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Rules, and Conley v. Gibson

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The Jurisprudence of Pleading: Rights, Rules, and *Conley v. Gibson*

Emily Sherwin*

For fifty years, *Conley v. Gibson*¹ stood as the landmark decision on pleading under the Federal Rules of Civil Procedure, establishing that a complaint is sufficient to initiate a lawsuit if it gives fair notice of the plaintiff's claim. Before *Conley*, pleading played a vital role in sustaining and shaping legal actions. The Supreme Court's decision in *Conley* greatly reduced both the strategic importance of pleading and the influence of pleading on the subsequent trial and decision of claims.

The Court stated in *Conley* 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... [A]ll 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.”² *The Court also remarked that “the purpose of pleading is to facilitate a proper decision on the merits.”*³

Most commentary on Conley has focused on the extent to which plaintiffs must marshal

*Professor, Cornell Law School. Thanks very much to Kevin Clermont for help and advice, and to Jill McCormack for excellent research assistance.

¹355 U.S. 41 (1957).

²*Id.* at 45-46, 47.

³*Id.* at 48.

factual support for their claims at the pleading stage of litigation, prior to discovery.⁴ *The consensus is that Conley* requires very little specificity,⁵ and most observers have endorsed the minimal standard set out in *Conley*. Supporters maintain that requiring extensive factual allegations before discovery is unfair to plaintiffs who may lack access to information in

⁴See, e.g., 2 James Wm. Moore, *Moore's Federal Practice* ¶ 8.04[1][a], at 8-21 to 8-28, ¶ 8.04[1a] (2008) [hereinafter *Moore's*] (discussing the degree of factual detail required by Rule 8 and stating that plaintiffs are not required to plead the elements of a legal claim); 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1202, at 92-97 (3rd ed. 2004) [hereinafter *Wright & Moore*] (discussing the generality of pleadings); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 *Ariz. L. Rev.* 987 (2003) (discussing lower federal courts' imposition of heightened pleading standards requiring greater factual specificity in particular types of cases, contrary to the Supreme Court's interpretation of Rule 8 in *Conley*); Christopher M. Fairman, *Heightened Pleading*, 82 *Tex. L. Rev.* 553 (2002) (opposing heightened pleading standards).

A possible exception is Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 *Tex. L. Rev.* 1749, 1755-59 (1998) (suggesting that pleading rules should be analyzed in terms of their capacity to facilitate early decisions on the merits); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 *Colum. L. Rev.* 433, 459-65 (1986) (suggesting that issue-oriented pleading can sometimes facilitate decisions on the merits).

⁵Wright and Miller comment that "it is very hard for counsel to draft" a defective complaint under the standard of *Conley*. Wright & Miller, *supra* note 4, §1202, at 97.

defendants' control, and that doubts about the factual foundation of a case can be adequately explored later in the process through mechanisms such as summary judgment and pretrial consultation.⁶ *Criticism of the Conley standard typically refers to the costs of discovery and the possibility that defendants will be forced to settle weak claims in order to avoid the expense of litigation.*⁷ *The Supreme Court's recent decisions, which reject the specific pronouncements made in Conley* but not necessarily its general approach to pleading, also address the problem of how much factual foundation plaintiffs can fairly be required to provide at the pleading stage of

⁶See, e.g., 2 Moore's, supra note 4, ¶ 8.04[1][a], at 8-24 (approving minimal pleading requirements and discussing alternative means for screening claims); 5 Wright & Miller, supra note 4, §1202, at 89, 98 (same); Fairman, Heightened Pleading, supra note 4, at 593-96 (same); Fairman, The Myth of Notice Pleading, supra note 4, at 993-94 (same); Editorial: The Devil in the Details, 91 Judicature 52 (citing the American ideal of access to courts). See also Richard A. Field, Benjamin Kaplan, & Kevin M. Clermont, Civil Procedure 1150-52 (9th ed. 2007) (proposing an amendment of the Rules to eliminate motions to dismiss for defective pleading).

⁷See, e.g., *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007) (citing expense and abuse of discovery); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005) (same); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments* (manuscript on file with the author) (suggesting that the pleading provisions of the Federal Rules are not well suited to modern complex litigation); Fairman, *The Myth of Notice Pleading*, supra note 4, at 1059 (explaining the reasoning of courts that have imposed heightened pleading standards).

litigation.⁸

When *Conley v. Gibson* was decided in 1957, however, a different sort of pleading debate was under way. The judges and academics who argued over pleading standards in 1957 were interested not only in the extent to which plaintiffs must plead facts but also in the extent to which their complaints must identify the legal issues in dispute. In other words, should the rules of pleading require plaintiffs to provide the court with a theory of recovery according to established or proposed rules of law? Or, alternatively, should procedural rules encourage plaintiffs to lay their stories before the court without reference to fixed categories of legal claims and allow judges to adjudicate in response, as the facts require?

These questions, which track more general choices between deference to precedent rules on one side and judicial discretion and particularistic justice on the other, are significant for anyone concerned with development and enforcement of civil rights. Expansion of civil rights may depend on judicial imagination; at the same time, judicial imagination without the constraint of rules can veer in directions that disfavor or distort civil rights. Today, the notion of issue pleading has been relegated to history: no one maintains that plaintiffs must specify the elements

⁸In *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), the Court rejected the “no set of facts” language of *Conley* and appeared to impose a new requirement of “plausibility” in pleadings. Two weeks later, in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), the court reversed the dismissal of a civil rights complaint against prison officials, with no mention of plausibility. The implications of these cases remain in doubt; in each case, however, the focus was on the specificity and plausibility of factual allegations in complaints.

of a legal cause of action in their complaints.⁹ *Nevertheless, the procedural debates that preceded Conley v. Gibson* are worthy of attention, if only to understand the path not taken.

In the article that follows, I offer a short intellectual history of *Conley* and the pleading debates taking place at the time of the decision. I also describe the decision itself, which the Court appears to have made in haste and without close consideration of the interpretive questions at stake or their broader jurisprudential implications. Finally, I touch briefly on the relationship between the procedural questions under debate at the time of *Conley* and enforcement of civil rights. That relationship, however, is far too complex for me to address systematically; my principal objective is simply to provide a historical footnote to the subject.¹⁰

⁹See *Swierkiewicz v. Sorema*, 534 U.S. 506, 510 (2002) (holding that plaintiffs are not required to plead the elements of a legal claim: “the prima facie case... is an evidentiary standard, not a pleading standard”). But cf. Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. Pa. J. Bus. & Emp. L. 627, 634, 636-40 (2008) (suggesting that Federal Rule 8 implies a “demonstration” requirement, such that plaintiffs must plead facts establishing the elements of a right of recovery, and that *Conley* should not be read to override this requirement). Huffman’s commentary is particularly directed toward antitrust actions.

¹⁰For a comprehensive jurisprudential history of civil rights advocacy by African-American lawyers, see Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 Yale L. J. 256 (2005). Mack suggests that “legal-liberal” model of social change through rights-based litigation does not capture the complex and variable theories that motivated civil rights lawyers in the first half of the twentieth century.

I. The Background

A. Federal Rule 8 and Its Antecedents

*Rule 8 of the Federal Rules of Civil Procedure, adopted in 1938, requires “a short and plain statement of the claim showing that the pleader is entitled to relief.”*¹¹ *Rule 8 was designed to make a significant break from pleading rules of the past. At least as interpreted in Conley v. Gibson, it accomplished its goal.*

In the early days of English law, lawsuits began at in Chancery and then proceeded to Westminster Hall in London, where lawyers pleaded their claims and defenses before the justices of the royal courts. The object of this initial stage of litigation was to identify an issue of fact for decision by a jury sitting in the locality where the claim arose. At the time, there was no appellate process as we know it; instead, rules of law were proposed, discussed, and approved or disapproved at the level of pleading. In the medieval period, the pleading process appears to have been vibrant and productive of an evolving body of law. By the sixteenth century, however, it was fixed and formal, serving only to screen out unorthodox cases and determine the mode of trial within the categories established by the common-law forms of action.¹²

The first comprehensive procedural reform in the United States was the Field Code,

¹¹Fed. R. Civ. Pro. 8(a).

