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FAMILY LAW—COURT-ORDERED SURGERY FOR THE PROTECTION OF A VIABLE FETUS—Jefferson v. Griffin Spalding County Hospital Authority, 247 Ga. 86, 274 S.E.2d 457 (1981)

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FAMILY LAW—COURT-ORDERED SURGERY FOR THE PROTECTION OF A VIABLE FETUS—*Jefferson v. Griffin Spalding County Hospital Authority*, 247 Ga. 86, 274 S.E.2d 457 (1981).

I. INTRODUCTION

In *Jefferson v. Griffin Spalding County Hospital Authority*,[1] the Supreme Court of Georgia upheld a lower court's decision ordering a pregnant woman to submit to a caesarean section if necessary to protect her thirty-nine week old fetus.[2] The court held that as a matter of law the viable fetus[3] was entitled to the protection of the Juvenile Court Code of Georgia[4] and, because of the mother's refusal to submit to recommended surgery, was without proper parental care and subsistence necessary to sustain life.[5] The court granted temporary custody of the fetus to the Georgia Department of Human Resources with full authority to consent to any necessary medical procedures.[6]

Historically, medical refusal cases have arisen in two contents: cases in which the treatment is intended for the unwilling patient's own benefit[7] and those in which the patient is a minor child or other type of incompetent whose parent or guardian withholds consent.[8] These categories have each generated substantial and well developed bodies of law. In *Jefferson*, however, a pregnant woman's refusal of medical treatment necessary to save the life of her fetus presented the Georgia Supreme Court with a unique legal dilemma for which there was surprisingly little authority upon which to base a decision. This situation, while generally related to the established lines of authority for medical refusal cases, is nevertheless validly distinguishable from both.[9] Furthermore, the problem has taken on a new

1. 247 Ga. 86, 274 S.E.2d 457 (1981).
2. *Id.* at 89, 274 S.E.2d at 460.
3. The meaning of "viable," as used in this note, is that set forth in Roe v. Wade, 410 U.S. 113 (1973), specifically, the point in development at which the fetus is potentially able to live outside of the mother. *Id.* at 160. No attempt will be made within this note to deal with the practical problems which may arise from this definition.
4. *See* GA. CODE ANN. § 24A (1981).
5. 247 Ga. at 88, 274 S.E.2d at 459.
6. *Id.*
7. *See infra* notes 12-46 and accompanying text.
8. *See infra* notes 46-53 and accompanying text.
9. In a study of Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J.

dimension in the wake of the Supreme Court of the United States' principal abortion decision, *Roe v. Wade*,[10] which significantly reevaluated the legal status of fetal life.[11]

This note will first survey the areas of medical refusal law most relevant to the problem of a pregnant woman's refusal of treatment. This discussion will be followed by an analysis of the current legal status of the unborn and the degree of protection given to the unborn by various courts. *Jefferson*, which combines both fields of law, will then be analyzed with respect to the finding that the juvenile court had jurisdiction over the fetus, the ultimate decision to order surgery upon the mother, and the propriety, in the context of current law, of both decisions. The final segment of the note will focus upon the implications of *Jefferson* to the disposition of similar future cases.

II. APPLICABLE LAW

A. *The Right to Refuse or Withhold Medical Treatment*

Court ordered medical treatment intended to protect a fetus necessarily involves a physical invasion of the mother, thus invoking the body of law dealing with a competent adult's right to refuse treatment upon his or her body. On the other hand, the intended beneficiary of the treatment is not the mother, but rather the fetus, which is being denied life-saving care by the mother's refusal. In this sense, the situation resembles those cases in which a parent withholds consent to treatment upon a child. Both lines of authority therefore bear some relationship to a pregnant woman's refusal of treatment.

1. The Competent Adult's Right to Refuse Treatment

It generally has been held that absent some pressing state interest, a competent adult has the right to refuse medical treatment upon

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421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964), a case, which like *Jefferson*, involved court ordered treatment upon a pregnant woman to save the life of her fetus, the author noted: "The principal case, however, does not fit directly in either of these categories; rather it contains elements of each." Note, *Constitutional Law - Freedom of Religion - New Jersey Supreme Court Orders Pregnant Jehovah Witness to Consent to Blood Transfusion to Save Unborn Child*, 33 FORDHAM L. REV. 80, 84 (1964).

10. 410 U.S. 113 (1973).

11. In this note, the term "fetus" rather than "unborn child" will be used to refer generally to the unborn. The term "child" has special legal significance, and its application to the unborn may be wholly inappropriate in the legal context. The term "fetus," on the other hand, is scientifically accurate as applied to the unborn beyond the first few weeks of development and is not presently a legal term of art. Thus, it appears to be the more legally neutral of the two.

his or her body.[12] The cases so holding have been based most frequently on the patient's right of privacy,[13] free practice of religion,[14] and the common law right to self-determination and bodily control.[15] None of these bases of refusal are absolute, however, and they are all subject to balancing against conflicting state interests and in-

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12. *See, e.g.*, *In re* Melideo, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (N.Y. Sup. Ct. 1976), in which the court stated:

> As a general rule, every human being of adult years and sound mind has a right to determine what shall be done with his own body and cannot be subjected to medical treatment without his consent. Specifically, where there is no compelling State interest which justifies overriding an adult patient's decision not to receive blood transfusions because of religious beliefs, such transfusions should not be ordered.

Id. at 975, 390 N.Y.S.2d at 524 (citations omitted). *See also* Byrn, *Compulsory Lifesaving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1 (1975); Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228 (1973); Clarke, *The Choice to Refuse or Withhold Medical Treatment: The Emerging Technology and Medical-Ethical Consensus*, 13 CREIGHTON L. REV. 795 (1980); Note, *The Refusal of Life-Saving Medical Treatment vs. The State's Interest in the Preservation of Life: A Clarification of the Interests at Stake*, 58 WASH. U.L.Q. 85 (1980). For general case discussion *see generally* Karnezis, *Patient's Right to Refuse Treatment Allegedly Necessary to Sustain Life*, 93 A.L.R.3d 67 (1979); Stasi, *Power of Courts or Other Public Agencies, in the Absence of Statutory Authority, to Order Compulsory Medical Care for Adult*, 9 A.L.R.3d 1391 (1966).

13. *See, e.g.*, *In re* Yetter, 62 Pa. D. & C.2d 619 (1973), in which the court stated: "[T]he constitutional right of privacy includes the right of a mature competent adult to refuse to accept medical recommendations that may prolong one's life and which, to a third person at least, appear to be in his best interests." *Id.* at 623 (citations omitted). *See generally supra* note 12 and articles cited therein. The constitutional right of privacy is not an enumerated right, but rather a recently emerging concept which first was articulated fully in Griswold v. Connecticut, 381 U.S. 479 (1965). In *Griswold*, the United States Supreme Court held that the constitutional guarantees of the Bill of Rights create "zones of privacy," and that a resulting constitutional right of privacy is therefore a legitimate one. *Id.* at 484-85. This right later served as the basis of the Court's decision in Roe v. Wade, 410 U.S. 113 (1973), in which the Court held that the right of privacy is broad enough to include a woman's decision to terminate her pregnancy. *Id.* at 153. *See also infra* notes 55-58 and accompanying text.

14. Some religions forbid their practitioners to receive certain types of medical treatment. For example, Jehovah's Witnesses believe that blood transfusions violate the teaching of several scriptural passages which condemn the "eating" of blood. *See* Ford, *Refusal of Blood Transfusions by Jehovah's Witnesses*, 10 CATH. LAW. 212, 212 (1964). When faced with court ordered treatment, patients refusing treatment on religious grounds have based their legal argument on the first amendment guarantee of free practice of religion, and frequently, the courts have upheld the the patient's right to refuse. *See, e.g.*, *In re* Osborne, 294 A.2d 372 (D.C. 1972); *In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965); *In re* Melideo, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (N.Y. Sup. Ct. 1976). *See generally* Paris, *Compulsory Medical Treatment and Religious Freedom: Whose Law Shall Prevail?*, 10 U.S.F.L. REV. 1 (1975); Note, *Compulsory Medical Treatment and the Free Exercise of Religion*, 42 IND. L.J. 386 (1967).

