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.”

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.”

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.”

Narrative-erasing procedure

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

• 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.”
• “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
  o Courts and rule-makers should explicitly take narrative into account when altering procedural standards.
  o Courts should adopt a narrative lens in even seemingly procedural decisions.

• Outside the legal system: Public narrative
  o From the social movements literature.
  o A leadership art that uses storytelling to translate values into action.
Thank you!
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