¹²On early English pleading practices, see generally, J.H. Baker, *An Introduction to English Legal History* 20-22, 53-57, 76-79, 86-90 (4th ed. 2002). By the 1500s, the ordeals of early medieval law had fallen out of use, but older writs might still require proof by oath. Trespass actions, in contrast, were tried to juries. See *id.* at 72-76.

which was enacted (in large part) in New York in 1848.¹³ The Field Code merged law and equity, abolished the common law forms of action, and greatly loosened procedural constraints on legal claims. To initiate a civil action under the Field Code, plaintiffs were required to submit a “plain and concise statement of the facts constituting a cause of action without unnecessary repetition.”¹⁴

The Field Code was intended to work a radical change in pleading practices. However, disputes soon arose over what causes of action were entailed in particular suits, what facts were necessary to make out the relevant causes of action, and how much factual detail must be included in a complaint. In response, lawyers and courts continued to cite precedents decided under the common-law forms of action.¹⁵

¹³On the history of the Field Code, see generally, Charles E. Clark, Handbook of the Law of Code Pleading §7, at 21-31 (2d ed. 1947) [hereinafter Clark, Code Pleading]; Field, Kaplan, & Clermont, *supra* note 4, at 1106-10; Stephen N. Subrin, How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 931-39 (1987). See also Robert G. Bone, Mapping the Boundaries of a Dispute: Conceptions of the Ideal Lawsuit Structure from the Field Code to the Federal Rules, 89 Colum. L. Rev. 1, 5-26 (sketching an intellectual history of the Field Code reforms).

¹⁴1848 N.Y. Laws ch. 379, § 142, as amended by 1949 id. ch. 438 and 1851 id. ch. 479.

¹⁵See Clark, *supra* note 13, § 38, at 225-32, §§ 39-40, at 247-52 (discussing problems of Code pleading and reliance on common-law precedents); Field, Kaplan, & Clermont, *supra* note 4, at 1147-48 (discussing Code pleading); Bone, *supra* note 13, at 28-39 (discussing differing conceptions of a cause of action). Debates over the meaning of a cause of action are discussed

The Field Code's failure to simplify civil procedure, particularly in the area of pleading, led to calls for further change.¹⁶ Reformers persuaded Congress to enact the Rules Enabling Act in 1934,¹⁷ and in 1938 the Supreme Court promulgated the Federal Rules of Civil Procedure. Rule 8 addressed the problems of Code pleading by omitting any reference to the plaintiff's "cause of action."

*In his classic article on the history of American civil procedure, Stephen Subrin characterizes the Federal Rules, and particularly the pleading standard announced in Rule 8, as a triumph of equity practice over the common law.¹⁸ The Rules adopted many of the procedures used by the former courts of equity and, more generally, an equitable approach to adjudication. The guiding principle of the Rules was that adjudication should not be hampered by procedural technicalities: parties should be free to present their versions of disputed events to the court and judges should have broad discretion to reach just outcomes.¹⁹ Rule 8, as interpreted in *Conley v. Gibson*, exemplifies the equitable character of the rules.*

In Subrin's view, the shift from common law practice to equity practice went too far. The decisional leeway associated with equity is conducive to the creation of new rights, but equity works best in tandem with a set of more concrete legal rules. A legal system that relies

further in text at notes ?, infra.

¹⁶See Subrin, *supra* note 13, at 943-73 (recounting the history of the reform movement that led to the Federal Rules).

¹⁷Pub. L. No. 73-415, 48 Stat. 1064. The Enabling Act is now codified at 28 U.S.C. § 2072 et seq. (1994).

¹⁸Subrin, *supra* note 13.

¹⁹See *id.* at 973; Clark, *Code Pleading*, *supra* note 13, § 11, at 54; Charles E. Clark, *The Handmaid of Justice*, 23 Wash. U. L. Q. 297 (1938).

too heavily on the equitable model of adjudication lacks the discipline needed to enforce rights effectively.²⁰

B. Legal Positivism, Legal Realism, and the Procedural Debates Preceding Conley v. Gibson

The pleading debate that took place in the first half of the twentieth century - the debate that ended with *Conley v. Gibson* - began as an argument over the meaning of the term “cause of action” in the various state procedural codes derived from the Field Code. As noted, the Code provision governing complaints required a statement of “facts constituting a cause of action.” Other provisions of the Code, including joinder provisions, also referred to the plaintiff’s cause of action.²¹

Traditional interpretations equated a cause of action with a legal right or, in the Hohfeldian terminology of the day, a “right-duty relation.” John Norton Pomeroy’s treatise on Code practice, for example, defined a cause of action as “the facts from which the plaintiff’s primary right and the defendant’s corresponding primary duty have arisen, together with the facts which constitute the defendant’s delict or act of wrong.”²² The terms “right,” “duty,” and “delict” are not explained, but their content evidently depended on the governing rules of

²⁰See Subrin, *supra* note 13, at 913, 1000-02.

²¹See Clark, *Code Pleading*, *supra* note 13, at §19, at 127 & n. 135.

²²John Norton Pomeroy, *Code Remedies* § 347, at 528 (5th ed., Walter Carrington, ed., 1929) [hereinafter *Pomeroy, Code Remedies*]; John Norton Pomeroy, *Code Remedies* § 347, at 461 (4th ed., Thomas A. Bogle, ed., 1904) . The language quoted in the text appears in the fourth and fifth editions of the treatise, both published after Pomeroy’s death and edited, respectively, by Thomas A. Bogle and Walter Carrington. Pomeroy himself, in earlier editions of the treatise, formulated the definition somewhat differently, but with the same effect. See John Norton Pomeroy, *Code Remedies* § 519, at 554-56 (1876).

*substantive law, independent of the Code.*²³ For pleading purposes, Pomeroy's formulation of a cause of action may be broad enough to allow for a novel interpretation or extension of existing substantive rules. At the least, however, it requires a pleader to have a legal theory in mind at the outset of the case.

Among twentieth century commentators, Oliver McCaskill, a professor at Cornell and other law schools, proposed the narrowest definition of a cause of action. McCaskill was a staunch defender of traditional pleading practices for more than twenty-five years, before and after the adoption of the Federal Rules.²⁴ McCaskill argued that the scope of a cause of action depends on the historical antecedents of the plaintiff's claim to relief. Specifically, a cause of action is:

*that group of operative facts which, standing alone, would show a single right of action in the plaintiff and a single delict to that right.... The singleness of the right and delict is determined by a study of the old remedies in connection with which the concepts as to singleness of rights and delicts developed.*²⁵

²³Pomeroy and his later editors conceived of the common law, which defined primary rights and duties, as a body of principles independent of individual judges. Accordingly, they maintained that although the Code had abolished the forms of action, the elements of a cause of action remained immutable. See Pomeroy, Code Remedies, supra note 22, §§ 45-47, at 74-79 (discussing the substantive content of a cause of action).

²⁴McCaskill voiced his objections to Charles Clark's approach to pleading as early as 1925. See McCaskill, Actions and Causes of Action, 34 Yale L.J. 614, 638 (1925) [hereinafter McCaskill, Actions]. In 1952, McCaskill, now teaching at the Hastings College of Law, participated in a Ninth Circuit judicial conference which culminated in a recommendation to amend Rule 8 to require "a short and plain statement of the claim showing that the pleader is entitled to relief, which statement shall contain the facts constituting a cause of action." Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure, 13 F.R.D. 253, 253, 271-74 (1952)[emphasis added]. Other examples of McCaskill's writing on the subject include O.L. McCaskill, The Modern Philosophy of Pleading: A Dialogue Outside the Shades, 38 A.B.A. J. 123 (1952) [hereinafter McCaskill, Modern Philosophy]; O.L. McCaskill, Easy Pleading, 35 Ill. L. Rev. (Nw. U.) 28 (1940) [hereinafter McCaskill, Easy Pleading]; Oliver L. McCaskill, The Elusive Cause of Action, 4 U. Chi. L. Rev. 281 (1936).

²⁵See McCaskill, Actions, supra note 24, at 638.

*Thus, McCaskill's definition linked the notion of a cause of action not only to substantive rules of law, but to the common law forms of action and the remedies they afforded for particular wrongs.*²⁶

Although the more traditional conceptions of a cause of action did not all send pleaders back to the forms of action, they had in common a close connection between pleading, and hence adjudication, and positive rules of law.²⁷ A complaint must set out a cause of action, meaning facts that correspond to a legal right. Accordingly, a viable lawsuit must, from its inception, invoke and conform to a plausible interpretation of law.

