The Role of Morality in Judging: A Woman Judge's Perspective*

The Honorable Patricia M. Wald**

I am going to break the rules for luncheon speakers, who should stick to humorous, or at least innocuous, subjects, by tackling a somber and troublesome one: the role of morality in judging, particularly in constitutional adjudication, and particularly for women. We are all women judges, whose jobs inevitably involve moral judgments of one kind or another, even if we don't always think about it that way. The role of morality in judging is a very lively current topic in law reviews and in popular critiques of the judicial process. Unfortunately, except for the literature of feminist jurisprudence, the treatment is almost exclusively by male authors and judges. Other speakers have emphasized the need to infuse more women judges into judicial education, judicial policymaking, and administration. I bid for more women judges and women law teachers to enter the thorny but important area of judicial philosophy. Its theories inform, constrain, and are used as a benchmark for critiquing our decision making. I think it imperative that we make our individual and collective points of view heard in the debate.

The concept of "morality" makes us all squirm a bit. A recent *New York Times* book review describes our ambivalence:

> Today there seems to be growing discomfort, if not embarrassment, with the question of morality. . . . [T]ell us that "Smith is a very moral man," and we are not at all sure we want to be involved with him. "Moralist" is often a pejorative term, and the word "morality" itself seems to be slipping in that direction . . . for at the heart of the problem there is this unanswered question: "What is morality?"[1]

Nonetheless, the relationship between judicial decision making and something called "morality" is very much with us these days. I will not dwell on transparently partisan attacks on judges or judicial candidates for nonconformity with a particular concept

---

* Keynote address given at the National Association of Women Judges Conference, Minneapolis, Minnesota, October 12, 1985.

** United States Court of Appeals, District of Columbia Circuit.

1. N.Y. Times, Aug. 4, 1985, § 7 (Book Review), at 31, col. 2.

of "morality." Nor will I focus on any of the highly visible moral issues currently in the courts—abortion, homosexuality, care of the homeless, remedies for racial inequality. Rather, I want to raise with you some basic questions about the process by which a judge, particularly a woman judge, goes about dealing with issues that involve morality—her own, the community's, the fundamental morality of the Constitution.

My colleague Judge Robert Bork recently published a provocative lecture on *Tradition and Morality in Constitutional Law*.[2] He began by voicing a concern I share that "[t]oo few people are aware of the trends [in constitutional law] and the importance of those trends for public policy."[3] He continues, however, to say that our legal institutions, particularly law schools, have mistakenly advanced "an ideology of the Constitution that demands . . . an infusion of [*outside*] moral and political notions."[4] He cites as an example the "incorrect" view of the first amendment "that the only kinds of harm that a community is entitled to suppress are physical and economic" harms and not moral harms.[5] He calls this discounting by the law of harm to community morality the "privatization of morality" or "moral relativism," and suggests we adopt the "common sense of the community" as a sufficient norm for moral harms against which the community may legislate.[6]

Intriguingly, Judge Bork identifies the wife of John Stuart Mill, author of *On Liberty*, as a source for the view that individual morality should transcend community morals. "It would," he writes, "be ironic . . . if we owed major features of modern American constitutional doctrine to Harriet Taylor Mill, who was not, as best I can remember, one of the framers at Philadelphia."[7] His basic thrust, however, is to discredit the "capacity of ideas that originate outside the Constitution to influence judges, usually without their being aware of it, so that those ideas are elevated to constitutional doctrine."[8] Notions like moral relativism and egalitarianism, he says, lack the legitimacy of democratic choice but have insidiously invaded constitutional decision making through judges.[9] Judges' attempts through moral reasoning to frame constitutional theories have removed from democratic control areas of

2. Robert Bork, Tradition and Morality in Constitutional Law (1984).
3. *Id.* at 2.
4. *Id.* at 2-3.
5. *Id.* at 3.
6. *Id.*
7. *Id.* at 5.
8. *Id.*
9. *Id.* at 6-7.

life the framers intended to leave to the political branches.[10]

Judges should not—he continues—simply enforce what they think are good values.[11] The Constitution meant to let people choose democratically to have a *public* morality. Expanding individual freedoms under the cover of doctrines like autonomy and privacy runs counter to that communal morality. Thus, the Framers' intentions, as to those few freedoms that do lie outside the reach of the majority, are the "sole legitimate premise" for finding constitutional rights that transcend the majority will.[12] He goes on then to describe a moral judge in these terms:

> In a constitutional democracy the moral content of law must be given by the morality of the framer or the legislator, never by the morality of the judge. The sole task of the latter . . . is to translate the framer's or the legislator's morality into a rule to govern unforeseen circumstances. That abstinence from giving his own desires free play, that continuing and self-conscious renunciation of power, that is the morality of the jurist.[13]

Judge Bork recently translated his call for judicial abstention from moral reasoning into practice in a much discussed opinion, *Dronenburg v. Zech*,[14] involving a constitutional challenge to the discharge of an overtly homosexual officer from the Navy. He refused to find in the privacy line of cases that began with *Griswold v. Connecticut*, the contraception case,[15] and ended with *Roe v. Wade*, the abortion case,[16] any mandate or authorization to recognize a right to freedom of sexual conduct for consenting adults.[17] He announced that community morality provides enough of a rational basis for legislation or executive action sanctioning aberrant sexual conduct. "If the revolution in sexual mores that appellant proclaims is in fact ever to arrive, we think it must arrive through the moral choices of the people and their elected representatives, not through the ukase of this court."[18]

Judge Bork's ideal of the restrained amoral judge has some appeal. And his desire to constrain the search for fundamental values in the Constitution to the ones our Founding Fathers held is shared by other scholars and judges of the originalist school of constitutional interpretation. In their view, judges are not free to

10. *Id.* at 8.
11. *Id.* at 8-9.
12. *Id.* at 10.
13. *Id.* at 11.
14. 741 F.2d 1388 (D.C. Cir. 1984).
15. 381 U.S. 479 (1965).
16. 410 U.S. 113 (1973).
17. 741 F.2d at 1396.
18. *Id.* at 1397.

find "new" rights in the Constitution, based on their own or others' notions of morality or philosophy. Only rights that are clearly traceable to the text of the Constitution or at least inferable from contemporaneous statements of the Framers deserve protection against the current majority, even when that majority is legislating solely to protect or entrench its own morality, rather than to protect against more concrete social or economic harms.

Before we as judges, as women judges, rush to embrace this philosophy in toto, there are things we ought to think about. Judge Bork reminded us that Harriet Taylor Mill was *not* one of the Founding Fathers, whose ideas alone the originalists would credit in interpreting the Constitution. Of course, there are *no* women eligible for such status. One may consult the Federalist Papers, the Records of the Convention, the letters of Madison, Jefferson, and Hamilton in vain for evidence of any woman's influence on the Constitution.[19] As judges, should we be frozen through eternity into a mold of constitutional analysis that prevailed in 1789, an age that gave no thought whatsoever to women as equal participants in community and national life. Indeed, if that was the Framers' intent, perhaps more heed should have been given to Jefferson's proposal that the Constitution be good only for thirty-four years and each new generation should make its own constitution commitment anew.[20]

Lest you think I am too extravagant, let me give an illustration of an originalist-type argument put forth, ironically, by one of our most liberal, civil rights-oriented academics, Professor Tom Emerson of Yale. In answering feminist theorist Professor Catharine MacKinnon, who argues for a civil right of women against pornography, he says:

> Obviously, the founding fathers, whatever restrictions they might have found constitutionally permissible with respect to sexually explicit speech, could not have intended the

---

19. Twelve years before the Constitutional Convention, in 1777, Abigail Adams did address her husband on the subject of women and the Constitution. She wrote:

> In the new code of laws which I suppose it will be necessary for you to make, I desire you would remember the ladies and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of the husbands. Remember, all men would be tyrants if they could. If particular care and attention is not paid to the ladies, we are determined to foment a rebellion, and will not hold ourselves bound by any law in which we have no voice or representation.

Abigail Adams, Familiar Letters, 149050, *quoted in* Hillsdale College v. Department of HEW, 696 F.2d 418, 431 (6th Cir. 1982) (Edwards, J., dissenting).

20. Letter from Thomas Jefferson to James Madison, Paris, Sept. 6, 1789, in The Life and Selected Writings of Thomas Jefferson 488, 492 (Adrienne Koch & William Peden eds. 1972).

