

The Vanishing Poor

Author : Elizabeth G. Thornburg

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Myriam Gilles, [*Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*](#), 65 **Emory L.J.** 1531 (2016).

It's certainly not news that, in recent years, the Supreme Court majority has been unenthusiastic about class actions. Reinterpretations of procedural rules and standing requirements make class certification more difficult and efforts at certification more expensive. Ever-broadening interpretations of the Federal Arbitration Act also move claims out of courts and prohibit aggregation of claims in arbitration. Procedure scholars have lamented these decisions for years, as the gradual accretion of unfortunate decisions continues.

I love this essay by [Myriam Gilles](#) because it changes my focus from processes to people and shines a light on the groups whose claims disappear in the absence of class action litigation. Conceptually, I've talked about "negative value claims" or perhaps "consumers" and "employees," but unconsciously saw the issue through the lens of my own class-member settlements in cases involving unauthorized foreign transaction fees and excessive e-Book prices. I failed to think through the many ways in which those SCOTUS decisions have a systemic and devastating impact on the poor and powerless.

Class Warfare explores three interconnected implications of the decline of class actions and their impact on low-income groups. First, it explores the ways in which the poor are particularly vulnerable to the kinds of unlawful practices that require aggregation for a remedy: low-value consumer claims and group-based workplace harms. Lack of access to conventional credit markets makes low-income consumers targets of financial abuses such as predatory lending, abusive mortgage terms, and subprime car loans. Payday loans are a particular scourge. Gilles argues that although there have been some efforts at regulatory enforcement, private class litigation has been an important tool in reigning in improper practices. She points to the class action against [ACE Cash Express](#) that settled in 2003, resulting in loan forgiveness, changed practices, and modest cash payments.

As for employees, Gilles posits that low-wage workers are more often victimized by employers. Explanations vary: they have less bargaining power, they lack information about alternatives, and they are rationally risk-averse (having no economic cushion in the event of dismissal). The result is lower pay, fewer benefits, less job security, more discrimination, and more violations of wage and hour laws. Again, there are some legislative and regulatory measures available, but for groups without political clout, aggregate litigation is a more effective alternative. Gilles does include a footnote identifying one fascinating example of nonjudicial self-help, however: an immigrants' rights group has developed a smartphone app for day laborers. According to an [article describing the app](#), "Workers will be able to rate employers (think Yelp or Uber), log their hours and wages, take pictures of job sites and help identify, down to the color and make of a car, employers with a history of withholding wages. They will also be able to send instant alerts to other workers."

Gilles' article's second point focuses on the potential impact of successful class litigation, where the small monetary claims are not individually feasible but aggregation provides a powerful tool for group relief. The most important benefit comes not from individual class-member payouts ("small value class actions [are] quite poor vehicles for efficiently distributing tiny per-person damages") but from broad-

based injunctive relief and from the deterrent effect of forcing the defendant to internalize the social cost of its actions. Gilles suggests that both specific and general deterrence are at work. Without such deterrence, exploitative practices will repeatedly impact the same people. “[W]hen members of low-income groups suffer group-based harm, there is a high likelihood that precisely the same individuals will suffer precisely the same harm in the future given the inability to escape poverty. And further, it is likely that their children (and possibly grandchildren) will also suffer the same harms in the more distant future.”

Third, and equally worrying, *Class Warfare* identifies potential long-term effects of losing class actions that invoke the rights of low-income litigants. Will some types of litigation disappear from the docket (because litigating individual claims is not economically viable)? If so, will courts lose the ability to develop the law in those areas? And when both people and legal issues have almost vanished from the docket, will judges – themselves likely to come from high-income backgrounds – lose the ability to understand the lived reality of low-income people? To be sure, this cultural blindness already exists. Gilles cites [United States v. Kras](#) (1973) as an example of some Justices’ making false assumptions about the ability of a bankruptcy debtor to make payments and find a job. [Judges](#), as humans, have the same kinds of implicit [biases](#) as the rest of us, and when there is no judicial exposure to poverty to enrich the lens through which judges view facts, inexperience can morph into fact-finding errors. This is all the more problematic at a time when judges are increasingly called upon to decide whether inferences from circumstantial evidence are [plausible](#) and whether discovery expenses are proportional given the [“importance of the issues at stake in the action”](#) and [“the parties’ resources.”](#)

One could quibble with some of Gilles’ points. Some of the abuses of the poor are legal, there are some agencies charged with providing relief, and some cases will find their way to court. Nonetheless, *Class Warfare* correctly describes the overall impact of court-rationing on low-income groups. Once again, the [“Haves”](#) come out ahead.

For some, the popular culture class action story is about greedy plaintiffs’ lawyers getting rich raising frivolous issues like the lack of vitamins in Vitamin Water and the presence of pesticides in “all-natural” tea. Gilles’ article is an important reminder that more is at stake. Procedural change has predictably disproportionate impact on those without the financial and legal resources to fully utilize the court system. It’s not just generic “consumers” and “employees” who suffer when class actions become unavailable; the burden will fall most heavily on those who have the least.

One last note: *Class Warfare* is part of a [symposium issue](#) of the Emory Law Journal (vol. 65, issue 6). Procedure scholars interested in Gilles’ essay will also find other articles in the issue fascinating.

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