

**CHAPTER 3
THE SENSE OF REALITY
CONCERNING JOB DISCRIMINATION**

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Grasping the realities of present day discrimination is no easy task. With a workforce in 1999 of 133 million people, the usual sources of our understanding of how employment practices operate may well be inadequate or biased. These sources include our own personal experiences, those of friends and acquaintances, and the experiences we absorb through the media. Sorting through the variety of impressions we absorb can leave us with diverse and inconsistent perceptions that then shape our “sense of reality.”

Isaiah Berlin has defined the “sense of reality” as “understanding rather than knowledge ... some kind of acquaintance with relevant facts... that enables those who have it to tell what fits with what: what can be done in given circumstances and what cannot, what means will work in what situations and how far....”²⁵ Berlin’s “sense of reality” is akin to the perspective of Justice Oliver Wendell Holmes, Jr. “The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”²⁶

**§1. A STATISTICAL SETTING FOR INDIVIDUAL STORIES
ABOUT DISCRIMINATION.**

This study may assist in clearing up confusion in the public mind about the extent of present day intentional job discrimination against minorities and women. The confusion – when not based on a conscious or self-interested desire to subordinate minorities and women – is a consequence of the increasing size and

complexity of society, sometimes magnified by residential and occupational segregation, and further magnified by the matters chosen to be emphasized by the media. This complexity has limited the reliability of our personal experiences as a basis for making social and political value judgments. We can no longer know whether our own life experiences are “typical.” Without this anchor in personal experience, we rely increasingly on secondary sources. Our reality is increasingly shaped by a concept of “news” which seeks out conflict, and ignores the larger picture of a society shifting its foundations. The real story of equal employment opportunity consists of both quiet improvement and stubborn, if now more subtle, resistance. It is better revealed by statistics reflecting reality, than by the assertions of radio talk show hosts or self-proclaimed community leaders. “Anecdotal evidence” of human conflict is more interesting than statistics; but statistics can tell us whether such anecdotal evidence is representative of typical behavior.

§2. PERCEPTIONS OF REALITY

Differing perceptions of reality involving employment discrimination were the subject of a report published in 2001 conducted by the Washington Post, the Kaiser Family Foundation and Harvard University. It consisted of telephone interviews with 1,709 respondents selected nationally.²⁷ Those interviewed included Whites, African Americans, Hispanics and Asians. Three aspects of that report are important for this study. Members of all the groups studied were unrealistic about the proportion of each group in the population as measured by the Census data. Whites underestimated the proportion of Whites in the population and exaggerated the proportion of African Americans, Hispanics and Asians. African Americans, Hispanics and Asians overestimated the proportion of each group in the population and underestimated the proportion of Whites.²⁸ These erroneous assumptions among members of all groups in the population may generate different conclusions about specific problems facing these groups, or how to address them.²⁹

All interviewed were asked, “Do you think the average African American/Hispanic/Asian American is just about as well off as the average white person in terms of the types of jobs they have?”³⁰ The responses affirming that the named minorities were “just about as well off as the average white” in terms of type of jobs were:

Table 1. Perceptions that minorities were “just about as well off as Whites in terms of jobs.”

Interviewees	Who answered “yes” to the above question		
	African Americans	Hispanics	Asians
White	44%	27%	58%
African American	23%	22%	46%
Hispanic	32%	27%	43%
Asian	27%	23%	51%

§3. THE REALITY REVEALED BY EMPLOYER REPORTS

Just as the Census data could test the “sense of reality” of each group’s perception of racial/ethnic population proportions, so the EEO-1 reports can compare perceptions of equality with the reality of minorities in the workplace. The Post/Kaiser/Harvard study examined the differing perceptions among racial ethnic groups; we can compare their perceptions with the reality that we have studied. This comparison makes clear that many Americans misunderstand the existing patterns of employment. They overstate the position of Blacks, Hispanics, and Asians in the workplace just as they overstate their proportions in the population.

Similar findings were reported in “How Race is Lived in America,” the New York Times examination of Black and White perceptions that won the 2001 Pulitzer Prize. Joseph Lelyveld, the editor who developed the study wrote that the stories were “samples that tell us, in simplest terms, that race is still very much lived in America, that the story of our struggle to become one nation is far from over, that the challenge has not receded.” The Times study concluded with reports of a poll that asked, “Just your impression, are blacks in your community treated less fairly than whites on the job or at work.” 73% of Whites said Blacks were not treated less fairly, while 40% of Blacks said they were.³¹ The following statistics provide a foundation in work place reality for the conclusion stated by Editor Lelyveld.

Table 2. Number and Percentage of Minority Workers by Occupation Compared to Whites in the EEO-1 Labor Force -- 1999.

Number of Employees of Each Group in Each Occupation—1999									
	O & M	Prof	Tech	Sales	O & C	Craft	Oper	Labor	Service
White	3,914,586	5,776,126	2,170,884	4,502,706	5,433,560	2,664,025	4,352,877	2,465,380	3,995,808
Black	261,784	434,443	282,215	676,335	1,002,549	281,087	822,616	555,325	1,104,780
Hispanic	180,739	230,445	156,518	435,297	508,591	283,142	662,521	616,677	763,623
Asian-Pac	127,394	511,620	140,765	148,202	213,494	74,646	206,825	102,022	178,580

Percentage of Employees of Each Group in Each Occupation--1999									
	O & M	Prof	Tech	Sales	O & C	Craft	Oper	Labor	Service
White	11%	16%	6%	13%	15%	8%	12%	7%	11%
Black	5%	8%	5%	12%	18%	5%	15%	10%	20%
Hispanic	5%	6%	4%	11%	13%	7%	17%	16%	20%
Asian-Pac	7%	30%	8%	9%	13%	4%	12%	6%	10%