15. For detailed discussion, see Clarke, *supra* note 12, at 797-800.

fringement upon the rights of others.[16] Even those courts that have upheld the patient's right to refuse treatment have been quick to reaffirm that in certain circumstances, state interests may overcome the patient's right.[17] For example, in *In re Melideo*,[18] the New York trial court held that life-saving blood transfusions could not be forced upon the unwilling adult patient, but noted further that "judicial power to order compulsory medical treatment over an adult patient's objection exists in some situations."[19] While the *Melideo* court analyzed the various bases of possible overriding state interests,[20] it concluded that no such interests were present.[21]

Generally, courts have not been hesitant to override a competent adult's right to refuse treatment in the presence of a state interest based on the life, health, and welfare of others. An illustration of such a situation is that in which the unwilling patient is the parent of a dependent minor child whose welfare would be jeopardized by the parent's death.[22] The state's interest under these circumstances has been said to arise under the doctrine of *parens patriae*.[23] Basically, *parens patriae* refers to the right and duty of the state to exercise its power to protect those unable to protect themselves. The doctrine is most often applied to minors and other incompetents.[24] Since al-

16. *See id.*, *supra* note 12, at 812. As to free practice of religion, courts throughout the history of our constitutional law have placed restrictions on this right, particularly in situations in which religious practices have conflicted with public welfare. *See, e.g.*, David v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878). Both cases were cited by Justice Smith in *Jefferson*, 247 Ga. at 91, 274 S.E.2d at 461 (Smith, J., concurring). As to the right of privacy, the Court in *Roe* specifically held that this is not an absolute right and may be limited in the face of a compelling state interest. 410 U.S. at 154. *Roe* also spoke to the right of self determination and bodily control saying that the right to do with one's own body as one pleases has never been recognized as an unlimited right. *Id.*

17. *See, e.g.*, Satz v. Perlmutter, 362 So.2d 160, 162 (Fla. Dist. Ct. App. 1978); Lane v. Candura, 6 Mass. App. Ct. 377, 378, 376 N.E.2d 1232, 1233 (1978) (citing Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977)); *In re* Melideo, 88 Misc. 2d 974, 975, 390 N.Y.S.2d 523, 524 (N.Y. Sup. Ct. 1976).

18. 88 Misc. 2d 974, 390 N.Y.S.2d 523 (N.Y. Sup. Ct. 1976).

19. *Id.* at 975, 390 N.Y.S.2d at 524 (citations omitted).

20. *See infra* notes 23-46.

21. 88 Misc. 2d at 975, 390 N.Y.S.2d at 524.

22. *See, e.g.*, *In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); United States v. George, 239 F. Supp. 752 (D. Conn. 1965); Hamilton v. McAuliffe, 277 Md. 336, 353 A.2d 634 (1976).

23. *See In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1008 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); *In re* Melideo, 88 Misc. 2d 974, 975, 390 N.Y.S.2d 523, 524 (N.Y. Sup. Ct. 1976).

24. *See, e.g.*, Johnson v. State, 18 N.J. 422, 114 A.2d 1 (1955), in which the court stated:

This *parens patriae* jurisdiction is a right of sovereignty and imposes a duty on

lowing the parent to die would be to allow that parent to abandon his or her child, courts, on the basis of *parens patriae*, have been willing to order treatment necessary to save the parent's life.[25] Court ordered treatment, in this situation, does not require that the patient be the only surviving parent.[26]

The state's interest in protecting minor children is the most typical example of an interest of sufficient magnitude to override a competent adult's right to refuse medical treatment. Another situation in which sufficient state interest has been found to exist is that in which a pregnant woman refuses treatment necessary for the life of her fetus. This was the factual setting of *Jefferson*. Prior to *Jefferson*, however, the only reported case to deal specifically with this problem was *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*.[27] Although *Raleigh* was similar in many respects to *Jefferson*, it was decided long before the United States Supreme Court reevaluated the legal status of the fetus in *Roe*.

In *Raleigh*, a woman more than thirty-two weeks pregnant refused blood transfusions. Her refusal was based on her beliefs as a Jehovah's Witness.[28] The transfusions were necessary to save both her life and that of her fetus.[29] The Supreme Court of New Jersey reversed the lower court's holding that the judiciary could not inter-

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> the sovereignty to protect the public interest and to protect such persons with disabilities who have no rightful protector. . . . [T]he power and duty imposed by the *parens patriae* doctrine . . . extends to the personal liberty of persons who are under a disability whether by reason of infancy, incompetency, habitual drunkenness, imbecility, etc.

Id. at 430, 114 A.2d at 5 (emphasis in original).

25. *See, e.g.*, *In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964), an opinion frequently cited for its insight into the various interests and policies involved in medical refusal cases. Judge Wright, after noting that the patient in question was the mother of a seven-month-old child, stated:

> The state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments. The patient had a responsibility to the community to care for her infant. Thus the people had an interest in preserving the life of this mother.

Id. at 1008. Presence of minor children has not been considered sufficient reason to order treatment in all cases. *See, e.g.*, *In re* Osborne, 294 A.2d 372 (D.C. 1972), in which the court determined that the future well-being of the patient's children had been adequately assured, and that consequently, the state's interest did not override the patient's right to refuse treatment. *Id.* at 375.

26. *See In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1002 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

27. 42 N.J. 421, 201 A.2d 537, *cert. denied*, 377 U.S. 985 (1964).

28. *Id.* at 422, 201 A.2d at 537-38.

29. *Id.* at 423, 201 A.2d at 538.

vene, and ordered the treatment purely on the basis of the state's concern for the fetus, stating:

> We have no difficulty in so deciding with respect to the infant child. The more difficult question is whether an adult may be compelled to submit to such medical procedures when necessary to save his life. Here we think it unnecessary to decide that question in broad terms because the welfare of the child and mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them with respect to the sundry factual patterns which may develop.[30]

The *Raleigh* court rested its decision on related bodies of law because of the complete absence of directly applicable precedent.[31] The court relied principally on *State v. Perricone*,[32] a New Jersey case in which blood transfusions were ordered given to a minor child after the child's parent refused consent on religious grounds.[33] Traditionally, the power to order medical treatment in the absence of parental consent is rooted in the doctrine of *parens patriae*.[34] Although the *Raleigh* court did not specifically mention *parens patriae*, it implicitly extended the doctrine to the protection of the unborn.[35] The court cited an additional New Jersey case[36] which stated that a child could sue for injuries negligently inflicted prior to birth.[37] Clearly, the court wished to establish that the fetus was a legally independent being with a right to live.[38] In doing so, the court more closely equated the fetus' legal status to that of a live-born child. In

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30. *Id.*

31. For analysis of *Raleigh*, see Note, *supra* note 9; Note, *Health - Compulsion of Adult of Sound Judgment to Submit to Blood Transfusions in Spite of Religious Objections*, 40 NOTRE DAME LAW. 126 (1964); Note, *Constitutional Law - Freedom of Religion - Blood Transfusions May Be Administered to Expectant Mother Despite Her Religious Objections if Necessary to Save Her Life or That of Her Child*, 10 VILL. L. REV. 140 (1964) [hereinafter cited as Villanova Note].

32. 37 N.J. 463, 181 A.2d 751, *cert. denied*, 371 U.S. 890 (1962). *See* 42 N.J. at 423, 201 A.2d at 538.

33. 37 N.J. at 480, 181 A.2d at 760.

34. *See supra* notes 23-24 & *infra* notes 47-53 and accompanying text.

