

WALKING A TIGHTROPE: THE FINE LINE BETWEEN  
PERSONAL AUTONOMY AND EUTHANASIA AND THE  
EUGENIC EFFECTS OF BOTH

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I. INTRODUCTION

The National Socialist Party has been condemned worldwide for the tactics employed during the holocaust. One of these tactics was euthanasia legislation. The question this article will explore is, whether United States abortion laws reaching a similar eugenic outcome as the National Socialist Party euthanasia laws? This article is a comparison of the legality the eugenic effects of the initiatives employed by the National Socialist Party for the purpose eliminating the handicapped from the population, and the current status of United States abortion laws effects on the population of handicapped people.

NATIONAL SOCIALIST'S: LIFE UNWORTHY OF LIFE

Hitler's ascended to power in 1933, and the issuing of laws and activation of civil service to exclude the regime's biological enemies closely followed.<sup>1</sup> The sterilization law<sup>2</sup> served throughout the Third Reich as the model for all eugenic legislation.<sup>3</sup>

Addressing the critics of the sterilization practices at the September 11, 1936 Nuremberg Rally, Gerhard Wagner<sup>4</sup> said:

As for you critics..., we refuse you the  
right to judge whether we are acting  
correctly when we prevent inferior life  
as long as you promote the unlimited

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<sup>1</sup> Henry Friedlander, "The Origins of Nazi Genocide: FROM EUTHANASIA TO THE FINAL SOLUTION" 23 (1995).

<sup>2</sup> Promulgated July 1933. The sterilization law introduced compulsory sterilization for individuals suffering from an array of mental or physical disorders and also defined the groups to be excluded from the national community. *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Gerhard Wagner was a physician, and head of the National Socialist Physicians' Association. Randall L. Bytwerk, Landmark Speeches of National Socialism 66 (Martin J. Medhurst, 2008).

right to abortion<sup>5</sup> when the growing life is valuable, whenever the mother, a doctor, or someone else wishes it.<sup>6</sup>

Sterilization of the handicapped opened the way for euthanasia, and proved to be the opening number of the holocaust.<sup>7</sup> The National Socialist Party implemented a vast propaganda campaign with the object of showing the benefits of euthanasia to the German people.<sup>8</sup> In 1935, Adolf Hitler told Gerhard Wagner that he would implement euthanasia when the war began.<sup>9</sup> Three years later, the Knauer baby gave Hitler his justification to begin the euthanasia program.<sup>10</sup>

The Knauer family, along with many other families, had appealed to Hitler to authorize euthanasia.<sup>11</sup> The Knauer baby was diagnosed an “idiot” by physicians; evidence suggests the baby was born blind with a leg and part of an arm missing.<sup>12</sup> After admitting the baby to the Leipzig University Children’s Clinic the baby’s father asked that the physician kill the baby, the physician refused because it was against the law.<sup>13</sup> Hitler instructed his personal physician Karl Brandt to visit the hospital and if diagnosis agreed with the facts stipulated in the fathers appeal Brandt was to authorize euthanasia.<sup>14</sup>

After the killing of the Knauer baby Hitler instructed Brandt to plan the implementation of euthanasia<sup>15</sup> by setting up a fictitious organization, existing only on paper, titled ‘Reich Committee for the Scientific Registration of Sever Hereditary Ailments.’<sup>16</sup> On August 18, 1939 a decree entitled “Requirement to

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<sup>5</sup> In 1935, a “eugenic justification” for abortion was introduced into the criminal code by the National Socialist Party, and in 1943 they supplemented §218 with a clause demanding the death penalty for abortions “in cases where the vitality of the German people is threatened.” Myra Marx Ferree, William Anthony Gamson, Jürgen Gerhards, Dieter Rucht, *Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States* 27 (2002).

<sup>6</sup> Bytwerk, *supra* note 4 at 73.

<sup>7</sup> Friedlander, *supra* note 1 at 22.

<sup>8</sup> Holocaust Education and Archive Research Team, Introduction to Nazi Euthanasia <http://www.holocaustresearchproject.org/euthan/>.

<sup>9</sup> Friedlander, *supra* note 1 at 39.

<sup>10</sup> *Id.*

<sup>11</sup> Holocaust Education, *supra* note 9.

<sup>12</sup> Friedlander, *supra* note 7.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> Holocaust Education, *supra* note 9.