O & M =Officials & Managers; Prof =Professionals; Tech =Technical workers; Sales =Sales workes; O & C =Office and Clerical; Craft =Craft workers-skilled; Oper =Operatives-semi skilled; Labor = Laborers- unskilled; Service = Service workers. Details in Appendix A

Percent of Employees of Each Group in Each Occupation -- 1999

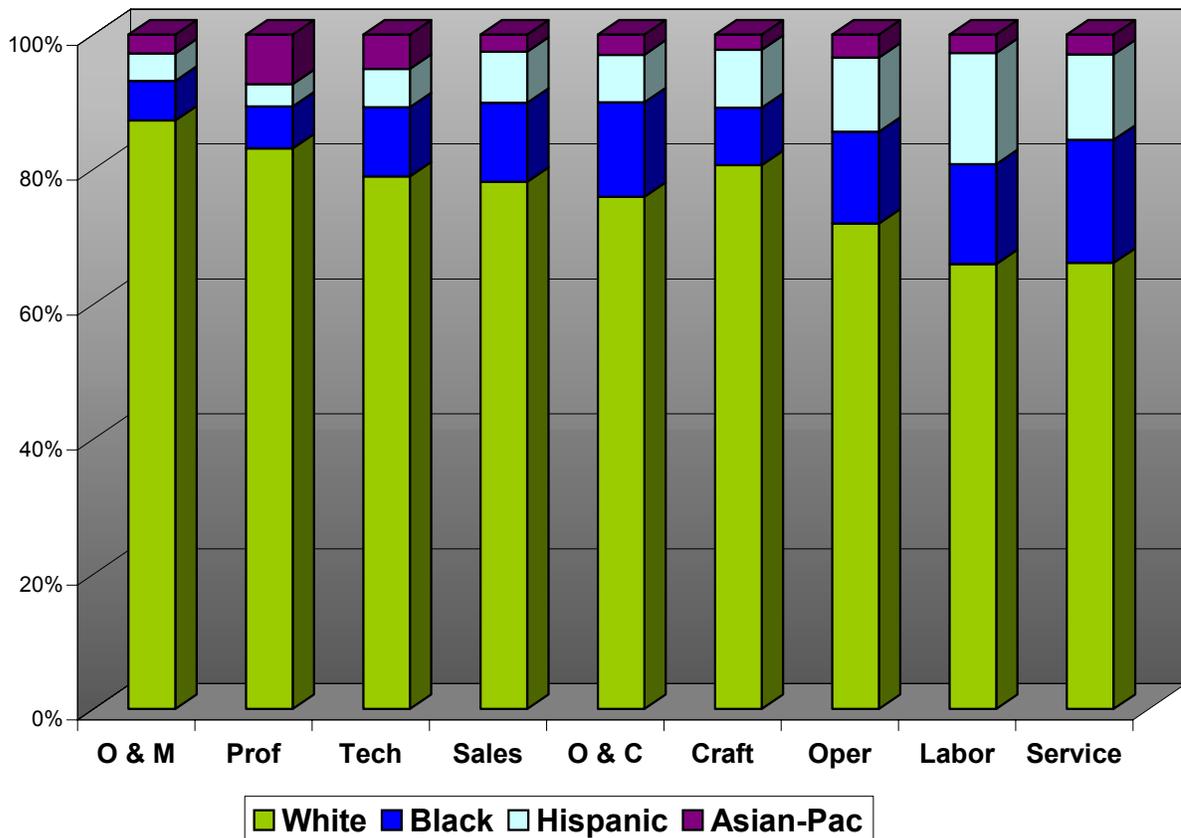
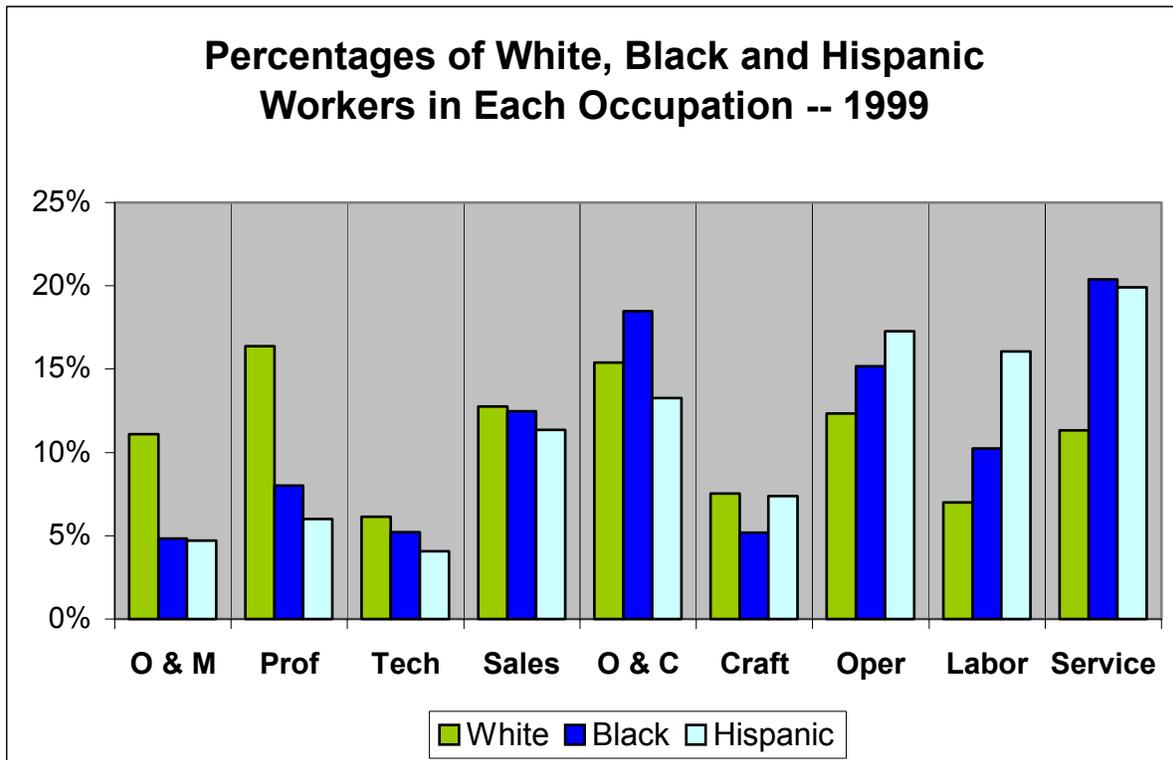


