CHAPTER 2
THE FOUNDATIONS OF THIS STUDY

Beginning in the 1760's, every generation of Americans has struggled with social questions of race and sex. The Revolution proclaimed equality, protected slavery, and did nothing for women's rights. The Northwest Ordinance of 1787 drew a line between slave and free territories along the Ohio River. That line was later stretched to the west by the Congress adding both "free" and "slave" states. This approach was abandoned in the 1850's. The ensuing Civil War settled the question of slavery, leaving a suffocating racial stigmatization lasting a hundred years. Women's rights faired a little better in the twentieth century, but equality remained as elusive for women as for the descendants of slaves.

All that began to change in the middle of the twentieth century, following revelations about the Holocaust at the end of World War II. From the first state Fair Employment Practice Laws in 1945 and Brown v. Board of Education in 1954 to the Civil Rights Acts of the 1960's, the social and economic rights of people of color and women were elevated by law. The Civil Rights Act of 1964 sought to "lift the Negro from the status of inequality to one of equality of treatment."[15]

After these laws were adopted, the nation began to shape and define those rights in concrete circumstances.[16] Justice O'Connor has explained that, "As a Nation we aspire to ensure that equality defines all citizens' daily experience and opportunities as well as the protection afforded to them under the law."[17] We analyze the employment patterns of minorities and women under principles of the common law and the Civil Rights Act to get a "sense of reality" about present day working conditions.[18]

§1. MEASURING AND EVALUATING

The assessment and evaluation of employment discrimination requires standards of measurement. This study has developed two standards: one to measure the current extent of intentional job discrimination and the other to measure improvement in the proportion of minority and female employment. This latter standard is discussed in Chapters 3, 9 and 10.

The central feature of this study is the standard that identifies discriminating establishments by comparing the employment of minorities and women in establishments in the same labor market and industry with regard to the same occupations. We compare each establishment with the average employment of minorities and women by other establishments that draw from the same labor market, in the same industry and for the same occupations. This average is not fair or neutral because discriminating establishments are part of the average against which all are measured. This average or benchmark is a fact, not a theory or quota. Establishments that are far below the average utilization of Minorities or Women are presumed by law to be intentional discriminators.

This study is concerned with job discrimination against the workforce of 1999, not with discrimination that may have existed in the past or which may appear under a vision of how the world *ought* to be organized. We do not measure intentional discrimination against a model of a "fair" employment pattern and ask how far we are from that goal. We base this study on the world as it is.

§2. THE BASIC METHODOLOGY OF THIS STUDY

Employment is driven by the technological requirements of industry. Therefore employers in the same industry and labor market are similarly situated with respect to both the technological requirements and the labor markets in which they operate. Labor markets function differently depending on the occupations and industries involved. By identifying the average employment of Minorities and Women within an industry and labor market and occupation, we are able to identify establishments that have so severely restricted or excluded Minorities and Women that, compared to other employers, they stick out like sore thumbs.

We have analyzed this data covering the period 1975 - 1999 using the statistical analysis of intentional job discrimination approved by the Supreme Court. The Supreme Court viewed such discrimination as the "most obvious evil" that the Civil Rights Acts were designed to address.[19] The Court has explained that: "[a statistical] imbalance is often a telltale sign of purposeful

discrimination.... In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination..."[20]

The methodology used in this Study was foreshadowed by Justice O'Connor of the Supreme Court, concurred with by Chief Justice Burger, Justice Rehnquist, and Justice Powell nearly 20 years ago. EEOC had charged Shell Oil with discrimination, based on EEO-1 data. Shell did not produce evidence demanded by EEOC, on the grounds that EEOC had not provided Shell with the statistics on which it relied. The Court unanimously enforced the subpoena.[21] Five Justices held that the disclosure of the EEOC's data was not required, in part, because the employer knew its own EEO-1 figures. Justice O'Connor's opinion, while upholding the subpoena, would have ordered EEOC to supply the statistics.

> "The [majority's] suggestion...that the employer "cannot plead ignorance of the figures relied upon by the [EEOC] 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 found important, using the EEO-1 reports to compare each individual employer to other employers in the same labor market and industry with respect to the same occupational category. By comparing establishments by industry, the breadth of the occupational categories is reduced. "Professionals" is a broad term, but professionals in the accounting industry are likely to be accountants, while professionals in the legal service industry are likely to be lawyers. The identity of the industry clarifies the requirements of the occupation.