<sup>16</sup> Friedlander, *supra* note 1 at 44.

Register deformed etc. Newborn” ordered midwives and physicians to report all children under the age of three with specified medical conditions.<sup>17</sup><sup>18</sup> The opening sentence of the decree created the impression that the ministry wanted this information for scientific research to aid children with serious medical conditions.<sup>19</sup> Sent with the decree was a form<sup>20</sup> for the midwives and physicians to fill out and hand over to the local public health officer.<sup>21</sup> The local public health officer confirmed the information and transmitted the report to the Reich Committee.<sup>22</sup>

The foundation was laid for the mechanism of euthanasia, and in October 1939 Hitler sent a secret decree, to Dr. Brandt and Reich Leader Bouhler authorizing “mercy deaths” for patients considered incurable.<sup>23</sup> The decree was backdated to September 1, 1939, the beginning of the war.<sup>24</sup> Codenamed Operation T-4<sup>25</sup> the goal was to eliminate persons the National Socialist authorities deemed “life unworthy of life.”<sup>26</sup>

Two functionaries<sup>27</sup>, without medical training, received the forms filled out by the nurses and physicians from the Reich Committee’s post office box and decided which cases merited special attention from medical experts.<sup>28</sup> Three medical experts<sup>29</sup>

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<sup>17</sup> Jonathan C. Friedman – *The Routledge History of the Holocaust* 162 (2011).

<sup>18</sup> The medical conditions specified are: (1) idiocy as well as mongolism (especially cases also involving blindness and deafness); (2) microcephaly (abnormally small head); (3) severe or progressive hydrocephalus; (3) all deformities, especially missing limbs, severely defective closure of the head and the vertebral column, etc., and; (5) paralysis, including spastic dysplasia. *Id.*

<sup>19</sup> The opening sentence stated: “Early registration of the appropriate cases involving hereditary deformations and mental retardation is essential for the clarification of scientific questions.” *Id.*

<sup>20</sup> The form was one side of one page and required: name; age; sex; detailed description of the illness; how the child’s ability to function is hampered by the illness; name of the hospital and details about the child’s stay; projected life expectancy; and changes for improvement. New forms distributed June 7, 1940 required more information including: the child’s address and religion. Friedlander, *supra* note 1 at 45.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Holocaust Education, *supra* note 9.

<sup>24</sup> *Id.*

<sup>25</sup> The codename was taken from the address, Tiergartenstrasse 4, rented by the KdF (Kraft durch Freude, Gernam for Strength through Joy). *Id.*

<sup>26</sup> Friedman, *supra* note 19 at 137.

<sup>27</sup> The two functionaries are named, Hefelmann and von Hegener. Friedlander, *supra* note 1 at 46.

<sup>28</sup> *Id.*

<sup>29</sup> Werner Catel, Hans Heinze, and Ernst Wentzler were the three experts. All were members of the planning committee and proponents of euthanasia. *Id.*

evaluated the forms without seeing the child or consulting medical case histories, basing their decisions whether or not to kill solely on the reporting forms.<sup>30</sup> The three experts all recorded their votes whether the child should live or die on the same sheet, therefore each of the three knew how the other two voted.<sup>31</sup>

The Reich Committee created 'children's wards' for expert care at state hospitals and clinics to effect the killing of the children.<sup>32</sup> On July 1, 1940 the Reich Committee's first children's ward was established under the direction of Hans Heinze at Brandenburg-Görden (near Berlin).<sup>33</sup> Disguising the programs actual intent, a decree informed public health offices that, "under expert medical supervision the psychiatric children's ward... will provide all available therapeutic interventions made possible by recent scientific discoveries."<sup>34</sup>

The policy of killing children was initiated and managed by the bureaucrats of the KdF<sup>35</sup> but its execution was left to the physicians in the children's ward.<sup>36</sup> The favored method for the killing of children was using medication, usually luminal or morphine-scopolamine, administered by putting a tablet (or liquid form) of the medicine into tea so the child would ingest it with a meal.<sup>37</sup>

For a secret killing operation, this method had many advantages: (1) luminal or morphine-scopolamine were regularly used at every medical facility, and become lethal in high doses; (2) the children were killed from an overdose of common medicine, rather than alien poisons; (3) these overdoses did not lead to immediate death, instead they lead to medical complications, such as pneumonia, that lead to death usually 2 to 3 days later; and (4) the physician's report would, therefore, show natural death as the cause of death.<sup>38</sup> Hermann Pfannmüller<sup>39</sup> testified before the U.S. Military Tribunal:

"I must emphasize this is not a matter of poisoning. The child simply dies of

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 46-47.

