

No. 93-

83-1149 JAN 18 1994

IN THE
Supreme Court of the United States

OCTOBER TERM, 1993

TINA KRAIL, LORI CHADWICK,
DEBORAH SMOLDORE AND JEANNIE HENDERSON
Petitioners

- against -

THE STATE OF NEW JERSEY
Respondent.

ON PETITION FOR WRIT OF CERTIORARI

**PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF NEW JERSEY**

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QUESTIONS PRESENTED

1. Once it is recognized that the life of a child begins at conception and the child is a separate, unique, and complete human being, does the child's mother have any true protectible interests which would support a right to intentionally take the life of her own child even before birth under the Fourteenth Amendment of the U.S. Constitution?
2. When does the life of a child begin?
3. Do children possess the natural and inalienable right to live or possess constitutional rights acquired through the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States at any time from conception to birth?
4. Whether it is violative of the natural and inalienable rights of a child or rights acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States for New Jersey to fail to recognize petitioners' standing to raise the rights of the child under the facts of this case?
5. Does a child before birth possess rights which, when balanced against a mother's Fourteenth Amendment liberty interest, require the state to protect the child's interest in life at any time from conception to birth under any particular circumstance?
6. Is it an unconstitutional infringement of Mr. Loce's child's natural and inalienable rights or the child's Fourteenth Amendment Due Process or Equal Protection rights for New Jersey to convict these petitioners of trespass under the facts of this case where the conduct of the petitioners was for the purpose of, and necessary for the defense of the

child's life, and the state's express purpose in prosecution and conviction was to allow the child's mother to intentionally terminate the life of the child?

7. Does a father have a Due Process and Equal Protection Right to defend the life of his child?
8. Whether this Court's decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. ___, 112 S.Ct. 2791 (1992), *Roe v. Wade*, 410 U.S. 113 (1973), or other precedent prohibits the Courts of New Jersey from applying New Jersey Constitutional protections, which extend rights to children prior to birth, to prohibit the criminal or quasi-criminal prosecution of petitioners under the facts of this case?
9. Whether, in light of the undisputed facts of human development, and the recently acquired scientific evidence of the humanity of the child prior to birth, the actions of the State of New Jersey (through its legislative enactments, executive actions and the acts of its courts) which result in the painful dismemberment and death of children prior to birth (even after "viability"), are violative of the natural and inalienable rights of those children and their rights acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States?

PARTIES TO THE PROCEEDINGS

Petitioners are Tina Krail, Lori Chadwick, Jeannie Henderson, and Deborah Smoldore, all of whom assisted and aided co-petitioner Alexander Loce in his effort to save the life of his child at his request. Mr. Loce has filed a separate petition on his own behalf. Mr. Loce first instituted a civil suit in the Superior Court of New Jersey on September 7, 1990, seeking an injunction of the abortion of his child. When he exhausted his civil suit that night (New Jersey Supreme Court Justice Robert Clifford denied relief), Mr. Loce attempted to protect the child's life the next day, September 8, 1990, by blocking access to the operating room at the clinic where the child's mother sought to terminate the child's life. He requested the assistance of fourteen other persons including these four petitioners, and he chained himself to them, succeeding in preventing the child's death, until the State of New Jersey removed Mr. Loce and these petitioners from the premises.

Each of these petitioners bring a unique point of view to the Court. All are women who have been touched or harmed by abortion. They provide an important assistance in litigating the question of a woman's rights and those of her child. Tina Krail has had two abortions. Lori Chadwick is a single mother. Jeannie Henderson was seven months pregnant on September 8, 1990 when she was arrested in this case. She carried and gave birth to her baby only after changing her original decision to have an abortion because she learned of information unavailable to her through an abortion clinic. Deborah Smoldore has been active in bringing attention to the fact that abortion is an exploitation of a woman and her child.

Respondent is the State of New Jersey which refused to provide Mr. Loce and his child access to court by dismissing his civil complaint and then arrested, prosecuted and convicted him and petitioners Krail, Chadwick, Henderson, and Smoldore of trespass for defending the child's life. The other ten co-defendants, have not filed a Petition.

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methodologies and technologies developed in the last decade.⁴⁶

It is now clear that a child is capable of experiencing pain as early as six to eleven weeks after conception.⁴⁷

II. A WOMAN'S RIGHT MUST REFLECT AND PROTECT HER TRUE INTERESTS AND ACCOUNT FOR THE FACT THAT HER CHILD IS A HUMAN BEING AND SHE IS A MOTHER WHOSE MOST IMPORTANT PERSONAL INTERESTS ARE COMPATIBLE WITH HER CHILD'S INTEREST IN LIFE.

A. NATURE AND SCOPE OF THE MOTHER'S REAL INTERESTS.

The most obvious implication of the new scientific and medical information which supports the conclusion that the life of a child begins at conception is that the child has a personal interest in life, an interest never before specifically identified or weighed by this Court which requires recognition of a corresponding natural and inalienable right to life of the child.⁴⁸ The fact of the child's human existence has equally profound implications for the interests of a woman carrying her child in utero.

Roe identified what it perceived to be a woman's interests the court sought to protect. However, the newly obtained scientific data concerning the child's humanity and the information about the

⁴⁶ See *Loce* pet. p. 14-16; see also, amicus brief of World Federation of Doctors.

⁴⁷ See *Loce* pet. p. 21-30; see also amicus brief of World Federation of Doctors.

⁴⁸ These petitioners adopt and incorporate those arguments on the child's rights found in the *Loce* Pet., Pt. II at p. 30-40.

substantial harm to women due to abortion, now available, reveal that identification of a woman's protectible interests by *Roe* was materially deficient. Because it is the existence, nature, and "protectibility" of any of these interests which constitute the necessary basis for a right, their proper identification is critical.

The *Roe* Court listed five potential harms to a woman used to conclude that her *Griswold* rights include abortion. The first, judgments when a mother's life is in danger is not implicated in this case.⁴⁹ The other concerns listed by *Roe* are: (1) maternity or additional offspring may cause a distressful life; (2) mental and physical health may be taxed by child care; (3) distress associated with an unwanted child; and (4) additional difficulties and continuing stigma of unwed motherhood. *Roe*, at 153. These may be concerns that implicate the right of privacy, but they only concern decisions before a woman becomes a mother. New Jersey does not have a compelling interest to interfere with the decision of a couple concerning conception. *Griswold v. Conn.*, 381 U.S. 479 (1965). However, once a mother conceives and her child is in

⁴⁹ In this case it was stipulated by the state that the mother's life was not in danger and conception was the result of consensual relations between a couple engaged to be married. Therefore, there is no need to address this interest of a woman in this criminal prosecution of Mr. Loce.

existence her personal interests are quite different.

Even if it were perceived that a woman, or couple had an "interest" in avoiding the obligations of parenthood even after the child comes into existence, those "interests" could never be protectible in a constitutional sense. It is not sufficient that one merely state a "need," a desire, or have some expectations. There must be a legitimate claim of entitlement for which there is an independent source. It is the underlying nature of the "interest" which must be examined. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Morrissey v. Brewer*, 408 U.S. 471, 481-483 (1972); *Meachum v. Fano*, 427 U.S. 215, 224-227 (1976); *Montanye v. Haynes*, 427 U.S. 236, 242 (1976). In *Roth, supra*, this court explained:

...the range of interests protected .. is not infinite ... We must look to see if the interest is within the Fourteenth Amendments' protection of liberty... 408 U.S. at 569, 571.

The determining factor is the underlying nature of the precise interest, not that there is a "grievous loss", but an interest of the protectible kind. *Morrissey v. Brewer, supra*, at 481; *Board of Regents v. Roth, supra*, at 569-574. The interest must have a source in law to be protectible. *Meachum v. Fano, supra*, 224-227; *Montanye v. Haynes, supra*, 242.

