

CHARLES E. CLARK AND SIMPLE PLEADING: AGAINST A “FORMALISM OF GENERALITY”

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Pleading, either civil or criminal, should be a practical thing. Its purpose is to convey information succinctly and concisely. In older days the tendency was to defeat this purpose by overelaboration and formalism. Now we should avoid the opposite trend, but of like consequence, that of a formalism of generality.

–Charles E. Clark¹

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¹ United States v. Lamont, 236 F.2d 312, 317 (2d Cir. 1956) (Clark, J.).

INTRODUCTION

In *Ashcroft v. Iqbal*² and *Bell Atlantic Corp. v. Twombly*,³ the Supreme Court moved away from the notice pleading regime that had governed its interpretation of Federal Rule of Civil Procedure 8(a)⁴ for fifty years. The court expressly “retired” the language from *Conley v. Gibson*⁵ 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.”⁶ The Court also expressly expanded the focus of pleading standards from a one-dimensional concern with the level of factual specificity required, to at least a second dimension of plausibility.⁷ As courts and commentators struggle to determine the implications of this change, it is important to put the change into context. Because Rule 8(a)’s requirement of a “short and plain statement” is ambiguous, examining the intent of the drafters of the Federal Rules can help clarify the Rule’s parameters. In particular, the writings of Charles E. Clark, the Reporter for the original Advisory Committee and principal architect of the Federal Rules,⁸ can clarify the goals motivating the Rules’ promulgation. This examination is particularly important given the Court’s recent decision in *Iqbal*, in which it attempted to address pleading standards again in light of the massive disarray that characterized federal courts’ interpretations of *Twombly*.⁹ This Comment argues that by rejecting the rigid

² 129 S. Ct. 1937 (2009).

³ 550 U.S. 544 (2007).

⁴ FED. R. CIV. P. 8(a) (“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.”).

⁵ 355 U.S. 41, 45–46 (1957)

⁶ *Twombly*, 550 U.S. at 562–63 (“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.”).

⁷ *Id.* at 570 (“[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

⁸ See, e.g., William E. Nelson, *Civil Procedure in Twentieth-Century New York*, 41 ST. LOUIS U. L.J. 1157, 1198 (1997) (“[Clark] served as reporter and hence principal draftsman of the Federal Rules.”). Whereas Clark worked on the Advisory Committee with fourteen other established and respected members of the bar, many of whom were “active in progressive legal and political reform,” his role as Reporter gave him “considerable power to shape debate and influence the final product.” Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 81 n.260 (1989).

⁹ See generally Martin H. Redish & Lee Epstein, *Bell Atlantic v. Twombly and the Future of Pleading in the Federal Courts: A Normative and Empirical Analysis* (Northwestern Univ. Sch. of Law Pub. Law & Legal Theory Series, Paper No. 10–16, 2008), available at <http://ssrn.com/abstract=1581481>

generality of notice pleading, the Court has moved towards restoring Clark's vision. Rather than merely reducing the amount of factual detail a plaintiff must furnish in a complaint, above all Clark sought to defeat the rigid formality that historically plagues pleading requirements. He worked to provide a flexible pleading standard in the Federal Rules. However, by first establishing a notice pleading standard in *Conley v. Gibson*, and then inflexibly adhering to it prior to *Twombly*, the Court had implemented the very rigidity Clark warned against—a rigidity of generality.

But this is not to suggest that Clark's vision was entirely clear. While Clark unequivocally rejected rigidity, his writings betray a deep tension. Whereas Clark expressly rejected both rigid formality and notice pleading, he neither clearly nor consistently articulated the pleading standard he envisioned under the Federal Rules of Civil Procedure. Advocates for both heightened pleading standards¹⁰ and notice pleading¹¹ have found support in Clark's writings. This confusion results not only from readers' biases but from a deep tension within the writings themselves. This Comment explores these inconsistencies while discerning what lessons Clark's intent provides in the wake of *Twombly* and *Iqbal*.

To provide a framework for analyzing Clark's writings and the debate around pleading standards, Part I explores the normative values that inform procedural rules and reviews the history of pleading to show that rigid pleading standards often work against those values. Part II examines Clark's writings contemporaneous with the promulgation of the Federal Rules in 1938. His writings reveal contradictions and confusion, but a careful reading of Clark's works demonstrates that he consistently advocated "simple pleading" that provides judges with flexibility and discretion. Clark consistently stated that under this standard a complaint met the requirements of the Rules if it provided sufficient factual detail to allow a court to apply the doctrine of *res judicata* to the matter in dispute and to correctly route the case through the court by indicating if the dispute falls in law or equity. What this means is that Clark did not measure a complaint's sufficiency based on its effectiveness in giving a defendant notice of the basis of the complaint, but by whether it gave a court enough information for the court to do its business.

Part III argues that *Twombly* and *Iqbal* represented a move back towards Clark's vision by reversing the Court's previous endorsements of notice pleading. Notice pleading reduced pleading requirements to a one-

(providing normative and empirical analysis of the broad variation in federal court interpretations of *Twombly*).

¹⁰ See, e.g., Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL'Y 1107, 1126 (2010).

¹¹ See, e.g., Charles B. Campbell, *A "Plausible" Showing After Bell Atlantic Corp. v. Twombly*, 9 NEV. L.J. 1, 11–16 (2008); Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. 627, 639 (2008).

dimensional inquiry into the level of factual specificity plaintiffs must provide in complaints. Because of this limitation, the regime of notice pleading ignored some of the normative goals both pleading and procedure generally seek to further. By rejecting this narrow view of the role of pleading, *Twombly* and *Iqbal* began to restore Clark's vision of a simple, flexible pleading standard. Part 0 concludes.

I. THE PURPOSE AND HISTORY OF PLEADING REQUIREMENTS

Professor William Holdsworth, the great English legal historian, warned that “[o]ne of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable.”¹² This Part shows that the history of civil procedure reveals a cycle of reforms addressing this problem: each reform has sought to simplify procedure but has grown rigid over time.¹³ This rigidity causes the procedural system to become unresponsive to the normative goals procedure seeks to achieve.

Procedure is purposive: it furthers normative goals and protects substantive rights. Professor Martin H. Redish has identified a number of these normative goals in what he calls the “litigation matrix.”¹⁴ As Redish explains, courts use procedure in the service of (1) decisionmaking accuracy, (2) adjudicatory efficiency, (3) political legitimacy, (4) fundamental fairness, (5) predictability, and (6) maintenance of the substantive–procedural balance.¹⁵

Whether courts impose a heightened pleading standard, which requires plaintiffs to provide significant factual detail in their complaints, or a notice pleading standard, which requires little or no detail,¹⁶ largely depends upon which of these values courts wish to promote. For example, a court that emphasizes political legitimacy and fundamental fairness to plaintiffs might choose to employ a system of notice pleading. This system would reduce the ability of pleading requirements to prevent plaintiffs from pursuing substantive rights and having their day in court. On the other hand, a court that emphasizes decisionmaking accuracy, adjudicatory efficiency, and fun-

¹² 2 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 196 (1909). He continues, “It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves.” *Id.*

¹³ See generally Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297 (1938) [hereinafter Clark, *Handmaid*] (discussing the tendency for procedure to grow rigid and interfere with the substantive law).

¹⁴ Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 593 (2001).

¹⁵ *Id.* at 594.

¹⁶ See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 998–1009 (2003) [hereinafter Fairman, *Myth*] (discussing different pleading standards imposed by courts and the level of detail required under each).

damental fairness to the defendant might choose a heightened pleading standard. More detailed complaints may allow courts to assess if there is adequate justification for proceeding to discovery, or if fundamental fairness requires protecting a defendant from what might amount to abusive discovery. Requiring factual specificity may also further judicial efficiency by allowing courts to trim unmeritorious cases from their dockets earlier in the litigation process. As these examples demonstrate, some of the matrix's values cut both ways, such as fundamental fairness. This value is served by ensuring that plaintiffs are able to vindicate their rights by having their day in court, but it is also served by protecting defendants from incurring the cost of discovery for unmeritorious claims.

Either way, a rigid system of pleading that imposes the same pleading requirements for all litigants and all types of cases dictates that the same normative values will receive primacy in all cases. This rigidity limits courts' ability to achieve the competing normative goals of the litigation matrix, whose operative effects—such as demanding more factual specificity in a complaint—may conflict with the procedural requirements of the established system. This tension exists whether the system is rigidly general or rigidly specific. The history and development of pleading, reviewed in this Part, evidence this conflict. Pleading standards were rigidly specific under the common law and code pleading, and this specificity prevented some wronged plaintiffs from vindicating their rights. After the Court's decision in *Conley v. Gibson*,¹⁷ however, pleading became rigidly general and came into conflict with the normative values notice pleading does not account for, such as protecting defendants from abusive discovery costs. By restoring some flexibility to the system, *Twombly*¹⁸ and *Iqbal*¹⁹ provide courts with the ability to adapt pleading requirements as circumstances or cases demand. This flexibility is suggested by the Court's statement in *Iqbal* that courts must use their "judicial experience and common sense" in the "context-specific task" of determining whether "a complaint states a plausible claim."²⁰

A. *The History of Pleading: Common Law and Code Pleading*

Clark was a scholar of the history of procedure.²¹ In his view, the reforms of the code pleading system that preceded the Federal Rules of Civil Procedure were a response to the failures of common law pleading require-

¹⁷ 355 U.S. 41, 45–46 (1957).

¹⁸ 550 U.S. 544 (2007).

¹⁹ 129 S. Ct. 1937 (2009).

²⁰ *Id.* at 1950.

²¹ See Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 47 (1957) [hereinafter Clark, *Big Case*] ("I wish to reiterate this as forcefully and sincerely as I can. I have spent a lifetime studying, teaching, and working in this field and I assert dogmatically that strict special pleading has never been found workable or even useful in English and American law.")

ments; in turn, the Federal Rules were the natural evolution of code pleading, guided by practical experience.²² Thus, to understand what Clark intended the Federal Rules to accomplish, one must understand how he viewed what came before.²³

1. *Common Law Pleading.*—Early English history common law pleadings were informal and delivered orally to the court.²⁴ By the sixteenth century pleadings had become written and formalized, ushering in the era of “special pleading,”²⁵ stiff and complex pleading requirements which prevented many plaintiffs from ever having their day in court. Clark thought written pleadings forced the common law into a “prisonhouse” by eliminating the interaction between the litigants and the judge.²⁶

Two characteristics exemplify the rigid formality of special pleading under the English Common law: the writ system and issue pleading.²⁷ The writ system required a plaintiff to bring his suit under a single correct form of action or have his case dismissed.²⁸ Plaintiffs often found this unmanageable because some writs overlapped, such as trespass and trespass on the case.²⁹ This overlap made it impossible at times to select the one correct writ for borderline cases.³⁰

Issue pleading required parties to work through pretrial averments and denials until they had narrowed the case to a single disputed issue of law or fact.³¹ According to Clark, lawyers exploited these pretrial motions to produce delay through “prolonged paper disputations,” seeking to obtain admissions from opposing counsel without showing their own hands.³² Clark

²² Charles E. Clark, *The Nebraska Rules of Civil Procedure*, 21 NEB. L. REV. 307, 308 (1942) [hereinafter Clark, *Nebraska Rules*]. Although the Rules evolved from previous systems, they still substantially changed earlier procedure. Clark considered the Rules to be a “significant reform, involving the due subordination of civil procedure to the ends of substantive justice.” Clark, *Handmaid*, *supra* note 13, at 297.