35. One *Raleigh* commentator expressed the point in this way: "The instant case, then, as regards the infant in the womb, represents a significant extension of the *parens patriae* doctrine insofar as it declares that transfusions may be administered *to the mother*, against her will, in order to save the baby's life." Villanova Note, *supra* note 31, at 143 (emphasis in original).

36. Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960). *See* 42 N.J. at 423, 201 A.2d at 538.

37. 31 N.J. at 368, 157 A.2d at 503.

38. Villanova Note, *supra* note 31, at 144. As to whether a fetus has constitutional rights, see notes *infra* 55-64 and accompanying text.

this way, the court effectively enhanced the relevance of *Perricone*.[39]

As illustrated by the foregoing discussion, courts have been willing to compel treatment for the competent adult patient in order to protect the life, health and welfare of others. Yet a more difficult question for the courts has been whether the state has sufficient interest in the life of a patient, absent concern for third parties, to order life-saving treatment. Several courts and commentators have observed a general state interest in the sanctity and preservation of human life that can be applied to the patient, independent of concern for others, and weighed against his or her right to refuse treatment.[40] In actual practice, however, this factor has been given very little weight, and most courts have been unwilling to order treatment upon a competent adult patient whose refusal does not invoke some other state interest.[41]

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39. Although *Raleigh* is the only reported case of its kind prior to *Jefferson*, the problem of a pregnant woman's refusal of medical treatment has been by no means so rare in the medical community. Several writings in medical journals have dealt specifically with this problem in the hospital setting. *See, e.g.*, Lieberman, Mazor, Chaim & Cohen, *The Fetal Right to Live*, 53 OBSTETRICS AND GYNECOLOGY 515 (1979); Shriner, *Maternal Versus Fetal Rights - A Clinical Dilemma*, 53 OBSTETRICS AND GYNECOLOGY 518 (1979). These articles deal primarily with the concerns of attending physicians when faced with a pregnant woman's refusal of medical treatment. At least one unreported case dealt directly with this problem, and as in *Raleigh*, a sufficient state interest was found to support an order of treatment upon the mother. *See* Bowes & Selgestad, *Fetal Versus Maternal Rights: Medical and Legal Perspectives*, 58 OBSTETRICS AND GYNECOLOGY 209 (1981). This article discusses an unreported Colorado case in which the mother ultimately was ordered to submit to a caesarean section so that the life of her fetus could be saved. This case appears in many respects to be quite similar to *Jefferson* in that the juvenile court assumed jurisdiction over a viable fetus so that the mother could be ordered to submit to the surgery. *See* 247 Ga. at 88, 274 S.E.2d at 459.

40. *See, e.g.*, Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 741, 370 N.E.2d 417, 425 (1977). *See also* Clarke, *supra* note 12, at 815-16.

41. *See, e.g.*, *In re* Melideo, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (N.Y. Sup. Ct. 1976); Erickson v. Dilgard, 44 Misc. 2d 27, 252 N.Y.S.2d 705 (1962). *See also* Clarke, *supra* note 12, at 816. Although the state's interest in the unwilling adult patient's own life, as a wholly independent consideration, has not been sufficient alone to override the patient's right to refuse treatment, this factor has been given considerable weight in the unusual situation in which the unwilling patient has a strong subjective desire to live. This situation has arisen occasionally in Jehovah's Witness blood transfusion cases in which the patient clearly wanted to live and would accept the treatment if ordered by the court but could not in good conscience give willing consent. *See In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000, 1009 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964). One author has suggested that the patient objects to consenting to the treatment, not to the treatment itself. Byrn, *supra* note 12, at 15. The patient, by using all convenient but non-violent means to resist, does not offend God if the treatment is ultimately administered. *Id.* at 15 n.55. The resulting dilemma was perhaps best illustrated in Powell v. Columbian Presbyterian Medical Center, 49 Misc. 2d 215, 267 N.Y.S.2d 450 (N.Y. Sup. Ct. 1965), in which Judge Jacob Markowitz, in his often-quoted closing remarks, exclaimed:

A somewhat different state interest considered in the medical refusal context pertains to physicians and hospitals.[42] More specifically, the interest lies in protecting the medical community from legal liability and in guarding the ethical integrity of the profession.[43] This state interest, however, is another example of one which in actual practice will not, in itself, overcome the patient's right to refuse treatment.[44] Courts citing this interest in their decisions to order treatment have consistently required at least one additional state interest.[45] One court specifically stated that the patient's rights in this regard are superior to the interests of the physicians and hospitals.[46]

2. The Parental Consent Cases: The Right to Withhold Treatment

Another line of medical refusal cases that courts may consider

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> How legalistic minded our society has become, and what an ultra-legalistic maze we have created to the extent that society and the individual have become enmeshed and paralyzed by its unrealistic entanglements!
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> I was reminded of "The Fall" by Camus, and I knew that no release – no legalistic absolution – would absolve me or the Court from responsibility if I, speaking for the Court, answered "No" to the question Am I my brother's keeper? This woman wanted to live. I could not let her die!

Id. at 216, 267 N.Y.S.2d at 452. Although the decision to order treatment in *Powell* appears to have been based solely on the court's desire to save the patient's life for her own sake, the court did at least mention that she was the mother of six children. *Id.* at 215, 267 N.Y.S.2d at 451. This may well have been a factor in the court's decision, and it remains unclear, therefore, whether the state's interest in the patient's life, standing alone and without some other state interest, would ever be sufficient to override the patient's refusal. Indeed, more recently, courts dealing with Jehovah's Witnesses blood transfusion cases have upheld the patient's right to refuse treatment. *See, e.g.*, *In re* Melideo, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (1976).

42. *See generally* Clarke, *supra* note 12, at 817-20; Note, *supra* note 12, at 102-03.

43. Note, *supra* note 12, at 102-03.

44. A recent study argues that as to civil liability, the competent patient will generally sign a waiver of responsibility. *Id.* As to the ethical integrity of the profession, the same study notes that medical ethics do not always require treatment, and, in any case, the patient's right would outweigh ethical considerations. *Id.* As another commentator has noted in the same regard, the ethical integrity issue involves merely a moral question while the patient's refusal of treatment involves a definite legal right, the latter of which is given more weight. Clarke, *supra* note 12, at 818-19.

45. *See, e.g.*, United States v. George, 239 F. Supp. 752 (D. Conn. 1965), in which the court, in its decision to order treatment, noted a concern for the conscience of the physicians, *id.* at 754, but also observed that the patient was the father of four children. *Id.* at 753. *See also In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964), in which the concern for the doctors and hospitals was among numerous state interests advanced by the court in its decision to order treatment. *Id.* at 1007-09.

46. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 743-44, 370 N.E.2d 417, 427 (1977).

when confronted with a pregnant woman's refusal of treatment is that in which a parent withholds consent for treatment of a minor child.[47] The common thread between this line of authority and the problem presented in *Jefferson* and *Raleigh* is that the intended beneficiary of the treatment is not the recalcitrant adult, but rather the child or fetus, as the case may be, who has no control over his or her own fate.[48]

The power of the state to protect minor children from parental neglect and abuse underlies the reasoning in this line of cases. Historically, such power has been based on the state's role as *parens patriae*.[49] Accordingly, states have enacted statutes establishing special courts with jurisdiction over matters involving the welfare of minors and empowering these courts to intervene on behalf of minors within their jurisdiction.[50] Not surprisingly, these and other child protective statutes have been invoked in cases dealing with parental withholding of consent to treatment necessary for the life of the child.[51] Indeed, in life and death circumstances, courts consistently have ordered the necessary treatment or upheld treatment already administered regardless of the parent's grounds for refusal.[52] In non-life-threatening cases, the parent's refusal occasionally has been upheld.[53] The relative scarcity of cases upholding a parent's right to

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47. *See, e.g.*, People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952); Morrison v. State, 252 S.W.2d 97 (Mo. App. 1952); State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962); *In re* Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955); *In re* Vasko, 238 A.D. 128, 263 N.Y.S. 552 (1933); *In re* Rotkowitz, 175 Misc. 948, 25 N.Y.S.2d 624 (1941); *In re* Green, 448 Pa. 338, 292 A.2d 387 (1972).

