THE ENFORCEMENT OF CIVIL RIGHTS STATUTES: THE REAGAN ADMINISTRATION'S RECORD

Barbara Wolvovitz*
Jules Lobel**

INTRODUCTION

The Reagan administration has launched a systematic attack on the constitutional and statutory rights of minorities and women contained in the civil rights statutes and the thirteenth, fourteenth and fifteenth amendments. Those amendments, and the civil rights laws which Congress has enacted to enforce the promise of equality contained in the Constitution, mandate an affirmative obligation on the part of the federal government to protect the rights of those who have been excluded from the American dream. As Judge Wisdom has pointed out, "[t]he Constitution calls for equal treatment under the law, and in light of the pervasive past discriminatory practices and the present effects of these practices, in many cases this goal can be achieved only by taking active affirmative steps to remove the effects of prior inequality."[1] Yet this administration, far from taking affirmative steps to root out and rectify discrimination, has proceeded to erect obstacle upon obstacle in the way of the enforcement of Americans' basic rights. Whatever may be the technical reasoning or argument of the administration in each case, the pattern and practice is clear—whether in housing, school desegregation, employment, municipal services or higher education—the administration has abandoned the very people that these constitutional amendments and statutes were designed to protect.

The Justice Department's Civil Rights Division has long been the centerpiece of the federal civil rights commitment. Yet, under this administration, the Division has reversed the bipartisan approach to civil rights that has characterized the last twenty years. Again and again, the Reagan administration has failed to uphold and enforce settled law and past administration's practice in the field of civil rights.[2] In contrast to its refusal to enforce well established legal principles on behalf of the rights of minorities and women, the Civil

---

* J.D., Rutgers Law School, 1978.

** Assistant Professor of Law, University of Pittsburgh School of Law. This article is adapted from testimony given by the authors before the House Committee on the Judiciary, Subcommittee on Civil and Constitutional Rights. Presented April 3, 1985, on behalf of the National Lawyers Guild.

We would like to thank the various students who helped prepare the testimony from which this article is adapted. Those students are: Francis D'Eramo of the University of Pittsburgh, Elsie Chandler and Estelle Bronstein of Rutgers Law School, and Robert Zuss of City University of New York Law School at Queens.

1. Williams v. City of New Orleans, 729 F.2d 1554, 1573 (5th Cir. 1984) (Wisdom, J., concurring).

2. *See* Days, *Turning Back the Clock: The Reagan Adminstration and Civil Rights*, 19 HARV.

Rights Division has taken an expansive and overreaching interpretation of the law when necessary to impinge upon the gains won by minorities and women in the past decades.

This betrayal of the interests of minorities and women by the federal government is much more than a dispute about which remedies may be employed in particular cases. Fundamentally, the present ideology and attitude of the Justice Department calls into question the very nature and existence of constitutional and statutory civil rights as well as the federal government's obligation and the private citizen's ability to enforce those rights.

At bottom, the Reagan administration attitude toward civil rights constitutes a denial of institutional racism and sexism. "When a vice is inherent in a system the vice can be eradicated only by restructuring the system."[3] Racism and sexism are vices which are institutionalized in many state, county and municipal governments as well as private enterprises. By ignoring the fact that institutional racism and sexism exist, the adminstration looks only at the actions and motives of individuals and the harm suffered by individuals. If this position is continued and eventually accepted as the law, the clock will be turned back 100 years to the period before the original civil rights acts of the 1860s and 1870s.

This article will review three areas in which Justice Department positions and actions have been wholly unwarranted under the current law, and which have been destructive to the aims of the civil rights legislation which they are mandated to enforce. The three areas are: (1) enforcement of Title VII as related to the Justice Department's response to the *Firefighters Local Union No. 1784 v. Stotts*[4] decision of the Supreme Court; (2) its enforcement of the fair housing laws; and (3) its widespread attempt to erode the disparate impact standard in various areas of law.

I. TITLE VII & AFFIRMATIVE ACTION

The Civil Rights Division's present perspective on the enforcement of civil rights is exemplified by its response to the Supreme Court's opinion in the case of *Stotts*. While the Supreme Court in *Stotts* framed the issue as whether the district court exceeded its powers in requiring white employees to be laid off instead of blacks in violation of an otherwise applicable seniority system, the Department has interpreted the *Stotts* decision far more expansively, asserting that it prohibits *all* affirmative action in hiring and promotion under Title VII.