²³ See Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 179 (1958) (“I want to say again that the rules in particular parts are not new. They were not intended to be new as such. There was no thought of suddenly developing a system which would be strange to everybody. The idea really was to take modern trends and developments and put them all together.”).

²⁴ See CHARLES E. CLARK, *CASES ON PLEADING & PROCEDURE* 32 (1940) [hereinafter CLARK, 1940 CASEBOOK].

²⁵ *Id.* at 31, 34, 45.

²⁶ *Id.* at 34 (citation omitted).

²⁷ *Id.* at 45–46.

²⁸ Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 449 (1936) [hereinafter Clark, *Proposed Rules*]; CLARK, 1940 CASEBOOK, *supra* note 24, at 46.

²⁹ CLARK, 1940 CASEBOOK, *supra* note 24, at 75. Trespass was roughly analogous to the modern intentional tort, whereas trespass on the case was analogous to negligence. Litigants struggled with which writ to use when the act complained of was intentional but the effect may not have been. *Id.*

³⁰ *Id.*

³¹ *Id.* at 45–46.

³² Charles E. Clark, *Simplified Pleading*, 27 IOWA L. REV. 272, 275 (1942) [hereinafter Clark, *Simplified Pleading*] (“Many of these written pleadings did become highly formalized, as counsel realized

argued that lawyers' energies were better devoted to "the actual work of trial and decision," rather than the "beautifying of the pleadings."³³

In the nineteenth century, the rigid formality of the English common law led to a popular call for reform by citizens who recognized that procedural obstacles denied people access to the courts, and thus worked against fundamental fairness.³⁴ This century-long call for reform was led by the likes of Jeremy Bentham and supported by Charles Dickens through his descriptions of the chancery court in *Bleak House*.³⁵ The reformers put the task to "the great pleading master of the day, Stephen."³⁶ Unfortunately, Stephen and his associates thought the solution was more formality in pleading, not less.³⁷ They created the Hilary Rules of 1834, which became infamous for their rigidity and abstruse formality.³⁸ Under these rules,

the possibilities of extensive allegation followed by affirmation and denial, together with confession and avoidance, replication, rebutter, and surrebutter, as long as anything stood not completely denied.")

³³ 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) [hereinafter Clark, *Underlying Philosophy*].

³⁴ See Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387, 390 (1935) [hereinafter Clark, *Background*]; Clark, *Proposed Rules*, *supra* note 28, at 447.

³⁵ Clark, *Handmaid*, *supra* note 13, at 300; Charles E. Clark, *Stability and Change in Procedure*, 17 VAND. L. REV. 257, 258 (1963).

³⁶ Clark, *Simplified Pleading*, *supra* note 32, at 275.

³⁷ See Clark, *Big Case*, *supra* note 21, at 45.

³⁸ Clark, *Simplified Pleading*, *supra* note 32, at 275–6 & n.5 (noting Holdsworth terms the Hilary Rules a "disastrous mistake," and Sir Frederick Pollock described the result as "bastard formalism" (footnotes omitted)). Clark rarely passed over these events without citing at length the satire inspired by the Hilary Rules, and since it is a good yarn, this Comment will do no less:

The participants in the Dialogue were Baron Surrebutter, a transparent disguise for Baron Parke (later Lord Wensleydale), author of many of the technical rulings of this era, and Crogate, the litigant who came to grief by reason of the replication de injuria in the great case reported in 8 Co. 66. The Baron, newly arrived in Hades, finds it a hopeless endeavor to make Mr. Crogate understand "the necessity and elegance" of the decision in his case. But the irony is most exquisite when they pass to modern times. First the Baron refers to the new procedure in the county courts where in consequence of "an absurd and idle clamour" the common people are allowed to get justice in cases of under twenty pounds without the refinements of special pleading—there dispensed with because of the expense and delay of correct pleading, because neither practitioners could be expected to understand the system properly, and because moreover "in these trifling matters the greatest object is to administer substantial justice in the simplest form and at the least expense." To this Crogate makes the classic response: "Well, in my ignorance I should have thought that would have been the object in great cases as well as small." They then pass to the new rules of pleading (the Hilary Rules), as to which Crogate supposes that as a matter of course they have done away with special pleading. This causes the Baron to exclaim: "Done away with special pleading? Heaven forbid! On the contrary, we adopted it . . . in even more than its original integrity." The Dialogue continues: "And we framed a series of rules on the subject, which have given a truly magnificent development to this admirable system; so much so, indeed, that nearly half the cases coming recently before the Court, have been decided upon points of pleading."

Crogate: You astonish me. But pray, how do the suitors like this sort of justice?

Surrebutter, B: Mr. Crogate, that consideration has never occurred to me, nor do I conceive that laws ought to be adapted to suit the tastes and capacities of the ignorant.

courts dismissed many cases for technical errors before ever reaching the merits.³⁹

2. *Pleading Under the Codes.*—In nineteenth century America, the rigidity of common law pleading spurred statutory reform, known generally as “code pleading.”⁴⁰ Code pleading replaced issue pleading with fact pleading, and replaced the writ system with a single form of action—the civil action.⁴¹ Under fact pleading in the code pleading system, the parties stated the facts and the court applied the law.⁴² Because a plaintiff had only to state the facts on which he based his claim, in theory code pleading allowed complaints so short and simple that “that even a child could write a letter to the court stating his case.”⁴³

Code pleading’s expected simplicity derived from the view that law would operate like syllogistic logic:⁴⁴ the law consisted of a series of major premises.⁴⁵ The parties provided the facts in their allegations, which served as the minor premises. The court would then apply the correct antecedent, producing the correct corresponding conclusion.⁴⁶ For example, the law might provide the major premise that all people who ride horses in an unreasonable manner are negligent. The complaint could allege the minor premise that a person had ridden a horse blindfolded and run over a child. The court could then apply the alleged facts to the law and deduce that the plaintiff had a negligence claim against the rider.

Code pleading’s promise of simplified pleading proved illusory. Clark lamented procedure’s tendency toward formality and complexity,⁴⁷ and he

Clark, *Big Case*, *supra* note 21, at 46 (quoting GEORGE HAYES, CROGATE’S CASE: A DIALOGUE IN THE SHADES ON SPECIAL PLEADING REFORM, *reprinted in* HOLDSWORTH, 9 HISTORY OF ENGLISH LAW 417 (2d ed. 1938)).

³⁹ Clark, *Underlying Philosophy*, *supra* note 33, at 976

⁴⁰ CLARK, 1940 CASEBOOK, *supra* note 24, at 48–49. This system was also known as “reformed pleading.” *Id.*

⁴¹ CHARLES E. CLARK, CASES ON MODERN PLEADING 22 n.12 (1952) [hereinafter CLARK, 1952 CASEBOOK]; Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: II. Pleadings and Parties*, 44 YALE L.J. 1291, 1301 (1935) [hereinafter Clark & Moore, *Pleadings and Parties*].

⁴² See CLARK, 1952 CASEBOOK, *supra* note 41, at 22 n.12; Clark & Moore, *Pleadings and Parties*, *supra* note 41, at 1301.

⁴³ Clark, *Simplified Pleading*, *supra* note 32, at 276; see also Clark, *Underlying Philosophy*, *supra* note 33, at 976 (“One main objective of this system, as is well known, was the statement of allegations in short and simple form, so simple in fact that a layman could understand them.”).

⁴⁴ CLARK, 1940 CASEBOOK, *supra* note 24, at 137–38. A familiar syllogism is the major premise that all men are mortal, the minor premise that Socrates is a man, and the conclusion that Socrates must die.

⁴⁵ *Id.*

⁴⁶ *Id.* An alternative view of the requirements of code pleading is given by the adherents of Baconian Induction. Rebelling against the influence of scientists and logicians, adherents of Baconian Induction advocated for “let[ting] the facts speak for themselves,” because “nature spoke a clear language to him who opened a passive ear.” *Id.* at 135.

⁴⁷ Clark, *Handmaid*, *supra* note 13; Clark, *Simplified Pleading*, *supra* note 32, at 277.

found code pleading to be no exception.⁴⁸ Code pleading's ills came from requiring plaintiffs to state only "ultimate facts" unadulterated by legal conclusions or evidence.⁴⁹ This requirement was "logically indefensible" because no bright line exists between different types of facts.⁵⁰ For example, a person's marital status and ownership of property are facts that can be essential to a complaint but are also legal conclusions.⁵¹

Because of its flawed conceptual underpinnings, Clark found that code pleading led to waste and delay.⁵² Code pleading's failure resulted from two inconsistent objectives: "taking over equity principles of convenience and flexibility" and "lay[ing] down rigid rules that would leave nothing to discretion."⁵³ The difficulties of code pleading foreshadowed the difficulties of notice pleading. Clark argued that code pleading was even less successful than common law pleading.⁵⁴ Despite these problems, Clark embraced the underlying idea of simple pleading requirements, accessible to the layman.⁵⁵ He considered the Federal Rules to be "but code pleading refined in the light of modern experience."⁵⁶

B. Pleading Standards in Supreme Court Decisions

[R]ules of procedure tend to assume a too obtrusive place in the attentions of judges and lawyers—unless, indeed, they are continually restricted to their proper and subordinate role.⁵⁷

Clark noted that procedure tends toward complexity and rigidity, so he advocated regular procedural reform to ensure that procedure continued to serve, rather than hamper, the substantive law.⁵⁸ Prior to *Twombly*,⁵⁹ courts acted as reformers, but their decisions were often at odds. The lower courts repeatedly imposed judge-made heightened pleading standards, which the

⁴⁸ See Clark, *Proposed Rules*, *supra* note 28, at 449–50.

⁴⁹ Charles E. Clark, Comment, *Pleading Negligence*, 32 YALE L.J. 483, 484 (1923) [hereinafter Clark, *Pleading Negligence*].

⁵⁰ Clark, *Proposed Rules*, *supra* note 28, at 450.

⁵¹ Clark, *Pleading Negligence*, *supra* note 49, at 485.

⁵² Clark, *Proposed Rules*, *supra* note 28, at 450 ("[Code pleading] caused more confusion than any possible worth it might have as admonition.").

⁵³ CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 34 (1928) [hereinafter CLARK, CODE PLEADING].

⁵⁴ Clark, *Pleading Negligence*, *supra* note 49, at 484.

⁵⁵ See Clark, *Nebraska Rules*, *supra* note 22, at 308.

⁵⁶ *Id.*

⁵⁷ Clark, *Handmaid*, *supra* note 13, at 297.

