PART I
LEGAL AND STATISTICAL BASIS FOR STUDYING INTENTIONAL JOB DISCRIMINATION

CHAPTER 1
INTRODUCTION:
AN OVERVIEW OF INTENTIONAL JOB DISCRIMINATION

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This study identifies intentional employment discrimination by applying legal standards to statistics of the race, sex and ethnic composition of large and medium size employers in the private sector. This information concerning White, Black, Hispanic, Asian-Pacific and Native American, and Male and Female employees has been supplied yearly to the federal government by employers since 1966.

With the assistance of a grant from the Ford Foundation to Rutgers Law School, we have reviewed these reports in light of long standing legal standards that identify intentional job discrimination. The basic legal principle is that when an establishment falls so far below the average utilization of minorities or women in the same labor market, industry and occupation that it is not likely to be accidental, the law will presume intentional discrimination and require employers to justify their conduct.[2]

This study includes information about the nation as a whole, as well as each state and metropolitan area for which there is data. In the absence of a study such as this, there have been few hard facts on the extent of intentional job discrimination against minorities and women. A substantial part of the public has erroneously assumed that intentional job discrimination is either a thing of the past, or the acts of individual "bad apples" in an otherwise decent work environment. Under these assumptions, they also believe that affirmative action in employment is no longer necessary. Meanwhile, thousands of employers have continued systematic restriction of qualified minority and female workers, and these workers have lost opportunities to develop and exercise the skills and abilities that would warrant higher wages. At the same time, the continuation of equal employment opportunity programs has been jeopardized.

Intentional discrimination was the "most obvious evil" addressed by Title VII of the Civil Rights Act of 1964.[3] In 1991, Congress confirmed that intentional discrimination was established "when a complaining party demonstrates that **race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.**"[4]

"Intent to discriminate" is not the equivalent of "evil motive," where a personal wish or desire to oppress women or minorities is the *only* explanation for the harm done. Evidence of "evil motive" has never been required to prove intentional discrimination under the 1964 Civil Rights Act.[5] If an employer has **both** a legitimate reason for its practices and also a discriminatory reason, then it is engaged in intentional discrimination.

§1. BASIC FINDINGS

For 1999, we examined 160,297 reports filed by establishments with at least 50 employees located in Metropolitan areas. One third of the establishments in Metro areas with 100 or more employees failed to report. These establishments are treated as reporting at the average rates of those who did report for the purposes of national statistics, and are not considered at all in the state reports.

- **MINORITIES –** Of 205,393 establishments, 75,793 – or 37% – intentionally discriminated against Minorities (Blacks, Hispanics and Asians) in at least one of nine occupational categories. This discrimination affected **1,361,083 Minorities** who were qualified and available to work in the same labor markets, industries and occupations. 63% of establishments do not appear to intentionally discriminate against Minorities.
- **WOMEN --** Of 208,393 establishments, 60,425 – or 29% – intentionally discriminated against Women in at least one of nine occupational categories. This discrimination affected **952,131 Women** who were qualified and available to work in the same labor markets, industries and occupations. 71% of establishments do not appear to intentionally discriminate against Women.
- **ALL MINORITIES AND WHITE WOMEN –** 31% of affected Women are minorities. Thus 666,970 affected Women are White. Added to the 1,361,083 Minorities of both sexes who were affected, there was a total of **2,028,053 workers affected by intentional job discrimination in 1999 among the large and medium sized establishments in the United States.**

- **THE "HARD CORE" --** Among those establishments are a "hard core" of 22,269 establishments that appear to have intentionally discriminated over at least a nine year period against Minorities, and 13,173 establishments that appear to have done so against Women. This "hard core" is responsible for roughly half of the intentional discrimination against minorities and one-third of intentional discrimination against women.
- **THE NATION** – The discrimination we have identified has affected all regions of the country, all occupations, and most of the industries that we examined.
- **THE 40/206 MAJOR INDUSTRIES** – 40 industries are responsible for three quarters of all intentional discrimination against those groups. Those industries each discriminated against Women, Blacks, Hispanics *and* Asian workers. They are responsible for nearly 85% of the discrimination against Asian Pacific workers, 79% of the intentional discrimination against Blacks, 75% of the intentional discrimination against White Women, 73% of the intentional discrimination against Hispanics. 206 industries, including the forty noted above, are responsible for 99% of intentional discrimination against Blacks, Hispanics and White Women.