48. As previously mentioned, the *Raleigh* court did use such a case as authority. *See supra* note 33 and accompanying text. Today, the relevance of this line of authority necessarily will depend on the present legal status of the fetus. *See supra* notes 31-38 and accompanying text.

49. State v. Perricone, 37 N.J. 463, 475, 181 A.2d 751, 758 (1962). For a definition of *parens patriae* see *supra* notes 23-24 and accompanying text.

50. *See, e.g.*, GA. CODE ANN. § 24A-3 (1981); N.J. STAT. ANN. § 2A:4-2 (West 1952).

51. *See, e.g.*, People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 624, 104 N.E.2d 769, 773, *cert. denied*, 344 U.S. 824 (1952); State v. Perricone, 37 N.J. 463, 477, 181 A.2d 751, 759 (1962).

52. Clark, *supra* note 12, at 810 n.70. An often-cited illustrative case is People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, *cert. denied*, 344 U.S. 824 (1952), in which a child, whose parent refused to consent to blood transfusions for the child, was held to be neglected. *Id.* at 624, 104 N.E.2d at 773. The court upheld an order appointing a guardian to consent to the treatment. *Id.* at 626-27, 104 N.E.2d at 774.

53. *See, e.g.*, *In re* Green, 448 Pa. 338, 292 A.2d 387 (1972), in which the parent of a child suffering from a spinal collapse refused remedial surgery on the grounds that the surgery would require blood transfusions in violation of the mother's beliefs as a Jehovah's Witness. *Id.* at 340, 292 A.2d at 388. The court held that as the child's life was not

withhold consent to treatment for a child, as compared to those upholding an adult's right to refuse treatment on his or her own body, makes it clear that the former right is much more limited.

B. *The Legal Status of Fetal Life Since* Roe v. Wade

The relevance of the parental consent cases to the issue of a pregnant woman's refusal of treatment necessarily will depend on the legal status of the fetus. The closer the fetus' legal status is to that of a live-born child, the greater relevance the parental consent cases will have. The *Raleigh* court did not hesitate to cite as authority a case in which treatment was ordered upon a minor child despite lack of parental consent, and the court, therefore, found its decision to be an easy one.[54] Since *Raleigh*, however, the legal status of the unborn has been redefined substantially by *Roe*.

In *Roe*, the Court held that a fetus is not a person in the constitutional sense.[55] Nevertheless, the state has an interest in potential human life and, when the fetus reaches viability, that interest becomes "compelling."[56] Since the mother's right of privacy, on which her prerogative to terminate the pregnancy is based, can be overridden by a compelling state interest,[57] the state accordingly may prohibit abortion of a viable fetus except as necessary to protect the life and health of the mother.[58]

Subsequent to *Roe*, the legal status of the viable fetus remains unsettled with regard to matters other than abortion.[59] If the viable fetus is not a person, it has no rights as such and viability represents merely the point at which the state's interest in the fetus is vindicated.[60] The proposition that the viable fetus is not the legal equivalent of a live-born child is strengthened by the *Roe* Court's

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immediately imperiled, the state did not have sufficient interest to overcome the parent's refusal. *Id.* at 348, 292 A.2d at 392.

54. *See supra* notes 31-35 and accompanying text.

55. 410 U.S. at 158. By this holding, the Court denied the fetus the protection of the fourteenth amendment, the result being that a fetus has no constitutional right to life.

56. *Id.* at 163.

57. *Id.* at 154-55. Based on the notion that even fundamental rights are not absolute, the Court held that the right of privacy could be limited by a compelling state interest. *Id.*

58. *Id.* at 163-64.

59. Although the *Roe* Court held that a state may prohibit the abortion of a viable fetus, *id.*, the Court gave no indication as to what other statutory measures might be taken by states, for example, to safeguard the life or even general health of the viable fetus.

60. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CALIF. L. REV. 1250, 1310 (1975). It has been argued that in various fields of

holding that the state cannot prohibit abortion of a viable fetus when an abortion is necessary for the mother's life and health.[61] While the *Roe* Court indicated that the state may give at minimum some measure of protection to the viable fetus,[62] the Court provided no real working basis from which to assess exactly what extent of protection might be given.[63] Not surprisingly, the matter remains unclear.[64]

In post-*Roe* decisions, the protection given to the viable unborn has varied considerably, especially with regard to statutory protection. For example, in *Reyes v. Superior Court*,[65] a felony child-endangering statute was held not applicable to the unborn.[66] In *Reyes*, a mother continued to use heroin during the last two months of pregnancy and, consequently, her twins were born addicted to the drug.[67] The court applied its holding to the unborn in general[68] and made no viability distinction. In noncriminal proceedings, however, courts have been quite willing to use the *Roe* emphasis on viability to justify statutory protection of the unborn. For example, in *Bowland v. Municipal Court*,[69] a statute prohibiting the unlicensed practice of the healing arts was held applicable to the practice of midwifery.[70] The *Bowland* court stated that "[f]or the same policy reasons for which the Legislature may prohibit the abortion of unborn children who have reached the point of viability, it may require that those who assist in childbirth have valid licenses."[71] Indeed in *Jefferson*,

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law, courts have never accorded full legal rights to the unborn. *See* Note, *Live Birth: A Condition Precedent to Recognition of Rights*, 4 HOFSTRA L. REV. 805, 836 (1976).

61. 410 U.S. at 163-64.

62. *Id.*

63. King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1648 (1979).

64. King provides an informative discussion of the uncertain legal status of the fetus. She concludes that although *Roe v. Wade* was not adequately reasoned, *id.* at 1657, the viability criterion nevertheless "strikes a fair balance between the competing interests of developing and mature humans." *Id.* at 1649. She notes further that there are no legal obstacles to giving the viable fetus the full protection given to the newly-born. *Id.* at 1678.

65. 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977).

66. The statute at issue was CAL. PENAL CODE § 273a(1) (West 1970). The court demonstrates that in other criminal statutes, the terms "human being" and "minor child" have been held not to include the unborn. 75 Cal. App. 3d at 217, 141 Cal. Rptr. at 913. It was also noted that to hold the statute applicable to a fetus would lead to an anomalous result, that is, that endangering the fetus would be punished more severely than aborting it. *Id.* at 218, 141 Cal. Rptr. at 914.

67. *Id.* at 216, 141 Cal. Rptr. at 913.

68. *Id.* at 219, 141 Cal. Rptr. at 915.

69. 18 Cal. 3d 479, 556 P.2d 1081, 134 Cal. Rptr. 630 (1976).

70. *Id.* at 486-87, 556 P.2d at 1084, 134 Cal. Rptr. at 663.

