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## **Grounds for U. S. Intervention in Iraq and the Just War**

### **Tradition**

Kate Boswell

In the past few years, many people have disputed the justice of the United States' war in Iraq. In attempting to investigate the justice of this enterprise, a key distinction must be noted: in traditional just war thinking the justice of going to war and the means one employs in war are often sharply distinguished. This paper will only focus on the former and attempt to ascertain whether the numerous human rights violations of Saddam Hussein's regime were sufficient just cause on humanitarian grounds for the United States' 2003 invasion of Iraq. This will be done through the examination of the following questions. First, do human rights violations constitute just cause? Do these violations justify an invasion? Were the violations perpetrated by Saddam Hussein and his government egregious enough to justify the United States' invasion?

In this paper, I will argue that human rights do constitute just cause for a war and, if they are grievous, also justify an invasion. I will argue that the crimes perpetrated by Saddam Hussein and his cohorts meet this criteria, and that the United States justly intervened on behalf of the Iraqi people. I will defend this last statement by recourse to prudential considerations since, in politics as well as in daily life, one must consider not just what is good, but also what is prudent.

Since talk of rights arose much later in history, the phrase "human rights" is absent from early writers in the just war tradition. However, early writers like Augustine provide the foundation for later theorists to develop the concept of wars waged on humanitarian grounds. One of the ideas that form this foundation is that of "benevolent harshness," a concept rooted in the Christian precept of love for one's neighbor.

Augustine reconciles Christian teachings on peace with teachings on justice by positing that Christ's sayings on peace "refer to a disposition of the heart, which is within oneself, rather than to a deed, which is manifest, so that patience and benevolence are to be held in the hidden places of the soul, and openly performed when it seems that they will be profitable for those for whom we must bear goodwill."<sup>21</sup> Augustine deduces that one can be a peacemaker by fighting and that waging war is not incompatible with loving one's neighbor. He says that some people "contrary to their own will, need to be set straight" and that "their welfare rather than their wishes must be considered."<sup>22</sup>

Augustine holds a related concept of war as a "necessary evil," an idea which forms the heart of traditional just war thinking. Augustine remarks, "If men were always peaceful and just, human affairs would be happier and all kingdoms would be small."<sup>23</sup> However, since mankind is fallen and people are not always peaceful and just, war must sometimes be waged out of necessity. Augustine says, "It is the iniquity of the opposing side that imposes upon the wise man the duty of waging wars; and every man certainly ought to deplore this iniquity since, even if no necessity for sin should arise from it, it is still the iniquity of men."<sup>24</sup> Humanitarian interventions fall under this conception of war. All war involves bloodshed and unintentional casualties, and is thus undesirable, but some crimes are so grievous that they impose the duty of waging war.

Modern humanitarian interventions descend from Augustine's principles. Political philosopher Michael Walzer comments that "humanitarian intervention is justified when it is a response . . . to acts that shock the moral conscience of mankind."<sup>25</sup> Walzer's beliefs resemble Augustine's formulation that the wise man has a duty to wage wars against iniquity, though Walzer does not formulate intervention in terms of duty. Other modern thinkers do, among them the late Pope John Paul II. He terms intervention to protect human life as "obligatory . . . where the survival of populations and entire ethnic groups is seriously compromised."<sup>26</sup> Pope John Paul II's words are very close to Augustine's thought on this topic, even down to the pope "singling out the cause of justice as linked to peace."<sup>27</sup> Both thinkers emphasize the importance of duty as well as justice.

Though humanitarian intervention provides sufficient cause for a war, it must also be asked whether human rights violations demand an outright invasion or uninvited intervention. In the modern political sphere, sovereignty is often considered an inviolable right.

Sovereignty, according to Walzer, “defines the liberty of states as their independence from foreign control and coercion.”<sup>8</sup> He says that “the recognition of sovereignty is the only way we have of establishing an arena within which freedom can be fought for and (sometimes) won.”<sup>9</sup> However, he admits that “the ban on boundary crossings is not absolute . . . in part because of the ambiguous relations of the political community or communities within those boundaries to the government that defends them.”<sup>10</sup> In cases of extreme human rights violations, the ban on uninvited intervention may be lifted temporarily.