The true nature of a woman's interest must be scrutinized in view of the fact of the child's existence and the harms to a mother which have come to light during two decades of experimentation with abortion. No matter which rhetoric is used to characterize a mother's or couples "interest" to avoid the obligations of parenthood once the child is in existence, the "interest" [in "abortion" or "choice"] is, in fact, an "interest" in terminating the life of a human being, a child. The interests found in *Roe* no more justify terminating the life of the child before birth than they would if a parent took the life of an infant two days after birth to avoid the stress of child rearing. See, *Thornburgh v. A.C.O.G.*, 476 U.S. at 787-795 (White, J., dissenting).⁵⁰

⁵⁰ If these were truly reasons to abort a child then a father would have a coexisting right to demand an abortion. All of these [except "maternity"] are experienced by him even when the child is born out of wedlock. The fact that a mother is the parent who carries the child does not alone give her the singular power over life and death. Both parents are equal contributors to life, with equal obligations following birth. The significant contribution of a mother who bears the burden of maternity is fairly and justly reflected in the New Jersey law which vests in her the right to choose to be the primary custodian of the child if the parents are separated at birth and disagree on custody. *Baby M*, 537 A.2d 1227, 1261 (1988). The fact that she carries and bonds with the child directly bears upon the health and welfare of the mother and child following birth, not the power over actual life itself. See IIC & IID below.

Casey elaborates on the concern pertaining to maternity:

"The mother who carries a child to term is subject to anxieties, the physical constraints, to pain that only she must bear." *Casey*, 112 S.Ct. at 2807.

But *Casey* does not suggest that this justifies taking the life of another human being. *Casey* recognizes that the interest in protecting the life of the unborn at "viability" is greater than that of the mother. Yet "viability" is precisely when these anxieties, physical constraints and pains are realized in their most acute

When a woman or a couple conceive the interests listed in *Roe* are no longer irrelevant. The key difference is the fact that the child exists. Even if a mother claimed an interest in terminating her child's life, it is not protectible because it is perfectly repugnant to her traditionally recognized and protectible interests including her interests in her child's actual life, and her relationship with the child [see, IIC and IID below].

B. Identifying the Real Nature of the Life in Question.

The fact that the child is a human being is pertinent to the interests of the mother. The *Roe* court's stated inability to determine when the life of the child began impaired its ability to accurately identify the true interests of the critical participants. As a result, ever since *Roe* declined to find when life began, the Court has labored under the disability of having never defined the nature of the life which was the subject of its opinions and the basis for an "interest" of the states. This failure and the resultant and substantial uncertainty surrounding the nature of the life is reflected in the language of the Court and imprecise definition of the "state's interest" and those of the mother. The Court most

form. *Casey* recognized that the responsibility for the avoidance of this experience, if desired, rests upon the mother before they are realized. The same reasoning applies before conception. 112 S.Ct. at 2817.

often refers to the child as "potential life" and the state's interests as one in 'potential life'. See, e.g., *Roe*, 410 U.S. at 163 (1973); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989).⁵¹ Nowhere is this failure and uncertainty more apparent than in *Casey*:

Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and depending on one's beliefs, for the life or potential life that is aborted. *Casey*, 505 U.S. ___, 112 S.Ct. at 2807 (emphasis added).

This reflects the failure of the Court to reach a conclusion concerning the nature of the life. Either this is a human being or it is not. It is not a "belief", religious or otherwise. It is a matter of fact. This determination affects the nature of a mother's right. If

⁵¹ In *Casey* the Joint Opinion refers to the child as: "the life or potential life" (112 S.Ct. at 2807); "postconception potential life" (at 2811); "fetal life" (at 2811); "the life of the unborn" (at 2816); "life" (at 2816); "life or potential life of the unborn" (at 2817); "potential life" (at 2817); and "the life of the fetus that may become a child" (at 2804). The Chief Justice refers to the child as "a fetus" (at 2859); "unborn human life" (at 2867); "unborn life" (at 2868) and "unborn child" (at 2871); Justice Stevens retains the use of "potential life" (at 2840, 2841); Justice Blackmun refers to "potential life" (at 2847) and "prenatal life" (at 2847). Justice Scalia observes on this:

The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. Scalia, J. dissenting, 112 S.Ct. at 2875.

she is killing her own child or not is material, if not decisive.

C. Once a Woman Conceives and her Child Exists her Personal Interests are Consistent with the Interests of her Child.

Once a woman conceives she has at least seven interests not identified in *Roe*, none of which are inconsistent with her child's interest in life, and all conflict with the *Roe* "interests." The first three, although distinct, are closely related. First, she has a personal interest in her protected relationship with her child. Second, she has a personal interest in the child's life. Third, she has an interest in defending and protecting her child's rights. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Santosky v. Kraemer*, 455 U.S. 745 (1982); *Quillion v. Walcott*, 434 U.S. 246 (1978); *In the Matter of Baby M*, 537 A.2d 1227 (N.J. 1988); *D.Y.F.S. v. A.W.*, 512 A.2d 438 (1986). The fact that the child is a human being distinguishes two separate sets of interests: those which form the basis for her fundamental right to the companionship with her child — and those which form the basis for her *Griswold* rights. Her relationship with her child exists and is protected during pregnancy. C.F. *Lehr, supra*. No government could demand she terminate that relationship without due process. *Santosky, supra*. The nature of this right is to preserve the life of the child and their relationship. It is not possible that her companionship interest,

because of its nature, entitles her to terminate the child's life because the existence and preservation of that right hinges on the child's welfare.⁵² A mother's relationship with her child during pregnancy is the most intimate, most unique, most important, and one most worthy of protection. Although the mother and child are

⁵² The nature of the mother's right to the protection of her relationship with her child is best understood by examining the constitutional principles concerning the termination of those protected rights. Two areas of inquiry determine whether a particular termination is constitutional: (a) whether the particular parent possesses a constitutional right; and (b) whether the grounds for termination satisfy Due Process criteria. In both inquiries, the welfare of the child is the most critical determinant. The grounds for termination have always been related to what is best for the child: only if continuing the relationship would be harmful to the child, could a termination take place. *E.g.*, *Santosky v. Kramer*, 455 U.S. 745 (1982); see *Stanley v. Illinois*, 405 U.S. 645 (1972); *Lehr v. Robertson*, 463 U.S. 248 (1983). A second inquiry is whether a parent has a constitutionally protected relationship with the child. Here too, the welfare of the child is a critical factor. A father of a child born out of wedlock enjoys a constitutionally protected relationship with his child. *Stanley v. Illinois*, *supra*. A natural father is not always recognized as having a constitutionally protected relationship. See *Quilloin v. Walcott*, *supra*; *Lehr v. Robertson*, *supra*; *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). *Quilloin*, *supra*, explains under what circumstances the Court would recognize an unwed father's right:

We have little doubt that the Due Process Clause would be offended 'if the state were to attempt to force the breakup of the natural family, over the objection of parents, and their children without some showing of unfitness and for the sole reason to do so was thought to be in the child's best interest'. *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863, (1977). But this is not the case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition of the family already in existence, a result desired by all concerned, except the appellant. 434 U.S. at 255.

This statement explains the difference in treatment of fathers' rights in *Lehr v. Robertson*, *supra*. In *Quilloin*, *Lehr* and *Michael H.* however, the dominant reason for the Court's refusal to recognize the father's rights was because there was an existing family which sought to protect the child's welfare. Therefore, the recognition of a parent's rights relates to and depends upon whether a family exists or the mother competes to protect the child's welfare.

two separate persons their relationship is so intimate that the unique bond between them, beginning as it does in utero,⁵³ creates a human relationship which may be the most rewarding in the human experience. Preservation of the benefits, beauty, and joy of that relationship is one of the greatest interests a woman possesses in all of life.

