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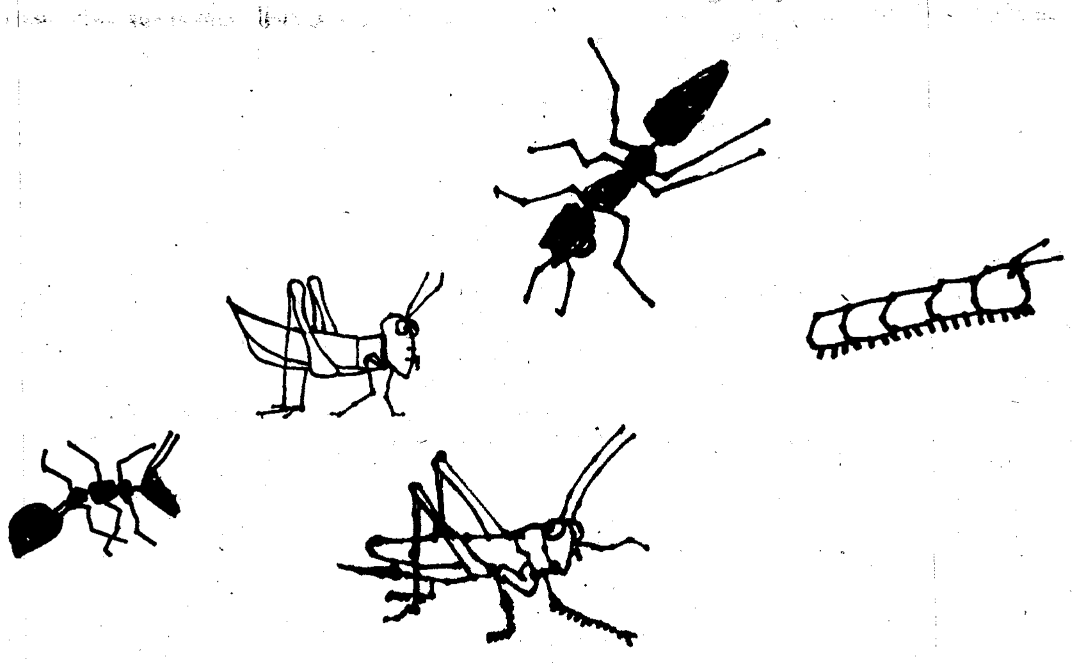