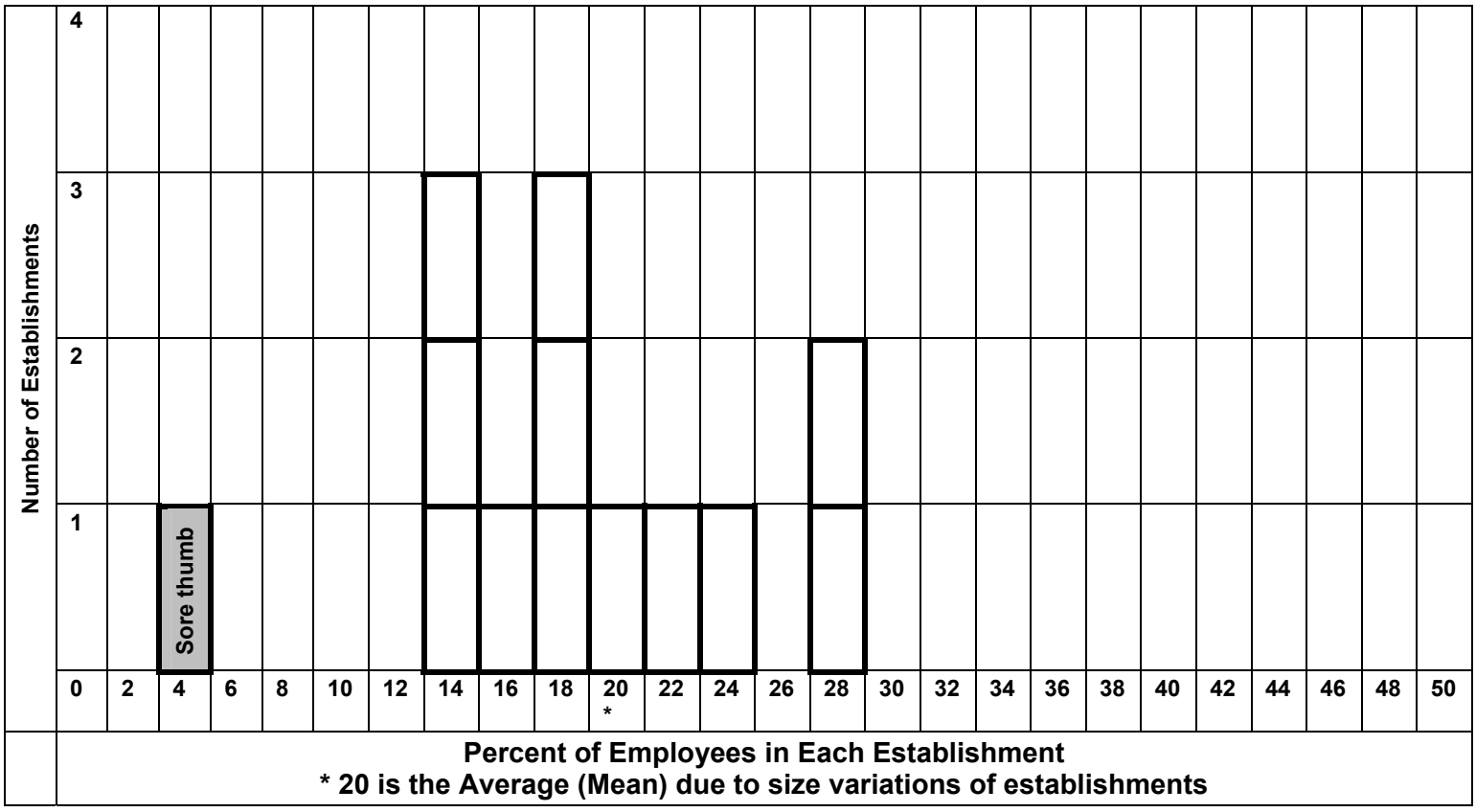
§3. THE "SORE THUMB" ANALYSIS DESCRIBES REALITY – IT IS NOT A "FAIR," "NEUTRAL," OR "NON-DISCRIMINATORY" APPROACH.

We compare only those establishments that are in the same labor market, and the same industry, with respect to the same occupational category. To be compared, an establishment must have at least 20 employees in the occupational category, there must be two other similar establishments with at least 20 employees, and there must be at least 120 workers in the same industry, labor market and occupation.[22] When these conditions are met, we compare each such establishment with the average (mean) utilization of minorities and/or women in

the entire industry, labor market and occupation. When an establishment falls far below this average, it will stick out like a "sore thumb." At this point, the law will presume that intentional discrimination was responsible, leaving it to the employer to show otherwise.