Table 3. Index of Occupational Participation by Group, Based on Percentage of White Participation (where Whites = 100%) -- 1999

Index of Occupational Participation By Group, Based on Percentage of White Participation (where Whites = 100%) -- 1999									
	O&M	Prof	Tech	Sales	O&C	Craft	Oper	Labor	Service
White	100%	100%	100%	100%	100%	100%	100%	100%	100%
Black	44%	49%	85%	98%	120%	69%	123%	147%	180%
Hispanic	42%	37%	66%	89%	86%	98%	140%	230%	176%
Asian-Pac	67%	183%	134%	68%	81%	58%	98%	86%	93%

O&M =Officials & Managers; Prof =Professionals; Tech =Technical workers; Sales =Sales workers;
 O&C =Office and Clerical; Craft =Craft workers-skilled; Oper =Operatives-semi skilled; Labor =
 Laborers- unskilled; Service = Service workers. Details in Appendix A



Blacks and Hispanics make up more than eighty percent of the minorities on which we have data. They are far from the average White person in terms of jobs as Officials, Managers, and Professionals; and hardly as well off as Whites in Technical jobs as well. In the lower paid job categories traditionally held extensively by minorities (Operatives, Laborers and Service Workers) the proportion of Blacks and Hispanics continues to be substantially higher than that of Whites. Yet 44% of Whites believed that Blacks were just about as well off as the

average White person in terms of jobs, and 27% of Whites believed the same about Hispanics.

In the Times report on the poll in 2000, 73% of Whites reported that Blacks were treated fairly at work, while 11% said they were not. This assumption may have influenced the attitude of Whites toward federal regulation of employment opportunities, a subject that was also examined in the Post-Kaiser-Harvard study.

The interviewees were asked, “Do you believe it is the responsibility or isn’t the responsibility of the federal government to make sure minorities have equality with whites in each of the following areas, even if it means you will have to pay more in taxes?”

Table 4. Should the federal government “make sure minorities have equality with whites” in employment?

	Responsibility of Federal Government	Not Responsibility of Federal Government
White interviewees	40%	50%
Afr-Amer. (Black) interviewees	73%	21%
Hispanic interviewees	66%	33%
Asian interviewees	57%	38%

In all the other areas examined in the interview (schools, health care and treatment by courts and police), a substantial majority of Whites believed that the Federal Government had the responsibility to make sure that minorities had equality with Whites.³² But with a substantial minority of Whites believing that Blacks had “made it” with respect to job opportunities, the necessity for continued federal regulation may not have been so clear. The Post-Harvard-Kaiser report suggests the importance of statistics, such as those used in this study, in helping citizens reach a common “sense of reality” that could frame the approach to public policies concerning discrimination.

§4. IMPROVEMENT IN MINORITY/FEMALE JOB OPPORTUNITIES – 1975-1999

One reality reflected in the EEO-1 data is the improvement in opportunities for minorities and women since the sixties when they were cramped into a limited range of jobs and denied opportunities to develop and demonstrate their abilities and earn appropriate compensation. This reality may have influenced the erroneous impressions of all groups concerning the proportions of minorities in the country, and their position in the job market.