71. *Id.* at 495, 556 P.2d at 1089, 134 Cal. Rptr. at 638. The viability standard has

the viability criterion again has been the rationale for extending direct statutory protection to the unborn.[72]

III. *JEFFERSON V. GRIFFIN SPALDING COUNTY HOSPITAL AUTHORITY*

A. *Facts and Holding*

Jesse Mae Jefferson, a woman thirty-nine weeks pregnant, had been an out-patient at the Griffin Spalding County Hospital for prenatal care.[73] Her examining physician determined that she was suffering from a condition known as "placenta previa" in which the placenta covers the opening of the birth canal.[74] The physician further noted that this condition almost never corrects itself and if natural childbirth was attempted, there would be a ninety-nine percent chance that the fetus would not survive and that the mother's chances for survival would be no better than fifty percent.[75] Delivery by caesarean section, however, if performed prior to labor, would have given both the mother and her fetus an almost certain chance of survival.[76] Ms. Jefferson, on the basis of her religious beliefs,[77] refused both the surgery and any ensuing blood transfusions.[78]

On January 22, 1981, the hospital petitioned the Superior Court of Butts County, Georgia for an order authorizing the necessary pro-

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also been applied to the interpretation of wrongful death statutes enabling a parent to recover for the wrongful death of a viable fetus. *See, e.g.*, Mone v. Greyhound Lines, Inc., 368 Mass. 354, 361, 331 N.E.2d 916, 920 (1975); Presley v. Newport Hosp., 117 R.I. 177, 192-93, 365 A.2d 748, 756 (1976) (Bevilacqua, C.J., concurring in part, dissenting in part). *See also* Note, *Torts - Wrongful Death - A Viable Fetus is a "Person" for Purposes of the Rhode Island Wrongful Death Act*, 46 U. CIN. L. REV. 266 (1977). This broad statutory application of the viability standard in wrongful death cases is of doubtful relevance here, however, since allowing an action for the wrongful death of a viable fetus relates not to the interests of the fetus, but rather to the interests of the parents, that is, compensation for injury. *See id.* at 273. *See also* Note, *supra* note 60, at 829-30.

72. *See infra* note 110 and accompanying text.

73. 247 Ga. at 86, 274 S.E.2d at 458.

74. *Id.*

75. A newspaper report of the case explained that when a woman with placenta previa goes into labor, the placenta tears loose from the uterine wall, usually killing the fetus and at the same time causing loss of blood to the mother. Atlanta Journal/Constitution, Jan. 24, 1981, at 1-A, col. 3.

76. 247 Ga. at 86, 274 S.E.2d at 458.

77. Ms. Jefferson was apparently a member of a Baptist church which teaches divine healing. *See* Atlanta Constitution, Feb. 11, 1981, at C-1, col. 2. The reported opinion indicated that only religious grounds were offered for the refusal. 247 Ga. at 88, 274 S.E.2d at 459. Newspaper reports, however, indicated that at sometime during the proceeding, the right of privacy and a fear of the surgery itself were also asserted. *See* Atlanta Journal/Constitution, Jan. 24, 1981, at 1-A, col. 3.

78. 247 Ga. at 86, 274 S.E.2d at 458.

cedures.[79] In an emergency hearing the same day, the superior court found that the fetus was viable,[80] that the lives of the mother and her fetus were inseparable, and that the hospital was required by its own policy to treat any patient in need of emergency treatment.[81] The court then authorized the necessary procedures effective only if Ms. Jefferson were to appear at the hospital for emergency delivery.[82] The court declined to order her to submit to surgery on any other basis but invited any appropriate state agency to intervene or file a separate suit.[83]

The following day, the Georgia Department of Human Resources, alleging that the child was deprived and without proper care, petitioned the Juvenile Court of Butts County for temporary custody of the fetus and an order for Ms. Jefferson to submit to a caesarean section.[84] The superior court, concerned that the powers of the juvenile court standing alone would be insufficient to provide the requested relief, consolidated the cases and upon a joint hearing rendered its judgment both as juvenile court, with regard to the fetus, and as superior court, with regard to the mother.[85] First, the court decided the issue of the juvenile court's jurisdiction stating:

> [T]he Court concludes and finds as a matter of law that this child is a viable human being and entitled to the protection of the Juvenile Court Code of Georgia. The Court concludes that this child is without proper parental care and subsistence necessary for his or her physical life and health.[86]

Then, in its capacity as the juvenile court, the court granted tempo-

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79. *Id.*

80. *Id.* at 87, 274 S.E.2d at 458. The court noted further that to abort the viable fetus would be a criminal offense under GA. CODE ANN. §§ 26-1201, 26-1202 (1981). *Id.*

81. 247 Ga. at 86-87, 274 S.E.2d at 458.

82. *Id.* The court's concern for the hospital policy seems to relate to the state's interest in the ethical integrity of the medical profession. *See supra* notes 42-46. *See also* United States v. George, 239 F. Supp. 752 (D. Conn. 1965), where the court, in upholding previously ordered blood transfusions, said:

> [T]he doctor's conscience and professional oath must also be respected. In the present case the patient voluntarily submitted himself to and insisted upon medical care. Simultaneously he sought to dictate to treating physicians a course of treatment amounting to medical malpractice. To require these doctors to ignore the mandates of their own conscience, even in the name of free religious exercise, cannot be justified under these circumstances.

Id. at 754.

83. 247 Ga. at 87, 274 S.E.2d at 458-59.

84. *Id.* at 87, 274 S.E.2d at 459.

85. *Id.*

86. *Id.* at 88, 274 S.E.2d at 459.

rary custody of the fetus to the Department of Human Resources with full authority to consent to surgical delivery. Finally, under its powers as the superior court, the court ordered Ms. Jefferson to undergo additional tests and, if necessary, to submit to a caesarean section and any other accompanying procedures.[87] The intrusion into the lives of Ms. Jefferson and her husband was held to be outweighed by the state's duty to protect the fetus.[88]

Upon appeal, the Supreme Court of Georgia affirmed in a per curiam opinion consisting primarily of the reports of the two earlier proceedings.[89] As further support for its holding, the court cited additional decisions including *Roe* and *Raleigh*.[90] Several concurring opinions accompanied that of the majority.[91]

B. *Analysis*

The facts and circumstances of *Jefferson* presented the court with two basic issues for resolution. First, the court was confronted with the issue of whether the juvenile court had jurisdiction over the fetus. This precise issue had not arisen previously under Georgia law, and the court, therefore, was faced with a precedent setting decision. Second, the court had to decide the more urgent question of whether Ms. Jefferson, as a competent adult, could be ordered to submit to surgery for the sake of the fetus.

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87. *Id.* at 88-89, 274 S.E.2d at 459-60.

88. *Id.* at 89, 274 S.E.2d at 460.

89. *Id.* Motion for stay to the Supreme Court of Georgia was denied. *Id.* The story nevertheless had a happy ending for the Jeffersons. According to newspaper reports, after sheriff's deputies removed Ms. Jefferson from her home to the hospital, the placenta previa condition slowly corrected itself before labor began, an event almost unheard of by her doctors. A baby girl was delivered in normal childbirth. Atlanta Journal/Constitution, Jan. 24, 1981, at 1-A, col. 3; Atlanta Constitution, Feb. 11, 1981, at C-1, col. 2.

90. The only other citation given by the court was Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969). For a discussion of this case see *infra* note 119.

91. Justice Hill, joined by Justice Marshall, emphasized that the power of the court to order a competent adult to submit to surgery is exceedingly limited. 247 Ga. at 89, 274 S.E.2d at 460. With *Roe* cited as authority for the state's interest in the viable fetus, he then indicated that the court's decision was one of balancing, stating: "[W]e weighed the right of the mother to practice her religion and to refuse surgery on herself, against her unborn child's right to live." *Id.* at 90, 274 S.E.2d at 460. As to the jurisdictional issue, Justice Hill noted that the court had not passed on whether the jurisdiction of the juvenile court was necessary to achieve the result, but he nevertheless agreed with the propriety of the juvenile court's exercise of jurisdiction. 247 Ga. at 90, 274 S.E.2d at 461.

Justice Smith's concurring opinion is of special interest with regard to the issue of the juvenile court's jurisdiction. *See infra* notes 113-15 and accompanying text.

1. The Jurisdiction of the Juvenile Court

The *Jefferson* court concluded that the viable fetus was entitled to the protection of the Juvenile Court Code of Georgia.[92] The majority, however, made no attempt to analyze the Code's jurisdictional provisions, the relevant portions of which state that "[t]he [juvenile] court shall have exclusive original jurisdiction over juvenile matters and shall be the sole court for initiating action . . . [c]oncerning any child."[93] The term "child" is defined as "any individual who is under the age of 17 years."[94] The court, by invoking this statute as applicable to situations in which a pregnant woman refuses medical treatment, necessarily implied that a viable fetus is a child within the meaning of the Code.