The opposing view of the matter was stated most often and forcefully by Charles Clark, dean of the Yale Law School and later a judge on Second Circuit Court of Appeals. Clark was a specialist in pleading, as well as the principal draftsman of the Federal Rules.²⁸ He was also a leading figure in the American Legal Realist movement.²⁹

Clark defined a cause of action (as used in the Field Code) as "such an aggregate of operative facts as will give rise to at least one right of action."³⁰ At first, this definition may

²⁶McCaskill viewed Pomeroy's definition as dangerously loose. See McCaskill, *Easy Pleading*, supra note 24, at 33 ("Pomeroy seems to have been the first writer of prominence to give impetus to the new deal for poor pleaders").

²⁷Dean Bernard Gavit of the Indiana University School of Law made this connection explicitly: "The theory has been that a plaintiff comes into court seeking recognition of an 'existing' right... Whether [the plaintiff's allegations] are sufficient for that purpose is a question not of pleading but of substantive law." Bernard C. Gavit, A "Pragmatic Definition" of the "Cause of Action," 82 U. Pa. L. Rev. 129, 145 (1933).

²⁸See generally Stephen N. Subrin, Charles E. Clark and His Procedural Outlook: The Disciplined Champion of Undisciplined Rules, in *Judges Charles Edward Clark* 115, 141 (Peninah Petruck, ed., 1991).

²⁹See generally Myers S. McDougal, *Reminiscence of Charles Edward Clark*, in *Judge Charles Edward Clark*, supra note 28, at 171. But cf. Bone, supra note 13, at 81-89 (characterizing Clark as a pragmatist).

³⁰Clark, *Code Pleading*, supra note 13, § 19, at 137.

sound similar to the standard right-based definition set out in Pomeroy's treatise. For Clark, however, the emphasis was on facts rather than law: the essence of a cause of action was not a legal right but a set of facts that ultimately might generate one or more legal rights.³¹ Clark went on to say that "the extent of the cause is to be determined pragmatically by the court, having in mind the facts and circumstances of the case... [T]he controlling factor will be the matter of trial convenience, for that is the general purpose to be subserved by these procedural rules."³² In other words, the contours of a cause of action do not depend on governing law, but on practical considerations, assessed in light of the underlying objective of full and fair investigation of the parties' dispute.

Clark's conception of a cause of action reflected his Legal Realist approach to law and legal procedure.³³ During the 1930s, under Clark's leadership, the Yale Law School was the hub of American Legal Realism.³⁴ Legal Realism began with the premise that legal rules do not

³¹See *id.* § 19, at 143 ("The essential thing is that there be chosen a factual unit, whose limits are determined by the time and sequence and unity of the happenings, rather than by some vague guess or prophecy of potential judicial action"). The suggestion in the text that Clark was concerned only with the potential capacity of the facts to generate a right, and not with whether they established a right under existing rules of law, is borne out by his later decision in *Dioguardi v. Durning*, 139 F.2d 774 (2d Cir. 1944). See *infra*, text at notes ?.

³²Clark, *Code Pleading*, *supra* note 13, § 19, at 137.

³³For helpful discussions of Legal Realism, see, e.g., Laura Kalman, *Legal Realism at Yale: 1927-1960* 3-44 (1986); Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* 21-30 (2007) [hereinafter *Leiter, Naturalizing Jurisprudence*]; Anthony J. Sebok, *Legal Positivism in American Jurisprudence* 75-83, 104-06 (1998); Brian Leiter, *American Legal Realism*, in *The Blackwell Guide to Philosophy of Law and Legal Theory* 50 (Martin P. Golding & William A. Edmundson eds. 2005) [hereinafter *Leiter, American Legal Realism*]; Anthony Kronman, *Jurisprudential Responses to Legal Realism*, 73 *Cornell L. Rev.* 335 (1987).

³⁴See Kalman, *supra* note 33, at 115-20. Kalman relates that Legal Realism lost momentum at Yale in the later 1930s (during Clark's second decanal term), due to financial difficulties, friction between Clark and the university administration, and theoretical disarray within the Legal Realist movement. See *id.* at 120-40. Clark left Yale for the Second Circuit in 1939. *Id.* at 140.

determine the outcome of adjudication: the abstract rules and constructs traditionally associated with law are too malleable and too far removed from the factual context of legal disputes to constrain judicial decisionmaking.³⁵ The important question, therefore, is how judges resolve disputes, or should resolve disputes, in the absence of effective rules. Answers diverged: some Legal Realists maintained that judicial decisions are constrained by judges' training, experience, and professional ethos; others took the more skeptical view that judicial decisions are a function of the personal values and psychological predilections of individual judges.³⁶

The point of agreement among Legal Realists was the incapacity of positive law to dictate legal results: judges were active players in the process of adjudication, not passive conduits for a body of substantive legal rules. For the Legal Realists, however, this was not necessarily a reason for cynicism or regret. The challenge for law and legal theory, as they saw it, was to eliminate abstractions in favor of a more "scientific" approach to adjudication, in which judges combine particular facts and social imperatives to achieve a just result.³⁷ In general, despite their belief that judges were unconstrained by positive law, Legal Realists had faith in the

³⁵See, e.g., Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* 72-75 (1960) (arguing that precedents are manipulable); see generally Kalman, *supra* note 33, at 3-10; Leiter, *Naturalizing Jurisprudence*, *supra* note 33, at 21-25; Leiter, *American Legal Realism*, *supra* note 33, at 52-53; Sebok, *supra* note 33, at 104-05.

³⁶See Leiter, *Naturalizing Jurisprudence*, *supra* note 33, at 25-26, 28-29 (distinguishing the "Sociological Wing" of Legal Realism from the "Idiosyncrasy Wing"); Leiter, *American Legal Realism*, *supra* note 33, at 54-56 (same).

³⁷See Kalman, *supra* note 33, at 30-35 (discussing ventures by Clark and other Legal Realists into empirical studies of law); Leiter, *Naturalizing Jurisprudence*, *supra* note 33, at 31-46 (characterizing Legal Realism as a "naturalized" theory of adjudication, treating legal decisionmaking as continuous with social science); Kronman, *supra* note 33, at 336-39 (discussing the "scientific branch" of Legal Realism).

wisdom and fairness of judges.³⁸

Not all Legal Realists were opposed to the use of rules to guide decisions, if the rules themselves were sensitive to context and social reality.³⁹ Karl Llewellyn, for example, designed the Uniform Commercial Code, and Charles Clark masterminded the Federal Rules. Yet, the central premise of Legal Realism - that judges are not constrained by rules - implied that rules could only operate as guides to decision, not reasons for decision. For Legal Realists, therefore, sound rules were responsive to variations among the cases they govern and permeable to the ends they were designed to achieve.⁴⁰

Clark aimed to carry out Legal Realist insights through the medium of procedural reform. The purpose of pleading, and of procedural rules generally, was to facilitate unrestricted judicial investigation of the parties' dispute, without the distraction of a preconceived theory of legal right and wrong.⁴¹ Like many Legal Realists, Clark also had

³⁸See, e.g., Charles E. Clark & David M. Trubeck, *The Creative Role of the Judge: Restraint and Freedom in the Common Tradition*, 71 *Yale L.J.* 255 (1961) (expressing confidence in judicial decisionmaking); Kalman, *supra* note 33, at 21 (noting the enthusiasm of Legal Realists for judicial discretion). For an extreme example of belief in the ability of judges to reach just decisions, see Joseph C. Hutchinson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 *Cornell. L.Q.* 274 (1928). To give just one example, Hutchinson (himself a judge) said that "judicial intuitions, and the opinions lighted and warmed by the feeling which produced them, ...not only give justice in the cause, but like a great white way, make plain in the wilderness the way of the Lord for judicial feet to follow." *Id.* at 287-88.

³⁹See Leiter, *Naturalizing Jurisprudence*, *supra* note 33, at 30 (discussing proposals for fact-specific rules or rules making reference to external norms); Leiter, *American Legal Realism*, *supra* note 33, at 53, 56 (discussing Legal Realist efforts to redesign legal rules).