Chart 1. Trends in Minority Participation in Occupations, 1975 – 1999

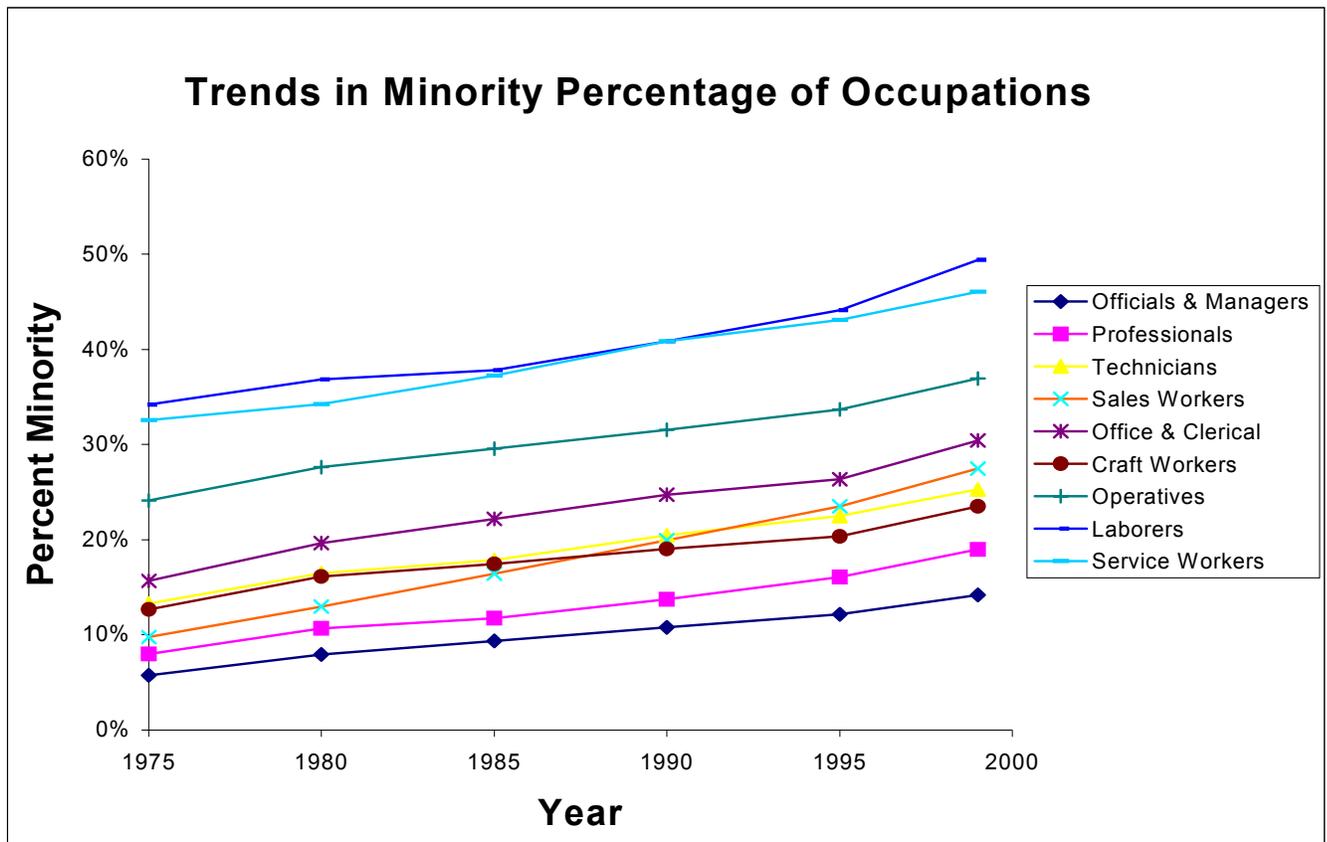
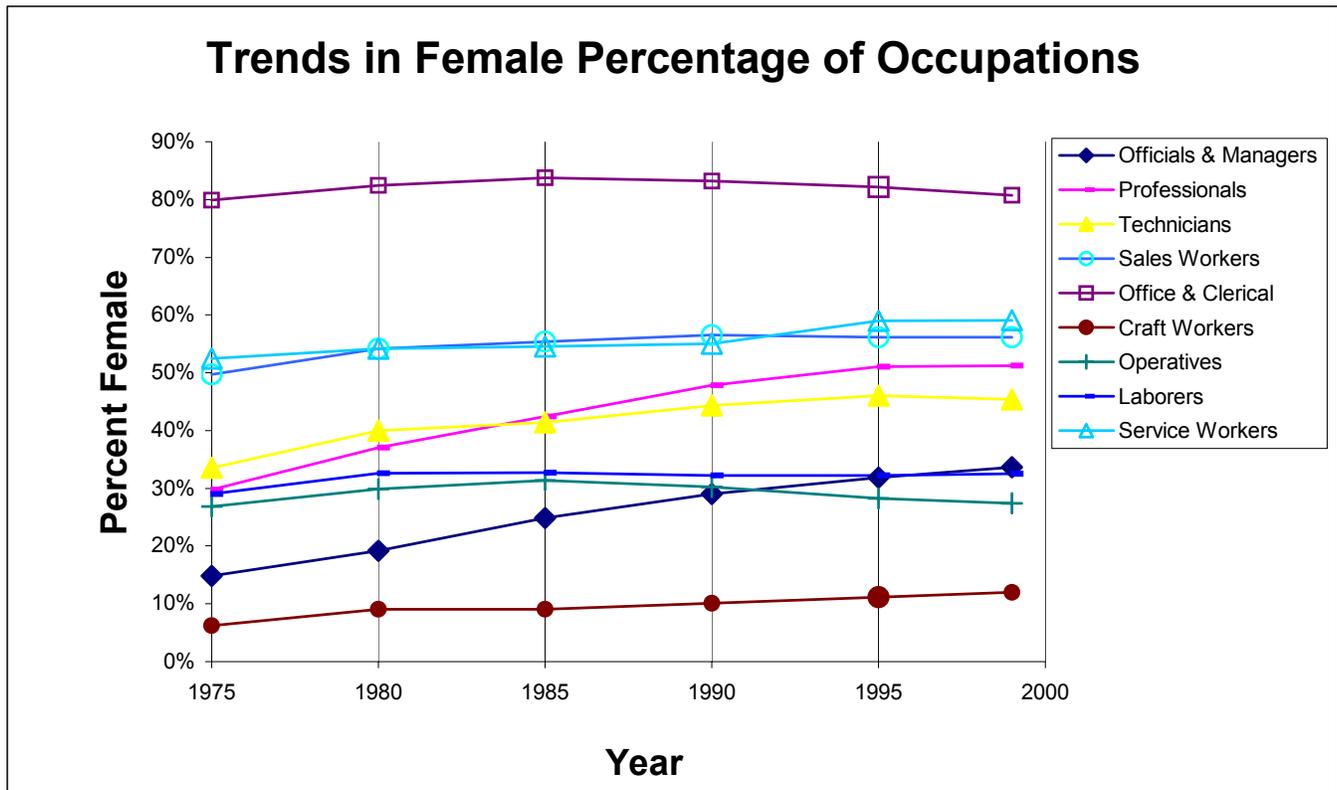


Chart 2. Trends in Female Participation in Occupations, 1975 – 1999



These graphics make clear that Minorities and Women have benefited from the expansion of job opportunities under the Civil Rights Laws of the sixties.³³ There are now hundreds of thousands of these workers who are qualified by education and work experience in specific industries at specific occupations. The statistics from the EEO-1 Labor Force emphasize this conclusion.