Not all courts have been so flexible in their statutory interpretation. A Michigan court, in *In re Dittrick Infant*,[95] held that the legislature did not intend the word "child," in the child custody provisions of the Probate Code, to include the unborn.[96] The Michigan statutory language read "jurisdiction . . . in proceedings concerning any child under 17 years of age,"[97] and was strictly construed although almost identical to that of the jurisdictional provisions of the Juvenile Court Code of Georgia.[98] Likewise, in *Reyes v. Superior Court*,[99] a California felony child-endangering statute was held not applicable to the unborn.[100] The court made no exception for the viable unborn.

On the other hand, the *Jefferson* court was not without precedent in its decision to include the unborn within the meaning of child. In *Hoener v. Bertinato*,[101] a New Jersey Superior Court held that nothing in the New Jersey statute conferring jurisdiction on the

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92. *Id.* at 88, 274 S.E.2d at 459.

93. GA. CODE ANN. § 24A-301(a)(1) (1981).

94. *Id.* § 24A-401(c)(1).

95. 80 Mich. App. 219, 263 N.W.2d 37 (1977).

96. *Id.* at 223, 263 N.W.2d at 39.

97. MICH. COMP. LAWS ANN. § 712A.2(a) (West 1968). The *Dittrick* court ruled that although the word "child" possibly could be read to include the unborn, and that such an amendment might even be desirable, "[w]e decline by judicial amendment to do that which, at the time of enactment, the Legislature did not contemplate." 80 Mich. App. at 223, 263 N.W.2d at 39.

98. *See supra* notes 93-94 and accompanying text.

99. 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977).

100. *Id.* at 219, 141 Cal. Rptr. at 915. In *Reyes*, a pregnant woman used heroin during the final months of pregnancy and consequently her twins were born addicted to the drug. *See supra* notes 65-68 and accompanying text.

101. 67 N.J. Super. 517, 171 A.2d 140 (1961).

juvenile court[102] prevented its application to the unborn.[103] The issue in *Hoener* was similar to that presented in the other cases: interpretation of the statutory term "child."[104] The New Jersey Juvenile Court exercised its jurisdiction and granted custody of a fetus to the Child Welfare Department to assure that it would receive life-saving transfusions immediately upon birth in order to prevent potentially fatal blood RH complications.[105] Similarly, in *People v. Estergard*,[106] the Colorado Childrens Code was construed liberally so as to include the unborn.[107] In this way, the court was able to implement the Code's provisions for determining parental identity even though the "child" in question was yet unborn.[108]

The *Jefferson* court did not cite either of these cases in its decision to grant the juvenile court jurisdiction over the fetus. The court relied instead on the fact that the fetus was viable, thus invoking the *Roe v. Wade*[109] emphasis on viability.[110] While it is true that *Roe* would establish a compelling interest in the life of the viable fetus,[111] it does not follow that this compelling interest should then mandate elevation of the legal status of the fetus to that of a statutory child. The *Jefferson* court gave the fetus the same legal protection as that given to a newborn child, but in order to do so, relied on rationale borrowed from the very decision which denied the fetus constitutional protection as a person. It is unlikely that the United States Supreme Court in *Roe* intended for the viability criterion to extend to such a broad measure of statutory protection.[112]

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102. N.J. STAT. ANN. §§ 9:2-9, 2-11 (West 1976).

103. 67 N.J. Super. at 524, 171 A.2d at 144.

104. *See id.* at 524, 171 A.2d at 143-44.

105. *Id.* at 525, 171 A.2d at 145. The *Hoener* court stated that there was nothing *to preclude* the application of the statute to the unborn. *Id.* at 524, 171 A.2d at 144. Compare this approach with the statutory analysis of Justice Smith in *Jefferson* who, in disagreeing with the majority on the jurisdictional issue, stated in a footnote that statutory terminology should be given its ordinary meaning. 247 Ga. at 92 n.1, 274 S.E.2d at 462 n.1 (Smith, J., concurring).

106. 457 P.2d 698 (Colo. 1969).

107. *Id.* at 699.

108. *Id.* Both *Hoener* and *Estergard* pre-dated *Roe*, and neither made any distinction on the basis of viability. It is questionable, then, as to whether their holdings would now apply to pre-viable fetuses. In any event, one commentator has found a recent unreported case involving facts similar to *Jefferson* in which a Colorado juvenile court, apparently on authority of *Estergard*, assumed jurisdiction to order a pregnant woman to submit to a caesarean section to save the life of her fetus. *See* Bowes & Selgestad, *supra* note 39, at 212.

109. 410 U.S. 113 (1973).

110. 247 Ga. at 88, 274 S.E.2d at 459.

111. 410 U.S. at 163.

112. While the *Roe* Court specifically says that a state may pass regulations for the

Whether the jurisdiction of the juvenile court was necessary to achieve the end result was not an issue specifically addressed by the *Jefferson* court. Justice Smith, in his concurring opinion, implied that jurisdiction was not necessary to achieve the end result. He viewed the jurisdiction of the juvenile court as inconsistent with the jurisdictional provisions of the Juvenile Court Code,[113] but concurred in result, stating that in view of the life and death emergency, the trial court's [*i.e.*, superior court's] action was a proper exercise of its equitable powers with respect to both the mother and the fetus.[114] As he further explained: "This is a case of first impression, and the trial court, in an attempt to cover all possible ground, rendered its judgment 'both as a Juvenile Court and under the broad powers of the Superior Court of Butts County.' "[115] In doing so, however, the court set a precedent that may be difficult to manage in the future.[116]

2. The Decision to Order Surgery

In spite of the differences of opinion on the jurisdictional issue, all of the justices concurred in the ultimate decision to order the caesarean section. The majority and both concurring opinions cited *Raleigh* as primary authority.[117] *Raleigh*, although nearly twenty years old, was, in the court's opinion, still valid authority for a case such as *Jefferson* in that both cases involved viable fetuses, clear life and death circumstances, and treatment not detrimental to the mother.[118] Conceivably, prior to *Roe*, the *Raleigh* holding, ordering treatment against the pregnant mother's wishes, might have been extended to cases in which the fetus was not yet viable or where the recommended treatment might jeopardize the mother's life.[119] However,

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protection of fetal life which has reached viability, 410 U.S. at 163, the extent of such regulations clearly is limited by the Court's further holdings that a state may not prevent an abortion necessary for the life and health of the mother, *id.* at 163-64, and that a fetus is not a constitutional "person." *Id.* at 158. It is apparent that the *Roe* Court did not intend the legal status of even a viable fetus to be equivalent to that of a live-born person.

113. Justice Smith first analyzed the relevant statutory language setting forth the jurisdiction of the juvenile courts. 247 Ga. at 92, 274 S.E.2d at 461. For these statutory provisions, *see infra* notes 93-94 and accompanying text. Then, unlike the other justices, he concluded "I believe the legislature intended that the juvenile courts exercise jurisdiction only where a child has seen the light of day. I am aware of no 'child deprivation' proceeding wherein the 'child' was unborn." *Id.* at 92, 274 S.E.2d at 461-62 (citation and footnote omitted).

114. 247 Ga. 92, 274 S.E.2d at 462.

115. *Id.*

116. *See infra* notes 140-41 and accompanying text.

117. 247 Ga. at 89-91, 274 S.E.2d at 460-61.

118. *Id.* at 86-87, 274 S.E.2d at 458; 42 N.J. at 422-23, 201 A.2d at 537-38.

