From Kierkegaard to Kennedy: Existentialist Philosophy in the Supreme Court's Decision in *Planned Parenthood v. Casey* and Its Effect on the Right to Privacy

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I. Introduction

In the landmark 1992 abortion rights case, *Planned Parenthood v. Casey*,[1] the Supreme Court advanced a novel constitutional perspective. The plurality's decision in that case added a new dimension to the right to privacy, which until that point had focused mainly on rights of physical autonomy, relating to reproduction, birth control, and abortion.[2] In *Casey*, the plurality articulated a new aspect of this right, deemed to be implicit in the Due Process Clause of the Fourteenth Amendment: a right to philosophical privacy.[3] In creating this new right, the *Casey* plurality embraced the ideals of existentialist philosophy, echoing some of existentialism's most fundamental tenets in the language of the decision.[4]

Like the existentialists' rejection of the Platonic idea of "Forms" as eternal truths, and other traditional philosophies, the *Casey* plurality rejected the notion that there exists a prevailing right or wrong on the issue of abortion, and acknowledged that every person

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1. 505 U.S. 833 (1992).

2. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Roe v. Wade, 410 U.S. 113 (1973).

3. 505 U.S. at 851.

4. *Id.*

has a right to determine their own ideas about existence.[5] In refusing to recognize the existence of moral truth regarding abortion, the plurality rejected traditional Judeo-Christian moral standards, standing with Nietzsche to declare, "God is dead."[6] According to the *Casey* plurality, religious morality should not be foisted on society with the strength of judicial or legislative determinations, leaving decisions about human life and death up to the individual alone.[7]

One of the central themes of existentialist philosophy, individual choice and autonomy, is at the heart of the plurality's decision in *Casey*. In that decision, the plurality recognized the importance of individual decision-making in regard to intimate issues such as abortion.[8] It allows women to decide, through their own experiences, what is right for them and their families. In this way, it recognized another of existentialism's fundamental truths: that the individual is inherently alone in creating and facing their life circumstances, and should likewise be allowed to resolve them alone. Like Camus' Sisyphus, each person holds the key to his or her own salvation.[9]

Likewise, the *Casey* plurality followed in the footsteps of the existentialists in accepting that life is full of sorrow and pain.[10] The plurality does not suggest that abortion is an easy decision, or that a woman contemplating abortion is not sorrowful over her decision.[11] Rather, it notes that such intimate decisions are painful and intense, and that it is only through careful contemplation and action that the proper decision can be made.[12] In this way, the court exalts personal experience over the imposed judgment of the state or the courts.

Implicit in the *Casey* plurality's decision is a question long debated in prior and subsequent cases of constitutional interpretation: what is the role of the court and the state in defining the morality of the American people? While the *Casey* plurality rejects the notion that the state should impose its moral imperatives on pregnant women,[13] this is by no means a widely shared view. The

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5. *Id.*

6. FRIEDRICH NIETZSCHE, THE GAY SCIENCE, *reprinted in* THE PORTABLE NIETZSCHE 93, 95 (Walter Kaufmann ed. and trans., 1976) (1882).

7. *Casey*, 505 U.S. at 851.

8. *Id.* at 850.

9. ALBERT CAMUS, THE MYTH OF SISYPHUS, *reprinted in* EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE 375, 378 (Walter Kaufmann ed. and trans., 1989).

10. *Casey*, 505 U.S. at 852.

11. *Id.*

12. *Id.*

13. *Id.* at 850.

dissenters in *Casey* were incensed that the Court was imposing its own moral imperatives, a job they viewed as specifically reserved for the legislatures and the democratic process.[14] While the existentialists offer no definitive answer on the role of the democratic process in creating moral imperatives for society, one scholar describes a general suspicion among the existentialists of democracy and democratic ethics for its "slave morality" and its "cater[ing] to the vulgar many at the expense of the . . . few."[15]

There are only a limited number of issues that come before the Supreme Court that require the Court to make philosophical judgments regarding life, death, and other intimate issues. Thus, it is not surprising that the famous words of the *Casey* plurality regarding existence and philosophical privacy have appeared in only two other decisions by the Supreme Court: *Washington v. Glucksberg*,[16] where the Court upheld a Washington state law banning physician assisted suicide, and *Lawrence v. Texas*,[17] where the Court struck down a Texas law banning consensual homosexual sex. These two cases reexamine the philosophical privacy described in *Casey*, and reach two different conclusions on its relevance to the constitutional issues at hand. *Lawrence* in particular gives us a clue to the future of the right articulated in *Casey*, and the changing role of morality in the American legal and political systems.

II. Existentialism

Beginning this discussion, it is important to attempt a definition for the philosophy with which I wish to examine the right to privacy as interpreted in *Casey*, *Glucksberg* and *Lawrence*. Existentialism has been described as a philosophy, a school of thought, and a movement, but all these descriptions are heartily rejected by existentialist scholars.[18] These labels are problematic because existentialist thought is comprised of the ideas of a wide variety of thinkers, philosophers, and writers who have completely disparate ideas about the society, religion, life, humanity, philosophy, politics, art, etc. Calling

14. *Id.* at 1001 (Scalia, J., dissenting).

15. Werner J. Dannhauser, *Existentialism and Democracy, in* CONFRONTING THE CONSTITUTION 399-401 (Allan Bloom ed., 1990).

16. 521 U.S. 702, 726 (1997).

17. 539 U.S. 558, 574 (2003).

18. WALTER KAUFMANN, EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE 11 (1989).

existentialism a "sensibility,"[19] Walter Kaufmann describes some of the common themes found in the work of existentialist thinkers: "The refusal to belong to any school of thought, the repudiation of the adequacy of any body of beliefs whatever, and especially of systems, and a marked dissatisfaction with traditional philosophy as superficial, academic, and remote from life."[20] Other scholars describe the existentialist "sensibility" this way: "Generally speaking . . . freedom of choice, individual dignity, personal love, and creative effort are the existentialist values, and . . . the most important among these are freedom of choice and individual dignity."[21]

For the purposes of this note, I have focused on four primary themes, culled from the work of a variety of existentialist writers and critics including Kierkegaard, Dostoyevsky, Sartre, Jaspers, and Nietzsche, among others. Specifically, the themes focused on in this essay are the rejection of traditional philosophical notions, denunciation of traditional religion as the source of truth and morality, the exaltation of individual choice and experience, and the acceptance of life as pain and suffering.