The EEO-1 Labor Force is the basis of this study. It consists of employees in establishments that have filed EEO-1 forms, are located in metropolitan areas and have 50 or more employees. This labor force has changed dramatically in the years between 1975 and 1999.

In 1975, there were 8.6 million Women and 4 million Minorities in the EEO-1 Labor Force. By 1999, there were 17 million Women and 11 million Minorities in that Labor Force.

Table 5. Employees in MSA Establishments of 50 or more, 1975 - 1999

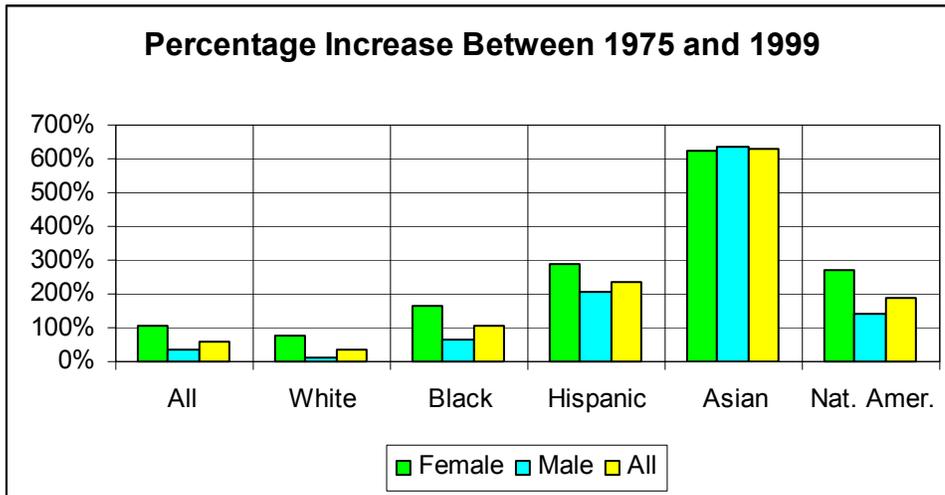
Change in Employment in MSAs in Establishments over size 50: 1975 - 1999									
	Number				%	Percent of Total			
	Female	Male	All			Female	Male	All	
1975									
All Groups	9,134,960	15,508,584	24,643,544		37.07%		100.00%	100.00%	100.00%
White	7,389,894	12,995,473	20,385,367		36.25%		80.90%	83.80%	82.72%
Black	1,161,135	1,578,211	2,739,346		42.39%		12.71%	10.18%	11.12%
Hispanic	439,552	761,353	1,200,905		36.60%		4.81%	4.91%	4.87%
Asian	117,370	127,095	244,465		48.01%		1.28%	0.82%	0.99%
Nat. Amer.	27,009	46,452	73,461		36.77%		0.30%	0.30%	0.30%
1999									
All Groups	17,650,129	19,710,579	37,360,708		47.24%		100.00%	100.00%	100.00%
White	12,138,729	14,061,674	26,200,403		46.33%		68.77%	71.34%	70.13%
Black	2,961,989	2,459,145	5,421,134		54.64%		16.78%	12.48%	14.51%
Hispanic	1,636,977	2,200,576	3,837,553		42.66%		9.27%	11.16%	10.27%
Asian	819,856	883,691	1,703,547		48.13%		4.65%	4.48%	4.56%
Nat. Amer.	92,578	105,493	198,071		46.74%		0.52%	0.54%	0.53%

The increase in proportions of female employees, and the concurrent decline in proportion of male employees, is also evident in the following table showing the same data as above with emphasis on the changes between '75 and '99.

Table 6. Change in number and proportions of Male and Female, White, Black, Hispanic, Asian, Native American employees, EEO-1 labor force, 1975-1999.

Race-Ethnic Group	Female			Male			All		
	Change from 1975 #	%	% of Total Change	Change from 1975 #	%	% of Total change	Change from 1975 #	%	% of Total Change
All	8,515,169	93%	100%	4,201,995	27%	100%	12,717,164	52%	100%
White	4,748,835	64%	56%	1,066,201	8%	25%	5,815,036	29%	46%
Black	1,800,854	155%	21%	880,934	56%	21%	2,681,788	98%	21%
Hispanic	1,197,425	272%	14%	1,439,223	189%	34%	2,636,648	220%	21%
Asian	702,486	599%	8%	756,596	595%	18%	1,459,082	597%	11%
Nat. Amer.	65,569	243%	1%	59,041	127%	1%	124,610	170%	1%

Chart 3. Percentage Increase of Men and Women in Each Group, ‘75 – ‘99



§5. INCREASE IN PROPORTIONS OF JOBS BY OCCUPATION

Minorities and Women not only shared in the increase of the Labor Force as the above tables and graphs show, they increased their proportion in the Labor Force. The following table shows how much Minorities and Women increased their share of the Labor Force. Because the entire Labor Force expanded extensively between 1975 and 1999, the increase in numbers of Minorities and Women might simply have reflected the general increase, the “rising tide that raises all boats.” But the rising tide raises all boats to the same relative position that they held when the tide was low. The canoe stands in the same relation to the passenger liner when the tide is in that it held when the tide was out. The crucial question is whether Minorities and Women improved their position in the labor force beyond that which resulted from the “rising tide.”