⁵⁸ *Id.* at 304 ("Now perhaps the first thing which experience teaches us is that our rules should be continually changed and improved. . . . Even good rules may become a nuisance when lawyers discover how to use them as instruments of delay."); Clark, *Simplified Pleading*, *supra* note 32, at 277 ("[A]ll rules of procedure or administration tend to become formalized and rigid and need to be checked regularly with their objectives and in the light of their present accomplishments.").

⁵⁹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Supreme Court struck down as too restrictive.⁶⁰ Despite the Court's admonitions before *Twombly*, lower courts continued to regularly attempt to advance competing normative values that compose the litigation matrix⁶¹ by imposing heightened pleading standards for certain types of cases.⁶² Unfortunately, the Court's efforts engendered their own problems, establishing a regime that allowed more general pleading but was no less rigid.⁶³ This Part examines the Supreme Court's pre-*Twombly* pleading precedents and demonstrates that these cases established a "formalism of generality."⁶⁴

1. *Conley v. Gibson*.—While the Court had interpreted the Federal Rules as establishing notice pleading in an earlier holding,⁶⁵ the paradigmatic notice pleading case is *Conley v. Gibson*.⁶⁶ In *Conley*, black members of the Brotherhood of Railway and Steamship Clerks and its Local Union No. 28 alleged that their employer, the Texas and New Orleans Railroad, had discriminated against them.⁶⁷ They alleged that the railroad claimed to have eliminated the positions of forty-five black employees, when in reality it had either filled the positions with white employees or demoted black employees.⁶⁸ The plaintiffs sought help from their union but claimed that the union "did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees."⁶⁹

The lower court granted the union's motion to dismiss for lack of subject matter jurisdiction, but the Supreme Court reversed, and considered and rejected the defendant's other arguments for dismissal, including rejecting

⁶⁰ See *Swierkiewicz v. Sorema*, 534 U.S. 506, 515 (2002) ("A requirement of greater specificity for particular claims is a result that 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" (quoting *Leatherman v. Tarrant County Narcotics Intelligence*, 507 U.S. 163, 168 (1993))); *Leatherman*, 507 U.S. at 168 ("Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."); *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) ("[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.").

⁶¹ See Redish, *supra* note 14 and accompanying text.

⁶² See *infra* Part I.C.

⁶³ See *infra* Part I.B.2.

⁶⁴ *United States v. Lamont*, 236 F.2d 312, 317 (2d Cir. 1956) (Clark, J.).

⁶⁵ *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) ("The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition–discovery process with a vital role in the preparation for trial.").

⁶⁶ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

⁶⁷ *Id.* at 42–43.

⁶⁸ *Id.* at 43.

⁶⁹ *Id.*

the propriety of dismissal for failure to state a claim.⁷⁰ In the part of the opinion that was the rallying cry of notice pleading for the next fifty years,⁷¹ the Court announced 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.”⁷² Read as a whole and in light of the factual detail of the complaint, this language seems likely to have been hyperbole: far from being barren of detail, the complaint in *Conley* delineated the circumstances of the employees’ removal and the union’s failure to help, along with allegations about the union’s other discriminatory acts.⁷³ The Court concluded that “all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant *fair notice* of what the plaintiff’s claim is and the grounds upon which it rests,” which the Court termed “notice pleading.”⁷⁴ Despite this last comment, the Court’s “no set of facts” language proved to be the foundation of notice pleading.⁷⁵

Conley’s “no set of facts” language was fundamental to the modern understanding of notice pleading, at least as it was expressed in the rhetoric of the courts. As noted below, the drafters had rejected the term “notice pleading,” and the term gained prominence only after it was used by the Supreme Court in *Conley*.⁷⁶ Prior to that, federal courts had used the term

⁷⁰ *Id.* at 44. The Union moved to dismiss on three grounds: failure to join an indispensable party, lack of subject matter jurisdiction, and failure to state a claim. The court below granted the motion to dismiss for lack of jurisdiction and was affirmed on that ground on appeal. *Id.* at 43–44.

⁷¹ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 577–78 (2007) (Stevens, J., dissenting) (re-viewing *Conley*’s central place in pleading precedents).

⁷² *Conley*, 355 U.S. at 45–46.

⁷³ See Richard L. Marcus, *Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 434 n.8 (1986) (“Plaintiffs alleged, for example, that the defendant union maintained two separate locals, one for whites and the other for blacks, providing inferior representation to the black local.” (citing Plaintiffs’ Compl. ¶¶ VI, VII, Transcript of Record at 8–11, *Conley*, 355 U.S. 41 (1957) (No. 7))); Redish & Epstein, *supra* note 9, at 42 (“If the allegation that the plaintiffs’ union made no efforts on plaintiffs’ behalf despite the fact that they all had been replaced by white workers was not in and of itself sufficient to make a reasonable observer suspect of defendant’s behavior, the complaint also alleged a history of past discriminatory acts on the part of the union.” (footnote omitted)).

⁷⁴ *Conley*, 355 U.S. at 47 (emphasis added). While *Twombly* retired *Conley*’s “no set of facts” language, 550 U.S. at 563, it employed the “grounds upon which it rests” language to explain the standard it imposed. 550 U.S. at 555.

⁷⁵ Notice pleading is “a system in which the pleading, such as it is, simply makes a very general reference to the happening out of which the case arose and no attempt is made to state the details of the cause of action.” Charles Alan Wright, *Modern Pleading and the Pennsylvania Rules*, 101 U. PA. L. REV. 909, 926 (1953).

⁷⁶ 355 U.S. at 47. Other commentators have noted this trend, too. See, e.g., Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 942–43 (1990) (“The rules do not include, define, or even refer to ‘notice,’ nor did the draftsmen use the term in their comments to the rules or in collateral commentary. The term appears to have rooted in procedural parlance after the Supreme Court referred to modern practice as ‘simplified notice pleading.’” (quoting *Conley*, 355 U.S. at 47) (quotation marks omitted)).

only a handful of times,⁷⁷ and several of those uses distinguished notice pleading from what the Rules required.⁷⁸ After *Conley*, however, courts' use of the term increased exponentially.⁷⁹

2. *Supreme Court Notice Pleading Decisions After Conley.*—In 1993, the Court returned to pleading standards in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*.⁸⁰ In this case, the district court had imposed a “heightened pleading standard” for a civil rights claim alleging municipal liability, as Fifth Circuit standards required.⁸¹ The Supreme Court rejected the district court’s use of a heightened pleading standard.⁸² Invoking the canon of statutory construction *expressio unius est exclusio alterius*,⁸³ the Court explained that because Rule 9(b) enumerates the only exceptions to Rule 8(a), courts could not impose a heightened pleading standard for those claims not explicitly included in Rule 9(b).⁸⁴

Despite the Court’s holding in *Leatherman*, lower courts continued to impose heightened pleading standards for certain causes of action, including civil rights cases.⁸⁵ Consequently, the Court returned to pleading standards a decade later. In *Swierkiewicz v. Sorema N.A.*,⁸⁶ the Court addressed an employment discrimination case in which the district court had applied a heightened pleading standard.⁸⁷ The district court had dismissed the com-

⁷⁷ On August 1, 2010, a Westlaw query in the allfeds database revealed twenty federal cases before *Conley* that used the term “notice pleading” (*Conley* was decided on November 18, 1957).

⁷⁸ See *United States v. Lamont*, 236 F.2d 312, 317 n.8 (2d Cir. 1956) (“‘[N]otice pleading’ [was] a characterization never accepted or approved by the Advisory Committee on Rules of Civil Procedure.”); *Sandidge v. Rogers*, 156 F.Supp. 286, 290 (S.D. Ind. 1957) (“It is elementary that in order to state a cause of action under the Anti-Trust Laws notice pleading, or the pleading of conclusions is insufficient but that the elements of the action must be alleged clearly, concisely, and particularly and factually.”); *Curtis v. Loew’s Inc.*, 20 F.R.D. 444, 447 (D.N.J. 1957) (“The complaint in the case at bar is not ‘notice pleading,’ but a very comprehensive narrative and catalog of acts, conditions and consequences extending over a period of time . . .”).

⁷⁹ See Fairman, *Myth*, *supra* note 16, at 988 n.4 (“As of May 27, 2003, a Westlaw query of ‘notice pleading’ in the Allfeds database yielded 5312 cases invoking the phrase. The phrase was used in 60 cases in the decade of the 1960s, 290 cases in the 1970s, 984 cases in the 1980s, and 2621 cases in the 1990s. So far this decade, ‘notice pleading’ has been recited by the federal courts in 1278 cases.”). As of September 5, 2010, this same query returns over 10,000 cases using the term “notice pleading” since 2000. Of those, 5791 predated *Twombly*.

⁸⁰ 507 U.S. 163 (1993).

⁸¹ *Id.* at 165.

⁸² *Id.*

⁸³ “A canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative.” BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

⁸⁴ *Leatherman*, 507 U.S. at 168. Rule 9(b) provides: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” FED. R. CIV. P. 9(b).

⁸⁵ See Fairman, *Myth*, *supra* note 16, at 1002–04.

⁸⁶ 534 U.S. 506 (2002).

⁸⁷ *Id.* at 509.

plaint for failing to provide facts supporting a prima facie case of discrimination, and the Second Circuit affirmed.⁸⁸ The Supreme Court reversed.⁸⁹ Quoting *Leatherman*, the Court reiterated its prohibition against court-imposed heightened pleading standards.⁹⁰

C. Lower Court Behavior Under Notice Pleading: Battling the Restraints of Rigid Generality

The rigid generality of notice pleading that governed before *Twombly* failed to advance a number of the normative goals that compose the litigation matrix, the values underlying procedural requirements.⁹¹ This failure prompted lower courts to pay lip service to the rhetoric of notice pleading while actually imposing heightened pleading standards.⁹² Whereas *Conley*'s interpretation of Rule 8(a), reinforced by *Leatherman* and *Swierkiewicz*, should have forever laid court-imposed heightened pleading standards to rest,⁹³ pre-*Twombly* courts persisted in requiring that plaintiffs provide factual detail for certain types of cases, including antitrust, RICO, civil rights, and defamation claims.⁹⁴

Courts may require pleading specificity for a number of reasons, including protecting defendants, limiting disfavored actions, and trimming dockets.⁹⁵ These motives overlap, and all share the goal of revealing the merits of a case at an early stage of the litigation in order to eliminate frivolous suits. Pursuing this goal was forbidden under the rigid generality of notice pleading. These motives also correspond to some of the values of the litigation matrix, namely fundamental fairness, adjudicatory efficiency, and decisionmaking accuracy.⁹⁶ This section will examine how courts defied the strictures of notice pleading in pursuit of each of these values prior to *Twombly*.

First, judicial concerns about fundamental fairness prompted courts to protect defendants through heightened pleading standards.⁹⁷ These efforts

⁸⁸ *Id.*

⁸⁹ *Id.* at 515.

⁹⁰ *Id.* at 512–13.

⁹¹ See *supra* note 14 and accompanying text.