The fact that she is the parent who carries the baby clearly distinguishes her circumstance (and her role in reproduction) from

⁵³ Recent studies demonstrate that a mother's bond with her child (and the child's attachment to her) begins during pregnancy and even at its early stages. Klaus and Kennel, "The Family During Pregnancy," in *Parent Infant Bonding*, 1-2 (1982); Lumely, "Attitudes to the Fetus Among Primagravidae," *Australian Pediatric J.*, 106, 108 (1982). Breaking this bond by abortion is detrimental to the health of the mother. See, Ortol, Edna, "Psychological Aspects of Abortion" in *Psychological Aspects of Pregnancy, Birthing and Bonding*, Blum, Barbara L., New York: Human Sciences Press (1980). This unique mother-child relationship, with the developing bond and attachment benefits both the child and mother. Klaus and Kennel, at 3. While at the same time the bond helps the mother to transfer her interest from herself to her child, and therefore prepares her for her unique role in the child's life. Sugarman, "Parental Influences in Maternal Infant Attachment," 47 *Am. J. Orthopsychiatry* 407 (1977). This accounts for the fact that a mother is the principle attachment figure for a child. Bowlby, "Attachment and Loss," Vol. I *Attachment*, at 304 (1969).

Studies have demonstrated the subjective and conscious awareness that mothers have concerning their bonding with their children during pregnancy. In the second trimester 63% of women expressed attachment with the child and 92% expressed such attachment during the third trimester. Some women even expressed the attachment during the first trimester. Lumely, "Attitudes to the Fetus Among Primagravidae" *Australian Pediatric J.*, 106, 108 (1982). Mothers talk to the fetus and stroke it. *Id.* at 109. The ability of the mother to make a correct assessment of the size, shape and movement of the baby increased as the pregnancy proceeds as does the sense of the separateness of the baby. *Id.* at 108. Increased sensitivity to the child follows experience of "quackening" when women can feel the baby move. Klaus and Kennel, *supra.* at 13; Leister, "Physiological Effects of Motherhood," at 76 (1980).

that of the father. But the fact that her contributions are different from (and at this age of the child, greater than) his do not make her interest inconsistent with those of the child. If anything, it creates the cherished right to protection of their relationship.⁵⁴

The fact that the mother is the parent who carries the child has always been considered material to her rights following birth when she is competing for custody. This is our understanding of *Lehr*.

This fact relates to human bonding and impacts upon the health of both the mother and child. New Jersey law gives the mother the right to choose to be the primary custodian when the natural parents do not live together and disagree on custody at the time of birth. *Matter of Baby M*, 537 A.2d 1227, 1261 (1988).

Therefore, the fact that a mother carries the child physically relates to her rights when she seeks to protect the child. To suggest that that fact supports a right to kill the child is contrary to constitutional principles dealing with termination rights.⁵⁵ The

⁵⁴ The New Jersey Supreme Court has observed, concerning the mother's relationship with the baby she carries "we think it is expecting something well beyond normal human capabilities to suggest that [a] mother should [part] with her newly born infant without a struggle. Other than survival, what stronger force is there?" *Matter of Baby M*, 109 N.J. at 459

⁵⁵ This court's opinion in *Southeastern Pa v Casey*, *supra*, is not inconsistent with this understanding of the mother's interests because *Casey* never addressed the humanity of the child. *Casey* only examines the question of whether a father

fact that a mother wants to kill her own child would be a basis for terminating her constitutional rights and inconsistent with her interest in protecting her child's life. The privacy right to preserve the mother-child relationship child cannot co-exist with the right to kill the child. They are repugnant.⁵⁶

may require his "consent" for abortion. *Casey*, 112 S.Ct. at 2830-31. A father never has an interest in an abortion, so his permission could never be required. His *only* interest is in preserving the child's life and their relationship. But any analysis of *Roe* and *Casey* forming grounds to terminate a father's rights, or refusing to recognize them at all, which is not consistent with the welfare of the child is at odds with precedent defining parental rights and is the result of this Court never having determined when the life of the child begins. (See footnote 52 above).

⁵⁶ The fact that a mother's interests in her child's life and her relationship with the child prior to birth are repugnant to a perceived "interest" in killing the child [and therefore mutually exclusive] through abortion is reflected in some modern feminist literature. In her book, *Sacred Bond*, Times Books, Random House, Inc., New York, 1st ed., 1988, Phyllis Chesler observed this conflict, stating that the "sacred bond" of a mother and child cannot be sacrificed for a right to destroy that relationship.

Some feminists say: "If women can't do what they want with their bodies, then we'll lose our right to abortion and pay equity." I hope not, but must women give up the right to keep our children -- a right we don't yet have -- for the right not to bear children?

Some feminists say: "Patriarchal motherhood has enslaved and destroyed women-who in turn have emotionally wounded their own children. There's nothing sacred about biological reproduction or motherhood. They're examples of devalued and alienated unpaid labor. Let's organize for wages and better working conditions and get men involved in mothering. At the very least, male mothers will upgrade women's status as childcare workers."

Perhaps, but how can we deny that women have a profound and everlasting bond with the children they've birthed; that this bond begins in utero; that it is further strengthened by the experience of childbirth, breast-feeding and primary childcare, and by the socialization into motherhood that women (not men) receive?

How can we deny that children bond with their birth mothers in utero, and that children suffer terribly in all kinds of ways when this bond is prematurely or abruptly terminated?

Acknowledging these truths does not doom women to the status of surrogate

Fourth, she has an interest to avoid the risk of physical and psychological harms to which she is subjected when abortion is used to satisfy interests that may have existed only before she becomes a mother. This nation's experimentation with abortion has revealed impressive evidence of profound risk of physical and psychological harms to which a mother is subjected when she acts against her interests by taking her child's life. This method of the destruction of the mother-child relationship places a woman at substantially increased risk for breast cancer. The first interrupted pregnancy causes a sequence of hormonal changes which permanently alter the cell structure of the women's breast. During the first full pregnancy, the breast changes from an immature organ to one which is fully functional. Abortion of a first pregnancy interrupts the transformation within the breast. Indeed, abortion terminates this process, leaving millions of breast cells suspended in transitional states where they face exceptionally high risks of turning cancerous.⁵⁷ In addition, abortion places women

uteruses-or men to the status of sperm donors. Patriarchal "civilization" has already done so. *Sacred Bond*, at 22-23. [Emphasis added.]