The following tables and graphs address this issue. They examine the change in the Minority and Female EE0-1 Labor Force to identify the extent to which the proportion of Minorities and Women in each occupational category exceeded the proportion in that category in 1975.

We know the proportion in each occupational category in 1975, the proportion in 1999, and the numbers in each category in both years. (Tables A & B, below) If the “rising tide” had been responsible for the increase, then the proportions in 1999 would be approximately the same as in 1975, even taking into account the enormous technological and other economic changes during the intervening period.

Therefore, we can test the “rising tide” theory by comparing the numbers of workers in each occupational category in 1999 with the numbers who would have been there in 1999 if the proportions of minorities and women in each occupational category had remained substantially the same as in 1975.

If that were true, then little “progress” would have resulted beyond the “rising tide.” But that is not true. In every occupational category for both Minorities and Women, the proportions increased visibly through that quarter of a century. (Table C, below). The number of workers who benefited by this increase add up to 4.6 million Minorities and 3.8 million Women. The Net Increase row in Table C breaks down this increase by each occupation.

Chart 4. Change in the Labor Force: 1975 – 1999

TABLE A. Comparison of Minority Labor Force, 1975-1999 showing increases beyond the distribution of 1975

MINORITIES										
	O&M	Prof	Tech	Sales	Office	Craft	Oper	Labor	Service	All
1975 Minorities	159,214	177,281	166,860	230,169	676,097	407,871	1,138,584	619,889	682,212	4,258,177
1975 All Groups	2,712,997	2,220,476	1,269,851	2,340,845	4,365,745	3,188,002	4,683,252	1,798,075	2,064,301	24,643,544
1975 % of All Groups	5.87%	7.98%	13.14%	9.83%	15.49%	12.79%	24.31%	34.48%	33.05%	17.28%
1999 All Groups	4,065,634	6,300,816	2,340,820	4,680,944	5,663,873	2,764,488	4,577,393	2,594,281	4,372,459	37,360,708
75 Dist of Minorities in 99	238,594	503,052	307,587	460,265	877,130	353,687	1,112,848	894,382	1,445,014	6,455,586
1999 Minorities	584,851	1,200,162	592,568	1,289,005	1,754,670	655,694	1,717,779	1,291,715	2,073,862	11,160,305
Net Change	346,257	697,110	284,981	828,740	877,540	302,007	604,931	397,333	628,848	4,704,719

TABLE B. Comparison of Female Labor Force, 1975-1999 showing increases beyond the distribution of 1975

WOMEN										
	O&M	Prof	Tech	Sales	Office	Craft	Oper	Labor	Service	All
1975 Women	397,951	653,642	418,873	1,113,945	3,499,424	203,214	1,251,700	516,722	1,079,489	9,134,960
1975 All Groups	2,712,997	2,220,476	1,269,851	2,340,845	4,365,745	3,188,002	4,683,252	1,798,075	2,064,301	24,643,544
1975 % of All Groups	14.67%	29.44%	32.99%	47.59%	80.16%	6.37%	26.73%	28.74%	52.29%	37.07%
1999 All Groups	4,065,634	6,300,816	2,340,820	4,680,944	5,663,873	2,764,488	4,577,393	2,594,281	4,372,459	37,360,708
75 Dist of Women in 99	596,360	1,854,773	772,143	2,227,535	4,539,957	176,218	1,223,407	745,532	2,286,499	13,849,005
1999 Women	1,363,845	3,194,622	1,043,531	2,613,123	4,535,741	334,321	1,270,798	865,216	2,428,932	17,650,129
Net Change	767,485	1,339,849	271,388	385,588	-4,216	158,103	47,391	119,684	142,433	3,801,124

* "Dist. Of 75" means the number of Black who would have been employed in each occupation in 1999 if Jobs had been distributed in 1999 in the same proportions as in 1975.

** "Net Increase" means the increase in number of jobs held in 1999 that they would not have held if jobs were still distributed by race as they had been in 1975.

The same statistics are shown graphically in the following two charts. The yellow wavelike line represents the “rising tide” of the 1975 – 1999 period. The Blue wavelike line above the blue wave represents the change in number of Minority and Women workers in each occupation beyond that which the rising tide would have produced.

