

# *Narrative-Erasing Procedure*

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# Restrictive procedure

- “[C]haracterized by a desire to discourage certain claims and to keep systemic litigation costs under control.”

A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 366 (2010).

# Narrative-erasing procedure

- Plausibility pleading under the *Twombly/Iqbal* regime;
- Proportional discovery under the revised Rule 26; and
- Ever-increasing pressures for settlement.

# Table of Contents

- I. Narrative Theory for Lawyers
- II. A Narrative Account of Civil Pretrial Litigation
- III. Narrative-Erasing Procedure
- IV. Solutions to the Problem of Narrative-Erasing Procedure

# What is narrative?

- “The representation of an event or series of events.”

H. PORTER ABBOTT, THE CAMBRIDGE  
INTRODUCTION TO NARRATIVE 12 (2002).

# Why are narratives persuasive?

- **Natural:** a key way that we make sense of the world.
- **Culturally powerful:** master narratives tell and retell history, traditions, values.
- **Shared:** audience invited to be part of the telling.
- **Narrative: contestable and flexible**

# Law as a narrative activity

“At its heart [the law] is a way of telling a story about what has happened in the world and claiming a meaning for it by writing an ending to it.”

- JAMES BOYD WHITE, *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 36 (1985).

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# Plausibility pleading

- Until 2007: “[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.”

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

- After *Twombly/Iqbal*: A court should consider the “well-pleaded factual allegations” in the complaint, and determine whether those allegations “allow[] the court to **draw the reasonable inference that the defendant is liable** for the misconduct alleged.”  
*Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).



- “My son is dating an African-American woman.”
- “I don’t want to discourage you from applying, but we have much more stringent criteria than all the other banks in town.”

# Pleading as narrative-erasing procedure

- At the pleading stage, plaintiffs may lack information that would allow them to construct a rich, plausible narrative.
- Judges applying the plausibility standard may rely on their existing narrative schema and cognitive biases.
- Plaintiffs will be forced into existing narratives to demonstrate plausibility, rather than working creatively to develop a path-breaking narrative of liability in a claim.
- Some litigants will be dissuaded from initiating a lawsuit altogether.

# Results

- Narrative-erasing procedures' effects compound.
- Individual cases are affected.
- Development of the law is affected.
- Especially devastating for individuals from marginalized groups.

# Solutions for narrative-erasing procedure

- Within the legal system: Advocating for narrative
  - Courts and rule-makers should explicitly take narrative into account when altering procedural standards.
  - Courts should adopt a narrative lens in even seemingly procedural decisions.
- Outside the legal system: Public narrative
  - From the social movements literature.
  - A leadership art that uses storytelling to translate values into action.

Thank you!

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