§2. THE OBJECTIVES OF THIS STUDY

This study seeks to advance the public "sense of reality" concerning the present extent of intentional job discrimination. It has four related objectives: (1) to assist the public in deciding whether affirmative action continues to be necessary in order to raise the status of minorities and women to that of equality; (2) to enable those employers whose practices appear discriminatory to understand their situations and take actions they deem appropriate; (3) to enable public and private agencies to address the continuation of intentional job discrimination through organized plans of action; and, (4) to bring a modest element of predictability to one aspect of the law of employment discrimination.

§3. THE MATERIALS STUDIED – "VISIBLE" WORKERS IDENTIFIED BY EMPLOYERS

In 1966, as authorized in the Civil Rights Act of 1964, the Equal Employment Opportunity Commission (EEOC) required all employers with 100 or more employees to report annually on the race, sex, national origin, and occupation of their employees on form EEO-1.[6] The Office of Federal Contract Compliance Programs (OFCCP) in the US Department of Labor has required government contractors with 50 or more employees to file identical reports.[7] The reports require information on the number of employees who are Men and Women, Black, Hispanic, Asian Pacific and Native American, divided into nine occupational categories from Officials and Managers to Labor and Service workers.[8]

The common thread that connects most members of these groups is their visibility. They cannot disappear into a "melting pot" of white society. They are singled out by their sex, color and/or language as perpetual strangers in a white male dominated society.[9] As such, they are the "strangers that sojourneth with you" and are entitled to the biblical injunction to be treated "as thy self."[10] The United States enacted this equality principle into the Fourteenth Amendment to the Constitution after the Civil War, and made it enforceable in the Civil Rights Act of 1964. But until now, the systematic identification of intentional job discrimination through a statistical and legal analysis has not been available.

§4. PAST FAILURES TO USE THE EEO-1 DATA – A BI-PARTISAN STORY

The failure of the federal government to use the EEO-1 data to assist in understanding and enforcing equal employment opportunity laws is a non-partisan story that begins when President Johnson halted an investigation based on statistics in 1965, just as the Equal Employment Opportunity Commission (EEOC) began operations.[11] Thereafter, the EEOC did require employers of 100 or more employees to file such data annually. The data was used by the Nixon Administration under EEOC Chairman Brown to charge several major employers, and under Labor Secretary Shultz to develop the "goals and timetables" program in the Labor Department. In the Carter administration, EEOC Chair Eleanor Holmes Norton created a systemic discrimination program that utilized the data. The Supreme Court upheld this program in 1984.[12]

The Reagan Administration rejected this use of statistics under EEOC Chairman Thomas, but the Labor Department began to use the data to identify government contractors to review. The Labor Department also allowed federal

contractors to use the two standard deviations analysis used in this study and approved by the Supreme Court to define "underutilization" under the Executive Order forbidding discrimination by government contractors.

The Clinton administration showed interest and did preliminary analyses of the approach taken in this study in the late 1990s, but had not adopted it by the end of its term.[13]

§5. THE SOURCE OF THE DATA FOR THE STUDY

In 1998, the Ford Foundation awarded a grant to Rutgers University to enable the authors – who have participated in federal and state anti-discrimination activities in both Republican and Democratic administrations, as well as with several state agencies – to analyze the statistics that the government had collected. We obtained the data from EEOC in computerized form "cleansed" of employer's names and identifying addresses.[14] The discrimination that is "visible" through our analysis is against workers who were qualified and available for jobs in a labor market, an industry and an occupation where they already worked.

Readers who wish to examine the results of the study in detail may go directly to PART II, Chapter 9 and 10 for the national details, to PART 3 for State details, and PART IV for details of major metropolitan areas. Comments on this Study, including suggestions for further research, will be appreciated. They should be sent by e-mail to Report1999@EEO1.com or by regular mail to Blumrosen Study, Rutgers Law School, 123 Washington St., Newark, NJ 07102.

President Bush as a candidate pledged to ensure "Equal Access" to opportunity and the new EEOC Chair, Cari M. Dominguez, has proposed "Freedom to Compete." These statements may provide an occasion for the Federal Government to establish a national program of the type recommended in Chapter 17. Intentional discrimination is too widespread and affects too many people for the existing Federal programs to continue in the disjointed and disorganized ways of the past. Formal proceedings by employers against all or most of the discriminators is out of the question: Affirmative Action by employers, backed by a consciously organized enforcement program, is necessary.