Chart 5. Increase in Minority Participation in the Labor Force, 1975 – 1999

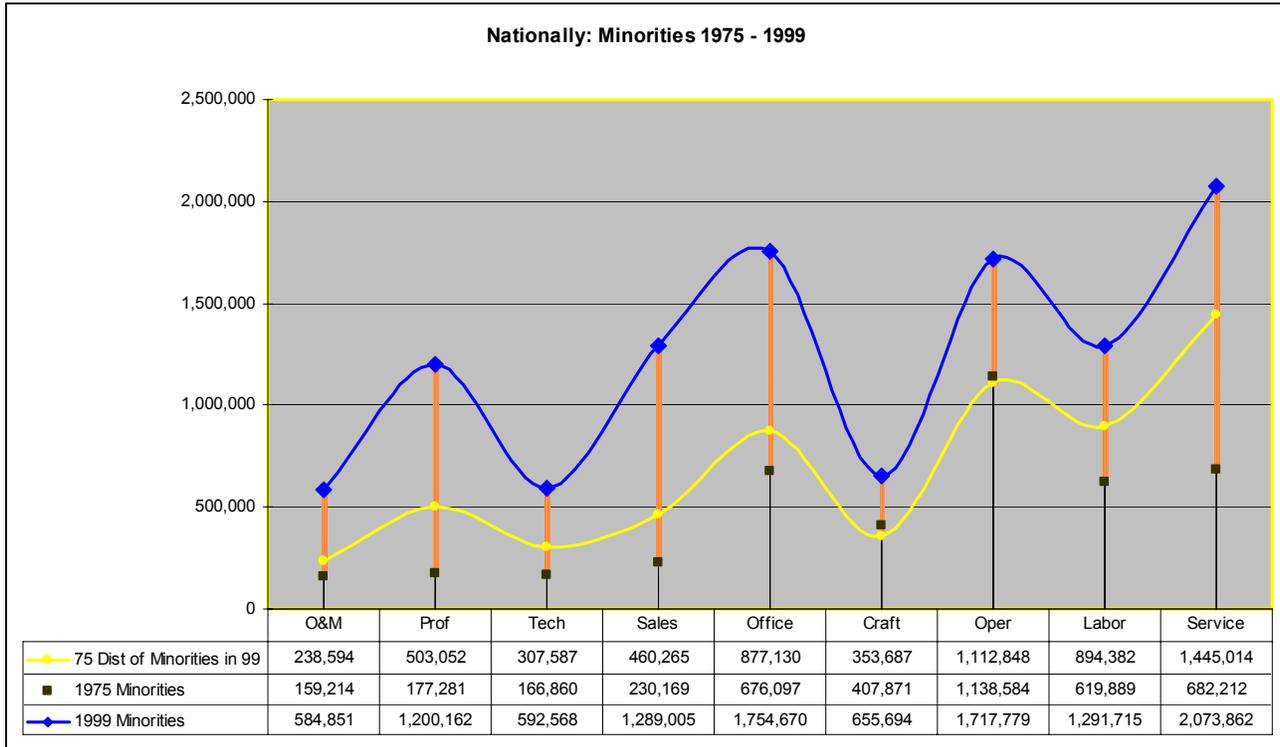
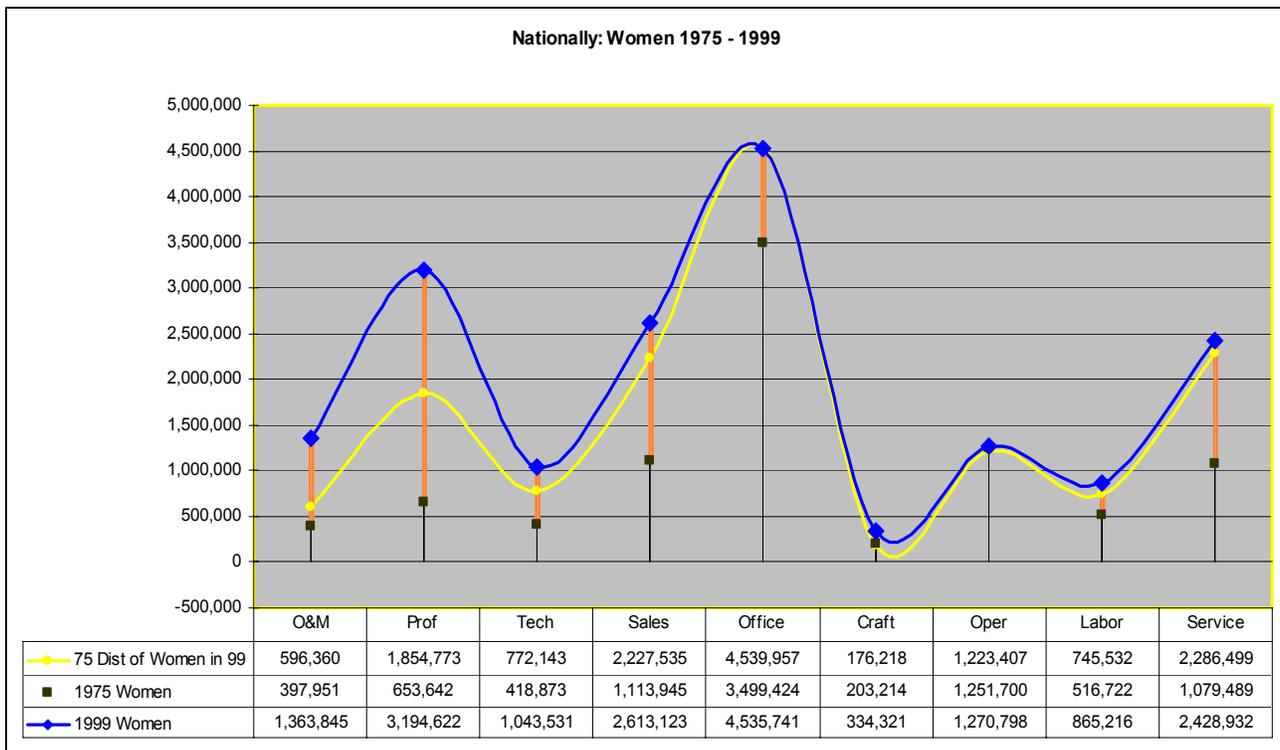


Chart 6. National Change for Women, 1975 – 1999



The bottom line of these tables is that minorities increased their proportion of the EEO-1 Labor Force between 1975 and 1999 by more than 4.6 million workers. These Minorities were 57% Black, 27% Hispanic, 9% Asian and .2% Native American. The net inflow of minorities in the EEO-1 Labor Force was an additional seven million workers, nearly doubling the minority labor force of 1975.