In fact, in some cases of massive rights violations a country would be wrong to abstain from intervention on grounds of sovereignty. As Walzer says, “The appeal to self-determination . . . has to do with the freedom of the community taken as a whole; it has no force when what is at stake is the bare survival or the minimal liberty of (some substantial number of) its members.”<sup>11</sup> He adds that, in cases of massacre and other crimes, the incapacity of the citizens to help themselves prompts foreign aid.<sup>12</sup> A country would not require people to help themselves in this situation. As to the rights of those in power who are perpetrating the crimes, those “who initiate massacres lose their right to participate in the normal (even in the normally violent) processes of domestic self-determination.”<sup>13</sup> Walzer goes so far as to say that “their military defeat is morally necessary.”<sup>14</sup> In these extreme cases, the perpetrators have forfeited their right to sovereignty.

Having established that human rights violations do constitute just cause for an invasion, I will now turn to the question of the Iraq invasion. I will examine the crimes committed by Saddam Hussein’s government and determine whether they justify the 2003 United States invasion. It is difficult to obtain reliable information on Hussein’s government (though that task has become much easier with Hussein’s deposition), in part because of the secretive nature of that government and in part because dissidents were often killed. What information is available is horrifying. In President George W. Bush’s 2003 State of the Union address, he lists a catalogue of torture methods gathered by international human rights groups: “electric shock, burning with hot irons, dripping acid on the skin, mutilation with electric drills, cutting out tongues, and rape.”<sup>15</sup> He adds that refugees told of “forced confessions . . . obtained by torturing children while their parents are made to watch.”<sup>16</sup> The President also recounts stories of scientists ordered to lie to United Nations weapons inspectors under pain of torture and death.<sup>17</sup>

Bush's speech relies partly on the testimony of academic Kanan Makiya, a writer and architect who fled Iraq in 1981 and has since written several books on Hussein's regime. His book *Republic of Fear* describes Hussein's Iraq as "a new, Kafkaesque world . . . one ruled and held together by fear. In this world, the ideal citizen became an informer."<sup>18</sup> Makiya describes a police state where citizens may be taken at any time from their homes, tortured, and killed on any pretext. He writes that "unlike Central American 'disappearances' in which the state denies complicity, the Ba'th give the event a macabre twist. What one assumes to be the corpse is brought back weeks or maybe months later and delivered to the head of the family in a sealed box. A death certificate is produced for signature, stating that the person has died of fire, swimming, or other such accident."<sup>19</sup> Makiya adds that the victim's family is charged for any costs incurred in the process "in advance." The procedures for those "convicted" of actual crimes is not much better, according to Makiya. In 1994, a law was issued decreeing that anyone guilty of stealing something worth more than 5,000 dinars (about \$12) "will be branded with a mark in the shape of an X. Each intersecting line will be one centimeter in length and one millimeter in width."<sup>20</sup> Iraqis could also be branded for a myriad of other offences, including desertion, and repeat offences could be punished by amputation of the hand at the wrist. The punishments were far from rare: "According to military personnel who escaped to Kuwait in 1994, up to two thousand soldiers already might have been branded on the forehead. A Kurdish opposition radio station based in northern Iraq declared that eight hundred soldiers with branded foreheads were captured by Kurdish forces along the border of the safe-haven zone in northern Iraq."<sup>21</sup> Considering that branding was established by law only a month earlier, the figures are startling.

One of the more horrific human rights violations under Hussein was the Al-Anfal campaign, which was recently ruled genocide by a court in The Hague.<sup>22</sup> During this campaign (named after a surat in the Qu'ran, but nicknamed "the Kurdish final solution" by some Western journalists), "Iraqi warplanes dropped chemical bombs on Kurdish villages. Several thousand helpless civilians died between August 25 and 27, 1988, becoming victims of an official genocidal campaign to exterminate Kurds."<sup>23</sup> Makiya estimates the death toll at "around one hundred thousand people." Even the more conservative estimates from organizations like Human Rights Watch (a non-governmental organization that documents human rights abuses) still rate deaths in the tens of



thousands.<sup>24</sup> According to Human Rights Watch, the captured Kurds were separated by gender, and the men and boys were taken to be killed in mass executions.<sup>25</sup> Women and children did not escape slaughter either. In 2003, American forces in Iraq discovered a mass grave containing the bodies of over 100 women and children, and evidence that there could be as many as twelve similar graves in the area.<sup>26</sup> The forces reported torture as well as slaughter. Some of the more extreme reports include tales of “hundreds of children whose eyes were gouged out to force confessions from their adult relatives.”<sup>27</sup> Though the Al-Anfal campaign officially closed in 1988, the mass killings of Kurds continued until 1989.<sup>28</sup>