⁵⁷ See: Russo, J., Russo IH (1980) "Susceptibility of the Mammary Gland to Carcino-genesis II. Pregnancy Interruption as a Risk Factor in Tumor Incidence" *Am J Pathol*, 100:497-451; Ownby, H.E., et als. (1983) "Interrupted Pregnancy as an Indicator of Poor Prognosis in TI, 2, No, Mo Primary Breast Cancer" *Breast*

Cancer Res Treat, 3:339-344; Olsson H., et al (1991) "Proliferation and DNA Ploidy in Malignant Breast Tumors in Relation to Early Oral Contraceptive Use and Early Abortions" *Cancer*, 67:1285-1290; Olsson H., et al. (1991) "Her - 2/neu and INT2 Proto-oncogene Amplification in Malignant Breast Tumors in Relation to Reproductive Factors and Exposure to Exogenous Hormones" *J Nat Cancer Inst*, 83:1483-1487; Clark, R.M., et als. (1989) "Breast Cancer and Pregnancy: The Ultimate Challenge" *Clin Oncol Royal Coll Radiol*, 1:11-18; MacMahon B., et als. (1970) "Age at First Birth and Breast Cancer Risk" *Bull World Hlth Org*. 43:209-221; Salber, E.J., et als. (1969) "Lactation and Reproductive Histories of Breast Cancer Patients in Boston" 1965-66, *J Nat Cancer Inst*, 43:1013-1024; Lowe C.R. et als. (1970) "Breast Cancer and Reproductive History of Women in South Wales" *Lancet*, i:153-156; Ravnihar B., et als. (1971) "Epidemiologic Features of Breast Cancer in Slovenia" 1965-1967, *Eur J Cancer*, 7:295-306; Herity B.A., et als. (1975) "A Study of Breast Cancer in Irish Women" *Brit J Prev Soc Med*, 29:178-181; Paffenbarger R.S., et als. (1980) "Characteristics that Predict the Risk of Breast Cancer Before and After the Menopause" *Am J Epidemiology*, 112:258-268; Segi M., et als. (1957) "An epidemiological Study on Cancer in Japan" *GANN* 48 Suppl: 1-43f; Wynder E.L., et als. (1960) "A Study of the Epidemiology of Cancer of the Breast" *Cancer*, 13:559-601; Valaoras V.G., et als. (1969) "Lactation and Reproductive Histories of Breast Cancer Patients in Greater Athens" 1965-67 *Int J Cancer*, 4:350-363; Yuasa S., et als. (1970) "Lactation and Reproductive Histories of Breast Cancer Patients in Tokyo, Japan" *Bull World Hlth Org*, 42:195-204; Lin, T.M., et als. (1971) "Epidemiology Characteristics of Cancer of the Breast in Taiwan" *Cancer*, 27:1497-1504; Mirra A.P., et als. (1971) "Breast Cancer in an Area of High Parity, Sao Paulo, Brazil" *Cancer Res*, 31:77-83; Stavrakys K., et als. (1974) "Breast Cancer in Premenopausal and Postmenopausal Women" *J Nat Cancer Inst*, 53:647-654; Soini I. (1977) "Risk Factors of Breast Cancer in Finland" *Int J Epidemiology*, 6:365-373; Choi N.W., et als. (1978) "An Epidemiological Study of Breast Cancer" *Am J Epidemiology*, 107:510-521; Toti A., et als. (1980) "Possible Indication of Breast Cancer Risk Through Discriminant Functions" *Cancer*, 46:1280-1285; Kelsey, J.L., et als. (1981) "Exogenous Estrogens and Other Factors in the Epidemiology of Breast Cancer" *J Nat Cancer Inst*, 67:327-333; Pike, M.C., et als. (1981) "Oral Contraceptive Use and Early Abortion as Risk Factors for Breast Cancer in Young Women" *Br J Cancer*, 43:72-76; Remennick, L (1990) "Induced Abortion as a Cancer Risk Factor: A Review of Epidemiological Evidence" *J Epidemiol Community Health*, 44:259-264; Vessey, M.P., et als. (1982) "Oral Contraceptive Use and Abortion Before First Term Pregnancy in Relation to Breast Cancer Risk" *Br J Cancer*, 45:327-331; Brinton L.A., et als. (1983) "Reproductive Factors in the Aetiology of Breast Cancer" 47:757-762; Ewertz M., et als. (1988) "Risk of Breast Cancer in Relation to Reproduction Factors in Denmark" *Br J Cancer*, 58:99-104; Yuan, J-M, et als. (1988) "Risk Factors for Breast Cancer in Chinese Women in Shanghai" *Cancer Res*, 48:1949-1953; Rosenberg, L., et als. (1988) "Breast Cancer in Relation to the Occurrence and Time of Induced and Spontaneous Abortion" *Am J Epidemiol*, 127:981-989; Mantel N., et als. (1959) "Statistical Aspects of the Analysis of

at significantly increased risk of [1] severe depression;⁵⁸ [2] lowered self esteem;⁵⁹ [3] suicide, suicidal ideation, attempted

Data From Retrospective Studies of Disease" *J Nat Cancer Inst*, 22:719-748; Le M-G, et als. (1984) "Oral Contraceptive Use and Breast or Cervical Cancer: Preliminary Results of a French Case-control Study," in "Hormones and Sexual Factors in Human Cancer Actiology" Wolff J-P and Scott JS, eds, Elsevier, Amsterdam, 139-147; Howe, H.L., et als. (1989) "Early Abortion and Breast Cancer Risk Among Women Under Age 40" *Int J Epidemiol*, 18:300-304; Nishiyama, F. (1982) "The Epidemiology of Breast Cancer in Tokushima Prefecture" *Shikoku Ichi (Shikoku Med J)*, 38:333-343 (Tr. Frank C., Farnham Co., Philadelphia); Dvoirin, V.V., et als. (1978) "The Role of Reproductive History in Breast Cancer Causation" in *Methods and Results of Studies of Breast Cancer Epidemiology*, Tallinn, 53-56 (in Russian, reported by Remennick, 1990 [ref #24]); Lindefors-Harris B-M, et als. (1989) "Risk of Cancer of the breast After Legal Abortion During the First Trimester: A Swedish Register Study" *Br Med J*, 299:1430-1432; Lindefors-Harris B-M, et als. (1991) "Response Bias in a Case-control Study: Analysis Utilizing Comparative Data Concerning Leagal Abortions From Two Independent Swedish Studies" *Am J Spidemiol*, 134:1003-1008; Adami H-O, et als. (1990) "Absence of Association Between Reproductive Variables and the Risk of Breast Cancer in Young Women in Sweden and Norway," *Brit J Cancer*, 62:122-126; Parazzini F., et als. (1991), "Spontaneous and Induced Abortions and Risk of Breast Cancer," *Br J Cancer*, 53:281-284; Harris J.R., et als. (1992) "Breast Cancer" (first of three parts), *N Engl J Med*, 327:319-328.

⁵⁸ Major, B. et als. (1985) "Attributions, Expectations and Coping with Abortion," in *Journal of Personality & Social Psychology*, 48, 3, 585-599; Louis Harris & Assoc. (April 20, 1993), "The Health of American Women," commissioned by the *Commonwealth Fund*; David, et al., "Postpartum and Postabortion Psychotic Reactions," in *Family Planning Perspectives*, (1981) 88-91; Reardon, *Aborted Women - Silent No More*, (Chicago; Loyola University Press, 1987); Reardon "Criteria for Identification of High Birth Abortion: Analysis of an in-depth survey of 100 aborted women" presented at the 1987 Paper Seminar of the Association for Inter-Disciplinary Research, Denver. See, generally, Beck, A.T., *Depression*, New York: Hocker (1967).