⁴⁰See, e.g., Llewellyn, *supra* note 35, at 159 (discussing precedents as guides to decision in analogous types of situations); Herman Oliphant, *A Return to Stare Decisis*, 14 *A.B.A. J.* 71 (1928) (advocating an "empirical" form of *stare decisis*).

⁴¹See Clark, *supra* note 19; Subrin, *supra* note 28, at 141.

*confidence in the ability of judges to manage trials fairly and resolve disputes justly.*⁴²

*Accordingly, his definition of a cause of action was, in a sense, no definition. A cause of action was whatever set of factual allegations gave notice to the defendant of the genesis of the plaintiff's claim and allowed the presiding judge to organize a fair hearing of the case.*⁴³ *The same standard, without the potentially misleading term "cause of action," was incorporated into the Federal Rules.*

*Oliver McCaskill, who was not a friend of Legal Realism, argued that Clark's definition of a cause of action imposed no constraint at all on the discretion of judges. "Operative facts and legal relations [are] intertwined [in Clark's definition], with the net result that it means what the person using the term makes it mean, and each trial judge, guided only by the principle of administrative convenience, shapes the cause of action to meet his own ideas."*⁴⁴ *Another critic, Dean Bernard Gavit of the Indiana University School of Law, tied his opposition more explicitly to the question of adherence to positive law. Gavit defended the utility of formal rules, arguing that in a field such as law, which is concerned with regulation of human conduct, abstract classifications and preexisting definitions of right and wrong are necessary for rational discourse and decision.*⁴⁵ *Clark's definition of a cause of action was an "ex post facto" definition, which contributed nothing and was not the meaning intended by the drafters of the Code.*⁴⁶ *In Gavit's view, the Code's pleading rules required the plaintiff to state "facts showing*

⁴²See Clark & Trubeck, supra note 38 (favoring judicial freedom); McDougal, supra note 29, at 176-77 (describing Clark's faith in judges); Subrin, supra note 28, at 143 (same).

⁴³See supra notes 30-32.

⁴⁴See McCaskill, Actions, supra note 24, at 619.

⁴⁵See Gavit, supra note 27, at 139-43 ("Mental images are all concepts....One who wishes to escape concepts must remain unborn.").

⁴⁶Id. at 143-44.

the existence of some legal right... Whether [the facts stated] are sufficient for that purpose is a question not of pleading but of substantive law.”⁴⁷

Thus, the early twentieth century debate over pleading was at least in part a jurisprudential debate, waged between legal formalists and Legal Realists. The theoretical divide occurred at two levels. First, formalists and Realists disagreed about the form of the pleading rule itself: should the meaning of a cause of action (and, accordingly, the requirements for a successful complaint) be fixed in advance or determined “pragmatically” by the trial judge, in the context of each proffered suit?⁴⁸ Second, and more importantly, the different interpretations formalists and Realists gave to the Code’s pleading rules reflected their differing views of the role of positive law in adjudication. The interpretation pressed by Clark’s opponents made the plaintiff’s cause of action dependent on supporting rules of substantive law, and so increased the chances that the course of litigation, and the resolution of litigated disputes, would be governed by articulable legal rules. Clark’s interpretation of a cause of action loosened the grip of substantive law on trials, favoring instead a mode of adjudication in which judges aimed for just outcomes, case-by-case.⁴⁹

In this respect, the pre-Conley debate was quite different from modern discussions of

⁴⁷Id. at 145.

⁴⁸Compare, e.g., Clark, *supra* note 13, at 137 (recommending that courts should define causes of action “pragmatically”), with Gavit, *supra* note 24, at 143-44 (arguing that a useful legal definition must operate prospectively).

⁴⁹See, e.g., Charles E. Clark, *The Cause of Action*, 82 U. Pa. L. Rev. 354, 361 (1934) (suggesting that his definition of a cause of action was consistent with “the logical progression of ideas which first considers the operative facts, that is the actual acts or events which have happened, and from these draws conclusions as to the legal rights which the courts will enforce), with Gavit, *supra* note 24, at 145 (maintaining a distinction between procedural and substantive law and stating that whether a complaint states a cause of action is “a question not of pleading but of substantive law”).

pleading, which center on the sufficiency of factual support for the plaintiff's claim. The Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*,⁵⁰ in which the Court suggested that the plaintiff must plead a "plausible" claim, has sparked a renewed discussion of what groundwork a plaintiff must lay to begin a suit.⁵¹ Commentators have assumed, however, that the the plausibility of a claim is a question of factual rather than legal sufficiency. Accordingly, their arguments have weighed plaintiffs' interest in access to the courts against the costs to defendants and society of allowing plaintiffs to initiate lawsuits in order to "fish" for facts that might support a claim (or to obtain nuisance settlements in the absence of supporting facts).⁵²

In contrast, the early debate over the meaning and necessity of a "cause of action" was primarily a debate about whether plaintiffs should be permitted to fish for law. Charles Clark believed that a plaintiff with a compelling story should be able to bring it before a judge and ask for justice.⁵³ Clark's opponents believed that courts should screen claims at the pleading stage to determine whether they fit within an existing rule of substantive law, or a plausible

⁵⁰127 S. Ct. 1555 (2007). See note 8 and accompanying text, *supra*.

⁵¹See, e.g., Lonnie S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: Constructing A Sustainable Theory of Judicial Power Over Pleading Sufficiency*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1097895 (forthcoming, B.U. L. Rev. (2008)); Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431 (2008) (discussing the meaning of plausibility); Ettie Ward, *The After-Shocks of Twombly: Will We "Notice" Pleading Changes*, 82 St. John's L. Rev. 893 (2008) (same); Kendall W. Hannon, *Note, Much Ado About Twombly?: A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 102 Notre Dame L. Rev. 101 (2008) (discussing plausibility and offering data on outcomes of motions to dismiss in cases after *Twombly*).

⁵²See Spencer, *supra* note 51, at 479-89; Hoffman, *supra* note 51, at 1, 5, 14-17. Cf. Marcus, *supra* note 4, at 434 (referring to "fishing expeditions" under the standard of *Conley*). For a critical examination of the term "fishing expedition," see Elizabeth G. Thornburg, *Just Say "No Fishing:" The Lure of Metaphor*, 40 U. Mich. J. L. Reform 1 (2006).

⁵³See *supra*, text accompanying notes 30-43.

*elaboration of existing law.*⁵⁴ *The current debate may be of greater practical significance, insofar as it determines the movement of large sums of money. From a jurisprudential point of view, however, the important debate was the older debate, which linked pleading to the fundamental question of how active a role judges should play in constructing, extending, and revising substantive law.*

*Although the promulgation of Federal Rule 8 was a victory for Clark and Legal Realism, it did not end the debate over pleading. In the years preceding Conley v. Gibson, O.L. McCaskill and others continued to argue either that the reference in Rule 8 to a statement “showing that the pleader is entitled to relief” implied that a complaint must set forth a legally defined theory of right, or that the Rule should be amended to require a statement of facts “constituting a cause of action.”*⁵⁵ *Again, discussions focused not on the necessary factual foundation for a viable claim, but on the need to delineate legal issues in order to constrain both the scope of trials and the discretion of judges. Thus, for example, at a conference convened in the Ninth Circuit to discuss the possibility of amending Rule 8, one McCaskill supporter argued that under Clark’s approach to pleading, “you find judicial imagination injecting all possible questions that are not there.”*⁵⁶ *Another critic suggested that under Rule 8, as designed by Clark, “the judge, and not the parties, picks the questions to be decided.”*⁵⁷

Commentators on both sides of the continuing debate drew a distinction between

⁵⁴See supra, text accompanying notes 44-47.

⁵⁵See, e.g., McCaskill, *Modern Philosophy*, supra note 24; McCaskill, *Easy Pleading*, supra note 24; *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, supra note 24.

⁵⁶*Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, supra note 24, at 269 (memorandum of Moses Lasky).