<sup>33</sup> *Id.* at 47.

<sup>34</sup> Friedlander, *supra* note 1 at 46, n. 47.

<sup>35</sup> Kdf stands for the Chancellery of the Führer. *Id.* at xix.

<sup>36</sup> *Id.* at 53.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 54.

<sup>39</sup> Head of Eglfing-Haar (another children's killing ward) near Munich. *Id.*

a certain congestion in the lungs, it does not die of poisoning.”<sup>40</sup>

Lies and threats were used to get the parents to cooperate in turning control of the child over, who once turned over became wards of the Reich Committee.<sup>41</sup> If the child was already institutionalized s/he would need to be moved to one of the killing wards.<sup>42</sup> To accomplish this transfer authorities would tell the parents their child would be cured in the wards.<sup>43</sup> At the end of a decree circulated on September 20, 1941, the ministry pointed out that refusal to commit the child would be harmful to the family and to the remaining healthy children, and public health authorities “might have to investigate whether such refusal is a transgression against the right to custody.”<sup>44</sup>

When asked by the U.S. prosecutor at Nuremberg, whether the parents of the child were notified prior to euthanasia was performed? Pfannmüller replied:

“Oh yes. We told the relatives that it would be expedient to visit the child because the child was sick and the relatives did come. In the beginning of Luminal treatment the child wakes up from time to time until the final cumulative effect of Luminal sets in.”<sup>45</sup>

When asked if the parents and guardian were instructed that Luminal treatment was going to be administered to the child, Pfannmüller replied, “No, no, that was a top secret matter.”<sup>46</sup>

It is impossible to calculate an exact number of children killed in the wards because many records have not survived, but conservative estimates that at least 5,000 children were murdered.<sup>47</sup> The child last was killed on May 29, 1945 twenty-one days after Germany’s unconditional surrender at the children’s ward in Kaufbeuren.<sup>48</sup>

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<sup>40</sup> *Id.*

<sup>41</sup> Friedlander, *supra* note 1 at 57.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Friedlander, *supra* note 1 at 59.

<sup>45</sup> *Id.* at 60.

<sup>46</sup> *Id.* at 61.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 163.

UNITED STATES: FROM BIRTH CONTROL RIGHTS TO  
PERSONAL AUTONOMY

In the 1920's the birth control movement and the eugenics movement of the United States were intertwined. Margaret Sanger, an advocate for women's reproductive rights,<sup>49</sup> understood the importance of propaganda and wrote many pamphlets and books for the purpose of educating women about birth control.<sup>50</sup> Sanger thought women needed to be made aware of the shackles that were being placed on them by bearing too many children and wished they would rise up against this sexual oppression.<sup>51</sup>

Sanger has been accused of prejudice for giving contraception to minorities who were part of the poor and immigrant population.<sup>52</sup> In 1920 Sanger wrote in a chapter entitled "The Goal" of her book *Women and the New Race*:

Birth controls itself, often denounced as a violation of natural law, is nothing more or less than a facilitation of the process of weeding out the unfit, of preventing the birth of defectives or of those who will become defectives. So, in compliance with nature's working plan, we must permit womanhood its full development before we can expect of it efficient motherhood. If we are to make racial progress, this development of womanhood must precede motherhood in every individual woman. Then and then only can the mother cease to be an incubator and be a mother indeed. Then only can she transmit her sons and daughters the qualities which

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<sup>49</sup> Margaret Sanger was a nurse whose efforts lead to the ultimate toppling of Comstockery bringing birth control to all who wanted and she is also considered the founder of the Planned Parenthood Federation of America. Moira Davison Reynolds, *Women Advocates of Reproductive Rights, Eleven Who Led the Struggle in the United States and Great Britain*. 67 (1994).

<sup>50</sup> *Id.* at 53 – 55.

<sup>51</sup> James Reed, *The Birth Control Movement and American Society from Private Vice to Public Virtue* 83 (1978).

