

CHAPTER 16
AFFIRMATIVE ACTION, REVERSE DISCRIMINATION, THE
METHODOLOGY OF THIS STUDY, AND A FIVE YEAR PLAN TO
ADDRESS INTENTIONAL JOB DISCRIMINATION

CHAPTER 16 AFFIRMATIVE ACTION, REVERSE DISCRIMINATION, THE METHODOLOGY OF THIS STUDY, AND A FIVE YEAR PLAN TO ADDRESS INTENTIONAL JOB DISCRIMINATION211

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This study seeks to make a modest contribution to the seemingly endless debate, discussion, dialogue and diatribe concerning Affirmative Action for minorities and women and “Reverse Discrimination” that usually means favoring minorities or women. Our discussion is limited to intentional discrimination as defined in this study. It may also be applicable to “disparate impact” discrimination when the statistics used to define the impact are comparable to those used in this study.

§1. HAS “THE MOST OBVIOUS EVIL” FADED AWAY?

Intentional job discrimination was “the most obvious evil” that the 1964 Civil Rights Act was intended to address.¹⁶¹ “Affirmative Action” is authorized and encouraged in Title VII as an effective way to end or avoid all discrimination,

including intentional discrimination. In recent years, the argument against affirmative action has been based on the assumption that systematic intentional discrimination against minorities and women is largely a thing of the past; that programs designed to address that now defunct activity have outlived their usefulness; and that affirmative action is now hurting whites/males without reason.¹⁶² This position was summed up by Regent Ward Connerly of the University of California in a “Sixty Minutes” interview with Mike Wallace. Wallace played a tape of President Johnson’s Howard University speech of 1965: “You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.”

In his interview, Regent Connerly said, “that was a great speech 32 years ago, but we’re not hobbled by chains any longer.... It just does not apply to America... in 1997.... Black Americans are not hobbled by chains any longer. We’re free to compete. We’re capable of competing. It is an absolute insult to suggest that we can’t.”¹⁶³ Connerly supported successful electoral initiatives to restrict affirmative action in the States of California and Washington in the late 1990’s. Our study suggests that Connerly was wrong – that visible practices of intentional discrimination continue to affect minorities and women in serious numbers.

§2. REMEMBRANCE OF THINGS PRESENT

The next three tables remind the reader just how extensively “the most obvious evil” continues to plague the lives of minorities and women. Table 1 addresses the probability that a minority or woman would, because of race, sex or ethnicity, face intentional discrimination each time he or she sought an opportunity in an occupation. It identifies the number of workers affected by that discrimination. Table 2 identifies the eleven industries which adversely affected more than half of all the minorities and women. For more details, see Chapters 9 and 10 of this Study. Table 3, reproduced from Chapter 15, identifies the Forty Industries that include much of the intentional discrimination against Blacks,

Hispanics, Asians, and White Women. These are “equal opportunity discriminators” in that they discriminate against members of each group.

Table 1. PROBABILITY OF FACING DISCRIMINATION BY MINORITY STATUS, SEX AND OCCUPATIONAL CATEGORY

	Minorities		Women	
	% Disc.	# Affected	% Disc.	# Affected
O & M	22%	32,764	18%	46,544
Prof	25%	104,286	23%	123,012
Tech	26%	45,156	23%	39,631
Sales	34%	170,100	20%	89,823
O & C	30%	132,656	19%	88,931
Craft	28%	36,928	37%	24,521
Oper.	31%	106,900	38%	94,843
Labor.	31%	54,410	30%	44,286
Service	35%	183,065	19%	76,802
All	30%	866,265	23%	628,395

% Disc. means the percentage of comparisons that are 1.65 standard deviations or more below the average.
 # Affected means number of workers who would have been employed in establishments that were two or more standard deviations below the average utilization of minorities/women in the same labor market, and industry if those establishments had been employing such workers at the average.
 Extrapolation from establishments that failed to file EEO-1 reports not included.
 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.

Table 2. Eleven Industry Groups with over Half of all Minority and Female Affected Workers.

