WOMEN'S HISTORY AND THE SEARS CASE

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Are women's interests best served by public policies that treat women and men identically, ignoring the social and cultural differences between them? Or should we view those differences positively and seek greater recognition and status for traditionally female values and forms of behavior? This tension between equality and difference has divided feminists in a variety of contexts. It is central to the debates over "women's culture" in feminist historical scholarship, for example.[1] Scholars analyzing women's experience, of course, can hedge on the issue, aiming for a balanced perspective that incorporates the insights of both positions. But in more immediately political contexts, this luxury is seldom available. The issue has deeply split feminist activists working on pregnancy disability policy, with some advocating "special treatment" for pregnant women, and others insisting on "equal treatment" (that is, that pregnancy-related disabilities must be treated exactly like any other disability).[2]

Now the scholarly and political dimensions of the question have been joined together in a sex discrimination case brought by the Equal Employment Opportunities Commission (EEOC) against Sears, Roebuck and Co. The case was tried in 1984 and 1985 in U.S. District Court in Chicago, and in early 1986 Judge John A. Nordberg decided in favor of Sears. The EEOC is appealing the case, however.

Women's history and the issue of difference figured prominently in Sears's trial defense, based primarily on the claim that the underrepresentation of women in high-paying commission sales jobs was not due to discrimination, as the EEOC charged, but to women's own job preferences. Two well-known feminist historians, Rosalind Rosenberg and Alice Kessler-Harris, testified as expert witnesses in the case, presenting conflicting historical inter-

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pretations of women's relationship to work and the relative importance of workers' and employers' roles in shaping patterns of employment by sex.

Rosenberg, testifying for Sears, argued that the EEOC's case incorrectly assumed that women and men were alike in their values and job preferences and thus did not prove Sears had engaged in sex discrimination. "Men and women differ in their expectations concerning work, in their interests as to the types of jobs they prefer or the types of products they prefer to sell," Rosenberg's "Offer of Proof" stated. "It is naive to believe that the natural effect of these differences is evidence of discrimination by Sears."[3] This testimony was an important component of Sears's argument that the firm had not denied women opportunities for better-paid commission sales jobs, as the EEOC alleged, but that women simply "were less likely to prefer or have relevant experience in commission sales positions."[4]

Faced with Sears's invocation of the historical record, the EEOC presented its own expert witness, Alice Kessler-Harris, who argued that Rosenberg's testimony neglected the central issue of employers' willingness to hire on a nondiscriminatory, sex-blind basis. "What appear to be women's choices, and what are characterized as women's 'interests' are, in fact, heavily influenced by the opportunities for work made available to them," Kessler-Harris testified. "Where opportunity has existed, women have never failed to take the jobs offered. . . . Failure to find women in so-called non-traditional jobs can thus only be interpreted as a consequence of employers' unexamined attitudes or preferences, which phenomenon is the essence of discrimination."[5] This testimony bolstered the EEOC's claim that Sears had denied women opportunities to work in commission sales.

Historians, even feminist historians, frequently disagree with one another. But it is difficult to imagine a forum less tolerant of the nuanced, careful arguments in which historians delight than a courtroom. And rarely are the stakes so high in a scholarly debate. Sears is the world's largest retailer and the nation's largest private sector employer of women.[6] Sales work is highly sex segregated, and no other major occupational group has a larger gender gap in pay.[7] The EEOC's case against Sears, had it been successful, could have made a real difference in the position of women salesworkers. Although the historical testimony of

Rosenberg and Kessler-Harris was only one component of the lengthy and complex trial, which lasted ten months and generated over 19,000 pages of transcripts, the case itself is very important. Not only does it offer valuable lessons about the uses of history in the courts, but it is also the last major antidiscrimination case brought by the government against a large corporation.

The Sears trial took place against the background of the Reagan administration's reduced enforcement of antidiscrimination legislation and escalating political attacks on the concept of affirmative action.[8] The lawsuit against Sears was originally filed in 1979, and in the current political climate, it seems unlikely that any new cases of comparable scope will be initiated by the EEOC.[9] And Clarence Thomas, the current EEOC chair, has publicly questioned the validity of the Sears suit, particularly its reliance on statistical evidence to demonstrate discrimination.[10] According to the *Washington Post*, Thomas and other Reagan administration officials "privately make little secret of their desire to lose the [Sears] case, and lose it in a way that would explode any chance for future EEOC officials to bring class-action suits on the basis of statistics."[11]

The case dates back to 1973, when an EEOC Commissioner's Charge against Sears was filed, alleging discrimination by race, sex, and national origin, in violation of Title VII of the Civil Rights Act of 1964. Over the next few years, the EEOC sought to resolve the charges through discussions with Sears, but no agreement was reached. In early 1977, the EEOC issued a Commission Decision that there was "reasonable cause" to believe Sears had discriminated against women and minorities in violation of Title VII. There followed renewed efforts to reach an out-of-court settlement, but in January 1979, the EEOC determined that conciliation efforts had failed, and the agency filed suit against Sears that October.[12]

The response of Sears to the EEOC's charges of discrimination was very different from that of other giant corporations in the 1970s. Unlike General Electric, General Motors, and others faced with similar EEOC charges, Sears chose not to follow the lead of AT&T and the steel industry, both of which signed consent decrees in the early 1970s, providing millions of dollars in back pay to women and minorities and establishing elaborate affir-

mative action plans.[13] Sears did institute an affirmative action plan in 1974, the year after the original Commissioner's Charge was filed, requiring that in jobs where women and/or minorities were underutilized, one out of every two people hired be either female or a member of a minority group. However, the EEOC ultimately argued that in the period from 1973 to 1980, Sears continued to discriminate against women in hiring for commission sales jobs.[14]

On 26 January 1979, the day the EEOC notified Sears of its "failure to conciliate" but before the government had filed suit against the company, Sears went on the offensive with a lawsuit of its own—a class action directed against the EEOC and nine other government agencies. The suit charged that "the myriad Federal anti-discrimination statutes and regulations" conflicted with one another and were impossible to comply with, and that government policies themselves had created "an unbalanced workforce dominated by white males." Through the GI Bill and other pro-veteran measures, Sears argued, government policy had "deprived" employers of "a pool of qualified minority and female applicants"; yet now the government was accusing them of race and sex discrimination. "Society has been unable to resolve the dilemma between protecting the traditional husband-wife family unit and encouraging the independence of women apart from the family," Sears complained, and it asked the court to require the federal government to issue uniform guidelines.[15]