<sup>52</sup> As well as other advocates of birth control. Reynolds, *supra* note 56 at 65.

make strong individuals and,  
collectively, a strong race.<sup>53</sup>

Sanger advocated that birth control was better left in the hands of the woman rather than the state, and by freeing reproductive instinct will make a better race.<sup>54</sup> Further, Sanger wrote, “Eugenics without Birth Control seems to us a house built upon the sands... at the mercy of the rising stream of the unfit.”<sup>55</sup> Sanger, died in 1966, but lived long enough to see her work come to fruition when the Supreme Court of the United States in 1965 struck down a Connecticut statute forbidding the use of contraceptives to married couples, because it encroached on their right to privacy.<sup>56</sup>

In 1967, the American Medical Association Committee on Human Reproduction advocated for the adoption of a policy opposed to induced abortion except when there is, among other things, a risk that the child might be born with ‘incapacity physical deformity or mental deficiency.’<sup>57</sup> The Committee continued that, two other professionally competent physicians must concur in writing, and the procedure is to be performed in a hospital the Joint Commission on Accreditation of Hospitals has accredited.<sup>58</sup>

Abortion became legal in the United States in 1973 with the Supreme Court’s decision in Roe v. Wade. Roe challenged Texas abortion laws which forbade “procuring or attempting an abortion except on medical advice for the purpose of saving the mother’s life.”<sup>59</sup> The Court noted three reasons historically advanced explaining and justifying the continued existence of 19<sup>th</sup> century criminal abortion laws that the case concerned: (1) Victorian social concern to discourage illicit sexual conduct<sup>60</sup>, (2) to restrain pregnant women from submitting to a medical procedure

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<sup>53</sup> Margaret Sanger, *Women and the New Race* 227 (1920).

<sup>54</sup> Margaret Sanger, *Birth Control and Racial Betterment* (1919). <https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=143449.xml>.

<sup>55</sup> *Id.*

<sup>56</sup> Penumbral emanations create a zone of privacy. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

<sup>57</sup> *Roe v. Wade*, 410 U.S. 113, 142 (1975).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 113.

<sup>60</sup> Texas did not advance this justification, and it appears no court takes this argument seriously. *Id.* at 148.

that placed her life in serious jeopardy, and (3) the State's interest in protecting prenatal life.<sup>61</sup>

The Court, holding the Texas statute unconstitutional, concludes that the unborn is not protected by constitution<sup>62</sup> and the right to privacy<sup>63</sup> is broad enough to cover a woman's choice to terminate or pregnancy or not, however, this right is not without limits and shall be considered against important regulatory state interests.<sup>64</sup> With respect to the State's interest in protecting the mother and prenatal life the court denotes 'compelling' points<sup>65</sup> in the pregnancy when the State's interests become substantial enough to allow for regulation.<sup>66</sup> Prior to these points the physician may consult with the patient and determine whether the pregnancy should be terminated without State regulation.<sup>67</sup>

The Court elaborated more about what type of regulations the State may impose in Casey.<sup>68</sup> Casey involved a challenge to five provisions<sup>69</sup> of the 1982 Pennsylvania Abortion Control Act. The Court rejected the flawed rigid trimester framework<sup>70</sup> for regulation and held that State regulations must not impose and

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<sup>61</sup> *Id.* at 150.

<sup>62</sup> '[W]ith our observation... that throughout the major portion of the 19<sup>th</sup> century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn. *Roe*, 410 U.S. at 158.

<sup>63</sup> Founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action. *Id.*

<sup>64</sup> *Id.* at 153 – 54.

<sup>65</sup> The 'compelling' point for the states important and legitimate interest in the health of the mother is approximately the end of the first trimester, and for prenatal life the 'compelling point' is viability. *Id.* at 163.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>69</sup> The provisions at issue required: (1) the woman give her informed consent prior to the abortion procedure, and be provided with certain information at least 24 hours prior to the abortion, (2) a minor must have consent from one or both parents, or use the judicial bypass option if the minor does not wish to or cannot obtain parent's consent, (3) a married woman must sign a statement indicating that she notified her husband, (4) medical emergencies are exempt from these requirements, and (5) certain reporting requirements are imposed on facilities providing abortion services. *Id.* at 844.