Eleven Industry Groups With Over Half of all Minority and Female Affected Workers					
SIC	Industry	# Affected Minorities		# Affected Women	
		Number	Ranking	Number	Ranking
80	Health Services	179,714	1	95,533	1
58	Eating & Drinking Places	86,082	2	35,370	3
53	General Merchandise Stores	82,309	3	49,156	2
54	Food Stores	71,722	4	28,373	6
48	Communications	32,059	5	34,630	4
60	Depository Institutions	29,091	6	19,816	9
73	Business Services	26,755	7	33,172	5
42	Motor Freight Transportation & Warehousing	24,043	8	14,466	15
37	Transportation Equipment	24,015	9	24,826	7
70	Hotels, Rooming Houses, Camps, Lodging Places	23,866	10	13,167	18
36	Electronic, Electrical Equipment & Components	23,141	11	21,377	8
	Total Affected Workers	602,796		369,886	

[Continued on next page.]

Table 3. 40 Industries that are “Equal Opportunity Discriminators”

FORTY INDUSTRIES' INTENTIONAL DISCRIMINATION* AGAINST WOMEN, BLACKS, HISPANICS, AND ASIANS, SHOWING AFFECTED WORKERS** AND DISCRIMINATION RISK BY INDUSTRY***										
SIC	Industry	WOMEN		BLACKS		HISPANICS		ASIANS		AFFECTED WORKERS
		#	% Rsk	#	%Rsk	#	%Rsk	#	%Rsk*	
806	Hospitals	63,908	21%	89,314	41%	19,562	22%	23,719	36%	196,503
581	Eating and Drinking Places	35,370	19%	55,591	43%	43,702	40%	3,530	40%	138,193
531	Department Stores	42,271	22%	50,959	37%	20,615	29%	5,414	31%	119,259
541	Grocery Stores	28,253	14%	53,333	41%	20,681	33%	1,559	24%	103,827
805	Nursing and Personal Care Facilities	13,865	14%	39,429	35%	7,247	34%	5,508	34%	66,049
737	Computer and Data Processing Services	31,114	26%	8,206	28%	1,986	27%	16,637	36%	57,943
701	Hotels and Motels	13,127	17%	17,960	29%	18,651	25%	6,471	32%	56,208
481	Telephone Communication	29,394	30%	19,857	32%	3,654	25%	2,886	33%	55,791
602	Commercial Banks	18,673	18%	20,131	37%	4,006	23%	4,821	30%	47,632
371	Motor Vehicles and Equipment	18,084	32%	14,470	36%	3,206	32%	1,732	37%	37,492
367	Electronic Components and Accessories	11,965	26%	3,001	33%	5,808	23%	11,748	35%	32,522
421	Trucking & Courier Services, Ex. Air	10,119	42%	15,842	35%	5,304	26%	501	32%	31,766
451	Air Transportation, Scheduled	15,651	32%	8,597	30%	4,057	22%	2,768	33%	31,073
308	Miscellaneous Plastics Products	11,109	33%	4,662	33%	7,216	35%	2,559	49%	25,547
514	Groceries and Related Products	11,184	32%	4,783	34%	6,077	32%	534	36%	22,577
809	Health and Allied Services	10,329	21%	6,767	35%	2,063	29%	1,478	32%	20,638
633	Fire, Marine, and Casualty Insurance	7,858	18%	4,012	22%	772	20%	754	32%	13,395
632	Medical Service and Health Insurance	5,733	19%	5,751	28%	914	21%	944	26%	13,341
372	Aircraft and Parts	5,901	29%	1,443	34%	2,611	17%	2,497	35%	12,453
357	Computer and Office Equipment	5,814	27%	1,310	28%	1,066	21%	4,170	32%	12,360
594	Miscellaneous Shopping Goods Stores	6,186	30%	3,216	36%	1,888	33%	619	28%	11,909
621	Security Brokers and Dealers	7,506	21%	2,277	29%	817	23%	1,122	21%	11,723
384	Medical Instruments and Supplies	5,474	25%	1,012	27%	1,821	27%	2,995	31%	11,301
871	Engineering & Architectural Services	6,487	23%	1,792	25%	715	18%	2,235	25%	11,229
504	Professional & Commercial Equipment	6,440	26%	1,984	26%	977	25%	1,632	29%	11,033
366	Communications Equipment	4,500	25%	1,269	20%	978	20%	3,839	36%	10,585
283	Drugs	5,301	23%	1,718	25%	1,185	24%	2,301	31%	10,504
801	Offices & Clinics Of Medical Doctors	4,936	19%	2,987	33%	1,028	22%	1,419	27%	10,370
275	Commercial Printing	4,869	29%	1,984	31%	1,486	31%	878	43%	9,216
201	Meat Products	2,286	32%	1,720	33%	3,517	28%	916	58%	8,439
641	Insurance Agents, Brokers, & Service	3,943	19%	2,768	30%	756	25%	756	25%	8,222
349	Misc. Fabricated Metal Products	3,440	35%	1,511	30%	1,683	29%	835	39%	7,469
836	Residential Care	2,481	21%	3,449	33%	854	28%	378	35%	7,163
267	Misc. Converted Paper Products	3,505	33%	1,511	30%	1,516	33%	456	44%	6,988
344	Fabricated Structural Metal Products	2,242	37%	1,660	33%	2,476	32%	511	48%	6,888
489	Communication Services	2,530	30%	1,322	27%	1,474	29%	1,474	29%	6,800
271	Newspapers	2,924	19%	2,094	37%	1,016	26%	337	31%	6,372
501	Motor Vehicles, Parts, and Supplies	2,579	29%	1,354	30%	1,010	31%	1,010	31%	5,953
209	Misc. Food and Kindred Products	2,024	32%	1,119	35%	2,091	25%	695	43%	5,930
225	Knitting Mills	1,396	34%	1,043	34%	700	46%	414	59%	3,553
Total affected workers		470,773		463,206		207,186		125,052		1,266,217
31% reduction for minority women included in Women totals		(145,940)								1,120,277
Percent of all affected Workers		75%		79%		73%		84%		77%
* Discrimination 1.65 or more standard deviations.										
**Affected Workers are the difference between employment in same labor market and occupation at 2 or more standard deviations below average, and number who would have been employed if establishment had employed at the average.										
***Risk based on proportion of comparisons of establishments in same labor market and occupation.										