Given these incidents, were the human rights violations under Hussein egregious enough to justify the United States’ intervention? The answer is yes. One can, and indeed must, set criteria to govern interventions. Walzer sees moral outrage as the main criterion for interventions. He means by this not the conscience of political leaders, but “the moral convictions of ordinary men and women, acquired in the course of their everyday activities.”<sup>29</sup> According to Walzer, political leaders often repress their feelings of outrage and indignation and may well be required to do so by the positions they hold.<sup>30</sup> Ordinary citizens are under no such compunction, and their reaction of horror, not the reaction of those in power, should prompt an intervention. In this sense, citizens must act as the conscience of a nation.

However, the phrase “egregious enough” implies a prudential judgment, a necessary component of politics. Humanitarian interventions prompted by moral outrage could arguably be justified in many areas of the world, but these interventions may not always be prudent. Walzer states that “though an event like the Nazi holocaust is without precedent in human history, murder on a smaller scale is so common as to be almost ordinary.”<sup>31</sup> Humans face many moral “oughts” in their everyday lives; if they acted on every one, they would not be able to carry out their day-to-day business. For example, if a person stopped to aid every individual he saw on the street, he would never have time or money to attend to his work or family. There must be a way of prioritizing “oughts;” prudence offers this. The public must react with appropriate outrage, and the politician must decide which good has primary claim on available time and resources. Practically, the ordinary citizen does not have the time or the resources to determine when or where intervention is prudent. For this reason, political leaders consult cabinet members and other experts before making decisions in complex matters.

The prudential politician must first consider the likelihood of success. Walzer qualifies his above statement on moral outrage justifying humanitarian intervention thus: “humanitarian intervention is justified when it is a response *with reasonable expectations of success*.”<sup>32</sup> An intervention with no hope of success would be not only pointless, but also foolish. Such an intervention could also worsen conditions in the affected region. For example, cases of human rights violations in China have been documented, and an intervention by the United States in China could conceivably be justified on moral grounds. However, such an intervention would be far from wise and could quite possibly result in worse conditions for those in the country.<sup>33</sup> That Bush and other leaders believed success in Iraq was possible can be inferred from their intervention in the country; it is absurd to assume that they would have authorized an invasion otherwise. In fact, Bush said prior to and after the invasion that he believed it would be successful. In a November 19, 2003, speech made in Whitehall Palace in London, he predicted that “democracy will succeed in Iraq...and the Iraqi people will not abandon their freedom.”<sup>34</sup>

The prudent politician must not only consider the possibility of success, but also what the intervening state may gain by intervening. Walzer sees this consideration as a negative aspect of intervention. He laments the lack of pure humanitarian interventions and remarks that “states don’t send their soldiers into other states, it seems, only in order to save lives. The lives of foreigners don’t weigh that heavily in the scales of domestic decision-making.”<sup>35</sup> However, perhaps this situation is not as dire as Walzer seems to believe. In everyday life, people rarely act for only one reason. Usually several factors of varying importance influence them. If this is the case with trivial decisions, it can hardly be expected to be less so with major ones. A government’s first duty should be to its people, and other considerations should come after this primary one. This is not to say that a government may never intervene on purely humanitarian grounds (though, given the state of the world, we might well be suspicious of such apparent altruism), but simply that an intervention on mixed grounds does not necessarily have to be morally suspect.<sup>36</sup>

In conclusion, the just war tradition offers the resources to justify an intervention on humanitarian grounds, and the United States’ 2003 invasion of Iraq was justified under these considerations. The crimes perpetrated by Saddam Hussein and his government against the Iraqi people were grave enough to warrant an intervention on behalf of the Iraqis. Additionally, prudential considerations

for an intervention were met in the invasion. Though the question still rages as to whether the war has been fought justly, the invasion did indeed begin on just terms according to the just war theory.

## NOTES

<sup>1</sup> Augustine, *Political Writings*, 219-220.

<sup>2</sup> *Ibid.*, 205-212.

<sup>3</sup> Augustine, *City of God*, 161.

<sup>4</sup> *Ibid.*, 929.

<sup>5</sup> Walzer, 101.

<sup>6</sup> Johnson, 92.

<sup>7</sup> *Ibid.*

<sup>8</sup> Walzer, 89.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Walzer, 101.

<sup>12</sup> *Ibid.*, 106.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> Bush, "State of the Union Address."

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Mikaya, xi.