This position undermines the policies embodied in Title VII as well as the underlying principles contained in the thirteenth and fourteenth amendments. The thirteenth amendment was designed not only to prohibit chattel slavery but to eradicate the badges and incidents of slavery.[5] "One of the cornerstones of slavery was the race-based denial of equal opportunities . . ."[6] Similarly the Supreme Court has noted that a critical objective of Title VII is "to elimi-

C.R.-C.L. L. REV. 309 (1984); WASHINGTON COUNCIL OF LAWYERS REAGAN CIVIL RIGHTS: THE FIRST TWENTY MONTHS (1982).

3. *Williams*, 729 F.2d at 1573 (Wisdom, J., concurring).
4. — U.S. —, 104 S. Ct. 2576 (1984).
5. Jones v. Alfred Mayer Co., 392 U.S. 409 (1968).
6. *Williams*, 729 F.2d at 1579 (Wisdom, J., concurring).

nate, so far as possible the last vestiges of discrimination."[7] A key method of carrying out both the legislative and constitutional mandates to eradicate discrimination root and branch is to fashion race-conscious remedies against our society's systemic racial discrimination against blacks as a class.

There is significant evidence that affirmative action does have an impact. Minorities and women have made greater gains in employment at those establishments subject to affirmative action requirements, than at companies not subject to such requirements.[8] For example, a study conducted by the Office of Federal Contract Compliance in 1983 found that minority employment increased 20.1% and female employment 15.2% between 1974 and 1980 for federal contractors subject to affirmative action requirements despite total employment gains of only 3%.[9] For non-federal contractors not subject to affirmative action requirements, minority employment measured 12.3% and female employment only 2.2%, despite an 8.2% growth in total employment over the same period.[10]

By opposing affirmative action plans the Civil Rights Division eviscerates the policies of Title VII and slams the door on minority and female job opportunities. The case of *Paradise v. Department of Public Safety*[11] currently pending before the Eleventh Circuit Court of Appeals provides an illustrative example of the consequences of the Justice Department's position. In that case, in 1972 the district court found that the defendant, Alabama Department of Public Safety, had engaged in a blatant and continuous pattern of racial discrimination for 37 years, during which it did not have a *single* black trooper.[12] Despite the entering of a decree imposing hiring requirements for blacks at the entry level, by late 1978, nearly 7 years after the original order, the Department did not have a single black corporal.[13] By December 1983, despite numerous decrees designed to ensure racially neutral promotion policies, the Department still did not employ a single black at any rank above corporal and only 6% of its corporals were black in a state containing a sizeable black population. Given the inability of court orders to obtain equality in promotion, the court ordered a 1 to 1 temporary promotion policy. The court found that such relief was necessary because:

> the racial imbalances in the upper ranks of the Alabama Department of Public Safety remain egregious and are now of long duration; and, furthermore, it is apparent from the history of this lawsuit that without immediate, affirmative, race-conscious action these intolerable disparities will not dissipate within the near future.[14]

Yet despite the clear need for affirmative relief, the Justice Department has filed a brief in the *Paradise* case urging the court of appeals to reverse the

7. Albermale Paper Co. v. Moody, 422 U.S. 405, 418 (1975).

8. *Affirmative Action to Open the Doors of Job Opportunity: A Report of the Citizen's Commission on Civil Rights* 122-29 (June 1984).

9. Office of Federal Contract Compliance Programs, Employment Standards Administration, A Review of the Effect of Executive Order 11246 and the Federal Contract Compliance Program or Employment Opportunities of Minorities and Women (1983).

10. *Id.*

11. (No. 84-7053) Record on Appeal at 74-75. *See also* NAACP v. Allen, 340 F. Supp. 703, 705 (M.D. Ala. 1972).

12. *Id.*

13. Paradise v. Shoemaker, 470 F. Supp. 439, 442 (M.D. Ala. 1979).

14. *Id.* at 172 (Record on Appeal).

district court's order because, it argues, the *Stotts* case bars such affirmative relief.[15] By doing so, the Justice Department is clearly leaving the situation to continue unrectified.