§3. WHO ARE THE BENEFICIARIES OF DISCRIMINATION AGAINST MINORITIES?

Discrimination against women necessarily benefits men. It is not so obvious who benefits from discrimination against a minority group because members of other minority groups may receive or share the benefits. But if we consider all three separate minority groups together, as subject to the phenomena of distrust because of race or color, this difficulty disappears. For each minority person affected by discrimination in Table 1, there is a white person who has gained an employment opportunity. The situation is identical to that between men and women.

Our statistics show that 90% of intentional discrimination comes from employers who were 2.5 standard deviations below the average utilization in the labor market, industry and occupation involved. This 2.5 standard deviation standard means that there is a 1 in 100 chance that the result was accidental. [see Chapter 7]

The tables above make obvious that which is sometimes lost in the noise of the arguments about “reverse discrimination.” Whites are the beneficiaries of intentional discrimination against minorities, and it is not accidental. In short, the original purpose of Title VII, to lift minorities “from the status of inequality to one of equality of treatment” has not been achieved.¹⁶⁴ The playing field of work remains full of obstacles based on race, sex and national origin. It is not level.

§4. CAN THE METHODOLOGY OF THIS STUDY IDENTIFY REVERSE DISCRIMINATION?

The methodology of this study cannot be used to address “reverse discrimination.” The reason lies at the heart of the methodology itself – the average utilization of minorities/women by establishments in the same labor market, the same industry and with respect to the same occupations. The specificity and individuality of this average is its strength. By no stretch of the imagination could this be called a “quota” because it varies with each occupational category in each labor market and between industries. The average is a fact: it describes the behavior of employers operating under specific economic conditions. It defines what other employers have actually done under the same market conditions – the custom of the industry in that location. This is a valuable way to identify discrimination against minorities and women, but it should not be confused with a “fair” or “non discriminatory” average.

