986); CLARK, *supra* note 73, at 225–28; Weinstein & Distler, *supra* note 77, at 520–21; Bilek, *supra* note 72, at 381–82, 381 n.31.

It is a fruitful source of the delay in litigation which is so commonly condemned; it causes a great waste of time on the part of appellate courts; it no doubt wastes much time in the trial courts . . . ; and occasionally it leads to an improper conclusion of a particular litigation.<sup>86</sup>

These state-law developments impacted federal pleading. Prior to the Federal Rules of Civil Procedure, law and equity remained divided in the federal courts.<sup>87</sup> Equity was governed by the Federal Equity Rules, under which “the code system substantially prevailed.”<sup>88</sup> And “[f]or actions at law, Congress’s passage of the Conformity Act in 1872 required that federal district courts follow the procedure of the state in which the court sat, which varied between common law and code pleading.”<sup>89</sup>

Efforts at reforming federal civil procedure ultimately bore fruit in the 1930s.<sup>90</sup> “In 1934, Congress enacted the Rules Enabling Act, authorizing the Supreme Court to promulgate uniform rules governing practice and procedure in the federal courts.”<sup>91</sup> The Court then quickly appointed an Advisory Committee to draft the Federal Rules of Civil Procedure.<sup>92</sup>

The Advisory Committee, “[s]obered by the fate of the Field Code . . . set out to devise a procedural system . . . in which the preferred disposition [would be] on the merits, by jury trial, after full disclosure through discovery.”<sup>93</sup> With respect to pleading, the drafters created—in Rule 8(a)—what they viewed as “a very simple, concise system of allegation and defense” requiring only “very brief and direct allegations,”<sup>94</sup> based on the philosophy that pleadings should “do little

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86. Clarke B. Whittier, *Notice Pleading*, 31 HARV. L. REV. 501, 506 (1918).

87. *See, e.g.*, CLARK, *supra* note 73, at 31.

88. *Id.*; *see also, e.g.*, United States v. United Shoe Mach. Co., 234 F. 127, 137 (E.D. Mo. 1916); 5 ARTHUR R. MILLER, MARY KAY KANE & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE, § 1218 (3d ed. 2021); Amber A. Pelot, Casenote, Bell Atlantic Corp. v. Twombly: *Mere Adjustment or Stringent New Requirement in Pleading?*, 59 MERCER L. REV. 1371, 1374 (2008).

89. Schwartz & Appel, *supra* note 74, at 1117; *accord, e.g.*, Charles B. Campbell, *A “Plausible” Showing After Bell Atlantic Corp. v. Twombly*, 9 NEV. L.J. 1, 10–11 (2008); *see also* Imre S. Szalai, *An Obituary for the Federal Arbitration Act: An Older Cousin to Modern Civil Procedure*, 2010 J. DISP. RESOL. 391, 402–06 (2010) (describing the history of conformity procedures in the federal courts before the Federal Rules of Civil Procedure); Burbank, *supra* note 80, at 1036–42 (same).

90. *See, e.g.*, Burbank, *supra* note 80, at 1035–98 (offering a comprehensive history of the federal procedural reform movement).

91. Schwartz & Appel, *supra* note 74, at 1117.

92. *See, e.g.*, Bone, *supra* note 63, at 894.

93. Marcus, *supra* note 85, at 439.

94. Charles E. Clark, *Fundamental Changes Effectuated by the New Federal Rules I*, 15 TENN. L. REV. 551, 552 (1939).

more than sketch the type of battle that is to follow.”<sup>95</sup> Indeed, Rule 8(a) was “designed to . . . reduce the pleading requirements to a minimum,” “make[] pleadings relatively unimportant,”<sup>96</sup> and impose “no fixed and certain rule as to the detail required.”<sup>97</sup> And the drafters “studiously avoided using the term[] ‘facts’ . . . which [gave] so much trouble in Code Pleading.”<sup>98</sup> Rule 8(a) and the other Civil Rules were adopted by the Supreme Court in 1937 and went into effect in 1938.<sup>99</sup>

Not everyone was enamored of Rule 8(a)’s design, however. For example, in the early 1950s, the Judicial Conference of the Ninth Circuit approved a resolution that Rule 8(a) should be amended to read—evoking the code pleading regime of days past—“substantially as follows: . . . ‘(2) a short and plain statement of the claim showing that the pleader is entitled to relief, which statement shall contain the facts constituting a cause of action.’”<sup>100</sup> The Conference did so apparently because it felt that Rule 8(a) had been too liberally construed and should

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95. James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 559 (1937).

96. *Id.* at 561.

97. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 316–17 (1938).

98. Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 263 n.9 (1939); *accord, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 575 (2007) (Stevens, J., dissenting); Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 12 (1938); *Access to Courts Hearing*, *supra* note 26, at 4–5, 12, 17 (statement of Stephen B. Burbank); Burbank, *supra* note 28, at 115, 117 & n.83; Marcus, *supra* note 85, at 439; Weinstein & Distler, *supra* note 77, at 522. For additional discussion of, and support for, the foregoing points in this paragraph, see *infra* Section III.B.2.

99. See FED. R. CIV. P. historical note. In designing Rule 8(a), its drafters did not entirely abandon history. For example, they indicated that, in certain respects, the pleadings they anticipated would satisfy common law and code requirements. See Clark, *supra* note 94, at 565 (asserting that the model complaint for negligence contained in the Civil Rules, discussed *infra* Section III.B.2, “would be good in at least most of the jurisdictions of the United States” and that other model forms were “really common law forms from the old action of assumpsit, including the common counts in assumpsit”). In fact, the drafters of Rule 8(a) drew directly on the common law’s allowance of general averments. See Clark, *supra* note 97, at 309 (explaining that, under the common law, “in such usual cases as claims for debt or negligence a simple form of general allegation was permissible” and that this “was carried . . . directly into the new federal rules”); *id.* at 316 (“[T]he model [of pleading under the Civil Rules] is the simple, direct, and rather general statement familiar to generations of lawyers by its use from common-law times to the present.”); see also *id.* at 309 (“[S]ome of the basic illustrative forms of pleading issued by the Court as an appendix to these new rules come directly from the common law.”). Nevertheless, they made clear that “[t]he real test of a good pleading under the new rules is not . . . whether the allegations would be deemed good at common law” but rather “whether information is given sufficient to enable the party to plead and to prepare for trial.” Sunderland, *supra* note 98, at 12; *cf. Access to Courts Hearing*, *supra* note 26, at 4 (statement of Stephen B. Burbank) (“[T]he committee wanted to escape the confinement of . . . common law procedure.”). And again, what the drafters thought of as sufficient pleading was quite minimal. See *supra* notes 93–98 and accompanying text.

100. *Claim or Cause of Action*, 13 F.R.D. 253, 253 (1952).

make clear that “ultimate facts” must be pleaded.<sup>101</sup> That proposal was rejected.<sup>102</sup>

ii. *Criminal Pleading*

The history of American criminal pleading also begins with the common law. Under that system, criminal pleading was—like its civil counterpart—characterized by excessive technicality, intricacy, and formality, largely driven by the severity of punishments at common law.<sup>103</sup> As one commentator explained in the 1920s:

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101. *See id.* at 264–65, 271–75.

102. *See, e.g.,* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 582–83 (2007) (Stevens, J., dissenting); Marcus, *supra* note 85, at 445. The Advisory Committee responded by proposing an Advisory Committee Note for Rule 8(a) indicating that critics had erroneously assumed “the rule does not require the averment of any information as to what has actually happened” and clarifying that the Rule indeed “envisages the statement of circumstances, occurrences, and events.” ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18–19 (Oct. 1955), <https://bit.ly/2RKPP05>; *see also* Marcus, *supra* note 85, at 445 & n.72. That Note was never adopted. *See, e.g.,* Wilson Research Corp. v. Piolite Plastics Corp., 336 F.2d 303, 305 (1st Cir. 1964). But in any event, whatever “circumstances, occurrences, and events” the Committee anticipated were minimal. The proposed Note explained that the need for pleading “circumstances, occurrences, and events” was shown, *inter alia*, by “the forms appended to the rules,” ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, *supra*, at 18–19, which were themselves largely conclusory, *see infra* Section III.B.2. It further said:

The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served . . . to prevent a party from having a trial because of mistakes in statement.

ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, *supra*, at 19. Moreover, it emphasized that Rule 8(a) “does away with the confusion resulting from the use of ‘facts’ and ‘cause of action’; and requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.” *Id.* And indeed, *Conley*-era courts sometimes drew upon the “circumstances, occurrences, and events” language—even though the proposed Note was not adopted—by relying on *Federal Practice and Procedure*, which concluded that that language comported with and was implicit in *Conley*. *See, e.g.,* McGregor v. Indus. Excess Landfill, Inc., 856 F.2d 39, 42 (6th Cir. 1988); *Jacobs v. Diaz*, Civil No. 393/82, 1983 WL 952749, at \*1 (V.I. Terr. Ct. Jan. 26, 1983); *cf. Twombly*, 550 U.S. at 555 n.3 (citing *Federal Practice and Procedure*’s discussion of the “circumstances, occurrences, and events” language in analyzing *Conley*’s “requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests” (citation omitted)).

103. *See, e.g.,* Homer Cummings, *The Third Great Adventure*, 29 A.B.A. J. 654, 655 (1943); Alexander Holtzoff, *Reform of Federal Criminal Procedure*, 12 GEO. WASH. L. REV. 119, 123 (1944); George Z. Medalie, *Federal Rules of Criminal Procedure*, 4 LAW. GUILD REV., June–July 1944, at 2–3; Arthur T. Vanderbilt, *New Rules of Federal Criminal Procedure*, 29 A.B.A. J. 376, 376–77 (1943); Sam. B. Warner & Henry B. Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years*, 50 HARV. L. REV. 583, 587 & n.5 (1937); Robert I. Broussard, Comment, *The Short Form Indictment: History, Development and Constitutionality*, 6 LA. L. REV. 78, 78–79 (1944);

In the face of such atrocious severity of punishment one might well expect to find humane judges searching for technicalities merely to save miserable offenders from penalties which were outrageously excessive in particular cases. This practice seems not to have been uncommon. . . .

Unfortunately, however, every such decision became a precedent for all future cases, even after undue severity had been eliminated from the penal provisions. . . . For every defendant who had been saved from paying the death penalty for some trivial offense by legalistic acumen, there remained an additional word, clause or phrase which all future indictments for such offenses would have to contain. More and more such pleadings became complicated and formidable. These fossilized relics of the age of punitive savagery were brought over to this country.<sup>104</sup>

Frustrations with common law criminal pleading—also like on the civil side—led to reform efforts.<sup>105</sup> Consequently, during the nineteenth century, “many states began statutory reforms to relax certain common-law pleading requirements.”<sup>106</sup> As part of that movement, several jurisdictions adopted code pleading rules to govern indictments. They required, for example, that an indictment contain “[a] statement of the facts constituting the offense, in plain and concise language without unnecessary repetition.”<sup>107</sup>

Those rules, however, also raised concerns. For example, commentators noted that they “usually failed to accomplish their purpose, because they did not purport to change the underlying function of the indictment and did not suggest the exact wording to be used in certain cases,” meaning that “lawyers preferred to use language which had been held sufficient for the particular purpose, however verbose and archaic, rather than to venture the use of a new and untested terminology in a very formal instrument.”<sup>108</sup> Others suggested that there was little

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Imwinkelried, *supra* note 41, at 355. For a concrete example of common law pleading (that demonstrates its excesses well), see *infra* Section IV.C.2.

104. Rollin M. Perkins, *Short Indictments and Informations*, 15 A.B.A. J. 292, 292 (1929).

105. See, e.g., Meyn, *supra* note 15, at 702–03, 706.

106. *State v. Hunt*, 582 S.E.2d 593, 600 (N.C. 2003). Many of these reforms occurred in the mid-1800s. See *id.*; see also LAFAYETTE ET AL., *supra* note 12, § 19.1(b). There were, however, earlier reforms. See, e.g., *Commonwealth v. Peas*, 43 Va. (2 Gratt.) 629, 637 (1834); *Kane v. People*, 8 Wend. 203, 218 (N.Y. 1831).

107. *State v. Patten*, 64 N.E. 850, 851 (Ind. 1902) (citation omitted); accord, e.g., *Fitzpatrick v. United States*, 178 U.S. 304, 308–09 (1900); *Grattan v. State*, 71 Ala. 344, 345–46 (1882); *In re Mansfield*, 39 P. 775, 777–78 (Cal. 1895); *Madden v. State*, 1 Kan. 340, 348–49 (1863); *State v. Hinckley*, 4 Minn. 345, 357–58 (1860); *People v. Laurence*, 33 N.E. 547, 521 (N.Y. 1893); *State v. Wright*, 37 P. 313, 314 (Wash. 1894).

108. Perkins, *supra* note 104, at 293.

difference between code and common law pleading<sup>109</sup>—and indeed, the code pleading rules were linguistically similar to common law requirements.<sup>110</sup>

Some reforms went further, however, and permitted so-called “short-form” indictments.<sup>111</sup> Such indictments were to include “an extremely truncated description of the criminal conduct” and then be supplemented by a bill of particulars or the like.<sup>112</sup> For instance, the American Law Institute in 1930 proposed a short-form indictment rule that allowed charging “[b]y using the name given to the offense by the common law or by a statute,” such as alleging just “murder” without stating any specific acts or even the generalized elements of the offense;<sup>113</sup> and that proposal was adopted by several states.<sup>114</sup> Overall, “[a]t one time, more than a dozen states had authorized some form of short-form pleading.”<sup>115</sup>

Nevertheless, before the Federal Rules, the common law pleading system largely prevailed in the federal courts.<sup>116</sup> Despite some federal

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109. *See, e.g.*, 2 JOEL PRENTISS BISHOP, *NEW CRIMINAL PROCEDURE OR NEW COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES* § 426 (4th ed. 1896); Charles A. Willard, *The Seventeenth Century Indictment in the Light of Modern Conditions*, 24 HARV. L. REV. 290, 293, 295 (1911).

110. *See, e.g.*, *Floren v. United States*, 186 F. 961, 962 (8th Cir. 1911); *United States v. Burns*, 54 F. 351, 361 (C.C.D.W. Va. 1893); *Locke v. State*, 3 Ga. 534, 538 (1847); *People v. Gates*, 13 Wend. 311, 317 (N.Y. Sup. Ct. 1835); *Scroter v. Harrington*, 8 N.C. (1 Hawks) 192, 193 (1820); *Fouts v. State*, 8 Ohio St. 98, 113 (Ohio 1857); *Lamberton v. State*, 11 Ohio 282, 284 (1842); *Hardy v. Commonwealth*, 58 Va. (17 Gratt.) 592, 595 (1867); 1 JOSEPH CHITTY, *A PRACTICAL TREATISE ON THE CRIMINAL LAW, WITH COMPREHENSIVE NOTES ON EACH PARTICULAR OFFENCE, THE PROCESS, INDICTMENT, PLEA, DEFENCE, EVIDENCE, TRIAL, VERDICT, JUDGMENT, AND PUNISHMENT* 168 (5th ed. 1847).

111. *See, e.g.*, LAFAVE ET AL., *supra* note 12, § 19.1(c); Warner & Cabot, *supra* note 103, at 588.

112. LAFAVE ET AL., *supra* note 12, § 19.1(c); *see also, e.g.*, *Butler v. State*, 129 S.W.2d 226, 227 (Ark. 1939); *People v. Curtis*, 98 P.2d 228, 233 (Cal. Dist. Ct. App. 1939); *State v. Engler*, 251 N.W. 88, 92 (Iowa 1933); *State v. Van Zelfden*, 152 So. 554, 556 (La. 1933); *Commonwealth v. Farmer*, 106 N.E. 150, 151 (Mass. 1914); *People v. Tenerowicz*, 253 N.W. 296, 301 (Mich. 1934); *People v. Bogdanoff*, 171 N.E. 890, 893 (N.Y. 1930); *State v. Domanski*, 190 A. 854, 857 (R.I. 1937); *State v. Solomon*, 71 P.2d 104, 105–07 (Utah 1937).

113. CODE OF CRIMINAL PROCEDURE §§ 152–54 (Am. Law Inst. 1930).

114. *See* Notes and Legislation, *Streamlining the Indictment*, 53 HARV. L. REV. 122, 123–24 (1939).