119. Although the fetus in *Raleigh* was viable and the treatment actually beneficial

Roe's holding that a mother may choose to abort a pre-viable fetus,[120] and that even a viable fetus may be aborted when necessary to save the mother,[121] implicitly ruled out any such extension.[122]

Perhaps owing to the obvious life and death nature of both cases, the *Jefferson* and *Raleigh* courts were satisfied with their decisions, and neither court felt compelled to present an in depth discussion of the basic underlying issues.[123] Consequently, these opinions provide little guidance for other courts dealing with the more difficult cases certain to arise in the future.[124] While *Jefferson* indicated that the process of judicial resolution was one of balancing,[125] the court failed to explain the mechanics of this balancing test or how it might be applied in similar but varying factual situations.

Under the traditional analysis, a competent adult patient's right to refuse treatment is subject to balancing against competing state

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to the health of the mother, 42 N.J. at 422-24, 201 A.2d at 537-38, nothing in the opinion makes clear that these matters were dispositive to the decision to order treatment.

120. 410 U.S. at 163.

121. *Id.* at 163-64.

122. The *Roe* opinion is devoid of any language which would diminish *Raleigh*'s vitality as applied to a factually analogous case such as *Jefferson*.

123. The *Jefferson* court's per curiam opinion cites only three cases, namely, Roe v. Wade, 410 U.S. 113 (1973), Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), and a third case, Strunk v. Strunk, 445 S.W.2d 145 (Ky. 1969). In *Strunk*, the parents of an incompetent adult sought judicial authorization to remove a kidney from the incompetent for transplantation to his brother, who was dying of kidney disease. *Id.* at 145-46. The *Jefferson* court does not explain its reliance on *Strunk*. The case was simply cited with the others at the end of the opinion. 247 Ga. at 89, 274 S.E.2d at 460. The case was not, as one might think, cited as authority for the decision to order surgery on one person for the sake of another. In *Strunk*, the decision to order surgery was based largely on the fact that the surgery was in the best interests of the incompetent kidney donor himself, who, according to psychiatrists, was emotionally dependent on his brother and would have been devastated by his death. 445 S.W.2d at 146. It can be surmised that the case was included instead because of its holding that the court in fact had power to issue such an order with respect to an incompetent. *Id.* at 149. The *Jefferson* court apparently viewed *Strunk* as precedent for its exercise of judicial power over the viable fetus. Whether *Strunk* was valid precedent for *Jefferson* in this regard is doubtful because the question of judicial authority over a live-born incompetent and that of judicial authority over a viable fetus are quite distinct. The legal status of the two beings are not the same, and the *Jefferson* court, by citing *Strunk*, essentially begged the question with regard to the fetus' legal status. In other words, the court took as an assumption that the viable fetus' legal status was in fact the same as that of a live-born incompetent.

124. For a hypothetical example of a more difficult case involving court-ordered treatment for the protection of a fetus see *infra* note 130.

125. The *Jefferson* court stated: "The Court finds that the intrusion involved into the life of Jessie Mae Jefferson and her husband, John W. Jefferson, is outweighed by the duty of the State to protect a living, unborn human being from meeting his or her death before being given an opportunity to live." 247 Ga. at 89, 274 S.E.2d at 460.

interests.[126] In applying this balancing test to a pregnant woman's refusal of treatment necessary to save the life of a viable fetus, it is clear from *Roe* that the state may assert a compelling interest in the life of the viable fetus.[127] It would be erroneous to assume from this, however, that each time the life of a viable fetus is threatened by some medical problem, the mother's right to refuse treatment automatically will be subordinated, regardless of other circumstances. The requirements of viability and a compelling state interest are simply prerequisites for the state to intervene on behalf of the fetus. The balancing test analysis must also reflect other factors, such as the degree to which the treatment enhances the fetus' chances of survival and the potential effect of the treatment upon the life and health of the mother.

The *Jefferson* court paid particularly close attention to the fact that the fetus' chance of survival was greatly enhanced by the surgery.[128] The court clearly would have been hesitant to order the treatment over the mother's refusal had the treatment only slightly increased the fetus' chance of survival.[129] Thus the state, in addition to showing the viability prerequisite has been met, must also demonstrate that the means chosen, in this case the proposed treatment, is sufficiently related to the goal of saving the fetus' life. The better prognosis the treatment offers, the closer that relationship will be. How close this relationship must be for a court to order the treatment is uncertain. In *Jefferson*, the relationship was so close, considering the medical statistics, that the court did not have to wrestle with the problem.[130]

Another factor that must enter into the balancing test is the possible risk or benefit of the treatment to the mother. Certainly, if the

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126. *See supra* notes 12-21 and accompanying text.

127. *See supra* notes 55-58 and accompanying text.

128. *See* 247 Ga. at 88, 274 S.E.2d at 459.

129. Generally, courts dealing with medical refusal cases have been reluctant to speculate as to what the outcome of a particular case might have been had the medical statistics been different from those actually confronting the court. Nevertheless, it is logically sound that in a balancing approach, a patient's right to refuse treatment is more likely to prevail if the proposed treatment only slightly improves the adverse prognosis.

130. One can easily imagine other factual situations similar to *Jefferson* in which the state's interest in the treatment might not be so strong, thus making judicial determination more difficult. For example, the fetus' chances of survival might be 25% without treatment and only 50% with treatment. Under these circumstances, the mother's right to refuse treatment might outweigh the state's interest in ordering it. This is not to suggest that the state would no longer have a compelling interest in the life of the fetus. Rather, the state would no longer seek to vindicate that interest against the mother's rights in view of the questionable benefit that the treatment would offer.

treatment jeopardized the life or health of the mother, it could not be ordered. This would be inconsistent with *Roe*'s holding that even a viable fetus can be aborted when the life and health of the mother are at stake.[131] Thus, in those situations in which the mother's right to life and health are invoked, her rights cannot be outweighed by a state interest. If, on the other hand, the condition which threatens the fetus also threatens the mother, and the proposed treatment increases the mother's chance of survival as well as that of the fetus, a sufficient state interest may emerge from a traditional analysis of medical refusal cases. For example, a mother might have dependents whose welfare would be jeopardized by her death.[132]

Due to the wide variety of possible factual settings and the complexity of the interests which may arise when a pregnant woman refuses medical treatment, a case-by-case analysis is necessary. In spite of the difficulty of obtaining a judicial decision in what will usually be an emergency situation, this approach provides a degree of assurance that all factors are given due consideration.[133] A mechanical approach, such as a statutory provision eliminating the requirement of the mother's consent once it is determined that certain specified medical conditions are present,[134] might be an expedient but would severely undercut the appropriate consideration of the rights of the mother. The constitutional and common law bases of an adult's right to refuse treatment must remain the focal point and should never be disregarded by such a rigid rule.

V. IMPLICATIONS

The most significant implications of *Jefferson* lie more in the grant of jurisdiction over the viable fetus to the juvenile court than in the decision to order treatment upon the mother.[135] The *Jefferson* court, as the highest court of the state, granted the viable unborn an enormous measure of statutory protection.[136] This is unlike *Raleigh*, in which the court accomplished essentially the same end but did so

131. 410 U.S. at 163-64.

132. *See supra* notes 22-27 and accompanying text.

133. Medical refusal cases have traditionally employed a case-by-case balancing approach. *See supra* notes 12-21 and accompanying text.

134. This is one of several alternative solutions examined and rejected by Shriner. *See* Shriner, *supra* note 39, at 519.

135. *See supra* notes 92-116 and accompanying text.