The administration embraces as an alternative approach the use of recruitment goals. However, even the use of such goals contradicts its basic approach. It is not immediately apparent why an employer granting preferences as to whom it will try to recruit based on race is lawful, while its granting preferences in the actual hiring process is not. Moreover, an additional question arises when an employer meets the recruitment goals and timetables, but still fails to hire meaningful numbers of minorities or women. It would be inconsistent for the Justice Department to argue that the court must then impose hiring goals. However, if that is not done, one fails to see the impact of recruitment goals. In fact, it is logical to presume that in the future the administration will move away from even numerical recruitment goals as contradicting its basic ideological premise.

The Civil Rights Division's view of *Stotts* is not only destructive to continued progress towards equality, but it is totally unwarranted. The Division's position is at odds with the unanimous view of all of the circuit courts of appeals that race-conscious affirmative action goals can be appropriate under Title VII,[16] and has not been accepted by the federal courts which have addressed the issue since the Supreme Court's decision in *Stotts*.[17] Yet the Justice Department would have us believe that the Supreme Court reversed the unanimous opinion of all the federal courts of appeals without even mentioning those opinions or giving the slightest indication that those decisions are overruled. Indeed, where the court has intended to overrule substantial circuit court precedent, it has clearly indicated that it is doing so, as Justice White did in *Washington v. Davis*[18] and Justice Stewart in *International Brotherhood of Teamsters v. United States*.[19] It is simply hard to believe that the Supreme Court intended to radically change the well-established Title VII law without so stating.

---

15. *Id.* (Reply Brief of the United States).

16. *See, e.g.*, Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984) (en banc); Chisholm v. United States Postal Service, 665 F.2d 482 (4th Cir. 1981); United States v. City of Chicago, 663 F.2d 1354 (7th Cir. 1981) (en banc); Association Against Discrimination in Employment v. City of Bridgeport, 647 F.2d 256 (2d Cir. 1981); Thompson v. Sawyer, 678 F.2d 257, 294 (D.C. Cir. 1982); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 943-44 (10th Cir. 1979); Firefighters Inst. for Racial Equality v. City of St. Louis, 616 F.2d 350, 364 (8th Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); United States v. City of Alexandria, 614 F.2d 1358, 1363-66 (5th Cir. 1980); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 174-77 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); Patterson v. American Tobacco Co., 535 F.2d 257, 273-74 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); NAACP v. Beecher, 504 F.2d 1017, 1027-28 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); Rios v. Enterprises Ass'n Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir. 1974); United States v. Ironworkers Local 86, 443 F.2d 544, 553-554 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971); Contractors Ass'n E. Pa. v. Secretary of Labor, 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971); United States v. I.B.E.W., Local No. 38, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

17. EEOC v. Local 638, 36 Fair Empl. Prac. Cas. Cases 1466, 1477 (2d Cir. 1985); Vanguards v. City of Cleveland, 36 Fair Empl. Prac. Cas. Cases 1431, 1437 (6th Cir. 1985); *see also* Deveraux v. Geary, 36 Fair Empl. Prac. Cas. Cases 415, 418-19 (D. Mass. 1984).

18. Washington v. Davis, 426 U.S. 239, 244-45 (1976). Justice White's treatment of the Court of Appeals precedent in *Washington v. Davis* is in marked contrast to the absence of any mention of that precedent in *Stotts*.

19. 431 U.S. 324, 346 n.28.

Yet, despite the fact that the Supreme Court's opinion in *Stotts* did not directly address the question of whether any affirmative action in hiring or promotion was permitted under Title VII; despite the unanimous view of the courts of appeals before and after *Stotts* that such plans are valid; despite the long-established and bipartisan policy of the Justice Department and EEOC under the Nixon, Ford and Carter administrations to seek such affirmative action plans to remedy past discrimination—Assistant Attorney General William Bradford Reynolds has sent letters to approximately 50 cities, counties and state agencies across the country stating that consent decrees with goals contemplating preferential treatment to victims of discrimination are plainly contrary to *Stotts*. The letters recommend that the city, county and state defendants join the Justice Department in filing motions in court modifying the consent decrees to remove any hiring goals.[20] To demonstrate the consequences of a city's failure to agree, the Justice Department has moved in United States District Court for the Western District of New York to modify or vacate the city of Buffalo's consent decree and has stated that it will take similar action in the future in other cities.[21]

Thus, without waiting for a definitive court ruling, the Justice Department is seeking to vacate or modify decrees which prior administrations negotiated with city, county and state defendants. The Justice Department has reversed its position from that of plaintiff to one of supporting the defendants, leaving the real plaintiffs in interest without representation in many of these situations.