115. LAFAVE ET AL., *supra* note 12, § 19.1(c).

116. *See, e.g.*, ROBERT M. HUGHES, *HANDBOOK OF JURISDICTION AND PROCEDURE IN UNITED STATES COURTS* 34 (1904); MARK S. RHODES, *ORFIELD’S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES* §§ 1:4, 7:22 (2019); Lester B. Orfield, *The Preliminary Draft of the Federal Rules of Criminal Procedure*, 22 TEX. L. REV. 37, 51 (1943); Cummings, *supra* note 103, at 655; Holtzoff, *supra* note 103, at 124; Medalie, *supra* note 103, at 3; Willard, *supra* note 109, at 293; Vanderbilt, *supra* note 103, at 377; *see also* James M. Shellow & Susan W. Brenner, *Speaking Motions: Recognition of Summary Judgment in Federal Criminal Procedure*, 107 F.R.D. 139, 150, 157 (1985).

efforts at reform that tempered the common law's extremes,<sup>117</sup> it was widely perceived that common law technicality governed. Commentators noted, for example, that "archaic, prolix, and technical accusations . . . are still used in the federal courts and . . . often give rise to the interpretation of technicalities and the writing of briefs and the preparation of arguments over points that have no bearing on the merits of the case."<sup>118</sup>

Change, however, was on the horizon. Around the time of the promulgation of the Federal Rules of Civil Procedure, "there were many who believed that the various criminal rules in use in the District Courts should be made uniform as well."<sup>119</sup> And "[c]onsistent with the conclusions of civil reformers, proponents of criminal procedure reform thought the judiciary best suited to create rules of procedure."<sup>120</sup> Ultimately, like with the Civil Rules, "Congress passed legislation that gave the Supreme Court authority to draft rules of criminal procedure,"<sup>121</sup> and the Court "appointed an Advisory Committee . . . to assist it in its undertaking."<sup>122</sup> The Supreme Court adopted the Federal Rules of Criminal Procedure in 1944, and they went into effect in 1946.<sup>123</sup>

### *iii. The Relationship Between Civil & Criminal Pleading Requirements*

Another aspect of American pleading history important for our purposes is that, before the Federal Rules, there existed a well-established relationship between civil and criminal pleading standards.

117. In 1872, Congress passed a statute stating that "no indictment . . . shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant." *Russell v. United States*, 369 U.S. 749, 762 (1962) (citation omitted). The Supreme Court regarded that statute as supporting the view that "[t]he rigor of old common-law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded." *Hagner v. United States*, 285 U.S. 427, 431 (1932); see also STANLEY F. BREWSTER, *FEDERAL PROCEDURE* § 1024 (1940); HUGHES, *supra* note 116, at 37.

118. Orfield, *supra* note 116, at 51; accord, e.g., THEODORE W. HOUSEL & GUY O. WALSER, *DEFENDING AND PROSECUTING FEDERAL CRIMINAL CASES* § 248 (1938); Cummings, *supra* note 103, at 655; Holtzoff, *supra* note 103, at 124; Medalie, *supra* note 103, at 3; Vanderbilt, *supra* note 103, at 377.

119. *Preface to 1 DRAFTING HISTORY*, *supra* note 63, at xi; accord Meyn, *supra* note 15, at 706-07; see also Holtzoff, *supra* note 103, at 122 (explaining that federal criminal procedure had become "a tangled web of numerous heterogeneous strands," drawing on "Acts of Congress," common law, state law "as it existed on the date of the admission of the state into the Union," and "current state law").

120. Meyn, *supra* note 15, at 707.

121. *Id.*

122. *Preface to 1 DRAFTING HISTORY*, *supra* note 63, at xi.

123. See FED. R. CRIM. P. historical note.

Nineteenth and early-twentieth-century state and federal courts repeatedly emphasized that the rules governing criminal pleadings were *at least as strict* as those applicable to civil pleadings, and—putting aside short-form indictments—they did so regardless of pleading regime.

One common refrain was that criminal and civil pleading rules were equivalent. For example, in 1843, the Circuit Court for the District of Ohio explained that “[t]he rules of pleading are the same in civil as in criminal actions.”<sup>124</sup> And in 1902, the Supreme Court of Indiana said that its code pleading indictment rule uses “precisely the language” as the rule “which declares the requisite of a complaint in a civil action” and that “[t]he whole purpose of the legislature, in the enactment of both the Civil and Criminal Code, was to do away with useless forms, repetition, and technicality, and thus bring the procedure in both classes of action to the ‘common understanding.’”<sup>125</sup> Similar examples abound.<sup>126</sup>

In addition, many decisions made clear that criminal pleading standards should be considered at least as stringent as, or more stringent than, their civil counterparts. For instance, the Circuit Court for the District of Michigan said, in 1853, “[omitting a particular type of allegation] would not answer in an action for civil damages, much less

124. *United States v. Brown*, 24 F. Cas. 1265, 1265 (C.C.D. Ohio 1843) (No. 14,666).

125. *State v. Patten*, 64 N.E. 850, 851 (Ind. 1902) (citation omitted).

126. *See, e.g.*, *Webb v. York*, 79 F. 616, 621 (8th Cir. 1897); *Ware v. State*, 225 S.W. 626, 631 (Ark. 1920); *State v. Hand*, 6 Ark. 165, 167 (1845); *People v. King*, 27 Cal. 507, 510 (1865); *Werner v. State*, 51 Ga. 426, 427–28 (1874); *Ex parte McLeod*, 128 P. 1106, 1108 (Idaho 1913); *Hunt v. State*, 159 N.E. 149, 150 (Ind. 1927); *Brunaugh v. State*, 90 N.E. 1019, 1028 (Ind. 1910); *State v. Stringfellow*, 52 So. 1002, 1004 (La. 1910); *State v. Bartley*, 43 A. 19, 20 (Me. 1899); *State v. Keen*, 34 Me. 500, 503 (1852); *Commonwealth v. Child*, 30 Mass. (13 Pick.) 198, 202 (1832); *Enders v. People*, 20 Mich. 233, 240 (1870); *State v. Hinckley*, 4 Minn. 345, 357–58 (1860); *State v. Hayward*, 83 Mo. 299, 305, 312–13 (1884); *State v. Ames*, 1 Mo. 524, 525 (1825); *State v. Hliboka*, 78 P. 965, 967 (Mont. 1904); *Territory v. Duncan*, 6 P. 353, 355–56 (Mont. 1885); *People v. Willis*, 53 N.E. 29, 30 (N.Y. 1899); *People v. Danahy*, 18 N.Y.S. 467, 468 (N.Y. Gen. Term 1892); *State v. Whedbee*, 67 S.E. 60, 62 (N.C. 1910); *Palamarchuk v. State*, 221 P. 120, 121 (Okla. Crim. App. 1923); *Hamilton v. Commonwealth*, 3 Pen. & W. 142, 144–45 (Pa. 1831); *State v. Crank*, 18 S.C.L. (2 Bail.) 66, 69 (S.C. Ct. App. 1831); *State v. Ryan*, 15 S.C.L. (4 McCord) 16, 16 (S.C. Ct. App. 1826); *State v. Hodgson*, 28 A. 1089, 1093–94 (Vt. 1894); *Hardy v. Commonwealth*, 58 Va. (17 Gratt.) 592, 608 (1867) (Rives, J., dissenting); *accord, e.g.*, JOSEPH HENRY BEALE, JR., A TREATISE ON CRIMINAL PLEADING AND PRACTICE § 93 (1899); FRANKLIN FISKE HEARD, HEARD ON THE CRIMINAL LAW: A TREATISE ADAPTED TO THE LAW AND PRACTICE OF THE SUPERIOR AND INFERIOR COURTS IN CRIMINAL CASES 101 (2d ed. 1882); HOWARD C. JOYCE & ARTHUR W. BLAKEMORE, TREATISE ON THE LAW GOVERNING INDICTMENTS WITH FORMS §§ 276, 291, 295 (2d ed. 1924); THOMAS W. POWELL, ANALYSIS OF AMERICAN LAW 637 (1870); FRANK S. RICE, THE GENERAL PRINCIPLES OF THE LAW OF EVIDENCE IN THEIR APPLICATION TO THE TRIAL OF CRIMINAL CASES AT COMMON LAW AND UNDER THE CRIMINAL CODES OF THE SEVERAL STATES § 120 (1893); William Chenault, *Criminal Pleading*, 1 KY. L.J. 53, 53 (1881); 1 CHITTY, *supra* note 110, at 168, 172; Meyn, *supra* note 15, at 701–02.



then, in an indictment, which should be specially descriptive of the offense charged.<sup>127</sup> Similarly, a 1902 Missouri appeals court declared that “immemorial law” provided that “greater strictness of averment is required in criminal than in civil pleadings.”<sup>128</sup> Likewise, in 1877, the Supreme Court of Alabama asserted that, although it was often said “that the rules of pleading are the same in criminal cases as in civil,” “the practice is to require greater strictness in criminal matters than in civil” and so, “in the absence of statutory regulations, as high a degree of certainty is required in criminal pleadings as in civil.”<sup>129</sup> And in 1871, the Supreme Court of Indiana observed that, under its code pleading regime, “[t]he rule of [criminal and civil] pleading is the same,” but “[i]f there was or should be any difference, it should be in favor of greater certainty and particularity in the criminal, than in the civil cases.”<sup>130</sup> Finally, also in 1871, the Supreme Court of Oregon illustrated the minimum an indictment should include under its code pleading rule by noting, “In our practice in *civil* cases, a pleading is insufficient and subject to demurrer if the pleader alleges conclusions of law instead of the facts from which such conclusions may be deduced.”<sup>131</sup> Again, there are numerous similar examples.<sup>132</sup>

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127. *United States v. Schuler*, 27 F. Cas. 978, 979 (C.C.D. Mich. 1853) (No. 16,234).

128. *Munchow v. Munchow*, 70 S.W. 386, 387 (Mo. Ct. App. 1902).

129. *Noble v. State*, 59 Ala. 73, 77–78 (1877) (citations omitted).

130. *Quinn v. State*, 35 Ind. 485, 487 (1871).

131. *State v. Dougherty*, 4 Or. 200, 202–03 (1871).

132. *See, e.g., Friedenstein v. United States*, 125 U.S. 224, 238 (1888) (Field, J., dissenting); *United States v. Hunter*, 80 F.2d 968, 970 (5th Cir. 1936); *Beck v. United States*, 33 F.2d 107, 110 (8th Cir. 1929); *United States v. Hous. Belt & Terminal Ry. Co.*, 205 F. 344, 348 (5th Cir. 1913); *United States v. Korner*, 56 F. Supp. 242, 250 (S.D. Cal. 1944); *United States v. Sugar Inst.*, 51 F.2d 1066, 1066 (S.D.N.Y. 1931); *United States v. United Shoe Mach. Co.*, 234 F. 127, 136 (E.D. Mo. 1916); *United States v. Martindale*, 146 F. 289, 293–94 (D. Kan. 1904); *United States v. Reid*, 73 F. 289, 290 (W.D. Mich. 1896); *United States v. Potter*, 56 F. 97, 102 (C.C.D. Mass. 1892); *United States v. Fisler*, 25 F. Cas. 1091, 1091 (D. Ind. 1865) (No. 15,105); *Seals v. State*, 194 So. 682, 684 (Ala. 1939); *People v. Cohen*, 50 P. 20, 21 (Cal. 1897); *People v. Wakao*, 165 P. 720, 721–22 (Cal. Dist. Ct. App. 1917); *Burnham v. State*, 20 So. 548, 549 (Fla. 1896); *Hoyt v. State*, 50 Ga. 313, 323 (1873); *Locke v. State*, 3 Ga. 534, 538 (1847); *People v. Berman*, 147 N.E. 428, 430 (Ill. 1925); *Haughn v. State*, 65 N.E. 287, 288–89 (Ind. 1902); *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, 479–80 (1884); *State v. Nutwell*, 1 Gill 54, 56 (Md. 1843); *People v. Maki*, 223 N.W. 70, 74–75 (Mich. 1929); *People v. Petheran*, 31 N.W. 188, 196 (Mich. 1887) (Campbell, C.J., dissenting); *State v. Patterson*, 59 S.W. 1104, 1105 (Mo. 1900); *State v. Mayfield*, 66 Mo. 125, 126 (1877); *City of Louisiana v. Anderson*, 73 S.W. 875, 876 (Mo. Ct. App. 1903); *State ex rel. Baldwin v. Kellogg*, 36 P. 957, 961–62 (Mont. 1894); *People v. Logan*, 1 Nev. 110, 116 (1865); *Manley v. People*, 7 N.Y. 295, 304 (1852) (Edmonds, J., concurring); *Latham v. Westervelt*, 26 Barb. 256, 260 (N.Y. Gen. Term 1857); *Kain v. State*, 8 Ohio St. 306, 317–18 (Ohio 1858); *State v. Scarth*, 3 P.2d 446, 450 (Okla. 1931); *Smith v. Nat'l Sur. Co.*, 149 P. 1040, 1040–41 (Or. 1915); *State v. Coleman*, 8 S.C. 237, 242 (1876); *Patrick v. Smoke*, 34 S.C.L. (3 Strob.) 147, 153–54 (S.C. Ct. App. 1848); *Commonwealth v. Peas*, 43 Va. (2 Gratt.) 629, 631–32

In short, before the Federal Rules, criminal pleadings were regularly viewed as subject to as much scrutiny as, or more scrutiny than, civil pleadings.

c. The Original Advisory Committee Note to Rule 7(c)

The third source is Rule 7(c)'s original Advisory Committee Note. That Note is important, first, because it explicitly references Rule 8(a). It says: "This rule introduces a simple form of indictment, illustrated by Forms 1 to 11 in the Appendix of Forms. Cf. Rule 8(a) of the Federal Rules of Civil Procedure."<sup>133</sup> In other words, it suggests a relationship between Rule 7(c) and Rule 8(a).

That relationship, moreover, is apparently one of analogy. At the time the Note was adopted, the "cf." signal directed readers to "where *contrasted, analogous, or explanatory* views or statements may be found."<sup>134</sup> And nothing indicates that the cross-reference to Rule 8(a) was meant to direct readers to *contrasting* or *explanatory* material. Furthermore, a separate portion of the Note—referring to a different provision of Rule 7(c)—contains a nearly indistinguishable "cf." cross-reference to Rule 8:

The provision . . . that it may be alleged in a single count that the means by which the defendant committed the offense are unknown, or that he committed it by one or more specified means, is intended to eliminate the use of multiple counts for the purpose of alleging the commission of the offense by different means or in different ways. Cf. Federal Rules of Civil Procedure, Rule 8(e)(2).<sup>135</sup>

That second cross-reference, relating to Rule 8(e)(2), was plainly meant to convey *analogy* because when the Advisory Committee Note was written, Rule 8(e)(2) permitted exactly what the Note says the referenced portion of Rule 7(c) was designed to accomplish: Rule 8(e)(2) allowed parties to "set forth two or more statements of a claim or defense alternately or hypothetically, *either in one count or defense or in separate counts or defenses*."<sup>136</sup> There is no reason to think the cross-reference to Rule 8(a), which, again, is essentially identical to the cross-

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(1834); *Selvey v. Grafton Coal & Coke Co.*, 79 S.E. 656, 657 (W. Va. 1913); *accord, e.g.*, *United States v. Hanna*, 7 C.M.R. 571, 578 (A.F.B.R. 1952); 11 *CYCLOPEDIA OF LAW* 129 (Charles E. Chadman ed., 1906); JAMES GOULD & ARTHUR P. WILL, *A TREATISE ON THE PRINCIPLES OF PLEADING* 1 n.b (6th ed. 1909); 1 BISHOP, *supra* note 109, §§ 320–21.

133. FED. R. CRIM. P. 7(c) 1944 advisory committee's note.

134. *CF.*, BLACK'S LAW DICTIONARY (3d ed. 1933) (emphasis added).

135. FED. R. CRIM. P. 7(c) 1944 advisory committee's note.

136. FED. R. CIV. P. 8(e)(2) (1938) (emphasis added).

reference to Rule 8(e)(2) and appears nearby in the same Note, was intended to convey something different.