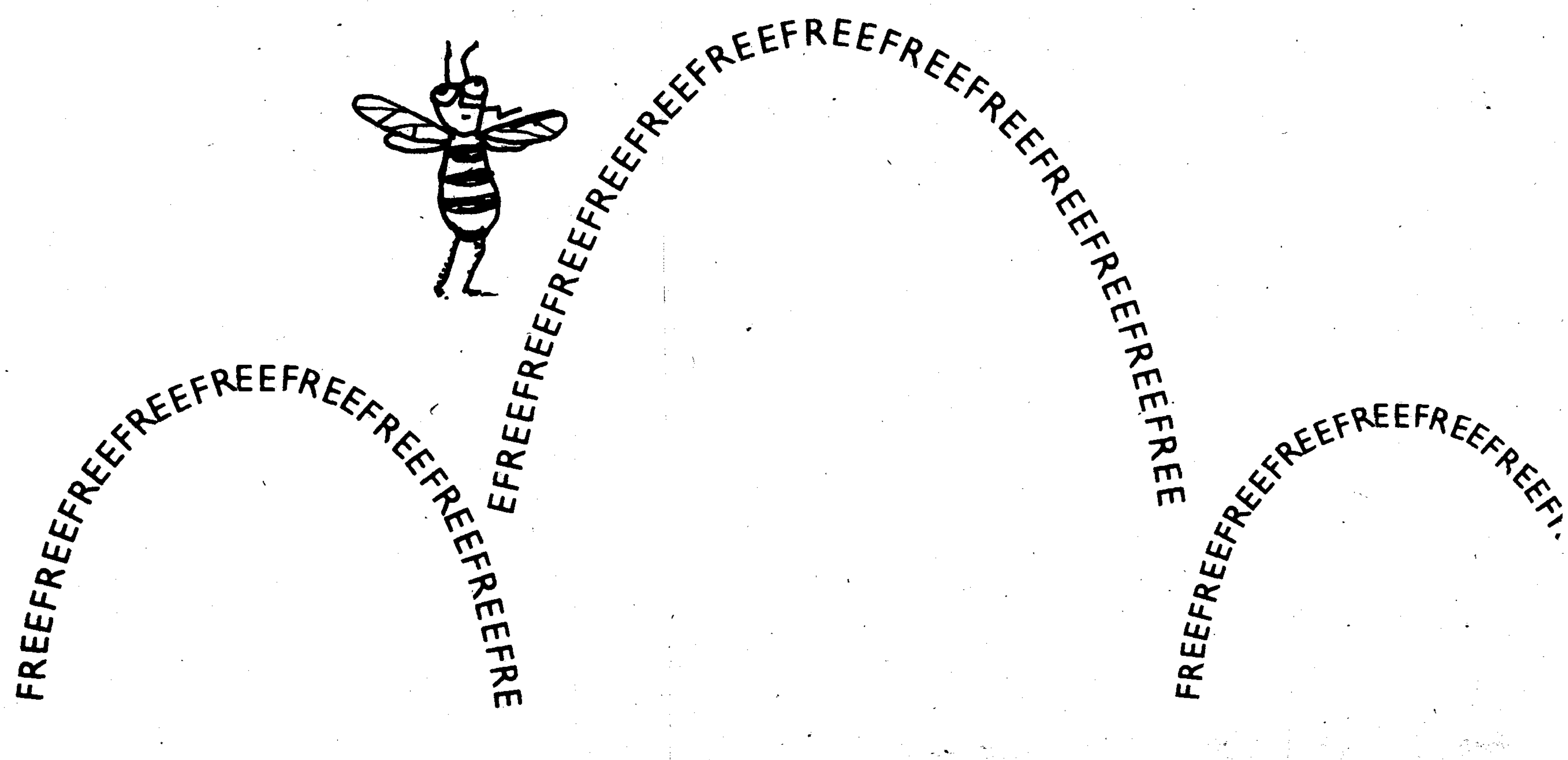

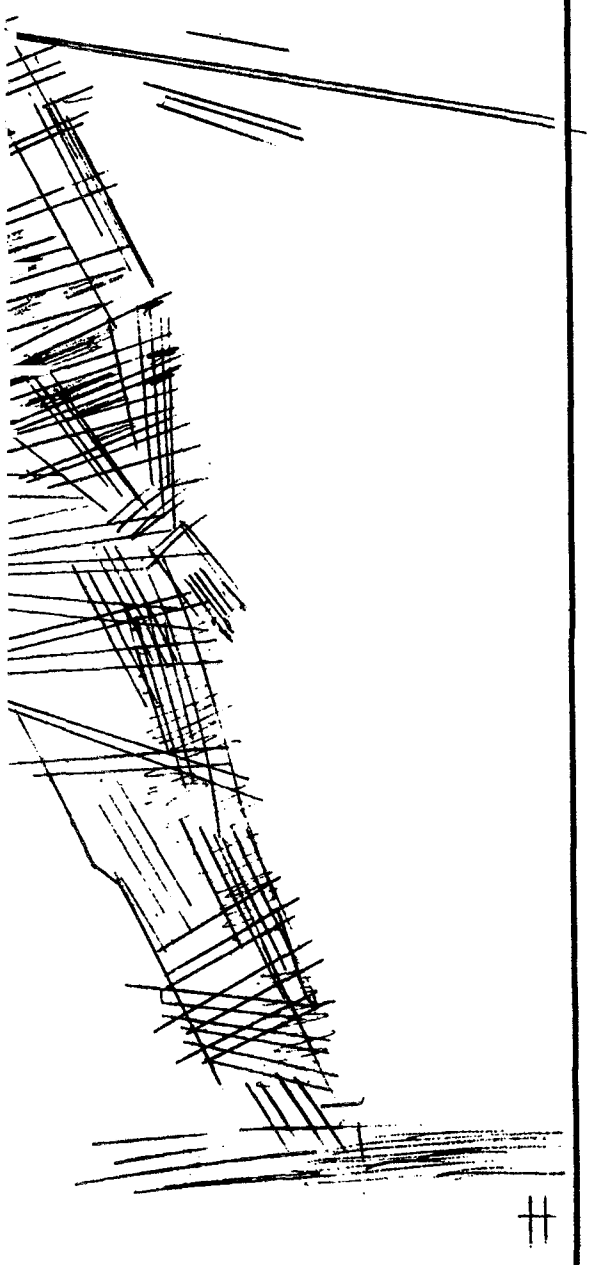

the family. So, too, the legal principles shielding the hearth from the invasive hand of government reflect economic institutions. The contemporary hue and cry among neoconservatives for turning over to private enterprises such public services as prisons and fire protection, and eliminating social services like medical care and dependents' aid, goes hand in hand with the challenge to personal autonomy and choice in matters of sexuality and family life.

The seeming contradiction between the libertarian thrust for "less government" and the repressive attempt to circumscribe personal choices in matters of sex and family disappears when one realizes that the goal is to both expand and reinforce free enterprise. The liberty being sought by the neoconservatives is, in the larger sense, liberty for the profit motive, and the family privacy that they claim to pursue is for the family as a private economic unit, not for its autonomous individual members or for those who choose to live outside it.

One happy family

Slavery provides a historical example of the relationship between the concept of family privacy and private property. Its defenders were fond of referring to the institution as "domestic slavery," by which they meant to imply that the slaves were a part of a domestic circle headed by the slavemaster that included his wife and children. Indeed, the close quarters and the social and economic interdependence of the plantation's various strata did promote the "one big happy family" image that the slaveholders projected. The law declined to govern the master-slave relationship on two counts: the slave was private property, which was sacrosanct to the 19th-century legal mind,

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Saying no to sexual harassment

By Ellen M. Saideman

LAST MONTH, IN A LANDMARK DECISION, the U.S. Supreme Court unanimously held that sexual harassment on the job violates Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment. This decision, written by Justice William Rehnquist, whom President Reagan recently nominated for chief justice, is a resounding victory for the women's movement.

When the Court had agreed to hear *Meritor Savings Bank, FSB vs. Vinson*, a shudder of alarm swept through the women's movement. Although every circuit court of appeals that had considered the issue had held that sexual harassment was against the law, in the *Vinson* case, three judges, including Judge Antonin Scalia, whom Reagan recently nominated to the Supreme Court, had suggested that sexual harassment was not the kind of discrimination that Congress had intended to make illegal.