§6. ENDNOTES

2. Lawyers will recognize the doctrine of Res Ipsa Locutor.

3. See Ch. 2 §2

4. Sec. 703 (m) of title VII.

5. Ch. 4, §§3,4.

6. §709 (c) of The Civil Rights Act of 1964, as amended, authorizes the US Equal Employment Opportunity Commission to require these reports and to share them with state fair employment practice agencies. The reporting form appears in an appendix to this study.

   The Commission exercised its statutory authority to require reports in 1966 under Director of Research Charles B. Markham. It was first administered by Phyllis Wallace, Herbert Hammerman and Al Golub. Employers have been filing reports since that time. Analysis of the initial reports filed in 1966 can be found in US Equal Employment Opportunity Commission, THE MANY FACES OF JOB DISCRIMINATION, 1966, reprinted in Alfred W. Blumrosen, BLACK EMPLOYMENT AND THE LAW, 103-137 (New Brunswick, NJ: Rutgers University Press, 1971). For an analysis of the reports filed before 1980, See Herbert Hammerman, A Decade of New Opportunity, Affirmative Action in the 1970s (Washington: The Potomac Institute, 1984). Analyses of EEO-1 data from the early 1980s are summarized in Jonathan S. Leonard, "Women and Affirmative Action," Journal of Economic Perspectives 3 (Winter 1989), pp. 6-75.

7. Employers file their forms with the Joint Reporting Committee created by EEOC and OFCCP to simplify the reporting process and avoid duplication.

8. Data is not collected on other minority groups, or on religion, age or disability.

9. The 2000 Census reported our population mix as follows:

	Number	Percentage of population
Total population	281,421,906	100.0%
White	211,460,626	75.1%
Black or African American	34,658,190	12.3%
Hispanic	20,640,711	7.3%
Asian	10,242,998	3.6%
American Indian and Alaska Native	2,475,956	0.9%

10. Leviticus 19:34, 24:22: "The stranger that sojourneth with you shall be unto you as the home born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt.… Ye shall have one manner of law, as well for the stranger as the homeborn."

11. Alfred W. Blumrosen, BLACK EMPLOYMENT AND THE LAW, p.74-79 (New Brunswick, NJ: Rutgers University Press, 1971). Data was available at that time from some employers who were members of "Plans for Progress." The form, still basically unchanged, and now EEO-1, was developed in the Labor Department by David Mann for Plans for Progress in the early 1960's. This data showed total exclusion of minorities from some occupations, and the computerized analysis became known as the "zero list." See note 6, supra.

12. EEOC v. Shell Oil Company, 466 US 54 (1984).

13. While conducting this study, the authors had discussions with both the EEOC and the Department of Labor in 1998-2000 concerning the usefulness of the methodology to these agencies. These discussions resulted in contracts with both agencies. The EEOC contract was to provide information on establishments using criteria that the staff proposed. The staff analysis of the first 45 subjects acknowledged the substantial accuracy of the data we presented, while resisting the concept of initiating an investigation in the absence of an individual complaint. The Labor Department contract was to provide a report to the Women's Bureau with information based on our methodology, which, with additional approaches, might bear on the current status of occupational segregation. The OFCCP had also shown interest in the methodology as a potential improvement in the EEDS system for identification of government contractors to review. Under a contract with Al Blumrosen in the mid-nineties, OFCCP had tested an early version of the methodology used here. It did not publish the report on that project. The genesis of the concept of using EEO-1 data to identify subjects for government review under the Civil Rights Act of 1964 is described in A.W. Blumrosen, note 11, supra 66-79.

14. By statute, the EEOC may not make public the identity of those employers who file reports prior to litigation. EEOC v. Associated Dry Goods Corp., 449 US 590 (1981). The EEOC has provided computerized copies of the statistics in the annual employer reports with the names and identifying addresses of the employers deleted. We have analyzed the reports from 1975-1999. The earlier data is not usable. We have issued a report on employment discrimination against women in the State of Washington and a report on discrimination against both women and minorities in Georgia. These reports were preliminary in nature and the data in them has been superseded by this report. Dr. Marc Bendick and Prof. John Miller of George Mason University made major contributions to the analysis that led to those preliminary state reports. They did not participate in the development of this report.