<sup>19</sup> *Ibid.*, 64.

<sup>20</sup> *Ibid.*, ix.

<sup>21</sup> *Ibid.*, x.

<sup>22</sup> "Killing of Iraq Kurds 'Genocide.'"

<sup>23</sup> Mikaya, xiii.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Iraq's Crime of Genocide*, 136.

<sup>26</sup> "Mass Graves Unearthed in Iraq?"

<sup>27</sup> Makiya, xiii. Makiya says he received this information from Amnesty International in 1989.

<sup>28</sup> *Ibid.*, 317.

<sup>29</sup> Walzer, 107.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*, 101.

<sup>32</sup> *Ibid.*, 107. Emphasis added.

<sup>33</sup> Amnesty International has an entire webpage devoted to this issue, and they are not alone in their concern.

<sup>34</sup> Bush, "President Bush Discusses Iraq Policy at Whitehall Palace in London."

<sup>35</sup> Walzer, 101-102.

<sup>36</sup> The question of what the United States did or did not gain in the Iraqi invasion is one I will not go into here, except to mention that the existence of such gains does not make the entire enterprise morally suspect.

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*This paper analyzes the April 2004 siege of Fallujah, Iraq, through the lens of just war criteria, as presented in Michael Walzer's *Just and Unjust Wars*. By applying *jus in bello* considerations to the siege, it is shown that primary military obligations to civilians were followed, though secondary obligations were not thoroughly fulfilled.*

## **Fighting Fair: Applying Walzer's *Jus In Bello* Considerations to the Siege of Fallujah**

Grace Maalouf

In times of war, citizens of democratic societies must stand by while military and political leaders make decisions on behalf of their nations. Although rational debate about the morality of these decisions is weighed down by partisan rhetoric, a return to principles of the just war tradition can help root civic debate in reason. The principles of *jus ad bellum* set out conditions that can clarify whether a country's initial decision to fight is just, and the principles of *jus in bello* help determine whether a military has conducted the actions of its campaign justly. This paper will focus on the latter category as it relates to the United States' war in Iraq, and in particular on the principles for conducting a siege, as set out in Michael Walzer's *Just and Unjust Wars*. Specifically, I will determine whether the United States' attack on Fallujah in April 2004 was conducted justly in line with the criteria set out by Walzer, a prominent political theorist and just war specialist. I intend to argue that although the siege was conducted in accord with the primary injunction allowing civilians to leave the besieged city, earlier warning should have been given, and clearing roads for refugee and humanitarian assistance should have been attempted before the ceasefire. Further, U. S. forces should not have placed restrictions prohibiting certain demographic groups from leaving the city. Therefore, the *jus in bello* imperatives for the siege were not totally disregarded by American military forces in the siege of Fallujah, but neither were their moral imperatives adequately or thoroughly observed.

### **Criteria for a Just Siege**

In *Just and Unjust Wars*, Walzer explains the principles of just

execution regarding sieges and blockades against civilians, while offering real-life examples in the sieges of Jerusalem and Leningrad. He does not shy away from the fact that sieges are naturally gruesome; the goal of surrender is meant to be achieved not through defeating an enemy's forces, but rather through "the fearful spectacle of the civilian dead."<sup>1</sup> Despite the extensive civilian casualties associated with sieges, Walzer claims that the importance of capturing cities sometimes makes the practice one of military necessity. However, the moral problems involved are pressing, and they make the main question one of responsibility.

Walzer's criteria are based on the assumption of three basic players taking part in the siege – the attacking army, the defending army, and the city's civilian population – each with its own responsibilities. He realizes that a city can be defended against the inhabitants' will, and so sets out the criterion that the defending army must first have the inhabitants' consent to be defended; otherwise, they are not cleared of blame for their deaths.<sup>2</sup> In turn, the attackers are responsible for offering the city the possibility of surrender. If the city refuses to surrender, a siege is possible, but the attacking army is still not freed of restrictions or given the "right to wage total war."<sup>3</sup> Now, the attacking army must attempt to open a way for inhabitants to leave the city, offering free exit to civilians and helping them move away from the battle scene. Only when they fulfill this obligation, Walzer says, is the battle itself "morally possible."<sup>4</sup>

Once the battle begins, the attacking army must direct its military efforts against the enemy's armed forces, aiming away from nonmilitary targets. "Strategic devastation," such as systematically destroying crops and food supplies, can only be justified in cases where provisions are made for noncombatants.<sup>5</sup> As will be shown in the discussion of Fallujah, though noncombatants were not directly targeted by coalition forces, they were nevertheless still in the line of fire due to the nature of the insurgency.