⁵⁹ Russo, N. & Zierh, K. (1992) "Abortion, Childbearing and Women's Well-Being," in *Professional Psychology: Research & Practice*, 23, 4, 269-280; Speckland, A. (1987), *Psycho-Social Stres Following Abortion*, Kansas City, MO: Sheed & Ward; Bradley, C. (1984), "Abortion and Subsequent Pregnancy," in *Canadian Journal of Psychiatry*, 29, 494; Dagg, P. (1991) "The Psychological Sequelae of Therapeutic Abortion," *American Journal of Psychiatry*, 148, 4, 578-585; Armsworth, M. (1991) "Psychological Response to Abortion," *Journal of Counseling & Development*, 69, 377-379; Zolese, G. & Blacker, C. (1992) "The

suicide and paranoid ideations;⁶⁰ [4] drug or alcohol abuse;⁶¹ [5] negative impact on marital relations;⁶² [6] negative feelings regarding subsequent pregnancies and obsessive thoughts about replacement children;⁶³ [7] stress disorders;⁶⁴ [8] sexual

Psychological Complications of Therapeutic Abortion," *British Journal of Psychiatry*, 160, 742-749; Adler, N., et als. (1992) "Psychological Factors in Abortion" *American Psychologist*, 47, 10, 1194-1024; Wilmoth, G., de Alteriis, & Bussell, D. (1992) "Prevalence of Psychological Risks Following Legal Abortion in the U.S.: Limits of the Evidence," *Journal of Social Issues*, 48, 3, 37-66; Speckland A. (1987) *Psycho-social Stress Following Abortion*, Kansas City, MO: Sheed & Ward; Bradley, C. (1984) "Abortion and Subsequent Pregnancy," in *Canadian Journal of Psychiatry*, 29, 494; Open Arms, (1993) *Abortion Information Survey Project*, Columbia, MO: P.O. Box 1056; Akron Pregnancy Service (1993), *Post-Abortion Research Project*, Akron, Ohio: 105 E. Market St.

⁶⁰ Campbell, et als. (1988) "Abortion in Adolescence," in *Adolescence*, 23, 92, 813-823; Garfinkel, B., et als. (1986) "Stress, Depression and Suicide: a Study of Adolescents in Minnesota," in *Responding to High Risk Young*, Minnesota Extension Service: University of Minnesota; Reardon, D. (1987), *Aborted Women: Silent No More*, Westchester, ILL: Crossway; Vaughan, H., *Canonical Variates of Post-Abortion Syndrome*, Portsmouth, N.H.; Institute for Aborting Recovery & Research; 1991; *Open Arms AIS Project (1993), supra., Akron Pregnancy Service Survey, supra.*; Freeman, et als. (1980) "Emotional Distress Patterns Among Women Having First or Repeat Abortions" in *Obstetrics & Gynecology*, 55, 5, 625-635.

⁶¹ Plant, M. (1985) *Women, Drinking and Pregnancy*, London; Tavistock Publications; Reardon, D. (1987) *Aborted Women: Silent No more, supra.*; *OPEN Arms (1993), Abortion Information Survey Project, Columbia, MO: P.O. Box 1056; Reardon, "Criteria for the Identifiable High Risk Abortion Patients: Analysis of an In-Depth Survey of 100 aborted Women," presented at the 1987 Paper Seminar of the Association for Inter-Disciplinary Research, Denver.*

⁶² Vaughan, H. (1991) "Canonical Variolis of Post Abortion Syndrome," *supra*; Wallerstein, et als. (1972) "Psychosocial Singular of Therapeutic Abortion in Young Unmarried Women" in *Archives of General Psychiatry Vol. 27.*

⁶³ Bradley, C. (1984) "Abortion and Subsequent Pregnancy" in *Canadian Journal of Psychiatry*, 29, 494; Speckhard, A. (1987) *Psycho-Social Stress Following Abortion*, Kansas City, MO; Sheed & Ward; Pare and Raven, "Follow-up of Patients Referred for Termination of Pregnancy," *The Lancet* (1970) Vol. I pg. 35-

dysfunctions;⁶⁵ [9] grief reactions;⁶⁶ [10] nervous and sleep

638; Wallerstein, et al., Id. Reardon, *Aborted Women - Silent No More*, Chicago: Loyola University Press, 1987; Vaughan, Id.; Poznanski, Elva O., "The 'Replacement Child' A Saga of Unresolved Parental Grief," in *The Journal of Pediatrics*, 81(6): 1190-1193 (1972); Ortof, Edna, "Psychological Aspects of Abortion" in *Psychological Aspects of Pregnancy, Birthing and Bonding*, Blum, Barbara L., ed. New York: Human Sciences Press (1988).

⁶⁴ Akron Pregnancy Service (1993), *Post-Abortion Research Project*, Akron, OH; 105 E. Market Street; Russo, N. & Zierk, K. (1992) "Abortion, Childbearing and Women's Well-Being." *Professional Psychology; Research & Practice*, 23, 4, 269-280; Dagg, P. (1991) "The Psychological Sequelae of Therapeutic Abortion," *Amer Journal of Psychiatry*, 148, 5, 578-585; Armsworth, M. (1991) "Psychological Response to Abortion," *Journal of counseling & Development*, 69, 377-379; Zolese, G. & Blacker, C. (1992) "The Psychological Complications of Therapeutic Abortion," *British Journal of Psychiatry*, 160, 742-749; Adler, N., et als. (1992) "Psychological Factors in Abortion," *American Psychologist*, 47, 10, 1194-1204; Wilmoth, G., et als. (1992) "Prevalence of Psychological Risks Following Legal Abortion in the U.S.: Limits of the Evidence," *Journal of Social Issues*, 48, 3, 37-66; Hanley, et als. (1992) *Woman Outpatients Reporting Continuing Post-Abortion Distress: A Preliminary Inquiry*, Paper Presented at the Eighth Annual Meeting of the International Society for Traumatic Stress Studies, Los Angeles; Barnard, C., *The Long Term Psychosocial Effects of Abortion*, Portsmouth, N.H., Institute for Abortion Recovery & Research, 1990.

⁶⁵ Reardon, *Aborted Women - Silent No More*, Chicago: Loyola University Press, 1987; Franache, *The Ambivalence of Abortion*, New York, Random House, 1978; Speckhard, H. (1987), *Psycho-Social Stress Following Abortion*, Kansas City, MO: Sheed & Ward.

⁶⁶ Peppers, L. "Grief and Elective Abortion: Breaking the Emotional Bond?" *Omega* 18:1 (1987), 1-12; Reardon, *Aborted Women - Silent No More*, supra; Reardon, "Criteria for Identification of High Risk Abortion Patients: Analysis of an In-Depth Survey of 100 Aborted Women," supra; Bowlby, J., *Attachment and Loss*, London: Hogarth Press (1980); Harris, Betty G., "Induced Abortion" in *Parental Loss of a Child*, ed Rando, Theresa A., Champaign, Ill: Research Press Co., (1986); Kuenning, Delores, "'I Killed My Baby' The Emotional Aftermath of Abortion" in *Helping People Through Grief, When a Friend Needs You*, Bethany House Publishers, Minneapolis (1987); Upton, Julia "Hidden Grief of Abortions" in *Pastoral Psychology*, 31(1): 19-25, Fall (1982); Shoor, M. et al., "Delinquency as a Manifestation of the Mourning Process" in *Psychiatric Quarterly*, 37:540-558.

disorders;⁶⁷ [11] and other physical and psychological injuries too numerous to detail.⁶⁸ Fifth, she has an interest in preserving her personal dignity in her role as mother, a role that does not simply "ennoble" her, or merely enrich her life, but one which distinguishes her as unique as the mother of the unique person she carries. A legal policy which denigrates her role in carrying her child is not one which actually protects her interests but destroys them. There is a difference between the experiences of women and men in the role of reproduction that must be accounted for to define a women's true interests.⁶⁹ The insistence by society that

⁶⁷ Ashton, J. (1980) "The Psychosocial Outcome of Induced Abortion," in *British Journal of Obstetrics & Gynecology*, 87, 1115-1622; Akron Pregnancy Service, supra; Freemard, et als. (1980) "Emotional Distress Patterns Among Women Having First or Repeat Abortions," in *Obstetrics & Gynecology*, 55, 5, 625-635.