> first amendment to allow the government to prohibit all speech that supported male domination. On Professor MacKinnon's own analysis, the very idea could not have occurred to them as members of the dominant male hierarchy. Insofar as "original intention" is a guide to constitutional interpretation, then, it runs squarely counter to the position taken by the proponents of the Indianapolis Ordinance.[21]

One certainly does not have to be a supporter of Professor MacKinnon's ordinance to be concerned about the implications for women of an originalist's view of constitutional interpretation. Indeed, except for the fact that certain rights, such as access to contraception or abortion, have already been established by the Supreme Court, they too would succumb to this doctrine. And, in view of the continuous attack on those rulings, we cannot feel too secure about their longevity.

There is also little doubt this originalist theory excludes women—particularly women judges—from contributing any special modes of analysis, ways of thinking, or moral concepts of their own to the development of constitutional rights and values. Professor Kenneth Karst of UCLA Law School has written:

> The men who wrote the Constitution in 1787 designed a framework for governing society as it was perceived by men and run by men. . . . The Bill of Rights, like the original Constitution, defined zones of autonomy, of noninterference. The whole enterprise of constitution-making, from its theoretical underpinnings to its consummation as a political bargain, was relentlessly contractual. In short, the Constitution from the beginning reflected the view from the ladder: safety from aggression was to be found not in connection with others but in rules reinforcing separation and noninterference.[22]

The ladder, of course, refers to the ground-breaking study by Carol Gilligan, *In a Different Voice*, of the separate ways in which men and women define and apply fundamental concepts of morality.[23] In briefest form, Gilligan finds that for men, the metaphor is the ladder, for women it is the web. Men tend to see and to judge human interactions as the contractual arrangements of individuals seeking position in a hierarchy.

> Women . . . tend to see the same interactions as part of ongoing, sharing connections in a network of relationships. The view from the ladder tends to produce . . . an abstract hierarchy of moral rules to govern the competition of highly individuated individuals. To see the world from the web, however, is to see individuals in connection with each other, and to see

21. Thomas Emerson, *Pornography and the First Amendment. A Reply to Professor MacKinnon*, 3 Yale L. & Pol'y Rev. 130, 132 (1984).

22. Kenneth Karst, *Woman's Constitution*, 1984 Duke L.J. 447.

23. Carol Gilligan, In a Different Voice (1982).

> morality as a question of responsibilities to particular people in particular [circumstances].[24]

In Karst's words, "American law is predominantly a system of the ladder, by the ladder, and for the ladder."[25]

Karst ambitiously proposes a reconstruction of constitutional law that recognizes the need to protect the web as well as the ladder—"After all, there is . . . much to be said for a constitutional law that takes into account a view of life, self, and morality that is the dominant mode among the female half of the nation's population."[26] One need not subscribe fully to Karst's revisionisms nor to the terminal diagnosis of at least one feminist jurisprudence writer who says "gendered concepts are constructs of the male experience, imposed from the male standpoint on society as a whole, liberal morality expresses male supremacist politics,"[27] to be troubled by the potential blocking action of the originalist school of interpretation on women judges' future contribution to constitutional jurisprudence.

Now in fairness, some originalists do distinguish between the process of discovering "new" rights in the Constitution and expanding rights already there to meet new situations. Thus, Judge Bork has written in a different case that although libel law at the time of the Constitution would have covered certain kinds of factual statements, today's huge jury verdicts and their resultant potential for chilling press freedom makes it necessary nowadays to afford constitutional protection to those same kind of statements.[28] That expansion he finds to be in line with "a judicial tradition of a continuing evolution of doctrine to serve the central purpose of the first amendment."[29] "[I]t is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. The world changes in which unchanging values find their application."[30]

You, like I, may find that distinction difficult to parse. Whether a right already exists and need only be accommodated to a new situation or whether a new right has to be declared—comes down to the level of generality with which the right is defined in the first place. Thus the court in *Dronenburg* could not find any

