JUSTICE BOUND

Peter Hannan

By David Kairys

The three articles that follow reveal the contradictory approaches and results that characterize the current Supreme Court. Within a matter of weeks, the court recognized sex harassment as a prohibited form of sex discrimination and approved of affirmative action in at least some circumstances, while allowing the states to criminalize consensual gay sex and consensual heterosexual acts recommended by best-selling sex manuals and practiced by an overwhelming majority of people.

But such contradictions are not unusual and should not surprise. Although there is considerable distrust of law and lawyers these days, we Americans—including those of us on the left—still have an unusually idealized notion of our legal system.

We talk about judicial activism and restraint as if there were legally required results divorced from values, politics and experience. Our president can state, almost without challenge, that he likes his nominees for the Supreme Court because of their conservative views, but it is improper for the Senate to consider more than technical qualifications in deciding whether to confirm them. The myth that fair procedures, application of legally mandated rules and interpretations, and logic result in justice—or even determine judicial outcomes—is very much alive. It justifies the enormous power of courts in our society, limits the scope of political discourse and legitimizes the social order.

The current Supreme Court is composed of two consistently liberal justices (Brennan and Marshall), two or three consistently conservative justices (Rehnquist, Burger and O'Connor), and a large, moderate center that usually tilts to the right. "Consistent" means that the justices at the court's political poles have predictable judicial approaches and perspectives, although it is often not clear in particular cases which rule or result is liberal or conservative. For example, the sex harassment decision would seem to be liberal, but other considerations may explain the court's unanimity, including the importance to business of incorporation of women into the workforce and the widespread nature of the problem.

Occasionally the moderates have shown a willingness to interrupt the generally rightward trend. They are less coherent in their approaches and less predictable, although some are fairly consistently liberal on certain issues and conservative on others.

The court has not wholly abandoned the "activism" of the Earl Warren years, as many expected it would. Yet there is a clear trend away from protection of individuals and groups from harmful or invasive actions by national, state or local governments. The conservative approach—popularized with notions of limiting government—has enormously strengthened the hand of government and big business, particularly against working people, the poor and minorities.

The worst example is the sodomy decision discussed on this page. It resembles some of the court's lowest moments, cases like *Korematsu vs. United States* (1944), *Bradwell vs. Illinois* (1873) and *Dred Scott vs. Sanford* (1857)—where the court upheld the internment of all persons of Japanese ancestry on the West Coast during World War II (with an opening passage declaring that the internment had nothing to do with racism), ruled that women could be prohibited from practicing law (a concurring justice said, "The paramount destiny and mission of woman [is] to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."), and upheld slavery (blacks are "of an inferior order, and altogether unfit to associate with the white race...so far inferior that they ha[ve] no rights which the white man [is] bound to respect").

Sometimes prejudice is so deep-seated that it prevents people, including judges, from seeing groups of other people as fully equal human beings. If President Reagan's political and judicial inclinations are not restrained, we can surely expect continued replacement of the Bill of Rights with right-wing fundamentalist notions of how everyone should live. ■

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Sexual privacy and justice, but not for all

By Margaret A. Burnham

WHEN IN 1886 SUPREME Court Justice Joseph P. Bradley first claimed constitutional protection for the "privacies of life," he carefully grounded the privacy right to two revered American foundational stones—the republican family and private property. In striking down a subpoena for business records, the justice wrote that the Fourth and Fifth Amendments "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property."

Since Justice Bradley's time, the Supreme Court has meandered throughout the realm of the privacy right, seeking to define its meaning with regard to sexual expression, procreation, marriage and family life. In a landmark 1965 case, *Griswold vs. Connecticut*, that struck down a statute forbidding the use of contraceptives, the court declared that marriage and family are entitled to protection of "a right to privacy older than the Bill of Rights." And although it is still constitutional to require that people seeking to conceive be married heterosexuals, the court has extended some of the rights to control procreation to unmarried persons.

But while it has adjusted to changing customs and values, the court has kept close to the view that the right to privacy should undergird, rather than stretch or challenge, the traditional male-dominated family. Grounding the privacy right in this way effectively restricts its reach and transforms it from a liberating legal principle into a defense of the economic and social features of the nuclear family.

In June the court upheld the state of Georgia's criminal prohibition against sodomy as applied to homosexual sex (*Bowers vs. Hardwick*). That decision served as a stark reminder that, while the court's "fundamental rights'" reflecting pool may be stirred by popular movements, it too often reflects back the judges' own images. The right to privacy, which is derived from the due process right to liberty, can only be expressed with full constitutional protection within the male-controlled family.

Clearly, judges and lawmakers decide what makes personal happiness and liberty according to their own experiences and ideals. But the matter is more complicated than that. As feminists argue, there are economic reasons for social support for heterosexuality and male dominance within

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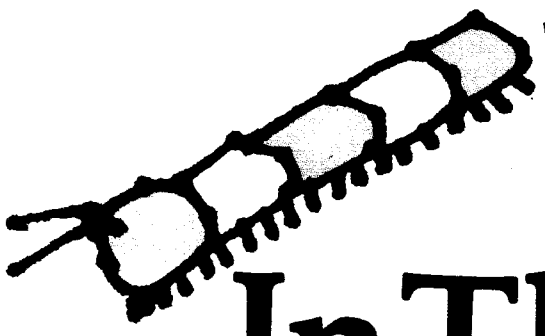

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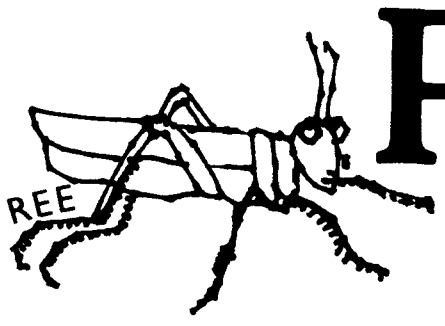

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