Sears's suit was thrown out of court a few months after it was filed. In the interim, however, it attracted a great deal of public attention. This was partly because of the suit's unprecedented line of argument. In addition, however, Sears was represented by Charles Morgan, a former civil rights lawyer and the former director of the Washington office of the American Civil Liberties Union (ACLU). Morgan left the ACLU in 1976 and went into private practice the following year. Sears was his first big client.[16] When asked by the *New York Times* about his views of discrimination and the law in 1979, when he filed Sears's suit against the government, Morgan said:

> I've always been against the Government. Where I come from [Birmingham, Alabama], Bull Connor was the government. What you've got to do is to make the Government use the law for the purposes for which it was intended. When you've got laws protecting women, minorities, the aged, the handicapped, including drug addicts and alcoholics and every kind of veteran, a company doesn't know what it should do because the Government is telling it too many confusing things. . . .
>
> The Government has to get its priorities straight. There's just no equation between minorities and women.

At that point the *Times* asked him what his priorities would be, and Morgan replied, "Look, I know who the 13th, 14th, and 15th Amendments were intended for and that's still the priority."[17]

Actually, the EEOC's charges against Sears included race as well as sex discrimination. In October 1979, five months after Sears's preemptive suit was dismissed, the EEOC filed five suits against Sears—a nationwide suit alleging sex discrimination and four separate suits alleging sex discrimination in hiring against blacks and Hispanics in specific Sears facilities.[18] Morgan represented Sears in all five cases.

Several reports appeared in the press in August 1979 (two months before the suits were filed) that EEOC staff lawyers were questioning whether the government could win its case against Sears in court. These reports cited "a series of confidential memos" from the office of Issie L. Jenkins, the EEOC's acting general counsel, suggesting a change in the Sears litigation strategy.[19] Instead of a single case against Sears, Jenkins's office recommended filing several separate suits: one nationwide sex discrimination suit alleging bias in recruitment, hiring, promotion, pay, and other areas; a separate nationwide race discrimination suit alleging discriminatory failure to promote minorities; as well as local race bias suits alleging discrimination in hiring and layoffs at specific stores. The memos also suggested that the national sex discrimination case was the strongest of the group.[20]

Because EEOC representatives are not permitted to comment on the leaked material, whether or how the agency's final litigation strategy was influenced by this advice is impossible to determine.[21] But the suits filed in October 1979 did separate the sex and race cases, a strategy generally consistent with what Jenkins's office had reportedly suggested.[22] A settlement was eventually reached in the race cases, while the nationwide sex discrimination case gradually wended its way through the court system until it finally went to trial in 1984.[23]

The sex discrimination case involved three basic charges. The EEOC accused Sears of failing to hire female job applicants for commission sales positions on the same basis as male applicants,

failing to promote female noncommission salespersons to commission sales positions on the same basis as males, and paying women in certain management-level job categories less than similarly situated men.[24] The historical testimony of Rosenberg and Kessler-Harris concerned only the commission sales issues, and so the charge of sex discrimination in pay for management employees will not be explored in detail here.

The EEOC suit charged Sears with systematic discrimination against women; originally there were thirty-five individual charges of sex discrimination attached to it. But because most of these were not specifically relevant to the charges of hiring and promotion discrimination in commission sales or to the pay discrimination charge involving managers, the EEOC decided not to try the individual cases as part of its suit. One reason for this decision was that each individual case required detailed attention in its own right, which it would not get in this setting. Some of these cases are being pursued separately by the individuals involved.[25]

The 1986 decision in the case emphasized the EEOC's failure to present any individual victims of discrimination as witnesses.[26] The EEOC, however, pointed out that testimony from a few individuals who believed they were victims of discrimination could do little to substantiate the charge of hiring discrimination because of the vast numbers of job applications Sears received and because in most cases an applicant who is not hired has no way of knowing the reason why.[27] The absence of testimony from individual victims may have also reflected the EEOC's limited resources, which were enormously taxed by the Sears case as it was. The agency reportedly spent about $2.5 million on the protracted case, while Sears spent an estimated $20 million in legal fees.[28] In any event, the EEOC's case against Sears concentrated on statistical evidence of discrimination.

The EEOC presented extensive evidence of disparities between the female proportion of commission sales hires and the female proportion of sales applicants.[29] Between 1973 and 1980, nationwide, women made up 61 percent of full-time and 66 percent of part-time sales applicants at Sears. But women were only 27 percent of full-time commission sales hires in this period and only 35 percent of part-time commission sales hires—except in Sears's Midwestern "territory," where women made up 52 percent of part-time commission sales hires in the 1973-80 period. Commission

salespersons consistently earned more than noncommission salespersons and generally sold more expensive items, such as furniture, appliances, televisions, and home improvement materials. Between 1973 and 1980, *first-year* commission salespersons had median earnings about twice those of *all* noncommission salespersons.[30]

The EEOC conducted elaborate statistical analyses to determine whether "differences between male and female applicants in characteristics that might be associated with success" could explain the disparities between the proportion of women among sales applicants and the proportion hired in commission positions. The factors controlled for in the statistical analyses were job applied for, age, education, job type experience, product line experience, and commission product sales experience.[31] This did reduce the disparities between expected and actual commission sales hires, but substantial and statistically significant disparities remained.[32] The EEOC also presented detailed statistical evidence regarding promotions, documenting statistically significant disparities between the expected and actual proportions of women among employees promoted from noncommission to commission sales positions in the 1973-80 period, for both part- and full-time workers.[33]

In support of its case that the statistical disparities were due to discrimination, the EEOC presented qualitative evidence of bias in Sears's hiring procedures along with the statistical data. In one of the EEOC memos leaked to the press in 1979, Acting General Counsel Issie L. Jenkins reportedly wrote that "in proving our case we intend to emphasize Sears's policy of allowing employment decisions to be dictated by the unguided subjective judgement of an essentially Anglo male supervisory workforce as the primary culpable aspect of the system."[34] In the trial itself five years later, the EEOC sought to do precisely this in presenting evidence about Sears's hiring procedures.

