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A Formulaic Recitation Will Not Do:

Why, as a Matter of Law, Federal Rule of Criminal Procedure 7(c) Should Be Interpreted to Be at Least as Stringent as Federal Rule of Civil Procedure 8(a)

By Charles Eric Hintz*

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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 contain sufficient factual matter to state a claim to relief that is plausible on its face, rather than mere conclusory statements tracking the elements of a cause of action. Given the infinitely higher stakes involved in criminal cases, one might think that at least as robust a requirement would exist in that 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 dichotomy between civil and criminal pleading standards is not justified. The drafters of Rule 7(c) intended 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 pleading in the United States, the original Advisory Committee Note to Rule 7(c), and the drafting history of the Criminal Rules. And, the drafters' original design should control how Rule 7(c) is interpreted today, notwithstanding the Supreme Court's reinterpretation of Rule 8(a) in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. All of that means that our current pleading "balance" is really an erroneous imbalance that should be adjusted by those with the authority to do so, that criminal defendants should be entitled to much more information about their cases at the pleading stage and have a much stronger mechanism for challenging the case against them before trial than decisional law requires, and that debates over what the criminal pleading standard should be are being fought in the wrong posture.

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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,” 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.”¹ If the plaintiff’s complaint fails to comply with those requirements, the defendant may move to dismiss it, bringing an early end to the case.

Given the infinitely higher stakes involved in criminal cases,² one might think that a stronger pleading standard would exist in that context. But, in fact, the opposite is true. Under the prevailing interpretation of Federal Rule of Criminal Procedure 7(c)—which, by its terms, requires that an indictment contain “a plain, concise, and definite written statement of the essential facts constituting the offense charged”³—indictments parroting the language of a statute are often sufficient.⁴ Consequently, allegations that would never sustain a civil complaint are frequently deemed adequate to allow a prosecution to proceed to trial.⁵ As one court put it well:

¹ Fed. R. Civ. P. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

² See James M. Burnham, *Why Don’t Courts Dismiss Indictments?*, 18 *Green Bag 2d* 347, 354, 357–58 (2015); Russell M. Gold et al., *Civilizing Criminal Settlements*, 97 *B.U. L. Rev.* 1607, 1644 (2017); Robert L. Weinberg, *Applying the Rationale of Twombly to Provide Safeguards for the Accused in Federal Criminal Cases*, 7 *Advance* 45, 51 (2013) [hereinafter Weinberg, *Applying Twombly*]; Robert L. Weinberg, *Iqbal for the Accused?*, 34 *The Champion* 28, 31 (2010) [hereinafter Weinberg, *Iqbal*].

³ Fed. R. Crim. P. 7(c).

⁴ See, e.g., *United States v. Resendiz-Ponce*, 549 U.S. 102, 109–10 (2007).

⁵ See, e.g., *United States v. Bennett*, No. CR-17-68-GF, 2019 WL 1770108, at *10–11 (D. Mont. Apr. 16, 2019) (“Between on or about January 2015 and October 2105 [sic], in Cascade County in the State and District of Montana and elsewhere, the defendant, BRANDON CORDELL BENNETT, did employ, use, persuade, induce, entice, and coerce and attempt to employ, use, persuade, induce, entice and coerce any minor, Jane Doe, who is known to the defendant but whose name is withheld to protect her identity, to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct, using materials that have been mailed, shipped, and transported in and affecting interstate and foreign commerce by any means, in violation of 18 U.S.C. § 2251(a).” (citation omitted)); *United States v. Focia*, No. 2:15cr17, 2015 WL 3672382, at *2–3 (M.D. Ala. June 12, 2015) (“On or about January 5, 2015, in Montgomery County, within the Middle District of Alabama, the defendant, MICHAEL ALBERT FOCIA,

[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.⁶

That interpretation of Rule 7(c), moreover, is firmly established. It was set by no less an authority than the Supreme Court.⁷ Furthermore, under the shadow of that authority, lower courts have consistently rebuffed attempts to strengthen the criminal pleading standard.⁸ And, the Advisory Committee on Criminal Rules rejected a 2016 proposal to clarify that indictments should be subject to the same pleading requirements as civil complaints.⁹

Commentators have taken notice of the dichotomy between our civil and criminal pleading standards and started to present arguments as to why that dichotomy 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.¹⁰ More importantly, however, they have begun to make textual and historical claims indicating that Rule 7(c) should be interpreted differently. For

did willfully and maliciously injure and destroy the works, property, and material of a radio system, operated and controlled by the United States and used and intended to be used for military and civil defense functions of the United States, and did willfully and maliciously interfere with the working and use of such system, and willfully and maliciously obstruct, hinder, and delay the transmission of a communication over such system, specifically, by interfering with law enforcement communications over such system, in violation of Title 18, United States Code, Section 1362.” (citation omitted)); *United States v. Guler*, No. 1:07CV130, 2007 WL 4593504, at *3, 5 (E.D. Mo. Dec. 21, 2007) (“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.”).

⁶ *United States v. Hansen*, __ F. Supp. 3d __, 2019 WL 7049954, at *3 (D. Utah Dec. 23, 2019) (citation omitted).

⁷ *Resendiz-Ponce*, 549 U.S. at 109–10.

⁸ *See, e.g., United States v. Vaughn*, 722 F.3d 918, 926 (7th Cir. 2013).

⁹ Minutes, Advisory Committee on Criminal Rules 19–21 (Apr. 2016), https://www.uscourts.gov/sites/default/files/2016-04-18-minutes_-_criminal_rules_meeting_final_0.pdf; Letter from James M. Burnham to Hon. Donald W. Molloy, Chair, Advisory Committee on Criminal Rules (Feb. 1, 2016), https://www.uscourts.gov/sites/default/files/16-cr-a-suggestion_burnham_0.pdf.

¹⁰ *See, e.g., Burnham*, *supra* note 2, at 348–49; Gold et al., *supra* note 2, at 1612–13; 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*]; Weinberg, *Applying Twombly*, *supra* note 2, at 49, 53; Weinberg, *Iqbal*, *supra* note 2, at 29–32.

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.¹¹ Likewise, and relatedly, some have begun to observe that the drafters of Rule 8(a) eliminated 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.¹² Additionally, at least one commentator has noted that the original Advisory Committee Note to Rule 7(c) includes cross-references to Rule 8.¹³ Finally, another scholar has engaged in a pioneering exploration of the drafting history of the Criminal Rules and, in doing so, has indicated that the drafters of Rule 7(c) adopted the pleading standard of the Civil Rules.¹⁴

The textual and historical claims raised in the literature are powerful and suggest that Rule 7(c) should be understood differently than it is today. But, scholarship on this subject is in nascent and underdeveloped form, and no commentator has performed an in-depth, holistic, thorough, and accurate analysis of the sources relevant to the meaning of Rule 7(c) in order to firmly establish how that Rule should be interpreted. This Article fills that gap. It reveals—in line with the burgeoning commentary in this area—that Rule 7(c) was originally intended to be at least as rigorous as Rule 8(a) and should be so construed today.

That finding is an important one. First of all, it demonstrates that our well-established approach to criminal pleading is actually unjustified and should be changed by those with the authority to do so. Furthermore, it shows that criminal defendants should receive much more information about their cases at the pleading stage and possess a much more robust mechanism for

¹¹ 5 Wayne R. LaFave, *Criminal Procedure* § 19.1(d) n.41 (4th ed. 2019); Meyn, *The Haves*, *supra* note 10, at 1809; Weinberg, *Applying Twombly*, *supra* note 2, at 49; Weinberg, *Iqbal*, *supra* note 2, at 29; Jenike-Godshalk, Comment, “Plausible Cause”?: *How Criminal Procedure Can Illuminate the U.S. Supreme Court’s New General Pleading Standard in Civil Suits*, U. Cin. L. Rev. 791, 806 (2010).

¹² LaFave, *supra* note 11, § 19.1(d) & n.41; Weinberg, *Applying Twombly*, *supra* note 2, at 49; Weinberg, *Iqbal*, *supra* note 2, at 29.

¹³ Jenike-Godshalk, *supra* note 11, at 806 & n.128.

¹⁴ Ion Meyn, *Why Civil and Criminal Procedure Are so Different: A Forgotten History*, 86 Fordham L. Rev. 697, 715–16 (2017).

challenging prosecutions before trial than decisional law requires.¹⁵ And, it makes clear that debates over the criminal pleading standard are being fought in entirely the wrong posture. Defenders of the present standard should have to *justify* why that standard is appropriate notwithstanding that Rule 7(c) is best interpreted as at least as stringent as Rule 8(a), rather than being in the position to *reject* efforts to alter it.

This Article, however, is not a policy-oriented one. It is not geared, as much of the literature on this subject has been, towards arguing that raising the criminal pleading standard is a “good” idea or that doing so could be justified on grounds similar to those that have been invoked to strengthen pleading standards in other contexts—although such arguments are far from weak.¹⁶ Rather, it is focused on ascertaining the meaning and proper interpretation of Rule 7(c). That scope has been chosen because, in the author’s view, any debate over what we might like the law to be should be informed by a complete understanding of what the law actually is, and that understanding is presently lacking.

The Article’s analysis proceeds as follows. Part II describes the current state of the law, including an introduction to the prevailing civil and criminal pleading standards as well as an overview of recent efforts to alter the criminal standard. Part III sets out the Article’s argument as to why Rule 7(c) should be interpreted to be at least as stringent as Rule 8(a). Part IV then engages with a host of counterarguments. Part V concludes.

¹⁵ *Cf.*, e.g., Burnham, *supra* note 2, at 348–49, 351, 354–57; Gold et al., *supra* note 2, at 1612–13, 1632–33, 1640–44; Weinberg, *Applying Twombly*, *supra* note 2, at 51–52; Weinberg, *Iqbal*, *supra* note 2, at 31–32.

¹⁶ *See*, e.g., Burnham, *supra* note 2, at 348–54, 357–62; Gold et al., *supra* note 2, at 1612–13, 1632–33, 1640–44; Meyn, *Unbearable Lightness*, *supra* note 10, at 55–57; Weinberg, *Applying Twombly*, *supra* note 2, at 48–52; Weinberg, *Iqbal*, *supra* note 2, at 29–32.

II. The Federal Civil and Criminal Pleading Standards

Before exploring the proper interpretation of Rule 7(c), 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.

A. The Civil Pleading Standard

As set out above, a plaintiff begins a civil action in federal court by filing a complaint, which lays out the substance of her claim for relief.¹⁷ That document must meet certain minimum standards.¹⁸ 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.”¹⁹ If the complaint fails to satisfy 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.²⁰

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*.²¹ 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.”²² 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

¹⁷ Fed. R. Civ. P. 3, 8(a).

¹⁸ Fed. R. Civ. P. 8(a).

¹⁹ Fed. R. Civ. P. 8(a).

²⁰ Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55 (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).

²¹ *See* 355 U.S. 41, 45–48 (1957).

²² *Id.* at 45–46.

the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”²³ In short, the Court largely rejected “a call for the pleading of specific facts.”²⁴ And, many courts read that decision to mean that “a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a 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.”²⁵

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.²⁶ 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 rejected by courts and commentators alike.²⁷ 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

²³ *Id.* at 47 (citation omitted).

²⁴ See 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*, 112d Cong. 5–6 (2012) [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)).

²⁵ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561–62 (2007) (first alteration in original); *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1289 (11th Cir. 2010); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2237, 2241 (1989); see also *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.”).

²⁶ 550 U.S. at 561–63; accord *Access to Courts Hearing*, *supra* note 24, at 7 (statement of Stephen B. Burbank); Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 *Judicature* 109, 113 (2009).

²⁷ 550 U.S. at 561–63.

adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”²⁸

The *Twombly* Court 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,” i.e., “to raise a right to relief above the speculative level.”²⁹ 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.”³⁰ And, it rejected the view “that the Federal Rules somehow dispensed with the pleading of facts altogether.”³¹ 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.”³²

Shortly after *Twombly*, the Supreme Court further clarified its Rule 8(a) jurisprudence in *Ashcroft v. Iqbal*.³³ Prior to *Iqbal*, some believed *Twombly* might be limited to certain contexts, such as antitrust (the type of claim in *Twombly*) or other sorts of cases that called for more rigor.³⁴ *Iqbal*, however, “made clear that [*Twombly*’s] approach applies across the board.”³⁵

Iqbal also elucidated how Rule 8(a) should be interpreted under *Twombly*. The Court said that “the pleading standard Rule 8 announces”—as construed by *Twombly*—“does not require

²⁸ *Id.* at 563.

²⁹ *Id.* at 555, 570.

³⁰ *Id.* at 555 (alteration in original).

³¹ *Id.* at 555 n.3.

³² *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,’ Rule 8(a)(2) still requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.” (citation omitted)).

³³ 556 U.S. 662, 678–80 (2009).

³⁴ *Twombly*, 550 U.S. at 569 (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 24, at 8 (statement of Stephen B. Burbank); Burbank, *supra* note 26, at 114.