*“notice” pleading and pleading issues. According to Clark, the purpose of a complaint was to give notice of “the general nature of the case and the circumstances and events on which it is based.”*⁵⁸ *In the view of his opponents, a complaint should also define and narrow the legal issues in dispute.*⁵⁹ *Again, the underlying disagreement concerned the degree to which adjudication should conform to positive law. Today, notice pleading is more often contrasted with “fact” pleading, or “Code” pleading, which entails a more specific statement of facts.*⁶⁰ *Prior to Conley, however, the critical question was not specificity, but the degree to which complaints, and more generally litigation, should conform to positive law.*

The difference between notice pleading and issue-oriented pleading is easy to see in

⁵⁷James Alger Fee, *The Lost Horizon in Pleading Under the Federal Rules of Civil Procedure*, 48 *Colum. L. Rev.* 491, 494 (1948).

⁵⁸Charles E. Clark, *Simplified Pleading*, 2 *F.R.D.* 456, 460-61 (1942). See Clark, *Code Pleading*, *supra* note 13, § 11, at 56-58 (discussing the purposes of pleading); James A. Pike & John W. Willis, *The New Federal Deposition-Discovery Procedure*, 38 *Colum. L. Rev.* 1179, 1179-80 (1938) (writing in support of notice pleading). Clark himself sometimes resisted the term “notice pleading,” claiming that Rule 8 required more than a bare notification of a legal claim and that a general statement of the circumstances under dispute was enough to apprise the parties and an experience of judge of the issues in the case. See, e.g., Charles E. Clark, *Comment on Judge Dawson’s Paper on the Place the Pleading in the Proper Definition of the Issues in the “Big Case,”* 23 *F.R.D.* 435, 438 (1958). See also Clark, *Simplified Pleading*, *supra*, at 456-62 (elaborating on the concept of notice).

⁵⁹See, e.g., Archie O. Dawson, *The Place of Pleading in the Property Definition of Issues in the “Big Case,”* 23 *F.R.D.* 430, 432, 434-45 (1958) (“most trial judges have come to the realization that the notice theory of pleading does not result in a delineation of issues sufficient to enable the trial judges to pass on the questions which arise with reference to discovery, particularly in the big case”); McCaskill, *Modern Philosophy*, *supra* note 24, at 123 (stating, with disapproval, that under Clark’s approach, pleadings “have the function only of giving fair notice” and “make no attempt to form issues”); McCaskill, *Easy Pleading*, *supra* note 24, at 35 (distinguishing pleading designed to identify legal issues from pleading designed to give notice, or “transaction” pleading, which he characterized as “communistic”).

⁶⁰See, e.g., Geoffrey C. Hazard, Jr., Colin C. Tait, William A. Fletcher & Stephen McG. Bundy, *Pleading and Procedure* 546 (9th ed. 2005); cf. 5 Wright & Miller, *supra* note 4, § 1202, at 92-94 (suggesting that “notice pleading” is a misleading term and that notice pleading differs from “fact” pleading under the Code only in the degree of specificity required).

Dioguardi v. Durning,⁶¹ a case decided by Clark following his appointment to the Second Circuit. In *Dioguardi v. Durning*, the plaintiff filed a pro se complaint against the New York collector of customs. The complaint, which contained no shortage of factual detail, made clear that the plaintiff was upset over the defendant's handling of a public sale of merchandise that the plaintiff had attempted to import from Italy. It did not, however, identify the legal basis of the plaintiff's claim: Clark's opinion speculated that proof might reveal that the defendant was liable "for a default or for negligence in the performance of his duties."⁶² *The District Court had dismissed the complaint but Clark reinstated Dioguardi's action, stating that under the Federal Rules, "there is no pleading requirement of stating 'facts sufficient to constitute a cause of action.'"* It was enough that "the plaintiff has disclosed his claims that the collector has converted or otherwise done away with two of his cases of medicinal tonics."⁶³ Clark also suggested that on remand, the District Court might "find substance" in other allegations in the complaint.⁶⁴ Thus, the complaint was adequate for purposes of notice, although it did not come close to pleading a framework of legal issues for trial.

A point of interest about the pre-Conley pleading debate is that it continued unabated after the adoption of the Federal Rules. There was little question that Rule 8 laid to rest the problematic "fact" pleading of the Code. Detailed fact pleading, however, was not what McCaskill and his allies were interested in defending: their point was that pleadings, and the trials and judicial decisions that follow, should be grounded in law. Procedural simplification was not enough to end the Clark-McCaskill debate, which concerned older, and possibly eternal,

⁶¹ 139 F.2d 774 (2d Cir. 1944).

⁶² *Id.* at 775.

⁶³ *Id.*

questions about the nature and grounds of adjudication.

II. Conley v. Gibson

A. The Conley Litigation

In *Conley v. Gibson*, the Supreme Court finally put to rest the question of pleading law. As I have noted elsewhere, *Conley* was an unusual, and perhaps inadvertent, vehicle for resolution of the debate over the role of substantive law at the pleading stage of adjudication.⁶⁵ *The Court's opinion, however, unambiguously endorsed notice pleading without the need to specify a legal theory of recovery.*

Conley was one of a series of cases challenging discriminatory practices by railroads and railroad unions against African-American employees.⁶⁶ *When Conley* was decided, there were no federal employment discrimination laws and the Fourteenth Amendment was not applicable to private discrimination.⁶⁷ *The Supreme Court, however, began to take action against railroads (a major source of employment at the time) through creative interpretation of the Railway Labor*

⁶⁴Id.

⁶⁵See Emily Sherwin, *Precedent By Accident: The Story of Conley*, in *Civil Procedure Stories* 295 (Kevin M. Clermont ed., 2d ed. 2008).

⁶⁶See, e.g., *Steele v. Louisville & Nashville R.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952); Elder Witt, *Congressional Quarterly's Guide to the United States Supreme Court* 608 (2d ed. 1990) (describing the Railway Labor Act cases).

⁶⁷Archibald Cox, *The Duty of Fair Representation*, 2 *Vill. L. Rev.* 151, 156 (1957);

Michael I. Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 *Colum. L. Rev.* 563, 563-65 (1962). A few states had fair employment laws, but most did not. See Cox, *supra*.

Act (RLA).⁶⁸

The RLA provided for union representation of railroad workers for the purpose of negotiating employment contracts with the railroads.⁶⁹ In the 1940s and 1950s, the unions, who theoretically represented both black and white workers, engaged in rampant discrimination, apparently without opposition from the railroads.⁷⁰ In one Supreme Court case, for example, an all-white union had negotiated a contract provision reserving the desirable position of train fireman for white employees.⁷¹ Some unions excluded black employees from membership,⁷² and unions that admitted black employees to membership commonly maintained separate lodges for black and white members and gave preference to the interests of the white lodges.⁷³ Segregated lodges were often coupled with union shop clauses limiting employment to union members, with the effect that membership in a segregated lodge became a condition of employment for many

⁶⁸The current version of the Railway Labor Act appears at 45 U.S.C. §§ 151-163.

⁶⁹45 U.S.C. § 152(Fourth).

⁷⁰See *Sovern*, supra note 67, at 565, 567 (describing discriminatory practices).

⁷¹See *Steele v. Louisville & Nashville R.*, supra note 66 (holding this practice invalid).

⁷²The RLA permitted unions to exclude black employees from membership. See *Steele v. Louisville & Nashville R.*, 323 U.S. 192, 323 (1944); *Sovern*, supra note 67, at 583 & n.80. However, a union elected by a majority of employees had exclusive power to negotiate labor contracts on behalf of all employees, including nonmembers.

⁷³See, e.g., *Taylor v. Brotherhood of Ry. & Steamship Clerks*, 106 F. Supp. 438, 442-44 (D.D.C. 1952) (holding a challenge to segregated lodges nonjusticiable).

*African-American workers.*⁷⁴

In 1944, the Supreme Court held that the exclusive bargaining powers of unions under the RLA were coupled with an implied duty of fair representation of all employees within the relevant bargaining unit.⁷⁵ Accordingly, although there was no law directly prohibiting railroads from discriminating against black employees, unions negotiating employment contracts with the railroad could not bargain for discriminatory terms. On this basis, for example, the Court ruled that the contract provision mentioned above, reserving the position of train fireman for white workers, was a breach of the union's duty of fair representation.⁷⁶

At the time of Conley, the Court had recognized the unions' duty of fair representation but a number of interpretive questions remained open. Among these were whether the duty of fair representation extended beyond negotiation of contract terms to administration of existing contracts;⁷⁷ whether the unions were required not only to refrain from imposing inferior conditions on black employees but also to actively promote equal conditions for all employees;⁷⁸

⁷⁴The RLA provided for union shop agreements, with an exemption for employees who were excluded from membership by the union. 45 U.S.C. § 152(Eleventh).