In identifying discrimination against minorities and women we followed legal precedent closely. We did not assume that the average utilization of minorities and women was “fair” or “non-discriminatory.” We knew that this average was itself “tainted” by discrimination because it is based on all establishments in the relevant labor market and industry, *including those that discriminate*. We assume only that the average usage was a measure of practical accomplishment against which to measure similar establishments. To use this same average to identify discrimination against whites and males would assume that it was a “fair and non-discriminatory standard,” which we know it is not. To treat it as fair would be to legitimate a status quo that itself is discriminatory. Where discrimination has restricted minorities as a whole, the beneficiaries (as the preceding discussion suggests) are always White. Thus the number and proportion of available and qualified Whites is itself a product of discrimination that has restricted minorities or women. This “inflation” of the pool of whites/males arising from discrimination against minorities and women also taints the average on which our analysis is based.

§5. CAN OUR METHODOLOGY BE MODIFIED TO IDENTIFY “REVERSE DISCRIMINATION”?

The strength of the methodology used in this study is that the average utilization which is the benchmark by which we identify discriminating establishments is a “real” numerical average, derived from the EEO-1 reports. It is not based on any theory of how the society *ought* to behave, but on the facts about how it is behaving, even when that behavior itself shows that discrimination continues. In order to develop a “benchmark” to measure discrimination against whites/males, we would have to leave the reality that is the strength of our methodology, and create an artificial “benchmark” that would be based on something other than practices we know to be discriminatory. We have explored the possibility of simply modifying the number of standard deviations in our methodology to justify its use in connection with Whites. We have concluded that as long as we use the “benchmark” that is the basis of this report, all our outcomes would be tainted by the inclusion in the average of discrimination against minorities and women.

To apply our methodology to Whites would not be “equal treatment” for Whites, rather it would entrench the advantages that Whites had achieved by discriminating against Minorities. While some may argue that what is sauce for the goose is sauce for the gander and seek to apply our averages to Whites/Males, we think that geese and ganders are no more similar than Aesop’s fabled stork and fox, noted by Chief Justice Burger in *Griggs v. Duke Power Company*.¹⁶⁵ Geese and Ganders are no more similarly situated in our society than are men and women, or whites and blacks. Whites/Males have been the beneficiaries of centuries of discrimination against Women and Minorities, not the victims of racial or gender discrimination. For these reasons, it would be inappropriate to use the average that includes discriminators against minorities in favor of Whites to prove “Reverse Discrimination” against Whites.

The line where steps taken to address the exclusion or restriction of women and minorities become “discrimination” against Whites/Males has been difficult to draw. This problem has faced all branches of government that have sought to recognize discrimination against Whites in such a way that it does not perpetuate White advantages arising from discrimination against minorities. How can

discrimination claims by Whites be recognized without subverting the principle of equal employment opportunity for all? Is there a role for some statistical methodology in identifying that line?

**§6. SUPREME COURT PRECEDENTS SUGGEST A ROLE FOR STATISTICS IN BOTH
SUPPORTING AFFIRMATIVE ACTION
AND IDENTIFYING “REVERSE DISCRIMINATION.”**

The Supreme Court’s first premise in dealing with this issue is that the prohibition on employment discrimination is applicable to Whites as well as Minorities, and, to Males as well as Females.¹⁶⁶ The second principle is that affirmative action programs that consider the race, sex or national origin of candidates for employment opportunities are lawful under certain circumstances. Supreme Court decisions have upheld affirmative action plans where there is a “manifest imbalance” in the utilization of minorities or women. Court of Appeals decisions have held that in individual claims of “reverse discrimination,” white/male plaintiffs must demonstrate that the employer was the “unusual” employer who preferred minorities or women.¹⁶⁷ In these ways, the principles of equality are preserved, while the evidentiary formulas to establish discrimination are modified to take account of the “sense of reality” – confirmed in this report – that whites/males are far more often the beneficiaries of discrimination and are rarely its targets. These principles shape the standards that we believe are relevant to measure the extent to which an employer may take affirmative action.

First, an employer whose statistics reveal that it is at risk of a finding of discrimination against women and/or minorities, may take affirmative action to reduce or eliminate that risk, without exposing itself to liability for “reverse discrimination.” Voluntary compliance with Equal Employment Opportunity laws has been a constant objective of the Congress since 1964. This means at least that an employer who is 1.65 standard deviations below the average utilization of women or minorities may take affirmative action to increase its utilization of women and minorities. And it may be careful not to get into the zone of risk identified by the 1.65 standard deviation measure. In order to accomplish this over time, the employer must be able to conduct its employment practices so as to meet or exceed the average employment of minorities and women without concern that a

single hiring will result in a finding that it had hired “too few,” or “too many.” As this study shows, there are many qualified and suitable persons in the workforce.