³⁵ *Access to Courts Hearing*, *supra* note 24, at 11 (statement of Stephen B. Burbank); Burbank, *supra* note 26, at 115; *accord Iqbal*, 556 U.S. at 684; *Starr*, 659 F.3d at 852 (O’Scannlain, J., dissenting from denial of reh’g en banc).

‘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.”³⁶ 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.”³⁷ It additionally explained that, in deciding a motion 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.”³⁸ Finally, the Court said that “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”³⁹

In sum, under the prevailing civil pleading regime, legal conclusions—e.g., 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

The initiation of a federal criminal prosecution is more complex than that of a standard civil lawsuit. But, the pleading process is analogous.⁴⁰ Often after several preliminary steps,⁴¹ the government files a “pleading . . . initiat[ing] the formal charge against the accused,” which, in

³⁶ *Iqbal*, 556 U.S. at 678 (second alteration in original) (citations omitted).

³⁷ *Id.* at 678–79.

³⁸ *Id.* at 679.

³⁹ *Id.* at 678.

⁴⁰ See 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).

⁴¹ See 1 Andrew D. Leipold, *Fed. Practice & Proc. Crim.* §§ 41, 71, 91, 121, 161 (4th ed. 2019).

felony prosecutions, is termed an indictment or information.⁴² That pleading, similar to a civil complaint, must satisfy certain requirements. Specifically, under Federal Rule of Criminal Procedure 7(c), the “[t]he indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged.”⁴³ If an indictment or information fails to satisfy Rule 7(c), the defendant may move to dismiss it for “failure to state an offense” under Rule 12(b)(3)(B)(v).⁴⁴ That would require the government to file a new pleading or terminate the prosecution.⁴⁵

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 2007.⁴⁶ 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 United States at a particular time and place.⁴⁷ It held that such an indictment was not defective.⁴⁸

In reaching that decision, the Court made several points relating to the criminal pleading standard. Specifically, it said that “an indictment parroting the language of a federal criminal statute is often sufficient.”⁴⁹ Additionally, as to Rule 7(c) itself, the Court explained:

⁴² *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 that has not been subject to grand jury review.” *Id.*

⁴³ Fed. R. Crim. P. 7(c).

⁴⁴ Fed. R. Crim. P. 12(b)(3)(B)(v); *United States v. Carter*, 465 F.3d 658, 662 (6th Cir. 2006).

⁴⁵ *See United States v. Slough*, 679 F. Supp. 2d 55, 58 (D.D.C. 2010).

⁴⁶ 549 U.S. 102, 109–10 (2007); *see, e.g., 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).

⁴⁷ *Resendiz-Ponce*, 49 U.S. at 104–05, 107 (citation omitted).

⁴⁸ *Id.* at 107, 111.

⁴⁹ *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.”⁵⁰

In sum, unlike in the civil context, an indictment that is largely conclusory and just tracks the language of a statute is adequate under the Federal Rules.⁵¹ And, because of that, pleadings that would certainly fail as civil complaints are often deemed sufficient as indictments.⁵²

C. Attempts to Raise the Criminal Pleading Standard

Resendiz-Ponce was decided months before *Twombly* and years before *Iqbal*.⁵³ As a result of those latter decisions, then, there have been numerous attempts to align the criminal and civil pleading standards. All have been unsuccessful.

Most of those efforts have been by way of litigation. Criminal defendants have repeatedly argued that indictments should have to comply with *Twombly* and *Iqbal*.⁵⁴ Lower courts have generally rejected those arguments on the grounds that binding decisional law holds to the contrary and that there is no authority supporting a heightened criminal pleading standard.⁵⁵ Those courts,

⁵⁰ *Id.* (citations omitted).

⁵¹ *Id.* at 107–09.

⁵² See *supra* notes 5–6 and accompanying text.

⁵³ 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).

⁵⁴ See, e.g., *United States v. Gerebizza*, 720 F. App’x 302, 305 (7th Cir. 2017); *United States v. Vaughn*, 722 F.3d 918, 926 (7th Cir. 2013); *United States v. Hansen*, ___ F. Supp. 3d ___, 2019 WL 7049954, at *1 (D. Utah Dec. 23, 2019); *United States v. Adcox*, No. CR 15-36, 2017 WL 2489998, at *4 (W.D. La. June 7, 2017); *United States v. Bundy*, No. 2:16-cr-46, 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-119, 2014 WL 4354121, at *3 n.1 (D. Nev. June 23, 2014), *adopted*, 2014 WL 4354125, at *1–2, 4 (Sept. 2, 2014); *United States v. Calvente*, No. S3 12 Cr. 732, 2013 WL 4038952, at *2 n.1 (S.D.N.Y. July 26, 2013); *United States v. Castillo Madrigal*, No. 12-cr-62, 2013 WL 12099089, at *1–2 (W.D. Wis. Jan. 28, 2013), *adopted*, 2013 WL 12099088 (Feb. 21, 2013); *United States v. Homaune*, 898 F. Supp. 2d 153, 164 (D.D.C. 2012); *United States v. Mensah*, No. 12-cr-71, 2012 WL 2466393, at *2 (N.D. Okla. June 27, 2012); *United States v. Lockhart*, 11-cr-90, 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).

⁵⁵ See, e.g., *Gerebizza*, 720 F. App’x at 305; *Vaughn*, 722 F.3d at 926; *Hansen*, 2019 WL 7049954, at *2–3; *Adcox*, 2017 WL 2489998, at *4; *Coley*, 2016 WL 743432, at *2; *Castillo Madrigal*, 2013 WL 12099089, at *1–2; *Calvente*,

however, have also raised substantive legal arguments against amplifying the criminal pleading standard, including: (1) that nothing in *Twombly* or *Iqbal* suggests that those decisions were intended to apply to criminal cases;⁵⁶ (2) that a defendant challenging the sufficiency of an indictment must establish prejudice to prevail;⁵⁷ (3) that a defendant who wants more detail about his case may seek a bill of particulars;⁵⁸ (4) that Rule 8(a) requires a “showing” that the pleader is entitled to relief, whereas Rule 7(c) does not;⁵⁹ (5) that the Criminal Rules were designed to eliminate technicalities, ensure procedural simplicity, and reduce detailed allegations;⁶⁰ 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.⁶¹

Another attempt at altering the criminal pleading standard involved a proposal to the Advisory Committee on Criminal Rules.⁶² In 2016, James Burnham submitted a formal recommendation to the Advisory Committee 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

2013 WL 4038952, at *2 n.1; *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.

⁵⁶ *Coley*, 2016 WL 743432, at *1–2; *Castillo Madrigal*, 2013 WL 12099089, at *1.

⁵⁷ *Castillo Madrigal*, 2013 WL 12099089, at *2.

⁵⁸ *Vaughn*, 722 F.3d at 926.

⁵⁹ *Coley*, 2016 WL 743432, at *2–3.

⁶⁰ *Id.* at *1 & n.2; *see also* *United States v. Resendiz-Ponce*, 549 U.S. 102, 110 (2007) (making the same point).

⁶¹ *United States v. Vaughn*, 722 F.3d 918, 926 (7th Cir. 2013); *United States v. Bundy*, No. 2:16-cr-46, 2017 WL 387204, at *6 (D. Nev. Jan. 11, 2017); *Coley*, 2016 WL 743432, at *3; *Castillo Madrigal*, 2013 WL 12099089, at *2.

⁶² 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. 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* U.S. Courts, *How the Rulemaking Process Works*, <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works> (providing a similar overview of the rulemaking process).

The rulemaking process has changed over time. For example, the Advisory Committee originally reported to the Supreme Court directly. *Preface to 1 Drafting History of the Federal Rules of Criminal Procedure* xi–xvi (Madeleine J. Wilkin & Nicholas Triffin eds., 1991) [hereinafter *Drafting History*].

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).”⁶³

When the Committee took up the proposal, a number of members expressed interest.⁶⁴ 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 “the proposal seeks to create new substantive rights, which is beyond the authority of the Rules Committee.”⁶⁵ After brief discussion, the Chairman summarily quashed the measure by “announc[ing] that he did not intend to set up a Subcommittee to pursue” it.⁶⁶

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 unjustified: 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. This Part explains why.

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 mid-1940s to design a new set of criminal procedure rules for the federal courts, it could have created any system it

⁶³ Letter from James M. Burnham to Hon. Donald W. Molloy, *supra* note 9.

⁶⁴ Minutes, Advisory Committee on Criminal Rules 19–21 (Apr. 2016), https://www.uscourts.gov/sites/default/files/2016-04-18-minutes_-_criminal_rules_meeting_final_0.pdf.

⁶⁵ *Id.*

⁶⁶ *Id.* at 21.

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).

The literature has begun to highlight some of the sources that are suggestive of that fact.⁶⁷ 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 cohesive whole.

i. The Sources Relevant to the Meaning of Rule 7(c)

1. The Text of Rule 7(c) and Rule 8(a)

To understand Rule 7(c), the first source to consider is the text of Rule 7(c) 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.”⁶⁸ 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.”⁶⁹

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 when originally adopted.⁷⁰

⁶⁷ See *supra* notes 10–14 and accompanying text; see *infra* note 204.

⁶⁸ Fed. R. Crim. P. 7(c).

⁶⁹ Fed. R. Civ. P. 8(a).

⁷⁰ See *Compare* Fed. R. Crim. P. 7(c) (2019) (“The indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged.”), *with* Fed. R. Crim. P. 7(c) (1946) (“The

2. The History of Pleading

The next source to consider is the history of pleading in the United States. This Section 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.

a. Civil Pleading

The history of American civil pleading begins with the common law.⁷¹ At common law, the ultimate objective of pleading was to narrow the issues for trial.⁷² 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.”⁷³ As one 19th-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.⁷⁴

indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”); Fed. R. Civ. P. 8(a) (2019) (“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.”), *with* Fed. R. Civ. P. 8(a) (1938) (“A pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”).

⁷¹ See James V. Bilek, *Twombly, Iqbal, and Rule 8(c): Assessing the Proper Standard to Apply to Affirmative Defenses*, 15 Chapman L. Rev. 377, 379–80 (2011).

⁷² Charles E. Clark, *Clark on Code Pleading* 12–13 (2d ed. 1947); Bilek, *supra* note 71, at 378–81.

⁷³ Clark, *supra* note 72, at 12–15; 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).

⁷⁴ 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 (1875).

Furthermore, although it was frequently said that parties were to plead “the material, issuable facts constituting the cause of action,”⁷⁵ the common law often actually required alleging fictions, conclusions, and generalities.⁷⁶ 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.”⁷⁷

Frustrations with those and other aspects of common law pleading ultimately led to a desire for reform.⁷⁸ In the United States, that desire culminated in a new code of procedure in New York—termed the “Field 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.⁷⁹

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.⁸⁰ 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, to present them in their bearing upon the issues rather than in

⁷⁵ *Id.* § 402.

⁷⁶ *Id.* §§ 404–05; accord Clark, *supra* note 72, at 225; Charles E. Clark, *The Complaint in Code Pleading*, 35 Yale L.J. 259, 259, 261–62 (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).

⁷⁷ Charles E. Clark, *The Complaint in Code Pleading*, 35 Yale L.J. 259, 259, 261–62 (1926).

⁷⁸ See Arphaxed Loomis et al., First Report of the Commissioners on Practice and Pleadings, Leg. 71, 1st Sess., § 118 cmt. (N.Y. 1848); Clark, *supra* note 72, at 17, 21–22, 225; Bilek, *supra* note 71, at 379–81; Clark, *supra* note 76, at 259; Maxeiner, *supra* note 76, at 1272–73; Schwartz & Appel, *supra* note 73, at 1113–14.

⁷⁹ See Loomis et al., *supra* note 78, at § 118 cmt.; Clark, *supra* note 72, at 21–24; Bilek, *supra* note 71, at 381; Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1038 (1982); Maxeiner, *supra* note 76, at 1271, 1273–74; Schwartz & Appel, *supra* note 73, at 1114–17; Weinstein & Distler, *supra* note 76, at 520.

⁸⁰ See Clark, *supra* note 72, at 22–23, 225; Bilek, *supra* note 71, at 380–82; Clark, *supra* note 76, at 259–62; Maxeiner, *supra* note 76, at 1272–74; Schwartz & Appel, *supra* note 73, at 1114.

their actual naked simplicity” would constitute “an averment of law instead of fact” and thus violate the principles of code pleading.⁸¹

The reformers used very specific 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.’”⁸² Similar language was adopted broadly by other code states.⁸³

The codes, however, faced their own problems. For example, because they focused on pleading “facts,” there arose serious “practical difficult[ies] in distinguishing between allegations of ultimate fact . . . and legal conclusions,” which, in turn, resulted in much litigation and the resurgence of technicality.⁸⁴ Commentators, accordingly, began to take issue with code pleading. For example, one writer lamented that code pleading “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.”⁸⁵

These state law developments impacted federal pleading. Prior to the Federal Rules of Civil Procedure, law and equity remained divided in the federal courts.⁸⁶ Equity was governed by

⁸¹ See Pomeroy, *supra* note 74, § 423; Charles E. Clark, *Pleading Negligence*, 32 Yale L.J. 483, 484 (1923); Clark, *supra* note 76, at 261; David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 Ga. L. Rev. 433, 476 (2010).