Moreover, based on an unwarranted reading of the *Stotts* opinion, the Justice Department is taking a shotgun approach towards interfering with dozens of affirmative action programs which are working in various cities and counties across the country. Important strides have been made in those cities and counties which have consent decrees mandating affirmative action programs. In Boston, the city's police and fire departments have expanded minority employment from 1.73%, in the aggregate, to 11.7% in the police department and 14.7% in the fire department as of 1981 since entering into a consent decree in the early 1970's.[22] Similarly in San Diego, California, there has been substantial job increases among minorities in county employment since the entering into of a consent decree in 1977 containing affirmative action goals.[23] Yet the Civil Rights Division now wishes to vacate virtually all of the decrees at a time when some progress is being made.

Moreover, the means by which the Department has chosen to reverse the position taken by prior administrations demonstrates a zeal for undermining the rights of blacks, hispanics and women. Based on what essentially amounts to dicta in the *Stotts* opinion, the Justice Department has taken a position at odds with past administrations' positions and the present law of the circuits. If the Justice Department wanted to change the present law, the means to accomplish that end would be to choose one or two test cases and litigate the

20. *See, e.g.*, letter from Wm. Bradford Reynolds to Mr. Lloyd M. Harmon, Jr., County Counsel of San Diego (January 11, 1985).

21. Syracuse Post Standard, Mar. 23, 1984, at 1, col. 4.

22. CITIZEN'S COMMISSION ON CIVIL RIGHTS, AFFIRMATIVE ACTION TO OPEN DOORS OF JOB OPPORTUNITY, 128 (June 1984).

23. *See* U.S. v. San Diego County, (S.D. Cal. 1983, No. 76-1094-S) (Transcript of Hearing of Defendant's Motion to Dissolve the Consent Decree).

issue. There is already a case in the Eleventh Circuit Court of Appeals, that is, *Paradise*, in which the United States as plaintiff-appellant directly raised the issue of the permissibility of affirmative action plans. Various district court proceedings have also addressed the issue as well as circuit court cases such as *Devereaux v. Geary*[24] where the United States has filed an amicus brief.[25] Pending resolution of this issue, and given that even after *Stotts*, various district and circuit courts have rejected the Justice Department's position, it is unclear why the Department has attempted to persuade fifty cities and counties to modify their decrees. Certainly it cannot be that the law is clear. The only logical answer is that the Department is seeking a wholesale reversal of these affirmative action plans irrespective of how the Supreme Court eventually construes the law in this area. Once these decrees are vacated or modified, it is extremely unlikely that they will ever be re-instituted. That the Justice Department's position is based not on the law, but on its own ideological position, can be seen in *U.S. v. San Diego County*.[26] There, even prior to the *Stotts* case, the Justice Department shifted policy and joined in defendant's motion to vacate the consent decrees, a motion which was denied by the court on March 5, 1983.[27] What the Department is hoping to accomplish is the dismantling of affirmative action programs even if affirmative action in hiring is upheld as lawful. To seek such a massive change in consent decrees around the country without first obtaining a definitive Supreme Court opinion changing the present law is to abdicate responsibility for enforcing the law. This stands in sharp contrast to the Department's attitude towards enforcing other laws beneficial to minorities and women, wherein the administration argues that ambiguities in the law prevents it from taking a strong position.

II. Fair Housing Laws

With the passage of the Title VIII of the Civil Rights Act the federal government committed itself to the prohibition of discrimination in private and public housing and provided some mechanisms necessary to achieve that goal.[28] It created a private right of action for the victims of discrimination and gave the attorney general authority to institute litigation where there was a pattern or practice of discrimination.