<sup>70</sup> The Court recognizes the trimester framework is flawed because "in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life." *Id.* at 873.

‘undue burden’<sup>71</sup> on a woman seeking an abortion because the means chosen by the State must be calculated to inform, not hinder, the woman’s free choice.<sup>72</sup>

Applying the ‘undue burden’ standard, the plurality, found the spousal notification requirement invalid because, among other things, carrying a child affects the mothers liberty more than the fathers; and the State may not give a man the kind of dominion over his wife that parents exercise over their children.<sup>73</sup> The Court also invalidated the parts of the reporting requirement because many women have pressing reasons not to reveal some of this information.<sup>74</sup> Moreover, the Court stated that under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.<sup>75</sup> Justice O’Connor’s opinion notes:

“Men and women of good conscious can, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating pregnancy even in its earliest stage. Some of us as individual find abortion offensive to our most basic principles of morality.... Our obligation is to define the liberty of all, not to mandate our moral code.”<sup>76</sup>

The courts obligation to define liberty rather than moral code may be most prevalently on display in the context of abortion in Gonzales. Gonzales concerned a challenge to the regulations of the Partial – Birth Abortion Ban Act of 2003.<sup>7778</sup> The Act defined ‘partial-birth abortion’ as:

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<sup>71</sup> “Undue burden” means the State regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. *Id.* at 877.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 895 – 98.

<sup>74</sup> *Id.* at 901.

<sup>75</sup> *Id.* at 886.

<sup>76</sup> *Id.* at 850.

<sup>77</sup> The Partial – Birth Abortion Ban Act said performing a partial-birth abortion and thereby killing a human fetus shall be find or imprisoned for up to 2 years, or both. *Gonzales v. Carhart*, 550 U.S. 124, 141 (2007).

<sup>78</sup> *Id.* at 132.

“(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of head-first presentation, the entire fetal head is outside of the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the naval is outside of the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus”<sup>79</sup>

Since the Act forbids a particular manner of ending fetal life, the Court laid out abortion procedures in some detail noting the Act does not regulate most common abortion procedures: vacuum aspiration<sup>80</sup>, or alternative medication, such as, mifepristone, were unaffected by the Act.<sup>81</sup> The Acts primary concern were second trimester abortions, “dilation and evacuation” (D & E) and intact D & E.<sup>82</sup>

In performing a D & E the physician must dilate the cervix to the extent needed to insert surgical instruments into the and to maneuver them to evacuate the fetus.<sup>83</sup> After sufficient dilation the woman is placed under general anesthesia or conscious sedation.<sup>84</sup> The doctor, guided by an ultrasound, inserts grasping forceps through the cervix and into the uterus grips a fetal part and pulls it back through the cervix and vagina, continuing after meeting resistance resulting in friction causing the dismemberment of the fetus.<sup>85</sup> The remaining parts of the fetus are removed piece by piece until completely removed.<sup>86</sup>

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<sup>79</sup> *Id.* at 142.

<sup>80</sup> During ‘vacuum aspiration’ the physician vacuums out the embryonic tissue. *Id.* at 134.

<sup>81</sup> The most common procedures performed to terminate pregnancy during the first three months are medication and vacuum aspiration. 85 to 90 percent of abortions performed each year in the United States happen in the first three months of pregnancy. *Id.* at 134.

<sup>82</sup> *Id.*

<sup>83</sup> *Gonzalez*, 550 U.S. at 135.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 135 – 36.

An intact D & E also begins with the dilation of the cervix, however, the fetus is extracted in a way conducive to pulling out its entire body, instead of ripping it apart.<sup>87</sup> A nurse testified before the Senate Judiciary Committee to what she witnessed during an intact D & E performed on a 26 ½ week fetus.<sup>88</sup> She described the doctor using forceps to grab the “baby’s legs and pull them down into the birth canal” delivering everything but the baby’s head, which was kept right inside the uterus, the babies little fingers were clasping and unclasping, and his little feet were kicking until the doctor stuck the scissors in the back of his head, then the baby’s arms jerked “like a flinch,” the baby went completely limp after the doctor opened the scissors and sucked out its brains out with a suction tube.<sup>89</sup> Congress determined this type of abortion method has a “disturbing similarity to the killing of a newborn infant,” and was concerned with “drawing a bright line that clearly distinguishes abortion from infanticide.”<sup>90</sup>

In holding the purpose of the Act was not to place a substantial obstacle in the path of a woman seeking an abortion, the Court says Congress was reasonable to think that partial-birth abortion, “undermines the public’s perception of the appropriate role of a physician during the delivery process.”<sup>91</sup>

#### VESTING REPRODUCTIVE RIGHTS IN PERSONAL PRIVACY PROTECTS INDIVIDUALS FROM GOVERNMENT IMPOSED EUGENCIS LEGISLATION

Both the early American birth control movement advocates and the National Socialist party had closely held eugenics influences and beliefs. Ultimately, however, the same issue was approached from opposite sides.

