

HEINONLINE

Citation: 35 J. Legal Educ. 130 1985

Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Thu Feb 2 17:20:26 2012

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0022-2208](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0022-2208)

is fair for two reasons. First, Polinsky does address many of the components of the equity issue, with discussions of wealth effects, the equity-efficiency trade-off, and use of legal rules to redistribute income. This discussion would be more forceful if gathered in a single chapter focusing on the moral bases of efficiency. Second, the book aims at readers who want to assess what economics has to offer the legal analyst, in addition or in contrast to other approaches based on rightness, fairness, or due process. To help make this assessment, the *Introduction* should suggest more fully how economics fits into a larger philosophical framework.

Discussing the philosophical framework of economics requires, of course, introducing another vocabulary. The "efficiency and ethics" literature centers on distinctions between Pareto efficiency and Kaldor-Hicks efficiency, utilitarianism and Kantian philosophy, and so forth. This book eschews such technical jargon. Given Polinsky's masterful ability to explain other difficult concepts in simple terms, however, I am confident that he could outline the essence of this philosophical debate as well. Perhaps he will in the Second Edition. If so, not only will future readers have a useful introduction to the economist's method of thinking about efficiency properties of the common law, but they would also have a more complete framework for evaluating the moral justifications and limitations of economic analysis.

Thomas Sowell, *Civil Rights: Rhetoric or Reality?*. New York: William Morrow, 1984. Pp. 164. \$11.95.

Reviewed by Stephen D. Sugarman

In *Civil Rights: Rhetoric or Reality?* black economist Thomas Sowell continues his attack on the "civil rights vision." That vision, according to Sowell, rests on the belief that observed group differences (say, in income) are caused by discrimination against minorities; the civil right strategy then becomes to use the power of government to attain representational participation everywhere, but especially in the job market. The reason that the inference of discrimination is drawn from statistical demonstrations of group differences (black/white and male/female for example), according to Sowell, is that civil rights leaders can imagine only two competing explanations from such outcomes — discrimination on the one hand and inherent inferiority on the other, something which both they and Sowell reject.

One of Sowell's central purposes is to explode this dichotomy by offering other explanations for group differences, especially differences in economic condition. Drawing on his previous work, the alternative hypotheses he offers fly largely under the flag of "culture." First, using illustrative examples, he points to such considerations as work habits, family size and

structure, the age profile of the group including the typical age of marriage, the geographical locales in which the group lives, and educational aspirations and attainment. Second, he asks, how can racial discrimination be assigned as the cause of overall white/black differences when second-generation blacks from the West Indies do virtually as well as whites, and when young, well-educated, black married couples do as well as whites? Finally, Sowell relies on the economist's explanation: Were massive employment discrimination against blacks and/or women occurring, this would mean that those who didn't care to discriminate, and there surely must be some of them, would have an enormous competitive advantage that could be exploited by hiring those talented blacks and/or women who the bigots were passing over. Indeed, as Sowell sees it, discrimination can exist on a large scale in a free market economy only if it has the backing of the law.

Sowell's other main message is his disapproval of the *political* efforts of civil rights visionaries. First, he argues that while blacks and now women pin their hopes on political success, this is perhaps an unnecessary strategy since other "minority" groups have succeeded without it. Along the way he castigates civil rights leaders for taking credit for economic gains for blacks and other groups that, Sowell argues, would have come about anyway, and merely reflect the long-term trend established before the era of quotas. Second, he finds the reliance on politics a dangerous strategy. He worries that black special-interest politics is generating a nasty backlash (and the growing power of hate groups), which is divisive to society, leads to low respect for courts and for government generally, and in the end may well be especially detrimental to blacks. Third, he attacks specific political strategies: affirmative action in employment, public employment targeted for blacks, and forced busing in education. For example, affirmative action, he says, both disadvantages the worst-off in the groups sought to be benefited and demeans its alleged beneficiaries. Moreover, he argues, black leaders pay a high price for getting others to back such measures: In return they have to support laws promoted by political allies (the unions, for example), which, while less visibly so, turn out to be bad for blacks. Here, minimum wage laws, union power in general, occupational licensing laws, and farm subsidies come in for condemnation.

How did we reach what Sowell sees as such a deplorable state of affairs? Lawyers and judges come in for much of the blame. It was the Supreme Court, after all (albeit in the face of more than a decade of "massive resistance"), that rejected neighborhood schools in favor of body mixing in the *Swann* case; and it was the Court, after all, that in *Griggs* adopted the powerful presumption that in employment-discrimination cases group differences would largely be treated as a *prima facie* showing of discrimination. Civil rights leaders too are blamed. Their behavior is explained as reflecting narrow self-interest in obtaining and holding onto power, as well as the need to find new causes for the civil rights organizations.

Sowell rejects the claim that this analysis calls for "benign neglect," for leaving people to bring themselves up by their own "bootstraps." What should the government do? Sowell returns to the free market economist's

solutions: deregulation (of occupational licensing for example), repeal of the minimum wage, education vouchers, and more crime control.

Writing in *The New Republic*, socialist Michael Harrington argues that Sowell attacks a straw man: The civil rights vision acknowledges that culture and history matter, but insists that discrimination remains widespread. Harrington also says that Sowell often has his facts wrong, especially about affirmative action which, he says, does help some minorities. And while Harrington agrees with Sowell that the worst-off have been hurt in recent years, the reason, he argues, is not because of affirmative action as Sowell would have it, but rather because the government has stuck too close to the very free market philosophy that Sowell espouses.

Chicago sociology professor William Julius Wilson, writing in *The New York Times*, criticizes Sowell for lack of balance, for always drawing benign conclusions from data that can as well be interpreted as evidencing discrimination. Moreover, Wilson chides Sowell for his inattention to real problems of class in a nation in which blacks are visibly far disproportionately represented in the lowest economic classes.

I have two further concerns to raise. First, Sowell gives no attention to the difficulties of actually proving intentional discrimination at a time when, although open and official racism is much reduced, it is widely thought that substantial discrimination nonetheless continues. To reject statistical showings and instead to impose rigorous and high proof standards on discrimination's victims is, in the view of many, to license the illegal denial of equal opportunity that Sowell despises. From the vantage point of Stanford's Hoover Institution, Sowell may be content to rely on the market to curb most such abuses. Nearly everywhere else this is considered woefully insufficient. In this light, the use of statistical showings about groups as a technique to shift the burden of proof looks quite different.

Second, when Sowell's response to his critics that he is not "blaming the victim" is laid along side his view that "culture" counts, where does this leave us? Surely there must be room here for the argument that some current, economically disadvantaging, cultural conditions are the legacy of past official discrimination. If so, then isn't there some public obligation to try to undo or compensate for such consequences? For example, I thought that one of the purposes of affirmative action was to provide minorities with plenty of role models, which in turn were supposed to affect cultural aspirations. There seems to be no place for this sort of argument in Sowell's view of the world, in which, now that Jim Crow has been formally banished, the main remaining role for government is to weed out general constraints on economic liberty.