The Advisory Committee Note is also significant because of the following sentence, which appears directly after the cross-reference to Rule 8(a):

For discussion of the effect of this rule and a comparison between the present form of indictment and the simple form introduced by this rule, see Vanderbilt, 29 A.B.A.Jour. 376, 377; Homer Cummings, 29 A.B.A.Jour. 654, 655; Holtzoff, 3 F.R.D. 445, 448–449; Holtzoff, 12 Geo.Washington L.R. 119, 123–126; Medalie, 4 Lawyers Guild R. (3) 1, 3.<sup>137</sup>

In that sentence, several articles are cited to depict what Rule 7(c) was meant to achieve, and all but one were written by members of the Advisory Committee that drafted the Criminal Rules.<sup>138</sup> What those articles make clear is that the Committee wanted to simplify criminal pleadings from the technical and intricate common law form, but not at all costs. Instead, the drafters wanted to balance simplifying procedures and protecting defendants' rights, and they even sought to strengthen defendants' rights where possible.<sup>139</sup> Indeed, one reason why they wanted to simplify pleadings was to protect defendants by ensuring they could *better* understand the allegations against them than they could under common law pleading.<sup>140</sup> And in order to avoid the delay caused

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137. FED. R. CRIM. P. 7(c) 1944 advisory committee's note.

138. See *New Rules on Criminal Procedure in the Federal Courts*, 15 N.Y. ST. B.A. BULL. 175, 175–76 (1943). The exception is the article by Homer Cummings. Additionally, the two articles by Alexander Holtzoff are functionally the same for our purposes, compare Holtzoff, *supra* note 103, with Alexander Holtzoff, *Reform of Criminal Procedure*, 3 F.R.D. 445 (1944), so I have only cited to one of them (the article in the *George Washington Law Review*).

139. See Cummings, *supra* note 103, at 654–55 (“While concerning ourselves with efficiency and expedition great care must be taken to avoid the impairment of any of the just rights of the accused. . . . At all times [the drafters] have been sedulous in preserving the rights of the accused.”); Holtzoff, *supra* note 103, at 123 (“The simplification of procedure has been accomplished . . . without sacrifice of any safeguards that properly surround a defendant in a criminal case. In fact, in some respects the new rules have cemented and strengthened the protection accorded to the defendant.”); Medalie, *supra* note 103, at 2 (“The rules therefore must be drawn to safeguard the innocent, to facilitate the prosecution and speedy conviction of the guilty, without sacrificing fundamental principles of justice and fair play.”); Vanderbilt, *supra* note 103, at 376–77 (“In drafting the rules, the committee has been guided by two basic principles. First, its purpose has been to provide a simple procedure devoid of technicalities . . . . The second principle . . . was the necessity of preserving unimpaired and of strengthening where essential and desirable those rights of a defendant which are regarded as basic in the Anglo-American conception of criminal justice.”).

140. See Cummings, *supra* note 103, at 655 (“[The simplified indictment] is a great improvement upon the ancient form which could serve only to bewilder an accused and impel his counsel to reach for a microscope to discern some possible defect in so lengthy

by motions for bills of particulars, the drafters decided *against* permitting “short-form” indictments.<sup>141</sup>

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and dismal a document.”); Holtzoff, *supra* note 103, at 124 (“Actually, instead of apprising the defendant of the crime of which he is accused, [the type of indictment Rule 7(c) repudiated] tends to mystify him.”); Medalie, *supra* note 103, at 3 (“The need to guard against microscopic technical flaws [under the old pleading rules] had resulted in a plethora of logomachy in which lurked, well hidden, the substance of the offense. . . . It is hoped that this new rule will lead to the swift abolition of the lengthy, wordy and obscure indictments which obfuscated, rather than stated, the facts constituting the crime.”).

141. See Holtzoff, *supra* note 103, at 125–26 (“The form adopted by the Committee is not what is technically known as the short form indictment, which merely names the crime with which the defendant is charged, by its legal term, without specifying or summarizing the facts of the offense. The Committee deliberately rejected indictments of this type, because they are apt to evoke motions for bills of particulars and thereby constitute a source of unnecessary delay.”); Vanderbilt, *supra* note 103, at 377 (“A simple form of indictment is proposed which constitutes a compromise between the present prolix document and the extremely short form. The objection to the latter is that it almost invariably evokes a motion for a bill of particulars and thereby is productive of delay.”).

Several contemporary articles written by the drafters but not cited in the Advisory Committee Note are in accord with the foregoing points about the articles referenced in the Note. See, e.g., George H. Dession, *The New Federal Rules of Criminal Procedure: II*, 56 YALE L.J. 197, 205–06 (1947); Alexander Holtzoff, *The New Federal Criminal Procedure*, 37 J. CRIM. L. & CRIMINOLOGY 111, 114–15 (1946); Lester B. Orfield, *The Federal Rules of Criminal Procedure*, 21 N.Y.U. L.Q. REV. 167, 175 (1948); Lester B. Orfield, *The Federal Rules of Criminal Procedure*, 26 NEB. L. REV. 570, 580 (1947); Orfield, *supra* note 116, at 50–51; cf. George H. Dession, *The New Federal Rules of Criminal Procedure: I*, 55 YALE L.J. 694, 696 (1946) (“Most of the articles by Committee members were written while the enterprise was still in progress, and reflect the policy considerations which moved the Committee.”). And around the time of the Criminal Rules’ promulgation, multiple drafters commented that Rule 7(c) was of limited effect, further suggesting that they did not seek to simplify pleadings at all costs. George Dession, for example, said:

Simple and non-technical pleadings are contemplated, as illustrated in the Appendix of Forms prepared by the Advisory Committee. But since such pleadings were entirely sufficient before the adoption of the Rule, it may be assumed that prolixity up to a point will continue to be tolerated and that the Rule will not end the flow of republication by commercial annotators of trial court rulings on procedural points which have little significance beyond the particular case and serve chiefly to augment the work of law clerks and the costs of litigation.

Dession, *The New Federal Rules of Criminal Procedure: II*, *supra*, at 205–06. Likewise, Arthur Vanderbilt explained that an indictment “could always be” “a plain, concise and definite written statement of the essential facts constituting the offense charged” and that he did not “know whether we can succeed except by moral suasion in getting the indictment to be concise and definite instead of prolix, verbose and involved.” *Proceedings of the Institute on Federal Rules of Criminal Procedure* (Feb. 1946), in 6 N.Y. UNIV. SCH. OF LAW, FEDERAL RULES OF CRIMINAL PROCEDURE WITH NOTES AND INSTITUTE PROCEEDINGS 157 (Alexander Holtzoff ed., 1946).

d. The Drafting History of the Criminal Rules

The final source is the drafting history of the Criminal Rules. That history reveals six critical points that are crucial to understanding Rule 7(c)'s original design.

The first is that the Criminal Rules were initially based on and tied to the Civil Rules, but the drafters ultimately severed any connection between those sets of Rules.

When the Reporter to the Advisory Committee, James Robinson, prepared his first draft of the Criminal Rules, he based that draft on the Civil Rules and sought to directly link the Civil and Criminal Rules.<sup>142</sup> He emphasized, for instance, that the draft “follow[ed] as closely as possible in organization, in numbering and in substance the Federal Rules of Civil Procedure.”<sup>143</sup> He further explained that the draft was “prepared with the idea of carrying that parallelism as far as possible” and that adhering to the organization and content of the Civil Rules was “a fundamental principle.”<sup>144</sup> And the first draft even included a “Conformity Rule,” which stated, “The procedure under these rules is designed to conform as closely as possible to the procedure under the Federal Rules of Civil Procedure, and these rules shall be construed with that purpose in view.”<sup>145</sup>

The Committee, however, quickly rejected the idea to align the Criminal and Civil Rules.<sup>146</sup> For instance, several Committee members expressed that they found the concept questionable because they viewed the criminal and civil contexts as markedly different with respect to “the dominant policies,” “the problems,” and “the work” in litigating cases.<sup>147</sup> And as a result of the discussion on this subject, the drafters voted unanimously to strike the Conformity Rule.<sup>148</sup>

Even after that, moreover, the drafters continued to emphasize that civil and criminal procedure should be kept separate. For example, in

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142. See Meyn, *supra* note 15, at 710, 713–14.

143. *Hearing Before the Advisory Committee on Rules of Criminal Procedure*, U.S. COURTS 5 (Sept. 1941) [hereinafter *September 1941 Hearing*], <https://bit.ly/3nAsfWv>. I generally describe Advisory Committee meetings as “hearings.” That term is drawn from the cover page of the initial transcript document for the Advisory Committee on Criminal Rules, and I use it for consistency throughout. The “hearings” I refer to, however, were not hearings in the sense of inviting outside participation in the discussion. Rather, they were simply meetings of the relevant Committees.

144. *Id.* at 4, 6.

145. FED. R. CRIM. P. 2 (Tentative Draft No. 1, Sept. 1941), *microformed on Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedures, 1935-1988--Committee on Criminal Procedure* (Cong. Info. Serv.); Meyn, *supra* note 15, at 713 (citation omitted).

146. See Meyn, *supra* note 15, at 714.

147. *September 1941 Hearing*, *supra* note 143, at 18, 21–22.

148. See *id.* at 23.

debating whether Civil Rule 11 should apply in criminal cases, Committee members said:

Mr. Dean. It points out the basic difficulties when we try to relate civil with criminal. We may have the same situation later on when someone tries to compare the civil and criminal, and actually they should not be compared.

Mr. Wechsler. I think any general student of the subject would be as surprised as I am to see the civil rules adopted as a model for the system of criminal procedure.

Mr. Dession. Yes; I think our duty is to find out what are the problems in the criminal law and to draw a code for them, and to pay no attention to what is in the civil code.<sup>149</sup>

The second critical point is that civil and criminal pleading reforms played a foundational role in the development of Rule 7(c) and its “essential facts” language. The Advisory Committee repeatedly invoked Civil Rule 8(a) in designing Rule 7(c), and it expressly amended and crafted Rule 7(c) to be more like its civil counterpart. The Committee also drew heavily on civil and criminal code pleading rules in creating Rule 7(c), and it viewed those rules as equivalent to each other and its reliance on them as in complete harmony with its invocation of Rule 8(a).

Although Robinson’s first draft of the Criminal Rules broadly followed the Civil Rules, the first draft of Rule 7(c) was designed to be more exacting than Rule 8(a).<sup>150</sup> It set out ten specifications regarding what a criminal pleading had to contain, including “a plain and concise statement of”: (1) “the court’s jurisdiction”; (2) the pleading’s source; (3) the defendant’s name; (4) when the offense occurred; (5) the location of the offense; (6) “the act or acts or the omission of legal duty” involved; (7) “the criminal intent”; (8) the name of anyone injured; (9) “any other fact or allegation which may be necessary because of special requirements . . . for notice to the defendant and to the court of the act and offense of which the defendant is accused”; and (10) “the statute” at issue.<sup>151</sup>

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149. *Id.* at 367.

150. *See* Meyn, *supra* note 15, at 715–16. Robinson regarded pleading as “one place where the civil rules and the criminal rules are different” because, in his view, criminal pleading involved “stating the grounds for putting a man in the penitentiary” and “[t]here is nothing comparable to that in the civil rules.” *September 1941 Hearing, supra* note 143, at 218; *see also* Meyn, *supra* note 15, at 716.

151. FED. R. CRIM. P. 8 (Tentative Draft No. 1, Sept. 1941), *microformed on* Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedures, 1935-1988--Committee on Criminal Procedure (Cong. Info. Serv.); *see also* Meyn, *supra* note 15, at 716 n.115.

Discussion of that Rule began with Committee member Frederick Crane. Crane believed that the Rule's ten specifications might be too much and argued that they should be replaced with simpler language: "a brief statement of facts constituting the crime."<sup>152</sup>

The Committee recognized that Crane's proposed language was similar to criminal code pleading statutes, so those statutes set the initial focus of the debate. George Medalie, for instance, said, "Judge Crane, you have in mind . . . the latest provision of the New York Code of Criminal Procedure with respect to the simplified indictment."<sup>153</sup> And Alexander Holtzoff suggested that Crane's idea was to adopt a type of simplified indictment that had been used under the New York criminal code pleading provision Medalie had cited.<sup>154</sup>

Soon, however, the drafters started to invoke civil code pleading practices, interchangeably with criminal ones, as informing Crane's language and the proper criminal pleading standard. For instance, after Crane clarified that his proposal did not mean that indictments actually needed to be short, Medalie responded with a discussion of civil code pleading:

You have the same situation as in modern equity pleading. In our code states it is provided for the complaint giving a simple and concise statement of the facts constituting the right to [relief]. That is all that is necessary. Some lawyers do it, but they are scared to death when they do it.

To this day, notwithstanding the simple code of pleading, the average complaint calling for equitable [relief] in any pleaded state of facts is a virtual pamphlet.<sup>155</sup>

He then directly tied civil and criminal code pleading together and treated them as supplying the appropriate pleading standard for the Criminal Rules in line with Crane's proposal, saying, "if you just have a rule such as you have in the civil practice acts and codes of criminal procedure where simple, nontechnical forms of pleading are provided for

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152. *September 1941 Hearing*, *supra* note 143, at 198–99.

153. *Id.* at 200. Crane rejected Medalie's comparison to New York law, which, in Crane's view, did not require a statement of the facts. *See id.* at 199–200. That disagreement, however, was the result of a simple misunderstanding. In 1881, New York had adopted a pleading requirement like Crane's. *See People v. Iannone*, 384 N.E.2d 656, 661 (N.Y. 1978); *see also* Charles B. Nutting, *The Indictment in New York*, 19 CORNELL L.Q. 580, 586–87 (1934). In 1929, however, it enacted a short-form indictment rule. *See Iannone*, 384 N.E.2d at 661; Nutting, *supra*, at 587. Nevertheless, indictments under the 1881 law remained proper. *See Iannone*, 384 N.E.2d at 661; Nutting, *supra*, at 587. Thus, Medalie was referring to the 1881 law, and Crane was rejecting the 1929 one.

154. *See September 1941 Hearing*, *supra* note 143, at 200–02.

155. *Id.* at 206.

by saying, ‘a concise statement of facts constituting the offense,’ that is sufficient.”<sup>156</sup>

Immediately after that, and without any suggestion of perceived inconsistency with Medalie’s invocation of code pleading, the Committee contemplated establishing a Rule based on Rule 8(a) incorporating Crane’s proffered language:

Mr. Holtzoff. Right there, Mr. Medalie, let me say that the civil rules, under Rule 8-A, requires a short and plain statement of the claim showing that the pleader is entitled to relief. We could adopt that language and require a short and plain statement of facts constituting the offense with which the defendant is charged.

Mr. Crane. Say “a concise statement of facts.”

Mr. Youngquist. I like the word “plain” because it eliminates these technical forms.

Mr. Crane. You want to state that he is charged with the crime first, and then you state the facts.

Mr. Holtzoff. Yes.

The Chairman [Vanderbilt]. May this be a fair solution of the problem, to adopt the language of the corresponding section of the civil rules for this purpose and then in a note indicate what would be some of the different elements that would be specified.<sup>157</sup>

Ultimately, Arthur Vanderbilt—serving as Chairman—asked if the Committee was “generally agreed that it is sufficient . . . to provide a paraphrase corresponding to the civil rules?”<sup>158</sup> But that led to a debate over whether to adopt a Rule similar to Rule 8(a) or something more stringent, in line with the original first draft of Rule 7(c).<sup>159</sup> As Vanderbilt put it: “There seem to be two schools of thought . . . One seems to be content with a mere statement of facts, and the other wants something longer.”<sup>160</sup> For example, Holtzoff and Robinson argued the issue as follows:

Mr. Holtzoff. You have civil rules which have been in effect for three years, and they have worked out very well.

Mr. Robinson. Here is one place where the civil rules and the criminal rules are different. You are stating the grounds for putting a

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156. *Id.*

157. *Id.* at 207.

158. *Id.* at 209.

159. *See id.* at 209–10, 214, 218–19.

160. *Id.* at 214.



man in the penitentiary. There is nothing comparable to that in the civil rules.