A. Rejection of Traditional Philosophy and Eternal Truth

In his *Concluding Unscientific Postscript*, Kierkegaard writes, "the paradoxical character of the truth is its objective uncertainty . . . The eternal and essential truth, the truth which has an essential relationship to an existing individual . . . is a paradox."[22] From the broader perspective of existentialism, Kierkegaard is essentially describing the paradox of Platonic Truth, or the theory of "Forms," an ideal reality that Plato posited as existing separate from human consciousness.[23] To Kierkegaard, the truth could not exist without a relationship to the individual, and thus it was necessarily subjective. Using the example of love to demonstrate the inherent subjectivity of all things, he wrote, "Love is falling in love . . . Love does not exist as something objective but comes into being every time a man loves, and it exists only in the lover; not only does it exist *for* the lover but it

19. *Id.* at 12.

20. *Id.*

21. Paul V. Regelbrugge, *Barbarism in the Plastic Bubble: An Application of Exisentialist Theory to Capital Punishment in the United States* DET. C. L. REV. 1011, 1019 (1990).

22. SOREN KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT 183 (David F. Swenson trans., 1968).

23. PLATO, TIMEAUS, *reprinted in* THE COLLECTED WORKS OF PLATO 1178 (Huntington and Cairns eds. Princeton U. Press 1980).

exists only *in* the lover."[24]

From Franz Kafka's perspective, we see an even more stark expression of the absence of objective truth. To Kierkegaard, at least, who never relinquished his Christian beliefs, faith was a form of truth.[25] Kafka, on the other hand, did not believe that any explanation for existence was possible, that the "truth" was unknowable. In discussing the Greek myth, *Prometheus*, Kafka wrote: "The myth tries to explain the unexplainable. As it comes out of a ground of truth, it must end again in the unexplainable."[26] For Kafka, the truth was that there was no truth—or at least not a cognizable truth. As Kaufmann explains, "it is for the sake of truth that Kafka eschews reduction to a single explanation. The world that confronts us, and our life in it defy any attempt at a compelling exegesis: that life lends itself to many interpretations is of its essence."[27]

B. Rejection of Religion as an Intellectual and Moral Guide

Though Kierkegaard and other existentialist thinkers did not let go of their faith and belief in traditional religion, many existentialist writers viewed religious doctrine in the same way that they viewed other forms of philosophy—as purely subjective forms of belief. Nietzsche, for example, wrote, "faith means not wanting to know what is true."[28] He expanded on this idea in a famous passage from *The Gay Science*: "'Whither is God' he cried. 'I shall tell you. We have killed him – you and I . . . What did we do when we unchained this earth from its sun? . . . God is dead. God remains dead. And we have killed him.'"[29] Nietzsche is describing the effects of the search for truth on religious faith. Once it is determined that truth is subjective, the idea of an essential truth stemming from God is no longer plausible. Sartre sums up this point of view in his work, *Existentialism*: "The existentialist . . . finds it extremely embarrassing

24. SOREN KIERKEGAARD, ON AUTHORITY AND REVELATION: THE BOOK ON ADLER, OR A CYCLE OF ETHICO-RELIGIOUS ESSAYS, *reprinted in* EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE 105, 109 (Walter Kaufmann ed. and trans. 1989).

25. SOREN KIERKEGAARD, CONCLUDING UNSCIENTIFIC POSTSCRIPT, *reprinted in* EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE, 110, 111 (Walter Kaufmann ed. and trans., 1989).

26. KAUFMANN, *supra* note 18, at 143 (quoting FRANZ KAFTKA, THE CASTLE).

27. *Id.* at 143-144.

28. KAUFMANN, *supra* note 18, at 19 (quoting FRIEDRICH NIETZSCHE, ANTICHRIST).

29. NIETZSCHE, *supra* note 6, at 95.

that God does not exist, for there disappears with Him all possibility of finding values in an intelligible heaven. There can no longer be any good *a priori*, since there is no infinite and perfect consciousness to think it."[30]

C. Exaltation Experience and Individual Choice

Individual choice and the value of experience are two themes that recur in many of the works of existentialist thinkers. Walter Kaufmann writes of Kierkegaard that he criticized the Greeks and Christians because "they have tried to escape the need for choices."[31] Further, Kierkegaard viewed traditional philosophy as a "self-deception . . . an unrelenting effort to conceal crucial decisions that we have made and must make."[32] Kierkegaard wrote "[o]ne may liken dread to dizziness. He whose eye chances to look down into the yawning abyss becomes dizzy . . . dread is the dizziness of freedom."[33] Thus, in choosing to avoid dreaded choice, humans have also chosen to avoid beloved freedom.

To the existentialists, the very nature of the ideas they were propounding was that life must be experienced rather than merely contemplated, making writing about philosophy only second best to living it. Kaufmann describes the impulse for the work of Karl Jaspers as "a dissatisfaction with mere doctrines and the conviction that genuine philosophizing must well up from a man's individual existence and address itself to other individuals to help them to achieve true existence."[34] This sentiment was common among the existentialists. As Ranier Maria Rilke wrote in *Letters to a Young Poet*:

> [H]ave patience with everything unresolved in your heart and to try to love the questions themselves as if they were locked rooms or books written in a very foreign language. Don't search for the answers, which could not be given to you now, because you would not be able to live them. And the point is, to live everything. Live the questions now. Perhaps then, someday far in the future, you will gradually, without even noticing it, live

30. JEAN-PAUL SARTRE, EXISTENTIALISM IS A HUMANISM, *reprinted in* EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE 345, 353 (Kaufmann ed. and trans., 1989).