In describing Sears's hiring process, the EEOC noted that anyone who appeared at a Sears personnel office indicating an interest in employment was given an application to fill out and was interviewed. Later, the applicant might be interviewed a second time, depending on the first interviewer's impressions and on whether there were vacancies to be filled. Hiring decisions were ultimately made by the store manager or personnel manager. The only docu-

ment in general circulation at Sears that offered managers guidance as to what sort of person to hire for a commission sales position was the "Retail Testing Manual," originally issued by Sears in 1953. The manual's profile of the commission salesperson (here called the "Big Ticket Salesman") was unmistakably masculine.

> Personality, supported by adequate mental ability, is important in Big Ticket Selling. This is illustrated by the fact that the Big Ticket Salesman is active and has a lot of drive. The high level of activity is backed by considerable physical vigor. He has a liking for tools, likes work which requires physical energy, and carries much of this energy and drive over into his selling activities. This information resulted from studying the Active and Vigor Scores for many Big Ticket Salemen. These men also enjoy changing tasks frequently, and dislike work which requires them to remain at one task or activity for prolonged periods of time. They do not take chances unnecessarily but may, as their impulsive scores indicate, act somewhat impulsively.

Although the explicitly masculine pronouns were eliminated in the editions of the manual written from 1966 on, this description of commission sales jobs otherwise remained unchanged.[35]

The Active and Vigor Scores referred to here are from the Thurstone Temperament Schedule, a test that Sears policy required each applicant for a sales position to take before she or he could be hired. The test measured seven dimensions of temperament. On six of them, there were few differences between female and male scores, but on the seventh, the Vigor scale, there were dramatic differences. The reason is evident from the twenty questions comprising the Vigor scale, which included the following: "Do you have a low-pitched voice?" "Do you swear often?" "Have you ever done any hunting?" "Have you participated in wrestling?" "Have you participated in boxing?" "Have you played on a football team?" The EEOC presented evidence that Sears believed that "a woman who scored 9 on the Vigor scale would have the same behavior as a man who scored 14." But while the company's 1973 "Retail Testing Manual" set out different recommended Vigor scores for selecting women and men for many other jobs, it used the same standard for both sexes in its recommended scores for commission sales positions. According to the manual, a man scoring 14 would be considered to have a "best score," while a woman scoring 9 would be viewed as a poor risk—even though Sears believed their behavior would be the same.[36]

The manual and test materials bolstered the EEOC's case, but

the argument that Sears had discriminated against women in commission sales jobs relied primarily on establishing the existence of (1) statistical disparities between the female proportion of hires and promotions and the female proportion of the relevant pools of available workers and (2) highly subjective employment processes. On both counts, the EEOC cited Title VII case law in support of its position.[37]

Sears did not dispute the EEOC's presentation of information about the hiring process itself, although it did contend that "tests were a minor consideration in commission sales selection."[38] The company also argued that the EEOC had to show that there was *intentional* discrimination against women ("disparate treatment") behind the statistical disparities.[39] Sears's "voluntarily-assumed affirmative action efforts" were cited as evidence of "the lack of an intention to discriminate." Management, Sears claimed, had made "stringent affirmative action efforts to recruit and encourage women to take commission sales jobs."[40] Sears also criticized the EEOC for not introducing testimony from victims of discrimination.[41] Lawyer Charles Morgan went so far as to suggest that "there was no victim here [in this trial] except one, and that one victim is Sears, Roebuck and Company."[42]

The bulk of Sears's defense, however, was devoted to challenging the validity of the EEOC's statistical analysis. The company argued that the EEOC's comparison of the representation of women among nonhired job applicants and among persons actually hired into commission sales jobs was improper—it was "comparing apples to oranges."[43] The proper comparison to make, Sears contended, was between the proportion of women among all sales applicants and among all (commission and noncommission) sales hires or between the female proportion of applicants who specifically indicated a preference for commission sales and the female proportion of commission sales hires.[44] (However, Sears did not ask its job applicants if they specifically preferred commission sales positions.)

Sears's critique of the EEOC's statistical analysis primarily concerned the "assumption" that "male and female applicants were equally qualified for and interested in commission sales positions."[45] On the contrary, Sears argued, there were fundamental differences between women's and men's qualifications and preferences, and women were generally less suited to selling on

commission. Commission salespeople, for one thing, must be willing to take risks.[46] And commission selling is highly skilled, specialized work, Sears contended.

> The commission salesperson must be able to determine customers' needs and match those needs with the product, trading up to better merchandise when possible. This requires intimate familiarity with, and ability to operate and demonstrate, several models in a product line, and frequently several product lines. . . .
>
> The commission salesperson must be able to face and meet objections, and must be willing to risk rejection and failure by attempting to "close" the sale—asking for the order at the earliest possible time and repeatedly until the sale is closed. . . .
>
> Although virtually all noncommission sales jobs can be filled by a sociable person with a pleasant, helpful personality and a reasonable ability to communicate and learn about relatively simple lines of merchandise, the combination of technical skills and specific personal characteristics found in effective commission salespersons distinguishes the latter as an elite among retail salespeople. . . .
>
> One of the most important personal qualities a commission salesperson must possess may be variously described as aggressiveness, desire, "hunger," or more generally, motivation.[47]

Sears argued that the EEOC's "assumption" that women and men in the applicant pool had similar qualifications and preferences for this work was "incredible on its face." Actually, the EEOC's statistical analysis controlled for certain factors which might legitimately influence the distribution of jobs between men and women—such as age, experience, and education. But Sears claimed that even with these "adjustments," the EEOC had "grossly overestimated female availability for commission sales." In the end, Sears argued, "the reasonableness of the EEOC's a priori assumptions of male/female sameness with respect to preferences, interests, and qualifications is. . .the crux of the issue."[48]