⁹² Fairman, *Myth*, *supra* note 16, at 988 (“To be sure, federal courts recite the mantra of notice pleading with amazing regularity. However, their rhetoric does not match the reality of federal pleading practice. Sometimes subtle, other times overt, federal courts in every circuit impose non-Rule-based heightened pleading in direct contravention of notice pleading doctrine.” (footnote omitted)).

⁹³ See *supra* note 60 and accompanying text.

⁹⁴ Fairman, *Myth*, *supra* note 16 (performing an empirical study in 2003 that shows courts in all circuits require heightened pleading standards for some types of cases, such as antitrust, RICO, civil rights, and defamation).

⁹⁵ See *id.* at 1060; Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1767 (1998).

⁹⁶ See Redish, *supra* notes 14–15.

⁹⁷ See Fairman, *Myth*, *supra* note 16, at 1059–60.

took two forms: preventing strike suits and protecting the defendant's reputation.⁹⁸ In a strike suit, the mere burden and cost of litigation is sufficient to force a defendant to settle, regardless of the merits of the case.⁹⁹ These suits are more likely when a "combination of a claim that is easy to allege yet risks voluminous discovery" permits the plaintiffs to engage in abusive discovery that drives up litigation costs, forcing defendants to settle.¹⁰⁰ In the pre-*Twombly* era, courts also sought to protect the defendant by limiting claims that could damage the defendant's reputation, such as securities fraud and RICO claims.¹⁰¹

Second, courts before *Twombly* required greater specificity for some claims because they desired adjudicatory efficiency: they wished to trim their dockets of unmeritorious claims at an earlier stage.¹⁰² Facing the pressures of the litigation boom, courts used heightened pleading standards in order to resolve more cases on the pleadings, thereby lightening their caseloads.¹⁰³ The demands of complex litigation, which Clark dubbed "Big Cases,"¹⁰⁴ consume more judicial resources, so eliminating unmeritorious instances of these claims earlier in the process would be especially effective in trimming dockets.

Third, courts used heightened pleading standards to limit disfavored claims.¹⁰⁵ This motive paralleled courts' desire to protect defendants and to further adjudicatory efficiency because a claim's potential to injure a defendant's reputation was a common reason for disfavor.¹⁰⁶ Additionally, judicial concern for adjudicatory efficiency led courts to disfavor claims that proliferated in the litigation boom, such as civil rights, securities fraud, and antitrust claims.¹⁰⁷

These reasons for imposing heightened pleading standards in "Big Cases" shared several common traits: each sought to address areas of law that had experienced enormous growth in the litigation boom,¹⁰⁸ and each assumed courts' ability to address the merits of a case at an early stage, in order to eliminate frivolous suits by revealing their defects in the pleadings.¹⁰⁹ But eliminating cases earlier in the proceeding would require that a court have more information to ensure decisionmaking accuracy. This ne-

⁹⁸ See *id.* at 1060.

⁹⁹ See Marcus, *Revival*, *supra* note 73, at 479.

¹⁰⁰ Fairman, *Myth*, *supra* note 16, at 1060.

¹⁰¹ See *id.*

¹⁰² Marcus, *Revival*, *supra* note 73, at 449.

¹⁰³ See *id.* at 445–46.

¹⁰⁴ See Clark, *Big Case*, *supra* note 21, at 48.

¹⁰⁵ Marcus, *Revival*, *supra* note 73, at 471.

¹⁰⁶ See *id.* at 472.

¹⁰⁷ Cf. *id.* at 471–73 (arguing that such claims should not be disfavored because they serve important social justice functions).

¹⁰⁸ See *id.* at 450.

¹⁰⁹ See *id.* at 436.

cessity led courts to require more factual detail in complaints. Thus, courts maintained heightened pleading standards for certain types of cases despite contrary Supreme Court precedent because they recognized that rigid notice pleading ignored the competing values of fundamental fairness to defendants, decisionmaking accuracy, and adjudicatory efficiency. These values proved so compelling to lower courts that they rebelled against notice pleading's formalism of generality.

D. *Twombly and Iqbal: Moving away from Notice Pleading*

Fifty years after *Conley*, the Court seemed to end or cut back its rigid imposition of notice pleading with *Twombly* and *Iqbal*. A thorough analysis of these cases is beyond the scope of this Comment,¹¹⁰ but the Court expressly “retired” *Conley*’s “no set of facts” language.¹¹¹ The Court also expressly expanded the focus of pleading standards from a one-dimensional concern with the level of factual specificity required to provide a defendant with notice of the claim, to at least a second dimension of plausibility.¹¹²

This Part has established the historical and normative context for examining the work of Charles E. Clark and the drafters of the Federal Rules of Civil Procedure, and what became of their efforts in the federal courts. The next Part examines the work of the drafters, in particular Clark’s writings, to discern what the Rules were intended to accomplish and how they were meant to be read.

II. CHARLES E. CLARK AND THE REQUIREMENTS OF PLEADING UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

A desire to eliminate the rigidity that characterized pleading under the common law and the codes animated Clark’s vision for the Federal Rules.¹¹³ At the time of drafting, Clark, the chief architect and spokesperson for the Federal Rules, forcefully advocated simplified pleading. But his views evolved and he failed to argue consistently about the purpose and requirements of pleading under Rule 8(a). This Part explores the views and tensions in Clark’s writings. First, Part II.A briefly looks at the inspirations for

¹¹⁰ Numerous commentators have weighed in on the meaning of these cases, which have generated a mass of confusion. See generally Redish & Epstein, *supra* note 9 (providing a normative and empirical study of the broad confusion *Twombly* produced among courts and commentators).

¹¹¹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) (“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.”).

¹¹² *Id.* at 570.

¹¹³ See, e.g., Clark, *Handmaid*, *supra* note 13; Clark, *Simplified Pleading*, *supra* note 32.

the Rules. Part II.B shows that Clark consistently argued for simple and flexible pleading. He intended the Federal Rules to reduce or eliminate the waste and delay of pretrial motions and to deter the lawyering games formal pleading requirements encouraged.¹¹⁴

Part II.C shows that Clark consistently argued that a sufficient complaint must both distinguish the matter of the claim so that a court can apply the doctrine of *res judicata* and identify the type of claim for routing as a matter of law or equity. Despite his consistency about these two purposes of pleading, Clark only occasionally mentioned the notice-providing function of complaints. He also expressly rejected the idea that the Rules were meant to establish a system of notice pleading.

Parts II.D through II.G examine the deep tensions in Clark's writings about the amount of factual detail complaints should have. Around the time the Advisory Committee was drafting the Rules, Clark supported varying pleading requirements and giving judges discretion to shape the requirements of complaints. In the decades after the Advisory Committee promulgated the Rules, Clark increasingly advocated the opposite position: all complaints under Rule 8(a) should be held to the same standard, regardless of the nature of the case. This later position conflicted with his argument against a "formalism of generality."¹¹⁵

A. *The Antecedents of the Federal Rules*

As noted above, Clark believed that the Federal Rules were the natural evolution of the code pleading system guided by practical experience.¹¹⁶ Clark also admired elements of other systems, such as the Uniform Equity Rules of 1912 (UER) and the English practice of allowing judges to decide whether to entertain motions to dismiss complaints.¹¹⁷ He lauded both of these systems' emphases on simple pleading and judicial discretion.

Before the Federal Rules existed, the Conformity Act required federal courts to use state procedure when sitting as courts of law.¹¹⁸ When sitting in equity, however, federal courts followed a uniform procedure under the UER.¹¹⁹ Clark thought the UER provided a model for the Federal Rules¹²⁰ because the UER was "substantially based on the best procedure in England

¹¹⁴ See *supra* note 32 and accompanying text.

¹¹⁵ *United States v. Lamont*, 236 F.2d 312, 317 (2d Cir. 1956).

¹¹⁶ See *supra* note 22 and accompanying text.

¹¹⁷ See *infra* notes 124–126 and accompanying text.

¹¹⁸ Under the Conformity Act, federal procedure conformed "as near as may be" to the procedure of the state where the federal court was located. Act of June 1, 1872, ch. 255, § 5, 17 Stat. 197, Rev. Stat. § 914 (1878), 28 U.S.C. § 724 (1934), *superseded by* Rules Enabling Act of 1934, 28 U.S.C. §§ 2071–77 (2006).

¹¹⁹ See *id.*; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 953 (1987).

¹²⁰ Clark & Moore, *Pleadings and Parties*, *supra* note 41, at 1299.

and America and therefore in purpose and in exact words closely modeled on the existing code practice.¹²¹ Clark especially admired that the UER allowed simple pleading, permitted liberal amendment of the pleadings, and required courts to disregard errors unless they affected the substantial rights of the parties:¹²²

The rules providing for the abrogation of technical forms, and for free amendment, the simple provisions for stating the case in the complaint, the abolition of demurrers and pleas, the explicit provisions as to the answer, with provisions for the filing of as many defenses in the alternative or regardless of consistency as the defendant has—all these and the other accompanying rules represent about the best there is in pleading today.¹²³

Clark also admired the English practice, which he claimed the Rules “substantially adopted.”¹²⁴ He remarked that the English system “aims to do away with a series of useless hearings not on the merits and to cut short all dilatory preliminary sorties and assaults.”¹²⁵ After the Rules were enacted, Clark advocated replacing Rule 12(b)(6) with the English practice of allowing judges, on request or *sua sponte*, to decide if a preliminary hearing would dispose of part or all of the action.¹²⁶ Clark regarded the discretion this provided a judge to refuse to hear a motion to dismiss as superior to the Federal Rules because it enabled courts to prevent inefficient pretrial delay due to lawyering games.¹²⁷

B. *The Rules as a System of Simple and Flexible Pleading*

Clark’s study of the history of procedure convinced him that procedure trends toward formalism.¹²⁸ He was concerned that the formalism of common law and code pleading produced costly and drawn-out pretrial proceedings.¹²⁹ These costs included time, money, and injustice.¹³⁰ Formal pleading requirements, he argued, “lead[] not merely to a waste of

¹²¹ Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 452 (1934) [hereinafter Clark, *Challenge of the Rules*].

¹²² Clark & Moore, *Pleadings and Parties*, *supra* note 41, at 1300–01.

¹²³ Clark, *Challenge of the Rules*, *supra* note 121, at 456.

¹²⁴ Charles E. Clark, *The Texas and the Federal Rules of Civil Procedure*, 20 TEX. L. REV. 4, 13 (1941) [hereinafter Clark, *Texas Rules*]. The federal rules seem to have many fathers.

¹²⁵ *Id.*

¹²⁶ Clark, *Simplified Pleading*, *supra* note 32, at 284–85.

¹²⁷ Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 568 (1939) [hereinafter Clark, *Fundamental Changes*] (decrying wasteful “sham battles” and “preliminary skirmishes”). Clark thought a “strong-minded” judge could read Rule 12(d) as permitting “exactly the English system,” but recognized that this was unlikely. *Id.* at 568–69.

¹²⁸ Clark, *Handmaid*, *supra* note 13, at 297.