Under both republican and democratic administrations between 1968 and 1978, the Civil Rights Division of the Justice Department filed more than 300 cases, averaging approximately 32 cases per year.[29] During the four years of the Carter administration a total of 66 cases were brought for an average of over 16 per year.[30] The record of the Reagan administration is pitiful in comparison. In its first year, 1981, no cases were brought.[31] The second year

24. 36 Fair Empl. Prac. Cas. (BNA) 415 (D. Mass. 1984) (appeal pending); *see also* cases cited *supra* note 17 *supra*.

25. *See supra* notes 16-17.

26. U.S. v. San Diego County, (S.D. Cal. 1983, No. 76-1094-S) (Transcript of Hearing).

27. *Id.* at 12.

28. Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3609 (1977).

29. Mindberg, *"A Thousand Days of Silence,"* Human Rights, ABA, Winter 1984, Col. 11, No. 3, p. 20.

30. Department of Justice, Case Docket for Complaints Filed Jan. 20, 1977 through Jan. 19, 1981.

31. Department of Justice, Case Docket for Complaints Filed Jan. 20, 1981 through Mar. 16, 1984.

showed a slight improvement—a total of 2 cases were brought.[32] As public outrage grew over the complete lack of enforcement, the Department felt compelled to initiate more suits, and in 1983, a total of 5 suits were initiated and the Justice Department intervened in 1 suit.[33] Because the administration recognized this low level of activity as a political liability in election year, a total of seventeen cases were commenced between March and November of 1984.[34] However, a closer analysis of this spurt of litigation shows it to be misleading because 6 of the cases attacked alleged racial steering of home buyers by real estate brokers in the Chicago area and therefore actually represent, in effect, a single case against a problem in one particular geographical area.

Two of the cases that are touted by the Division as proof of its concern with housing discrimination are: *United States v. Gerston*[35] and *United States v. Starrett City*.[36] *Gerston* and *Starrett City* were suits filed against large housing projects which maintained racial quotas in order to maintain integrated housing.[37] Both of these housing projects are integrated housing projects which use "racial quotas" in order to maintain integration. They are not segregated housing projects. While there is a great deal of debate about whether this use of quotas to maintain integrated housing is the best method to end housing segregation, there is no doubt that the allocation of scarce federal resources to end racial discrimination in housing is more appropriately employed against those landlords that maintain segregation and not against those that are attempting to maintain integrated housing.[38] Yet, this is the future area of emphasis for the Division's fair housing litigation.

Prior to the Reagan administration, the Department made a significant contribution to the development of case law that enhanced the effectiveness of Title VIII. One of the key concepts is the application in housing cases of the "effects" test recognized in employment discrimination cases. The prior Justice Department position was that a violation of the Fair Housing Act can be proven by showing that either an intentional act of discrimination has been committed or that the actions taken have had a discriminatory effect. This position has been adopted by six courts of appeals, and is recognized as the current state of the law.[39]

---

32. *Id.*

33. *Id.*

34. Budget Analysis of the Civil Rights Division, Fiscal Year 1982, 181 (Oct. 20, 1983).

35. C.A. No. C83227 AJZ (N.D. Calif.) consent decrees entered Nov. 30, 1983 and Jan. 6, 1984.

36. C.A. No. C.V.-84-2793 (E.D.N.Y.) (complaint filed June 28, 1984).

37. Budget Report of the Civil Rights Division for Fiscal Year 1983, 181 (Oct. 20, 1984).

38. In fact, the Starrett City Project had been receiving federal subsidies from the Department of Housing and Urban Development with its full knowledge and acceptance of the policies used to maintain housing integration. Thus, two of the Division's major cases clearly contravene past federal policies and do not attack those which continue unlawful segregationist policies.