Sears presented a series of witnesses from its own personnel operations who testified that "far more men than women. . .were interested in and willing to accept commission sales jobs." Some Sears managers even testified "that they had interviewed every woman in the store and found not one who was willing to sell big ticket merchandise." Women were generally not interested in commission sales jobs, Sears sought to persuade the court, because of their

> (1) fear or dislike of the competitive, "dog-eat-dog" atmosphere of most commission sales divisions; (2) discomfort or unfamiliarity with most product lines sold on commission. . .; (3) fear of being unable to compete, being unsuccessful and losing their jobs; (4) fear of nonacceptance by customers in such traditionally male-oriented divisions as hardware, automotive, installed home improvements, and tires; (5) distaste for the type of selling they believed was required in commission divisions; (6) preference for noncommission sales jobs; (7) preference for "keeping busy" and dislike of the relatively slower customer traffic in most commission divisions; (8) the overall belief that the increased earnings potential of commission selling was not worth the additional responsibilities, problems, pressure, and uncertainty.[49]

According to Sears, then, the underrepresentation of women among commission salespersons was due not to discrimination but to women's own preferences. In his summation, lawyer Charles Morgan ridiculed the very idea of sex discrimination. "Strange, isn't it," the former civil rights advocate suggested, "that we live in a world where there is supposed to be a monopsony of white men who somehow get up every morning trying to find a way to discriminate against their wives, their daughters, their mothers, their sisters."[50]

To buttress its claim that most women are not interested in commission sales jobs, Sears introduced historical evidence into the case through the testimony of Rosalind Rosenberg. Sears asked other experts in women's history to testify in its behalf, but Rosenberg was the only one who accepted the invitation. Both Kathryn Kish Sklar and Carl Degler declined, and later both criticized Sears's use of historical evidence in the trial.[51] Rosenberg says she accepted the job because she thought that the EEOC's case against Sears was weak and the assumptions of the statisticians were untenable. In addition, she has acknowledged that the fact that her ex-husband works for Morgan Associates, the law firm which represented Sears, may have played a role.[52]

Rosenberg's testimony marshaled evidence from the literature in U.S. women's history to challenge the "assumption that women and men have identical interests and aspirations regarding work." Citing the work of dozens of prominent scholars in the field (including Degler, Sklar, and Kessler-Harris herself), Rosenberg sought to persuade the court that "many workers, especially women, have goals and values other than realizing maximum economic gain."[53] Her sketch of the history of the sexual division of labor in the United States assigned great weight to women's distinctive values and interests. "Throughout American history," Rosenberg's "Offer of Proof" stated, "there has been a consensus,

Wallace's book containing the quotation Rosenberg had cited:

> Both the federal government and the company *may have underestimated the effect of powerful social constraints* on changing the characteristics of a fairly rigid internal labor market. A congressional report noted in September 1974 that the AT&T settlement had been difficult and expensive to monitor. The company may perceive its primary objective as providing telephone service, securing a fair return on its investment, protecting its markets from firms selling competitive equipment, and adjusting to lower levels of economic activity. John W. Kingsbury, AT&T Assistant Vice President, has noted that "our managers—and millions of others like them in business after business across the country—did not yet understand the need for some of the specific features required in new, formalized procedures which are necessary in order to speed the upward movement of women and minority group members. The threat of increased competition from individuals they perceive to be less qualified than themselves is part of the reason for this managerial reluctance. Basic prejudice may be another reason. And some managers may feel they are losing some of their hard-earned management prerogatives. However, the main cause, I submit, is simply a resistance to change. Line managers at all levels of most organizations really don't understand the significance of new equal opportunity regulations, labor laws, OSHA [Occupational Safety and Health Administration], or a host of other external impingements on their primary responsibilities. And further, they tend not to view these external forces as their problem but as a personnel or legal matter."

"Now having read that, don't you agree, Dr. Rosenberg," Baker asked, "that the social constraints that Phyllis Wallace was talking about were those of management and its views of what it did and not the social constraints limiting the availability of women who are interested in these positions?" Ultimately Rosenberg conceded that this was the case and requested that the Wallace quotation in her rebuttal be stricken from the record.[72]

On 22 June 1985, with Rosenberg's final testimony and cross-examination, the part of the trial involving historical evidence came to an end. The protracted trial itself ended the following week. Seven months later, the District Court in Chicago issued its decision in favor of Sears.[73] Shortly afterwards, Sears filed a suit against the EEOC—and against the individual EEOC attorneys who handled the case—to recover its legal costs.[74]

Judge John A. Nordberg seemed to give the historical testimony considerable weight in justifying his acceptance of Sears's argument that women were uninterested in commission sales jobs and in rejecting the EEOC's statistical evidence of discrimination. Nordberg, a Reagan appointee who became a federal judge in

1982, characterized Rosenberg as a "well-informed witness who offered reasonable, well-supported opinions" and "a highly credible witness." In contrast, his decision stated that Kessler-Harris's testimony "often focused on small segments of women, rather than the majority of women, in giving isolated examples of women who have seized opportunities for greater income in nontraditional jobs when they have arisen," and that it was "not supported by credible evidence." Nordberg contrasted Kessler-Harris's testimony to the "more convincing testimony. . .offered by Sears expert Dr. Rosalind Rosenberg." And in the very next paragraph, he concluded that the "EEOC's assumption of equal interest is unfounded and fatally undermines its entire statistical analysis."[75]

Ever since the trial itself ended, Rosenberg's role in the case has been widely discussed and has provoked much criticism in the scholarly community, especially among feminists. Few have agreed with Judge Nordberg's view that she was a more credible and convincing witness than Kessler-Harris. But most of the concern has focused on the political import of Rosenberg's testimony. Historian Ellen DuBois, for example, commented that

> the EEOC lawsuit is part of a political battle that has been altering the cultural configuration Rosenberg says she laments. She argues that history shows the situation is "too complicated" for an affirmative action program to remedy. This argument is the essence of conservatism and must be read as an attack on working women and sexual equality, an attack on the whole concept of affirmative action.[76]

In December 1985, the controversy was aired at a session of the Women and Society Seminar at Columbia University. Before an audience of at least 150 feminist scholars, Kessler-Harris and Rosenberg presented their views of the case and their respective roles in it. In the discussion that ensued, Rosenberg was criticized repeatedly, and although some comments were neutral, no one voiced support for her position.[77] One participant even proposed that the group issue a formal statement condemning Rosenberg's role in the case. Although no such action was taken at the seminar, later in the month, at the American Historical Association's Annual Meeting in New York, a resolution was passed by the Coordinating Committee of Women in the Historical Profession (CCWHP) which read in part:

> We. . .are deeply concerned by certain circumstances and issues raised in the 1984-85 trial of a 1979 EEOC case against Sears Roebuck. In this trial. . .a respected scholar buttressed Sears's defense against charges of sex discrimina-

tion. . . . We urge attention to the following questions:

(1) What responsibility do feminist scholars bear to the women's movement?