⁶⁸ Many of these harms are inherent to abortion or the breaking of the mother-child bond developed during pregnancy, such as the grief reactions in abortion (so characteristic to birth mother separated from their children after birth). See, generally, Peppers, L. "Grief and Elective Abortion: Breaking the Emotional Bond?" *Omega* 18:1 (1987), 1-12; the other injuries cited above are inherent in the abortion conduct because it acts against the natural interests of the mother. The study in two Canadian provinces which found that 25% of "aborted" women made visits to psychiatrists as compared to 3% of the control group is typical. See, Badgley, et als. (1977) Report of the Committee on the Operation of the Abortion Law, *Ottawa: Supply and Services*, 313-321.

⁶⁹ A woman's sense of personhood is most often grounded in her relatedness to others. Women tend to find satisfaction, pleasure, effectiveness and a sense of worth if they experience their life activities relating to a sense of connection with others. This sense of connection leads to an increase in vitality, aliveness and energy. Women also have a heightened sense of empathy and this ability enhances rather than diminishes them. Miller, *New Physiology of Women* (1986). Women tend to focus more on their relationships to others. These characteristics

women conform in their conduct in the ways expected of men ignores and denigrates the experience of the mother during pregnancy.⁷⁰ To pretend that she can deny her true experience to meet these expectations is not only insulting but cruel. To establish a formal policy which chooses to protect the destruction of her relationship with her child instead of a policy which clearly protects it is a denigration of women, because a policy which infers it is a distressing experience to be a mother is a statement that it is bad to be a woman.

Sixth, she has an interest in not being exploited by societal pressures which destroy her interests as mother as a method to

are associated with her bonding and reproductive functions. Blenesky, Clinchy, Goldberger and Tarule, *Women's Ways of Knowing*, at 1-7 (1986). Gilligan, *In a Different Voice*, at 23 (1982), writes that the elusive mystery of women's development lies in its recognition of the continuing importance that attachment has in the human life cycle. Gilligan, *supra*, at 9-10, noted that there are differences in the ways men and women define themselves in relationship to others. Women seem more comfortable speaking of the relationships that sustain them. Thus the emphasis on relationship found in women will tend to enhance bonding, while the emphasis on separation and independence in men will tend to minimize the importance of bonding.

⁷⁰ A male dominated society prized autonomy and independence; the goal of development was total independence. Women's development and role as mother often did not follow this trajectory. Miller, *What do We Mean by Relationships*, 22 *Work in Progress*, Stone Center, Wellesly College 1, 16 (1986). The mother's bonding process and her experience being different from that of men must be accounted for. See, Miller, *New Psychology of Women*, at 140 (1986). See Hoeissman, M. et al., "Sex Differences and the Epidemiology of Depression" in *Archives of General Psychiatry*, 34: 98-111 (1977).

satisfy the interests of third parties, including the State, the father,⁷¹ and others, who may have personal interests inconsistent with those of mother and child. Abortion is an exploitation of women. It treats the mother as if she is not a whole woman. It assumes she can be sexually exploited and act as though she is not, in fact, a mother. It demands that she detach herself from her experience and her bond, love, and sense of duty to herself and her child.⁷² It expects a mother to prevent the bonding process despite the fact that this natural process is both

⁷¹ Many abortions are at the urging of the father who does not have to live with the experience of pregnancy, bonding, love of child, and abortion. See studies of abortions as result of pressure from the father, Shostak, A., et al., *Men and Abortion, Lessons, Losses and Love*, New York, Proejen, (198); Lien-Mak, F., et al., "Husbands of Abortion Applicants: A Comparison with Husbands of Women Who Complete Their Pregnancies" in *Social Psychiatry* 14:59-64 (1979) [the authors of this Hong Kong study warns "our study has served to emphasize the important role that the husband plays in abortion seeking ... it is high-time [to] give substance to the shadowy figure [of] the male partner"]; See also, Rue, V., "Abortion in Relationship Context" in *International Review of Natural Family Planning* 9:95-121 (1985) (abortion serves the purpose of the erotic compulsive male who seeks self-esteem through sexual "achievement").

⁷² Feminists who oppose abortion see it as a male institution which encourages and even forces a woman to act irresponsibly, against her self-interest, her dignity and self-worth, just as men often do in reducing women as "sport" and "entertainment." Newman, B., "Why Post-Modern Patriarchy Loves Abortion," in *Sisterlife*, (1993) Vol. XIII, 1, p.1, 5; Some of the greatest feminist leaders, such as Susan B. Anthony, deplored abortion as an exploitation of women, calling it "child murder," [The Revolution, 4(1):4 (July 8, 1869)] and the result of the use of women as sport [Anthony, Marriage and Maternity," *The Revolution*, 4 (1)4, 1869].

psychological and physiological.⁷³ It uses the mother as a sexual object without regard for the harm abortion can cause her.⁷⁴ It allocates all of the risk, guilt, physiological and physical pain to her and further isolates her in her distress in circumstance of an unplanned or imprudent pregnancy by placing the responsibility of killing her child entirely upon her.⁷⁵

Perhaps worst of all is the fact that a mother is deprived of any meaningful consent to the destruction of her cherished and sacred relationship with her child. In circumstances where mothers express their intentions during pregnancy to terminate their relationships with their children, no state permits enforcement of

⁷³ "Men tend to take abortion lightly; they...fail to realize the values involved. The woman who has recourse to abortion is disowning feminine values, her values...Women learn to believe no longer in what men say...the one thing they are sure of is the rifled and bleeding womb, these shreds of crimson life, this child that is not here." Simone deBeauvoir, *The Second Sex*, 1952; "Abortion is violence: a deep, desperate violence inflicted by a woman upon, first of all, herself. It is the offspring, and will continue to be the accuser, of a more pervasive and prevalent violence, the violence of rapism." Adrienne Rich, *Of Women Born*, 1976.

⁷⁴ "It is typical of the contradictions that break women's hearts that when they avail themselves of their fragile right to abortion they often, even usually, went with grief and humiliation to carry out a painful duty that was presented to them as a privilege. Abortion is the latest in a long line of non-choices that begin at the very beginning with the time and the place and the manner of lovemaking..." Germaine Greer, *The New Republic*, interview, October 5, 1992.

⁷⁵ See discussion of psychiatric harm above. Dr. Alice Ruben Stockharm wrote of this isolation. See, Stockharm, A., *Takology* (1887), p. 247.

a mother's oral or written statement to surrender her child until after birth because, in every instance, regardless of the counseling, her decision, before actual birth, is uninformed. The New Jersey Supreme Court has found that any promise or decision by a mother to terminate her relationship with her child made before birth is uninformed as a matter of law. *Matter of Baby M*, 537 A.2d 1227, 1248. That court has made it clear that when it comes to the cherished relationship between a mother and her child, during pregnancy, no consent concerning the termination of that relationship can be recognized: that there are in a civilized society some relationships too important, too sacred, for that society to impose its collective power to assist in the destruction of that relationship, regardless of the beliefs of a mother in a moment of crisis or vulnerability. *Matter of Baby M*, 537 A.2d at 1249-1250. If that is true where a mother gives birth, it is more so where she irrevocably kills her own child and must live with the consequences.⁷⁶ Abortion also fails to recognize the reality that most women who originally intend to surrender children to adoption (be-

⁷⁶ When a woman is in crisis her "consent" is invariably "uninformed" in any true sense. C.f. Hardison, J.E., "Uninformed Consent and Terms Within Definitions," in *American Journal of Medicine*, 74:923-933 (1983).

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cause of the *Roe* "interests") change their mind. Abortion is repugnant to every policy that New Jersey has adopted to protect and preserve a mother's relationship with her child-policies ted to protect her interests as well as the child's.⁷⁷

Seventh, she has an interest in having the law extend to her dignity and respect by recognizing that she is capable of living with dignity in the family, commercial and professional life of this nation without being denigrated by specially and artificially crafted "principles of law" which ingrain the belief that she is inherently inferior because she cannot be happy in life without an exclusive "right" to terminate the life of her own child.