Mr. Holtzoff. I think that if you have a statement of the facts that is all that any defendant is entitled to.<sup>161</sup>

Vanderbilt eventually sought to bring the issue to a close for the day—and further emphasized that the Committee was between embracing a pleading requirement based on Rule 8(a) or something more demanding—by asking:

The Chairman [Vanderbilt]. Haven't we pressed this issue about as much as we can? The issue is pretty clear: either to have the rule stated in substantially the same form as it is now or alternatively to have it made in paraphrase with the civil rules corresponding to it with an accompanying annotation by the reporter giving it substance plus some specimen forms in an appendix?

Mr. Medalie suggests that we do not have a vote on it, but should not we think about this issue and perhaps see a revised form of the rule in a form suggested by Judge Crane, and then tomorrow proceed to come to a tentative decision on it?<sup>162</sup>

Nevertheless, a discussion followed in which Holtzoff again suggested that “[i]f you take the civil rules, you can say ‘plain and specific statement of the facts constituting the offense with which the defendant is charged’, then paraphrase the civil rule.”<sup>163</sup>

The Committee reconvened the next day, and when the pleading Rule came up again, the focus shifted fluidly back to criminal code pleading.<sup>164</sup> Vanderbilt raised the issue and asked whether the Committee was ready for a tentative vote.<sup>165</sup> Then, Medalie again noted that New York's criminal code pleading provision contained language similar to Crane's.<sup>166</sup> Vanderbilt eventually called for a vote on whether to tentatively adopt “[t]his form presented by the reporter or the short

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161. *Id.* at 218.

162. *Id.* at 219. Vanderbilt had unsuccessfully called for a decision earlier. *See id.* at 214.

163. *Id.* at 220.

164. *See September 1941 Hearing, supra* note 143, at 335.

165. *See id.*

166. *See id.* at 335–36.

form<sup>167</sup> advocated by Judge Crane and just quoted by Mr. Medalie.”<sup>168</sup> The Committee unanimously voted for Crane’s version.<sup>169</sup>

Later discussions of the Rule, moreover, returned to civil code pleading. During review by the Subcommittee on Style, several Advisory Committee members suggested that an indictment might simply include a statement of facts and lead to convictions for whatever crimes those facts supported.<sup>170</sup> Herbert Wechsler then clarified that he thought that was the import of the Committee’s chosen pleading language—precisely because it drew upon civil code pleading. In his words, “I thought [just setting forth the facts and letting the chips fall where they may fall] was the purpose of the rule, that is, it followed the civil precedent that goes back to the earliest codes, that you shall have a plain and concise statement of the facts.”<sup>171</sup>

The third critical point from the drafting history essential for understanding Rule 7(c) is that, although a core aspect of the Committee’s pleading discussion involved whether to adopt Robinson’s or Crane’s proposed language, the drafters also repeatedly indicated that Crane’s language was *paraphrasing* Robinson’s. As Crane explained when he initially proposed his phrasing, “You can say ‘a brief statement of facts constituting the crime’; it covers all these [the ten specifications from Robinson’s first draft version] and yet leaves some liberality.”<sup>172</sup>

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167. “Short form” here did not mean an indictment merely naming the offense. *Cf. supra* notes 111–115 and accompanying text. Rather, it referred to a short rule repudiating the common law form. The Committee used the term “short form” inconsistently.

168. *September 1941 Hearing, supra* note 143, at 337–38.

169. *See id.* at 338. After the Committee tentatively voted on Crane’s language, Robinson produced a new draft Rule incorporating that language which largely matched the final version. *See Hearing Before the Advisory Committee on Rules of Criminal Procedure*, U.S. COURTS 244 (Jan. 1942) [hereinafter *January 1942 Hearing*], <http://bit.ly/3rAmMzA> (“The written accusation shall be a plain, concise, and definite statement of the essential facts which constitute the offence charged against the accused.”). The Committee then voted to approve it in substance. *See id.* at 244–48.

170. *See Minutes of Meetings of Sub-Committee on Style of the Advisory Committee on Rules of Criminal Procedure* 296, 298–99 (Mar.–Apr. 1942), *microformed on Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedures, 1935–1988--Committee on Criminal Procedure* (Cong. Info. Serv.) [hereinafter *March–April 1942 Hearing*].

171. *Id.* at 299. The drafters ultimately adopted at least a version of that approach, albeit one that offered more protections to defendants than a pure statement of facts. *Cf. FED. R. CRIM. P.* 7(c) (1946) (requiring citation of the statute, etc., underlying the charge but specifying that “[e]rror in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice”); *March–April 1942 Hearing, supra* note 170, at 296, 298–99, 313–34, 350–53 (showing that the development of the “citation” provision of Rule 7(c) was informed by Wechsler’s (and others’) view on indictments, as described above).

172. *September 1941 Hearing, supra* note 143, at 198.

And after Robinson produced a new draft Rule incorporating Crane's language, he described it as reflecting Crane's idea "to try to state in a few words what was contained in the former rule, which sought to catalog or list the essential elements of the offence."<sup>173</sup>

The fourth critical point is that the Advisory Committee adopted its "essential facts" language despite receiving feedback warning of the problems such language could cause—the problems of code pleading that Rule 8(a)'s drafters sought to avoid<sup>174</sup>—and highlighting Rule 8(a)'s omission of the word "facts."

During the drafting process, the Committee collected commentary from the bench and bar on drafts of the Criminal Rules, and it received numerous responses to its pleading Rule. Those responses included serious criticisms of the proposed "essential facts" language. For example, one commentator remarked:

[T]hat first sentence may lead to trouble, to say "The information or the indictment shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Now I think that probably is a good a statement as one could make, but we are always confronted with the question of whether your reference to essential facts . . . means essential evidentiary facts or whether that means essential ultimate facts, and you will have cases in which counsel for the defendants will contend that while perhaps the stated facts are inferences from facts and those are mixed questions of law and fact . . . this rule contemplates that the evidentiary facts shall be stated.<sup>175</sup>

Another suggested that the Rule be rewritten to omit reference to "essential facts" because then it would "not call for taking the technical distinction between evidence, facts and conclusions of law as the [draft Rule] does, or at least may," and that commentator further advised the Committee to "[c]ompare the Federal Civil Rules where in Rule 8(b)

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173. *January 1942 Hearing*, *supra* note 169, at 244. There were comments to the contrary. For example, Robinson objected to Crane's proposal because he believed it would "simply take [the ninth specification] and make it the rule." *September 1941 Hearing*, *supra* note 143, at 218. And others were opposed to certain of the specifications. *See, e.g., id.* at 211 ("Mr. Holtzoff. I am opposed to point 10."). But the drafters at least to some degree accepted the idea that Crane's language captured the essence of the more stringent first draft of the Rule.

174. *See supra* notes 93–98 and accompanying text; *infra* Section III.B.2.

175. *Comments, Recommendations and Suggestions Concerning the Preliminary Draft of the Federal Rules of Criminal Procedure*, in 2 *DRAFTING HISTORY*, *supra* note 63, at 70.

[sic] and elsewhere in connection with pleading there is no reference to pleading ‘facts.’”<sup>176</sup> And a third noted:

[The Rule] reads that the indictment or information shall state “the essential facts constituting the offense charged.” While some of the Forms evidence a liberal interpretation of what the charge may be, the requirement, in the Rule, of the allegation of “facts” touches a matter that has given trouble, it seems to me, whenever it has been encountered.<sup>177</sup>

In short, the Committee was cautioned that its “essential facts” language might lead to the same problems as code pleading and that Rule 8(a) did not use the word “facts.” Nevertheless, the drafters retained that language in full.

The fifth critical point is that the Committee considered whether to allow short-form indictments but decided against doing so. Crane from the outset rejected the idea, stressing that he “[d]id not like” pleading requirements under which “you need not state the facts.”<sup>178</sup> And Medalie emphasized early on “that the sentiment is against simply naming the offense and later giving the particulars.”<sup>179</sup> Around the votes on Crane’s language, moreover, Crane, Robinson, and Medalie all asserted that the Committee had not approved of short-form indictments.<sup>180</sup>

Now despite that, one Committee member did argue for short-form indictments, after Crane’s proposal had been adopted. George Dession asserted that “if we want to guard against pleadings being dismissed through an inadvertent error, then I think the extremely short form of pleading might be worth considering here.”<sup>181</sup> Medalie observed, however, that such an indictment was “of course . . . not covered by our discussion at all.”<sup>182</sup> Additionally, Holtzoff rebuffed Dession, saying, “Of course, we want to avoid a bill of particulars as much as possible by having the indictments set forth sufficient [sic] so that bills of particulars would not be necessary.”<sup>183</sup> Dession pushed back, and some members toyed with allowing short-form indictments.<sup>184</sup> But Crane, who was then

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176. *Comments, Recommendations and Suggestions Concerning the Preliminary Draft of the Federal Rules of Criminal Procedure*, in 3 DRAFTING HISTORY, *supra* note 63, at 368–69.

177. *Id.* at 369.

178. *September 1941 Hearing*, *supra* note 143, at 199.

179. *Id.* at 207.

180. *See id.* at 342; *January 1942 Hearing*, *supra* note 169, at 243.

181. *January 1942 Hearing*, *supra* note 169, at 253.

182. *Id.* at 255.

183. *Id.* at 256.

184. *See id.* at 256–58.

serving as Chairman, brought the conversation to a close by observing that the matter had already been decided.<sup>185</sup> No change was adopted.<sup>186</sup>

The final critical point is that the drafters recognized that setting the criminal pleading standard was a momentous decision and approached it carefully. Initial notes of matters to be covered by the Criminal Rules emphasized the importance of pleading, directing the Committee to:

Substitute a short form<sup>187</sup> indictment for the archaic, prolix, technical forms of indictments that are still used in the Federal courts and that frequently give rise to the interposition of technicalities and writing of briefs and the preparation of arguments that have no bearing upon the merits of the case.<sup>188</sup>

When Robinson introduced his first draft, moreover, he explained that, as to pleading, “the recommendations from the bar are quite heavy” and “we have lots of recommendations of the short form<sup>189</sup> of indictment.”<sup>190</sup> And as a result, he made clear that serious thought had been put into the pleading question, saying, at various points: “So the effort has been made to decide what the answer is to ‘short.’ Just what is your short form<sup>191</sup> of indictment?”; and “I feel we have the responsibility of all these requests that have been coming in here about the short form<sup>192</sup> of indictment.”<sup>193</sup>

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185. *See id.* at 258.

186. *See id.* That conclusion is further confirmed by the development of Rule 7(c)'s Advisory Committee Note. The first draft of that Note stated, “The form of indictment or information proposed is not the short form, which often requires supplementation by the dilatory and technically restrictive bill of particulars.” FED. R. CRIM. P. 8 advisory committee's note (Tentative Draft No. 5, June 1942), *microformed on* Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedures, 1935-1988--Committee on Criminal Procedure (Cong. Info. Serv.). That language, in substance, prevailed for multiple drafts before the final version. *See* FED. R. CRIM. P. 7(c) advisory committee's note (Tentative Draft No. 6, Fall 1942), *microformed on* Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedures, 1935-1988--Committee on Criminal Procedure (Cong. Info. Serv.); FED. R. CRIM. P. 8(d) advisory committee's note (Preliminary Draft No. 1, Mar. 1943), *microformed on* Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedures, 1935-1988--Committee on Criminal Procedure (Cong. Info. Serv.); FED. R. CRIM. P. 7(c) advisory committee's note (Preliminary Draft No. 2, Feb. 1944), *microformed on* Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedures, 1935-1988--Committee on Criminal Procedure (Cong. Info. Serv.). And the articles cited in the final Note confirm that short-form indictments were prohibited. *See supra* note 141 and accompanying text.

187. *See supra* note 167.

188. *Notes of Matters to be Covered by Rules of Criminal Procedure 2* (Feb. 1941), *microformed on* Records of the U.S. Judicial Conference, Committees on Rules of Practice and Procedures, 1935-1988--Committee on Criminal Procedure (Cong. Info. Serv.).

189. *See supra* note 167.

190. *September 1941 Hearing, supra* note 143, at 198.

191. *See supra* note 167.

192. *See supra* note 167.

Furthermore, after an extensive debate over pleading requirements, Vanderbilt called for a vote but Medalie urged restraint.<sup>194</sup> He stressed that the Committee was “dealing with one of the most fundamental questions that [it was] going to decide here” and that “we should do a lot of thinking about it,” and his guidance was followed.<sup>195</sup> Lastly, Rule 7(c)’s language was ultimately adopted only after multiple votes,<sup>196</sup> as well as considerable debate and deliberation.<sup>197</sup>

2. How the Sources Demonstrate that Rule 7(c) Was Designed to Be at Least as Stringent as Rule 8(a)

The foregoing sources, taken together, demonstrate that Rule 7(c) was designed to be at least as stringent as Rule 8(a).

To start, in crafting Rule 7(c) and adopting its “essential facts” language, the Advisory Committee repeatedly invoked Rule 8(a) and used it as a key design template. And it did so in *moving away* from what it considered to be a more stringent requirement contained in the first draft of the Rule—not in *moving towards* Rule 8(a) from a less stringent requirement. Furthermore, although the Committee did not *just* draw on Rule 8(a), it treated the pleading practices it relied upon as interchangeable, and it never indicated that those other practices were *less demanding* than Rule 8(a).

Additionally, the Committee’s reliance on Rule 8(a) led to a real and tangible connection between Rule 7(c) and Rule 8(a). Instead of leaving its references to Rule 8(a) to the hearing room and the pages of a transcript, the Committee elected to include an explicit cross-reference to Rule 8(a) in the Advisory Committee Note to Rule 7(c). And the drafters plainly wanted that cross-reference to signify an analogous relationship between Rule 7(c) and Rule 8(a)—in line with their understanding of the Rules during the drafting discussions—given their use of the “cf.” signal in the cross-reference as well as their utilization of a virtually identical cross-reference nearby in the same Note to convey analogy between Rule 7(c) and Rule 8.

The decision to associate Rule 7(c) with Rule 8(a), moreover, was significant and meant to have force. The first draft of the Criminal Rules was keyed to the Civil Rules, but the drafters eliminated any generalized relationship between those Rules—repeatedly emphasizing that the criminal and civil contexts were too dissimilar to be associated. Rule 7(c), however, followed precisely the opposite path. The first draft of

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193. *September 1941 Hearing*, *supra* note 143, at 198, 341.

194. *See id.* at 214.

195. *Id.* at 214, 219.

196. *See, e.g., id.* at 338; *January 1942 Hearing*, *supra* note 169, at 244–48.

197. *See supra* notes 150–171 and accompanying text.

Rule 7(c) was designed to depart from Rule 8(a),<sup>198</sup> but it was later—after the Committee had already severed the relationship between the Civil and Criminal Rules—specifically redesigned with Rule 8(a) in mind and linked to Rule 8(a) expressly by way of the cross-reference in the Advisory Committee Note. In short, the Committee purposefully bolstered the relationship between Rule 7(c) and Rule 8(a) while terminating connections between the Civil and Criminal Rules generally. It is profoundly unlikely that the drafters did that casually or without intending to have a meaningful impact on the Rule.

What is more, there is strong evidence that the relationship between Rule 7(c) and Rule 8(a) the drafters anticipated was that Rule 7(c) would demand *more* than Rule 8(a). First of all, Rule 8(a) was designed to repudiate civil code pleading and its focus on alleging factual detail. Indeed, the drafters of Rule 8(a) carefully avoided requiring the pleading of “facts” in order to avert the problems of code pleading, and after the Civil Rules were adopted, commentators argued that the word “facts” should be added to Rule 8(a) to ensure that facts would be pleaded. Yet the drafters of Rule 7(c) wrote the Rule to require the pleading of “essential facts,” drawing directly on civil and criminal code pleading—which they treated as equivalent. Moreover, the drafters retained their pleading language despite being specifically informed that Rule 8(a) did not refer to “facts” and expressly alerted to the problems of code pleading that their chosen language might generate. And they apparently did not expect their language to impose a pleading standard less stringent than code pleading, since they both treated code pleading as supplying the appropriate criminal pleading standard and did not consider invoking both code pleading and Rule 8(a) to be in any way inconsistent.<sup>199</sup> Additionally, unlike the drafters of Rule 8(a), the drafters of Rule 7(c) did not seek to *minimize* pleading requirements; rather, they wanted to balance simplification and protecting defendants’ rights and sought to ensure that defendants could meaningfully understand the allegations against them.<sup>200</sup> Finally, even though the drafters’ pleading language was intended to be more like Rule 8(a) than the more detailed first draft of Rule 7(c), the drafters also at times treated that language as having paraphrased the first draft.