---

24. Karst, *supra* note 22, at 462.
25. *Id.* at 462.
26. *Id.* at 463.
27. Catharine MacKinnon, *Not A Moral Issue*, 2 Yale L. & Pol'y Rev. 321, 330 (1984).
28. Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984)(en banc)(Bork, J., concurring), *cert. denied*, 105 S. Ct. 2662 (1985).
29. *Id.* at 995.
30. *Id.*

right to sexual privacy in Supreme Court precedent,[31] but several months after *Dronenburg*, a panel of the Eleventh Circuit found in the same cases a discernible and distinct principle covering private adult consensual homosexual conduct, that is "quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation."[32] A few months later the Fifth Circuit, en banc, in a third case, disagreed with *that* reading, finding "homosexual conduct is not a constitutionally protected liberty interest" and "[i]n view of the strong objection to homosexual conduct, which has prevailed in Western culture for the past seven centuries, we cannot say that [the statute barring it] is 'totally unrelated to the pursuit of' . . . implementing morality, a permissible state goal . . . ."[33]

But since originalism asserts it is the Framers' values and their morality that must somehow be extrapolated to make the necessary constitutional adjustments to a contemporary society, there is still no room in that process for what we have learned in the intervening two hundred years or more for the infusion of women's morality into constitutional interpretations. Karst cites several examples of what he calls women's "morality of care and responsibility" that could influence doctrines of constitutional law. One is a redefinition of discrimination, "abandoning the requirement of a showing of discriminatory purpose in favor of a principle recognizing a law's discriminatory impact[s] as a constitutional harm" in themselves;[34] another is a recognition of affirmative constitutional responsibilities to relieve persons from some intolerable burdens, such as hunger.[35] Whether or not we agree with his examples, we may be reluctant as judges to be consigned rigidly to a surrogate role of putting ourselves in the Founding *Fathers'* shoes in order to divine what they would have done about a situation they could not possibly have predicted 200 years ago.

Yet another disturbing consequence of originalism is that by limiting constitutional protection to the very narrow class of rights *expressly* envisioned by the Framers two centuries ago, or in subsequent amendments, judges ensure conventional or traditional morality will carry the day in *all* other cases. The content of that morality will be determined by popularly elected legislatures and executive branches. Judge Posner, in his book *The Federal Courts*,

---

31. 741 F.2d 1388, 1396 (D.C. Cir. 1984).

32. Hardwick v. Bowers, 760 F.2d 1202, 1212 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 342 (1985).

33. Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985)(en banc)(citations omitted).

34. Karst, *supra* note 22, at 488.

35. *Id.* at 493.

suggests due process in the fourteenth amendment should not include any rights not legislated by a majority of states.[36] One of the judges concurring in the denial of en banc rehearing in *Dronenburg* said, "It simply cannot seriously be maintained . . . that the right of privacy extends beyond . . . traditional [family] relationships . . . ."[37] Conventional morality is deserving of respect and deference in most cases, but in the words of one scholar, it should be a significant player in the constitutional discourse, but not the "trump card."[38] There are higher values to be found implicitly as well as explicitly in the Constitution which judges should be free to honor. By now it has become almost trite to cite Justice Bradley's famous concurrence a century ago in *Bradwell v. Illinois*,[39] where the Supreme Court found no constitutional right of a qualified woman to be admitted to the practice of law:

> [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.[40]

That was conventional morality in 1873. We have come a long way since then, but not far enough. The National Association of Women Judges' studies on gender bias in the courts suggest residual prejudice against women in assessing personal injury damages, sentencing, divorce and child custody, and juvenile justice.[41] Some of the feminist scholars strongly assert there is no such thing as gender-free conventional morality. And if we are to depend exclusively on legislatures to define morality, we must accept

---

36. Richard Posner, The Federal Courts: Crisis and Reform 194 (1985).

37. 746 F.2d 1579, 1584 (D.C. Cir. 1984)(statement of Starr, J.)(reh'g denied en banc).

38. Thomas Morawetz, Constitutional Review and Moral Premise: The Future of an Illusion 20 (June 13, 1985) (Colloquium Paper presented at Woodrow Wilson Int'l Center for Scholars, Smithsonian).

39. 83 U.S. (16 Wall.) 130, 141 (1873).

40. *Id*.

41. *See, e.g.*, Gender Bias in Courts, 7 Jud. Conf. Rep. No. 1 (1985)(New Jersey study looked to gender bias in sentencing, personal injury damages, juvenile justice, domestic violence, divorce, child custody—found women "disadvantaged" in every area).

the fact that those legislatures contain only a small number of women. Thus a judge constricted by majority-defined morality would have a hard time protecting a wife against interspousal rape, or including sexual harassment in the definition of sex discrimination, or finding a right to comparable worth if the state legislature had not yet acted to do so.