Women increased their proportion of the EEO-1 Labor Force by nearly 3.8 million workers. The net inflow of women was an additional 9 million women, more than doubling the female labor force of 1975. The women workers were 69% White, 17% Black, 9% Hispanic, 5% Asian and 1% Native American.³⁴

One important question for this study is whether, in light of this improvement in the quality and availability, the Minority and Female workforce is still subject to discrimination that prevents them from applying skills and qualifications and obtaining the earnings that are associated with them. It is expectable that the introduction of these millions of minorities and women would produce issues of equality in the workplace that could not arise in their absence. Harassment, promotion, assignment and discharge claims cannot be made by those minorities or women who were not hired in the first place. Congress may have anticipated such new issues by addressing all forms of employment discrimination in Title VII.³⁵

The most startling change demonstrated by comparing these charts is the way employment of Women and Minorities in managerial, professional, technical and sales jobs increased during the period. Minorities increased their participation in these jobs by nearly 2,160,000 jobs and Women by 2,660,000 jobs beyond the proportions of 1975. These are the jobs from which officials and managers usually come.

The pressure to address the “glass ceiling” clearly increased as many Women and Minorities bumped their heads against it from the professional, technical and sales positions.³⁶ Yet the traditional women’s jobs of office and clerical work remain predominantly Female. Much of the integration of the work force is evidently more the result of women moving into previously male jobs than integration of “women’s work” by men. Minorities increased their participation in various occupations at a rate slower than women. That was similar throughout the period except in sales, where the rate was substantially faster. Nevertheless, their greatest increase was in the traditional minority semi-skilled, labor and service occupations.

This study examines how employers have addressed the emerging reality described above: that the number and proportion of qualified minority and female workers has been increasing. At the beginning of this period, in 1975, the Supreme Court described Title VII remedies for employment discrimination as the:

“spur or catalyst to cause employers and unions to self-examine and to self evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country’s history.”³⁷

Many employers did just that. They reduced their use of pro forma screening devices such as written tests, and changed the ways they recruited and evaluated workers, sometimes adopting formal affirmative action programs, usually where their history warranted it.³⁸ The most positive finding of this study shows that the “law transmission system” – the process by which formally established new legal norms are incorporated into “citizens daily experience” as Justice O’Connor put it – has in fact been at work. The increasing inclusion of Minorities and Women meant that the formal barriers to their participation were falling, along with such informal barriers as tests that were not job related. As this happened, other more subjective criteria became increasingly important in a labor force that was constantly adding minorities and women with qualifications and experience in higher level jobs. These more subjective judgments of supervisors could harbor discrimination.³⁹ The discriminatory character of these judgments may become visible only when a pattern of similar activity is observed – often when the employer is compared to similar establishments. When the comparison yields a significant disparity, the Supreme Court has concluded that there is “substantial reason, based upon the statistical manifestations of the net effects of the employer’s practices, to believe that the employer has violated Title VII on a continuing basis.”⁴⁰

Using this principle we have evaluated establishments in each industry and each metropolitan statistical area for which we have data. This enables us to identify those that are so far below the average utilization of minorities and women in particular occupations that the law presumes that intentional discrimination has taken place.

§6. ENDNOTES

25. Isaiah Berlin, *THE SENSE OF REALITY: STUDIES IN IDEAS AND THEIR HISTORY*, Henry Hardy, ed., Farrar, Straus and Giroux ed., paperback, 1998, p. 32.
 26. *THE COMMON LAW* (1881) Little, Brown and Co.
 27. *RACE AND ETHNICITY IN 2001; ATTITUDES, PERCEPTIONS, AND EXPERIENCES*. Free copies available as publication #3143, on the Kaiser Family Foundation website at www.kff.org, or by calling the Kaiser Family Foundation's Publication Request line, 1-800-654-4533. Analyses of the study appear in the *Washington Post* for June 22, July 5, and July 11, 2001.
 28. For example, Whites believed they were 55% of the population, while they are 69%. African Americans believed they were 37%, and Whites believed they were 29%, while they are 12%. The average of all groups concluded that Hispanic Americans were 24.6% when they are 13%, the average belief was that Asians were 16.7% when they are 4%. *Id* at 4.
 29. Those interviewed were asked where they got their information about the different groups. The choices were personal contact, listening to family, friends, seen or read in the media, and a "general sense." All groups reported that personal contact was the primary source. *Id* at 25.
 30. *Id* at 6, 8, 10. The above quoted material was part of a broader question, whether members of the following groups are "better off (+) than the average white person, just about as well off (=), or worse off (-) as the average white person."
 31. Correspondents of the *New York Times*, Joseph Lelyveld, ed., *HOW RACE IS LIVED IN AMERICA*, XIX, 385. (Times Books, Henry Holt & Co. 2001)
 32. *Id* at 10-11.
 33. See, for example, Equal Employment Opportunity Commission, *INDICATORS OF EQUAL EMPLOYMENT OPPORTUNITY— STATUS AND TRENDS*, (2000), A. W. Blumrosen, *MODERN LAW: THE LAW TRANSMISSION AND EQUAL EMPLOYMENT OPPORTUNITY* (1993), pp.289-314.
 34. Details in Chapter 9.
 35. *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988)
 36. This concern led to the Glass Ceiling Act of 1991.
 37. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975).
 38. See *MODERN LAW: THE LAW TRANSMISSION AND EQUAL EMPLOYMENT OPPORTUNITY*, note 9, *supra*, at 289-317.
 39. *Watson v. Fort Worth Bank And Trust*, 487 U.S. 977 (1988). Alfred W. Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 *Chicago Kent L. Rev.* 1 (1987).
 40. *EEOC v. Shell Oil Company*, 466 U.S. 54, 71 (1984).
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