31. KAUFMANN, *supra* note 18, at 17.

32. *Id.*

33. SOREN KIERKEGAARD, THE CONCEPT OF DREAD, *reprinted in* EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE 101, 105 (Kaufmann ed. and trans., 1989).

34. KAUFMANN, *supra* note 18, at 23.

your way into the answer.[35]

To the existentialists, true living was found in the individual's experience of life—even a life that was full of hardship and travail.

D. Acceptance of Life as Pain and Suffering

Another common theme among the work of existentialist thinkers is the acceptance of life as full of pain and suffering. Once one has accepted the absence of a higher truth, and of a God to create a purpose for humanity, one recognizes the inherent emptiness of life.[36] But this is not to say that the existentialist is a pessimist. Once humans come to this realization, they can accept life, live it to its fullest extent, and even find their own salvation.[37] Kaufmann describes this aspect of Sartre's work:

> Man is free; but his freedom does not look like the glorious liberty of the Enlightenment; it is no longer the gift of God. Once again, man stands alone in the universe, responsible for his condition, likely to remain in a lowly state, but free to reach above the stars.[38]

Albert Camus expressed this acceptance of the tragic nature of human existence in his work, *The Myth of Sisyphus*, in which he relates the tragic myth of a man who, in punishment, must push a huge rock up a slope, only to have it roll back on its own weight.[39] He describes the human condition as tragic, absurd, and tortuous, and man himself as powerless, rebellious, wretched, and scornful.[40] Yet, Camus goes on to point out the essential duality of life: in the absurd, one finds joy and mastery of one's own destiny. "There is no sun without shadow, and it is essential to know the night."[41]

III. A Brief History of the Right to Privacy

To examine the parallels between existentialist philosophy and the right to philosophical privacy as formulated by the *Casey* plurality, it is necessary to trace the development of the right from its

35. RANIER MARIA RILKE, LETTERS TO A YOUNG POET 34-35, *reprinted in* AHEAD OF ALL PARTING: THE SELECTED POETRY AND PROSE OF RANIER MARIA RILKE (Stephen Mitchell, ed. and trans., Modern Library 1995).

36. KAUFMANN, *supra* note 18, at 46-47.

37. *Id.* at 46.

38. *Id.* at 47.

39. ALBERT CAMUS, *supra* note 9, at 375.

40. *Id.* at 376-378.

41. *Id.* at 378.

first promulgation in *Griswold v. Connecticut*.[42] In that case, brought by a married couple, the Court struck down a Connecticut law that banned the use of contraceptives.[43] Justice Douglas, writing for the majority, did not ground his finding of a right to privacy in the language of the Fourteenth Amendment.[44] Rather, he located this right in the "penumbras," or shadows, of the First, Third, Fourth, Fifth and Ninth Amendments.[45] His version of the right had a very spatial aspect, which he described as a "zone of privacy."[46] This zone was primarily located within the confines of the marital home and relationship. Justice Douglas wrote: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[47] Thus, the earliest notions of the right to privacy were much different than they are today. They focused on the marital relationship, and the intimacies of that relationship that occurred inside the home.

Just a few years after *Griswold* was decided, the Supreme Court expanded the right to privacy in a decision that many say opened the door to the Court's decision in *Roe v. Wade* one year later.[48] In *Eisenstadt v. Baird*,[49] the Court struck down a Massachusetts law that prohibited the distribution of contraceptives to unmarried people under the Equal Protection Clause of the Fourteenth Amendment.[50] The case was brought on behalf of a sex educator who had distributed contraceptive foam to a single female without a prescription after a lecture on the campus of Boston University,[51] and it transformed the right to privacy from the narrow holding in *Griswold* to something much broader.

First, the decision took the right of privacy outside the marital bedroom of *Griswold* into the public sphere, by focusing on a statute that prohibited not the use of contraception, but the distribution of

42. 381 U.S. 479 (1965).

43. *Id.*

44. *Id.* at 484.

45. *Id.*

46. *Id.* at 485.

47. *Id.* at 485-86.

48. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term through* Romer v. Evans, 32 IND. L. REV. 357, 364 (1999).

49. 405 U.S. 438 (1972).

50. *Id.* at 454.

51. *Id.* at 440.

it.[52] Second, the decision conferred the right of privacy given to married people in *Griswold* on individuals, both married and single.[53] Writing for the majority, Justice Brennan noted:

> [T]he marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[54]

This language was used by Justice Brennan to frame the issue in *Eisenstadt* as one of Equal Protection.[55] However, his use of the phrase "bear or beget" opened the door for the Court's decision in *Roe v. Wade*, one year later, by linking the right to privacy specifically to the issue of abortion.

In *Roe v. Wade*,[56] the Supreme Court firmly rooted the right to privacy in the Due Process Clause of the Fourteenth Amendment.[57] Furthermore, it extended the right to encompass a woman's decision whether or not to terminate a pregnancy.[58] While the Court expanded the spatial, marital, and decisional aspects of the right to privacy as enunciated in *Griswold* and *Eisenstadt* by adding the right to terminate a pregnancy, the Court's decision in *Roe* did not fundamentally alter the right to privacy.[59] While determining that abortion was, in fact, a fundamental right,[60] the decision in *Roe* also served to limit the right to privacy. As Justice Blackmun wrote:

> The privacy right involved . . . cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.[61]

This limiting language in *Roe* allowed the Court to reexamine its

52. *Id.* at 446.
53. *Id.* at 453 (citations and emphasis omitted).
54. *Id.*
55. *Id.* at 447.
56. 410 U.S. 113 (1973).
57. *Id.* at 153.
58. *Id.*
59. *Id.* at 154.
60. *Id.* at 152.
61. *Id.* at 154 (citations omitted).