⁸² Schwartz & Appel, *supra* note 73, at 1115–16 (alteration in original) (citation omitted); *see also* Marcus, *supra* note 81, at 476 (same).

⁸³ Clark, *supra* note 72, at 225; Pomeroy, *supra* note 74, § 402, 411; Clark, *supra* note 76, at 259, 260 n.4, 261 n.11; Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. Pa. L. Rev. 441, 447 (2010).

⁸⁴ Schwartz & Appel, *supra* note 73, at 1116; *accord* Clark, *supra* note 72, at 225–28; Bilek, *supra* note 71, at 381–82 & n.31; Clark, *supra* note 81, at 484; Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 438 (1986); Weinstein & Distler, *supra* note 76, at 520–21.

⁸⁵ Clarke B. Whittier, *Notice Pleading*, 31 Harv. L. Rev. 501, 506 (1918).

⁸⁶ Clark, *supra* note 72, at 31.

the Federal Equity Rules, under which “the code system substantially prevailed.”⁸⁷ 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.”⁸⁸

Efforts at reforming federal civil procedure—a subject with a long and colorful history beyond the scope of discussion here—ultimately bore fruit in the 1930s.⁸⁹ “In 1934, Congress enacted the Rules Enabling Act, authorizing the Supreme Court to promulgate uniform rules governing practice and procedure in the federal courts.”⁹⁰ The Supreme Court then quickly appointed an Advisory Committee to draft the Federal Rules of Civil Procedure.⁹¹

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.”⁹² 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,” based on the philosophy that pleadings should “do little more than sketch the type of battle that is to follow.”⁹³ And, they “studiously avoided using the

⁸⁷ *Id.*; *United States v. United Shoe Mach. Co.*, 234 F. 127, 137 (E.D. Mo. 1916); Arthur R. Miller et al., *Federal Practice and Procedure Civil* § 1218 (3d ed. 2019); Amber A. Pelot, Casenote, *Bell Atlantic Corp. v. Twombly: Mere Adjustment or Stringent New Requirement in Pleading?*, 59 Mercer L. Rev. 1371, 1374 (2008).

⁸⁸ Schwartz & Appel, *supra* note 73, at 1117; Charles B. Campbell, *A “Plausible” Showing After Bell Atlantic Corp. v. Twombly*, 9 Nev. L.J. 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).

⁸⁹ *See* Burbank, *supra* note 79, at 1035–98 (offering a comprehensive history of the federal procedural reform movement).

⁹⁰ Schwartz & Appel, *supra* note 73, at 1117.

⁹¹ Bone, *supra* note 62, at 894.

⁹² Marcus, *supra* note 81, at 439.

⁹³ Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 Tenn. L. Rev. 551, 552 (1939); James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Geo. L. J. 551, 559 (1937).

term[] ‘facts’ . . . which [gave] so much trouble in Code Pleading.”⁹⁴ Rule 8(a) and the other Civil Rules were adopted by the Supreme Court in 1937 and went into effect in 1938.^{95,96}

Not everyone was enamored of Rule 8(a)’s language, 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.’”⁹⁷ The Conference did so, it appears, because it felt that Rule 8(a) had been too liberally construed and should make clear that “ultimate facts” must be pleaded.⁹⁸ That proposal was rejected.⁹⁹

⁹⁴ Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 Va. L. Rev. 261, 263 n.9 (1939); accord *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 575 (2007) (Stevens, J., dissenting); accord *Access to Courts Hearing*, *supra* note 24, at 4–5, 12, 17 (statement of Stephen B. Burbank); Burbank, *supra* note 26, at 115, 117 & n.83; Marcus, *supra* note 81, at 439; Edson R. Sunderland, *The New Federal Rules*, 45 W. Va. L. Q. 5, 12 (1938); Weinstein & Distler, *supra* note 76, at 522.

⁹⁵ See Fed. R. Civ. P. historical note.

⁹⁶ 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, e.g., Clark, *supra* note 93, at 565 (asserting that the model complaint for negligence contained in the Civil Rules, discussed *infra* at notes 231–236 and their accompanying text, “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 Charles E. Clark, *The Handmaid of Justice*, 23 Wash. U. L. Q. 297, 309, 316 (1938) (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 “the model [of pleading under the Civil Rules was] 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 94, at 12; cf. *Access to Courts Hearing*, *supra* note 24, at 4 (statement of Stephen B. Burbank) (“[T]he committee wanted to escape the confinement of . . . common law procedure.”). Indeed, Rule 8(a) was “designed to . . . reduce the pleading requirements to a minimum,” “make[] pleadings relatively unimportant,” Moore, *supra* note 93, at 561, and impose “no fixed and certain rule as to the detail required,” Clark, *supra*, at 316–17.

⁹⁷ *Claim or Cause of Action*, 13 F.R.D. 253, 253 (1952).

⁹⁸ *Id.* at 264–65, 271–75.

⁹⁹ *Twombly*, 550 U.S. at 582–83 (Stevens, J., dissenting); Marcus, *supra* note 81, at 445.

b. 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.¹⁰⁰ As one commentator explained in the 1920s:

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 and unreasonable harshness had been removed from the procedure itself. 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.¹⁰¹

Frustrations with common law criminal pleading—also like on the civil side—led to reform efforts.¹⁰² Consequently, during the 19th century, “many states began statutory reforms to relax certain common-law pleading requirements.”¹⁰³ As part of that movement, several jurisdictions adopted code pleading-like rules to govern indictments. They required, for example, that an

¹⁰⁰ See Robert I. Broussard, *The Short Form Indictment History, Development and Constitutionality*, 6 La. L. Rev. 78, 78–79 (1944); Sam. B. Warner & Henry B. Cabot, *Changes in the Administration of Criminal Justice During the Past Fifty Years*, 50 Harv. L. Rev. 583, 587 (1937); 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, 3 F.R.D. 445, 447 (1944); Imwinkelried, *supra* note 40, 355; George Z. Medalie, *Federal Rules of Criminal Procedure*, 4 Lawyers Guild Rev. 1, 3 (1944); Arthur Vanderbilt, *New Rules of Federal Criminal Procedure*, 29 A.B.A. J. 376, 376–77 (1943).

¹⁰¹ Rollin M. Perkins, *Short Form Indictments and Informations*, 15 A.B.A. J. 292, 292 (1929).

¹⁰² See Meyn, *supra* note 14, at 702, 706.

¹⁰³ *State v. Hunt*, 582 S.E.2d 593,600 (N.C. 2003). Many of these reforms occurred in the mid-1800s. *Id.*; LaFave et al., *supra* note 11, § 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).

indictment contain “[a] statement of the facts constituting the offense, in plain and concise language without unnecessary repetition.”¹⁰⁴

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.”¹⁰⁵ Others suggested that there was little difference between code and common law pleading¹⁰⁶—and, indeed, the code pleading rules were linguistically similar to common law requirements.¹⁰⁷

Some reforms went further, however, and permitted so-called “short-form” indictments.¹⁰⁸ 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.¹⁰⁹ For instance, the American Law

¹⁰⁴ *State v. Patten*, 64 N.E. 850, 851 (Ind. 1902); *see, 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).

¹⁰⁵ Perkins, *supra* note 101, at 293.

¹⁰⁶ *See, e.g.*, Charles A. Willard, *The Seventeenth Century Indictment in the Light of Modern Conditions*, 24 Harv. L. Rev. 290, 293, 295 (1911); Joel Prentiss Bishop, 2 *New Criminal Procedure or New Commentaries on the Law of Pleading and Evidence and Practice in Criminal Cases* § 426 (1896).

¹⁰⁷ *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); *Grattan*, 71 Ala. at 345–46; *Locke v. State*, 3 Ga. 534, 538 (1847); *People v. Gates*, 13 Wend. 311, 317 (N.Y. Sup. Ct. 1835); *Dord v. People*, 9 Barb. 671, 675 (N.Y. Sup. Ct. 1851); *Scroter v. Harrington*, 8 N.C. 192, 193 (1820); *Fouts v. State*, 8 Ohio St. 98, 113 (Ohio 1857); *Lamberton v. State*, 11 Ohio 282, 284 (1842); *Lewis v. State*, 50 Tenn. (3 Heisk.) 333, 336 (Tenn. 1871); *Hardy v. Commonwealth*, 58 Va. 592, 595 (1867); *State v. Seifert*, 118 P. 746, 747 (Wash. 1911); *accord* 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).

¹⁰⁸ LaFave et al., *supra* note 11, § 19.1(c); Warner & Cabot, *supra* note 100, at 588.

¹⁰⁹ LaFave et al., *supra* note 11, § 19.1(c); *see, 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, 300–01 (Mich. 1934); *People v. Bogdanoff*, 171 N.E. 890, 893 (N.Y. 1930); *State v. Domanski*, 190 A. 854, 847 (R.I. 1937); *State v. Solomon*, 71 P.2d 104, 105–07 (Utah 1937).

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—and that proposal was adopted by several states.¹¹⁰ Overall, “[a]t one time, more than a dozen states had authorized some form of short-form pleading.”¹¹¹

Nevertheless, before the Federal Rules, the common law pleading system largely prevailed in the federal courts.¹¹² Despite some federal efforts at reform that tempered the common law’s extremes,¹¹³ 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.”¹¹⁴

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

¹¹⁰ Code of Criminal Procedure §§ 152–54 (Am. Law Inst. 1930); *Streamlining the Indictment*, 53 Harv. L. Rev. 122, 123–24 (1939).

¹¹¹ LaFave, *supra* note 11, § 19.1(c).

¹¹² See, e.g., Robert M. Hughes, *Handbook of Jurisdiction and Procedure in United States Courts* 34 (1904); Orfield’s *Criminal Procedure Under the Federal Rules* §§ 1:4, 7:22 (2019); Cummings, *supra* note 100, at 655; Holtzoff, *supra* note 100, at 124, 448; Medalie, *supra* note 100, at 3; Lester B. Orfield, *The Preliminary Draft of the Federal Rules of Criminal Procedure*, 22 Texas L. Rev. 37, 51 (1943); James M. Shellow & Susan W. Brenner, *Speaking Motions: Recognition of Summary Judgment in Federal Criminal Procedure*, 107 F.R.D. 139, 150, 157 (1985); Willard, *supra* note 106, at 293; Vanderbilt, *supra* note 100, at 377.

¹¹³ 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). 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); accord Stanley F. Brewster, *Federal Procedure* § 1024 (1940); Hughes, *supra* note 112, at 38.

¹¹⁴ Orfield, *supra* note 112, at 51; accord Theodore W. Housel & Guy O. Walser, *Defending and Prosecuting Federal Criminal Cases* § 248 (1938); Cummings, *supra* note 100, at 655; Holtzoff, *supra* note 100, at 124, 448; Medalie, *supra* note 100, at 3; Vanderbilt, *supra* note 100, at 377.

the District Courts should be made uniform as well.”¹¹⁵ And, “[c]onsistent with the conclusions of civil reformers, proponents of criminal procedure reform thought the judiciary best suited to create rules of procedure.”¹¹⁶ Ultimately, “Congress passed legislation that gave the Supreme Court authority to draft rules of criminal procedure.”¹¹⁷ Then, as with the Civil Rules, the Supreme Court “appointed an Advisory Committee of eighteen representative members of the Bar including defense counsel, district attorneys, prosecutors, judges, former judges, and law professors to assist it in its undertaking.”¹¹⁸ The Supreme Court adopted the Federal Rules of Criminal Procedure in 1944, and they went into effect in 1946.¹¹⁹

c. The Relationship Between Civil and Criminal Pleading Requirements

Another aspect of American pleading history important to understanding Rule 7(c) is the fact that, before the Federal Rules, there existed a well-established relationship between civil and criminal pleading standards. That historical relationship distills down to this: 19th and early 20th-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 indictment rules—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.”¹²⁰ And, in 1902, the Supreme Court of Indiana said

¹¹⁵ *Preface to 1 Drafting History*, *supra* note 62, at xi; Meyn, *supra* note 14, at 706–07; *see also* Holtzoff, *supra* note 100, at 122, 447 (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”).

¹¹⁶ Meyn, *supra* note 14, at 707.

¹¹⁷ *Id.*

¹¹⁸ *Preface to 1 Drafting History*, *supra* note 62, at xi.

¹¹⁹ *See* Fed. R. Crim. P. historical note.

¹²⁰ *See* *United States v. Brown*, 24 F. Cas. 1265, 1265 (C.C.D. Ohio 1843) (No. 14,666).