(2) Would it be appropriate to seek to define a set of ethical principles for feminist scholarship and its use, similar to those accepted by other professional organizations?

(3) What is the relationship of the ideology of domesticity to women's position in the work force? . . .

We believe as feminist scholars we have a responsibility not to allow our scholarship to be used against the interests of women struggling for equity in our society.[78]

The resolution did not name Rosenberg directly, but it clearly expressed the concern of other feminist scholars about her role in the Sears case.

Rosenberg, however, has steadfastly defended her actions, writing letters to various publications which have covered the controversy as well as an Op-Ed piece in the *New York Times*.[79] She told the Women and Society Seminar:

I realize that many people disagree with my view of scholarly responsibility and believe that I showed poor political judgment in deciding to testify, that I played into the hands of conservatives, and that my testimony, if successful, will leave large companies free to discriminate against women. I reject the view that scholarship should be subordinated to political goals. But even if I were to accept that view, I would still feel justified in having testified in this case, because I think that Sears has advanced women's interests, whereas the position taken by the EEOC *in this case* has *not*.[80]

Sears had advanced women's interests, Rosenberg believes, through its affirmative action plan which, starting in 1974, required that 50 percent of commission sales jobs go either to women or to minority males. "I believe the evidence shows not only that Sears was not discriminating against women but that it was successfully recruiting women into nontraditional jobs through a vigorous affirmative action program," she wrote.[81] Rosenberg was also influenced by the fact that the EEOC's case did not include direct testimony from women who were victims of Sears's discrimination. "I said in the beginning, 'If there's ever a complainant in this case, I'm not going to testify,'" Rosenberg recalled in an interview, "which strikes me in retrospect as a little bit crazy. . . . [But] for me, symbolically, the absence of complainants was critical."[82]

Another factor that induced Rosenberg to testify was that she genuinely believed that the EEOC's case was based on a faulty assumption, namely, "that men and women applying for sales positions at Sears were equally interested in commission sales."[83] She was not asked to testify as to Sears's "guilt or innocence," she insists. "I was simply asked to determine, from a historical point of view, whether the assumption on which the EEOC had built its case made sense."[84] This was part of Sears's broader effort to criticize the EEOC's statistical analysis. "What I conceived of myself as doing was challenging the assumptions of the statisticians," Rosenberg said. "Though I couldn't have done it if I didn't think that the evidence against Sears was very weak and unpersuasive."[85]

That Charles Morgan's law firm was representing Sears also entered into her decision to testify, Rosenberg said. Not only did her ex-husband work for Morgan as a researcher, but also she "had known of Chuck Morgan going back twenty years, and had always respected him as an honest person." Finally, there was a moral aspect to her decision to testify. "Part of it too was my sense that people were reluctant to [testify for Sears] because they feared criticism," she said. "In the end I felt that if I said no it would be because I didn't have the nerve to say what I thought was right, or do what I thought was right. It was that Calvinistic burden I've carried from my childhood."[86]

Kessler-Harris also had to decide whether to testify. The EEOC asked her to do so, as a rebuttal witness, after the trial was already under way.[87] Told that Rosenberg, testifying on Sears's behalf, had cited her writings, Kessler-Harris later wrote, "I reacted viscerally to seeing my own work, badly distorted, put to the service of a politically destructive cause. I believed that the success of Sears's lawyers would undermine two decades of affirmative action efforts and exercise a chilling effect on women's history."[88] She has strongly criticized Rosenberg's use of her work:

With others in the field, I participated in developing the notion that an economistic view of the labor market explained little about women's roles in it, and that a more complete picture could be obtained by examining the shaping role of ideology. . . . Rosenberg, apparently influenced by the political demands of the case, has distorted this interpretation into unrecognizability by arguing that the domestic ideology was itself responsible for the choices that women made. Her position negates the ways that employers are responsible for the structure of the labor market not least because they share in, and take advantage of, prevailing ideology.[89]

Ironically, Rosenberg, does not see herself as an advocate of the concept of "women's culture" as it has developed in the literature

on women's history. "I was and I continue to be skeptical of the utility of conceiving of men and women living in separate cultural worlds," she said recently, and added that she thinks it is "wrongheaded" to view the Sears case through the prism of the broader controversy over questions of equality and difference.[90] Kessler-Harris, on the other hand, has been much more sympathetic to the notion of "women's culture," and in fact has recently been exploring the ways in which difference influences the struggles of women in the workforce.[91] However, in her view, "the real issue in the Sears case was not whether women and men are different, but rather, whether the preferences of employers or those of women themselves best explain the underrepresentation of women in specific jobs."[92]

Both Kessler-Harris and Rosenberg testified under the peculiar constraints of the courtroom—constraints that demanded yes or no answers to complex questions and prohibited any expert witness from acknowledging disagreements or controversy within her field without losing her legitimacy as an expert. Under these conditions, Rosenberg argued from the perspective of difference, and Kessler-Harris stressed the importance of opportunity in shaping the positions of women and men in the workforce. The broader controversy their testimonies tap into is one that cannot be easily resolved. But if feminist scholars can learn anything from the Sears case, it is that we ignore the political dimensions of the equality-versus-difference debate at our peril, especially in a period of conservative resurgence like the present.