Second, just as employers are given a wide leeway *below* the average utilization before a presumption of discrimination arises in favor of minorities/women, they must be given a similarly wide leeway *above* any average that is suggested as “fair” before a presumption of “reverse discrimination” arises in a suit by whites/males. This is recognized in decisions mentioned above allowing affirmative action in cases of manifest imbalance, and requiring whites/males to show that the employer being sued is “unusual” in that it prefers minority/female employment. It is also important to leave employers free of a straight jacket of numbers on either side of an average to avoid litigating every choice that an employer makes in any competition between workers with different backgrounds.

Third, as with discrimination claims by minorities and women, “reverse discrimination” claims fall under different methods of analysis. “Disparate treatment” claims rely primarily on a showing that an individual was treated differently than similarly situated persons because of race, sex or national origin. The unfairness to the individual compared to other identified individuals is the focus of the case, and statistics play a secondary role. There are cases where minority officials overreach in promoting or protecting minorities, just as white officials have overreached in rejecting minorities.

The other type of case is where the employer explains that race or sex played a part in the decision, because the employer consciously sought to improve opportunities for minorities or women. In those cases, the ultimate issue is whether the employer had a legitimate reason to take race or sex or national origin into account in a competition between a white or male and a minority or woman. The burden is on the white/male claimant to show either that the plan itself, or its application, was illegal, just as a minority or woman has such a burden in a “direct” discrimination case.

Fourth, at this point the statistics developed by our methodology may be useful. If those statistics show that the employer was employing minorities or women at a level equal to or *below* the average utilization in the labor market, industry and occupation, a justification for reasonable affirmative action arises

under existing legal principles. We know that the average incorporates discriminatory establishments, so that it cannot serve as a “ceiling” on when an employer may take affirmative action. The Courts give employers accused of discrimination against minorities and/or women a wide leeway *below* average utilization to make discretionary decisions. If the employer is within two standard deviations *above* whatever is decided to constitute a “fair” average utilization of Whites, its judgment about taking affirmative action should be upheld. That fair average, as yet undefined, must by definition be higher than the average utilization which is the basis of this study. How far above that point the employer must be before that justification weakens will depend on the myriad of circumstances in particular cases until the courts or agencies provide clarification. At this point in the development of the law, the methodology of this study – dependent as it is on existing legal standards – can take us no further.¹⁶⁸

**§7. THE METHODOLOGY OF THIS STUDY ITSELF MAY BE
A PRACTICAL TOOL TO ASSIST IN DEFINING THE ARENAS FOR AFFIRMATIVE
ACTION AND REVERSE DISCRIMINATION**

One of the goals of this study is to enable employers to understand when they may be at risk of a finding of a “pattern or practice” of intentional job discrimination. Without comparing their utilization of minorities or women with other similar establishments, employers have no way to know that their utilization is so low that they face this risk.

This methodology may be a useful tool for employers, not only in assessing the risk of discrimination or the appropriateness of affirmative action, but in the daily experience of employee relations. Somewhere above 1.65 standard deviations and the point where “reverse discrimination” is blatant, employers face day in and day out issues which may become discrimination matters, but may not be recognized as such. This methodology may be helpful in guiding employers into areas where they should be especially careful. As discussed earlier, an employer’s credibility may be tested in the usual “he said-she said” type of discrimination case by reference to relevant employment statistics. If the employer has a record of employing minorities or women above the average rate for the labor market, industry and occupation, a charge of discrimination is likely to fail unless

accompanied by significant specific evidence. Conversely, a complaint alleging discrimination in an establishment that falls two standard deviations below the average in a relevant market, industry and occupation is likely to be believed. This belief may be shared by the employer, if it knows where it stands. Otherwise, the employer may end up litigating a case that should have been settled.