That alarm was completely dispelled when Rehnquist, the most conservative justice, said for the full court, "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."

Because the trial court had found that Vinson's promotions during her employment at the bank were based on merit alone and were not a *quid pro quo* for sexual relations, the issue before the court was whether sexual harassment itself, with no relation to a tangible job benefit, was sex discrimination. The bank argued that for sexual harassment to violate federal law, the victim must suffer tangible economic loss.

Justice Rehnquist handily dismissed the bank's argument. Speaking for the full court, he noted that the language of Title VII that bars discrimination in the "terms, conditions or privileges of employment" is not limited to economic loss and that it was Congress' intent to "strike at the entire spectrum of disparate treatment of men and women." The court thus found that employees have the right to work in an environment free from discriminatory intimidation, ridicule and insult.

The Supreme Court also rejected the Justice Department's position, laid out in its *amicus curiae* brief, that the trial court had correctly held that no sexual harassment had occurred because Vinson had "voluntarily" had sexual relations with her supervisor. Rehnquist wrote, "But the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" The court thus endorsed the Equal Employment Opportunity Commission (EEOC) definition of sexual harassment as "unwelcome" sexual activity.

The *Vinson* case raised two other issues. The first and most important was the extent to which an employer would be held liable for harassment by a supervisory employee. Rehnquist, speaking for the majority, declined to issue a definitive rule on the question, but rejected the circuit court's standard that held employers automatically liable for such harassment. Instead, he said that the rules of agency apply, and whether an employer is liable in a particular case depends on the facts. Rehnquist noted approvingly that the courts have consistently held employers liable for discriminatory discharges of employees by supervisory personnel, "whether or not the employer knew, should have known, or approved of the supervisor's actions." But Rehnquist did suggest that the employer may not be automatically liable in a hostile environment case like Vinson's. He did, however, specifically note that "absence of notice to an employer does not necessarily insulate that employer from liability," and there is no question but that an employer who knows about sexual harassment and does not act to prevent it will be held liable.