### **The Siege of Fallujah**

In April 2004, the United States military launched Operation Vigilant Resolve, which included a siege on the Iraqi city of Fallujah. The operation was in response to increasing violence in Baghdad and Najaf, but it was also sparked by the brutal March 31 killings of four American contractors from Blackwater, who were in the city escorting a catering truck.<sup>6</sup> After their bodies were mutilated and burned amidst a cheering crowd, the U. S. took steps to root out the insurgents responsible both for the display and for other violence in

the city. The operation aimed to “restore order and eliminate anti-coalition forces.”<sup>7</sup> Although this may have been a necessary step, it made the siege appear to be retaliation for American deaths.<sup>8</sup>

The siege itself began on April 5. U. S. Marines set up a cordon around the city of Fallujah and imposed a curfew.<sup>9</sup> Fighting broke out immediately and escalated in intensity. In an April 8 news conference, General Ricardo Sanchez, the head of coalition ground forces, said troops were “conducting deliberate, precise and robust combat operations to separate, isolate and destroy the enemy wherever we find him on the battlefield.”<sup>10</sup> In this case, the battlefield was a city of 200,000. The military called in airstrikes and continued house-to-house fighting, coming under heavy attack from insurgents, many employing small arms and rocket-propelled grenades. The Marines’ First Expeditionary Force sustained several casualties, and General Sanchez characterized the insurgency as more persistent than had been expected.<sup>11</sup>

Less than three days into the fighting, stories had already spread of American helicopters shooting aid vehicles and of humanitarian assistance being denied access to the city. When asked about such details, General Sanchez responded that “multiple initiatives” were trying to get the aid to Fallujah, adding that logistical issues had to be coordinated with commanders on the ground.<sup>12</sup> He later went further, categorically denying that U. S. troops were cutting off humanitarian aid and food to the city. He did, however, admit to troops shooting and “destroying” vehicles – but only, he said, if “those vehicles have shot at us.”<sup>13</sup> Reporters on the ground noted extensive patrolling of the city and attacks on U. S. troops by vans of gunmen, snipers, rifle fire, and rocket fire; unsurprisingly, the troops returned fire.<sup>14</sup> The intense fighting allegedly brought Sunnis and Shiites together in their opposition – both ideological and military – against the U. S. forces.<sup>15</sup>

The first phase of the siege lasted until April 9, when Paul Bremer, head of the Coalition Provisional Authority, called for a conditional ceasefire to “hold talks between the Governing Council, Fallujah’s leaders, and representatives of the anti-Coalition forces,”<sup>16</sup> to let in humanitarian aid, and to “allow residents of Fallujah to tend to wounded and dead.”<sup>17</sup> There are still conflicting reports as to how many wounded and dead there were at the time. The director of the city’s general hospital placed the number killed at 600.<sup>18</sup> U. S. military officials did not give figures of civilian deaths; they said verifying the number of noncombatant casualties would be impossible.<sup>19</sup> However, in an April 16



report by Human Rights Watch expressing concerns about the number of civilians killed, U. S. Marine Lt. Col. Brennan Bryne was quoted as saying 95 percent of the fatalities were probably “military age males.”<sup>20</sup>

The fragile ceasefire deteriorated quickly. By April 14, U. S. forces were reported to have attacked the city once again, and by April 20, intense fighting had resumed.<sup>21</sup> Fighting continued until the end of the month, when U. S. troops withdrew and left “former members of Saddam’s army to police” the city.<sup>22</sup> Though the attack left extensive damage, Fallujah would be the site of another, more destructive battle in November.

### Analysis

The three military and political players in the siege of Fallujah are somewhat different from those envisioned by Walzer, mostly because the nature of the insurgency made it difficult to differentiate between civilians and enemies. The force he assumed to be the defending army can be seen as parallel to the insurgents; however, since the insurgents were not organized under the mantle of a government, they cannot be representative of the civilian population. The question of whether the inhabitants have consented to being defended (unlikely, given the aforementioned lack of representation) in this case becomes a question of how much blame the insurgents carry for the noncombatant casualties.<sup>23</sup> The insurgents did not actually coerce the city’s inhabitants into remaining during the siege, but they placed the inhabitants without any real consensus into a dangerous, defensive position from which the insurgents themselves were not able to defend civilians.