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.’”¹²¹ Similar examples abound.¹²²

In addition, many decisions made clear that criminal pleading standards should be 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 then, in an indictment, which should be specially descriptive of the offense charged.”¹²³ Similarly, a 1902 Missouri appeals court declared that “immemorial law” provided that “greater strictness of averment is required in criminal than in civil pleadings.”¹²⁴ 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

¹²¹ *State v. Patten*, 64 N.E. 850, 851 (Ind. 1902) (citation omitted).

¹²² *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, 1029 (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 (Va. 1867) (Rives, J., dissenting); *accord* Joseph Henry Beale, Jr., *Treatise on Criminal Pleading and Practice* § 93 (1899); Franklin Fiske Heard, *Heard on the Criminal Law: Treatise Adapted to the Law and Practice of the Superior and Inferior Courts in Criminal Cases* 101 (2d ed. 1882); Chitty, *supra* note 107, at *168, 172; Thomas W. Powell, *Analysis of American Law* 637 (1870); Howard C. Joyce & Arthur W. Blakemore, *Treatise on the Law Governing Indictments with Forms* §§ 276, 291, 295 (2d ed. 1924); Frank S. Rice, *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); Meyn, *supra* note 14, at 701–02.

¹²³ *United States v. Schuler*, 27 F. Cas. 978, 979 (C.C.D. Mich. 1853) (No. 16,234).

¹²⁴ *Munchow v. Munchow*, 70 S.W. 386, 387 (Mo. Ct. App. 1902).

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.”¹²⁵ 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.”¹²⁶ 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.”¹²⁷ Again, there are numerous similar examples.¹²⁸

In short, before the Federal Rules, criminal pleadings were regularly viewed as subject to at least as much scrutiny as civil pleadings.

¹²⁵ *Noble v. State*, 59 Ala. 73, 77–78 (1877) (citations omitted).

¹²⁶ *Quinn v. State*, 35 Ind. 485, 487 (1871).

¹²⁷ *State v. Dougherty*, 4 Or. 200, 202–03 (1871).

¹²⁸ 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, 551–52 (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 (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 v. Kellogg*, 36 P. 957, 960–62 (Mont. 1894); *People v. Logan*, 1 Nev. 110, 116 (1865); *Manley v. People*, 7 N.Y. 295, 304 (1852); *Latham v. Westervelt*, 26 Barb. 256, 260 (N.Y. Gen. Term 1857); *Kain v. State*, 8 Ohio St. 306, 317–18 (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 (1834); *Selvey v. Grafton Coal & Coke Co.*, 79 S.E. 656, 657 (W. Va. 1913); *accord* *United States v. Hanna*, 7 C.M.R. 571, 578 (A.F.B.R. 1952); 1 Bishop, *supra* note 106, §§ 320–21 (1895); *Cyclopedia of Law* 129 (Charles E. Chadman, ed. 1908); James Gould et al., *Treatise on the Principles of Pleading* 1 n.b (6th ed. 1909).

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

An additional source central to the meaning of Rule 7(c) is the Rule’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.”¹²⁹ In other words, it suggests a relationship between Rule 7(c) and Rule 8(a).

That relationship, moreover, seems to be 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.”¹³⁰ 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).¹³¹

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.*”¹³² There is no reason to think

¹²⁹ Fed. R. Crim. P. 7(c) advisory committee note.

¹³⁰ *CF.*, Black’s Law Dictionary (3d ed. 1933).

¹³¹ Fed. R. Crim. P. 7(c) advisory committee note.

¹³² Fed. R. Civ. P. 8(e) (1938) (emphasis added).

the cross-reference to Rule 8(a), which, again, is essentially identical to the cross-reference to Rule 8(e)(2) and appears nearby in the same Note, was meant 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.

What is important there is the cited articles. All are used 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.¹³³ Those articles make clear 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.¹³⁴ Indeed, one reason why they wanted to simplify pleadings was to protect defendants by ensuring they could *better* understand the

¹³³ *New Rules on Criminal Procedure in the Federal Courts*, 15 N.Y. St. B.A. Bull. 175, 175 (1943). The exception is the article by Homer Cummings.

¹³⁴ Cummings, *supra* note 100, 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 100, at 123, 447 (“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 100, 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 100, at 376 (“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.”).

allegations against them.¹³⁵ And, in order to avoid the delay caused by motions for bills of particulars, the drafters decided *against* permitting “short-form” indictments.^{136,137}

4. The Drafting History of the Criminal Rules

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

The first critical point 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.

¹³⁵ Cummings, *supra* note 100, 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 and dismal a document.”); Holtzoff, *supra* note 100, at 124, 448 (“Actually, instead of apprizing 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 100, 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.”).

¹³⁶ See Holtzoff, *supra* note 100, at 125–26, 449 (“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 100, 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.”); see also *supra* notes 108–111 and accompanying text.

¹³⁷ Several contemporary articles written by the drafters but not cited in the Advisory Committee Note are in accord. See, e.g., George H. Dession, *The New Federal Rules of Criminal Procedure: II*, 56 Yale L.J. 197, 205–06 (1947); *The*; 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*, 11 N.Y.U. L. Q. 167, 175 (1948); Lester B. Orfield, *The Federal Rules of Criminal Procedure*, 26 Neb. L. Rev. 570, 580 (1947); 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 *Federal Rules of Criminal Procedure with Notes and Institute Proceedings* 157 (N.Y. Univ. Sch. of Law ed., 1946).

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.¹³⁸ 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.”¹³⁹ 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.”¹⁴⁰ And, the first draft 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.”¹⁴¹

The Committee, however, quickly rejected the idea to align the Criminal and Civil Rules. Herbert Wechsler, for instance, noted that such an approach seemed “questionable, because we are dealing with situations in criminal cases in which the dominant policies may well be different.”¹⁴² Arthur Vanderbilt, likewise, questioned the idea because “the problems of criminal law . . . are quite different from some of the problems of civil law.”¹⁴³ Additionally, Alexander Holtzoff stated that “the problems of criminal procedure are so different, the work in criminal cases so different from trying a civil case, that it would be dangerous to tie the criminal rules too strongly to the civil rules.”¹⁴⁴ And, as a result of the discussion on this subject, the drafters voted unanimously to strike the Conformity Rule.¹⁴⁵

¹³⁸ Meyn, *supra* note 14, at 710.

¹³⁹ *Hearing Before the Advisory Committee on Rules of Criminal Procedure* 4 (Sept. 1941) [hereinafter *September 1941 Hearing*], <https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes>.

¹⁴⁰ *Id.* at 4, 6.

¹⁴¹ Fed. R. Crim. P. Rule 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, CIS No. CM-301-17 (Cong. Info. Serv.).

¹⁴² *September 1941 Hearing*, *supra* note 139, at 18.

¹⁴³ *Id.* at 21.

¹⁴⁴ *Id.* at 22.

¹⁴⁵ *Id.* at 23.

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

Mr. Orfield. I used to think the criminal and civil were unlike; but from actual practice I was surprised to find how similar they are.

Mr. Holtzoff. But the attorneys in the courts say they are different.¹⁴⁶

The second critical point is that civil pleading reforms played a foundational role in the development of Rule 7(c) and its “essential facts” language. The Advisory Committee explicitly and repeatedly invoked civil reforms in designing Rule 7(c), and it expressly amended and crafted the Rule to be more like Civil Rule 8(a). Furthermore, although the Committee also drew heavily on criminal code pleading reforms in creating Rule 7(c), it treated the criminal and civil pleading practices it sought to adopt as interchangeable.

Although the 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).¹⁴⁷ It read as follows:

The written accusation shall be a plain and concise statement of (1) the specification of the court’s jurisdiction, (2) the source of the written accusation, namely the grand jury or the United States Attorney, (3) the name of the defendant, (4) the name of

¹⁴⁶ *Id.* at 367.

¹⁴⁷ 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.” See *infra* note 159 and accompanying text.

the alleged commission of the offense, (5) the place of the alleged commission of the offense, (6) the act or acts or the omission of legal duty by which the defendant is alleged to have committed the offense, (7) the criminal intent if any with which the defendant is alleged to have committed the offense, (8) the name of the person injured, if anyone, by the alleged offense, (9) any other fact or allegation which may be necessary because of special requirements, statutory or otherwise, for notice to the defendant and to the court of the act and offense of which the defendant is accused, and (10) the statute, by its official or customary citation, which the defendant is alleged to have violated.¹⁴⁸

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."¹⁴⁹

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."¹⁵⁰ And, Holtzoff suggested that Crane's idea was to adopt a type of simplified indictment that had been used—by a district attorney named James Cropsey—under the New York criminal code pleading provision Medalie had cited, which would say, for example, "that the defendant murdered John Smith by a fatal gunshot wound."¹⁵¹

After some further discussion, the drafters started to invoke civil pleading reform practices, interchangeably with criminal ones, as informing Crane's language. For instance, after Crane

¹⁴⁸ Fed. R. Crim. P. Rule 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, CIS No. CM-301-56-05 (Cong. Info. Serv.).

¹⁴⁹ *September 1941 Hearing*, *supra* note 139, at 198-99.

¹⁵⁰ *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. *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. *People v. Iannone*, 384 N.E.2d 656, 661 (N.Y. 1978); *see* Charles B. Nutting, *The Indictment in New York*, 19 Cornell L.Q. 580, 587 (1934). In 1929, however, it enacted a short-form indictment rule. *Iannone*, 384 N.E.2d at 661. Nevertheless, indictments under the 1881 law remained proper. *Id.* at 661; Nutting, *supra*, at 587. Thus, Medalie was referring to the 1881 law, and Crane was rejecting the 1929 one.

¹⁵¹ *September 1941 Hearing*, *supra* note 139, at 200-02; *James C. Cropsey, Jurist, Dies at 64*, N.Y. Times, June 17, 1934, at 23.

clarified that his proposal did not mean that indictments actually needed to be short, Medalie responded:

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.¹⁵²

He then said that, as to the pleading standard for the Criminal Rules, “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 by saying, ‘a concise statement of facts constituting the offense,’ that is sufficient.”¹⁵³ Medalie also made clear that he viewed such a Rule as requiring the type of “simple indictment” that had been used by Cropsey in New York.¹⁵⁴

Immediately after that, and in apparent perceived harmony with Medalie’s position, the Committee began to discuss whether to adopt a Rule comparable to Civil 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.

¹⁵² *September 1941 Hearing, supra* note 139, at 206.

¹⁵³ *Id.*

¹⁵⁴ *See id.* at 200–02, 205–07.

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.¹⁵⁵

Ultimately, Vanderbilt—serving as Chairman—asked if the Committee was “generally agreed that it is sufficient . . . to provide a paraphrase corresponding to the civil rules?”¹⁵⁶ There was some pushback by other Committee members, who wanted the Rule to be more like the first draft version.¹⁵⁷ Accordingly, and after more deliberation, Vanderbilt explained that “[t]here seem to be two schools of thought”: “[o]ne seems to be content with a mere statement of facts, and the other wants something longer.”¹⁵⁸

Thereafter, the Committee further debated whether the criminal pleading Rule should be based on Rule 8(a) or impose more detailed requirements:

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 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.

...

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?¹⁵⁹

¹⁵⁵ *Id.* at 207.

¹⁵⁶ *Id.* at 209.

¹⁵⁷ *See, e.g., id.* at 209 (“Mr. Seth. I would like to see most of the points in here left in.”).

¹⁵⁸ *Id.* at 214.

¹⁵⁹ *Id.* at 218–19.

Vanderbilt then proposed that the Committee “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?”¹⁶⁰ A brief discussion followed, however, 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.”¹⁶¹

The Committee reconvened the next day, and, when the pleading Rule came up again, the focus shifted back to criminal pleading practices.¹⁶² Vanderbilt raised the issue and asked whether the Committee was ready for a tentative vote.¹⁶³ Then, Medalie—who had consistently invoked civil and criminal code pleading reforms interchangeably—again noted that New York’s criminal code pleading provision contained language similar to Crane’s and said that that provision had permitted “everything from what Cropsey has done to prolix indictments.”¹⁶⁴ Vanderbilt eventually brought the question to a head by calling for a vote on whether to tentatively adopt “[t]his form presented by the reporter or the short form¹⁶⁵ advocated by Judge Crane and just quoted by Mr. Medalie, to be accompanied by a note for the guidance of the district attorney, giving the substance of this rule.”¹⁶⁶ The Committee unanimously voted for Crane’s version.¹⁶⁷

¹⁶⁰ *Id.* at 219.

¹⁶¹ *Id.* at 220.

¹⁶² *Id.* at 335.

¹⁶³ *Id.*

¹⁶⁴ *See id.* at 335–36.

¹⁶⁵ “Short form” here did not mean an indictment merely naming the offense. *Cf. supra* notes 108–111 and accompanying text. Rather, it referred to a short rule repudiating the common law form. The Committee used the term “short form” inconsistently.

¹⁶⁶ *September 1941 Hearing, supra* note 139, at 337–38.