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How is an employer to know if its practices are likely to be presumed to be intentional? While the employer will know its own statistics – and will probably know that it employs few minorities or women – how will it know if it falls below the two standard deviation criteria for intentional discrimination?¹⁶⁹

Prior to this study, there has been no way that an employer could learn with clarity whether it was at risk of being found to engage in a pattern or practice of discrimination. At best, employers could make an estimate, based on statistics concerning the availability of minorities or women with the general skills in the labor market. Employers had no way of comparing their utilization with others in the same industry, and thus could not account for the special circumstances of the industry. The available statistics had other problems that would be likely to surface only if litigation claiming a pattern or practice of discrimination had been filed.¹⁷⁰ This would happen long after the alleged discrimination had taken place.¹⁷¹ The employer today has the risk that a plaintiff will develop statistical evidence that it may have to rebut, without ever knowing in advance of a claim what the statistics might show. Employers need reliable data on this issue in time to adjust their practices **before** they cause harms for which they will be responsible.

**§8. THE UNFAIRNESS OF LEAVING EMPLOYERS UNAWARE
OF THE RISK OF LIABILITY**

The unfairness to the employer of the existing situation was identified by Justice O'Connor of the Supreme Court nearly 20 years ago. She discussed the importance of comparisons between the employment of minorities or women by a particular employer and their employment in the labor market in *EEOC v. Shell Oil Co.* EEOC had subpoenaed evidence from Shell, based on EEO-1 data. Shell resisted the Subpoena because EEOC had not provided Shell with the statistics on which it relied. The Court unanimously enforced the subpoena.¹⁷² Five Justices held that the disclosure of the EEOC's data was not required because the employer knew its own EEO-1 figures. Justice O'Connor, with Chief Justice Burger, Justice Rehnquist and Justice Powell concurring, while upholding the subpoena, recognized that the crux of the matter was a comparison of the employers employment of minorities with the behavior of the industry in the relevant labor market. She explained her reasoning as follows:

“The [majority's] suggestion...that the employer “cannot plead ignorance of the figures relied upon by the Commissioner” is simply mistaken. The employer supplies only one half of the relevant figures – its own employment statistics. EEOC supplies the other half – overall statistics for the employment market from which the employer draws. *It is only in a comparison between these two sets of figures that a pattern of discrimination becomes apparent.*” [emphasis added]

This study makes the comparisons that Justice O'Connor identified, using the EEO-1 reports to define the labor market and the place of each individual employer, without identifying names or addresses, compared to other employers in the same industry and with respect to the same occupational category.¹⁷³ The EEOC and the OFCCP had begun to experiment with using the EEO-1 data for a variety of purposes, including enforcement. Since only those agencies (and perhaps the states) can identify the establishments by name, it would be appropriate for the agencies to supply to employers who are at risk the “other half” of the data they need in order to understand their situation.

§9. THE PREFERENCE FOR VOLUNTARY COMPLIANCE

As a nation, we have a deep preference for employer self help to end discriminatory practices – a preference written into the Civil Rights Act’s requirement of “conference, conciliation and persuasion,” and repeatedly stressed in Congressional, court and agency actions during the last thirty five years.¹⁷⁴ As the Supreme Court said in 1975, Title VII’s remedies were to be “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.”¹⁷⁵ In emphasizing the intentional quality of discrimination, this study makes clear that these problems are created by human decisionmakers, not by “societal discrimination” that may be intractable. The progress thus far in improving Minority and Female job opportunities demonstrates in practice that the effort is worthwhile.

An employer that is aware of a perilous legal situation may take reasonable actions to extricate itself from a problem of its own making, even if this means changing the “standard operating procedures” that produced the discriminatory pattern. This is a classic case where reasonable and responsible affirmative action would be appropriate. The action may be as simple as recruiting at a minority high school or as complex as reexamining the validity of entry level or promotional requirements. The objective is to increase the utilization of qualified minorities or women so that the employer is no longer in the zone of risk of liability based on the statistical analysis we have described. This action would not constitute a quota program, because it would not be rigid, nor would it require an employer to hire without regard to qualifications: it would not constitute a preference for minorities or women, but an elimination of preferences which have favored whites/males.

As the statistics in this study make clear, more than seventy thousand establishments fall near or below the two standard deviation mark, and risk liability under the “pattern or practice” concept. Today, these employers are unable to learn where they stand so that they may address their problems and reduce their risk of liability. Only the federal government (EEOC and the OFCCP) and, derivatively, the states have access to this information for individual firms. So far, they have

not used it to identify intentional discrimination or advise employers that they may be at risk.