¹²⁹ See Clark, *Simplified Pleading*, *supra* note 32, at 274.

¹³⁰ *Id.*

time in attempting to pursue the illusion of pleading certainty, but often to a denial of justice to the client for the mistake of his lawyer.¹³¹

Consequently, the drafters designed the Federal Rules to be a “simple and flexible system of procedural steps wherein the merits of the case are at all times stressed.”¹³² The rules of pleading were to “provide for an extremely simple method of setting forth the issues in the case under the general control and within the discretion of the trial judge, with no detailed or formalistic allegations or denials required or expected.”¹³³ The pleadings were “not the place to obtain particularization of the case.”¹³⁴ Thus, Rule 8(a) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹³⁵ Clark believed that the complaint should state the plaintiff’s theory of the case, but left it to the plaintiff’s discretion what detail to provide.¹³⁶ This flexibility could avoid the formality that previous systems had demonstrated.

C. *The Purposes of Complaints Under Rule 8(a)*

1. *Res Judicata and Routing the Case.*—Examining the purpose of pleading reveals the type and amount of detail a plaintiff must include in a complaint under the Rules “simple pleading” standard. Clark consistently articulated two purposes for pleading. First, a complaint should provide sufficient identifying facts for *res judicata*, allowing courts to establish if final judgment already had been rendered on a matter.¹³⁷ Second, a complaint

¹³¹ *Id.*; see also Charles E. Clark, *The Bar and the Recent Reform of Federal Procedure*, 25 A.B.A. J. 22, 23 (1939) [hereinafter Clark, *Bar and the Rules*] (“[Factually specific] pleadings take valuable time of courts and litigants to obtain and to perfect and when secured they are of no value.”); Clark, *Nebraska Rules*, *supra* note 22, at 308 (“[A]ll preliminary procedure devoted to polishing up the formal allegations, without going quickly to the merits of the case, is sheer waste.”); Charles E. Clark, *Summary Judgments and a Proposed Rule of Court*, 25 J. AM. JUDICATURE SOC. 20, 21 (1941) [hereinafter Clark, *Summary Judgments*] (“A case cannot be tried and concluded on the paper pleadings against the desires of a litigant or his counsel, and the time spent in refining the allegations is not worth the cost in actual results.”).

¹³² Clark, *Nebraska Rules*, *supra* note 22, at 308, 312 (“[Pleadings] are only a mere step in trying to get to the actual merits of the litigation.”).

¹³³ Clark, *Proposed Rules*, *supra* note 28, at 448.

¹³⁴ Clark, *Simplified Pleading*, *supra* note 32, at 287.

¹³⁵ FED. R. CIV. P. 8(a).

¹³⁶ Clark & Moore, *Pleadings and Parties*, *supra* note 41, at 1301 (“Now it has come to be appreciated that the distinction is one between generality and particularity in stating the transaction sued upon and that considerable flexibility should be accorded the pleader.”).

¹³⁷ Clark, *Bar and the Rules*, *supra* note 131, at 23 (“[The pleadings’] function 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.”); Clark, *Fundamental Changes*, *supra* note 127, at 566–67 (“What you want in pleadings are general statements . . . that . . . provide the basis for that most important thing, namely, *res adjudicata*.”); Clark, *Handmaid*, *supra* note 13, at 316 (“What we can expect [of the pleadings] is such a statement of the case as will isolate it from all others, so that the parties and the court will know what is the matter in dispute, the case can be routed through the court processes to the proper me-

should provide enough factual detail to allow courts to correctly route the case by determining if the claim presents a question of law or equity.¹³⁸ When the drafting of the Rules began, federal courts did not sit in both law and equity at the same time,¹³⁹ so correctly being able to route a case was essential to the court's ability to hear it. However, Clark only occasionally included giving notice to the court and defendant of the claims as a purpose of pleading.¹⁴⁰ His short treatment of notice may have resulted from a concern that the Rules would be confused with notice pleading, as discussed below.¹⁴¹ Complaints could accomplish their purposes with only "very brief and direct allegation[s]."¹⁴²

Clark argued that *res judicata* was the most important of these purposes¹⁴³ and was the test for the sufficiency of a complaint:

[Res judicata] may perhaps be considered the final test, for if the pleadings isolate the events in question from others sufficiently to show the affair which the judgment settles, then the parties will have the protection they are entitled to against relitigation of the same matter.¹⁴⁴

2. *Pleadings Are Not a Proper Source of Evidence.*—Clark also emphasized what pleadings are not supposed to do. The pleadings are not the appropriate vehicle for providing proof.¹⁴⁵ Historically, the proof presented

thod of trial and disposition, and the judgment will be *res adjudicata*, so that the same matter cannot again be litigated."); Clark, *Simplified Pleading*, *supra* note 32, at 273 ("[Pleadings] must sufficiently differentiate the situation of fact which is being litigated from all other situations to allow application of the doctrine of *res judicata*, whereby final adjudication of this particular case will end the controversy forever."); Clark, *Underlying Philosophy*, *supra* note 33, at 977 ("We can expect a general statement distinguishing the case from all others.").

¹³⁸ Clark, *Fundamental Changes*, *supra* note 127, at 566 ("[Pleadings] will provide the basis for all your ordinary actions, what I like to call the routing of the case through the court, where it goes for formal trial and so on."); Clark, *Simplified Pleading*, *supra* note 32, at 273 ("[Pleadings] will also show the type of case, so that it may be assigned to the proper form of trial, whether by the jury in negligence or contract, or to a court, referee, or master, as in foreclosure, divorce, accounting, and so on."); Clark, *Underlying Philosophy*, *supra* note 33, at 977 ("We can expect a general statement . . . so that the manner and form of trial and remedy expected are clear . . .").

¹³⁹ See Clark, *Challenge of the Rules*, *supra* note 121, at 445.

¹⁴⁰ See, e.g., Clark, *Summary Judgments*, *supra* note 131, at 21 ("The essence of modern pleading is the generalized form of statement which gives fair notice of opposing claims, but avoids the detailed particularization of the old special pleading.").

¹⁴¹ See *infra* notes 150–152 and accompanying text; see also Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 917–18 (1976) (arguing Clark recognized a limit to the generality in pleading under the Rules).

¹⁴² Clark, *Fundamental Changes*, *supra* note 127, at 552.

¹⁴³ *Id.* at 566–67.

¹⁴⁴ Clark, *Simplified Pleading*, *supra* note 32, at 278.

¹⁴⁵ Clark, *Fundamental Changes*, *supra* note 127, at 566 ("I think the great mistake has been made in the past in even thinking that pleadings can take the place of evidence, which really means that you are hoping the other fellow will make a slip and say something he does not intend. The trouble with that is, if he is any good he will not do it, and if he is not the judge has got to protect his client from his own

at trial had to be “based upon, contained in, or limited by the pleadings.”¹⁴⁶ But under the Rules, discovery and summary judgment reveal the merits of a claim, not the pleadings. The pleadings require the plaintiff simply to “state what happened,” and courts afford this effort “considerable flexibility.”¹⁴⁷ The pleadings also allow plaintiffs flexibility to choose their arguments by permitting liberal amendments to the pleadings,¹⁴⁸ and the Rules allow the pleadings to conform to evidence presented at trial.¹⁴⁹

3. *Rejecting Notice Pleading.*—Clark clearly distinguished the system established by the Federal Rules from notice pleading, explaining that under the Rules

[t]he notice in mind is rather that of the general nature of the case and the circumstances or events upon which it is based [W]hile a useful rule may perhaps be framed in terms of notice, I think the Federal Rules follow a wiser course of stating a still more general and, if you please, more legal requirement.¹⁵⁰

As he conceived it, notice pleading required only the conclusory naming of a claim:

In view of the difficulties involved in deciding upon the amount of detail required [in pleadings], some writers have urged an approach from the opposite extreme—notice pleading, wherein the pleadings will contain only a bare reference to the cause rather than a statement of its elements. This system is said to work satisfactorily in tribunals of special character, as, for example, small claims courts. In many such tribunals, too, the issue is of a standard form substantially repeated in case after case. . . . It is to be noticed that even the general form of pleading visualized in Form 9 [now Form 11] of the new federal rules differentiates the accident from all others, so as to show that it is between a pedestrian and an autoist at a certain time and place, thus making decision as to the proper method of trial or of appeal easy and res adjudicata clear, whe-

actions.”); Clark, *Underlying Philosophy*, *supra* note 33, at 977 (“[A court] cannot expect the proof of the case to be made through the pleadings, and . . . such proof is really not their function.”).

¹⁴⁶ CLARK, 1940 CASEBOOK, *supra* note 24, at 237.

¹⁴⁷ Clark & Moore, *Pleadings and Parties*, *supra* note 41, at 1301.

¹⁴⁸ Clark, *Nebraska Rules*, *supra* note 22, at 311–12.

¹⁴⁹ FED. R. CIV. P. 15(b).

¹⁵⁰ See Clark, *Simplified Pleading*, *supra* note 32, at 278. Curiously, courts and scholars have quoted this description of notice pleading as the standard enacted by the Federal Rules, despite Clark’s expressly distinguishing the notice pleading from the requirements of the Rules. See, e.g., *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 16 (D.C. Cir. 2008); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 557 (2002) [hereinafter Fairman, *Heightened Pleading*]; Fairman, *Myth*, *supra* note 16, at 991; Mary Margaret Penrose & Dace A. Caldwell, *A Short and Plain Solution to the Medical Malpractice Crisis: Why Charles E. Clark Remains Prophetically Correct About Special Pleading and the Big Case*, 39 GA. L. REV. 971, 1009 n.213 (2005); Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 HOW. L.J. 73, 85 (2008).

reas a mere general claim of money damages for defendant's "negligence" would not do so.¹⁵¹

Clark continued to distinguish the Federal Rules from notice pleading in his later writings, even while defending the generality Rule 8(a) permits against attack from courts that construed it as requiring only notice pleading.¹⁵² Some commentators have suggested that Clark's rejection of notice pleading grew with time.¹⁵³

D. Transsubstantivity: One for All?

Inconsistencies shroud Clark's views on whether some Rule 8(a) claims should require more specificity. Accepting that Clark's favor for a transsubstantive standard¹⁵⁴ grew over time somewhat resolves these inconsistencies. Early in his thinking, Clark seemed to believe that some complaints required greater specificity. Later, perhaps convinced by his own defense of simplified pleading, Clark argued that courts should apply the same standard to all complaints that fall under Rule 8(a).

A comment from 1935 illustrates Clark's earlier views supporting heightened pleading standards when the circumstances demand it:

¹⁵¹ CLARK, 1940 CASEBOOK, *supra* note 24, at 182 (citations omitted). It is worth noting that Clark omitted this excerpt from the 1952 version of the text. See CLARK, 1952 CASEBOOK, *supra* note 23, at 192.