¹⁶⁷ *Id.* at 338. After the Committee tentatively voted on Crane’s language, Robinson produced a new draft of the Rule incorporating that language which largely matched the final version. *See Hearing Before the Advisory Committee on Rules of Criminal Procedure* 244 (Jan. 1942) [hereinafter *January 1942 Hearing*], <https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes> (“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 the new Rule. *See id.* at 244–48.

Later discussions of the Rule, moreover, returned to civil pleading reform practices. 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.¹⁶⁸ Wechsler then clarified that he thought such pure fact pleading was the import of the Committee’s chosen pleading language—precisely because it drew upon civil pleading reform practices. 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.”¹⁶⁹

The third critical point 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 Rule, “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.”¹⁷⁰ 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.”¹⁷¹

¹⁶⁸ *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, CIS Nos. CM-201-01, 204-12, 204-14–15 (Cong. Info. Serv.) [hereinafter *March-April 1942 Hearing*].

¹⁶⁹ *Id.* at 299.

¹⁷⁰ *September 1941 Hearing*, *supra* note 139, at 198.

¹⁷¹ *January 1942 Hearing*, *supra* note 167, 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 139, 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.

The fourth critical point is that the Advisory Committee adopted its “essential facts” language despite receiving feedback that warned of the problems such language could cause—the problems of code pleading Rule 8(a)’s drafters sought to avoid¹⁷²—and that highlighted 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 relating to its pleading Rule. Those responses, however, included serious criticism 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, as to whether that 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.¹⁷³

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 he further advised the Committee to “[c]ompare the Federal Civil Rules where in Rule 8(b) [sic] and elsewhere in connection with pleading there is no reference to pleading ‘facts.’”¹⁷⁴ 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

¹⁷² See *supra* notes 92–94 and *infra* notes 237–256 and accompanying text.

¹⁷³ Comments, Recommendations and Suggestions Concerning the Preliminary Draft of the Federal Rules of Criminal Procedure, in 2 Drafting History, *supra* note 62, at 70–71.

¹⁷⁴ Comments, Recommendations and Suggestions Concerning the Preliminary Draft of the Federal Rules of Criminal Procedure, in 3 Drafting History, *supra* note 62, at 368–69.

allegation of “facts” touches a matter that has given trouble, it seems to me, whenever it has been encountered.¹⁷⁵

In short, the Committee was warned 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 and 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.”¹⁷⁶ And, in arguing for pleading language reminiscent of civil and criminal code pleading, Medalie explained: “That is the simple form of indictment instead of the short form which names only the offense. I understand that the sentiment is against simply naming the offense and later giving the particulars.”¹⁷⁷ Furthermore, after the tentative vote adopting Crane’s Rule, Crane again clarified that the Committee had not approved of short-form indictments.¹⁷⁸ Likewise, at a later point, Robinson said, in response to a statement by Medalie: “But who said the short form indictment or information was going to be adopted or recognized? We haven’t adopted that, have we?”¹⁷⁹ Medalie replied, “I am not saying the short form is adopted.”¹⁸⁰

Additionally, one Committee member affirmatively argued for short-form indictments. 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.”¹⁸¹ Medalie observed, however, that such an indictment was “of course . . . not covered by

¹⁷⁵ *Id.*

¹⁷⁶ *September 1941 Hearing, supra* note 139, at 199–200.

¹⁷⁷ *Id.* at 206–07.

¹⁷⁸ *See id.* at 342.

¹⁷⁹ *January 1942 Hearing, supra* note 167, at 243.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 253.

our discussion at all.”¹⁸² 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.”¹⁸³ Dession pushed back, contending that the prosecutor will “put his allegations of fact in, because he wants to avoid a bill of particulars, too,” and Robinson and Holtzoff both acknowledged that that was true.¹⁸⁴ After that, some members toyed with allowing short-form indictments, but Crane, who was then serving as Chairman, brought the conversation to a close.¹⁸⁵ No change was adopted.¹⁸⁶

Moreover, the development of Rule 7(c)’s Advisory Committee Note shows that Dession’s proposal was rejected. 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.”¹⁸⁷ That language, in substance, prevailed for multiple drafts before the final version.¹⁸⁸ And, the articles cited in the final Note confirm that short-form indictments were prohibited.¹⁸⁹

¹⁸² *Id.* at 255.

¹⁸³ *Id.* at 256.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 256–58.

¹⁸⁶ *Id.* at 258, 275, 278–79.

¹⁸⁷ Fed. R. Crim. P. Rule 8 advisory committee 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, CIS No. CM-901-63 (Cong. Info. Serv.).

¹⁸⁸ See Fed. R. Crim. P. Rule 7(c) advisory committee 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, CIS No. CM-1001-75 (Cong. Info. Serv.); Fed. R. Crim. P. Rule 8(d) advisory committee 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, CIS No. CM-1624-64 (Cong. Info. Serv.); Fed. R. Crim. P. Rule 7(c) advisory committee 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, CIS No. CM-1706-25 (Cong. Info. Serv.).

¹⁸⁹ See *supra* note 136 and accompanying text.

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 directed the Committee to:

Substitute a short form¹⁹⁰ 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.”¹⁹¹

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 form¹⁹² of indictment.”¹⁹³ And, as a result, he made clear that serious thought had been put into the pleading question, saying: “So the effort has been made to decide what the answer is to ‘short.’ Just what is your short form¹⁹⁴ of indictment?”¹⁹⁵ Then, after extensive debate over pleading requirements, Vanderbilt called for a vote but Medalie urged restraint.¹⁹⁶ 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.”¹⁹⁷ That guidance was followed.¹⁹⁸

Additionally, when the Committee met again later to discuss pleading, Robinson emphasized how important that discussion was—albeit in the context of deciding whether indictments should cite the charging statute or regulation. In his words:

I feel pretty strongly about this because it is very fundamental. I feel we have the responsibility of all these requests that have been coming in here about the short

¹⁹⁰ See *supra* note 165.

¹⁹¹ 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, CIS No. CM-1601-05 (Cong. Info. Serv.).

¹⁹² See *supra* note 165.

¹⁹³ *September 1941 Hearing*, *supra* note 139, at 198.

¹⁹⁴ See *supra* note 165.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 214.

¹⁹⁷ *Id.*

¹⁹⁸ See *id.* at 219.

form¹⁹⁹ of indictment. I believe about all we are doing is telling them that the indictment ought to be short, and now again we come back to the question . . . Just how short is “short”?²⁰⁰

Finally, Rule 7(c)’s language was ultimately adopted only after multiple votes,²⁰¹ as well as considerable debate and deliberation.

ii. 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 civil and criminal pleading reforms it relied upon as interchangeable and nowhere indicated that those other reforms 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

¹⁹⁹ See *supra* note 165.

²⁰⁰ *Id.* at 341.

²⁰¹ *Id.* at 338; *January 1942 Hearing, supra* note 167, at 244–48.

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. Rule 7(c), however, followed precisely the opposite path. The first draft of Rule 7(c) was designed to depart from Rule 8(a),²⁰² 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) at the same time as it severed 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, the drafters’ “essential facts” language was highly reminiscent of criminal and civil code pleading requirements, which—at least on the civil side—Rule 8(a) was designed to repudiate. Indeed, the drafters of Rule 8(a) carefully avoided requiring the pleading of “facts” in order to avert the problems of fact pleading under the civil codes—and, after the Civil Rules were adopted, commentators argued that “facts” should be added back in to ensure that facts would be pleaded. Moreover, the drafters of Rule 7(c) were specifically alerted to the problems of fact pleading that might be generated by their “essential facts” language and were informed that Rule 8(a) did not refer to “facts,” but they stayed the course. Further, during drafting discussions, multiple

²⁰² Recall that Robinson viewed pleading as “one place where the civil rules and the criminal rules are different.” *See supra* notes 147, 159 and accompanying text.

Committee members cited civil code pleading as informing its chosen pleading language and supplying the appropriate criminal pleading standard; and, given that the drafters referenced pleading reform practices interchangeably, they did not treat the other practices they relied upon as imposing a standard less stringent than civil code pleading. Finally, even though the “essential facts” language of Rule 7(c) was intended to be more like Rule 8(a) than the more detailed first draft of the Rule, the Committee also at times treated that language as paraphrasing the first draft.

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 reform 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. And, the Committee elected to adopt pleading language reminiscent of the civil and criminal reform codes, thereby incorporating the historical balance that language represented. The drafters did so, moreover, notwithstanding that Rule 8(a) was designed to *move away* from code pleading. And, they rejected more radical reforms, such as the short-form indictment, that might have indicated a desire to upset the traditional pleading balance.²⁰³

Finally, Rule 7(c) was the result of careful deliberation. The drafters recognized that designing a 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 no accident.

²⁰³ Also, several drafters indicated that Rule 7(c) did not change much. *See supra* note 137. That further suggests that 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 92–96 and accompanying text.

In sum, the drafters of Rule 7(c) intended to create a pleading standard at least as stringent as Rule 8(a).²⁰⁴

B. The Original Design of Rule 7(c) Should Control Our Interpretation of the Rule Today

The forgoing discussion shows that Rule 7(c) was designed to be at least as stringent as Rule 8(a). But, why should that control how the Rule is interpreted today? There are several reasons.

First, the intended design of Rule 7(c) offers powerful insights into the meaning of the Rule, especially given the care the drafters exercised in designing it. And, there does not appear to be any *better* source for ascertaining the Rule’s significance.²⁰⁵

²⁰⁴ As noted above, in reaching this conclusion and analyzing its implications for the interpretation of Rule 7(c) today, this Article extends beyond the previous literature. See *supra* notes 10–14 and accompanying text. However, Ion Meyn’s work warrants brief separate discussion here. That is because it too indicates that Rule 7(c)’s drafting history shows that the drafters adopted the civil pleading standard—albeit not in the context of determining the Rule’s proper interpretation—but it describes the history differently and, respectfully, in a problematic way.

For example, Meyn frames the debate over Rule 7(c) as simply a battle of wills between Robinson—who wanted a criminal pleading standard more stringent than the civil standard—and Holtzoff—who “advocated for the full embrace of notice pleading”—and he treats the Rule’s “essential facts” language as stemming merely from “concessions” to Medalie and Crane. See Meyn, *supra* note 14, at 715–16 (“Robinson attempted to find a middle ground, rejecting the formalized and unyielding language of the common law but also building in a minimum baseline of notice. Robinson defended his decision to deviate by a degree from the civil standard: ‘You are stating the grounds for putting a man in the penitentiary. There is nothing comparable to that in the civil rules.’ Holtzoff disagreed and advocated for the full embrace of notice pleading, again praising the civil code’s simplicity. . . . With some concessions to Medalie and Frederick E. Crane, who thought a prosecutor should at least provide a ‘concise statement of facts,’ Holtzoff persuaded others to adopt the civil rule in this instance.” (citations omitted)); *id.* at 716 n.120 (“Holtzoff stated, ‘We could adopt that language and require a short and plain statement of facts constituting the offense with which the defendant is charged.’ Holtzoff may have added the last part—a short and plain statement of facts—to placate a member who advocated for such a rule.”). Meyn also says that “the chairman by fiat ultimately adopted Holtzoff’s version” of the Rule. *Id.* at 716 n.120.

That account, however, is not quite accurate and does not capture the thoughtful and deliberate way in which Rule 7(c) was designed and decided upon. As shown above, the discussion about Rule 7(c)’s contours and language was rich and thorough, and it involved numerous Committee members, not just Robinson and Holtzoff. Moreover, the “essential facts” language was not merely inserted by Holtzoff to appease a few members; rather, that language, in substance, was proposed at the outset of the discussion (by Crane), served as the core point of debate, and its acceptance was a significant choice. Finally, Rule 7(c)’s language was voted on multiple times and was not adopted “by fiat.”

²⁰⁵ In *Ortiz v. Fibreboard Corp.*, the Supreme Court indicated that it had to interpret the Federal Rules by reference to how it “understood [them] upon [their] adoption.” See 527 U.S. 815, 861 (1999); accord *Access to Courts Hearing*, *supra* note 24, at 17–18 (statement of Stephen B. Burbank); Burbank, *supra* note 26, at 117 n.83. And, the first Supreme Court decision interpreting Rule 7(c) was *United States v. Debrow*, which construed the Rule in line with *Resendiz-Ponce*. See 346 U.S. 374, 376–78 (1953). But, before *Twombly* and *Iqbal*, there was little need to consider

Second, the intended design of Rule 7(c) 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.²⁰⁶ Additionally, the Supreme Court has said that “the ‘traditional tools’ of construction”—which apply to the Federal Rules²⁰⁷—include the provision’s history and purpose,²⁰⁸ and courts regularly rely on the history of the Criminal Rules and the drafters’ intent in ascertaining the meaning of the Rules.²⁰⁹ Furthermore, Rule 7(c)’s text is not patently clear as to the level of detail it requires, so resort to a broader set of considerations is warranted and valuable.²¹⁰

Third, nothing eliminates the value of Rule 7(c)’s intended design as an interpretive resource. Had later amendments to the Federal Rules changed the substance of Rule 7(c) or Rule 8(a), then any anticipated balance between them could have been severed. But, those Rules have

the relationship between Rule 7(c) and Rule 8(a), and the Court has never done so. Moreover, the Court’s language in *Ortiz* was countering the idea that it was “free to alter [a Rule] except through the process prescribed by Congress in the Rules Enabling Act.” *See Ortiz*, 527 U.S. at 861–64. Indeed, *Ortiz* contained a lengthy discussion of the intent of the drafters of the Rule at issue. *See id.* at 838–45.