D. THE INTERESTS THAT HAVE ENJOYED TRADITIONAL PROTECTION ARE THE CHILD'S INTEREST IN LIFE, AND WELFARE, AND A MOTHER'S INTEREST IN PROTECTING BOTH THE LIFE OF HER CHILD AND HER RELATIONSHIP WITH HER CHILD. THE LAW AND TRADITIONS OF NEW JERSEY AND THIS NATION HAVE NEVER RECOGNIZED AS PROTECTIBLE A MOTHER'S "INTEREST" TO TERMINATE THE LIFE OF HER CHILD—AN "INTEREST" COMPLETELY OPPOSED TO THE BASIC FABRIC OF ALL LAW PROTECTING MOTHER'S AND THEIR CHILDREN, AND THE VERY FUNCTION OF GOVERNMENT ITSELF.

Once the fact of the child's existence is recognized, a perceived

⁷⁷ All of these harms that befall the mother is actually done to accommodate society's sexual exploitation because it was easier for that society to create an industry of abortion than to correct the underlying exploitive conduct that results in unplanned pregnancy.

Constitution characterizes life as one of the three fundamental rights of which no one can be deprived without due process of law...our own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. Const. (1947), ART. 1, SEC. 1. The declaration of independence states that the primacy of man's 'inalienable' right to life is a 'self-evident truth.' Nowhere in these documents is there to be found an indication that the life of persons suffering from handicaps are to be less cherished than those non-handicapped beings. *Berman v. Allan*, 404 A.2d 8, 13 (1979) (emphasis added).

As recently as 1992 the New Jersey Supreme Court reaffirmed

that portion of *Gleitman, supra*, which held that the state constitution extends a right to live to children prior to birth:

In *Gleitman* the Court observed that '[a] child need not be perfect to have a worthwhile life,' (citation omitted) and found that, '[e]ugenic considerations are not controlling,' *ibid.*, noting that considerations of financial burden to the father and convenience of the mother *did not outweigh the child's right to live, albeit imperfectly.*" *Hummel v. Reiss*, 608 A.2d 1341, 1345-1346 (N.J. 1992). (emphasis added)

2. The Traditional Protection of a Mother's Relationship with Her Child.

New Jersey has a strong and long standing policy to protect a mother's relationship with her child during pregnancy,⁷⁸ which protects against the destruction of the mother's relationship with her child and the exploitation of the mother during pregnancy. The fundamental policy of New Jersey's adoption laws is to preserve

⁷⁸ The deep rooted respect for this relationship is found in western literature replete with statements that recognize that this relationship is at the heart of an ordered culture. It is "the nearest and dearest" known to mankind. Aeschylus, "Eumides" translated by George Thompson, *Greek Play's in Modern Translation* (Dudley, Fitts, ed. 1947) at 130.

the relationship of a mother and child during and after pregnancy and protect it against exploitation and undue influences. *Sees v. Baber*, 377 A.2d 628 (1977); *Matter of Baby M*, 537 A.2d at 1248-1250; *A.L. v. P.A.*, 517 A.2d 171 (A. D. 1986). Likewise New Jersey protects a mother's relationship with her child from exploitation, pressures and inducements of surrogate contracting arrangements even when she had promised to conceive and carry a child for another couple, and terminate her relationship after birth. *Matter of Baby M*, at 1248-1250. This protection is based upon the long standing policies which protected the mother's relationship even after her promises, made before or during pregnancy, to surrender her relationship, whether it be to adoption or under the terms of a surrogacy arrangement. New Jersey refuses to enforce such a promise because a decision by a mother to terminate her relationship with her child, made during pregnancy, regardless of counseling, is uninformed as a matter of law. *Matter of Baby M*, at 1248.

When parents are separated at a child's birth, and they disagree on custody, New Jersey's strong commitment to preservation of the mother's relationship requires that the child must initially be left in the custody of the mother (if she desires it) unless there is

a clear showing that the child will be harmed because the mother is unfit. *Id.*, at 1261. This policy is based upon the recognition that the interests of a mother and her child are the same in their mutual need to further nurture their relationship. *Id.* at 1261. In short the relationship between a mother and her child, at every stage of development of the child, is the most cherished and best protected in all of the human experience. The New Jersey laws against abortion were designed to protect the mother's interests as well as the child's. See, *N.J. v. Novak*, 121 A.2d 521 (1956); *N.J. v. Siciliano*, 117 A.2d 490 (1956); *N.J. v. Colmer*, 122 A.2d 325 (A.D. 1957); N.J.S.A. 2A-87-1.

The relationship and benefits a mother derives from it are too important, too sacred to destroy it at all, but especially where it is destroyed in crisis, under pressure, by inducement or threat, or in the circumstance where it is impossible for her to truly appreciate the nature of her act. Any method of termination of a mother's relationship with her child before birth is contrary to all existing law and policy in New Jersey.⁷⁹

⁷⁹ In *Franz v. United States*, 707 F.2d 582 (D.C. Cir. 1983), the interest of a mother in her child's relationship was eloquently described:

"[the law protects] the profound importance of the bond between a parent and child to the emotional life of each. *Frequently each party to the relationship*

3. An "Interest" of a Mother to Terminate Her Child's Life is Unprotectible.

An "interest" of a mother to terminate the actual life of her child has no source in law or the traditions of this nation and therefore not protected by the Due Process Clause. See, *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Morrisey v. Brewer*, 408 U.S. 471, 481-483 (1972); *Meachum v. Fano*, 427 U.S. 215, 224-227 (1976); *Ruckalhaus v. Monsanto Co.*, 467 U.S. 986, 1001-1003 (1984); *Codd v. Velger*, 429 U.S. 624, 628 (1977); *Ingrahm v. Wright*, 430 U.S. 651, 672-673 (1977); *Webb's Fab. Phar., Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *Smith v. organ. of Foster Fam.*, 431 U.S. 816, 838-847; 858-863 (1977).

The "interest" of a mother in terminating her child's life is not merely without "an independent" source, it is directly opposed to all of the interests of a mother and child which have always enjoyed protection. The repugnant nature of this "interest" precludes it as "protectable" because, by necessity, it destroys the natural right to life of the child and the fundamental rights of the mother

depends heavily on his ties with the other for his sense of self-worth, for his very self-definition. To rephrase the point in the language of entitlement, the parents right to the preservation of his relationship with his child derives from the fact that the parent's achievement of a rich and rewarding life is likely to depend significantly on his ability to participate in the rearing of his offspring." 707 F.2d at 599 (emphasis added).

in their relationship. *Smith v. Organ. of Fos. Fam.*, 431 U.S. at 846. In *Smith*, the majority observed that for one to have a recognized liberty interest, it cannot operate to "derogat[e]" the substantive Due Process right of another. 431 U.S. at 846. (See also, concurring opinion of Justice Stewart, 431 U.S. at 856-863).

Neither *Roe* nor *Casey*, although protecting an "interest" in abortion, recognized an interest in actually killing a child.⁸⁰ A government which expressly authorizes or participates in the termination of a child's life has failed to perform the legitimate function for which it is created. The purpose and duty of the government is to protect its people and the life of all within its jurisdiction. *Yick Wo v. Hopkins*, 118 U.S. 356, 369-370 (1885) [see *Loce* Pet. Pt. II].