The National Socialists used their governmental influence to deceive and coerce families into sending their children to the camps to ultimately die. While issuing the death penalty for any abortion other than those of handicapped children. However, the birth control movement primary purpose was to inform the working woman that she had other options than continually being pregnant and thus a prisoner of her home. The movement

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<sup>87</sup> *Id.* at 137.

<sup>88</sup> *Id.*

<sup>89</sup> Gonzalez, 550 U.S. at 138-39.

<sup>90</sup> *Id.* at 158.

<sup>91</sup> *Id.* at 160.

advocated that the decision be left in the hands of the mother, which would also be more effective for eugenics purposes.<sup>92</sup>

In the United States the Center for Disease Control (CDC) collects statistics as to the number of abortions per year. The CDC requests data from 52 reporting areas<sup>93</sup> to document the number and characteristics of women obtaining legal induced abortions.<sup>94</sup> Of the 49 areas that reported in 2012<sup>95</sup> a total number of 699,202 abortions were reported<sup>96</sup>. Due to the limited reporting categories<sup>97</sup> the CDC does not report the number of abortions of prenatally diagnosed handicapped fetus. A study published in 2012 suggests that 67% to 85% of women who receive a prenatal diagnosis of down syndrome terminate their pregnancies.<sup>98</sup> This abortion rate has resulted in the population of persons living with Down Syndrome in the United States being reduced by an estimated 30% overall.<sup>99</sup> And as previously mentioned, Hitler's euthanasia program last approximately six years and conservative estimates total the number of fatalities at 5000 handicapped children.

The difference between 699,202 and 5000 is what Gerherd Wagner was referring to in his Nuremburg speech when he criticized abortion as killing "valuable life" while the National Socialist were killing "inferior life." The numbers above tend to

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<sup>92</sup> Sangers position was that if each woman could choose the number of her children, that number would be small. Reynolds, *supra* note 56 at 65.

<sup>93</sup> Karen Pazol, PhD, Andreea A. Creanga, MD, PhD, Denise J. Jamieson, MD, Abortion Surveillance – United States, 2012 (November 27, 2015) <https://www.cdc.gov/mmwr/preview/mmwrhtml/ss6410a1.htm>.

<sup>94</sup> Collection is facilitated by the legal requirement for hospitals, facilities, and physicians to report all abortions to a central health agency. *Id.*

<sup>95</sup> California, Maryland, and New Hampshire did not report. *Id.*

<sup>96</sup> Compared to 3,952,841 births registered in the United States in 2012. Joyce A. Martin, M.P.H.; Brady E. Hamilton, Ph.D.; Michelle J.K. Osterman, M.H.S.; Sally C. Curtin, M.A.; and T.J. Mathews, M.S., Division of Vital Statistics. Births: Final Data for 2012, [http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62\\_09.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_09.pdf).

<sup>97</sup> The categories of the data collected by the CDC include: maternal age in years; gestational age in weeks at the time of abortion; race; ethnicity; method type; marital status; number of previous live births; number of previous abortions; and maternal residence. Abortion Surveillance, *supra* note 93.

<sup>98</sup> Jamie L. Natoli, Deborah L. Ackerman, Suzanne McDermott, Janice G. Edwards, Prenatal Diagnosis of Down Syndrome: a systematic review of terminations rates (1995-2011) <http://onlinelibrary.wiley.com/doi/10.1002/pd.2910/full>.