²⁰⁶ *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).

²⁰⁷ *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 Comm’ns Enters., Inc.*, 498 U.S. 533, 540–41 (1991) (treating the Civil Rules as subject to statutory interpretation principles).

²⁰⁸ *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

²⁰⁹ *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 (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 (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 206, at 1155–56, 1165–66 (explaining, in the Civil Rules 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).

²¹⁰ *See, e.g., In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 39 (1st Cir. 2009); *cf. Bus. Guides, Inc.*, 498 U.S. at 540–41 (“As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous.”).

not changed meaningfully since their adoption. Thus, the relationship between Rule 7(c) and Rule 8(a) should remain as strong as ever.

Now, to be sure, *Twombly* and *Iqbal* reimagined Rule 8(a).²¹¹ But, those decisions made clear that, at least by their terms, they were not amending the Rule. Rather, they purported to *reject a misconstruction* of Rule 8(a) that arose out of a misreading of *Conley* and *restore a proper understanding* of the Rule. For example, the *Twombly* Court 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.²¹²

The Court also said that its decision aligned "with th[e] Court's 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."²¹³ Furthermore, it expressly referenced model complaint Form 9—discussed more below²¹⁴—which had accompanied the Civil Rules in effectively the same form since their adoption,²¹⁵ as exemplifying proper pleading.²¹⁶ And, the Court said that, "[i]n reaching [our] conclusion, we do not apply any heightened pleading standard . . . which can only be

²¹¹ Cf. *Access to Courts Hearing*, *supra* note 24, at 18 (statement of Stephen B. Burbank) (treating *Twombly* and *Iqbal* as "judicial lawmaking" rather than "interpretation").

²¹² *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) (emphasis added) (citations omitted).

²¹³ *Id.* at 563 n.8.

²¹⁴ See *infra* notes 231–236 and accompanying text.

²¹⁵ See Fed. R. Civ. P. Form 9 (2006); Fed. R. Civ. P. Form 9 (1938).

²¹⁶ See *Twombly*, 550 U.S. at 565 n.10.

accomplished by the process of amending the Federal Rules, and not by judicial interpretation.”²¹⁷ Lastly, the Court in *Iqbal* expressly nested its “new” 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.”²¹⁸ 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).

Even if we were to treat *Twombly* and *Iqbal* as changing the meaning of Rule 8(a), however, that alone should not eliminate the value of Rule 7(c)’s intended design as an interpretive authority. The drafters of the Criminal Rules, all distinguished legal minds of their day, would not be surprised by the idea that the meaning of legal language could change by way of judicial reinterpretation over time. Accordingly, had the drafters wanted to avoid the possibility of Rule 7(c) shifting in meaning as a function of Rule 8(a)’s interpretive evolution, they could have made Rule 7(c) more static by, *inter alia*, not adopting historically-charged language, declining to insert a cross-reference to Rule 8(a) in the Advisory Committee Note, and/or clarifying that they did not want to preserve the traditional civil-criminal pleading balance. But they did not do any of that. Rather, they carefully associated Rule 7(c) and Rule 8(a) and assumed the risk that Rule 7(c)’s meaning would vary along with that of Rule 8(a).

In sum, the original design of Rule 7(c) should be dispositive as to the meaning of the Rule. It is the strongest source of guidance, an eminently appropriate basis for interpretation, and nothing eliminates its interpretive power. *Twombly* and *Iqbal*, therefore, should set the minimum standard for indictments.

²¹⁷ *Id.* at 569 n.14 (citation and internal quotation marks omitted).

²¹⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

IV. Why Counterarguments Are Unpersuasive

To be sure, there are counterarguments to contend with. Not only do several naturally present themselves, but also courts around the country and the Advisory Committee itself have offered legal arguments against altering the prevailing criminal pleading standard. This Part therefore addresses counterarguments anticipated by the author as well as those that have been raised by the case law and the Advisory Committee.

A. Anticipated Counterarguments

This Part begins with two counterarguments that the author views as some of the strongest against this Article’s position: (1) that the drafters of Rule 7(c) did not intend to require anything like *Twombly* and *Iqbal*’s pleading standard; and (2) that Rule 7(c) does not require prosecutors to specify the “means” of the crime.

i. The Drafters of Rule 7(c) Did Not Intend to Impose a Pleading Standard Like that of *Twombly* and *Iqbal*

The first counterargument is that, even if the drafters of Rule 7(c) meant for the Rule to be at least as demanding as Rule 8(a) and could have anticipated some fluctuation in Rule 8(a)’s meaning, they did not intend for Rule 7(c) to encompass anything like the pleading standard of *Twombly* and *Iqbal*. That is a strong point and is likely true.

When the Criminal Rules were adopted, they were accompanied by “form indictments” meant to illustrate Rule 7(c)’s requirements.²¹⁹ 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

²¹⁹ Fed. R. Crim. P. 7(c) advisory committee note; Fed. R. Crim. P. 58 (1946). The forms have since been abrogated. *United States v. White*, 980 F.2d 836, 844 (2d Cir. 1992).

vehicle, which was moving as interstate commerce, and he then knew the motor vehicle to have been stolen.”²²⁰ And, the form indictment for first degree murder on a federal reservation 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.”²²¹

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 a “Cropsey” indictment that “would allege that the defendant murdered John Smith by a fatal gunshot wound,” and he approved of such indictments.²²² Medalie made statements to a similar effect.²²³ 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.²²⁴ Additionally, in discussing the intersection between “Cropsey” indictments and the proposed “essential facts” language, Crane asserted:

You charged a murder in the first degree, “in that with premeditation and deliberation,” and so forth. That constitutes malice. “That with 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.²²⁵

²²⁰ Fed. R. Crim. P. Form 7 (1946).

²²¹ Fed. R. Crim. P. Form 2 (1946).

²²² *September 1941 Hearing*, *supra* note 139, at 200–02; *January 1942 Hearing*, *supra* note 167, at 249.

²²³ *September 1941 Hearing*, *supra* note 139, at 202–03, 206–07; *January 1942 Hearing*, *supra* note 167, at 255.

²²⁴ *September 1941 Hearing*, *supra* note 139, at 215–17.

²²⁵ *January 1942 Hearing*, *supra* note 167, at 249–50 (emphasis added).

Moreover, in Rule 7(c)'s Advisory Committee Note, the drafters expressly said that “[t]his rule introduces a simple form of indictment, *illustrated by Forms 1 to 11 in the Appendix of Forms.*”²²⁶ And, the articles cited in the Note generally praised the form indictment for 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.”²²⁷ Vanderbilt, likewise, said that it was “an illustration” of “[t]he form preferred by the committee.”²²⁸ Finally, Homer 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.”²²⁹

Nevertheless, the fact that Rule 7(c)'s drafters did not anticipate the Rule embracing the *Twombly-Iqbal* pleading standard does not undercut the force of the foregoing discussion, for several reasons.

First, precisely the same critique can be leveled at Rule 8(a) itself—notwithstanding that *Twombly* and *Iqbal* interpreted that Rule.²³⁰ 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.²³¹ For instance, the form complaint for goods sold and delivered required the plaintiff

²²⁶ Fed. R. Crim. P. 7(c) advisory committee note (emphasis added).

²²⁷ Holtzoff, *supra* note 100, at 125, 449.

²²⁸ Vanderbilt, *supra* note 100, at 377.

²²⁹ Cummings, *supra* note 100, at 655.

²³⁰ *Cf. Access to Courts Hearing, supra* note 24, 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”); *id.* at 5 (Answers to Senator Arlen Specter’s Post-Hearing Questions by Stephen B. Burbank) (“[T]he resulting arbitrary distinctions – between ‘facts,’ ‘threadbare allegations,’ and ‘conclusions’ -- are demonstrably inconsistent with a fundamental premise of the system of notice pleading that the drafters of the Federal Rules intended to implement in 1938.”).

²³¹ Fed. R. Civ. P. 84 (1938). Those forms were initially illustrative, became “sufficient,” and were ultimately abrogated. Fed. R. Civ. P. 84 & advisory committee note (2020) (abrogated).

to plead that “Defendant owes plaintiff ten thousand dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936.”²³² The form complaint for conversion, likewise, had the plaintiff allege that, “[o]n 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.”²³³ And, the form complaint for negligence required the plaintiff to assert, for example, that, “[o]n 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.”²³⁴

The idea that the model complaints and indictments suggest comparably light anticipated pleading standards, moreover, is far from idiosyncratic. Indeed, Charles Clark, “the ‘principal draftsman’ of the [Civil] Rules” and Reporter to the original Civil Rules Advisory Committee,²³⁵ wrote an opinion while serving as a Second Circuit judge in 1956 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.²³⁶

What is more, the drafters of the Civil Rules broadly indicated that they did not expect Rule 8(a) to bar pleading conclusions as opposed to facts—in contrast to the interpretation supplied by

²³² Fed. R. Civ. P. Form 5 (1938)

²³³ Fed. R. Civ. P. Form 11 (1938).

²³⁴ Fed. R. Civ. P. Form 9 (1938).

²³⁵ Campbell, *supra* note 88, at 10 (citation omitted).

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

Twombly and *Iqbal*. For example, during the drafting process, Advisory Committee member George Pepper suggested pleading requirement language that eliminated the word “facts.”²³⁷ 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 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.”²³⁸ 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.²³⁹

A motion to adopt Pepper’s language ultimately carried.²⁴⁰

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, said 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.”²⁴¹ 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 in practice” of “draw[ing] a sharp line between facts, conclusions of law and evidence.”²⁴² Another maintained that he supported

²³⁷ *Proceedings of Meeting of Advisory Committee on Rules of Civil Procedure of the Supreme Court of the United States*, 253, 263, 278, 281–82 (Feb. 1936) [hereinafter *February 1936 Hearing*], <https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/meeting-minutes>.

²³⁸ *Id.* at 264.

²³⁹ *Id.* at 280–81.

²⁴⁰ *Id.* at 302.

²⁴¹ *Id.* at 287.

²⁴² *Id.* at 294.

“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.²⁴³

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.²⁴⁴ 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 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.²⁴⁵

He likewise asserted that “[t]here is no fixed and certain rule as to the detail required” for pleadings, that the function of pleadings “is only to set the general boundaries of the action and to provide the basis for res adjudicata or the binding force of the final judgment to be rendered,” and that, “[i]f you need facts about the case before trial from your opponent, you should get them by deposition and discovery.”²⁴⁶ And, Clark stated: “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.”²⁴⁷ Further, he said, in referring to the form complaint for

²⁴³ *Id.* at 299–300.

²⁴⁴ See *supra* notes 93–96 and accompanying text.

²⁴⁵ Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 450 (1936).

²⁴⁶ Charles E. Clark, *The Bar and the Recent Reform of Federal Procedure*, 25 A.B.A. J. 22, 23 (1939); Clark, *supra* note 96, at 316–17; *accord Access to Courts Hearing*, *supra* note 24, at 5 (statement of Stephen B. Burbank); Clark, *supra* note 93, at 566–67; Charles E. Clark, *The New Federal Rules of Civil Procedure: The Last Phase – Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

²⁴⁷ Clark, *supra* note 93, at 552.

negligence and the sufficiency of a complaint, that a “statement of the act in question in a general way, and with a characterization that it is negligent, is sufficient.”^{248,249}

Similarly, James Moore—Clark’s assistant during the drafting process—maintained, in describing the philosophy underlying the Civil Rules: “Litigation is not an art in writing nice pleadings. It can and should seldom be settled on its merits at the pleading stage unless the parties are agreed upon the facts and want a quick legal answer.”²⁵⁰ Moore also explained 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.”²⁵¹

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 real test of a good pleading under the new rules is not, however, whether the allegations would be deemed good at common law. The test 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.²⁵²

That member likewise contended:

The word “facts” does not appear in the federal rules relating to pleadings, for the reason that that term has proved to be a very troublesome one. There is no workable definition of a “fact.” The proper test of a good allegation should not be that it alleges “facts” but that it gives adequate information. Under the federal rules allegations will be deemed sufficient if they supply whatever information is

²⁴⁸ *Access to Courts Hearing*, *supra* note 24, at 5 (statement of Stephen B. Burbank) (citation omitted).

²⁴⁹ 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.” *Id.* at 17.

²⁵⁰ See Moore, *supra* note 93, at 560.

²⁵¹ *Id.* at 559, 561.

