Redefining Efficiency In Civil Procedure

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Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. Rev. 1777 (2015), available at SSRN.

In his year end report, Chief Justice Roberts stated that the 2015 civil procedure amendments were "to address the most serious impediments to just, speedy, and efficient resolution of civil disputes." Roberts clearly was referring to Rule 1 of the Federal Rules of Civil Procedure, which states that the rules are to be interpreted to achieve a "just, speedy, and inexpensive determination." In other words, Roberts equated efficiency with inexpensive. The Chief Justice's comment illustrates the "efficiency norm" problem that Professor Coleman has addressed in her noteworthy article. The courts, the rulemakers, and Congress have defined efficiency too narrowly, and this definition has resulted in fewer trials and an anti-plaintiff bias.

In her article, Coleman considers the important question of how the concept of efficiency should affect litigation. She first recognizes that the number of cases filed in federal court has increased significantly since the rules were adopted in 1938—some of this as the result of the creation of new substantive rights. This phenomenon has lead to criticism of the litigation system. Influenced by and participating in this criticism, the institutional actors of the rulemakers, the judiciary, and Congress have promoted "the efficiency norm." Under this mandate, they make changes in the name of efficiency and focus on just cost—more specifically on only certain costs—the costs to corporate or governmental defendants.

Coleman aptly illustrates how institutional actors have employed this norm. For example, in their recent decision to change the discovery rule to add proportionality as a consideration, the rulemakers focused on cost to defendants and failed to consider the possible costs to plaintiffs of not receiving necessary discovery. Similarly, in Twombly, Iqbal, and Concepcion, the Supreme Court discussed only the costs to businesses, not the effect of the possible changes on plaintiffs such as having more cases dismissed without the opportunity to receive important discovery. Finally, Congress also has narrowly viewed efficiency. For example, the Prison Litigation Reform Act intended to decrease the costs of frivolous litigation to the federal courts but did not consider the possible cost to prisoners with meritorious claims that may be dismissed.

Coleman makes the important point that the procedural changes made in the name of efficiency or cost may not even lessen costs. For example, the new proportionality rule may increase discovery motion practice and thus costs.

Coleman also critiques how the efficiency norm is conveyed. Extensive efforts have been made to broadcast a view about the high costs of litigation to the public without also showing the other costs and benefits of litigation. While Coleman recognizes the difficulty of quantifying these other costs and benefits, she rightly argues that regardless of these problems, the other costs and benefits must be presented and considered to accurately examine the question of efficiency. Moreover, she notes that the costs to defendants are often "cherry-pick[ed]" or exaggerated—all resulting in an incomplete picture of litigation.

As previously mentioned, Coleman asserts that the efficiency norm has contributed to two presumptions in our modern litigation system. Although the original system valued trials and was receptive to plaintiffs, now, non-trial adjudication is favored over trials and there is skepticism towards plaintiffs. For example, the new proportionality rule's focus on less discovery without viewing what plaintiffs actually need for trial disfavors trial and plaintiffs.

Coleman goes on to argue that modern adjudication is now de-democraticizing our civil justice system. Public

adjudications including those that employ the public as jurors are rare. Moreover, it is difficult for a regular citizen to litigate a dispute in court. These changes create losses, including public benefits. People or companies may not abide by the law because the threat of consequences is not as great as in the past.

According to Coleman, these changes are connected to a larger issue in civil procedure—the shift from a liberal ethos to a restrictive ethos—a problem about which Professors Rick Marcus and Benjamin Spencer have written. In other work Coleman has explained that while benefiting corporations, government, and other entities, this restrictive ethos has caused certain plaintiffs—who are economically or culturally disadvantaged—to vanish.

Coleman argues that efficiency norm should be redefined. She states “efficiency—as applied to civil litigation—must take account of all of the potential costs and benefits.”

Whenever efficiency or costs are mentioned, Coleman’s words should be heeded. The rulemakers, the courts, and Congress should look at all of the potential costs and benefits.

If you are interested in Coleman’s arguments, you should also read *The Perverse Effects of Efficiency in Criminal Process*. There, Darryl Brown has written about how this concept of efficiency affects our criminal system, emphasizing that particular costs have been stressed and the appropriate costs and benefits have not been examined.

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