Justice Marshall, joined by Justices Brennan, Blackmun and Stevens, argued in a concurring opinion that the employer should be automatically liable for harassment by supervisory personnel. In a separate opinion, Justice Stevens said that he saw no inconsistency in the majority and concurring opinions. He may prove correct when the court is required to make a definitive ruling.

The other issue the case raised was whether evidence of a woman's dress and publicly disclosed fantasies was admissible in court in a sexual harassment case. The Supreme Court unanimously held that such evidence is not automatically inadmissible, struck the court as minimal.

The court did leave open the question of the extent to which an employer will be but rather the trial judge is to weigh the potential for unfair prejudice against the relevance of the evidence in determining whether it is admissible. Thus, the court applied the evidentiary rules set forth in the Federal Rules of Evidence. It is important to note in this context that Title VII claims are tried before judges and not before juries, so the potential for prejudice may have held responsible for sexual harassment where the victim does not lose a tangible job benefit and where the employer has neither actual nor constructive knowledge of the harassment. Future litigation will undoubtedly force the court to clarify its ruling on this point. But it is clear that employers are liable when they know or should know of sexual harassment and do not take prompt action to remedy the problem.

Rothco

William Rehnquist

"When a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex."

Thus the Supreme Court's decision will provide an incentive for employers to adopt policies prohibiting sexual harassment and to act quickly to remedy complaints of such harassment. By holding employers responsible for sexual harassment they know about, the decision empowers victims of sexual harassment who have previously considered themselves powerless and will encourage them to make complaints.

The *Vinson* case also sets an important precedent for other areas of discrimination law. Applying *Vinson*, it is most likely that the courts will hold that sexual harassment in housing or education violates the laws against discrimination in both of those arenas. ■

***Ellen M. Saideman** represented Working Women's Institute in an* amicus *brief in* Meritor Savings Bank, FSB vs. Vinson.

Saying yes to affirmative action

By John Brittain

IN THREE SEPARATE CASES THIS TERM the Supreme Court upheld the constitutionality of affirmative action plans, whether ordered by a federal court or voluntarily negotiated. It was an emphatic repudiation of the direct attack on affirmative action mounted over the past several years by the Reagan administration, especially Attorney General Edwin Meese and his assistant, Bradford Reynolds.

Although the Court set limits on affirmative action goals and methods, it decided that race-conscious remedies for a history of racial discrimination could be used to benefit minorities who had not personally suffered discrimination. Some conservatives have argued that only people who could prove they were actual victims of discrimination were entitled to relief. The court ruled that general remedies for past discrimination could be established privately or through court-enforced orders.

In the first case, *Wygant vs. The Jackson (Michigan) Board of Education*, several white tenured teachers were dismissed after a budget crunch necessitated layoffs and black probationary teachers were retained. An affirmative action plan negotiated between the Board and the teachers' union provided that seniority governed layoffs, but that the percentage of black teachers in the system should always remain the same as the proportion of black students.

The court declared that the plan was unconstitutional, because the goal of proportional representation of teachers to provide role models was not sufficient to justify affirmative action. Also, the court ruled that laying off white teachers with greater seniority was too broadly intrusive to accomplish those goals. But a clear majority approved the use of affirmative action. If the Board had set a goal of hiring more minority teachers to reflect the local labor market as a way to overcome a demonstrated record of prior discrimination in hiring by the Board, a majority of the justices probably would have approved.

Despite the appearance of a defeat, *Wygant*, like *Bakke vs. the Board of Regents* (a 1978 California case in which a white law school applicant successfully argued that he was a victim of reverse discrimination), reaffirmed that race-conscious affirmative action is legal, as long as the institution involved gives a compelling reason and uses the least restrictive means to achieve its goal. The current court, however, does not support making affirmative action plans take precedence over seniority systems used

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