The Supreme Court in 1977 explained that to identify the point where the "sore thumb" has formal legal consequences, that point is realized when an establishment is at least two standard deviations below the average. At that point, a presumption of discrimination arises requiring the establishment to show either that the statistics are wrong, or that there is a non-discriminatory reason that fully explains the statistics.[23]

Table 1. Sore Thumb Example: Percent Females Among Sales Employees Security Dealers and Brokers in the Seattle Metropolitan Area, 1997



This average becomes the standard against which establishments are measured for their utilization of minorities and women. The average is not used because it is "fair" or "non discriminatory." It is neither. For that reason, it cannot be used to presume that employers who are above the average are either "non discriminatory" or are engaged in "reverse discrimination" against Whites and

Males.[24] It measures only what similar employers actually do within a labor market that is shared by others in the same industry for the same kind of jobs.

Our data cannot particularize the myriad discriminatory practices and events that take place beyond the view of our computer screen and contribute to the restriction on opportunity reflected in the statistics. These acts may include discriminatory recruiting and hiring practices, job assignment patterns, limitations on promotional and training opportunities, layoff and discharge practices, creating a hostile work environment, denying equal pay to minorities or women, or resisting employment of minorities or women in certain occupations by an entire industry or labor market. Nor can we "see" discrimination that takes place outside of Metropolitan Areas, or by employers of 50 or fewer workers. In addition, we require that an establishment have at least 20 employees in an occupational category to consider it in connection with that category. Many smaller establishments will not have 20 employees in any single occupational category, and will not be considered in connection with that category.

Since the majority of the work force is employed by employers who are not "visible" to our study and since discriminatory patterns appear to be similar among different sized employers [see Ch. 9 §5], we have reason to believe that the extent of intentional job discrimination may be at least double that which we have observed.

Beyond that, there are uncounted individualized acts of discrimination among establishments that do not involve a discriminatory pattern. Individual managers may engage in practices in their departments that do not rise to the observable level, or make individual employment decisions on a discriminatory basis that are not part of a visible pattern. An entire industry in a particular labor market, or as a national practice, may discriminate in some form. If this happens, the average utilization that is the basis for our analysis may itself be skewed in a discriminatory manner, but this will not be visible to us. For the purposes of this study, we accept the existing average as the "benchmark" for measuring discrimination. This acceptance of the "status quo" makes this study inherently conservative. The average is an accurate reflection of what similarly situated employers have in fact accomplished in providing minority and female job opportunities. Would it be possible to develop a "fair" average so that we can tell when discrimination is "over?" That is not within the scope of this study. [See Chapter 16, §§4&5] Future research may attempt to control for the discrimination against minorities and women inherent in the present methodology.

Our methodology holds employers only to the standards that similarly situated employers have met in the same labor market, industry and occupation.

§4. ENDNOTES

15. Sen. Edward Muskie, 110 Congressional Record 14,328, 88th Cong. 2d Sess. 1964.

16. For a semi-insider's view of the post enactment process, see Alfred W. Blumrosen, MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY, University of Wisconsin Press, 1993. For a historian's view, see Hugh Davis Graham, THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972, Oxford University Press, 1990.

17. Dissenting in Metro Broadcasting v. FCC, 497 U.S. 547, 612 (1990).

18. Isaiah Berlin, THE SENSE OF REALITY: STUDIES IN IDEAS AND THEIR HISTORY, Henry Hardy, ed., Farrar, Straus and Giroux ed., paperback, 1998, p. 32.

19. Teamsters v. United States, 431 US at 324, 335, n. 15 (1977). Both Congress and the Supreme Court expected that increased employment opportunities for minorities and women would result from ending discrimination. "When the color blind model was passed into law [in the 1964 Civil Rights Act], it was done with the belief or expectation that freedom from discrimination would bring about black equality – comparable statistical rates of black and white employment and unemployment. Congressional documents reflect this expectation." John David Skrentny, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA, 15 (1996). When courts were shown that minorities and women were restricted beyond the point where it could be considered accidental, they adopted the Congressional assumption – and the common sense of the situation – that the reason for the restriction was race/sex, unless the employer could demonstrate otherwise.

20. Teamsters, 431 U.S. 324, n. 20.

21. EEOC v. Shell Oil Co., 466 U.S. 54, 72 (1984)

22 . See Ch 4. and the Technical Appendix for further criteria for identification of establishments.

23. Teamsters v. United States, 431 US 324 (1977), Hazelwood School District v. United States,433 US 299 (1977)

24. See Ch. 17.