¹⁵² Clark, *Big Case*, *supra* note 21, at 49–50 (“[N]otice’ is not a concept of the Rules, as the Advisory Committee’s Note reprinted in the Appendix here so carefully points out.” (citing Report of Proposed Amendments, October 1955, at 18–19)). The unadopted advisory note provides:

Rule 8(a)(2) is retained in its present form. This Note is appended to it in answer to various criticisms and suggestions for amendment which have been presented to the Committee. The criticisms appear to be based on the view that the rule does not require the averment of any information as to what has actually happened. *That Rule 8(a) envisages the statement of circumstances, occurrences, and events in support of the claim presented is clearly indicated not only by the forms appended to the rules showing what should be considered as sufficient compliance with the rule, but also by other intermeshing rules; see, inter alia, Rules 8(c) and (e), 9(b–g), 10(b), 12(b)(6), 12(h), 15(c), 20, and 54(b).* Rule 12(e), providing for a motion for a more definite statement, also shows that the complaint must disclose information with sufficient definiteness. The intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement and to sweep away the needless controversies which the codes permitted that served either to delay trial on the merits or to prevent a party from having a trial because of mistakes in statement.

Proposed Amendments, October 1955, at 18–19 (emphasis added).

¹⁵³ See Smith, *supra* note 141, at 925 (“At least rhetorically, Clark asserted these limits on simplified pleading with increasing rigor as the 1950’s progressed. In the 1955 report of the Advisory Committee, he repeatedly insisted that the Federal Rules required the pleading of actual events and circumstances.”). *But see* Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 244 n.142 (1992) (“In his earlier writings, Clark was more willing to embrace the term ‘notice pleading.’”).

¹⁵⁴ In procedure, the principle of transsubstantivity provides that the same procedural standards should apply to all matters, independent of the substance of the issue being addressed. EDWARD J. BRUNET & MARTIN H. REDISH, *SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE* 282 (3d ed. 2006).

The [pre-Rules] federal practice, which has also reflected this dispute [about the specificity required for pleading], has like the states held that stricter rules of specific allegation are required only if particularity is *seasonably demanded* In all these cases the court is demanding what is *under the circumstances* an adequate statement of the fact transaction to identify it with reasonable certainty, not to set forth all its details. Under the new federal civil procedure there need be no material change in these principles¹⁵⁵

Clark provides two examples of insufficient claims. The first was *Jack v. Armour & Co*, a Sherman Act antitrust case.¹⁵⁶ The plaintiffs in the case alleged, on information and belief, that the defendants, who were engaged in commercial slaughter and distribution of meats to butchers, had conspired to maintain a monopoly in restraint of trade from 1900 until the time of the action in 1923.¹⁵⁷ The complaint gave significant detail about the alleged transgression:

[The defendants conspired] to refrain from bidding against each other in the purchase of such live stock, thus and thereby compelling the owners of such stock to sell same at prices less than such owners would receive if the bidding were competitive. It is further alleged that defendants have combined and conspired to “bid up” the prices of live stock for a few days in the markets and stockyards, thereby inducing shippers to make heavy shipments, and when such shipments have been thus induced and the markets congested, to refrain from “bidding up” such live stock, “thereby obtaining such live stock at prices much less than it would bring in the regular way of trade.” It is further alleged that defendants, in order to restrain competition among themselves in such trade and commerce, and in order to monopolize the same, have combined and conspired arbitrarily to lower and fix prices and to maintain uniform prices, at which they will sell their products to dealers and consumers. The manner in which such prices are fixed, agreed on, and maintained is thereupon pleaded¹⁵⁸

The court dismissed the complaint for failing to specify what entitled the plaintiff to the \$75,000 he sought in damages.¹⁵⁹ Clark approved of the court’s holding, describing the complaint as “alleg[ing] little more than a combination and conspiracy by the defendants to the plaintiff’s damage, without setting forth the manner or extent of his injuries.”¹⁶⁰ A court applying the *Conley* notice pleading standard would certainly not have dismissed this case because it is possible for the facts in the complaint to reveal an antitrust violation.

¹⁵⁵ Clark & Moore, *Pleadings and Parties*, *supra* note 41, at 1301–02 (emphasis added).

¹⁵⁶ *Id.* (citing *Jack v. Armour & Co.*, 291 Fed. 741 (8th Cir. 1923)).

¹⁵⁷ *See Jack*, 291 Fed. at 743.

¹⁵⁸ *Id.* at 743–44.

¹⁵⁹ *Id.* at 745.

¹⁶⁰ Clark & Moore, *Pleadings and Parties*, *supra* note 41, at 1302.

The second case Clark cited as an example of a court's appropriately requiring greater pleading particularity was *United States v. Bentley & Sons*, in which the government sought to recover overpayments made to an army contractor.¹⁶¹ The court "held that the petition must contain such reasonable particularization as will indicate upon what matters evidence is to be given, and that a general allegation of fraud, of waste, and the purchasing and re-selling of materials and equipment at a profit was too indefinite."¹⁶² Clark argued that a statement by the plaintiff that "he feels himself generally aggrieved is not sufficient."¹⁶³ Clark contrasted the particularity warranted by these claims with the lesser "generalized statement" sufficient to support familiar claims such as the "common counts."¹⁶⁴ Other commentators also note that Clark thought "complex cases involving the government called for different procedures than simpler cases."¹⁶⁵ This distinction demonstrates Clark's non-transsubstantive views: at least in his earlier writings, he believed the pleader should provide greater specificity for certain types of substantive claims.

Clark expressed further approval for requiring different levels of particularity for different types of complaints when he argued that the heightened pleading standard for fraud under Rule 9(b) was unnecessary because it "probably state[d] only what courts would do anyhow and may not be considered absolutely essential."¹⁶⁶ This statement suggests that Clark assumed courts had discretion to require different degrees of specificity for different claims. Clark's nonchalant dismissal of the need for a separate standard for fraud under Rule 9 and the barren history¹⁶⁷ of the reasoning behind the Rule are remarkable considering that Rule 9(b)'s separate standard for fraud is the basis for the Court's pre-*Twombly* requirement that all

¹⁶¹ *Id.* (citing *United States v. Bentley & Sons, Co.*, 293 Fed. 229 (S.D. Ohio 1923), *aff'd*, 16 F.2d 895 (6th Cir. 1927)).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* Common counts were the cases with which courts often dealt, and for which the courts developed simplified procedural requirements. See *infra* notes 189–193 and accompanying text.

¹⁶⁵ Subrin, *supra* note 119, at 995 (citing Charles E. Clark, REPORT ON CIVIL CASES OF THE BUSINESS OF THE FEDERAL COURTS 19 (May 1934)); accord Matthew A. Josephson, Note, *Some Things Are Better Left Said: Pleading Practice After Bell Atlantic Corp. v. Twombly*, 42 GA. L. REV. 867, 877 n.61 (2008) ("Even Charles E. Clark, the Reporter of the Supreme Court Advisory Committee that drafted the Federal Rules, felt that some sort of filtering mechanism would be desirable because complex cases often demand different procedures than simpler cases.").

¹⁶⁶ Clark, *Simplified Pleading*, *supra* note 32, at 282.

¹⁶⁷ See Fairman, *Heightened Pleading*, *supra* note 150, at 563 (describing the obscure history of the inclusion of Rule 9(b)); William M. Richman et al., *The Pleading of Fraud: Rhymes Without Reason*, 60 S. CAL. L. REV. 959, 965–68 (1987) (examining the legislative history of Rule 9(b)).

causes of action falling under Rule 8(a) be held to the same pleading standard.¹⁶⁸

In stark contrast to Clark's views at the time the Rules were drafted, by 1957 he seems to have adopted a transsubstantive view of pleading requirements for claims under Rule 8(a).¹⁶⁹ In response to a movement by the Southern District of New York to require heightened pleading standards for antitrust cases, Clark wrote an article emphasizing the need for consistent pleading standards for all matters falling under Rule 8(a).¹⁷⁰ In *Baim & Blank, Inc. v. Warren-Connelly Co.*, the New York district court had held that antitrust cases should be held to a higher pleading standard:

The modern "notice" theory of pleading is not sufficient when employed in a complaint under the anti-trust laws. It is all very well for Professor Moore to state that: "The modern philosophy concerning pleadings is that they do little more than indicate generally the type of litigation that is involved." This will not do in this type of case. If a complaint contains nothing more than general allegations that defendants have violated various provisions of the anti-trust laws combined with a prayer for relief, such a pleading, as I have previously said, "becomes a springboard from which the parties dive off into an almost bottomless sea of interrogatories, depositions, and pre-trial proceedings on collateral issues, most of which may have little relationship to the true issue in the case." For these reasons, it is not practical in these cases to proceed as in a negligence case or in a simple commercial case. To do so would cause both court and counsel to become bogged down in the endless problems that will arise in pre-trial discovery proceedings. The complaint should show the relationship of the parties, the specific acts complained of, and the relation of the acts to the damages claimed.¹⁷¹

Clark rejected the court's argument. He asserted that the Rules make no exception for the "Big Case"¹⁷² and dismissed the court's description of the Federal Rules as requiring only notice pleading.¹⁷³ He also rejected the court's concern about the significant expense that typifies antitrust actions.¹⁷⁴ Clark argued that most cases that are dismissed just return later, so nothing is gained by the dismissal.¹⁷⁵ According to Clark, "most usual in-

¹⁶⁸ See *supra* notes 82–84 and accompanying text (explaining that the Supreme Court applied a canon of statutory construction to the enumeration of Rule 9(b)'s exceptions to Rule 8(a) to justify demanding the same pleading standard be applied to all claims under Rule 8(a)).

¹⁶⁹ Cf. Clark, *Big Case*, *supra* note 21, at 48 (rejecting a heightened pleading standard for complex litigation).

¹⁷⁰ *Id.* at 49. This article was published in August, 1957. *Conley v. Gibson*, 355 U.S. 41 (1957) was decided November 18, 1957.

¹⁷¹ 19 F.R.D. 108, 109–10 (S.D.N.Y. 1956) (citations omitted).

¹⁷² See Clark, *Big Case*, *supra* note 21, at 48. Clark does not mention the exceptions under Rule 9(b), but he does reference Rule 71A(c) as providing for a special complaint for the condemnation of property. *Id.*

¹⁷³ See *supra* Part II.C.3.

¹⁷⁴ Clark, *Big Case*, *supra* note 21, at 48–49.