holding twenty years later in the decision that is the foundation of this essay, *Planned Parenthood v. Casey*.[62] In that case, the Court backed away from its holding in *Roe* that abortion was a fundamental right.[63] The plurality opinion, while not "overrul[ing] *Roe*'s essential holding," dramatically changed the way abortion was viewed under the Constitution.[64] The language used by the plurality to define a woman's right to terminate her pregnancy turned from "fundamental right" to "liberty."[65] Additionally, rather than limiting the state's interest in potential life to after the point of viability as the Court had done in *Roe*,[66] the *Casey* plurality wrote that "there is a substantial state interest in potential life throughout pregnancy."[67] This meant, in the plurality's view, that the state could regulate abortion at any time and in any manner as long as it did not impose an undue burden on a woman's right to seek an abortion.[68]

What is exceptional about *Casey* is that the plurality proposes these sweeping changes to the *Roe* regime, while at the same time proclaiming the existence of a right to philosophical privacy "central to the liberty protected by the Fourteenth Amendment."[69] While many view the enunciation of this new aspect of the right to privacy as mere dicta,[70] the language of the *Casey* plurality decision is undeniably linked to the themes of existentialist philosophy. It has been used in subsequent cases to evaluate new questions that arise under the right to privacy implicit in the Due Process Clause of the Fourteenth Amendment, and implicates larger questions of the role of morality in our system of constitutionally based democracy.

IV. Existentialist Analysis of *Casey*

The language of the *Casey* plurality is virtually incomparable to anything previously written by the Supreme Court and is perhaps the most "philosophical" language the court has ever put its name to. It is arguable that this kind of writing has no place in the Supreme

62. 505 U.S. 833 (1992).
63. *Id.* at 869.
64. *Id.*
65. *Id.*
66. Roe v. Wade, 410 U.S. 113, 163 (1973).
67. *Casey*, 505 U.S. at 876.
68. *Id.* at 878.
69. *Id.* at 851.
70. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting).

Court's constitutional jurisprudence.[71] But as the existence of this language shows, in the plurality's own words, "[a]bortion is a unique act."[72] In accordance with this realization about abortion, the plurality sets a unique tone for its opinion:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.[73]

It is difficult to read these words without conjuring up images of the existentialist philosophers, and it is thus appropriate that the decision in *Casey* implicates some of the central themes of that philosophy, such as the rejection of traditional notions of right and wrong, a dismissal of Judeo-Christian morality as a guide for social legislation, and a prioritizing of individual experience above majority rule. Since *Casey*'s time, this language has been utilized in other Supreme Court decisions that focus on the acceptability of morality-based legislation,[74] and it is possible that this employment of existentialist philosophy may provide us with clues as to the future of the Supreme Court's jurisprudence regarding moral questions. It is with this in mind that we turn to the existentialist critique of *Planned Parenthood v. Casey*.

A. Rejection of Traditional Philosophy

In the famous passage citied above, the plurality seems to be echoing one of the main tenets of existentialist thought. That, at least with regard to the issue of abortion, there is no "truth" in the Platonic sense of the world. One critic of the *Casey* decision writes:

> Having so defined liberty, Justice O'Connor has adopted the existential premise that there is no preexisting right or wrong, no objective truth that informs or limits individual choice. She has in the name of constitutional law borrowed a page from Jean-Paul Sartre's *Being and Nothingness* in which Sartre claims that each individual human being has absolute freedom of choice without regard for consequences of for societal norms.[75]

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71. *See, e.g., id.* at 588 (Scalia, J., dissenting).

72. *Casey*, 505 U.S. at 852.

73. *Id.* at 851.

74. *See, e.g.,* Washington v. Glucksberg, 521 U.S. 702, 726 (1997); *Lawrence,* 539 U.S. at 574.

75. Herbert W. Titus, *Defining Marriage and the Family*, 3 WM. & MARY BILL RTS. J. 327, 336 (1994) (footnote omitted). Titus wrongly attributes the above quoted passage

To the contrary, the *Casey* plurality merely seems to accept that we as a society do not know whether abortion is acceptable or intolerable, whether it is a mere medical procedure or murder, whether it is "right" or "wrong." As Kierkegaard notes, "what is in itself true may in the mouth of such and such a person become untrue."[76] Similarly, the plurality writes:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.[77]

Therefore, the State should not attempt to dictate whether individuals can act on these widely varying beliefs. The plurality recognizes that the essence of the abortion issue is a purely moral question. Even Justice Scalia acknowledges this fact in his dissent: "There is of course no way to determine [whether the fetus is merely potentially human] as a legal matter; it is in fact a value judgment. Some societies have considered newborn children not yet human, or the incompetent elderly no longer so."[78] Though Justice Scalia believes that it is wholly appropriate for the state to legislate on such matters,[79] the plurality decision suggests that it is a question that can never be answered with a yes or a no by the courts or the legislatures.

B. Religious Disparity in the Abortion Discourse

One of the defining characteristics of the Supreme Court's jurisprudence on abortion is the refusal to accept traditional religious morality as a basis for constitutional interpretation. Abortion is an anathema to most religious traditions because it is believed that a fetus is a person, and taking that life through abortion is the equivalent of murder.[80] One scholar has suggested in response to the existentialist language of the *Casey* plurality that "to claim that one

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from *Casey* to Justice O'Connor. However, the language comes from a plurality decision with no single cited author.

76. SOREN KIERKEGAARD, *supra* note 22, at 181.

77. *Casey*, 505 U.S. at 850.

78. *Id.* at 982 (Scalia, J., dissenting).

79. *Id.* at 1001 (Scalia, J., dissenting).