39. Betsey v. Turtle Creek Assoc., 736 F.2d 983 (4th Cir. 1984); Smith v. Town of Clarkton, 682 F.2d 1055 (4th Cir. 1982); Robinson v. 12 Lofts Realty, 610 F.2d 1032 (2d Cir. 1979); Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); United States v. Pelzer Realty Co., 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); *see also* United States v. Youritan Constr. Co., 370 F. Supp. 643 (N.D. Cal. 1973); *aff'd in part*, 509 F.2d 623 (9th Cir. 1975); Malone v. City of Fenton, Mo., 592 F. Supp. 1135 (E.D. Mo. 1984); Angel v. Town of Manchester, 3 Eq. Op. Housing Rptr. ¶ 15,398 (D. Conn. 1981); U.S. Housing Auth. of Chickasaw, 504 F. Supp. 716 (S.D. Ala. 1980).

As discriminatory actions become more and more sophisticated, and less overt, the availability of an "effects" test is absolutely critical to effect real change in segregated housing patterns. This interpretation of Title VIII was supported at the time of its enactment and reaffirmed during consideration of proposed amendments to the Fair Housing Act in 1980 and has been the standard employed by previous administrations of both parties. But, the Reagan administration has chosen to proceed as though that standard does not exist. In the recent case of *United States v. City of Birmingham*[40] the Division changed its litigation strategy in midstream by switching from the "effects" test,[41] to a standard of discriminatory intent, despite the prior acceptance of the impact test. Similarly, in *Angell v. Zinsser*,[42] according to Section Chief Robert Reinstein, Division attorneys had organized their legal and trial tactics using the "effects" test concept but were ordered not to use that theory by Reagan appointees.[43] This new approach resulted in an adverse decision by the court.[44] In response to charges by the "civil rights establishment" that the Division's decision to not use the effect standard is improper, Assistant Attorney General Reynolds argues that the law is not clear.[45] The cases he cites in support of utilizing solely an intent test are inapposite. The first, *Joseph Skillken & Co. v. City of Toledo*,[46] is a case which analyzes the requirements of proving a constitutional violation. Requiring a higher standard for the constitutional violation does not mean that the Court would impose a similar requirement for a Title VIII violation and therefore does not actually support Mr. Reynolds's position. The second case cited by Mr. Reynolds is the decision of the Second Circuit Court of Appeals in *Boyd v. Lefrak*.[47] What Mr. Reynolds conveniently fails to mention is a subsequent Second Circuit Court of Appeals case, *Robinson v. 12 Lofts Realty*,[48] in which the court holds that a complainant averring a Title VIII violation has a burden of proof similar to that of a Title VII complaintant (the effect test),[49] and distinguishes and limits its earlier holding in *Boyd*.[50] Therefore it appears that the legal dispute does not actually exist. It has been manufactured to justify the Department's new position.

As a consequence of the decision to employ the legal strategy of refusing to utilize the effects test, the people whose interest the Justice Department represented in *Angell* lost their right to be free from racial discrimination in housing because counsel did not adequately represent their interests. The Justice Department has chosen to employ a litigation strategy that is destined to fail. Through this choice, it begins to reverse over ten years of a positive ap-

40. 727 F.2d 560 (6th Cir. 1984).

41. United States v. City of Birmingham, 538 F. Supp. 819, 827 n.9 (E.D. Mich., 1982). *Id.* at 565-66.

42. Angell v. Zinsser, 473 F. Supp. 488 (D. Conn. 1979).

43. WASHINGTON COUNCIL OF LAWYERS, REAGAN CIVIL RIGHTS: THE FIRST TWENTY MONTHS, 22 (1922).

44. *Id.*

45. Reynolds, *The Civil Rights Establishment is All Wrong*, 12 HUMAN RIGHTS, 34 Spring 1984 at 37-38, n.8.

46. 528 F.2d 867 (6th Cir. 1975), *vacated and remanded*, 429 U.S. 1068 (1977), 558 F.2d 350 (6th Cir.), *cert. denied*, 434 U.S. 985 (1977).

47. 509 F.2d 1110 (2d Cir. 1975).

48. 610 F.2d 1032 (2d Cir. 1979).

49. *Id.* at 1036-38.

50. *Id.* at 1037-38, n.10.

proach which made some inroads towards breaking down systemic and institutional discrimination. In its place it has substituted a legal theory which at its best can remedy only a very small number of cases and have minor impact.