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198. Recall that Robinson viewed pleading as “one place where the civil rules and the criminal rules are different.” See *supra* notes 150, 161 and accompanying text.

199. Even if, in actuality, Rule 8(a) was less demanding than code pleading.

200. It is worth noting that the above points, to an extent, reflect the different projects of the drafters of Rule 8(a) and of Rule 7(c). Whereas the drafters of Rule 8(a) were responding largely to the problems of *code pleading*, the drafters of Rule 7(c) were largely responding to the problems of *common law pleading*. Code pleading was the solution to common law pleading, whereas minimal pleading was the solution to code pleading.

More broadly, the Committee never abrogated the traditional balance between civil and criminal pleading standards. As noted above, criminal pleading standards were historically viewed as at least as stringent as civil ones, both under the common law and the codes. In designing Rule 7(c), the drafters explicitly drew upon both civil and criminal pleading requirements interchangeably, showing that they accepted the idea that those requirements were at least comparable. Furthermore, the Committee adopted pleading language reminiscent of, and based on, the civil and criminal codes, thereby incorporating the historical pleading balance that language represented. The drafters did so, moreover, notwithstanding that Rule 8(a) was designed to *move away* from code pleading. They also, again, avoided simplifying pleadings at all costs and rejected more radical reforms, such as the short-form indictment, which might have indicated a desire to upset the traditional pleading balance.<sup>201</sup>

Finally, Rule 7(c) was the result of careful deliberation. The drafters recognized that designing the criminal pleading Rule was a profoundly important endeavor, central to the project of creating the Criminal Rules. As a result, they engaged in protracted debate over what should be required. They refused to decide the matter too quickly, and they ultimately voted on Rule 7(c) on multiple occasions. Rule 7(c)'s design, in other words, was a conscious and deliberate choice.

In sum, the drafters of Rule 7(c) crafted the Rule to be at least as stringent as Rule 8(a).<sup>202</sup>

### *B. The Original Design of Rule 7(c) Should Govern Our Understanding of the Rule Today*

The forgoing analysis shows that Rule 7(c) was designed to be at least as stringent as Rule 8(a). However, that still leaves open the question of why the original design should control today. This Section answers that question in two steps. First, it discusses why, in general, the original design of Rule 7(c) is authoritative as to the Rule's meaning. It then explains why that remains true despite *Twombly* and *Iqbal*.

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201. In addition, several drafters indicated that Rule 7(c) did not change much. *See supra* note 141. That further suggests the Rule was not designed to upset the traditional balance, especially given that Rule 8(a) was intended to minimize civil pleading requirements. *See supra* notes 93–98 and accompanying text.

202. *Cf. Meyn, supra* note 15, at 715–16 (concluding that Rule 8(a) served as the foundation for Rule 7(c) based on the drafting history of the Criminal Rules (although discounting, in my view, certain aspects of that history that demonstrate the full import of Rule 7(c)'s language)).



## 1. Why Rule 7(c)'s Original Design Is Authoritative

The original design of Rule 7(c) is authoritative today for three main reasons. First, as a practical matter, the original design of a rule necessarily offers powerful insights into its meaning, and that is especially so for Rule 7(c), given the care with which the drafters fashioned it and the robust evidence demonstrating what the original design was. And there does not appear to be any *better* source for ascertaining Rule 7(c)'s significance.<sup>203</sup>

Second, the drafters' design meets the applicable standards to serve as a font of interpretive guidance. That design is embodied in the Rule's text and original Advisory Committee Note, both firmly established bases for interpreting the Criminal Rules.<sup>204</sup> Additionally, the Supreme Court has said that "the 'traditional tools' of construction"—which apply to the Federal Rules<sup>205</sup>—include a provision's history and purpose,<sup>206</sup> and courts regularly rely on the history of the Criminal Rules and the drafters' intent in ascertaining the meaning of the Rules.<sup>207</sup> Furthermore,

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203. In *Ortiz v. Fibreboard Corp.*, the Supreme Court indicated that it had to interpret the Federal Rules as it "understood [them] upon [their] adoption." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999); accord *Access to Courts Hearing*, *supra* note 26, at 17–18 (statement of Stephen B. Burbank); Burbank, *supra* note 28, at 117 n.83. But there, the Court was rejecting the notion that it could "alter [a Rule] except through the process prescribed by Congress in the Rules Enabling Act," not questioning reliance on the drafters' design. *Ortiz*, 527 U.S. at 861–62. Indeed, *Ortiz* contained a lengthy discussion of the drafters' intent. *See id.* at 838–45. And the Court has never considered the relationship between Rule 7(c) and Rule 8(a), given that, before *Twombly* and *Iqbal*, there was little need to do so.

204. *See, e.g.*, *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013); *Horenkamp v. Van Winkle & Co.*, 402 F.3d 1129, 1132 (11th Cir. 2005); Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 312 (2000); Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103, 1122, 1161–67 (2002).

205. *See, e.g.*, *United States v. Melvin*, 948 F.3d 848, 852 (7th Cir. 2020); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 (9th Cir. 2017); *United States v. Petri*, 731 F.3d 833, 839 (9th Cir. 2013); *cf. Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 540–41 (1991) (treating the Civil Rules as subject to statutory interpretation principles).

206. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (citation omitted).

207. *See, e.g.*, *Crosby v. United States*, 506 U.S. 255, 260–61 (1993); *United States v. Sampson*, 898 F.3d 270, 280 (2d Cir. 2018); *United States v. Rolle*, 204 F.3d 133, 137 (4th Cir. 2000); *United States v. Navarro*, 169 F.3d 228, 237–38 (5th Cir. 1999); *United States v. Restrepo*, 832 F.2d 146, 148 (11th Cir. 1987); *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985); *United States v. Pachay*, 711 F.2d 488, 490–91 (2d Cir. 1983); *In re Application*, 849 F. Supp. 2d 565–66 (D. Md. 2011); *United States v. Flowers*, 983 F. Supp. 159, 167, 170 (E.D.N.Y. 1997); *cf. Scott Dodson, Subclassing*, 27 CARDOZO L. REV. 2351, 2380 & n.187 (2000) (noting where the Supreme Court has relied on the drafters' intent and the drafting history in interpreting a Civil Rule); Struve, *supra* note 204, at 1155–56, 1165–66 (explaining, in the civil context, that "[o]n occasion, the Court suggests that the relevant question is what the Advisory Committee intended," and noting times when that has occurred (even with Justice Scalia's approval)).

Rule 7(c)'s text is not patently clear as to the level of detail it requires, so resort to a broad range of interpretive sources is warranted.<sup>208</sup>

Third, the value of Rule 7(c)'s original design as an interpretive resource has not been formally eliminated. Had future Advisory Committees changed the substance of Rule 7(c) or Rule 8(a), the original design could have been rendered irrelevant. But that never happened. Thus, the original design of Rule 7(c) still carries authoritative weight.

## 2. Why *Twombly* & *Iqbal* Do Not Undermine the Authority of Rule 7(c)'s Original Design

Of course, *Twombly* and *Iqbal* reimagined Rule 8(a),<sup>209</sup> and that raises the question of whether we can still rely on the original design of Rule 7(c) as at least as stringent as Rule 8(a) in interpreting Rule 7(c) today. The answer is that we can and we should.

First of all, *Twombly* and *Iqbal* did not, at least by their terms, change much. Rather, they simply purported to *reject a misconception* of Rule 8(a) that arose out of a misreading of *Conley* and *restore a proper understanding* of the Rule. For example, the Court in *Twombly* explained:

We could go on, but there is no need to pile up further citations to show that *Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. *The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.* *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.<sup>210</sup>

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208. See, e.g., *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 39 (1st Cir. 2009).

209. Cf. *Access to Courts Hearing*, *supra* note 26, at 18 (statement of Stephen B. Burbank) (treating *Twombly* and *Iqbal* as "judicial lawmaking" rather than "interpretation").

210. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) (emphasis added) (citations omitted).

The Court also said that its decision aligned “with [its] statements in the years since *Conley*” and that appellate decisions from the 1940s that “allegedly gave rise to *Conley*’s ‘no set of facts’ language” “do not challenge the understanding that . . . a complaint must allege facts suggestive of illegal conduct.”<sup>211</sup> Furthermore, it expressly referenced model complaint Form 9 (discussed more below<sup>212</sup>), which had accompanied the Civil Rules in effectively the same form since their adoption,<sup>213</sup> as exemplifying proper pleading.<sup>214</sup> And the Court stated that, “[i]n reaching [our] conclusion, we do not apply any heightened pleading standard . . . which can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation.”<sup>215</sup> Lastly, the Court in *Iqbal* explicitly nested its pleading standard within the historical development of Rule 8(a), asserting that “Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”<sup>216</sup> In short, under *Twombly* and *Iqbal*, the Supreme Court’s pleading standard reflects the original meaning of Rule 8(a)—ostensibly the very meaning the drafters of the Criminal Rules intended to link to Rule 7(c).

Additionally, even if we ignore what *Twombly* and *Iqbal* purported to do and view them as leading Rule 8(a) away from its original meaning, the original design of Rule 7(c) should remain authoritative, given the nature of that design. Had the drafters of Rule 7(c) wanted to avoid the possibility of the Rule shifting in meaning as a function of Rule 8(a)’s interpretive evolution, they could have easily done so by, for example, not adopting historically charged language, declining to insert a cross-reference to Rule 8(a) in the Advisory Committee Note, and clarifying that they did not want to preserve the traditional balance between civil and criminal pleading standards. But they did nothing of the sort. Rather, they carefully associated Rule 7(c) and Rule 8(a). And given that the drafters were all distinguished legal minds of their day, they would hardly be surprised by the idea that the meaning of legal language could change through reinterpretation over time. Accordingly, they either expected that Rule 7(c)’s meaning would vary along with Rule 8(a) or, at the very least, assumed the risk of that result by crafting Rule 7(c) as they did.

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211. *Id.* at 563 n.8.

212. *See infra* Section III.B.2.

213. *See* FED. R. CIV. P. Form 9 (2006); FED. R. CIV. P. Form 9 (1938).

214. *See Twombly*, 550 U.S. at 565 n.10.

215. *Id.* at 569 n.14 (citation omitted) (internal quotation marks omitted).

216. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

Now, there is a complicating factor here that must be addressed at some length: even though the drafters designed Rule 7(c) to be at least as stringent as Rule 8(a), they seemingly did not actually intend the Rule to encompass the *Twombly-Iqbal* pleading standard.

When the Criminal Rules were adopted, they were accompanied by “form indictments” meant to illustrate Rule 7(c)’s requirements.<sup>217</sup> Those forms did not require much factual detail, and they even permitted stating the “facts” in statutory or legalistic language. For example, the form indictment for receiving a stolen motor vehicle read, “On or about the [blank] day of [blank], 19 [blank], in the [blank] District of [blank], John Doe received and concealed a stolen motor vehicle, which was moving as interstate commerce, and he then knew the motor vehicle to have been stolen.”<sup>218</sup> And the form indictment for first-degree murder on federal land stated, “On or about the [blank] day of [blank], 19 [blank], in the [blank] District of [blank], and on lands acquired for the use of the United States and under the (exclusive) (concurrent) jurisdiction of the United States, John Doe with premeditation shot and murdered John Roe.”<sup>219</sup>

The drafters, moreover, indicated that those types of factually limited indictments reflected their ideal. During drafting discussions, for instance, Holtzoff said the idea underlying Crane’s “statement of facts” language was an indictment that “would allege that the defendant murdered John Smith by a fatal gunshot wound,” and he approved of such indictments.<sup>220</sup> Medalie made statements to a similar effect.<sup>221</sup> Likewise, Holtzoff posited that an indictment would be sufficient if it provided that, on a specific date, “the defendant transported certain property, to-wit, certain bonds to the value of \$6,000 from New York City, State of New York, to the City of Washington, District of Columbia, and said property had been stolen, and the defendant knew the same to be stolen,” and others seemed to agree.<sup>222</sup> Also, in discussing the “essential facts” language and his experience in New York practice, Crane asserted:

You charged a murder in the first degree, “in that with premeditation and deliberation,” and so forth. That constitutes malice. “That with

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217. See FED. R. CRIM. P. 7(c) 1944 advisory committee’s note; FED. R. CRIM. P. 58 (1946). The forms have since been abrogated. See, e.g., *United States v. White*, 980 F.2d 836, 844 (2d Cir. 1992).

218. FED. R. CRIM. P. Form 7 (1946).

219. *Id.* Form 2.

220. *September 1941 Hearing*, *supra* note 143, at 200–02; see also *January 1942 Hearing*, *supra* note 169, at 249.

221. See *September 1941 Hearing*, *supra* note 143, at 202–03, 206–07; *January 1942 Hearing*, *supra* note 169, at 255.

222. *September 1941 Hearing*, *supra* note 143, at 215–17.

premeditation and deliberation,” *those are the words of the statute*, “he did kill John Jones on the night of so and so.” Now, “premeditation and deliberation,” those are facts. “Premeditated and intended to kill him and did kill him”—those are facts, and those facts have to be stated.<sup>223</sup>

Additionally, in Rule 7(c)’s Advisory Committee Note, the drafters explained that “[t]his rule introduces a simple form of indictment, illustrated by Forms 1 to 11 in the Appendix of Forms.”<sup>224</sup> And the articles cited in the Note generally praised the form indictment for first-degree murder or used it to demonstrate Rule 7(c)’s meaning. Holtzoff maintained, for instance, that that “indictment sets forth all of the substantive elements of the offense and definitely informs the defendant of the specific crime of which he is accused.”<sup>225</sup> Vanderbilt, likewise, said that it was “an illustration” of “[t]he form preferred by the committee.”<sup>226</sup> Finally, Cummings proclaimed that the murder indictment “is clear and explicit,” “sets forth every element of the offense and accurately acquaints the defendant with the specific crime with which he is charged,” and “is a great improvement upon the ancient form.”<sup>227</sup>

Nevertheless, the original design of Rule 7(c) as at least as stringent as Rule 8(a) should still govern—even though *Twombly* and *Iqbal* are out of sync with the drafters’ expectations for what Rule 7(c) would require in practice—for two reasons.

First, Rule 8(a) suffers from exactly the same problem—even though *Twombly* and *Iqbal* interpreted that Rule.<sup>228</sup> To start, Rule 8(a) was also illuminated by model forms, and those forms, just like the criminal ones, allowed for conclusory and factually limited pleading.<sup>229</sup> For instance, the form complaint regarding claims for goods sold and delivered provided, “Defendant owes plaintiff ten thousand dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936

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223. *January 1942 Hearing*, *supra* note 169, at 249–50 (emphasis added).

224. FED. R. CRIM. P. 7(c) 1944 advisory committee’s note (emphasis added).

225. Holtzoff, *supra* note 103, at 125.

226. Vanderbilt, *supra* note 103, at 377.

227. Cummings, *supra* note 103, at 655.

228. *Cf.*, e.g., *Access to Courts Hearing*, *supra* note 26, at 18 (statement of Stephen B. Burbank) (indicating that *Twombly* and *Iqbal* rejected “the system of notice pleading that Clark intended, that Congress and the bar were told in 1938 had been implemented in the Federal Rules, and that the Supreme Court embraced as early as 1947,” and replaced it with a standard “that is hard to distinguish from that which the drafters of the Federal Rules explicitly rejected”).