80. John Cornyn, *Restoring our Broken Judicial Confirmation Process*, 8 TEX. REV. L. & POL. 1, n.42 (2003) (discussing the official position of the Catholic Church, "which characterizes abortion as an 'abominable crime'").

has the right to define one's own meaning, existence, universe, and the mystery of human life is to claim that one is God."[81] In his condemnation, this scholar has gotten it exactly right. Sartre himself once wrote: "man is the being who wants to be God."[82] But, as noted above, the existentialist perspective, like the perspective of the *Casey* plurality, rather than trying to replace God, is looking for direction after accepting that God does not exist (*i.e.* that religion cannot act as our moral compass). As one writer put it, "the Sartrean view [is] that we are not bound by nature or God to any fixed way of being."[83] Though the *Casey* plurality does not directly address the religious aspects of the abortion debate, Justice Blackmun's dissent in *Bowers v. Hardwick* sums up well the plurality's position:

> That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.[84]

C. Individual Autonomy, Personal Choice and Experience

The crux of the legal question in *Casey* is one that the existentialists gave utmost importance: the question of choice. Alongside choice exists the deeply held existentialist values of personal experience and individual autonomy. As one scholar characterizes the existentialist views: "human beings create and define themselves through their choices and acts."[85] Therefore, "'choice' . . . is a higher value than any traditional concept of a fixed moral code."[86] Likewise, the *Casey* plurality finds that, "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[87] They write that *Casey* involves "personal decisions concerning not only the meaning of procreation but also . . . *responsibility* [. . .] for it."[88] Like Rilke, the plurality is announcing: "*You* must change your

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81. Herbert Titus, *supra* note 74, at 338.

82. KAUFMANN, *supra* note 18, at 47 (quoting Jean-Paul Sartre, *L'etre et le neant*).

83. David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975, 983 (1992).

84. 478 U.S. 186, 211 (1986) (Blackmun, J. dissenting).

85. Smolin, *supra* note 82, at 981.

86. *Id.* at 983.

87. Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992).

88. *Id.* at 853 (emphasis added).

life."[89] It is not the place of society or the legislature to do it for you. What follows is that a woman must have the ability to choose whether or not to terminate her pregnancy.

D. Acceptance of Pain and Suffering

The plurality in *Casey* seems to accept this essential existentialist premise. Life can be painful, and that humans will encounter tough decisions. The Court is by no means promoting abortion as a "good" thing. However, it has accepted abortion as a tragic and necessary party of the human condition. "[A woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role . . . ."[90] The plurality describes abortion as "an act fraught with consequences" and pregnancy as an anxiety provoking, painful sacrifice that women have endured from the beginning of the human race.[91] Their willingness to continue to condone abortion is nothing more than an acceptance of this pain and suffering, and an understanding that humans must experience it if they are ever to find their own salvation.

One concurring Justice in *Casey* does not limit his discussion of existence and the universe to the issue of abortion. In an ultimate existentialist gesture, Justice Blackmun takes a few sentences of his decision to contemplate his own mortality: "I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made."[92] This melding of judicial opinion and personal reflection is reflected in the tone of Dostoevsky's narrator in *Notes from the Underground*, described here by Kaufmann: "it is man's inner life, his moods, anxieties, and his decisions, that are moved into the center until, as it were, no scenery at all remains."[93]

V. Morals-Based Legislation and the Role of Courts

With the statement that its obligation is not to "mandate [its]

89. KAUFMANN, *supra* note 18, at 30 (quoting Ranier Maria Rilke) (emphasis added).

90. *Casey*, 505 U.S. at 852.

91. *Id.*

92. *Id.* at 943.

93. KAUFMANN, *supra* note 18, at 13.

own moral code"[94] the plurality in *Casey* is touching upon a question that is at the heart of this case as well as other right-to-privacy cases: what is the role of government in moral decision-making? The dissenters in *Casey* clearly believe this is the province of state legislatures.[95] The plurality, on the other hand, suggests that questions of morality are for the individual to decide; yet even by making this claim, the Court is imposing its own perspective on society, implicating questions of the legitimacy of judicial review. Still, in keeping with their existentialist perspective—its primacy of the individual and rejection of traditional systems of belief—the plurality is consistent in expressing the view that individuals should be allowed to determine their own moral code.

Justice Scalia's dissent in *Casey* expresses a vastly different view than the plurality of the Court's role in the abortion debate. However, his opinion is not necessarily as at odds with the plurality's as he suggests. He writes that the court is substituting "value judgments" for constitutional interpretation.[96] And further, that "value judgments should be voted on, not dictated."[97] Justice Scalia is agreeing with the plurality that the Court should not be making moral decisions, but he is also taking issue with the plurality for even setting forth an opinion as to who should be making these decisions. For Justice Scalia, it is solely the province of legislatures to mandate a moral code for society and the Court should not interfere with this legislative decision making at all.

In his concurring opinion, Justice Blackmun directly challenges Justice Scalia's claims that the legislature is the correct forum for moral decision-making. He writes,

> But we are reassured, there is always the protection of the democratic process. While there is much to be praised about our democracy, our country since its founding has recognized that there are certain fundamental liberties that are not to be left to the whims of an election. A woman's right to reproductive choice is one of those fundamental liberties. Accordingly, that liberty need not seek refuge at the ballot box.[98]

Justice Blackmun explains what Justice Scalia seemingly fails to consider: that a popular vote on issues such as abortion, or laws

94. *Casey*, 505 U.S. at 850.

95. *Id.* at 1001 (Scalia, J., dissenting).

96. *Id.* at 1000-1001 (Scalia, J., dissenting).

97. *Id.* at 1001 (Scalia, J., dissenting).

98. *Id.* at 943.

passed by legislatures, or decisions by an "imperial judiciary,"[99] are all equally dictatorial. Justice Blackmun quotes the plurality, saying "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."[100] He has distilled the reason why the legislative process is not equipped to handle the question of abortion: it takes into account the will of those to whom the issue is practically irrelevant. Essentially, decisions regarding abortion should not be majoritarian decisions, but rather, should be made by those who are directly affected by them. Furthermore, Justice Blackmun supports the power of the Court to weigh in when states are not protecting the interest of this relevant minority. He writes that if the Court were to follow Justice Scalia's advice and "get out of this area,"[101] it would be abdicating its constitutional responsibility.[102]

Justice Kennedy takes a similar tone as Justice Blackmun when discussing whether judicial review is appropriate in the realm of moral issues. In *Casey*, he joins the plurality, whose opinion on this issue is discussed above. It is in other cases that Justice Kennedy really expresses his views on this matter. In his dissent in *U.S. v. Lopez*,[103] Kennedy echoes Justice Blackmun's opinion that the constitutional structure requires the Court to play a role in answering these types of questions.[104]