¹⁷⁵ *Id.* at 52.

structions for repleading seem to be little more than a demand for particular instances—*surely an improperly limiting requirement of pleading the evidence.*¹⁷⁶

Clark further argued that because antitrust laws at the time allowed a plaintiff to draw an inference of agreement from conscious parallelism,¹⁷⁷ the court should not have required a definite allegation of an agreement in the complaint.¹⁷⁸ Clark concluded that “it is quite apparent that the real objection is not failure to state a claim, for that is abundantly stated; it is rather the lack of detail which defendant seeks and the court thinks he should have.”¹⁷⁹ These arguments reveal an about-face from his earlier view that courts should be able to demand more information when they think it is warranted

E. Judicial Discretion

Clark’s views on judicial discretion also shifted over time. He originally favored giving judges more latitude over the procedure used in their courts. Providing a judge with discretion over pleading requirements could permit a nontranssubstantive standard by allowing judges to impose different procedural requirements in particular cases. As Clark’s transsubstantive convictions solidified, his favor for judicial discretion over procedure declined.¹⁸⁰

Contrary to his later views, at the time the Rules were drafted Clark favored giving judges discretion over pleading standards. In the first draft of the Rules, he suggested that the committee consider whether local judges could not only add to the Rules, but change them.¹⁸¹ His motive for providing this discretion flew in the face of a rigid, transsubstantive system. Clark argued that “[s]ome such provision affording flexibility to the rules is necessary if they are to be adjusted easily and without friction to the differing habits and customs of lawyers throughout the country.”¹⁸² Clark later aban-

¹⁷⁶ *Id.* at 51 (emphasis added).

¹⁷⁷ Subsequent case law mooted this argument for *Twombly*. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 579–83 (1986).

¹⁷⁸ Clark, *Big Case*, *supra* note 21, at 52.

¹⁷⁹ *Id.* Clark asserted that the discovery, not the pleadings, is the proper vehicle for obtaining more detail. After all, “any time a claim is frivolous” summary judgment was available to avoid “an expensive full dress trial.” *Id.* at 49.

¹⁸⁰ Compare Subrin, *supra* note 119, at 964 (“[Clark] almost always opted for judicial discretion and procedural solutions chosen from equity.” (referring to CLARK, CODE PLEADING, *supra* note 53, at 19, 150–51, 255; Charles E. Clark, *The Code Cause of Action*, 33 YALE L.J. 817, 819, 820 (1924); Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 548 (1925))), with Clark, *Big Case*, *supra* note 21, at 48 (rejecting agreements for applying different pleading standards based on the subject matter).

¹⁸¹ Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2013 (1989).

¹⁸² *Id.* (citing Suggestions of Local Committees and Suggestions of District Judges, as compiled by the Secretary of the Advisory Committee and furnished to members to accompany Tentative Draft (Oct.

doned this view as well, decrying “the perils of attempted rule-making by individual judges” as needing to be corrected by uniform Federal Rules.¹⁸³

F. *The Forms*

Clark’s views on pleading requirements under the Rules also manifested in his writings on the sample complaints appended to the Rules. Clark recognized that abstract statements could not sufficiently convey the meaning of the “short and plain statement” required by Rule 8(a).¹⁸⁴ Consequently, the drafters supplemented the Rules with an appendix of forms to illustrate “the simplicity and brevity of statement which the rules contemplate.”¹⁸⁵ The most famous of these is Form 11,¹⁸⁶ which merely provides: “On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.”¹⁸⁷

Clark saw the Forms, like the Rules generally, as evolving from and embodying the best of the common law and the codes.¹⁸⁸ Under the common law, courts had established the “common counts” in assumpsit for frequently recurring types of cases.¹⁸⁹ The courts relaxed the procedural requirements for plaintiffs pleading these counts.¹⁹⁰ For example, courts “allowed a very broad and general statement of a debt due.”¹⁹¹ Common counts were embraced for offering “a simple and effective means of stating common, recurring business situations.”¹⁹² Because of their ease and con-

15–16, 1935), contained in looseleaf binder entitled Advisory Committee on Rules for Civil Procedure, Tentative Draft 1 (Oct. 15–16, 1935) (Note to Rule 3)).

¹⁸³ Clark, *Big Case*, *supra* note 21, at 50.

¹⁸⁴ See Clark, *Texas Rules*, *supra* note 124, at 11.

¹⁸⁵ See Clark, *Nebraska Rules*, *supra* note 22, at 313 (“All the abstract admonitory phrases in the world cannot bring home to the profession the real simplicity and generality of pleading intended as can a few concrete examples.”); *id.* (“I regard it as vital that a set of illustrative forms be provided, but it would be almost calamitous to have the play of Hamlet produced with the prince himself left out.”).

¹⁸⁶ This form was originally titled “Form 9,” but the stylistic changes made by the Rules Advisory Committee in 2007 changed the title. Is nothing sacred?

¹⁸⁷ FED. R. CIV. P. Form 9 (modified slightly and relabeled Form 11 in the 2007 amendments to the Rules).

¹⁸⁸ Clark, *Handmaid*, *supra* note 13, at 309 (“[W]hile special pleading could be had in the old days, . . . in such usual cases as claims for debt or negligence a simple form of general allegation was permissible, a practice so admirable that it was carried over to the more successful of the code systems, and thence directly into the new federal rules.”). Ironically, while the forms came from the preceding systems, courts and commentators point to them as evidence that the Federal Rules intended to implement a system of notice pleading. See, e.g., *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 575–76 (2007) (Stevens, J., dissenting).

¹⁸⁹ Clark, *Handmaid*, *supra* note 13, at 315; Clark, *Simplified Pleading*, *supra* note 32, at 275.

¹⁹⁰ Clark, *Handmaid*, *supra* note 13, at 315; see Clark, *Simplified Pleading*, *supra* note 32, at 275.

¹⁹¹ Clark, *Handmaid*, *supra* note 13, at 315.

¹⁹² Clark & Moore, *Pleadings and Parties*, *supra* note 41, at 1302; see Clark, *Simplified Pleading*, *supra* note 32, at 275 (“It seems that any system must have an outlet of uncomplicated proceedings in order that the court may promptly dispose of its ordinary day-to-day work.”). This view is consistent

venience, the common counts persisted under code pleading.¹⁹³ Forms 4 through 8 “are modern direct statements based on these common law models.”¹⁹⁴

Form 11 shares a similar history. Courts’ concerns for simplifying their regular business led them to adopt simplified pleading requirements for ordinary varieties of trespass on the case.¹⁹⁵ This simplified pleading requirement was captured in a sample form in a pleading textbook in the nineteenth century¹⁹⁶ and then in a Massachusetts statute¹⁹⁷ that was the basis for Form 11.¹⁹⁸ A similar form was provided in the Connecticut Practice Book.¹⁹⁹

Clark explained that Form 11 provides all the detail necessary to explain the plaintiff’s theory of the case and move to trial:

Pleading in auto negligence actions perhaps best illustrates the point. There is a recurring similarity in the cases, and outside of indicating the few different types of accident (auto and pedestrian, auto and auto on open highway, the same at a street intersection) nothing is gained by requiring lengthy allegations of speed, lack of control, and so on. . . . To attempt to procure more is to delay the case to secure theoretically better paper essays, but no more real information to any one; and a skillful pleader may actually convey less information than otherwise by piling detail on detail.²⁰⁰

with the goal behind issue pleading to limit the case to a single question; for common disputes, that question would be familiar and would not require lengthy pleadings to flush out the matter. Clark’s treatment of the common counts is consistent with requiring less detail for certain categories of claims.

¹⁹³ Clark, *Handmaid*, *supra* note 13, at 315 (“[A]lthough criticized from time to time by theorists, [the common counts] were found practically too convenient to be rejected in code pleading.”); Clark, *Pleading Negligence*, *supra* note 51, at 485 (“A conspicuous example of the failure of the code ideal [of pleading only facts] is the use of the ‘common counts’ under the codes.”).

¹⁹⁴ Clark, *Handmaid*, *supra* note 13, at 315.

¹⁹⁵ Clark, *Simplified Pleading*, *supra* note 32, at 275.

¹⁹⁶ 2 JOSEPH CHITTY, A TREATISE ON PLEADING 529 (Henry Greening ed.; London; S. Sweet, V. & R. Stevens, and G. S. Norton, 7th ed. 1844).

¹⁹⁷ 2 MASS. GEN. LAWS ch. 231 § 147, p.2892, Form 13 (1932). The Massachusetts statutes stated:

And the plaintiff says that the defendant so negligently and unskillfully drove a motor vehicle in a public highway, called _____ street, in Boston, that by reason thereof the said motor vehicle struck the plaintiff who was then properly crossing the said highway (*or* a carriage of the plaintiff in which he was then properly passing along the said highway) whereby the plaintiff was thrown down and had his leg broken and was otherwise much injured (*or* the said carriage was broken and damaged and the plaintiff was hurt, etc.) and was prevented from transacting his business, and suffered great pain both of body and mind, and incurred expense for medicine, medical attendance and nursing, (and in repairing the said carriage, and was deprived of the use thereof for a long time and was thereby delayed and injured in his business).

Id.

¹⁹⁸ Clark, *Handmaid*, *supra* note 13, at 317.

¹⁹⁹ CONN. PRACTICE BOOK § 302, 452 (1922) (Defendant “carelessly drove against the wagon of the plaintiff, and thereby broke and injured the same.”).

²⁰⁰ Charles E. Clark, Book Review, 44 YALE L.J. 1483, 1484 (1935) (reviewing THE CONNECTICUT PRACTICE BOOK OF 1934).

Significantly, this statement betrays both a non-transsubstantive view and the functional view Clark brought to pleading. Clark allowed for a bear bones complaint because of the similarity between automobile accident cases, which suggests courts may require greater specificity for complaints in complex cases, which are more likely to be unique.

Another factor Clark considered in determining what should be demanded of a complaint was the relative ability of the parties to provide information. Clark saw Form 11 as sufficient in part because it was more difficult for the plaintiff to access information about the incident than it was for the defendant. Clark worried that courts would require complaints to provide factual detail unavailable to plaintiffs and that this requirement would prevent plaintiffs from pursuing meritorious claims. Clark made this concern explicit when he argued that the plaintiff would not be able to provide additional information:

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. . . . The succinct statement of the old form brings out the plaintiff's essential claim as clearly as a wealth of details would.²⁰¹

Although he believed that Form 11 provided sufficient factual detail to explain the plaintiff's case in order to proceed, Clark's opinion about whether Form 11 provided sufficient notice to the defendant is less clear. Clark asserted that a motion for a more definite statement should lie only against a complaint "which is not averred with sufficient definiteness or particularity to enable [a defendant] properly to prepare his responsive pleading or to prepare for trial,"²⁰² and that courts should not generally grant these motions because they create waste and delay.²⁰³ But, despite disfavoring these motions and despite the dictates of Rule 84 that the forms are legally sufficient,²⁰⁴ Clark wondered "whether [Form 11] is amplified enough, that is, whether a motion for a more definite statement would lie" against Form 11.²⁰⁵ This statement suggests either that notice is not a required function of a complaint because Form 11 is legally adequate but provides none, or that Form 11 is vulnerable to a motion to dismiss because it fails to provide notice. Rule 84 indicates that it be the former because it provides that

²⁰¹ Clark, *Handmaid*, *supra* note 13, at 317–18 (emphasis added).

²⁰² FED. R. CIV. P. 12(e) (pre-1948 Amendments version). Clark lamented the language "to prepare for trial," foreshadowing later amendments to the Rules. Clark, *Simplified Pleading*, *supra* note 32, at 286.

²⁰³ Clark, *Fundamental Changes*, *supra* note 127, at 566.