<sup>99</sup> Study: Aborting Babies With Down Syndrome Has Wiped Out 30% of the Down Syndrome Community. Mark Bradford April 22, 2015. <http://www.lifenews.com/2015/04/22/study-aborting-babies-with-down-syndrome-has-wiped-out-30-of-the-down-syndrome-community/>.

agree for the purposes of eugenics. However, the excess abortions of what Wagner would call valuable life, Margaret Sanger would call shackles that bind young women and mothers with too many children. So from a modern society standpoint why is Margaret Sanger more correct than Gerhard Wagner? Two key issues stand out: timing and the governmental interest.

#### 1. TIMING MATTERS, BUT THE METHOD DOES NOT

An obvious problem with euthanasia over abortion is that euthanasia is preformed after birth when the child gains its constitutional protections<sup>100</sup> and it becomes murder. As mentioned above, the Supreme Court of the United States in Gonzales was concerned with a similar problem, the difference between infanticide and abortion. The Court implies the line between murder and abortion when the fetus, viable or not, is outside of the womb because the Court is concerned about it looking like a baby and not distorting the physician's role in the birthing process. The technique for the D & E may seem just as gruesome as the intact D & E when described, however, the technique employed is not the problem, rather the fact that the fetus looks like a human, and therefore killing it feels more like murder.

Interestingly, this implies that the method of termination does not matter as long as the child is inside the woman, unless there is State imposed legislation regulating abortion methods that do not impose an undue burden on the woman. Therefore, the method of giving the child an overdose after birth is of course murder, however, had the National Socialists used the same drugs to kill a fetus while inside the mother they would be free from murder prosecution.

The Court allows states to impose regulations on who can perform abortions.<sup>101</sup> With the absence of regulations in the National Socialist State, had they used the same methods in deciding which children were able to be aborted, there seems to be no repercussion under American jurisprudence with National Socialists not using people with medical training in making the decisions or the methods employed in carrying out those decisions, as long as, the methods employed would not impose an undue burden on the woman. Further, while the Court does recognize the

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<sup>100</sup> Roe, 410 U.S. at 150.

<sup>101</sup> As long as it does not impose an "undue burden." Casey, *supra* note 78.

States interest in the health of the woman and prenatal life after viability, the State does not have to assert those interests.

## 2. NATIONAL SOCIALISTS GOVERNMENT INTRUSIONS ARE AN INVASION OF INDIVIDUAL PRIVACY

The National Socialist Party took control of Germany and implemented operation T-4 while the birth control movement steadily gained more and more momentum leading to the Supreme Court of the United States extending the zone of privacy to cover contraception and the right to choose to abort a fetus to the woman.

The tactics used by the National Socialist Party in pursuance of their governmental interest removing life unworthy of life obliterated the privacy rights of the individual, beginning with the forms the physicians and nurses filled out about the child to the ultimately threatening to remove custody of your children if there was non-compliance. The United States Supreme Court would have found the forms filled out unconstitutional for the same reasons they did the reporting requirement in Casey.

Further, in all of the aforementioned United States cases the Court balances the states interests against the interest of the individual, and for the purposes of regulation the State must have a compelling governmental interest. Prior to Roe, however, the Court's response to the argument from the National Socialist's viewpoint that the State is concerned with the health of the population, and thus the labor force, as a whole would have been very interesting.

Remember, in 1927, Justice Oliver Wendell Holmes said that the compulsory sterilization of the "feeble minded" did not violate the due process or equal protection clauses of the Fourteenth Amendment.<sup>102</sup> However, today Roe protects the people from the government forcing them to be sterilized or have an abortion.

When a fifteen year old girl became pregnant in Burke County, North Carolina, she sought prenatal care at a clinic

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<sup>102</sup> Justice Holmes stated, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for the imbecility, society can prevent those who are manifestly unfit from continuing their kind." Buck v. Bell, 274 U.S. 200, 207 (1927).

operated by the government<sup>103</sup> where following a blood test the nurses told her that she had the sickle cell trait<sup>104</sup> which exclusively affects black people.<sup>105</sup> The girl and her mother were urged to consider sterilization by a doctor and nurse<sup>106</sup> with the clinic, to which they consented. They were accompanied by a social worker trainee<sup>107</sup> to the state court where sterilization was authorized.<sup>108</sup> Afterwards, the girl found out she did not have the sickle cell trait, and contended that she only consented to the sterilization due to the misrepresentations and exhortations of those employed by the boards.<sup>109</sup>