The right and duty to preserve life cannot co-exist with a right or duty to destroy it. The right and duty to preserve and protect the cherished relationship between mother and child cannot co-exist with a right and duty to destroy it. It is the law, as it represents the collective interests of the individuals for whom it ex-

⁸⁰ Even if such an interest were "protectible", which it cannot be, it could never outweigh the child's right to live. See and compare, *Zacchini v. Scipps - Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Rowan v. U.S. Post Office Department*, 397 U.S. 728 (1970); *Runyon v. McCary*, 427 U.S. 160 (1976).

ists, that must choose which set of interests it must protect, and long ago our law was required to choose life over death; the mother's beautiful interest in her child's life over its destruction; the protection of innocent children over the misguided philosophies and trends in social thought which come and go. If there are any self-evident and universal truths that can act for the human race as a guide or light in which social and human justice can be grounded, they are these: that life has intrinsic value; that each individual human being is unique and irreplaceable; that the cherished role of a mother and her relationship with her child, at every moment of life, has intrinsic worth and beauty; that the intrinsic beauty of womanhood is inseparable from the beauty of motherhood; and that this relationship, its unselfish nature and its role in the survival of the race is the touchstone and core of all civilized society. Its denigration is the denigration of the human race. This relationship, its beauty, its survival, its benefits to the mother and child, its benefits to society, all rest in the self-evident truth that a mother is not the owner of her child's life — she is the trustee of it.

III. CONVICTION OF PETITIONERS CHADWICK, KRAIL, SMOLDRE AND HENDERSON IS AN UNCONSTITUTIONAL DEPRIVATION OF THE RIGHTS OF THE CHILD AND THEIR OWN RIGHTS TO THE EQUAL PROTECTION OF THE LAW.

These petitioners have the standing to raise the rights of Mr.

Loce's child. "Standing" is an element of the "adverse parties" requirement of Article III and concerns whether the party seeking relief has:

Alleged such a personal status in the outcome of the controversy as to assure that concrete adverseness which sharpens the preservation of issues upon which the court so largely depends for illumination of difficult constitutional questions. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

This Court has often recognized the standing of a litigant to prosecute the rights of another if the litigant demonstrates: [1] a degree of injury to herself, and [2] that, under the circumstances present, the injured parties whom they seek to represent would probably be unable to assert their own rights. See e.g., *Barrows v. Jackson*, 346 U.S. 249 (1953); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976); *Craig v. Boren*, 429 U.S. 190, 192-197 (1976); *Carey v. Population Services Intl.*, 431 U.S. 678, 682-684 (1977); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

The policy underlying these requirements was best stated in *Singleton v. Wulff*, 428 U.S. 106 (1976). With respect to the first requirement *Singleton* states:

If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least

can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter. 428 U.S. at 114, 115.

Here petitioners sought to protect the child's life, the defense of which is the very core of the child's right in question. It matters not that they were prosecuted under a trespass statute: the Appellate Division found that the activity in which they engaged was the direct act of preventing the death of the child. They were convicted for preventing the "abortion". The Appellate Division stated that its refusal to recognize petitioners' otherwise valid defenses was the Appellate Division's effort to protect the mother's conduct in terminating the child's life. [A-87, 88]. The state's act of removing the petitioners from the clinic was to allow the termination of the child's life. The petitioners had stopped the termination until the state intervened. All of the state's actions, the removal of the petitioners from the clinic, their prosecution and conviction, was for the sole purpose of advancing and protecting "the mother's right" to kill the child [A-87, 88]. The harm to petitioners which satisfies the first requirement of *Singleton* is obvious in petitioners' conviction for protecting the child. The

second requirement of *Singleton* is totally satisfied. Unlike every other case decided by this Court, if standing is not recognized in the petitioners (or other persons similarly situated) then the rights of this class of children could never be raised. The parties whose rights are sought to be protected must rely on others to prosecute their rights.

As *Singleton* points out, one of the reasons for the standing requirement is that the third parties [the possessors of the rights in question]:

Usually will be the best proponents of their own rights. The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them. 428 U.S. at 114

So the effectiveness of the petitioners as advocates of the child's rights is a factor. However, here the court does not have the luxury of holding out for the third parties as the *most effective* advocates, because the children always depend upon someone in the position of the petitioners to litigate their rights for them. The question then is not if petitioners are the *best advocates*, but whether they are effective. Their personal harm, and the fact their activity directly involves the act of protecting the child's rights, renders them effective. However, their unique personal status as four women who have been harmed by abortion brings an insight

concerning the true interests of women and abortion as an exploitation of women that is absent without their litigating the child's rights. They may be the *most effective advocates* of the child's rights because of their sensitivity to and understanding of the relationship between mother and child and the harm to women when this relationship is destroyed.

This Court has never held that a defendant in a prosecution cannot raise the rights of another even if the possessors of the right are capable of litigating their rights, and even where others (such as Mr. Loce) were in the same case also prosecuting the rights of the third party. Only a showing that the child's rights would be adversely affected, not entirely denied, is sufficient for an acquittal of the petitioners. The harm to petitioners (conviction) and the total denial of the child's rights are sufficient.

In *Singleton, supra*, a doctor was *merely threatened* with the loss of money, and the persons whose rights he sought to protect were capable of litigating their own rights. The mere "chilling" of the women's ability to assert their right was sufficient infringement to condemn the State's action. In *Doe v. Bolton*, 440 U.S. 179 (1973) a Georgia statute which *merely threatened* prosecution of a doctor was declared by the Court to be an unconstitutional


infringement of a "patient's" rights despite the fact that [1] the doctor was not himself prosecuted, and [2] pregnant women were themselves parties to the very action. The combination of the mere threat of prosecution to the doctor combined with mere "restriction" of the women's rights rendered the statute against the doctor unconstitutional. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the prosecution of the Executive Director and Medical Director of a clinic was declared to be an unconstitutional deprivation of the privacy rights of couples. This Court, in short, has held that if a state's interest intrudes upon or violates an individual fundamental right it cannot form the basis of a criminal conviction. By removing petitioners from the premises and charging them with trespass the State acted in violation of the child's rights and impermissibly interfered with their own right to equal protection of the law.⁸¹ The prosecution of petitioners therefore, operating as

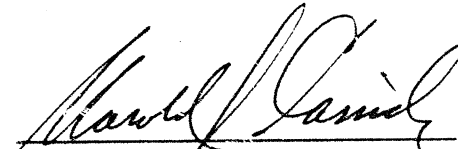
⁸¹ Refusal to recognize the petitioners' standing to raise the child's rights would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment. New Jersey extends the defense of a defendant's act as being necessary to defend the life of others in every other instance, and the conviction of the Krail petitioners is solely based upon the classification of persons only on their status as "unborn". See affirmative defenses for protecting other persons under *N.J.S.A. 2C:3-5*; *N.J.S.A. 2C:32-2*; *N.J.S.A. 2C:3-10*; *N.J.S.A. 2C:30-8*; and *New Jersey State Constitution Article 1, Section 1* (right to defend life). See *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964).

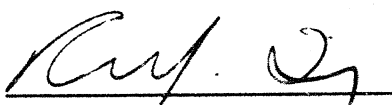
a complete bar to the assertion of the child's rights is clearly an unconstitutional deprivation of those rights. These petitioners, it should be noted, acted in concert with the child's father, at his request, and he could not have protected the child's life without their help. Petitioners' standing and those of Loce are interwoven and the considerations unique to Mr. Loce by virtue of his relationship with the child support the standing of petitioners Chadwick, Krail, Smoldore and Henderson. [See, Loce Pet. pt. IV]. If this Court recognizes the standing of doctors who assist in terminating the life of children, then clearly the Court, by the same principles of law, must recognize the standing of petitioners who aid a father to protect and defend the child's life.

CONCLUSION

The issues presented by this petition have never been directly decided by this court. The public importance of the issues requires that the court grant certiorari to decide them.


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