Another problem with exalting conventional morality in constitutional discourse is that many decisions involve choices between *different* conventional moralities. Professor Morawetz notes, "In a pluralistic society subject to both rapid technological change and rapid spread of attitudes and ideas by public media, it is a daunting if not quixotic project to *identify* conventional morality."[42] And J. Anthony Lukas, in an op ed piece in the *New York Times* discussing the strife-ridden history of school desegregation in Boston, pointed out that "one of the deepest divisions in American life [is] between the demands of *equality* and the call of *community*."[43] Lukas wrote:

> In recent years Boston and other American cities have learned that they have to make some hard choices: between racial justice and self-determination, between equality of educational opportunity and neighborhood schools, between a black child's right to a desegregated education and a white mother's right to control her own child's upbringing. What makes this experience rise to the level of genuine tragedy is precisely that these are not choices between right and wrong, or between judicial dictatorship and sound social policy, but between competing values, between right and right.[44]

The fact is there is no way for the originalists to take judges completely out of the business of making moral choices in constitutional cases, and judges will have to draw on more than the Framers' intent or conventional moralities to make those choices. Professor Van Alstyne tells us that in most other countries with written constitutions, the constitutions are in fact interpreted only by the majoritarian branches with no appeal allowed to the courts for enforcement by individual citizens.[45] Enforcement of individual constitutional rights by our courts has been this country's unique contribution to constitutional jurisprudence. Few of us are ready to blow the whistle on it just yet. There is, after all, something inherently contradictory in relying exclusively on majority

42. Morawetz, *supra* note 38, at 21; *see generally* John Ely, Democracy and Distrust (1980).

43. J. Anthony Lukas, *Community and Equality in Conflict*, N.Y. Times, Sept. 8, 1985, at E25, col. 2 (emphasis added).

44. *Id.*

45. William Van Alstyne, *Notes on a Bicentennial Constitution*, 1984 U. Ill. L. Rev. 933.

morality to determine a *minority's* fundamental rights against that very majority. Most constitutional issues are difficult precisely because they arise out of the fissures in whatever social consensus may otherwise exist. "To have a right against the majority, good only so long as the majority values its exercise, is to have no right at all."[46]

If, then, we decide to reject the originalists and the conventional moralists as our oracles on the hard questions of morality, where should we look for guidance? Some judicial philosophers say judges should search for the enduring, timeless, and important values that reside in the Constitution and transcend conventional morality.[47] Indeed, one of the most eminent English jurisprudentialists, H.L.A. Hart, has declared that "[t]he law of every modern state shows at a thousand points the influence of both the accepted social morality and wider moral ideals. These influences enter into law either abruptly and avowedly through legislation, or silently and piecemeal through the judicial process."[48]

In Professor Alexander Bickel's philosophy, the "[Supreme] Court is an educator whose mission is to instruct and elevate, to bring out the best in us and show us where our own convictions lead."[49] Bickel's "principle-defining process" in the Constitution

> requires a familiarity with the moral tradition within which one is working and a talent for combining or extending the elements of this tradition in novel ways to cover previously unresolved (or nonexistent) problems. . . . [I]t is never principled either to limit or extend a constitutional norm merely to reflect existing majoritarian views. . . .[50]

The judge's job is to identify the "moral trajectory" of "enduring values" in the nation's life and help guide them forward, at the same time she employs the "passive virtues" of occasionally postponing confrontation, and accommodating to existing institutions to ensure societal acceptance of inevitable but nonetheless unpopular decisions.[51]

All of this, I know, is heavy stuff. I will be candid. I find the conceptualization of many of these theories easier than their execution. While Professor Karst encouragingly tells us, "I am per-

---

46. Michael Moore, *A Natural Law Theory of Interpretation*, 58 S. Calif. L. Rev. 277, 395 (discussing the arguments of John Hart Ely); *see also* Morawetz, *supra* note 38, at 34.

47. *See, e.g.*, Moore, *supra* note 46, at 277, 393.

48. H.L.A. Hart, The Concept of Law 199 (1961).

49. Anthony Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 Yale L.J. 1567, 1581 (1985).

50. *Id.* at 1582-83.