229. *See* FED. R. CIV. P. 84 (1938). Those forms were initially illustrative, later deemed “sufficient,” and ultimately abrogated. FED. R. CIV. P. 84 advisory committee’s notes to 1946 and 2015 amendments.

and December 1, 1936.”<sup>230</sup> The form complaint for conversion, likewise, stated, “On or about December 1, 1936, defendant converted to his own use ten bonds of the [blank] Company (here insert brief identification as by number and issue) of the value of ten thousand dollars, the property of plaintiff.”<sup>231</sup> And the form complaint for negligence said, “On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.”<sup>232</sup>

Moreover, the idea that the model complaints and indictments reflected comparably light anticipated pleading standards, and therefore that Rule 8(a) suffers from a similar disconnect to *Twombly* and *Iqbal* as Rule 7(c), is far from idiosyncratic. Indeed, “Charles E. Clark, the ‘principal draftsman’ of the [Civil] Rules” and Reporter to the original Civil Rules Advisory Committee,<sup>233</sup> wrote an opinion while later serving as a Second Circuit judge that treated the form indictment for murder and the form complaint for negligence as equivalently general. In his words:

There seems to be some tendency to confuse general pleadings with entire absence of statement of claim or charge. But this is a mistake, for general pleadings, far from omitting a claim or charge, do convey information to the intelligent and sophisticated circle for which they are designed. Thus the charge that at a certain time and place “John Doe with premeditation shot and murdered John Roe,” F.R.Cr.P., Form 2, even though of comparatively few words, has made clear the offense it is bringing before the court. [Then, in a footnote:] So also the famous Form 9 of the Civil Rules, “Complaint for Negligence,” shows a complete claim for damages for personal injuries.<sup>234</sup>

What is more, the drafters of the Civil Rules broadly indicated that they expected Rule 8(a) to establish a relaxed standard that would not require alleging facts and would allow pleading conclusions—in contrast to the interpretation supplied by *Twombly* and *Iqbal*. For example, during the drafting process, Advisory Committee member George Pepper suggested pleading-requirement language that eliminated the word “facts.”<sup>235</sup> He explained that using that word, or the like, leads to “this endless discussion as to the distinction between fact and law” and does not “add[] anything in the way of clarity,” and he suggested not requiring

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230. FED. R. CIV. P. Form 5 (1938).

231. *Id.* Form 11.

232. *Id.* Form 9.

233. Campbell, *supra* note 89, at 8, 10 (citation omitted).

234. *United States v. Lamont*, 236 F.2d 312, 317 & n.9 (2d Cir. 1956).

235. See *Proceedings of Meeting of Advisory Committee on Rules of Civil Procedure of the Supreme Court of the United States*, U.S. COURTS 253, 263, 278, 281–82 (Feb. 1936) [hereinafter *February 1936 Hearing*], <https://bit.ly/3eGmVgj>.

pleading “facts” because that was “tried unsuccessfully in the codes, as evidenced by the amount of disputation in the cases as to what [words like ‘facts’] mean.”<sup>236</sup> And he later said:

[I]f you take these distinctions between law and fact, you get involved in all sorts of contradictions. If you are really strictly thinking about it, and are bound by the rule that you must state facts and not conclusions of law, or that you must state conclusions of law and not facts, you could not draw a libel in divorce, because you could not state that the parties had been married. The statement that they had been married is a statement of fact, and it is a statement of a conclusion of law from the fact. There is no end to the subtleties in which you may engage if you undertake to make those refinements.<sup>237</sup>

A motion to adopt Pepper’s phrasing ultimately carried.<sup>238</sup>

During the discussion of Pepper’s language, moreover, others indicated that that language would largely eliminate the distinction between factual and legal allegations. One member, for instance, warned that the idea that it is “no longer . . . necessary to state facts” in a pleading “is going to be very far-reaching, and a very decided change in pleading in this country.”<sup>239</sup> A second argued that “you would [not] get anywhere by using the term ‘facts’ except into the difficulty that we have all gotten into in the code states” involving the “impossibility” of “draw[ing] a sharp line between facts, conclusions of law and evidence.”<sup>240</sup> Another maintained that he supported “relax[ing] the requirements on the pleader” in line with Pepper’s proposal because civil pleading rules requiring factual allegations but not legal or evidentiary ones had caused trouble.<sup>241</sup>

Outside the drafting process, but around the time of the Civil Rules’ adoption, Rule 8(a)’s drafters also expressed the view that pleading rules should be exceedingly flexible and that alleging legal conclusions should be acceptable.<sup>242</sup> For example, Clark explained:

The old requirement that a party must plead only facts, avoiding evidence on the one hand and law on the other, was logically indefensible, since the actual distinction is at most one of degree only and in actual practice it caused more confusion than any possible worth it might have as admonition. The new rules provide only for a

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236. *Id.* at 264.

237. *Id.* at 280–81.

238. *See id.* at 302.

239. *Id.* at 287.

240. *Id.* at 294.

241. *Id.* at 299–300.

242. *See, e.g., supra* notes 94–98 and accompanying text.

short and plain statement of claim or defense showing that the party is entitled to the relief claimed or the action of the court desired; and there is only the further general admonition that each averment of a pleading shall be set forth as simply, concisely, and directly as the circumstances permit.<sup>243</sup>

He likewise said: “Then there is also contemplated a very simple, concise system of allegation and defense. Some lawyers have been quite a little worried for fear there was not enough required in the way of detailed pleading, but nevertheless this system calls for very brief and direct allegations.”<sup>244</sup> And James Moore—Clark’s assistant during the drafting process—maintained that “[t]he pleading rules are designed to . . . reduce the pleading requirements to a minimum,” “make[] pleadings relatively unimportant,” and require pleadings that “do little more than sketch the type of battle that is to follow.”<sup>245</sup>

Several members of the Advisory Committee, moreover, articulated comparable sentiments. One member, for instance, said:

The reason [that the word “fact” does not appear in Rule 8] is, nobody knows what “facts” are; courts have been trying for five hundred years to find “facts” and nobody has ever been able to draw a line between what were and what were not “facts.” Since the word “facts” has given a great deal of trouble the suggestion was, Why not eliminate it? . . . .

. . . . The test [of a good pleading under the new rules] is whether information is given sufficient to enable the party to plead and to prepare for trial. A legal conclusion may serve the purpose of pleading as well as anything else if it gives the proper information.<sup>246</sup>

Another asserted:

What these rules do emphasize with respect to the contents of a pleading (as the forms in the Appendix show) is that any plain telling of the story that shows that the pleader is entitled to relief upon the grounds he states is sufficient to bring the pleader’s cause into court. That the statement or averment includes a conclusion of law is no ground for a motion to strike or for a motion to make definite, merely

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243. Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 450 (1936).

244. Clark, *supra* note 94, at 552. It has also been observed that “it is difficult to find *Twombly*’s (let alone *Iqbal*’s) standards in the relevant work of Charles Clark . . . and difficult to separate his views from those of the Advisory Committee.” *Access to Courts Hearing*, *supra* note 26, at 17.

245. Moore, *supra* note 95, at 559, 561.

246. Sunderland, *supra* note 98, at 12; accord Edson R. Sunderland, *The Availability of the New Federal Rules for Use in the State Courts of Ohio*, 4 OHIO ST. U. L.J. 143, 145 (1938).



because the statement or averment embodies a conclusion which might be elaborated by a more particularized detailing of the facts.<sup>247</sup>

Lastly, a third member, in testifying to Congress about the Civil Rules after they were proposed, explained:

You used to have the requirement that a complaint must allege the “facts” constituting the “cause of action.” I can show you thousands of cases that have gone wrong on dialectical, psychological, and technical argument as to whether a pleading contained a “cause of action”; and of whether certain allegations were allegations of “fact” or were “conclusions of law” or were merely “evidentiary” as distinguished from “ultimate” facts. In these rules there is no requirement that the pleader . . . must allege “facts” or “ultimate facts.” [Rule 8 prescribes] the essential thing, reduced to its narrowest possible requirement, “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>248</sup>

Second, *Twombly* and *Iqbal*'s focus on pleading facts rather than conclusions fits much better with Rule 7(c) than Rule 8(a), if it fits anywhere at all. Unlike the drafters of the Civil Rules, the drafters of the Criminal Rules did not reject any requirement of pleading “facts.” Rather, they expressly adopted an “essential facts” pleading requirement, invoked code pleading standards that demanded alleging “facts,” and did not respond to warnings and commentary about using the word “facts.”

Furthermore, Rule 7(c)'s drafters repeatedly emphasized the importance of pleading facts. Many examples of that are set out above, given the Committee's focus on Crane's “statement of facts” language.<sup>249</sup> But there are yet others. For instance, early in the discussions, Crane said:

I myself think that we should have a statement of the facts, but I do not like to say how the facts should be stated. There are so many different facts, but when you state these facts you know that when they are true that a crime has been committed.<sup>250</sup>

And later, in discussing his experience in New York practice and Rule 7(c)'s “essential facts” language, Crane observed:

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247. *Access to Courts Hearing*, *supra* note 26, at 5 n.10 (statement of Stephen B. Burbank) (citation omitted).

248. *Id.* at 4 (statement of Stephen B. Burbank) (alteration in original) (citation omitted).

249. *See, e.g., supra* notes 152, 155–157, 160–161, 163, 170–171, 178 and accompanying text.

250. *September 1941 Hearing*, *supra* note 143, at 202.

We had to use the words. We had to state the facts. But the other adjectives were all left out, and that was covered by the first sentence, which is-

“plain and concise and definite statement of the essential facts.”

*F-a-c-t-s! Facts are so important to all of us. We think we always get to the law before we get to the facts, but the facts must be stated which constitute an offence charged against the accused.*

I do not see how you can narrow that, and I do not see how you can enlarge upon it. And, as you know, we have found it worked pretty well.<sup>251</sup>

Additionally, even Dession, in arguing for a short-form indictment, said, “I suppose we would all agree that before the pleading is finished facts should be set out which clearly cover every substantive detail of an offence,” with “the only question” being “in which paper [the facts of the offense] must all appear.”<sup>252</sup>

The drafters also made similar statements in the articles cited in Rule 7(c)’s Advisory Committee Note. For example, Medalie asserted that “[i]t is hoped that this new rule will lead to the swift abolition of the lengthy, wordy and obscure indictments which obfuscated, rather than stated, the facts constituting the crime.”<sup>253</sup> Holtzoff, likewise, stated that the Committee had “deliberately rejected” short-form indictments that do not “specify[] or summariz[e] the facts,” and that “[a] simple indictment, briefly and succinctly setting forth the facts of the specific crime, seems far preferable.”<sup>254</sup>

In short, even though the drafters did not intend for Rule 7(c) to impose the pleading standard set by *Twombly* and *Iqbal*, neither did the drafters of Rule 8(a), and if *Twombly* and *Iqbal*’s fact-intensive standard has any place at all, it is with Rule 7(c). Thus, the fact that the drafters’ expectations for what Rule 7(c) would require are in tension with *Twombly* and *Iqbal* should not undermine the foregoing analysis.

### 3. Concluding Comments

To conclude, the original design of Rule 7(c) should govern our interpretation of the Rule today. It is an exceedingly potent source of guidance, an eminently appropriate basis for interpretation, and nothing formally eliminates its interpretive power. Furthermore, even though

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251. *January 1942 Hearing*, *supra* note 169, at 250 (emphasis added).

252. *Id.* at 253, 258.

253. Medalie, *supra* note 103, at 3.

254. Holtzoff, *supra* note 103, at 125–26.

*Twombly* and *Iqbal* reimagined Rule 8(a), they only purported to restore the original meaning of the Rule—at least nominally the very meaning that the drafters of Rule 7(c) relied upon; the drafters expected or could have anticipated variation in Rule 7(c)’s meaning, given their design of the Rule; and the fact that the drafters did not expect to create a *Twombly-Iqbal*-like pleading standard should not matter. Accordingly, as long as *Twombly* and *Iqbal* set the civil pleading standard, Rule 7(c) should impose a criminal standard that is at least as demanding.

#### IV. WHY COUNTERARGUMENTS ARE UNPERSUASIVE

To be sure, there are counterarguments, both ones that could be raised and that have been raised by courts and the Advisory Committee itself. This Part therefore addresses a series of legal counterarguments anticipated by the author and advanced by the aforementioned authorities. In the end, however, these objections are unavailing.

##### A. *Anticipated Counterargument: Rule 7(c) Does Not Require Prosecutors to Specify the “Means” of the Crime*

This Part begins with a counterargument anticipated by the author: that Rule 7(c) has always allowed the prosecutor to “allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means,”<sup>255</sup> and so the Rule cannot demand factual allegations like those required by *Twombly* and *Iqbal*. Although not a weak point, it is unpersuasive.

First, although *Twombly* and *Iqbal*, applied in the criminal context, might be limited by Rule 7(c)’s “means” provision, that would only be so when the means are actually unknown. Allowing prosecutors to say that the means are unknown in a particular case is different from treating *any* factually barren indictment as sufficient.

Second, essentially the same principle animating the “means” provision applies to Rule 8 and served as no barrier to *Twombly* and *Iqbal*. Civil Rule 8(e)(2) originally said that “[a] party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses.”<sup>256</sup> Effectively the same statement now appears in Civil Rule 8(d)(2).<sup>257</sup> And in explaining Rule 8(e) around the time of its promulgation, Clark stated:

The rules definitely permit a considerable choice to the pleader as to how he shall tell his story. Thus prohibitions developed in certain codes against alternative or conditional statements are expressly

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255. FED. R. CRIM. P. 7(c)(1); see FED. R. CRIM. P. 7(c) (1946) (similar).

256. FED. R. CIV. P. 8(e)(2) (1938).

257. See FED. R. CIV. P. 8(d)(2).

removed. *If he is not sure of his facts he may show what his doubt is so long as he honestly sets forth what he knows.*<sup>258</sup>

In short, like Rule 7(c), Rule 8 accounts for circumstances in which a party lacks knowledge and allows him to “show his doubt.”

Moreover, the drafters of the Civil Rules indicated that the *means* of the legal violation did not need to be stated. For example, in discussing the model complaint for negligence, which did not require specifying the details—or means—of the negligence at hand, Clark said:

Now some lawyers have thought that further details should be added. But details will not necessarily paint a truer picture. They may even mislead. . . . So with our form, what can be added with profit? Defective brakes, lack of headlights, failure to keep a lookout, *etc.*? It would be nice, indeed, for the plaintiff if the defendant would admit any of these things. And yet it is the plaintiff who is making the allegations. Moreover none of them are primary or ultimate in the sense that even if they existed the case would be proven.<sup>259</sup>

Hence, Rule 8, like Rule 7(c), was designed to allow one to plead without full knowledge and leave the “means” unspecified. Given that *Twombly* and *Iqbal* govern Rule 8(a) anyway, Rule 7(c)’s “means” provision should not serve as a barrier to applying a similar pleading standard in criminal cases.

Third, and finally, the goal of Rule 7(c)’s “means” provision was not to create any major difference between Rule 8 and Rule 7(c). As the original Advisory Committee Note to Rule 7(c) explained:

The provision . . . that it may be alleged in a single count that the means by which the defendant committed the offense are unknown, or that he committed it by one or more specified means, is intended to eliminate the use of multiple counts for the purpose of alleging the commission of the offense by different means or in different ways. Cf. Federal Rules of Civil Procedure, Rule 8(e)(2).<sup>260</sup>

In other words, the “means” provision was designed to prevent the use of multiple counts for alleging different ways in which a violation of law might have occurred—just like Rule 8(e)(2) allowed—and the drafters tied Rule 7(c) and Rule 8(e)(2) together by way of a cross-reference. The Note mentions nothing special about allowing prosecutors to admit when they do not know the means. Consequently, nothing indicates that the

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258. Clark, *supra* note 97, at 316 (emphasis added).

259. *Id.* at 317.

260. FED. R. CRIM. P. 7(c) 1944 advisory committee’s note.

“means” provision should affect the interplay between Rule 8(a) and Rule 7(c).<sup>261</sup>

*B. Counterarguments from the Courts*

Next, we must consider the counterarguments from judicial decisions. Those counterarguments include: (1) that nothing in *Twombly* and *Iqbal* suggests their applicability to criminal cases; (2) that a defendant challenging the sufficiency of an indictment must establish prejudice; (3) that a defendant can obtain a bill of particulars; (4) that Rule 8(a) requires a “showing” of entitlement to relief, whereas Rule 7(c) does not; (5) that Rule 7(c) was designed to reduce technicalities, procedural complexity, and detailed allegations; and (6) that criminal procedure and civil procedure are simply different.