§10. THE NEED FOR DISCLOSURE TO EMPLOYERS

The vastness of this situation means that traditional law enforcement methods of case by case processing alone simply cannot work. This is true even if we consider all present case processing activity, before the EEOC, the OFCCP, the State agencies, and the Courts, federal and state. The present situation is unfair to all the interested parties: to employers who may be taken by surprise; to the minorities and women who are victims of discrimination; to the public that bears the expense associated with the processing of cases and the social costs that arise when job opportunities continue to be unfairly restricted.

The first step in addressing this situation should be notice to employers of the reality of their situations if they are at risk so that they may make their own judgments about whether to take steps to address the situation. The federal government is obviously in the best position to provide this information. It should do so without threat of enforcement action, because large scale enforcement is impossible. Some employers may decide to address the situation in which they find themselves, and hope that over time, with informal efforts, they will reduce the risks of liability based on the statistical analysis. Since the average number of workers affected by discrimination is less than 50, reasonable efforts by many employers should ameliorate the situation in a relatively short time.

As a legal matter, the same statistics that show a “usual” practice of discrimination also justify affirmative action by employers to rid themselves of the consequences of prior discrimination.¹⁷⁶ The establishment of “affirmative access” to employment opportunities is the preferred method of addressing these situations.

§11. A PRIVATE SECTOR SOLUTION.

In the early days under the Civil Rights Act, the mission of the federal agencies was clear. It was to break the openly segregated job patterns in the country, and destroy barriers that effectively restricted minority and female opportunities. These open manifestations of intentional discrimination are all but gone; with the result that millions of minorities and women are in higher occupational categories than they would have been in the earlier era. Since these earlier years, government programs have not had such clear direction. Proof of discrimination has become more complex. The public is now more aware of its rights and has increasingly resorted to agencies and courts for their enforcement. There are now 18,000 employment discrimination cases pending in Federal District Courts, and 2,300 in the Courts of Appeal. That is 12.5% of the caseload in the Courts of Appeal.¹⁷⁷

Some new focus is needed because of all of these circumstances, along with the variations and dislocations in the “global economy” of which we are a part. The federal agencies should adopt a methodology of the type suggested here, to focus their activities over the next five years. This would provide a common ground for the agencies, employers and interested groups to concentrate their energies. The Compliance Review functions of OFCCP already go part way in this direction; they could be more refined. The complaint processing activities of EEOC, which still produce relief to fifteen percent of complainants, should be further shifted into a coordinated program with OFCCP concentrating on the 40 and then the 206 industries we have identified, and the EEOC litigation program should adopt this approach as well.

We doubt that the government will take these important steps without political incentive. Neither Democratic nor Republican administrations have adopted a positive approach to using the EEO-1 data, such as that used in this study. With this history, it seems probable that only the private sector will be able to provide information of the type presented in this study. Within the limitations of the confidentiality provision of Title VII, the authors of this report have created EEO1 Inc. to make some general information available to the public and to make specific information available to employers who are entitled to it. No employer

would be identified. Their identifying names and addresses were never provided to this study.

As a first step, EEO1 Inc. will open a website – EEO1.com – which will include a “Discrimination Calculator.” There, the public may obtain, without cost, statistics concerning the probability that a person with specific demographic characteristics is likely to be discriminated against in a specific industry and occupation within a Metropolitan Statistical Area. No names or addresses of employers are involved. The purpose is to provide a perspective on the risks of discrimination generally, not with respect to a particular employer. This may be useful to job seekers, to people thinking of changing careers or locations, to employees considering whether they have been discriminated against, to agencies seeking to evaluate claims of discrimination, to attorneys deciding whether to accept a case, and to employers seeking some sense of their vulnerability.

Employers may seek information concerning the relative status of their labor force in specific MSA’s (not including the names or addresses of any other employers) by having their counsel apply through EEO1.com.