III. The General Retreat From The Disproportionate Impact Test

The retreat from civil rights enforcement efforts has not been limited to remedies alone. As in the area of housing litigation, the administration is moving to redefine and limit the nature of the rights granted by Title VII. Instead of looking at institutional racism and sexism as embodied in statistical evidence of the effect of various employment decisions on black, hispanic and female employment, the administration is moving towards reinstating the search for particularly evil employers with discriminatory motive. Under the Supreme Court's test in *Griggs v. Duke Power Co.*,[51] proving discriminatory intent is not necessary to establish a Title VII action; disparate impact suffices. However, in *Connecticut v. Teal*,[52] the government tried to create an exception to the *Griggs* decision. The Court rejected the Justice Department's position characterizing it "as offering the employer some special haven for discriminatory tests."[53] As the Court pointed out, the government was confusing the search for evil motive on the part of the employer with the traditional test of the impact of the examination on black and hispanic employees.

More recently the administration has attempted to change the Uniform Guidelines of Employee Selection Procedures,[54] which were adopted by the Department of Justice, the Department of Labor and the former Civil Service Commission (now the Office of Personnel Management) and the EEOC in 1978. These guidelines and the Supreme Court's decision in *Griggs* presume that a test which has a substantial adverse impact on the employment opportunities of black and hispanic employees was *prima facie* invalid unless the employer has shown the test, "by professionally acceptable methods, to be predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated."[55] Yet despite the fact that these rules have been responsible for much of the job advancement of blacks, hispanics and women over the last two decades, the administration now proposes to change the Uniform Guidelines. The new theory apparently favored by the adminstration would permit general cognitive ability tests to be validated generally, and not simply for the particular job involved. Such a change would in effect shift the presumption of invalidity of a test which had an adverse impact on minorities or women and radically alter the *Griggs* test.[56] The Chairman of the EEOC, Mr. Clarence Thomas, has stated that "statistics have been terribly overused. Every time there is a statistical disparity it is presumed that there is discrimi-

51. 402 U.S. 424.
52. 457 U.S. 440 (1982).
53. *Id.* at 2533.
54. 29 C.F.R. Part 1607, 43 Fed. Reg. 38290.
55. Ablemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).
56. Testimony of the Lawyers' Committee for Civil Rights Under Law on Recent Efforts of the administration to Alter the Effect of Title VII of the Civil Rights Act of 1964 Before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor 11-12 (Dec. 14, 1984).

nation."[57] In fact that is precisely what the Supreme Court in *Griggs* decided should be done. Thus it is not surprising that Chairman Thomas has argued that "recent decisions of the Supreme Court may have 'drawn into question' landmark rulings in cases such as *Griggs v. Duke Power Company* decided in 1971"[58] and that the *Stotts* case "modified *Griggs*."[59] Again, as with the Justice Department view of *Stotts*, the administration is seizing on the *Stotts* case to make assertions which are totally baseless. The *Griggs* opinion is not even mentioned by the Supreme Court in *Stotts*. Yet, EEOC's agenda for review of the Uniform Guidelines expressly questions the adverse impact standard and the *Griggs* decision.[60]

Nor is this undermining of the impact standard in Title VII confined to the EEOC. According to long time Civil Rights Division employees, it is getting much harder to bring a test case. At least one test case is apparently now being held up, while in another the Division is holding up the proposed findings of fact being submitted by the Department's lawyers. Certainly, undermining the *Griggs* standard is consistent with the broad attack launched by the Division on the impact standard in a wide variety of contexts.

As already indicated, in Title VIII of the Civil Rights Act, the Department has abandoned the adverse impacts standard. The passage of Title VI of the Civil Rights Act prohibiting discrimination by recipients of federal funds led to numerous federal agencies promulgating regulations that proof of discriminatory effect will suffice to prove a Title VI violation. More than ten years ago, Solicitor General Bork, in the Nixon administration took the position that the "effects" test adopted by the regulations were valid and convinced the Supreme Court to adopt that standard,[61] a standard followed by the Ford and Carter administrations.[62] However, the current Assistant Attorney General William Bradford Reynolds urged the Solicitor General to argue in a recent Supreme Court case that the regulations were invalid and should be abandoned.[63] Fortunately the Solicitor General's office rejected this attempt and the Supreme Court eventually reaffirmed the validity of the disparate impact standard of the regulations.[64]

In the area of voting rights, the administration adamantly opposed House bill HR 3112[65] extending and strengthening the Voting Rights Act, which was scheduled to expire in 1982. The administration objected to, *inter alia*, the part of the bill which established that voting laws which had discriminatory results or effects would violate the law.[66] Only after massive public and con-

57. N.Y. TIMES, Dec. 3, 1984, at B10, col. 4.

58. *Id.*

59. Washington Post, Dec. 4, 1984, A13, col. 4.

60. *See* Testimony, note 56 *supra*, Attachment A.