²⁵² Sunderland, *supra* note 94, at 12.

necessary to enable the opposite party to plead or to prepare for trial. The simplicity and lack of technicality contemplated in the drawing of pleadings is illustrated by the model forms which are attached to the new federal rules as an appendix. Some of the allegations in those forms might be technically designated as conclusions of law, rather than facts of the orthodox issuable type, but they fully serve the purpose of giving information and are, therefore, considered suitable.²⁵³

And, 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 because the statement or averment embodies a conclusion which might be elaborated by a more particularized detailing of the facts.²⁵⁴

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

I want you now to consider this provision in Rule 8, as to what you have to put into your paper. 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 plead a technically perfect "cause of action" or that he 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."²⁵⁵

He also testified that "[t]he simplified pleadings provided for . . . give a general view of the controversy" and "are supplemented by the provisions for depositions, discovery and pretrial practice."²⁵⁶

Second, *Twombly* and *Iqbal*'s focus on pleading facts rather than conclusions fits much better with Rule 7(c) than Rule 8(a). Unlike the drafters of the Civil Rules, the drafters of the

²⁵³ 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).

²⁵⁴ *Access to Courts Hearing*, *supra* note 24, at 5 n.10 (statement of Stephen B. Burbank) (citation omitted).

²⁵⁵ *Id.* at 4 (statement of Stephen B. Burbank) (alteration in original) (citation omitted).

²⁵⁶ *Id.* (citation omitted).

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.”

Beyond that, Rule 7(c)’s drafters 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.²⁵⁷ 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.²⁵⁸

And, later, in discussing New York practice and the proposed “essential facts” language, Crane observed:

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.²⁵⁹

Additionally, even Dession, in arguing for a short-form indictment, said, “I suppose we would all agree that before the pleading clearly is finished facts should be set out which cover every substantive detail of an offence,” with “the only question” being “in which paper [the facts of the offense] must all appear.”²⁶⁰

²⁵⁷ See, e.g., *supra* notes 149, 152–153, 155, 158–159, 161, 168–169, 176 and accompanying text.

²⁵⁸ *September 1941 Hearing, supra* note 139, at 202.

²⁵⁹ *January 1942 Hearing, supra* note 167, at 250 (emphasis added).

²⁶⁰ *Id.* at 253, 258.

Furthermore, the drafters made similar statements in the articles cited in Rule 7(c)'s Advisory Committee Note. For example, Medalie said 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.”²⁶¹ Holtzoff, likewise, said 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.”²⁶²

In sum, it may be true that Rule 7(c) was not designed to impose anything like the pleading standard of *Twombly* and *Iqbal*. But, the same can be said for Rule 8(a). And, if *Twombly* and *Iqbal*'s fact-intensive standard has any place at all, it is with Rule 7(c). So, given that Rule 7(c) was designed to be at least as stringent as Rule 8(a), there is no reason why a pleading standard at least as demanding as *Twombly* and *Iqbal* should not govern Rule 7(c) today.

ii. Rule 7(c) Does Not Require Prosecutors to Specify the “Means” of the Crime

A second counterargument is that Rule 7(c) allows—and historically 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,”²⁶³ 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 the case when the means are actually unknown.

²⁶¹ Medalie, *supra* note 100, at 3.

²⁶² Holtzoff, *supra* note 100, at 125–26, 449.

²⁶³ Fed. R. Crim. P. 7(c); Fed. R. Crim. P. 7(c) (1946) (similar).

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, in relevant part, “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.”²⁶⁴ Effectively the same statement now appears in Civil Rule 8(d)(2).²⁶⁵ 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 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.*²⁶⁶

In short, like Rule 7(c), Rule 8 accounts for circumstances in which a party lacks knowledge about his case 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.²⁶⁷

²⁶⁴ Fed. R. Civ. P. 8(e)(2) (1938).

²⁶⁵ See Fed. R. Civ. P. 8(d)(2).

²⁶⁶ Clark, *supra* note 96, at 316 (emphasis added).

²⁶⁷ *Id.* at 317.

Hence, Rule 8, like Rule 7(c), was designed to allow one to plead without full knowledge and leave “means” unspecified. Given that *Twombly* and *Iqbal* govern Rule 8(a) anyway, Rule 7(c)’s “means” provision should serve as no bar to applying a similar pleading standard in criminal cases.

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).²⁶⁸

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 “means” provision should affect the interplay between Rule 8(a) and Rule 7(c).²⁶⁹

B. Counterarguments from the Case Law

The next set of counterarguments comes from the case law. Those counterarguments include: (1) that nothing in *Twombly* and *Iqbal* suggests those decisions were meant to apply to criminal cases; (2) that a criminal defendant challenging the sufficiency of an indictment must establish prejudice to prevail; (3) that a criminal 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

²⁶⁸ Fed. R. Crim. P. 7(c) advisory committee note.

²⁶⁹ In fact, the drafters of Rule 7(c) thought the Civil Rules did 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 168, at 296–97.

7(c) was designed to eliminate technicalities; and (6) that criminal procedure and civil procedure are simply different.

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

The first argument from the case law is that nothing in *Twombly* and *Iqbal* indicates that those decisions were meant to apply to criminal cases.²⁷⁰ That argument is unpersuasive, however, for two reasons. First, the drafters of Rule 7(c) meant the Rule to be at least as stringent as Rule 8(a), meaning that the Supreme Court did not need to discuss criminal cases for a reinterpretation of Rule 8(a) to require a reinterpretation of Rule 7(c). 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.

ii. A Defendant Challenging an Indictment Must Establish Prejudice to Prevail

The second case law 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.²⁷¹ But that argument, too, is unavailing.

Tracing that argument back through the cases cited to support it,²⁷² 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.²⁷³

²⁷⁰ See *supra* note 56 and accompanying text.

²⁷¹ See *supra* note 57 and accompanying text.

²⁷² See *United States v. Castillo Madrigal*, No. 12-cr-62, 2013 WL 12099089, at *2 (W.D. Wis. Jan. 30, 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).

²⁷³ *Hagner*, 285 U.S. at 431–32.

There also existed a similar statute that applied to civil and criminal cases and 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.²⁷⁴

Those statutes were repealed in 1948.²⁷⁵ But, their substance was retained in Criminal Rule 52(a),²⁷⁶ which says that “[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”²⁷⁷

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 stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.²⁷⁸

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.²⁷⁹ 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.”²⁸⁰ 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.”²⁸¹

²⁷⁴ Fed. R. Crim. P. 52(a) advisory committee note.

²⁷⁵ *United States v. Williams*, 203 F.2d 572, 573 (5th Cir. 1953).

²⁷⁶ *Id.*; Fed R. Crim P. 52(a) advisory committee note.

²⁷⁷ 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).

²⁷⁸ Fed. R. Civ. P. 61. Rule 61 remains essentially the same as when originally adopted. *See* Fed. R. Civ. P. 61 (1938).

²⁷⁹ Fed. R. Civ. P. 61 advisory committee note; *see also* *Mims v. Reid*, 275 F.177, 178–79 (4th Cir. 1921) (reciting the similar civil statute).

²⁸⁰ Fed. R. Crim. P. 52(a) advisory committee note.

²⁸¹ *See* Lester B. Orfield, *Two Years of the Federal Rules of Criminal Procedure*, 22 *Temp. L.Q.* 46, 60 n.271 (1948).

Federal courts have also repeatedly concluded that Rule 61 is effectively the same as Rule 52(a). For example, the Fifth Circuit observed that “Civil Rule 61 combines in a single rule the harmless and plain error rules stated in Criminal Rule 52(a) and (b).”²⁸² Likewise, the Third Circuit said that it “d[id] not perceive a clear distinction between the two” Rules.²⁸³ And courts consistently cite the Rules interchangeably or as imposing essentially the same requirements.²⁸⁴ Indeed, if anything, Rule 61 is treated as less forgiving than Rule 52(a).²⁸⁵

Furthermore, Rule 61 applies to pleadings. As explained in *Federal Practice and Procedure* on Rule 61, “[t]echnical errors in pleading usually are treated as harmless and disregarded.”²⁸⁶ Courts have invoked Rule 61 in or connected it to the pleading context as well.²⁸⁷

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 not counter the view that Rule 7(c) should be at least as demanding as Rule 8(a).

²⁸² *Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415, 1424 (5th Cir. 1996).

²⁸³ *McQueeney v. Wilmington Tr. Co.*, 779 F.2d 916, 927 n.17 (3d Cir. 1985).

²⁸⁴ *See, e.g., O’Neal v. McAninch*, 513 U.S. 432, 441 (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); *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, 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).

²⁸⁵ *See, e.g., McQueeney*, 779 F.2d at 925; *Miller et al., supra* note 87, § 2883.

²⁸⁶ *Miller et al., supra* note 87, § 2884.

²⁸⁷ *See, e.g., M.G.B. Homes, Inc., v. Ameron Homes, Inc.*, 903 F.2d 1486, 1489 (11th Cir. 1990); *Dye Constr. Co. v. OSHA*, 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-417, 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-702, 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-66, 2011 WL 3806947, at *2–3 (S.D. Ind. Aug. 26, 2011); *Aretakis v. Durivage*, No. 1:07-CV-1273, 2009 WL 2567781, at *2 (N.D.N.Y. Aug. 17, 2009); *Foote v. Barnhart*, No. 3:06-686, 2008 WL 2756256, at *10 (M.D. Tenn. July 15, 2008); *IQ Grp., Ltd. v. Wiesner Pub’g, LLC*, No. Civ.A. 03-5221, 2005 WL 3544335, at *3 (D.N.J. Dec. 28, 2005); *Mioduszezewska v. Bd. of Educ.*, No. 93 CIV. 3843, 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).

iii. A Defendant Can Obtain a Bill of Particulars

The third argument from the case law is that *Twombly* and *Iqbal* should not be applied to criminal cases because a defendant who wants more detail about his case may seek a bill of particulars.²⁸⁸ But that argument fails too.

First, the drafters of Rule 7(c) designed the Rule to be at least as stringent as Rule 8(a), despite authorizing bills of particulars.²⁸⁹ Thus, the existence of that mechanism should not undermine the intent of the drafters.

Second, the drafters designed the Rule to avoid the need for bills of particulars. Indeed, they specifically rejected short-form indictments to achieve that result.²⁹⁰ Consequently, relying on bills of particulars to treat Rule 7(c) as less demanding than Rule 8(a) would be a particularly egregious deviation from the drafters' design.

Third, bills of particulars have a very limited role in modern practice. Courts have often concluded that the test for whether a bill of particulars should be granted is essentially the same as for whether an indictment is sufficient to survive a motion to dismiss and/or that a bare-bones indictment is enough to obviate the need for a bill of particulars.²⁹¹ And, they have observed that “[m]otions for bills of particulars are seldom employed in modern federal practice.”²⁹² Accordingly, and in line with the drafters' original design, bills of particulars are not an effective mechanism for obtaining information beyond that provided in the indictment. Thus, they cannot be used persuasively to argue that more detail should not be included in an indictment.

²⁸⁸ See *supra* note 58 and accompanying text; Fed. R. Crim. P. 7(f).

²⁸⁹ See Fed. R. Crim. P. 7(f) (1946).

²⁹⁰ See *supra* notes 136, 176–189 and accompanying text.

²⁹¹ See, e.g., *United States v. Vaughn*, 722 F.3d 918, 927 (7th Cir. 2013); *United States v. Moyer*, 674 F.3d 192, 203 (3d Cir. 2012); *United States v. Belardo-Quinones*, 71 F.3d 941, 943–44 (1st Cir. 1995); *United States v. Levine*, 983 F.2d 165, 166–67 (10th Cir. 1992); *United States v. Moody*, 923 F.2d 341, 351 (5th Cir. 1991); *United States v. Chenaar*, 552 F.2d 294, 302 (9th Cir. 1977).

²⁹² See, e.g., *United States v. Sepulveda*, 15 F.3d 1161, 1192 (1st Cir. 1993).

Finally, the Civil Rules have their own “bill of particulars”-like mechanism: the motion for a more definite statement. That motion allows a party to seek “a more definite statement of a pleading . . . which is so vague or ambiguous that the party cannot reasonably prepare a response.”²⁹³ And, Clark did not think such motions should be often granted.²⁹⁴ Given that both the Civil and Criminal Rules contain similar mechanisms for obtaining additional information about the opposing party’s case, the availability of bills of particulars is no basis for treating Rule 7(c) as less stringent than Rule 8(a).²⁹⁵

iv. 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.²⁹⁶

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

²⁹³ Fed. R. Civ. P. 12(e).

²⁹⁴ See Clark, *supra* note 93, at 566.

²⁹⁵ When the Civil Rules were originally promulgated, they also referenced bills of particulars. See Fed. R. Civ. P. 12(e) (1938) (“[A] party may move for a more definite statement or for a bill of particulars of any matter which is not averred with sufficient definiteness or particularity to enable him properly to prepare his responsive pleading or to prepare for trial.”). That reference was quickly eliminated because parties used bills of particulars to try to avoid the discovery rules—which courts prohibited—and “commentators, judges and members of the bar” expressed criticism. *Preuss v. Todd*, 31 F.R.D. 584, 585 (E.D.N.Y. 1963).