Important as the use of historical evidence was in this case, it seems likely that even without Rosenberg's testimony, Sears would have won. The odds were heavily stacked in the giant retailer's favor. The EEOC's top official, Clarence Thomas, had publicly proclaimed his negative view of statistical evidence and his desire to lose the case. Sears spent eight times as much money as did the EEOC on legal work.[93] The judge was appointed by the Reagan administration, which has repeatedly proclaimed its opposition to affirmative action. As long as this is the political context in which we find ourselves, feminist scholars must be aware of the real danger that arguments about "difference" or "women's culture" will be put to uses other than those for which they were originally developed. That does not mean we must abandon these arguments or the intellectual terrain they have opened up; it does

mean that we must be self-conscious in our formulations, keeping firmly in view the ways in which our work can be exploited politically.

NOTES

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1. See Ellen DuBois, Mari Jo Buhle, Temma Kaplan, Gerda Lerner, and Carroll Smith-Rosenberg, "Politics and Culture in Women's History: A Symposium," *Feminist Studies* 6 (Spring 1980): 26-64.
2. Compare, for example, Wendy Chavkin, "Walking a Tightrope: Pregnancy, Parenting, and Work," in *Double Exposure: Women's Health Hazards on the Job and at Home*, ed. Wendy Chavkin (New York: New Feminist Library of Monthly Review Press, 1984), 196-213; and Wendy W. Williams, "Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate," *New York University Review of Law and Social Change* 13 (1984-85): 325-80. This recent controversy is a particular instance of the more general and much older debate over protective legislation. For discussion, see Ann Corinne Hill, "Protection of Women Workers and the Courts: A Legal Case History," *Feminist Studies* 5 (Summer 1979): 247-73; Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* (New York: Oxford University Press, 1982), 180-214; and Patricia G. Zelman, *Women, Work, and National Policy: The Kennedy-Johnson Years* (Ann Arbor: UMI Research Press, 1982).
3. "Offer of Proof Concerning the Testimony of Dr. Rosalind Rosenberg," Defendant's Exhibit 3, Rosenberg version with notes, *EEOC v. Sears*, Civil Action No. 79-C-4373, U.S. District Court for the Northern District of Illinois, Eastern Division (hereafter cited as *EEOC v. Sears*), par. 24. Rosenberg told me that she did not write the "Offer of Proof" herself. "I wrote a series of memos and the lawyers extracted what they considered to be the most persuasive points that they wanted to see developed" (interview with Rosenberg, New York, N.Y., 24 January 1986). However, in her deposition and at the trial, Rosenberg stated that she agreed with all the statements in the Offer of Proof. See "Deposition of Rosalind Rosenberg" (2 July 1984), *EEOC v. Sears*, vol. 1, 10, and Trial Transcript, *EEOC v. Sears*, 10345 (11 March 1985). These documents from the trial, and the others cited below, are on deposit in the Schlesinger Library, Radcliffe College, Cambridge, Massachusetts. Rosenberg's "Offer of Proof" and Kessler-Harris's "Written Testimony" (cited in note 5) will appear in *Signs* 11 (Summer 1986).
4. "Trial Brief of Sears, Roebuck and Co." (September/October 1984), *EEOC v. Sears*, 27.
5. "Written Testimony of Alice Kessler-Harris" (June, 1985), *EEOC v. Sears*, pars. 2, 6, 13.
6. "U.S. Files Five Suits Charging Sears with Job Bias," *New York Times*, 23 Oct. 1979, A1, A21, notes that Sears is the world's largest retailer. Allan Sloan and John J. Donovan, "The Sears Case of Equal Job Opportunity," *New York Law Journal*, 22 Feb. 1979, mention that Sears was (in 1979) the second largest private employer of women, second only to AT&T. With the AT&T breakup, however, Sears has moved into first place.

7. Year-round, full-time women salesworkers' median earnings were only 51.2 percent of men salesworkers' earnings in 1981. See U.S. Department of Labor, Women's Bureau, *Time of Change: 1983 Handbook on Women Workers,* Bulletin no. 298 (Washington, D.C.: GPO), 93. For general discussion of women and sales work, see Louise Kapp Howe, *Pink Collar Workers: Inside the World of Women's Work* (New York: G.P. Putnam's Sons, 1977), 61-102; and Susan Porter Benson, "Women in Retail Sales Work: The Continuing Dilemma of Service," in *My Troubles Are Going to Have Trouble with Me: Everyday Trials and Triumphs of Women Workers,* ed. Karen Brodkin Sacks and Dorothy Remy (New Brunswick: Rutgers University Press, 1984), 113-23.
8. See Clarice Stasz, "Room at the Bottom," *Working Papers* 9 (January-February 1982): 28-41; "Damage Report: The Decline of Equal Employment Opportunity Enforcement under Reagan," *Women Employed Advocates Bulletin* 3 (December 1982): 1-5; and "U.S. Plans to Ease Rules for Hiring Women and Blacks," *New York Times,* 3 Apr. 1983, 1, 17.
9. However, litigation has by no means stopped completely. In November 1985, for example, the EEOC filed lawsuits charging three relatively small employers (the largest has 3,200 employees) with job discrimination. See "Agency Cites Statistical Evidence in Lawsuits on Job Discrimination," *New York Times,* 13 Nov. 1985, A22.
10. Clarence Thomas's criticisms of the use of statistical evidence closely parallel those used by Sears in its own defense (see below). "Every time there is a statistical disparity, it is presumed there is discrimination," Thomas told the *New York Times.* He added that such disparities could often be explained by other factors, such as culture, educational levels, "previous events," or commuting patterns. See "Changes Weighed in Federal Rules on Discrimination," *New York Times,* 3 Dec. 1984, A1, B10.
11. "Despite Doubts, U.S. Presses to Resolve Sears Bias Case," *Washington Post,* 9 July 1985, A1, A6.
12. "Plaintiff's Pretrial Brief – Commission Sales Issues" (revised 19 Nov. 1984), *EEOC v. Sears,* 2, 12. 17.
13. "Despite Doubts, U.S. Presses to Resolve Sears Bias Case," A1. For details on the AT&T and steel consent decrees, see Phyllis A. Wallace, ed., *Equal Employment Opportunity and the AT&T Case* (Cambridge: MIT Press, 1976); and Kay K. Deaux and Joseph C. Ullman, *Women of Steel: Female Blue-Collar Workers in the Basic Steel Industry* (New York: Praeger, 1983).
14. Sears's own account of its affirmative action efforts may be found in "Trial Brief of Sears, Roebuck and Co.," 36-39. Sears claims to have begun its affirmative action program in the late 1960s, but a plan that included women and had specific goals was not introduced until 1974. The EEOC's case is discussed in more detail below.
15. "Justice Dept. Seeks Dismissal of Sears Job-Rights Suit," *New York Times,* 28 Mar. 1979, A19; "Sears Suit Goes beyond Court," *New York Times,* 6 Apr. 1979, D12; Sloan and Donovan.
16. "Sears Loses Its Suit over Job-Bias Rules," *New York Times,* 16 May 1979, A1, D18; George Kannar, "Sears Shall Overcome," *The New Republic,* 10 Mar. 1979, 18-21; "Sears Suit Stumbles," *Esquire,* 24 Apr. 1979, 13-14.
17. Charles Morgan, quoted in "Sears Suit on U.S. Job-Bias Rules Puts Past Alliances to Strict Test," *New York Times,* 29 Jan. 1979.
18. "U.S. Files Five Suits Charging Sears With Job Bias," A1, A21.
19. Rosalind Rosenberg has cited this in her own defense, in response to criticism of her role in the case. "I think that it is the responsibility of the scholar to see that public policy is based on sound premises, even if doing so means criticizing the EEOC," she said. "Back in 1979 Issie Jenkins, the black woman general counsel to the EEOC, warned that the enforcement image of the agency would be badly damaged if it pressed a case against Sears that was fundamentally flawed. Unfortunately, the agency did not heed her advice." (Written text of Rosenberg's statement at the Columbia University Women and Society Seminar, 16 Dec. 1985, 8; hereafter referred to as the Rosenberg Seminar Statement. It is not easy to determine whether Jenkins's advice was in fact heeded, as the discussion in the text below explains.