1. Nothing in *Twombly* or *Iqbal* Suggests They Were Meant to Apply to Criminal Cases

The first judicial counterargument is that *Twombly* and *Iqbal* should not apply in the criminal context because nothing in them indicates that they apply to criminal cases.<sup>262</sup> That argument is unpersuasive, however, for two reasons. First, the point of the foregoing analysis is that Rule 7(c) should be interpreted *in perspective of the prevailing interpretation of Rule 8(a)*, meaning that the Supreme Court did not need to discuss criminal cases in *Twombly* and *Iqbal* for its reinterpretation of Rule 8(a) to require a reinterpretation of Rule 7(c). In other words, raising the criminal pleading standard is a *consequence* of reinterpreting Rule 8(a), not an *application* of *Twombly* and *Iqbal*. Second, because *Twombly* and *Iqbal* were civil cases and the connection between Rule 7(c) and Rule 8(a) was not fully fleshed out until now, the Supreme Court had no occasion to consider the implications of reinterpreting Rule 8(a) for criminal cases.

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261. In fact, the drafters of Rule 7(c) thought the Civil Rules would do more than the Criminal Rules in this context. Holtzoff said, for instance:

Lots of people thought there was going to be uproar against the provision in the Civil Rules that you can have alternative allegations and hypothetical allegations. Of course, we are not going to suggest hypothetical allegations for an indictment, I suppose, but the Civil Rules go further and they permit both hypothetical and alternative.

*March–April 1942 Hearing, supra* note 170, at 296–97.

262. See *supra* note 57 and accompanying text.

## 2. A Defendant Challenging an Indictment Must Establish Prejudice

The second judicial argument is that the *Twombly-Iqbal* pleading standard is inappropriate in the criminal context because a defendant challenging an indictment must establish prejudice to prevail.<sup>263</sup> But that argument, too, is unavailing.

Tracing that argument back through the cases cited to support it,<sup>264</sup> it is based on a federal statute passed in 1872, which stated:

No indictment . . . shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.<sup>265</sup>

There also existed a similar statute that applied to civil and criminal cases, which provided:

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.<sup>266</sup>

Those statutes were repealed in 1948.<sup>267</sup> But their substance was retained in Criminal Rule 52(a),<sup>268</sup> which says that “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”<sup>269</sup>

The Civil Rules contain a similar “harmless error” provision. Under Rule 61:

Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every

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263. *See supra* note 58 and accompanying text.

264. *See United States v. Castillo Madrigal*, No. 12-cr-62-bbc-04, 2013 WL 12099089, at \*2 (W.D. Wis. Jan. 30, 2013), *adopted*, 2013 WL 12099088, at \*1 (Feb. 21, 2013); *United States v. Castaldi*, 547 F.3d 699, 703 (7th Cir. 2008); *United States v. Webster*, 125 F.3d 1024, 1029 (7th Cir. 1997); *Russell v. United States*, 369 U.S. 749, 763 (1962); *Smith v. United States*, 360 U.S. 1, 9 (1959); *Hagner v. United States*, 285 U.S. 427, 431–32 (1932).

265. *Hagner*, 285 U.S. at 431–32.

266. FED. R. CRIM. P. 52(a) 1944 advisory committee’ note.

267. *See United States v. Williams*, 203 F.2d 572, 573 (5th Cir. 1953).

268. *See id.*; FED R. CRIM P. 52(a) 1944 advisory committee’s note.

269. FED R. CRIM P. 52(a). Rule 52(a) remains essentially the same as when originally adopted. *See* FED. R. CRIM. P. 52(a) (1946).

stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.<sup>270</sup>

Not only are Rule 61 and Rule 52(a) linguistically similar, but also they share the same lineage and are inextricably intertwined. Rule 61 was designed as a combination of the second harmless error statute referenced above (the one applicable to civil cases) and another similar statute for civil cases, with unspecified modifications.<sup>271</sup> Additionally, the original Advisory Committee Note to Rule 52(a) stated that “[a] similar provision is found in Rule 61 of the Federal Rules of Civil Procedure.”<sup>272</sup> And Lester Orfield, one of the drafters of the Criminal Rules, explained shortly after the adoption of Rule 52(a) that the Rule “really amounts to a shortened form of the second sentence of Civil Rule 61.”<sup>273</sup>

Federal courts have also repeatedly concluded that Rule 61 is effectively the same as Rule 52(a). For example, the Fifth Circuit has observed that “Civil Rule 61 combines in a single rule the harmless and plain error rules stated in Criminal Rule 52(a) and (b).”<sup>274</sup> Likewise, the Third Circuit has said that it “do[es] not perceive a clear distinction between the two” Rules.<sup>275</sup> And courts consistently refer to the Rules interchangeably or as imposing essentially the same requirements.<sup>276</sup>

Furthermore, Rule 61 applies to pleadings. As explained in *Federal Practice and Procedure* on Rule 61, “Technical errors in pleading

270. FED. R. CIV. P. 61. Rule 61 remains essentially the same as when originally adopted. See FED. R. CIV. P. 61 (1938).

271. See FED. R. CIV. P. 61 1937 advisory committee's note; see also *Hoiness v. United States*, 335 U.S. 297, 300 n.6 (1948) (reciting the similar civil statute).

272. FED. R. CRIM. P. 52(a) 1944 advisory committee's note.

273. Lester B. Orfield, *Two Years of the Federal Rules of Criminal Procedure*, 22 TEMP. L.Q. 46, 60 n.271 (1948).

274. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1424 (5th Cir. 1996) (en banc).

275. *McQueeney v. Wilmington Tr. Co.*, 779 F.2d 916, 927 n.17 (3d Cir. 1985).

276. See, e.g., *O'Neal v. McAninch*, 513 U.S. 432, 441–42 (1995); *Chapman v. California*, 386 U.S. 18, 22 & n.5 (1967); *United States v. Barton*, 909 F.3d 1323, 1337–38 (11th Cir. 2018); *United States v. Reid*, 751 F.3d 763, 767 (6th Cir. 2014); *Christian v. United States*, 337 F.3d 1338, 1343 (Fed. Cir. 2003); *United States v. Patterson*, 215 F.3d 776, 782 (7th Cir. 2000), *rev'd on other grounds*, 531 U.S. 1033 (2000); *Friends of Keesville, Inc. v. FERC*, 859 F.2d 230, 234 n.11 (D.C. Cir. 1988); *CalMat Co. v. Oldcastle Precast, Inc.*, Civ. No. 16-26 KG/JHR, 2018 WL 3025053, at \*2 (D.N.M. June 21, 2018); *Creter v. Arvonio*, Civ. A. No. 92-4493, 1993 WL 306425, at \*6 (D.N.J. Aug. 5, 1993); see also 11 MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE §§ 2881, 2883 (3d ed. 2021). Indeed, if anything, Rule 61 could be viewed as more forgiving of error than Rule 52(a). See, e.g., *McQueeney*, 779 F.2d at 925; 3B PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 853 (4th ed. 2021); KANE, *supra*, § 2883.

usually are treated as harmless and disregarded.”<sup>277</sup> Courts have invoked Rule 61 in, or connected it to, the pleading context as well.<sup>278</sup>

In sum, the basis for the “prejudice” argument is “harmless error,” which applies to both civil and criminal procedure and to civil pleadings. Accordingly, that argument does nothing to counter this Article’s position.

### 3. A Defendant Can Obtain a Bill of Particulars

The third argument from the courts is that *Twombly* and *Iqbal* should not apply to criminal cases because a defendant who wants more detail about his case may seek a bill of particulars.<sup>279</sup> But that argument fails too.

First, the bill of particulars mechanism appeared in the original Criminal Rules.<sup>280</sup> Thus, the relationship between Rule 7(c) and Rule 8(a) that the drafters established was created in perspective of that mechanism, and it cannot be used to undermine the modern consequence of that relationship for the criminal pleading standard.

Second, the drafters crafted Rule 7(c) to avoid the need for bills of particulars. Indeed, they specifically rejected short-form indictments for that reason.<sup>281</sup> Consequently, relying on bills of particulars to justify interpreting Rule 7(c) as less demanding than Rule 8(a) would be an egregious inversion of the Rule’s design.<sup>282</sup>

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277. KANE, *supra* note 276, § 2884.

278. *See, e.g.*, *M.G.B. Homes, Inc., v. Ameron Homes, Inc.*, 903 F.2d 1486, 1489 (11th Cir. 1990); *Dye Constr. Co. v. OSHRC*, 698 F.2d 423, 425 n.6 (10th Cir. 1983); *McCoy v. Providence Journal Co.*, 190 F.2d 760, 766 (1st Cir. 1951); *Rawls v. Paradise Artists, Inc.*, No. 3:18-cv-0417, 2019 WL 7482142, at \*4 & n.6 (M.D. Tenn. Apr. 16, 2019); *Griesinger v. Univ. of Cincinnati*, No. 1:13-cv-808, 2016 WL 2349112, at \*5 (S.D. Ohio May 3, 2016); *Capital Mach. Co. v. Miller Veneers, Inc.*, No. 1:09-cv-00702-JMS-DML, 2012 WL 243563, at \*3 n.3 (S.D. Ind. Jan. 25, 2012); *Spencer Cty. Redev. Comm’n v. AK Steel Corp.*, No. 3:09-cv-00066-RLY-WGH, 2011 WL 3806947, at \*2–3 (S.D. Ind. Aug. 26, 2011); *Aretakis v. Durivage*, Civ. No. 1:07-CV-1273 (RFT), 2009 WL 2567781, at \*2 (N.D.N.Y. Aug. 17, 2009); *Foote v. Barnhart*, No. 3:06-00686, 2008 WL 2756256, at \*10 (M.D. Tenn. July 15, 2008); *IQ Grp., Ltd. v. Wiesner Publ’g, LLC*, No. Civ.A. 03-5221(JAG), 2005 WL 3544335, at \*3 (D.N.J. Dec. 28, 2005); *Mioduszevska v. Bd. of Educ.*, No. 93 CIV. 3843 (VLB), 1993 WL 564902, at \*2 (S.D.N.Y. Dec. 13, 1993); *Courtney v. Sch. Dist. No. 1*, 371 F. Supp. 401, 402 (D. Wyo. 1974).

279. *See supra* note 59 and accompanying text.

280. *See* FED. R. CRIM. P. 7(f) (1946).

281. *See supra* notes 141, 178–186 and accompanying text.

282. To be sure, the original bill of particulars provision only allowed granting bills “for cause,” FED. R. CRIM. P. 7(f) (1946), and that limitation was removed in 1966 “to encourage a more liberal attitude by the courts toward bills of particulars,” FED. R. CRIM. P. 7 advisory committee’s note to 1966 amendment. But that change did not affect the requirements of Rule 7(c).



Third, as the drafters originally anticipated, bills of particulars do little in practice. First of all, several decisions have indicated that the test for whether a bill should be granted is quite similar to the test for whether an indictment is sufficient,<sup>283</sup> and others have found bare-bones or nonspecific indictments adequate to render a bill unnecessary.<sup>284</sup> Additionally, a bill of particulars will generally be denied if the defendant had access to information about his case through other means (for example, court filings and hearings, discovery, personal observations),<sup>285</sup> even if those means do not specify the government's allegations or only present information about them indirectly, haphazardly, close to trial, or in a burdensome manner.<sup>286</sup> Moreover, whether to grant a bill is left to the trial court's broad discretion, and a denial will not be overturned unless the defendant can show prejudice and/or surprise as a result.<sup>287</sup> Accordingly, "[m]otions for bills of particulars are seldom employed"<sup>288</sup>—like the drafters intended—and their existence does not suggest that Rule 7(c) should be interpreted leniently.

Finally, the Civil Rules provide for a mechanism that is similar to the bill of particulars. Criminal bills of particulars are used to clarify the pleadings.<sup>289</sup> Civil Rule 12(e), likewise, allows a motion for "a more definite statement of a pleading . . . which is so vague or ambiguous that the party cannot reasonably prepare a response."<sup>290</sup> Given that *Twombly* and *Iqbal* amplified the pleading standard on the civil side anyway, the

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283. See, e.g., *United States v. Leahy*, 598 F. App'x 210, 212 (4th Cir. 2015) (per curiam); *United States v. Vaughn*, 722 F.3d 918, 927 (7th Cir. 2013); *United States v. Moody*, 923 F.2d 341, 351 (5th Cir. 1991); *United States v. Chenuar*, 552 F.2d 294, 302 (9th Cir. 1977); *United States v. Ligambi*, Criminal Action Nos. 09-00496-01, 03-08, 10-11, 14-15, 2012 WL 2362638, at \*2 (E.D. Pa. June 21, 2012).

284. See, e.g., *United States v. Al Jaber*, 436 F. App'x 9, 12 (2d Cir. 2011) (per curiam); *United States v. Nelson-Rodriguez*, 319 F.3d 12, 30-31 (1st Cir. 2003); *United States v. Belardo-Quiñones*, 71 F.3d 941, 943-44 (1st Cir. 1995); *United States v. Cephas*, 937 F.2d 816, 823 (2d Cir. 1991); *United States v. Serrano-Serrano*, No. 2:16-cr-56-RJS-PMW, 2016 WL 7217632, at \*2 (D. Utah Dec. 13, 2016); *United States v. Dyer*, No. 3:07-CR-39, 2007 WL 2326899, at \*2 (E.D. Tenn. Aug. 10, 2007).

285. See, e.g., *United States v. Lundstrom*, 880 F.3d 423, 439-40 (8th Cir. 2018); *United States v. Huggans*, 650 F.3d 1210, 1220 (8th Cir. 2011); *United States v. Blanchard*, 542 F.3d 1133, 1140-41 (7th Cir. 2008); *United States v. Mejia*, 448 F.3d 436, 445-46 (D.C. Cir. 2006); *United States v. Urban*, 404 F.3d 754, 771-72 (3d Cir. 2005); *United States v. Robinson*, 390 F.3d 853, 867 (6th Cir. 2004); *United States v. Ivy*, 83 F.3d 1266, 1281-82 (10th Cir. 1996).

286. See, e.g., *Mejia*, 448 F.3d at 446; *Robinson*, 390 F.3d at 867; *Ivy*, 83 F.3d at 1281-82; *Serrano-Serrano*, 2016 WL 7217632, at \*2.

287. See, e.g., *Lundstrom*, 880 F.3d at 439; *Huggans*, 650 F.3d at 1220; *Blanchard*, 542 F.3d at 1140; *Mejia*, 448 F.3d at 445; *Urban*, 404 F.3d at 771-72; *Robinson*, 390 F.3d at 867; *Ivy*, 83 F.3d at 1281.

288. *United States v. Sepulveda*, 15 F.3d 1161, 1192 (1st Cir. 1993).

289. See, e.g., *Lundstrom*, 880 F.3d at 439; *Ivy*, 83 F.3d at 1281.

290. FED. R. CIV. P. 12(e).

criminal bill of particulars cannot be used to argue against similarly bolstering the criminal pleading standard.

#### 4. Rule 8(a) Requires a “Showing” of Entitlement to Relief, Whereas Rule 7(c) Does Not

The fourth case law argument is that Rule 8(a) is more demanding than Rule 7(c) because Rule 8(a) requires a “showing” that the pleader is entitled to relief, whereas Rule 7(c) does not.<sup>291</sup>

It is true that *Twombly* said that its pleading standard “reflects the threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief’” and that “Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief,” devoid of factual adornment.<sup>292</sup> But Rule 8(a) contained the “showing” of entitlement to relief language at the time Rule 7(c) was crafted, meaning that the drafters of Rule 7(c) were fully aware of it when they created the Rule and determined its relationship to Rule 8(a).<sup>293</sup> Moreover, Rule 7(c) adopted the code pleading language that Rule 8(a) had repudiated to liberalize pleading and eliminate the problems of requiring the allegation of “facts.” Hence, the language of Rule 8(a) does not undermine this Article’s analysis.

#### 5. Rule 7(c) Was Designed to Reduce Technicalities, Procedural Complexity & Detailed Allegations

The fifth argument that appears in the case law is that Rule 7(c) was designed to reduce technicalities, procedural complexity, and detailed allegations.<sup>294</sup> Although true, the drafters of Rule 7(c) used Rule 8(a) as a model of the simplicity they wanted to achieve, and Rule 8(a) seems to have simplified pleadings *more* than Rule 7(c). And Rule 7(c)’s drafters did not decide to simplify pleadings at all costs. Rather, they eschewed short-form indictments and sought to promote defendants’ rights.

#### 6. Criminal Procedure & Civil Procedure Are Different

Finally, courts maintain that *Twombly* and *Iqbal* should not apply to indictments because criminal and civil procedure are fundamentally different, for example, with respect to discovery burdens and the constitutional protections defendants receive.<sup>295</sup> However, the drafters of Rule 7(c) designed the Rule as they did with full knowledge of, and

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291. *See supra* note 60 and accompanying text.

292. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 n.3, 557 (2007) (alteration in original).

293. *See* FED. R. CIV. P. 8(a) (1938).

294. *See supra* note 61 and accompanying text.

295. *See supra* note 62 and accompanying text.

indeed in spite of, the fact that criminal and civil procedure are generally quite different. At the time the drafters created the Rule, furthermore, the Civil Rules contained expansive discovery provisions and the Constitution offered criminal defendants a host of distinct protections. Therefore, the differences between criminal and civil procedure cannot justify refusing to amplify the criminal pleading standard in line with its original design.

### *C. Counterarguments from the Advisory Committee*

The final set of counterarguments comes from the Advisory Committee's decision to reject the 2016 proposal to strengthen the criminal pleading standard. The Committee offered three main legal arguments for doing so: (1) that courts uphold bare-bones indictments; (2) that minimal pleading is hundreds of years old and raising the criminal pleading standard would be a return to the common law; and (3) that raising the pleading standard would create new substantive rights.

#### 1. Courts Uphold Bare-Bones Indictments

The Committee's first argument asserts that criminal pleading practices are set by appellate decisions that uphold bare-bones indictments.<sup>296</sup> But pleading requirements are actually set by the Criminal Rules, which are then interpreted by courts.<sup>297</sup> Thus, saying that the criminal pleading standard should not change because appellate decisions have upheld bare-bones indictments puts the cart before the horse and, in any event, fails to account for the original design of Rule 7(c), which shows that court decisions interpreting Rule 7(c) should be rethought.

#### 2. Minimal Pleading Is Hundreds of Years Old & Raising the Criminal Pleading Standard Would Be a Return to the Common Law

The second Committee argument maintains "that minimal pleading in criminal cases is hundreds of years old" and that aligning the criminal and civil pleading standards would operate as a "return to the old common law pleading rules."<sup>298</sup> But each component of that argument does not withstand scrutiny.

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296. *See supra* note 66 and accompanying text.

297. *Cf. Twombly*, 550 U.S. at 569 n.14 ("[W]e do not apply any heightened pleading standard . . . which can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation." (citation omitted) (internal quotation marks omitted)).

298. *See supra* note 66 and accompanying text.

As to the point that minimal pleading is hundreds of years old, that point seems to be channeling the accurate proposition that indictments drawn in statutory language have long been held sufficient—at least subject to the qualification that the statutory language must sufficiently apprise the defendant of the allegations against her.<sup>299</sup> However, while the point may be true, it does not make a persuasive argument.

As explained previously, before the Federal Rules there was a well-established pleading balance that treated criminal pleading requirements as at least as rigorous as civil ones. And in line with that balance, courts historically indicated that the rule in the criminal context allowing pleadings to employ statutory language applied to non-criminal cases as well. For instance, in 1907, the Circuit Court for the District of Massachusetts said that, with respect to a civil action under the Sherman Anti-Trust Act, “it is not sufficient to frame the declaration in the words of the statute” because “[t]he statute does not set forth the elements of the offenses which are forbidden,” and to support that conclusion, it quoted a criminal case under the Act holding that the Act “is not one of the class where it is always sufficient to declare in the words of the enactment, as it does not set forth all the elements of a crime.”<sup>300</sup> Likewise, the Supreme Court of Kansas, in 1919, said: “In criminal pleading, where the statute creates an offense and sets out the facts which constitute it, an information that follows the language of the statute is good. The same rule of pleading should, and does, apply in civil actions.”<sup>301</sup> There are myriad similar examples.<sup>302</sup> Thus, if “minimal”

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299. *See, e.g.*, *Armour Packing Co. v. United States*, 209 U.S. 56, 83–84 (1908); *United States v. Carll*, 105 U.S. 611, 612–13 (1881); *United States v. Simmons*, 96 U.S. 360, 362 (1877); *Summers v. United States*, 11 F.2d 583, 584 (4th Cir. 1926); *United States v. Burns*, 54 F. 351, 360–61 (C.C.D.W. Va. 1893); *United States v. Green*, 26 F. Cas. 32, 32 (C.C.E.D. Wis. 1879) (No. 15,257); *United States v. Schuler*, 27 F. Cas. 978, 980 (C.C.D. Mich. 1853) (No. 16,234); *Grattan v. State*, 71 Ala. 344, 345 (1882); *State v. Brown*, 4 Port. 410, 413 (Ala. 1837); *Caldwell v. State*, 83 S.W. 929, 929–30 (Ark. 1904); *People v. Ward*, 42 P. 894, 895 (Cal. 1895); *State v. Patten*, 64 N.E. 850, 851 (Ind. 1902); *State v. Brandt*, 41 Iowa 593, 607–08 (1875); *Commonwealth v. Black*, 20 S.W.2d 741, 742 (Ky. 1929); *Commonwealth v. Stout*, 46 Ky. (7 B. Mon.) 247, 249 (1847); *State v. Munsey*, 96 A. 729, 729–30 (Me. 1916); *State v. Burke*, 52 S.W. 226, 227–28 (Mo. 1899); *Jordan v. State*, 3 S.W.2d 159, 160 (Tenn. 1928); *Richardson v. Fletcher*, 52 A. 1064, 1068 (Vt. 1902); *State v. Martin*, 162 P. 356, 358 (Wash. 1917); *State v. Parkersburg Brewing Co.*, 45 S.E. 924, 925 (W. Va. 1903).

300. *Cilley v. United Shoe Mach. Co.*, 152 F. 726, 728–29 (C.C.D. Mass. 1907).

301. *Patrick v. Bd. of Comm'rs*, 181 P. 611, 612 (Kan. 1919) (citation omitted).

302. *See, e.g.*, *United States v. 385 Barrels, etc., of Wine*, 300 F. 565, 565 (S.D.N.Y. 1924); *United States v. Or. Short Line Ry. Co.*, 180 F. 483, 484 (D. Idaho 1908); *Smith v. Witcher*, 60 So. 391, 392 (Ala. 1912); *St. Louis & S. F. R. Co. v. Phillips*, 51 So. 638, 641 (Ala. 1910); *Cotton v. Holloway*, 12 So. 172, 174 (Ala. 1892); *Hollenbacher v. Bryant*, 30 A.2d 561, 562–63 (Del. Super. Ct. 1943); *Lynam v. Hastings*, 185 A. 91, 91–92 (Del. Super. Ct. 1936); *O'Brien v. Wilmington Provision Co.*, 148 A. 294, 295 (Del. Super. Ct. 1929); *Wailuku Sugar Co. v. Spreckels*, 13 Haw. 527, 530

pleading was the historical norm in criminal cases, so too was it in civil cases. Yet *Twombly* and *Iqbal* came down as they did anyway—and were so decided notwithstanding that Rule 8(a) itself was meant to minimize pleading. Therefore, the history of minimal pleading in criminal cases is not a sound basis for keeping the criminal pleading standard less stringent than the civil standard, especially since, again, Rule 7(c) was not meant to upset the traditional balance between civil and criminal pleading standards or impose a pleading requirement any less demanding than Rule 8(a).

As to the point that aligning the civil and criminal pleading standards would be a return to common law criminal pleading, it is unavailing because it assumes *Twombly* and *Iqbal* require that style of pleading. But they do not. The type of common law indictments the drafters of Rule 7(c) eschewed looked something like this:

In the District Court of the United States within and for the [blank] Division of the District of [blank] sitting at the City of [blank], State of [blank], at the [blank], 19 [blank] term of said court.

The grand jurors of the United States in and for the District and Division aforesaid, duly empaneled, sworn, and charged, at the term aforesaid, by the court aforesaid, on their oaths, find, charge, and present that on or about the [blank] day of [blank], 19 [blank], at and in the City of [blank], in [blank] County, State of [blank], and upon land purchased and acquired by the United States of America for a United States Post Office and a United States Courthouse building, the real estate on which such building rests, being otherwise described as lots numbered [blank], on [blank] Street, all as disclosed by the recorded plat of the original town site of the City of [blank],

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(1901); *Patten*, 64 N.E. at 851; *Latshaw v. State ex rel. Latshaw*, 59 N.E. 471, 474 (Ind. 1901); *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, 479–80 (1884); *Blanchard-Hamilton Furniture Co. v. Colvin*, 69 N.E. 1032, 1034 (Ind. App. Ct. 1904); *Burkart v. City of Newport*, 97 S.W.2d 803, 805 (Ky. 1936); *City of St. Louis v. Weitzel*, 31 S.W. 1045, 1048 (Mo. 1895); *City of Louisiana v. Anderson*, 73 S.W. 875, 876 (Mo. Ct. App. 1903); *Canham v. Bruegman*, 109 N.W. 733, 734 (Neb. 1906); *Crooks v. People's Nat'l Bank*, 61 N.Y.S. 604, 607–08 (N.Y. App. Div. 1899); *Dickenson v. Henderson*, 176 P. 797, 798 (Or. 1918); *Utah Ass'n of Creditmen v. Boyle Furniture Co.*, 136 P. 572, 573 (Utah 1913); *Richardson*, 52 A. at 1068; *Selvey v. Grafton Coal & Coke Co.*, 79 S.E. 656, 657 (W. Va. 1913); *State v. Zillman*, 98 N.W. 543, 545 (Wis. 1904); *Jarvis v. Hamilton*, 16 Wis. 574, 577–78 (1863); *Blatchley v. Adair*, 5 Iowa 545, 546 (1858); *accord, e.g.*, 1 MORRIS M. ESTEE & CARTER P. POMEROY, ESTEE'S PLEADINGS, PRACTICE AND FORMS, ADAPTED TO ACTIONS AND SPECIAL PROCEEDINGS UNDER CODES OF CIVIL PROCEDURE § 827 (3d ed. 1886); FRANCIS HILLIARD, THE LAW OF REMEDIES FOR TORTS, INCLUDING REPLEVIN, REAL ACTION, PLEADING, EVIDENCE, DAMAGES 236 n.a, 237 (2d ed. 1873); 3 WILLIAM A. SUTHERLAND, A TREATISE ON CODE PLEADING AND PRACTICE § 5028 (1910); *see also* *Blue Valley Creamery Co. v. Stone*, 80 F.2d 483, 484 (3d Cir. 1935) (applying the statutory language rule to bankruptcy cases); *Meek v. Beezer*, 28 F.2d 343, 346 (3d Cir. 1928) (same); *In re Bellah*, 116 F. 69, 71–76 (D. Del. 1902) (same).

[blank] County, State of [blank], and the said real estate and building thereon being under the exclusive jurisdiction of the United States of America, the same having been purchased and acquired by the United States for such Post Office and Courthouse purposes by the consent of the Legislature of, and the laws of the State of [blank] for the erection of such needful buildings of the United States, and such buildings and real estate being in the [blank] Division of the District of [blank], and within the jurisdiction of this court, one A.B. and one C.D. did then and there knowingly, wilfully, unlawfully, purposely, deliberately, premeditatedly, feloniously, of their malice aforethought, and with the intent so to do, kill and murder X.Y., a human being, the said murder being perpetrated in the manner and form herein set forth by the said A.B. and C.D., then and there holding in their respective hands certain respective pistols, revolvers and small firearms, loaded with powder and leaden steel and metallic bullets, a more exact description of which firearms and bullets being to the grand jury unknown, and which said firearms so held respectively by the said defendants, A.B. and C.D., they, and each of them, fired, shot and discharged at, towards, against and into the body, abdomen, chest, and limbs of the said X.Y., thereby mortally wounding him, the said X.Y.; all of which the said A.B. and C.D. did with the wilful, unlawful, deliberate, premeditated and felonious intent aforesaid, and with malice aforethought, as aforesaid, to kill and murder and take the life of him the said X.Y.; and that the said X.Y. from the effect of said bullets and the mortal wounds inflicted thereby did languish, and languishing did die on or about the [blank] day of April, 19 [blank]; all contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.<sup>303</sup>

*Twombly* and *Iqbal* demand nothing of that sort.

Furthermore, those decisions simply purported to restore the original meaning of Rule 8(a). Rule 8(a), in turn, was designed to impose a lighter pleading standard than code pleading, which was itself designed to repudiate the technicality, complexity, and opacity of common law pleading. Thus, *Twombly* and *Iqbal* should be viewed as imposing the lightest pleading standard of all—one less rigid and technical than common law pleading and less fact-bound than code pleading—especially given the traditional civil-criminal pleading balance. In other words, *Twombly* and *Iqbal* are a far cry from common law indictments.<sup>304</sup>

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303. Holtzoff, *supra* note 103, at 124–25.

304. As noted above, the drafters of Rule 8(a) did draw on the common law insofar as it allowed for pleading little factual detail. *See supra* note 99. But flexibility in averment is not what the drafters of Rule 7(c) were trying to escape. *See, e.g.*, Holtzoff, *supra* note 103, at 124 (“The prolix and archaic form of indictment couched in

### 3. Raising the Criminal Pleading Standard Would Create Substantive Rights

The Committee's final argument contends that raising the criminal pleading standard would "create new substantive rights, which is beyond the [Committee's] authority."<sup>305</sup> That argument is unconvincing, however, because raising the criminal pleading standard would comport with the pre-Federal Rules principle that criminal pleading requirements should be at least as strict as civil ones. Additionally, *Twombly* and *Iqbal* imposed their pleading standard in the civil context without "creating substantive rights," so it is unclear why aligning the civil and criminal pleading standards in accordance with the original design of Rule 7(c) and the traditional balance between those standards would do so. Furthermore, given that *Twombly* and *Iqbal* simply purported to restore the original meaning of Rule 8(a), which was designed to make the civil pleading standard *less stringent* than code pleading, it is hard to imagine how applying the *Twombly-Iqbal* pleading standard to Rule 7(c), which contains code pleading language, would create rights. Lastly, it cannot be the case that aligning Rule 7(c) with Rule 8(a) would create substantive rights simply because the Constitution provides for indictments, notice to the accused, and due process.<sup>306</sup> If that were so, every Federal Rule that afforded more protection than the constitutional minimum would be invalid.<sup>307</sup>

## V. CONCLUSION

Under our current pleading regime, a civil plaintiff must allege sufficient factual matter to state a plausible claim to relief and cannot merely present legal conclusions, but a prosecutor can plead using broadly worded statutory language. Hence, civil pleadings are held to much more exacting requirements than criminal ones. That pleading

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Elizabethan English is still used in the federal courts. Actually, instead of apprizing the defendant of the crime of which he is accused, an indictment of this sort tends to mystify him. Moreover, much useless and laborious learning has been accumulated and an incalculable amount of midnight oil burned over the futile problem of how an indictment should be drawn and what it should contain."); Medalie, *supra* note 103, at 3 ("Prevailing forms of federal indictments, evolved after years of litigation over technical defects, represent anything but a clear and simple statement of the facts constituting the crime. The need to guard against microscopic technical flaws had resulted in a plethora of logomachy in which lurked, well hidden, the substance of the offense.").

305. See *supra* note 66 and accompanying text.

306. See, e.g., *Russell v. United States*, 369 U.S. 749, 760–61 (1962); *cf.*, e.g., *United States v. Anderson*, 280 F.3d 1121, 1124 (7th Cir. 2002) (describing the minimum constitutional requirements for an indictment).

307. *Cf.*, e.g., *United States v. Timmreck*, 441 U.S. 780, 783 (1979) (noting that a Criminal Rule violation was not a constitutional violation); *United States v. Fry*, 831 F.2d 664, 667 (6th Cir. 1987) (same).

balance, however, is misguided. Rule 7(c) was designed to require at least as much detail as Rule 8(a), and that original design should govern Rule 7(c) today.

Those conclusions are serious ones. They call into question a deeply entrenched pleading system that has been accepted or supported by the highest authorities in the land, and they suggest that those authorities should rethink their positions. They also indicate that criminal defendants should, under the Federal Rules, receive more protections and information about the case against them than they presently do. Finally, they render policy arguments regarding our pleading regime quite important. If our existing pleading system is to be retained despite its weak legal footing, it must at least have powerful normative support. If it does not or if the normative considerations favor changing our pleading system—which they seem to<sup>308</sup>—the need for change is all the more pressing.

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308. *See supra* note 17 and accompanying text.



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