⁷⁵*Steele v. Louisville & Nashville R.*, 323 U.S. at 202-04.

⁷⁶*Id.* at 203.

⁷⁷See *Dillard v. Chesapeake & O. Ry.*, 199 F.2d 948 (4th Cir. 1952) (finding an enforceable duty); *Hettenbugh v. Airline Pilots Ass'n Int'l*, 189 F.2d 319 (5th Cir. 1951) (finding no judicially enforceable duty); *Hayes v. Union Pac. R. Co.*, 184 F.2d 337 (9th Cir. 1950) (finding no judicially enforceable duty).

⁷⁸See *Cox*, supra note 67, at 156-67 (opposing a duty); *Sovern*, supra note 67, at 577-81

*and whether unions could legitimately maintain segregated lodges.*⁷⁹ *The complaint in Conley raised each of these issues.*

The plaintiffs in *Conley* were African-American employees of the Texas and New Orleans Railroad.⁸⁰ *The complaint alleged that the plaintiffs were required by a union shop agreement to join a union, which then placed them in a segregated lodge.*⁸¹ *It also alleged that the union refused to prosecute a grievance for forty-five members of the black lodge whom the railroad had wrongfully discharged.*⁸² *Based on these allegations, plaintiffs sought damages and an injunction against the union and its officers for breach of the union's duty of fair representation.*⁸³

The case began badly for the plaintiffs: a federal District Court dismissed the plaintiffs' suit on the ground that a claim based on discriminatory administration of a collective bargaining agreement fell within the exclusive jurisdiction of the governing administrative body, the

(supporting a duty).

⁷⁹Taylor v. Brotherhood of Ry. & Steamship Clerks, *supra* note 73.

⁸⁰See *Conley v. Gibson*, Complaint, in Transcript of Record 3, 7-8, available at <http://legal1.cit.cornell.edu/kevin/civprostories/chap07/conley01.pdf> [hereinafter Transcript].

The union representing the plaintiff's bargaining unit was the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. The defendants in *Conley* were the union and several union officers. *Id.* at 8-9.

⁸¹*Id.* at 9-11.

⁸²*Id.* at 11-14.

⁸³*Id.* at 14-16.

*National Railway Adjustment Board.*⁸⁴ *The Fifth Circuit summarily affirmed,*⁸⁵ *and the plaintiffs petitioned for a writ of certiorari. Following the Court's grant of certiorari, the plaintiffs were represented by a team of African-American lawyers led by Joseph C. Waddy, a veteran civil rights advocate and alumnus of Howard University.*⁸⁶ *Waddy and his associates ultimately prevailed: the Supreme Court reversed and reinstated the suit.*

Curiously, although *Conley* was long considered to be the definitive interpretation of Federal Rule 8, pleading was not a significant point of dispute between the parties. The plaintiffs' complaint was quite specific - perhaps overly specific - in relating the series of events that led the plaintiffs to sue. The complaint also identified with reasonable clarity the legal questions at issue in the case. The defendants' motion to dismiss relied primarily on jurisdictional claims, although it concluded with a perfunctory statement that the complaint failed to state a claim on which relief could be granted.⁸⁷ *The lower court decisions dealt only with the question of jurisdiction and made no mention of defective pleading.*

⁸⁴*Conley v. Gibson*, 138 F. Supp. 60, 62-63 (S.D. Tex. 1955).

⁸⁵*Conley v. Gibson*, 229 F.2d 436 (5th Cir. 1956).

⁸⁶Waddy went on to become a Federal judge, as did two of his associates counsel in the *Conley* litigation, Robert C. Carter and William B. Bryant. See [http://www.jtbf.org/index.php?src=directory&view=biographies&srctype=display&refno=202&PHPSESSID=521c7a00ed2451b66e5d55a7b8a657d2;](http://www.jtbf.org/index.php?src=directory&view=biographies&srctype=display&refno=202&PHPSESSID=521c7a00ed2451b66e5d55a7b8a657d2)
[http://www.brownat50.org/BrownBios/BioJudgeRbtCarter.html;](http://www.brownat50.org/BrownBios/BioJudgeRbtCarter.html)
<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/14/AR2005111401699.html>

⁸⁷*Conley v. Gibson*, Motion to Dismiss, in Transcript, supra note 80, at 17-18.

Before the Supreme Court, neither party's brief discussed or even cited Rule 8. In their briefs and arguments to the Court, Waddy and his associates focused on the three legal issues raised in the complaint: whether the union's duty of fair representation (and federal jurisdiction to hear the claim) extended to contract administration; whether passive behavior, such as failure to prosecute the plaintiffs' grievance, could constitute a breach of duty; and whether the union breached its duty by confining the plaintiffs to a segregated lodge.⁸⁸ The defendants at first relied heavily on the jurisdictional argument that had persuaded the lower courts to dismiss the case.⁸⁹ Then, following a change of heart by the Fifth Circuit on the question of federal jurisdiction,⁹⁰ they turned their attention to the scope of the duty of fair representation and the problem of segregated lodges.⁹¹

Pleading played only a marginal role in the defendants' arguments. Given the

⁸⁸See Conley v. Gibson, Conley v. Gibson, Petitioner's Brief at 3-4, 7-13, available at <http://legal1.cit.cornell.edu/kevin/civprostories/chap07/conley04.pdf>.

⁸⁹See Conley v. Gibson, Brief of Respondents in Opposition 10-19, available at <http://legal1.cit.cornell.edu/kevin/civprostories/chap07/conley03.pdf>.

⁹⁰See Richardson v. Texas & New Orleans R., 242 F.2d 230, 233-34 (5th Cir. 1957) (disapproving the court's prior decision affirming dismissal of the Conley plaintiffs' complaint). This decision was rendered between the Supreme Court's grant of certiorari in *Conley* and the filing of brief on the merits.

⁹¹See Conley v. Gibson, Brief for Respondents Pat Gibson, et. al. 16-35, available at <http://legal1.cit.cornell.edu/kevin/civprostories/chap07/conley05.pdf> [hereinafter Brief for Respondents].

procedural posture of the case, which had been dismissed at the level of pleadings, it was natural for the defendants to refer in their briefs to the plaintiffs' complaint and to argue that the complaint was deficient. For the most part, however, the defendants discussed the complaint in conjunction with substantive arguments about the scope of the duty of fair representation. For example, they pointed out that the complaint alleged only that the union had failed to act on the plaintiffs' behalf; that it alleged only one incident (failure to prosecute a grievance after the plaintiffs were discharged) rather than a course of conduct; and that it did not allege that the union had negotiated for discriminatory contract terms.⁹² These were not objections to the formal sufficiency of the complaint, calling for greater specificity or further delineation of the legal issues in dispute. Instead, the contention was simply that the plaintiffs had misinterpreted the applicable law.⁹³

One argument advanced by defendants in their brief might be interpreted as a formal objection to the complaint: the union contended that the plaintiffs were not in a position to object to its establishment of a segregated black lodge because they did not allege in their complaint that they had applied for membership in the white lodge.⁹⁴ This, of course, was a disingenuous argument. The only reason for the existence of separate lodges was to segregate black and white

⁹²See Brief for Respondents, *supra* note 91, at 5, 13-14, 17-18, 20-22, 26-28, 31.

⁹³See *id.* at 18-19 (“In short...we do not believe the Railway Labor Act or the Constitution exact the obligation for which Petitioners contend”). The defendants also suggested that the plaintiffs' real dispute was with the railroad, and that, consequently, the railroad was either the proper defendant or, at least, an indispensable party to the case. See *id.* at 14-15.

⁹⁴See *id.* at 4, 12-13.

employees in the context of a union shop, and it must have been clear to all involved that application for membership in the white lodge would be futile. In any event, the argument does not appear to have been intended as a foray into the pleading requirements of Rule 8. Rule 8 was not mentioned, and the thrust of the defendants' contention was that Mr. Waddy was pressing arguments before the Supreme Court that were not raised in the original complaint or decided by the courts below.⁹⁵ In other words, the defendants' objections were aimed primarily at the proper scope of argument on review, rather than the sufficiency of the complaint.