61. Lau v. Nichols, 414 U.S. 563 (1974). *See also* memorandum from Attorney Timothy Cook, Civil Rights Division, to William French Smith, Attorney General Oct. 1983, p. 34 [hereinafter cited as "Cook" memorandum].

62. *See* Memorandum for the United States as Amicus Curiae, in Guardians v. Civil Service Commission, — F.2d — (2d Cir.) filed Aug. 20, 1980.

63. *See* Memorandum from Reynolds to the Solicitor General (May 24, 1982) and accompanying proposed Supreme Court brief cited in the Cook Memorandum, *supra* note 61, at 24.

64. Guardians v. Civil Service Commission, 463 U.S. 582, 103 S. Ct. 3221 (1983).

65. HR 3112, 97th Cong., 1st Sess. 1981.

66. *See* Days, *Turning Back the Clock: The Reagan Administration and Civil Rights*, 19 HARV. C.R.-C.L. L. REV. 309, 337-39 (1984); Mincherg, *A Thousand Days of Silence*, 11 HUM. RTS. 18 (1984).

gressional opposition to its position, did the administration finally support and sign an extension of the Voting Rights Act based on House bill HR 3112.

Similarly, despite the advice of career supervisors to bring suits challenging the discriminatory effects of a pattern and practice of providing lower levels of municipal services to black neighborhoods in such communities as Marianna, Florida and Jefferson, Texas, Mr. Reynolds obstructed the filing of such suits.[67]

Thus, we see in the areas of voting rights, housing, municipal services and employment discrimination the administration and its Justice Department has opposed, obstructed and side-stepped a construction of civil rights statutes followed by past republican and democratic administrations which would define a violation of civil rights based on the effect of the challenged action.[68] In opposing the "effects" test, the Justice Department again demonstrates its refusal to address institutional racism and sexism. It also demonstrates that it sees its mission as not enforcing existing civil rights law, but obstructing such enforcement. The same logic which refuses to recognize the necessity for affirmative action, refuses to look beyond discriminatory motive to the effect of the challenged action. Affirmative action and the effect tests are simply opposite sides of the same problem—both reflect a recognition that racism is not simply the product of evil intent, but of supposedly neutral standards which perpetuate past discrimination.

CONCLUSION

Under the current administration, the efforts of the Civil Rights Division of the United States Justice Department have been focused not on assuring equality for those who have traditionally been denied the American dream; rather, the Department has placed substantial emphasis on rolling back the advances made in the 1960s. Rather than carrying out the duty of an attorney general which is to enforce the law, these actions evidence a disregard for the law. This dereliction of duty seriously threatens the rights of large sections of the American population—women, blacks, hispanics, asians, the disabled and native americans. Such conduct, far from being consistent with the constitutional obligation to enforce the law, rather makes a mockery of such obligation.

67. Cook Memorandum, *supra* note 54, at 29.

68. In a related area, the Justice Department refuses to utilize a key presumption which shifts the burden of proof at trial to a defendant school district where purposeful discrimination is shown. Keyes v. School District No. 1, 413 U.S. 189 (1973). Mr. Reynolds' response is obfuscatory—namely that the Department uses the *Keyes* presumption at the trial stage but not at the investigative stage. Reynolds, *The Civil Rights Establishment is All Wrong*, 12 HUM. RTS. 34 (1984). What this means is that the Department will not bring cases where the *Keyes* presumption should be utilized, but will utilize the presumption at trial if necessary. This position in effect undermines *Keyes* by refusing to bring cases based on the law of that case. Again, as with the testing area, the Justice Department is undermining established law by simply not bringing cases based on the law.