First, in discussing whether the federal government has a role in regulating areas that are generally seen as the province of the states, Kennedy writes: "Judicial review is [. . .] established beyond question, *Marbury v. Madison,* [citation omitted], and though we may differ when applying its principles, see, *e.g., Planned Parenthood of Southeastern Pa. v. Casey,* . . . its legitimacy is undoubted."[105] Kennedy further discusses the relationship between the states and the federal government, a precarious balance that the Court is often asked to help maintain. He quotes *The Federalist No. 51* to support his view that the federal system is necessary to protect individual liberty:

99. *Id.* at 997.
100. *Id.* at 925.
101. *Id.* at 1002 (Scalia, J., dissenting).
102. *Id.* at 943, n.12.
103. 514 U.S. 549 (1995).
104. *Id.* at 575 (Kennedy, J., concurring).
105. *Id.*

> Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. 'In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.'[106]

According to Justice Kennedy, the very structure of the federal government provides protection for individual rights.[107] If the federal and state governments, and every branch found within, fulfill their constitutional duties, the rights of the individual will be protected.

Poe v. Ullman,[108] decided a few years before *Griswold*, provides nice insight into the views of past Supreme Court Justices on the question of whether a state should legislate on moral issues, and whether the Court may review such "democratic" decisions. Justice Douglas writes:

> We should say with Kant that 'It is absurd to expect to be enlightened by Reason, and at the same time to prescribe to her what side of the question she must adopt.' Leveling the discourse of medical men to the morality of a particular community is a deadening influence.[109]

While Justice Douglas goes on to recognize that legislatures often do and must legislate in the realm of morality, he sees that this ability must be limited through mechanisms such as judicial review: "to say that a legislature may do anything not within a specific guarantee of the Constitution may be as crippling to a free society as to allow it to override specific guarantees so long as what it does fails to shock the sensibilities of a majority of the Court."[110]

Justice Harlan takes a slightly different tone when discussing the power of the state to infringe on individual freedom by legislating morality. While recognizing the state "has traditionally concerned itself with the moral soundness of its people,"[111] he suggests, like the

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106. *Id.* at 576 (Kennedy, J., concurring) (quoting James Madison, The Federalist No. 51, at 323 (C. Rossiter ed., 1961).

107. *Id.*

108. 367 U.S. 497 (1961)

109. *Id.* at 514 (Douglas, J., dissenting) (quoting EMANUEL KANT, THE CRITIQUE OF PURE REASON, 42 Great Books, p. 221 [sic]).

110. *Id.* at 518 (Douglas, J., dissenting).

111. *Id.* at 546 (Harlan, J., dissenting).

dissent in *Bowers v. Hardwick*,[112] discussed above, that limitations should be placed on this power.[113] Justice Harlan argues that where the state is acting solely to "protect the moral welfare of its citizenry," and in doing so is infringing on a basic right, the state is acting in an unconstitutional manner.[114] He writes that "the mere assertion that the action of the State finds justification in the controversial realm of morals cannot alone justify any and every restriction it imposes."[115]

However, Justice Harlan also approaches such moral questions with great hesitancy and expresses a restrictive view of the Court's role in weighing in on such issues.[116] He admits that the state's judgment on personal issues such as abortion and homosexuality are no more correct than the judgment of the Court or of individuals.[117] He even suggests that had the case in question been one of abstract moral principles, he would question the Court's role in the decision making process:

> If we had a case before us which required us to decide simply, and in abstraction, whether the moral judgment implicit in the application of the present statute to married couples was a sound one, the very controversial nature of these questions would, I think, require us to hesitate long before concluding that the Constitution precluded Connecticut from choosing as it has among these various views.[118]

The existentialists' view of morality is largely a product of the rejection of a traditional religious understanding of the world. For the (non-Christian) existentialists, the end of belief in religion has set humanity morally adrift.[119] Nietzsche's view is particularly bleak: "'All lacks meaning.' (The untenability of one interpretation of the world, upon which a tremendous amount of energy has been lavished, awakens the suspicion that all interpretations of the worlds are false.)"[120] But, other existentialist thinkers offer more of a solution for moral direction than Nietzsche suggests. Rather than just accept,

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112. *See,* 478 U.S. 186, 211 (1986) (Blackmun, J., dissenting).

113. *Poe*, 367 U.S. at 545 (Harlan, J., dissenting).

114. *Id.*

115. *Id.*

116. *Id.* at 547.

117. *Id.*

118. *Id.*

119. FRIEDRICH NIETZSCHE, THE WILL TO POWER, *reprinted in* EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE 130, 131 (Kaufmann ed. and trans. 1989).

120. *Id.*

as Nietzsche has, that no moral or ethical truth exists, Kierkegaard urges one to find direction in oneself: "I must find a truth that is true for me . . . ."[121] Kierkegaard also tells us where not to look in the search for truth: "Politics, etc., have nothing to do with 'eternal truth.'"[122] One scholar has suggested that the existentialist perspective on law and morality is similar to John Stuart Mill's theory of liberty, which argues that the power of the state should be limited to the prevention of harm to others and the state has no authority to dictate its own moral code through legislation.[123] Thus, from an existentialist perspective, the state certainly should not prescribe individual morality; rather, it is up to individuals to create their own moral code.

VI. *Casey*'s Legacy

The legacy of *Casey*, with its existentialist undertones, is still being developed in the Supreme Court's jurisprudence, and the end result of this kind of judicial thinking is in no way clear. The plurality's language from *Casey* regarding existence has been quoted in only two other Supreme Court cases to date, both significantly related to the existentialist themes discussed above, and ultimately turning on the question of whether the state may regulate an individual's moral decisions. In one of these cases, *Washington v. Glucksberg*,[124] the Court backed away from the philosophical privacy promulgated in *Casey* when it upheld a Washington State law banning physician-assisted suicide. But six years later, the Court once again embraced the notion of philosophical privacy with its decision in *Lawrence v. Texas*,[125] overturning a state anti-sodomy law.