*In oral arguments, the defendants' lawyer repeated the claim that the plaintiffs had failed to allege facts necessary to support their arguments before the Court, and in particular that they had failed to allege that they had applied for membership in the union's white lodge.⁹⁶ At this point, Justice Black, who authored the opinion in *Conley*, broke in with several brief remarks about "free and easy" pleading under the Federal Rules and the possibility of amending the complaint. Apart from this exchange, both parties' arguments focused on substantive questions*

⁹⁵See *id.* at 6, 12, 26-27 ("Because in our view...Petitioners misstate the issues involved in this case by making extravagant claims of racial discrimination by the Brotherhood which the factual allegations of the complaint do not support, we believe a careful analysis of the allegations of the Complaint is required"). The brief also suggested that, in their brief to the Court, the plaintiffs were asking for "an abstract determination of a series of racial discrimination issues which we respectfully submit are not presented on this record." *Id.* at 16-17.

⁹⁶*Conley v. Gibson*, Oral Arguments (second of two files), available at <http://legal1.cit.cornell.edu/kevin/civprostories/>.

relating to the scope of a union’s duty of fair representation. Thus, the only references to formal pleading defects in the course of the *Conley* litigation were several rather obscure remarks about missing facts, in aid of an argument that had little if anything to do with the requirements of Rule 8.

Accordingly, the Court’s opinion, with its sweeping pronouncements about the meaning of Rule 8 and purpose of a complaint, may have come as a surprise to the litigants. The pleading questions on which Clark, McCaskill, and others had divided for decades were not briefed and argued before the Court. There was no exploration of background jurisprudential issues: certainly, no one discussed the impact that different pleading requirements might have on the the role of substantive law in adjudication. The most frequently cited passage of the *Conley* opinion, in which Justice Black announced that a complaint should not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts... that would entitle him to relief” was not the product of careful deliberation, but a nearly verbatim duplication of a passage from *Moore’s Federal Practice* (a treatise written by a protégé of Charles Clark).⁹⁷

⁹⁷See *Des Isles v. Evans*, 200 F.2d 614, 615-16 (5th Cir. 1952), in which the court quoted *Moore’s* as follows: “a motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.” Because *Moore’s* is a looseleaf service, it is no possible to pinpoint the date of the statement, but it is fair to assume it still appeared in the treatise at the time of the *Conley* decision.

It is interesting to note that Justice Black, who was 71 at the time of *Conley*, had remarried just one month before the oral arguments in the case. His biographer reports that he

Ironically, the Court's opinion in Conley did not address the legitimacy of segregated lodges - the issue that had elicited the defendant's most pointed objection to the form of the plaintiffs' complaint.⁹⁸ *Instead, the opinion simply confirmed that the union's duty of fair representation extended to administration of collective bargaining agreements and required the*

spent less time than usual at the Court during this period, and had taken to self-administering shots of testosterone. This, together with the Justice's evident annoyance with the *Conley* defendants, might explain the rather hasty look of the opinion.

⁹⁸It was reasonably clear that Congress intended that unions could exclude black employees from their membership, provided only that they could not both deny membership and insist on enforcement of a union shop agreement that would prevent the employer from hiring black workers. See H. R. Rep. No. 2811, 81st Cong., 2d Sess. 5 (1950); S. Rep. No. 2262, 81st Cong., 2d Sess. 3-4 (1950); *Steele v. Louisville & Nashville RR.*, 323 U.S. 192, 204 (1944) (noting that the RLA "statute does not deny [a union] the right to determine eligibility to its membership"); Michael I. Sovern, *The National Labor Relations Act and Racial Discrimination*, 62 Colum. L. Rev. 563, 583 & n.80 (discussing the legislative history of the RLA). The *Conley* defendants also pointed to a proposed amendment to the RLA denying statutory privileges to unions who maintained segregated lodges, which was rejected in the House and Senate committees. Brief for Respondents Pat J. Gibson, et al., at 23, citing Hearings before House Committee on Interstate and Foreign Commerce on H. R. 7789, 81st Cong., 2d Sess. 294-295, 285-286 (1950); Hearings before Senate Subcommittee of the Committee on Labor and Public Welfare on S. 3295, 81st Cong., 2d Sess. 301-302, 244-245 (1950). As a result, the Court may have preferred to avoid this issue rather than do battle with Congress.

union to prosecute grievances on an equal basis for all employees.⁹⁹ In light of the minimal treatment of pleading in the parties' briefs and arguments, and the Court's limited discussion of substantive issues - which stayed well within the allegations set out in the complaint - just why Justice Black decided to opine so emphatically on the requirements of Federal Rule 8 remains a mystery.

Had the Court taken on the segregation issue, Justice Black's reference to notice pleading might have been pertinent as a response to the defendants' arguments about the allowable scope of review. Traditionally, a party appealing an adverse decision must confine his or her arguments to the legal issues decided by the courts below.¹⁰⁰ By extension, it would seem that a plaintiff who appeals a judgment of dismissal for failure to state a claim cannot rely on a theory of recovery that differs markedly from whatever theories the plaintiff pursued in the lower court. Suppose, however, that the plaintiff files a complaint that, consistent with notice pleading, contains only a brief narrative of the events that led to the suit. The lower court responds by dismissing the complaint and the plaintiff appeals. If the complaint is not required to set out a theory of recovery, but only to give notice of a set of facts that might support recovery, there is no obvious reason why the plaintiff could not submit any applicable theory of recovery on appeal, or why the appellate court could not construct a theory of its own. In other words, if the plaintiff's position before the lower court was simply that there might be some legal ground for relief, a theory presented for the first time on appeal does alter the case presented to the lower

⁹⁹Conley v. Gibson, 355 U.S. at 45-47. The Court also confirmed that the fair representation claim was within the jurisdiction of the federal courts. Id. at 44-45.

¹⁰⁰See Field, Kaplan & Clermont, *supra* note 4, at 1563.

court. Thus, for example, if Dioguardi - the angry importer of Italian medicinal tonic¹⁰¹ - *hired a lawyer to appeal the dismissal of his claim, that lawyer might argue before the appellate court that the customs collector was negligent in conducting the auction of Dioguardi's goods, or that he breached a contract with Dioguardi, or that he committed any other wrong consistent with the narrative presented in Dioguardi's complaint. Of course, Conley has never been read this way, because the opinion does not explain this aspect of the defendants' objection and makes no reference to the scope of review.*

B. Aftermath of *Conley*

The Court's decision in *Conley* settled the requirements for a valid complaint, at least as they pertain to identification of legal issues. A complaint must give notice of the events under dispute, but it need not set out a substantive theory of recovery. Only if the allegations in the complaint eliminate the possibility of recovery will the complaint fail on legal grounds. After *Conley*, therefore, plaintiffs could present their stories to the court as Charles Clark had hoped; and courts were free, at least procedurally, to grant whatever relief they believed was warranted by the stories brought before them.¹⁰²

¹⁰¹See text at notes?, supra.

¹⁰²As noted above, the sufficiency of the complaint in *Conley* was not an important point of contention between the parties: the only argument directed to the form of the complaint was primarily an argument about the scope of permissible appellate review. Interestingly, if the Court's opinion had focused on the scope of review rather than the requirements of Rule 8, the *Conley* decision might still have some bearing on the relationship between adjudication and

The verbal formula Justice Black set out in Conley is no longer the reigning interpretation of Rule 8. In any event, Black's formula probably had a far greater effect on the factual contents of complaints than on the legal structure and contents of complaints. For reasons of custom and expedience, lawyers usually organize complaints around theories of law, whether or not a legal theory is necessary to withstand a motion to dismiss.¹⁰³ *Theoretically, however, the decision in Conley* worked a major change, which is likely to be permanent. The position that Oliver McCaskill and others maintained so vigorously, that a successful lawsuit *must* conform from the outset to a fairly detailed substantive theory of law, quickly vanished from sight.

In current discussions, pleading requirements are viewed as a gatekeeping device - a device that, for better or worse, keeps factually unsupported claims out of court. The focus on gatekeeping is a product of modern litigation conditions, augmented, perhaps, by the loose language used in *Conley*. The older debate over pleading assigned a different function to pleading, as means of imposing legal discipline on adjudication of disputes. In the post-*Conley* era, the legal function of pleading is long forgotten. The jurisprudential questions that lie behind it, however, inhere in any legal system.

substantive law. If a complaint is required only to apprise the defendant of the events in dispute, it will have less influence on the arguments the plaintiff can raise on appeal if the complaint is dismissed. Thus, liberal pleading rules might facilitate judicial discretion and innovation in a different way, at the level of appellate review.