²⁰⁴ FED. R. CIV. P. 84.

²⁰⁵ Clark, *Fundamental Changes*, *supra* note 127, at 565.

all the forms are legally sufficient,²⁰⁶ but Clark's statement is not so straightforward.

Clark also illustrated his views of the Rules' pleading requirements with an example of an insufficient complaint. He contrasted the sample complaint in Form 11 with the claim "damages for X for \$10,000 for personal injuries."²⁰⁷ Clark explained that whereas Form 11 specifies an event limited in time and space, "particularized to a running-down accident with the defendant's automobile while the plaintiff was crossing a certain street on a particular date," this counterexample does not "afford[] a basis for res judicata," which would allow a court to determine if a matter has been adjudicated.²⁰⁸ Here, again, Clark used res judicata, not notice, as the measure of the sufficiency of a complaint.

G. Rule 12(b)(6) and Demurrer

Clark's interpretation of Rule 12(b)(6), which allows a defendant to challenge a complaint for failing "to state a claim upon which relief can be granted,"²⁰⁹ further reveals his intent for pleading requirements. Clark explained that Rule 12 had resulted from a compromise between different pleading philosophies: a combination of the English system and code pleading.²¹⁰ He regarded the Rule as ambiguous and the "most unsatisfactory of all the federal rules."²¹¹

Instead of Rule 12(b)(6), Clark had advocated for the adoption of the English system.²¹² Under the English system, "objections in law can be raised by motion or incorporated in the answer and may be heard in advance of trial in the discretion of the court."²¹³ This procedure allows the judge to hold a preliminary hearing if "he believes he can thus dispose of the whole, or a substantial part of, the case."²¹⁴ The judge exercises this power in only "the clearest of cases."²¹⁵ In other words, a judge has the discretion not to address a motion to dismiss unless he thinks good cause exists

²⁰⁶ FED. R. CIV. P. 84.

²⁰⁷ Clark, *Simplified Pleading*, *supra* note 32, at 279.

²⁰⁸ *Id.*

²⁰⁹ FED. R. CIV. P. 12(b)(6).

²¹⁰ Clark, *Nebraska Rules*, *supra* note 22, at 312.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Clark & Moore, *Pleadings and Parties*, *supra* note 41, at 1308. In some accounts, Clark stated that the English system requires the request be made in the answer. See Clark, *Simplified Pleading*, *supra* note 32, at 284–85.

²¹⁴ Clark, *Nebraska Rules*, *supra* note 22, at 312.

²¹⁵ Clark, *Simplified Pleading*, *supra* note 32, at 285.

to do so. Clark thought that a strong-willed judge could read the Rules to allow for the use of this superior test.²¹⁶

Clark's dissatisfaction with Rule 12 may have colored his description of what is required to survive a motion to dismiss, though he gave little guidance on this question outside of his discussion about the requirements of Rule 8(a). However, he viewed a motion to dismiss as identical to demurrer²¹⁷ and stated that a "demurrer to a complaint should be sustained only when the pleading fails to state a cause of action either in law or equity."²¹⁸ If stating a "cause of action" is merely stating the name of the legal claim, then this view is consistent with Clark's sample of an insufficient complaint above, because merely demanding "damages for X for \$10,000 for personal injuries" does not provide a cause of action.²¹⁹ More likely, Clark refers to the pleading requirements under code pleading, which demanded that a complaint include factual detail supporting every element of a cause of action.²²⁰ Clark specifically denied that the Federal Rules imposed this standard.²²¹

This examination of Clark's writings on pleading under the Federal Rules reveals that he envisioned a system of simple pleading. This system requires only that complaints provide sufficient factual detail to allow courts to apply *res judicata* and to correctly route a case. While his position on the matter was inconsistent, Clark's writings from around the time the Rules were drafted support giving courts discretion to shape the rules, including the flexibility to impose different pleading requirements for different types of cases. Clark also expressly rejected the proposition that the Rules established a regime of notice pleading.

III. SIMPLE PLEADING AND FLEXIBILITY: CLARK'S VISION APPLIED

Had the Court applied Clark's simple pleading standard in its landmark pleading cases, its decisions would have been the same but with dramatically different reasoning. By using factual specificity as the one test of a complaint's sufficiency, the Court has endorsed notice pleading and rendered the Rules rigid and inflexible, as Clark had feared. Had the Court imple-

²¹⁶ *Id.* at 285 ("[Under Rule 12(d)] a strong-minded judge may override the desires of counsel and apply practically the English system, although the form of statement of the rule perhaps suggests that this should be the exception . . .").

²¹⁷ *Id.* at 284 (asserting that a motion to dismiss is just demurrer renamed).

²¹⁸ Clark, *Background*, *supra* note 34, at 421.

²¹⁹ See *supra* notes 207–208 and accompanying text.

²²⁰ See Anthony J. Bellia, Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 796 n.74 (2004) ("Clark argued that a cause of action [under the codes] consisted simply of 'an aggregate of operative facts, a series of acts or events, which gives rise to one or more legal relations of right-duty enforceable in the courts.'" (quoting CLARK, CODE PLEADING, *supra* note 53, at 137)).

²²¹ See Subrin, *supra* note 119, at 976 (noting that the terms "facts" and "cause of action" had been removed from subsequent drafts of the rule and that Clark rejected requiring the statement of a cause of action in favor of the concept of a claim).

mented the multi-dimensional analysis of complaint sufficiency and judicial discretion that Clark envisioned, courts could have shaped pleading requirements to address the different normative values of the litigation matrix. It follows that by overthrowing the regime of notice pleading, *Twombly* made an initial step towards restoring the flexibility Clark envisioned.

Clark applied simple pleading in *Dioguardi v. Durning*,²²² in which, sitting as a Second Circuit judge, he addressed a motion to dismiss a pro se plaintiff's "inartistically" drafted complaint.²²³ Clark described the complaint:

[O]n the auction day, October 9, 1940, when defendant sold the merchandise at "public custom," "he sold my merchandise to another bidder with my price of \$110, and not of his price of \$120," and . . . "that three weeks before the sale, two cases, of 19 bottles each case, disappeared." Plaintiff does not make wholly clear how these goods came into the collector's hands, since he alleges compliance with the revenue laws; but he does say he made a claim for "refund of merchandise which was two-thirds paid in Milano, Italy," and that the collector denied the claim.²²⁴

The plaintiff had provided a date and the basic outlines of the case. The lower court had dismissed the claim because it lacked "facts sufficient to constitute a cause of action."²²⁵ But Clark reversed, providing little beyond the above description of the facts in the complaint to show that the complaint stated a claim that satisfied the requirements of Rule 8(a).²²⁶

Under the regime of notice pleading (which this case predated),²²⁷ a court could conceivably have found that such an inartistic complaint failed to provide sufficient notice of the claim. Under Clark's simple pleading standard, however, the claim was not dismissed because it limited the disputed event sufficiently to allow a court to apply *res judicata*. The claim also announced that the plaintiff sought damages, thus allowing the court to route the claim to a jury. Because the plaintiff provided the date and location of the contested activity and explained the general nature of the dispute, the complaint satisfied the simple pleading standard.

The results in the Supreme Court's landmark pleading cases would have produced similar results had the Court used the simple pleading standard.²²⁸ Under a flexible system, however, the Court would have allowed lower courts to modify pleading requirements to address the changing judi-

²²² *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944).

²²³ *Id.* at 775.

²²⁴ *Id.* at 774.

²²⁵ *Id.*

²²⁶ *See id.* at 774–75

²²⁷ *See supra* Part I.B (arguing that *Conley* was the source of the notice pleading regime).

²²⁸ *See supra* Part I.B (detailing the complaints in these cases).

cial landscape rather than clinging inflexibly to a notice pleading standard.²²⁹

Indeed, the cases that most reinforced notice pleading also did the most violence to Clark's vision. In *Leatherman*²³⁰ and *Swierkiewicz*,²³¹ the Court went beyond asserting that the complaints provided sufficient information to establish a claim for relief. In both cases, the Court found that Rule 8's pleading standard makes the same requirement of all types of cases except for fraud and mistake, which are enumerated in Rule 9(b).²³²

As noted above, Clark found Rule 9(b) unnecessary because he assumed courts always had the discretion to impose heightened pleading standards.²³³ He envisioned a more flexible system in which courts could shape procedure to serve the substantive law. *Leatherman* and *Swierkiewicz* replaced his system with a rigid transsubstantivity, which required courts to impose the same pleading standards for all Rule 8(a) claims—the very formalism of generality Clark feared.

Such a formalist system not only betrays Clark's vision but also cannot fulfill the needs of a modern judiciary coping with a litigation explosion. Rigid generality imprisons procedure, rendering it unable to respond to the normative values procedure is meant to further. Simple pleading gives courts the flexibility to respond to a shifting adjudicatory landscape. Whereas notice pleading entrenches the choice of normative values the courts can use procedure to advance, simple pleading allows courts to adapt.

The rigidity of notice pleading explains lower courts' resistance to that standard in the face of emerging concerns, such as the litigation explosion in the end of the last century and the challenges of burdensome and expensive electronic discovery.²³⁴ The rigid generality of notice pleading prevented courts from legitimately addressing the abusive uses of electronic discovery and strike suits to force settlements for unmeritorious suits.²³⁵ Notice pleading inflexibly privileged the values of fundamental fairness to plaintiffs and submission of procedure to substance by preventing courts from assessing the reasonableness of allowing a plaintiff to proceed at the early stages of a lawsuit.

In contrast, under a flexible simple pleading standard courts can balance competing normative values. For example, in suits where the costs of discovery are potentially enormous, a court can require greater specificity

²²⁹ See *supra* Part I.C.

²³⁰ *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

²³¹ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

²³² *Id.* at 513 (quoting *Leatherman*, 507 U.S. at 168).

²³³ See *supra* note 166 and accompanying text.

²³⁴ See *supra* Part I.C.

²³⁵ See *supra* notes 97–101 and accompanying text.

from a plaintiff.²³⁶ Doing so would allow courts to balance the concerns served by notice pleading with the concerns of fairness to defendants, adjudicatory efficiency, and decisionmaking accuracy.²³⁷ Simple pleading would restore the flexibility Clark envisioned at the time the Rules were drafted.

CONCLUSION

Modern scholarship largely analyzes pleading requirements on the basis of factual specificity alone. Clark sought to reduce not just the level of particularity required in pleading, but also the rigidity. He recognized that generality could also tend to formalism, and that is precisely what occurred under the notice pleading system. Thus, while *Twombly* departed from Supreme Court precedent, it also had the potential to move the law closer to Clark's vision. By analyzing a complaint's plausibility in addition to its factual specificity, the Court seemed to abandon the rigid formality of notice pleading in favor of a more flexible standard. *Iqbal* confirmed that the Court was providing the lower courts the flexibility to shape pleading requirements based on the circumstances of the case.

²³⁶ This was exactly what the *Twombly* Court struggled to accommodate under the notice pleading system. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

²³⁷ See *supra* Part I.C.