A. The Right to Die

In *Washington v. Glucksberg*, the Court confronted the question of whether there exists a "liberty interest protected by the Fourteenth Amendment which extends to a personal choice by a mentally competent, terminally ill adult to commit physician assisted

121. Microsoft® Encarta® Online Encyclopedia, *Existentialism* (2004), *available at* http://encarta.msn.com (quoting SOREN KIERKEGAARD, THE JOURNALS)

122. SOREN KIERKEGAARD, "THAT INDIVIDUAL": TWO "NOTES" CONCERNING MY WORK AS AN AUTHOR, *reprinted in* EXISTENTIALISM FROM DOSTOEVSKY TO SARTRE 94, 97 (Kaufmann ed. and trans. 1989).

123. David M. Smolin, *supra* note 83, at 981.

124. 521 U.S. 702 (1997).

125. 539 U.S. 558 (2003).

suicide."[126] The Court rejected the petitioner's argument that the existentialist freedom promulgated in *Casey* extended to the right to die.[127] Writing for the majority, Chief Justice Rehnquist notes, "that many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . and *Casey* did not suggest otherwise."[128] In further trying to limit the effect of the expansive language of *Casey*, Chief Justice Rehnquist directly confronts the duality of the plurality's philosophical stance regarding questions of existence: "The opinion [in *Casey*] moved from the recognition that liberty necessarily includes freedom of conscience and belief about ultimate considerations to the observations that 'though the abortion decision may originate within the zone of conscience and belief, it is more than a philosophical exercise.'"[129] Thus, just four years after the *Casey* decision, the Court had essentially attempted to limit the application of the doctrine of existentialist freedom. But not all the Justices agreed. Justice Stevens, for one, refused to allow the majority in *Glucksberg* to deny the strength of the plurality decision in *Casey*.[130]

In his concurring opinion, Justice Stevens reinvigorates the opinion of the *Casey* plurality by pointing out that that case actually affirmed the rights of individuals to make personal decisions when their interests outweighed those of the state.[131] Justice Stevens compares the *Glucksberg* case to that of *Cruzan v. Department of Public Health*,[132] where the Court affirmed the right of a mentally competent individual to refuse life sustaining medical treatment, and concludes that questions regarding assisted suicide were within the contemplation of the plurality decision in *Casey*. He writes:

> Whatever the outer limits of the [right to privacy] may be, it definitely includes protection for matters "central to personal dignity and autonomy." . . . Avoiding intolerable pain and the indignity of living one's final days incapacitated and in agony is certainly "[a]t the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the

126. 521 U.S. 702, 705-708 (1997).

127. *Id.* at 726.

128. *Id.*

129. *Id.* (quoting Planned Parenthood v. Casey, 505 U.S. 833, 852 (1992)).

130. *Glucksberg*, 521 U.S. at 744 (1997) (Stevens, J., concurring).

131. *Id.*

132. 497 U.S. 261 (1990).

universe, and of the mystery of human life."[133]

Justice Stevens' opinion on the matter of decisions regarding life and death echoes the existentialist philosophers in that he accepts the fact that individuals have vastly differing opinions about what is "right."[134] He makes a strong argument that legislative decision-making regarding such deeply personal issues is inappropriate because in passing laws on the matter, the democratic system necessarily disregards the deeply held beliefs and choices of many citizens:

> Some find value in living through suffering; some have an abiding desire to witness particular events in their families' lives; many believe it a sin to hasten death. Individuals of different religious faiths make different judgments and choices about whether to live on under such circumstances. There are those who will want to continue aggressive treatment; those who would prefer terminal sedation; and those who will seek withdrawal from life-support systems and death by gradual starvation and dehydration . . . "[N]o uniform collective decision can possibly hope to serve everyone even decently."[135]

Furthermore, promoting the existentialist notion of individualism, Justice Stevens points out that the state interest in protecting human life is in fact an aspect of "individual freedom" rather than a "collective interest."[136]

Despite this convincing argument by Justice Stevens, the Court found that the individual liberty expressed by the *Casey* plurality did not extend to the right to assisted suicide.[137] It appeared that the "existential privacy" promulgated in *Casey* was to be limited to certain situations regarding unwanted pregnancies.

B. The Right to Sexual Intimacy

This limited applicability of the *Casey* plurality's language remained intact for six years, until the Court's recent decision in *Lawrence v. Texas*.[138] In that decision, the Court struck down a Texas law that proscribed consensual same-sex sexual acts, finding that it infringed on the individual's right to liberty as protected by the Due

133. *Glucksberg*, 521 U.S. at 744 (quoting *Casey*, 505 U.S. at 851).

134. *Id.* at 746.

135. *Id.* at 747 (quoting R. DWORKIN, LIFE'S DOMINION 213 (1993)).

136. *Id.* at 746.

137. *Id.* at 735.

138. Lawrence v. Texas, 539 U.S. 558 (2003).

Process Clause of the Fourteenth Amendment.[139]

Writing for the Court, Justice Kennedy's wholehearted adoption of the ideas expressed in *Casey* puts to rest any doubts about the applicability and relevance of the existentialist language in that opinion. The same type of philosophical freedom expressed in *Casey* is echoed in the first paragraph of the *Lawrence* decision: "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions."[140] With this language, Justice Kennedy is clearly attempting to reinforce the idea of philosophical privacy promulgated by the *Casey* plurality, and is formulating a right to privacy that encompasses most individual moral decisions.

In *Lawrence*, the Court engaged in another discussion of the role of morality in legislation and judicial review. The majority expressed the view taken by Justice Harlan in his dissent in *Poe*:[141] if moral condemnation is the only justification for a law that attempts to regulate deeply personal issues, that law violates the Due Process Clause of the Fourteenth Amendment.