§12. ENDNOTES

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161. *Teamsters v. United States*, 431 US at 324, 335, n. 15 (1977).
162. The issue of affirmative action has constitutional dimensions we do not consider here. See Alfred W. Blumrosen and Ruth G. Blumrosen, *EQUAL EMPLOYMENT OPPORTUNITY PROGRAMS IN CONSTITUTIONAL JEOPARDY*, available at <http://law.newark.rutgers.edu/blumrosen.htm>; A. Blumrosen, *MODERN LAW*, pp. 219 – 260.
163. Interview on “60 Minutes” by Mike Wallace, Aug.2, 1998, transcript, p. 22.
164. Ch. 2, n. 1.
165. 401 U.S.424 (1971).
166. *MacDonald v. Santa Fe Trail Transportation Co.*, 427 US273 (1976); *Johnson v. Santa Clara County Transportation Agency*, 480 US 616 (1987).
167. *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012 (DC Cir. 1981)
168. Justice O’Conner reached a similar conclusion concerning statistics in *Watson v. Fort Worth Bank and Trust*. There are a variety of proposals seeking to define a “fair” or “non discriminatory” labor force. Cite *Duncan*. This study does not involve any such concept.
169. *Hazelwood School District v. United States*, 433 U.S. at 312, n.17. At two standard deviations, there is only one chance in 20 that the observed result occurred by chance. The project has used the two standard deviation analysis as described in *EEOC v. American National Bank*, 652 F.2d 1176, 1192 (4th Cir. 1981) and *Berger v. Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395,1411-1414 (DC Cir. 1988). The “two standard deviations” rule has been adopted as establishing a prima facie case of intentional discrimination in a number of Circuits. See *Rendon v. AT&T Technologies*, 883 F.2d 388, 397-98 (5th Cir. 1989). Justice O’Connor incorporated the *Teamsters/Hazelwood* standard deviation analysis in her opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). This standard of proof is far more rigorous than any known to law. The criminal law standard, “beyond a reasonable doubt,” does not require that the trier of fact be “95%” certain that the defendant caused harm. The civil law requirement that the trier of fact find that it is “more likely than not” that the defendant caused harm, is far more lenient than a “95% certainty” standard. *EEOC v. American National Bank*, 652 F.2d 1176, 1192. See Michael J. Zimmer, et. al., *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION*. 278-98 (4th ed. 1997).

Defendants may rebut or seek to weaken the force of this evidence in the manner set forth in *Hazelwood* and in *Bazemore v. Friday*, 478 U.S. 385 (1986). Under *Bazemore*, the defendant bears the burden of persuasion.

170. For example, the statistics were frequently based on data collected in the dicennial census, and thus would be up to ten years out of date, even though they were modified by surveys taken during the intervening years.
 171. “Pattern or practice” cases can be brought by the EEOC against private employers, and the evidentiary pattern can be used in class actions brought by plaintiffs who have satisfied the procedural prerequisites.
 172. EEOC v. Shell Oil Co., 466 U.S. 54, 72 (1984)
 173. The categories have been in use for thirty five years under the EEO-1 system, and have acquired some stability. They are accompanied by an explanation in the EEO-1 form booklet. The employer may, of course, assert that a narrower category, such as accountants or lawyers, more accurately reflects its activities. But the employer would still have to show that the outcome of different comparisons would exonerate the establishment. Thus, under Bazemore v. Friday, 478 U.S. 385 (1986), the matter would be presented to the trier of fact.

See EEOC v. O & G Spring and Wire Forms Specialty Co., 38 F.3d 872 (7th Cir. 1994) illustrating various approaches to defining an occupational category and a labor market.
 174. Alfred W. Blumrosen, Six Conditions for Meaningful Self Regulation, 69 American Bar Association Journal 1264 (1983). [Ross Prize Essay]
 175. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).
 176. Johnson v. Transportation Agency, Santa Clara County, California, 480 U.S. 616 (1987). Wygant v. Jackson Board of Education, 476 U.S. 267 (1986). EEOC, Guidelines on Affirmative Action, 29 CFR 1608, 1-12 (1879). See Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616 (1987); United Steelworkers v. Weber, 443 U.S. 193 (1979). Justice O’Connor and Justice Brennan agreed on the appropriateness of voluntary affirmative action where statistics were “sufficient to support a prima facie Title VII pattern or practice claim,” Wygant v. Jackson Bd. of Education, 476 U.S. 267 at 292, although Justice Brennan, for the Court, applied a broader standard of “manifest imbalance” to justify affirmative action.
 177. See EEOC’s website at www.eeoc.gov.
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