136. The Georgia Code section which deals with jurisdiction of the juvenile courts now carries an annotation with the heading "Unborn Child" in which *Jefferson* is cited. GA. CODE ANN. § 24A-301 (1981).

without invoking any statute or reinterpreting statutory language.[137]

The *Jefferson* court conceivably opened the door to allow the juvenile court to invoke its unique powers over a viable fetus. It would need only be determined that the fetus is neglected, and the juvenile court technically would have the same ability to issue orders as it would in the case of a live-born child. The juvenile court's jurisdiction might even be invoked absent any life or death threat to the fetus.[138] Justice Smith may have foreseen such implications when he contended that the jurisdiction of the juvenile court should not extend to the unborn.[139]

Two factors may be asserted which militate against such implications: First, the trial court expressed doubt as to whether the powers of the juvenile court, standing alone, were sufficient to order the relief sought.[140] Stated another way, the court was unsure whether the juvenile court had any power with respect to the mother. The court therefore issued its judgment in a two-part fashion, issuing one order in its role as juvenile court with respect to the fetus, and another in its role of superior court with respect to the mother.[141] The Supreme Court of Georgia, simply restating the trial court's opinion, did not answer the question of whether the juvenile court's power alone would have been sufficient. Consequently, a suit filed in Georgia Juvenile Court on behalf of a "neglected" fetus might result in an unenforceable order since such an order would necessarily intrude on the rights of the mother, over whom the court definitively would not have any power. It makes no difference that the juvenile court might grant custody of the fetus to a state agency. Such a gesture is simply a legal concept with regard to the unborn, since there is no actual physical separation. In reality, one cannot treat the fetus without treating the mother. Thus, the *Jefferson* court's grant of jurisdiction to the juvenile court was rather self-limiting.

Second, even if the juvenile court had power over both the fetus and the mother, there would still be some question as to whether such power would ever be used in anything less than a life and death situation. Indeed, even in those cases where parents have withheld

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137. In *Raleigh*, the case came on appeal from the court of Chancery. 42 N.J. at 421, 201 A.2d at 537.

138. For example, the power of the juvenile court might be used to compel prenatal care or to prevent the mother from engaging in activities potentially hazardous to the fetus.

139. *See supra* notes 113-15 and accompanying text.

140. 247 Ga. at 88, 274 S.E.2d at 459. *See supra* notes 79-81 and accompanying text.

141. 247 Ga. at 88, 274 S.E.2d at 459.

consent to treatment upon a live-born child, courts have not always ordered treatment where the life of a child was not immediately endangered.[142] It is even less likely that courts in a non-life-threatening situation would order treatment requiring an actual physical invasion of the mother.

The *Jefferson* court's decision to give the viable fetus the protection of the Juvenile Court Code was a significant judicial amendment to the Code's jurisdictional provisions. Considering the complexity of the issues involved, the matter deserved much more careful and painstaking consideration than the court was able to give it in an emergency proceeding such as this. Since, as Justice Smith pointed out, the powers of the juvenile court might not have been necessary under the circumstances of the case,[143] the court more appropriately should have avoided the issue, if possible, and deferred its final determination until a time at which both parties had been given a full opportunity to carefully prepare and present their arguments. *Jefferson*, at the very least, has laid the foundation for further intrusions into the lives of pregnant women regardless of whether the full implications are realized immediately.

As a final matter, it remains to be answered which line of medical refusal cases is presently most analagous to a case such as *Jefferson*: specifically, those cases in which the treatment is for the unwilling patient's own life and health,[144] or the parental consent cases in which the patient is a live-born child whose parent withholds consent.[145] The legal dilemma presented by a pregnant woman's refusal of medical treatment cannot be resolved satisfactorily by either line of authority.[146] From a practical standpoint, however, the outcome of such a case could be greatly influenced by the attorney's ability to analogize the factual situation to one line of authority over the other. In the first line of authority, the general rule is that a competent adult may refuse treatment even in life-threatening circumstances unless the state can demonstrate a sufficient interest to overcome the patient's rights.[147] In the parental consent cases, however, the general rule has been the opposite: A parent cannot, on any basis, prevent a child from receiving life-saving treatment.[148]

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142. *See supra* note 53 and accompanying text.
143. 247 Ga. at 91-92, 274 S.E.2d at 461-62.
144. *See supra* notes 12-21 and accompanying text.
145. *See supra* notes 47-53 and accompanying text.
146. *See supra* note 3 and accompanying text.
147. *See supra* notes 12-15 and accompanying text.
148. *See supra* notes 47-52 and accompanying text.

The *Jefferson* court was, at best, equivocal in the matter. It granted the juvenile court jurisdiction over the fetus, thus allowing custody of the fetus to be awarded to a consenting guardian. In this sense, the *Jefferson* court treated the fetus as a live-born child and analyzed the case as if it were within the parental consent line of authority. On the other hand, the court clearly implied that the juvenile court might not have any ability to order treatment upon the mother, thus leaving the juvenile court powerless in the matter.[149] It is apparent that the court never lost sight of the fact that the treatment was not upon the child at all, but rather upon the mother, who has a well established right to refuse treatment upon her own body. The court tacitly recognized that as long as the treatment required an actual physical invasion of the mother against her will, the parental consent cases alone were not controlling and that the line of cases construing an adult's right to refuse treatment also played a part in the analysis. The opinion, however, made no attempt to explain how these lines of authority should be applied to the facts of *Jefferson*. Instead, the court declined to use case citations falling squarely within either line of authority and thus avoided the issue.

The answer to the problem of applicable precedent seems to lie not in *Jefferson*, but rather in *Roe*.[150] The fetus, viable or otherwise, is simply not the legal equivalent of a live-born child. It has no constitutional right to live, as does a live-born child and, therefore, any attempt to analogize the two in this setting would be largely inappropriate. This, taken together with the inescapable fact that the treatment involves a bodily invasion of the mother, makes clear that the refusal of treatment cases, rather than the parental consent cases, is by far the more analagous under present law. Indeed, Justice Hill, in his concurring opinion, cites cases and secondary sources specifically from the line of authority construing a competent adult's right to refuse treatment.[151] While it might be true that the enactment of a "Right to Life" bill[152] would move the analysis somewhat closer to the parental consent line of cases, that is, by giving the fetus full constitutional status as a person, such is not the state of our law at

149. *See supra* notes 85, 140-41 and accompanying text.

150. *See supra* notes 55-58 and accompanying text.

151. *See* 247 Ga. at 90, 274 S.E.2d at 460. Justice Hill cites, for example, *In re* Melideo, 88 Misc. 2d 974, 390 N.Y.S.2d 523 (N.Y. Sup. Ct. 1976) and *In re* Yetter, 62 Pa. D. & C. 2d 619 (1973). He also cites Karnezis, *supra* note 12.

152. *E.g.*, H.R. REP. No. 900, 97th Cong., 1st Sess. (1981); H.R. REP. No. 3225, 97th Cong., 1st Sess. (1981).

present and the relevance of those cases remains minimal at best today.

VI. CONCLUSION

Court ordered medical treatment involves many complex and controversial issues. The delicate balancing process of judicial resolution seldom has been easy. In the case of a pregnant woman's refusal of treatment, the process is further complicated by a lack of controlling precedent in medical refusal law and an unsettled body of law concerning the legal status of the unborn. The *Jefferson* court's ultimate decision to order treatment to save the life of a viable fetus nevertheless came as no surprise in view of the compelling medical statistics present in the case and recent emphasis placed on viability by the Supreme Court of the United States in *Roe*. Perhaps owing to the emergency nature of the proceedings, however, the *Jefferson* court failed to articulate clearly the theoretical basis of its decision and thus provided little guidance for courts dealing with more difficult cases in the future.

The most unusual aspect of *Jefferson* was the court's decision to grant the juvenile court jurisdiction over the viable fetus. On the basis of viability, the court gave the fetus legal standing as a statutory "child." This was a large grant of legal protection in view of *Roe*'s holding that a fetus cannot be a "person" in the constitutional sense. The decision was motivated by a desire to assure that sufficient judicial power existed to order treatment on the mother for the sake of the fetus. The means chosen, however, may have been unnecessary and overbroad. The court no doubt was moved by the extreme circumstances of this unusual case and was determined to reach its desired result.

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