> The condemnation [of homosexual conduct] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society.[142]

One scholar argues that the decision in *Lawrence* marks a turning point in Supreme Court jurisprudence permanently away from condoning morals-based legislation.[143] This is the same criticism voiced by Justice Scalia in his dissent in *Lawrence*. Justice Scalia argues that "state laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and

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139. *Id.* at 578.

140. *Id.* at 562.

141. Poe v. Ullman, 367 U.S. 497, 545 (Harlan, J. dissenting).

142. *Lawrence*, 539 U.S. at 571.

143. Saama Saifee, Note, *Penumbras, Privacy, and the Death of Morals-Based Legislation: Comparing U.S. Constitutional Law with the Inherent Right of Privacy in Islamic Jurisprudence*, 27 FORDHAM INT'L L.J. 370, 446 (2003).

obscenity are . . . sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision."[144] In Justice Scalia's view, it is perfectly acceptable for laws to be based on notions of morality.[145] He argues that the promotion of "majoritarian sexual morality"[146] is a legitimate state interest, and specifically, that Texas' anti-sodomy law "seeks to further the belief of its citizens that certain forms of sexual behavior are 'immoral and unacceptable.'"[147]

It is difficult to accord the views of the *Lawrence* majority with those expressed in Justice Scalia's dissent. Clearly, these two sides of the Court have vastly different views of the role of law in society. One scholar claims that the disparity in these opinions is actually based on fundamentally different understandings of morality itself.[148] He writes:

> Justice Scalia understands morality to be obedience to a set of rules established by higher authority. If one believes that morality constitutes an authoritative code of conduct, it is not only reasonable but imperative for the democratic majority to enact this code of conduct into law. The moral understanding of the majority is fundamentally different . . . Consistent with [the "mystery of life" passage in *Casey*] is the idea that "intimate and personal choices" constitute moral choices only if individuals are free to make those choices. The essence of morality is the power to choose right from wrong. When choice is taken away from the individual, it is no longer a question of morality, but a question of law. The decision of the majority in *Lawrence* distinguishes "essentially moral choices" from legal imperatives.[149]

This description of the *Lawrence* majority's view on morality seems to be exactly in line with the views promulgated by the existentialist thinkers discussed above. The majority's opinion expresses a clear rejection of traditional notions of right and wrong, not only in the overruling of its own precedent,[150] but in its rejection

144. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

145. *Id.*

146. *Id.* at 599 (Scalia, J., dissenting).

147. *Id.* (quoting Bowers v. Hardwick, 478 U.S. 186, 196 (1986)).

148. Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in* Grutter *and* Lawrence, 12 WM. & MARY BILL RTS. J. 65, 91 (2003).

149. *Id.* at 91-92.

150. *Lawrence*, 539 U.S. at 578 ("*Bowers v. Hardwick* should be and now is overruled.").

of eternal truths[151] and of religious morality.[152] It also promotes the values of individual choice and self-determination as well as an acceptance of suffering if that is truly what one's own decisions will lead to.[153] It seems that the Supreme Court (at least a majority of it) has finally taken the advice of the existentialists, and, in Justice Scalia's words, has "effectively decree[d] the end of all morals legislation."[154]

VII. Conclusion

The Supreme Court's decision in *Planned Parenthood v. Casey* is a landmark decision, not only because of its substantial effect on abortion rights, but also because of its introduction of existentialist philosophy into constitutional jurisprudence. The plurality opinion in *Casey* wholly embraced the fundamental tenets of existentialist philosophy, including its rejection of the idea of eternal truth and religion as a moral guide for society, its exaltation of individual choice and autonomy, and its acceptance of the pain and suffering as part of the human condition.

Casey also marked the continuing evolution of the right to privacy. First promulgated in *Griswold v. Connecticut* as implicit in the Due Process Clause of the Fourteenth Amendment, the right to privacy was limited in a spatial sense to the marital home or bedroom, and in the relational sense, in its application only applied to married couples. In *Eisenstadt v. Baird*, the right was enlarged to include public acts and conferred specifically on individuals. That case opened the door for the right of privacy to be expanded, in *Roe v. Wade*, to encompass the decision whether or not to terminate a pregnancy. In *Casey*, decided nearly 20 years after *Roe*, the right to privacy was yet again transformed through the existentialist language of the plurality's decision, to include a liberty interest in philosophical and moral privacy, and personal autonomy.

The *Casey* plurality deemed that the right to make moral decisions regarding intimate issues should be the sole province of the

151. *Id.* at 579 ("[L]aws once thought necessary and proper in fact serve only to oppress.").

152. *Id.* at 571 (citing and rejecting Chief Justice Burger's statement in *Bowers* that "[c]ondemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards." *Bowers*, 478 U.S. at 196).

153. *Id.* at 578 ("The State cannot . . . control their destiny by making their private sexual conduct a crime.").

154. *Id.* at 599 (Scalia, J., dissenting).

individual. By taking this stance, the Court brought into the discussion the larger question of morals-based legislation, and its implications for judicial review and the democratic process, issues that have been debated throughout the long history of Supreme Court jurisprudence. Due to the absence of a clear majority in *Casey*, however, the Court's view on the issue of morals-based legislation was never fully articulated.

Casey's legacy can be clearly tracked through the limited number of cases that have used its notorious language in their interpretations of the right to privacy. In *Washington v. Glucksberg*, the Court wrestled with the precedent set forth in *Casey*, and ultimately deemed that the liberty interest expressed there did not extend to the right to assisted suicide. Finally, *Lawrence v. Texas* marks the most recent evolution of the right to privacy, and an embrace by a majority of the Court of many of *Casey*'s foundational ideas. In that case, the Court reaffirmed that the individual has the sole right to make certain intimate, philosophical and moral decisions and took a firmer stance on the issue of morals-based legislation. In accord with its existentialist leanings, the Court suggested that morals-based legislation has a very limited place in the American legal system.

The legacy of *Planned Parenthood v. Casey* lives on. After *Lawrence*, it seems clear that the existentialist values set forth by the Court in *Casey* will play a continuing role in the Supreme Court's Fourteenth Amendment jurisprudence.

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