51. *See id.*

suaded that [a distinctive moral perspective] will be progressively infused into our public life as more and more women [become judges] and . . . [c]onstitutional law in particular is a field in which movement toward the values of the network may come sooner rather than later,"[52] there are very few road maps in the law reviews or even in the judges' manual. Moreover, my seven years on the bench strongly suggests that not all the writers and thinkers in the originalist school practice what they preach, either. In the end we are left to depend on our own intellectual and moral resources, on our respect for precedent, the letter and the spirit, and our appraisal of the strength and the vulnerability of the legal and social structure of which we are a part. Karst calls this "contextual morality"[53] and says women's morality emphasizes context—"the needs of real people in the fullness of their real situations."[54] Gilligan describes the interaction of "an ethic of justice [that] proceeds from the premise of equality—that everyone should be treated the same—[and] an ethic of care [that] rests on the premise of nonviolence—that no one should be hurt."[55] This dialogue, she suggests, will lead to the ultimate morality.[56]

Law is and should be based on morality, but the Constitution is still a vehicle to prevent the political majority from denying minorities their rights in the name of morality simply because it disapproves of the way they will exercise those rights. Judging moral cases is hard and controversial work. We are not all Marshalls, Stones, Harlans, Frankfurters, or Blacks. But we are thoughtful and worldly women, in the truest sense of the words. Our individual experiences as citizens, yes, *as women*, play a legitimate part in the moral reasoning through which we filter history, relevant precedent, prevailing traditions, and conventional morality in search of the enduring values that perpetuate a constitutional democracy. We should not too quickly subscribe to a theory of judicial interpretation that says none of this has any worth. When cases of genuine conflicts between majoritarian morals and minority claimants

52. Karst, *supra* note 22, at 506-07.

53. *Id.* at 495.

54. *Id.*

55. Gilligan, *supra* note 23, at 174.

56. Gilligan states:

> This dialogue between fairness and care not only provides a better understanding of relations between the sexes but also gives rise to a more comprehensive portrayal of adult work and family relationships. . . . [W]e can begin to envision how a marriage between adult development as it is currently portrayed and women's development as it begins to be seen could lead to a changed understanding of human development and a more generative view of human life.

Id. at 174.

to constitutional rights arise, we should as judges openly confront the conflicts, not in order to decide according to our own predilections, but in order to make the necessary inquiry into whether constitutional verities must override popular morality in the interests of an enduring constitutional democracy. If we had been pre-1954 judges confronted with a Jim Crow "separate but equal" ordinance, would it have been moral to declare it constitutional? Were judges before 1972 required to uphold gender discriminatory laws because they reflected the stereotyped version of the moral nature of women?

As judges enunciating fundamental values we should give deference to consensus morality. But there are times when we must transcend convention and recognize the more permanent values that come not just from our personal morality—though that can rarely if ever be totally ignored—but from the underlying motifs of our national history, aspirations, and ideals. This morality, according to Gilligan, is "aligned with 'the kind of integrity' that comes from 'making decisions after working through everything you think is involved and important in the situation,' and taking responsibility for choice."[57]

I personally think the spectre of judges dominating the arena of moral decision making is not all that realistic. Our jurisprudence bristles with presumptions in favor of the constitutionality of legislation and executive actions. The judge who would overturn them labors under a heavy burden. She does not just reach out and substitute her own set of values for those laid down by the political branches. Only if the judge identifies and can articulate an overriding value that has roots in prior precedents or in the grand themes of the Constitution itself does she seriously entertain the possibility of invalidating a majoritarian policy. Only rarely does a lower court in fact declare legislative or executive action unconstitutional. Last term in our court I don't remember that it happened a single time. But the job of judges should not be defined as upholding conventional morality against all challenge but rather as giving a reasoned account of whether conflicting values or goals asserted to arise from the Constitution can be reconciled with that morality or should override it.

The moral dialogue that cautious but courageous judges initiate when—on rare occasions—they find majority morality at odds with more enduring concepts in our Constitution marks the path of a maturing constitutional jurisprudence. We should regard with skepticism those judges and commentators who suggest this power

57. *Id.* at 147.

cannot legitimately be exercised at all. As women judges, we *can* contribute in our own *special* way to our nation's moral and constitutional growth. Let us not default before we begin.