Those efforts at avoiding the discovery rules occurred, it seems, because, before the Civil Rules, motions for a more definite statement were used to remedy defects in pleadings and bills of particulars were used “in aid of the trial . . . after issue joined.” *United States v. Schine Chain Theatres*, 1 F.R.D. 205, 207 (W.D.N.Y. 1940); *McKenna v. U.S. Lines*, 26 F. Supp. 558, 559 (S.D.N.Y. 1939). Under the Civil Rules, however, bills of particulars and motions for a more definite statement were treated the same, to clarify the pleadings and not to ascertain evidence or proof. *Byers v. Olander*, 7 F.R.D. 745, 746 (W.D. Pa. 1948); *Schine Chain Theatres*, 1 F.R.D. at 207–08; *McElwain v. Wickwire Spencer Steel Co.*, 1 F.R.D. 177, 177–78 (W.D.N.Y. 1940); *McKenna*, 26 F. Supp. at 559; *Sharp v. Pa.-Reading Seashore Lines*, 1 F.R.D. 16, 17 (D.N.J. 1939); *Alexander Holtzoff*, *Twelve Months Under the New Rules of Civil Procedure*, 26 A.B.A. J. 45, 47 (1940). Since the Criminal Rules took effect, criminal bills of particulars have been used in the same manner. See, e.g., *United States v. Perryman*, 881 F. Supp. 2d 427, 430–31 (S.D.N.Y. 2012); *United States v. Rosenberg*, 10 F.R.D. 521, 523 (S.D.N.Y. 1950). Thus, bills of particulars in criminal cases were and are effectively the same as motions for a more definite statement in civil cases, and the reference to bills of particulars in the original Civil Rules does not change the foregoing discussion.

²⁹⁶ See *supra* note 59 and accompanying text.

entitlement to relief,” devoid of factual adornment.²⁹⁷ 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).²⁹⁸ Moreover, Rule 7(c) adopted the code pleading language that Rule 8(a) had repudiated to liberalize pleading and eliminate the problems of alleging only “facts.” In short, the language of Rule 8(a) does not undermine the foregoing analysis.

v. Rule 7(c) Was Designed to Eliminate Technicalities

The fifth argument that appears in the case law is that Rule 7(c) was designed to eliminate technicalities and ensure procedural simplicity.²⁹⁹ Although that is 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.

vi. Criminal Procedure and Civil Procedure Are Different

Finally, courts maintain that *Twombly* and *Iqbal* should not apply to indictments because criminal procedure and civil procedure are fundamentally different, for example, with respect to discovery burdens and the constitutional protections defendants receive.³⁰⁰ However, the drafters of Rule 7(c) designed the Rule to be at least as stringent as Rule 8(a), and they did so in perspective of the Civil Rules’ discovery provisions and the Constitution. Differences between civil and criminal procedure might well support amending the Criminal Rules to *divorce* Rule 7(c) and Rule 8(a), but they cannot *justify* the pleading standard dichotomy as it stands.

²⁹⁷ Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 n.3, 557 (alteration in original).

²⁹⁸ See Fed. R. Civ. P. 8(a) (1938).

²⁹⁹ See *supra* note 60 and accompanying text.

³⁰⁰ See *supra* note 61 and accompanying text.

C. Counterarguments from the Advisory Committee

The final set of counterarguments comes from the Advisory Committee’s decision to reject Burnham’s 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.

i. Courts Uphold Bare-Bones Indictments

The Committee’s first argument was that criminal pleading practices are set by appellate decisions that uphold bare-bones indictments.³⁰¹ But pleading requirements are actually set by the Criminal Rules, which are then interpreted by courts.³⁰² 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.

ii. Minimal Pleading Is Hundreds of Years Old and Raising the Criminal Pleading Standard Would Be a Return to the Common Law

The second Committee argument was “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.”³⁰³ That argument is odd because it is inconsistent; if minimal pleading is hundreds of years old, then minimal pleading must have been the style of

³⁰¹ See *supra* note 65 and accompanying text.

³⁰² Cf. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) (“[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 and internal quotation marks omitted)).

³⁰³ See *supra* note 65 and accompanying text.

pleading authorized at common law that the argument fears a return to. But, putting that inconsistency aside, the argument is also unavailing.

As a threshold matter, the argument is unconvincing in a broad sense simply because the drafters of the Criminal Rules intended Rule 7(c) to be at least as stringent as Rule 8(a), and Rule 8(a) now requires more than minimal pleading. More specifically, however, there are two additional reasons why it fails.

First, the point that minimal pleading is hundreds of years old 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.³⁰⁴ But, arguments against rethinking the criminal pleading standard based on that ignore the historical balance between criminal and civil pleading standards that treated criminal pleading standards as at least as stringent as civil ones.

That balance, as explained previously, was well established before the Criminal Rules. And, in line with it, courts often indicated that the rule allowing indictments to employ statutory language applied to non-criminal cases. 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

³⁰⁴ 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 (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).

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.”³⁰⁵ 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.”³⁰⁶ There are myriad similar examples.³⁰⁷ Thus, if minimal pleading in criminal cases is hundreds of years old, so too is it in civil cases. Yet that served as no bar to *Twombly* and *Iqbal*.

Furthermore, the Federal Rules did not change the traditional balance between civil and criminal pleading standards. As set out above, the drafters of Rule 7(c) did not intend to upset that balance and wanted the Rule to be at least as stringent as Rule 8(a). And, the drafters of Rule 8(a) sought to minimize pleading requirements and were largely comfortable with conclusory pleading.

Indeed, the traditional civil-criminal pleading balance even appeared regularly in the case law after the Federal Rules became effective. Before *Iqbal*, courts and jurists commonly invoked

³⁰⁵ *Cilley v. United Shoe Mach. Co.*, 152 F. 726, 728–29 (C.C.D. Mass. 1907).

³⁰⁶ *Patrick v. Bd. of Comm’rs*, 181 P. 611, 612 (Kan. 1919) (citation omitted).

³⁰⁷ *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 (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* *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, Law of Remedies for Torts, including Replevin, Real Action, Pleading, Evidence, Damages* 237, 236 n.a (2d ed. 1873); 3 William A. Sutherland, *Treatise on Code Pleading and Practice Also Containing 1900 Forms Adapted to Practice in California, Alaska, Arizona, Idaho, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Other Code States* § 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).

the idea that criminal pleadings should be at least as detailed as civil ones.^{308,309} For example, in 2008, the Eastern District of Michigan explained that, “[l]ike a civil complaint’s ‘notice pleading’ requirement, a criminal indictment is sufficient if it ‘contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend.’”³¹⁰ Likewise, in 2007, the Western District of Missouri concluded:

The pleading requirements in criminal cases go beyond the “notice pleading” that is adequate in civil litigation. Rule 7(c)(1) of the Rules of Criminal Procedure requires “definite” allegations of “facts” constituting the offense charged. While evidentiary details need not be pleaded, the “essential facts” cannot be omitted. Conclusory legalistic pleading will not suffice. Often the law is sufficiently factual in its articulation to allow use of statutory language, but the defendant is entitled to know, quite definitely, what she is accused of doing.³¹¹

And, in 1953, the Eastern District of Arkansas said that, because “it is not necessary for [an] indictment to allege” certain matters, “a fortiori such a requirement should not be made in a civil case.”^{312,313}

³⁰⁸ See, e.g., *United States v. Sanchez*, 269 F.3d 1250, 1311 n.12 (11th Cir. 2001) (en banc) (Barkett, J., concurring); *McCoy v. United States*, 266 F.3d 1245, 1266 n.11 (11th Cir. 2001) (Barkett, J., concurring); *United States v. Staggs*, 881 F.2d 1527, 1543–44 (10th Cir. 1989) (en banc) (Ebel, J., dissenting); *Subin v. Goldsmith*, 224 F.2d 753, 766 (2d Cir. 1955) (Frank, J., dissenting); *United States v. O’Connor*, No. 89 CR 152, 1989 WL 50888, at *1 (N.D. Ill. Apr. 28, 1989); *Brantley v. E.F. Hutton & Co.*, 710 F. Supp. 135, 141 n.9 (E.D. Pa. 1989); *Bradford v. Moench*, 670 F. Supp. 920, 929 n.12 (D. Utah 1987); *Myers v. Rosenberg*, No. 83 C 1342, 1985 WL 585, at *8 (N.D. Ill. Apr. 12, 1985); *United States v. Scheur*, Criminal No. 05-304, 2007 WL 1063301, at *2 (E.D. La. Apr. 3, 2007); see also *United States v. Chagra*, 638 F. Supp. 1389, 1396 (W.D. Tex. 1986) (applying the *Conley* pleading standard to an indictment).

³⁰⁹ To be sure, views were not uniform. See, e.g., *Staggs*, 881 F.2d at 1532 n.6; *United States v. Mavroules*, 819 F. Supp. 1109, 1118–19 (D. Mass. 1993); *United States v. Marchese*, No. 89 Cr. 229, 1991 WL 60338, at *2 (S.D.N.Y. Apr. 11, 1991); Richard A. Brown, *The Double Jeopardy Clause: Refining the Constitutional Proscription against Successive Criminal Prosecutions*, 19 UCLA L. Rev. 804, 827 (1972). But the point is that the traditional civil-criminal pleading balance did not disappear under the Federal Rules.

³¹⁰ *United States v. Hammoud*, 556 F. Supp. 2d 710, 715–16 (E.D. Mich. 2008) (citations omitted).

³¹¹ *United States v. Zwego*, No. 7-7-CR, 2007 WL 1289687, at *2 (W.D. Mo. May 1, 2007).

³¹² *Ketcher v. Sheet Metal Workers’ Int’l Ass’n*, 115 F. Supp. 802, 815 (E.D. Ark. 1953).

³¹³ The traditional civil-criminal pleading balance has even appeared, in a sense, in post-*Twombly-Iqbal* decisions, as some courts have questioned the flipped pleading balance that prevails today. See, e.g., *United States v. Hansen*, ___ F. Supp. 3d ___, 2019 WL 7049954, at *1–2 (D. Utah Dec. 23, 2019); *United States v. Bibbs*, No. 15 CR 578, 2016 WL 4701441, at *3 (N.D. Ill. Sept. 8, 2016); *United States v. Novak*, No. 13 CR 312, 2014 WL 2937062, at *3 (N.D. Ill. June 30, 2014); *United States v. Adcox*, Criminal Action No. 15-36, 2017 WL 2489998, at *4 (W.D. La. June 7, 2017); *United States v. Diallo*, No. 9 CR 858, 2009 WL 4277163, at *2 n.10 (S.D.N.Y. Nov. 24, 2009).

In short, although indictments have long been permitted to use statutory language, that rule historically applied to civil pleadings, it existed comfortably alongside and as part of the traditional civil-criminal pleading balance, and the Federal Rules did not upset that traditional balance. Hence, it is not a basis for subjecting criminal pleadings to less scrutiny than civil ones.

Second, aligning the civil and criminal pleading standards would not be a return to common law criminal pleading unless *Twombly* and *Iqbal* required that. 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], [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.³¹⁴

Twombly and *Iqbal* demand nothing of that sort.

Moreover, 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.³¹⁵

iii. Raising the Criminal Pleading Standard Would Create New Substantive Rights

The Committee’s final argument was that raising the criminal pleading standard would “create new substantive rights, which is beyond the authority of the Rules Committee.”³¹⁶ That argument is unconvincing, however, given that the original design of Rule 7(c) complies with the longstanding 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

³¹⁴ Holtzoff, *supra* note 100, at 124–25, 488.

³¹⁵ As noted above, the drafters of Rule 8(a) did draw on the common law in so far as it allowed for pleading little factual detail. *See supra* note 96. But, flexibility in averment is not what the drafters of Rule 7(c) were trying to escape. *See, e.g.,* Holtzoff, *supra* note 100, at 124, 448 (“The prolix and archaic form of indictment couched in 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 100, at 2 (“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.”).

³¹⁶ *See supra* note 65 and accompanying text.

and restoring the original and 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.³¹⁷ If that were so, every Federal Rule that afforded more procedural protection than the constitutional minimum would be invalid.³¹⁸

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. In other words, civil pleadings are held to much more stringent requirements than criminal ones. That balance between civil and criminal pleading standards, however, is plainly unjustified. 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.

The conclusion is a serious one. It undermines a deeply-entrenched relationship between criminal and civil pleadings that has been accepted by the highest authorities in the land, and it calls for those authorities to seriously rethink their positions. It also means that criminal defendants should receive substantially more information at the outset of prosecutions and possess a greater opportunity for challenging the case against them before trial than they currently do. And, it shows

³¹⁷ See *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).

³¹⁸ *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).

that policy debates over whether the criminal pleading standard should be changed are being fought in the wrong posture. The onus to prove that the criminal pleading standard should be different should be on those arguing that that standard should be *weaker* than the civil standard, not on those urging that those standards should be aligned. Those in the latter group, despite lag in authoritative interpretation, are already right.