20. The first such report, upon which all of the others are based, was David B. Parker's "EEOC Discovers Its Investigation of Sears Is So Flawed, It Should Settle and Not Sue," *Employment Relations Report,* 1 Aug. 1979. See also "EEOC Staff Recommends Dropping Suit against Sears," *Washington Post,* 2 Aug. 1979; "U.S. Doubts It Can Win Sears Case," *Washington Star,* 2 Aug. 1979; and "EEOC's Lawyers Question Plan to Sue Sears Over Job Bias," *Wall Street Journal,* 3 Aug. 1979, 22.
21. An EEOC representative told me this in a telephone conversation on 13 January 1986. I also learned in this conversation that the reports of the leaked EEOC memos were ruled "inadmissible" as evidence during the 1985 trial.
22. As noted above, ultimately the EEOC filed a nationwide sex discrimination suit against Sears and four separate race discrimination suits involving specific facilities but no nationwide race discrimination suit. See "U.S. Files Five Suits Charging Sears with Job Bias," A1, A21.
23. "Despite Doubts, U.S. Presses to Resolve Sears Bias Case," A6.
24. "Plaintiff's Pretrial Brief – Commission Sales Issues," 1-2.
25. EEOC sources told me this in a telephone conversation on 29 January 1986. I also learned that the 1977 Commission Decision also had consolidated numerous individual charges of sex and race discrimination received by the EEOC.
26. See Judge John A. Nordberg, "Memorandum Opinion and Order" (31 Jan. 1986), *EEOC v. Sears,* 102.
27. Closing Arguments, Trial Transcript, 18983-85, 28 June 1985..
28. "Despite Doubts, U.S. Presses to Resolve Sears Bias Case," A6. At press time, Sears had revealed only its "costs" in the case – not including attorneys' fees – which it is seeking to recover from the EEOC by court action. "Bill of Costs for Sears, Roebuck and Co." (3 March 1986), *EEOC v. Sears.*
29. Applicants for commission and noncommission sales positions at Sears went through the same application process, and few specifically indicated an interest in commission sales positions in the 1973-80 period. See "Plaintiff's Pretrial Brief – Commission Sales Issues," 4, 28-30.
30. Ibid., 4, 39-41, 2-3, 27.
31. Ibid., 5, 48.
32. Two types of statistical analysis were performed: a logit analysis and a multivariate cross-classification analysis. The logit analysis of the six characteristics noted in the text reduced the expected female proportion of hires for full-time commission sales positions from 61 to 49 percent; the multivariate cross-classification analysis reduced it from 61 to 37 percent. The actual female proportion of hires was 27 percent, as noted above. See "Plaintiff's Final Argument" (26 June 1985), *EEOC v. Sears,* 6-9. Similar results were obtained for part-time commission sales hires, discussed in "Plaintiff's Final Argument," 10-12. Detailed multivariate cross-classification analyses were also conducted for each of fourteen product lines, revealing disparities adverse to women in all but a few cases. For details, see "Plaintiff's Pretrial Brief – Commission Sales Issues," 53-55, 60-65. In addition, the EEOC analyzed "Sears Applicant Interview Guides" from 1978-80 for one region. The guides were forms that allowed job applicants to rate their own skills, interests, and experiences in various activities related to positions at Sears.

Although analysis of the guides did show differences between women and men, the expected female proportion of full-time commission sales hires in four key product lines (major appliances, auto parts, home improvements, and hardware) was equal to or higher than the expected proportions yielded by the multivariate cross-classification analysis. See "Plaintiff's Final Argument," 12-14.