In 1981, these facts reached the Fourth Circuit Court of Appeals in Avery. It was evident to the court that through the boards the county was acting under the color of state law.<sup>110</sup> The court cited to Roe to assert that the right of procreation is constitutionally protected by the equal protection clauses of the Fourteenth Amendment.<sup>111</sup>

Moreover, in 1986, a school counselor summoned a boy and girl into her office.<sup>112</sup> While in the office the counselor had the girl take a pregnancy test, to which she tested positive, and the boy admitted paternity.<sup>113</sup> The counselors then coerced the children to agree to have an abortion.<sup>114</sup> Since the children could not afford an abortion themselves, the public school officials paid them to perform menial tasks, and gave the person who drove them to the medical facility to obtain the abortion twenty dollars.<sup>115</sup>

Action was filed in this matter, and in 1989 the Eleventh Circuit Court of Appeals, which concluded that coercing a minor to abort a child violates the minor's constitutionally protected

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<sup>103</sup> The clinic was operated by the Burke County Health Department, an agency of the Board of Health. Avery v. County of Burke, 660 F.2d 111, 113 (4th Cir. App. 1981).

<sup>104</sup> Affecting approximately 10% of black people in the United States. *Id.* at 115.

<sup>105</sup> *Id.*

<sup>106</sup> They cautioned that a woman with sickle cell is unable to take birth control pills, child birth would endanger or shorten her life, and made her susceptible to numerous diseases. *Id.*

<sup>107</sup> An agent of the Board of Social Services. *Id.*

<sup>108</sup> Avery, 660 F.2d at 115.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Arnold v. Board of Education, 880 F.2d 305, 309 (11th Cir. App. Ct. 1989).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

freedom to choose whether to abort or bear her child.<sup>116</sup> The court reiterated Roe, that within in the zones of privacy we find constitutional guarantees safeguarding an individual's freedom of choice relating to marriage and family, also that it is the freedom in the decision making process which receives constitutional protection.<sup>117</sup>

By constitutionally protecting the right to privacy and deciding that the decision making process of whether or not to bear a child falls into one of the zones of privacy in Roe, the Court has built in the best defense against an authoritative power deciding it is in the best interest of the people to have a "fit" race by forcing sterilization and abortion on the people. By vesting that right in the women of the United States the Court has forbade the government from not only preventing a woman to get an abortion, but also forbade the government from coercing a woman to get an abortion.<sup>118</sup> Thus, Roe protects Americans from a National Socialistic implementation of government coercion to force abortions and sterilization.

#### CONCLUSION

In Conclusion, advocates such as Margaret Sanger, paved the path to personal autonomy rather than governmental intrusion in the United States.

Compared to the child euthanasia practices employed by the National Socialist Party, Margaret Sanger seems to displayed that eugenics works best when the power to choose is in the hands of the individual woman rather than the government. In retrospect, looking only at the numbers, Hitler would have been more successful at eliminating handicapped children, likely if he killed them before they were born.

Is what Hitler did really worse though? The answer to this is almost immediately, "Of course, Yes! He murdered children!" However, if we look at the ultimate effect that abortions are having on the handicapped population, then it becomes harder tell. Considering that aborting fetuses prenatally diagnosed with Down Syndrome is the norm and carrying Down Syndrome babies to term is the outlier. It is hard to think of many people condemning the Knauer family if they had aborted their deformed child prior

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<sup>116</sup> *Id.* at 310

<sup>117</sup> *Id.* at 311

<sup>118</sup> But can still attempt to coerce her not to terminate her pregnancy. *Casey*, 505 U.S. at 877.

rather than had it euthanized. Even the AMA Committee prior to Roe was unopposed to induced abortion when the child might be born with a physical deformity.

Therefore, looking at only the ends, placing reproductive rights in the hands of the mother does have a greater effect, for eugenics purposes, on the population than the tactics used by the National Socialist Party. Had Hitler put aside his own “moral” disapproval and enacted abortion legislation allowing women access to abortions rather than euthanasia legislation, then the women of Germany would likely have made the decision for him which life was unworthy of life at a far more effective and efficient rate over a longer period of time.<sup>119</sup>

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<sup>119</sup> In 2014 there were 99,700 abortions that occurred in Germany. Abortions in Germany Decline over Last Decade <http://www.dw.com/en/abortions-in-germany-decline-over-last-decade/a-18305629>.