¹⁰³See Hannon, *supra* note 51, at 128 (suggesting that lawyers commonly exceed the requirements of Rule 8).

III. Conclusion: Pleading Rules and Civil Rights

I have suggested that the academic debate over pleading that preceded *Conley v. Gibson* was not about the quantity, specificity, or plausibility of the facts a plaintiff must set out in a complaint, but about the extent to which a complaint must propose a theory of recovery, based on existing law or some reasonable interpretation of existing law. I have also suggested that, understood in this way, the pre-*Conley* pleading debate reflected a difference of opinion about the role of judges in adjudicating disputes. Traditionalists believed that judges should resolve disputes by reference to established rules of law; Legal Realists believed that judges should do justice in response to the facts before them. *Conley v. Gibson* was a notable victory for the Legal Realist point of view.

This is not to say that the Court's brief remarks on the subject of pleading in *Conley* brought an end to the rule of law in American courts or set the courts on a course of unbridled discretion and activism. Judicial attention to legal rules is more likely to depend on professional habits and training, or on broader social norms, than on the rules of pleading. Meanwhile, as noted, lawyers continue to structure complaints around theories of law.¹⁰⁴ *Nevertheless, the looser, narrative form of pleading endorsed in Conley* may contribute, at least marginally, to the willingness of our judges to give relief in response to compelling facts, case-by-case, according to their own best judgment of what is fair and just.

A requirement that plaintiffs must fit their suits within prescribed categories of actions (along the lines suggested by McCaskill) seems completely outmoded today. Yet, it is conceivable that pleading rules could require more substantive foundation for legal actions than

¹⁰⁴See note ?, supra.

is now thought necessary under Rule 8. It is also conceivable that a rules requiring more substantive legal foundation for complaints might result in a closer connection between established rules of substantive law and the conduct and outcome of trials. If so, what implications might stricter pleading rules have for civil rights litigation?¹⁰⁵

¹⁰⁵In an empirical study of pleading before and after the Supreme Court's decision in *Bell Atlantic v. Twombly*, Kendall Hannon found that, although the overall rate of dismissal of complaints in federal courts has not changed markedly since *Twombly*, there has been a steep increase in dismissals of civil rights complaints (defined as actions brought under §§ 1981, 1982, 1983, and 1985 of Title 42 of the United States Code). Hannon, *supra* note 51, at 123-27. The author suggests three possible explanations for these results. First, the new, stricter pleading the Court adopted in *Twombly* standard may have had little impact outside the area of civil rights because lawyers were already including more detailed allegations than *Conley* required. In civil rights cases, however, lawyers may not have exceeded the *Conley* standard, either because the necessary facts are harder to detect or because plaintiffs cannot afford high-quality representation. See *id.* at 127-30. Second, the new plausibility gives judges more discretion over dismissal of complaints than *Conley*, which strictly limited the ability of judges to dismiss at the stage of pleading. Outside the area of civil rights, judges may have responded by continuing to give minimal scrutiny to complaints. In civil rights cases, however, courts may have used their new discretion to increase scrutiny of complaints, out of concern for the burdens that potential liability places on government actors. See *id.* at 131-32. Finally, lower federal courts may have begun to impose higher pleading standards (presumably in non-civil-rights cases) prior to *Twombly*. See *id.* at 132-33.

The relationship between rule-governed decisionmaking and civil rights is a complex problem. Empirical testing is difficult, and armchair analysis is likely to be affected by political and theoretical assumptions of the analyst. The easiest answer is a skeptical answer, that legal rules are incapable of governing judicial decisionmaking. The Legal Realists of the 1930s, for example, might have argued that legally defined civil rights are meaningless because the rules that define them are too malleable to constrain the outcomes of particular disputes.¹⁰⁶ Another skeptical position, associated with more recent critical scholarship, holds that legally defined rights not only are illusory, but have the malign effect of perpetuating current distributions of social power.¹⁰⁷ If these views are correct, it follows either that the choice of pleading rules is of no consequence, or that liberal pleading is healthy because it eliminates a pointless source of distraction.

Because the in *Twombly* standard pertains to the level of factual support required in a complaint, rather than the legal foundation for claims, Hannon's data are not directly relevant to the question posed in the text, which asks what implications a stricter test of the legal content of pleadings might have for civil rights litigation. However, two points Hannon mentions in his analysis might bear on my inquiry. If in fact civil rights plaintiffs have difficulty obtaining high-quality representation, their complaints might be more likely to suffer from legal defects than complaints in other types of litigation. Further, a standard requiring more legal foundation for claims might, as a practical matter, give courts more leeway to disfavor civil rights claims.

¹⁰⁶See note 35 and accompanying text, *supra*.

¹⁰⁷See Mack, *supra* note 10, at 259-160 (discussing Critical Legal Studies scholarship on the topic of civil rights and citing examples).

If, on the other hand, legal rules are capable of determining the outcome of judicial decisions, then Stephen Subrin's assessment seems correct: in a fundamentally equitable procedural system such as ours, courts will be very good at creating rights but less good at enforcing them.¹⁰⁸ Adjudication according to rules stabilizes established rights but makes it harder for courts to expand rights beyond the terms of the rules that currently define them. A more open-ended, discretionary mode of adjudication permits judges to innovate but can also enable particular judges to disregard claims of right they do not find persuasive. Accordingly, a pleading regime that focuses litigation on established rights (or modest adjustments to established rights) may slow the development of new rights, but may also provide the most reliable structure for enforcement of rights.

Some have suggested that judicial decisions establishing or extending civil rights are unlikely to affect social behavior unless and until they are accepted by the public; therefore, civil rights laws enacted by democratically elected legislatures may have a greater practical effect than adjudication on the well-being of rightholders.¹⁰⁹ If this view is correct, then judicial

¹⁰⁸See note 20 and accompanying text, *supra*.

¹⁰⁹See, e.g., Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change* 39-169 (1991); Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7, 8-13 (1994); Mack, *supra* note 10, at 346-51 (describing civil rights lawyers' views of the functions of litigation during the 1930s and 1940s). Cf. Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 U.C.L.A. L. Rev. 677, 678-84 ((1997) (suggesting that legislation may not be effective if it does not reflect a sufficient, cross-racial convergence of opinion).

*innovation in favor of civil rights may be ineffectual, while judicial resistance to civil rights could delay implementation of rights that have gained popular support. As a result, the risks of judicial discretion may outweigh the benefits of discretion. In this regard, it is interesting to note that the first calls for equitable reform of the Field Code came from business advocates who hoped that a strong and relatively unrestrained judiciary would resist legislative attempts to regulate economic activity.*¹¹⁰

*A middle ground, in which judges are attentive to legally defined rights but willing on occasion to look beyond established rules, may be optimal for protection of civil rights. Ordinarily, compromises between formality and unconstrained decisionmaking are not logically possible: a rule that is subject to exception or modification, either to further the underlying rationale of the rule or in response to compelling circumstances, loses its power to constrain.*¹¹¹ *Procedural mechanisms, however, have some promise as a way to achieve a compromise between rules and discretion, because they operate indirectly. The process of adjudication can be structured in ways that make it more or less likely that judges will approach a dispute with rules of positive law in mind - for example, by providing for rule-oriented pleading at the outset of the case.*

¹¹⁰See Subrin, *supra* note 13, at 948-55 (discussing Thomas Shelton and other supporters of the Rules Enabling Act).

¹¹¹For extensive analysis of why this is true, see Larry Alexander & Emily Sherwin, *The Rule of Rules: Morality, Rules, and the Dilemmas of Law* 53-95 (2000); Frederick Schauer, *Playing By the Rules: A Philosophical Examination of Rule-Based Decision-Making in Life and Law* 128-34 (1991).

A return to mandatory issue-pleading is highly unlikely, and probably undesirable, in modern times. But as long as lawyers persist in the habit of outlining a legal theory of recovery in their complaints, it is possible that lingering pleading practices may help to preserve the integrity of rights, without unduly restricting the development of rights.