33. See "Plaintiff's Pretrial Brief—Commission Sales Issues," 42-48. Using two different methods, the analysis found disparities on a nationwide basis and in each territory and in each year (1973-80), except for the Eastern territory in 1980.
34. Parker.
35. "Plaintiff's Pretrial Brief—Commission Sales Issues," 7-9, 28-32, 36. The passage cited is on 32.
36. Ibid., 9-12, 33-37. The test questions appear on 34.
37. Ibid., 72-73.
38. See "Post-Trial Brief of Sears, Roebuck and Co." (26 June 1985), *EEOC v. Sears*, 10, n. 1.
39. "Trial Brief of Sears, Roebuck and Co.," 1-4; "Post-Trial Brief of Sears, Roebuck and Co.," 33-36. The EEOC contended that the outcome of the case would be the same whether it was treated as a "disparate treatment" case or as a "disparate impact" case, where intent to discriminate need not be demonstrated. See "Plaintiff's Pretrial Brief—Commission Sales Issues," 73; and "Plaintiff's Final Argument," 1-4.
40. "Trial Brief of Sears, Roebuck and Co.," 37, 39; "Post-Trial Brief of Sears, Roebuck and Co.," 7-10, 15-16.
41. "Trial Brief of Sears, Roebuck and Co.," 30-33; "Post-Trial Brief of Sears, Roebuck and Co.," 39-40.
42. Closing Arguments, Trial Transcript, 19059 (28 June 1985).
43. "Trial Brief of Sears, Roebuck and Co.," 9, 25-26. Sears also criticized the EEOC's definition of "sales applicants" as all nonhired job applicants who did not specifically indicate a preference for a nonsales post on their application forms, and it also criticized the EEOC's assumption that the female percentage of these "sales applicants" was the female percentage of "persons interested, qualified and available for commission sales positions" (ibid., 17). See also "Post-Trial Brief of Sears, Roebuck and Co.," 24-33.
44. "Trial Brief of Sears, Roebuck and Co.," 26. Sears also suggested (p. 8) another appropriate comparison would be between noncommission sales hires and commission sales hires—groups it insisted had very different characteristics.
45. Ibid., 18; "Post-Trial Brief of Sears, Roebuck and Co.," 21-24.
46. Sears asserted that "commission salespeople stand apart from the general run of retail sales personnel in that commission salespeople risk all or part of their income upon their ability to sell merchandise—usually more expensive, "big ticket" merchandise. . . ." See "Trial Brief of Sears, Roebuck and Co.," 10. However, even before 1977, when most commission salespersons were paid on a draw-versus-commission basis, these employees were guaranteed a minimum income each week, regardless of commissions. And beginning in January 1977, Sears's commission salespersons were paid on a salary plus commission basis. See "Plaintiff's Pretrial Brief—Commission Sales Issues," 26.
47. "Trial Brief of Sears, Roebuck and Co.," 10-13.
48. Ibid., 18, 20, 21. As mentioned above, the EEOC controlled for six factors: job applied for, age, education, job type experience, product line experience, and commission product sales experience.
49. "Post-Trial Brief of Sears, Roebuck and Co.," 9, 11-12.
50. Closing Arguments, Trial Transcript, 19064.

51. See Jon Wiener, "The Sears Case: Women's History on Trial," *The Nation* 241 (7 Sept. 1985): 161, 176-80. Degler, however, recently stated that he now regrets his decision not to testify, saying he was "too lazy and too cowardly to take the time to understand the methodological question." See Karen J. Winkler, "Two Scholars' Conflict in Sears' Sex-Bias Sets Off War in Women's History," *The Chronicle of Higher Education* 31 (5 Feb. 1986): 1, 8.
52. Interview with Rosenberg.
53. "Offer of Proof," pars. 1 and 2. Kessler-Harris and Degler are cited in the first footnote of the "Offer of Proof." Sklar is not cited there but in the "Deposition of Rosalind Rosenberg," (3 July 1984), vol. 2, 56-57. All three have objected to the use of their writings in this context, as has William Chafe. See Wiener.
54. "Offer of Proof," pars. 4, 8-11.
55. Ibid., par. 19.
56. Trial Transcript, 10357-58 (11 Mar. 1985).
57. "Deposition of Rosalind Rosenberg," (3 July 1984), vol. 2, 98.
58. Rosenberg's deposition took place in July 1984; she testified at trial almost a year later, in March 1985. The EEOC contacted Kessler-Harris in September 1984, the month the trial began. In April 1985, Kessler-Harris was deposed, and she testified during the last month of the trial, in June 1985. Rosenberg then testified again, in rebuttal of Kessler-Harris, later in June 1985.
59. "Written Testimony of Alice Kessler-Harris," passim. Emphasis added. The quotes are from pars. 2, 13, and 11, respectively.
60. "Deposition of Alice Kessler-Harris," (12 Apr. 1985), *EEOC v. Sears*, 241.
61. Trial Transcript, 16616 (7 June 1985).
62. "Deposition of Alice Kessler-Harris," passim.
63. Trial Transcript, 16498 (6 June 1985).
64. "Written Rebuttal Testimony of Dr. Rosalind Rosenberg," June 1985, *EEOC v. Sears*, par. 1. Although Rosenberg, as noted above, had not written the earlier "Offer of Proof" herself, when asked if she had written the rebuttal testimony she told the court "there's some editing but yes, I did." Trial Transcript, 18216 (22 June 1985).
65. "Written Rebuttal Testimony of Dr. Rosalind Rosenberg," pars. 16a, 3, quoting Kessler-Harris, *Out to Work*, 259.
66. "Written Rebuttal Testimony of Dr. Rosalind Rosenberg," par. 4.
67. Ibid., par. 10, emphasis added. The citation is to Kessler-Harris, "American Women and the American Character: A Feminist Perspective," in *American Character and Culture*, ed. John Hague (Greenwood Press, 1979), 228. In a similar vein, in a footnote to this paragraph (10) of her rebuttal, Rosenberg also characterizes Kessler-Harris as "herself an adherent of the dual labor market theory," and in the text she critically quotes Kessler-Harris's characterization of employers and government officials as "villains."
68. "Written Rebuttal Testimony of Dr. Rosalind Rosenberg," pars. 16, 11, 16.
69. Ibid., appendix, 1. The quote is from Kessler-Harris, *Out to Work*, 128.
70. Trial Transcript, 18278-79 (22 June 1985).
71. "Written Rebuttal Testimony of Dr. Rosalind Rosenberg," par. 9. The Kessler-Harris statement cited here is from "Written Testimony of Alice Kessler-Harris," par. 5e. The Wallace quotation is from Wallace, 341-42.
72. Trial Transcript, 18268-70, 18285 (22 June 1985). The italicized portion of the quotation from Wallace is the part Rosenberg had cited.
73. "Federal Judge Rules for Sears in Sex Bias Case," *New York Times*, 4 Feb. 1986, A21.