Even though the insurgents are partly responsible for the ensuing civilian casualties, this does not lighten any responsibility from the shoulders of the attacking army. The attacking army’s responsibility toward the city’s civilians is the *jus in bello* consideration stressed most by Walzer in his treatment of sieges; provision for civilians to leave the city in question is the key criterion. The siege commander’s “offer of free exit clears him of responsibility for civilian deaths.”<sup>24</sup> In the siege of Fallujah, residents of the city were allowed to flee if they wanted to do so, but only after fighting began did they realize its intensity. Even the coalition military was surprised by the level of violence. Once hostilities had started, thousands of residents did in fact leave, many waiting hours at U. S. checkpoints and then making their way to nearby Baghdad.<sup>25</sup> At the beginning of the attack, Marines distributed posters with pictures of wanted men to distinguish from civilians and

passed out Arabic letters explaining how they would handle detained Iraqis.<sup>26</sup> Before the siege began, Marines told the city's inhabitants to stay indoors, and "Iraqi police dropped off U. S. leaflets at city mosques," announced a curfew, ordered residents not to carry weapons, and gave instructions on how to behave if forces entered their homes.<sup>27</sup>

Yet there is no evidence that U. S. forces gave clear warning that the impending conflict would turn into a siege, even as they were digging trenches around the city and sealing off roads.<sup>28</sup> Walzer does not specify whether the ability of civilians to escape must be allowed in advance of the actual siege, or whether it is merely an ongoing requirement while the fighting takes place. It may be tactically impossible to give civilians advance notice of a siege, but considering the difficulties and dangers often inherent in fleeing a besieged city, the possibility should be explored by military leaders. The siege of Fallujah, though short, was deadly enough to require advance warning to civilians wishing to leave, and U. S. forces should have taken more steps to ensure this was not only possible but plausible. Warning civilians about the nature of the impending battle might have helped encourage their early departure, and preparing ways for humanitarian aid to arrive would have helped address the residents' needs. These steps were obviously not wholly foreign to the military, since they were implemented in the shaky ceasefire.<sup>29</sup>

But the ceasefire itself was not enough. On April 9, during the break in the fighting, U. S. troops reportedly announced through loudspeakers to Fallujah's residents that women, children, and the elderly could leave the city, but not "military age men."<sup>30</sup> This distinction is understandable in light of the fact that determining who is and is not an insurgent is incredibly difficult, but it creates a problem within the framework of Walzer's criteria. Though this ban on the departure of certain residents seems justified, Walzer leaves no loopholes for presuming enemies' guilt. Concerning guerrilla warfare, however, he makes the distinction that civilians associated with the enemy cannot be considered actual targets if no hostile actions against an army make them such.<sup>31</sup> In the case of Fallujah, it would seem that military-age men wishing to flee the city with their families should have been given leave to do so. Such an action might have had a tactical as well as humanitarian advantage for the coalition forces. Insurgents had already created something of a stronghold within the city, and the sustained fighting actually sparked some residents to join the fighters.<sup>32</sup> Allowing all civilians to leave might have tempered part of the anger caused by the siege conditions themselves.

The distinction between insurgents and nonviolent civilians presented another problem with the siege. Although Walzer sets out the criterion of aiming only at the armed forces of the enemy, the fact that the armed forces were often sheltered in residential neighborhoods complicated the situation. At multiple times during the siege, battles took place in residential areas and homes.<sup>33</sup> Under American military rules of engagement, U. S. troops facing attacks from these locations had the right to strike back. However, Walzer specifies that the attacking army should not direct efforts against nonmilitary targets. General Sanchez noted, "It is absolutely regrettable when non-combatants get hurt on the battlefield or killed. We regret that. . . . But that is a fact when you're on a battlefield of this nature in an urban environment."<sup>34</sup> Although his statement is true, it does not lessen the damage done by the attacking army. If the damage affected families whom the army had prevented from leaving, the army could be seen as liable for their deaths. For this reason, the army's provision for noncombatant right to flee was its primary *jus in bello* obligation. It was also the primary area in which the army's actions could be seen as inadequate.

## Conclusion

Militarily, the siege of Fallujah was something of a failure. U. S. forces made little progress compared to what was expected, and they withdrew after less than three weeks, only to return and attack the site seven months later. Although the attacking army was not liable in the strictest sense for the damage done to the city and most of the civilian population per Walzer's *jus in bello* considerations, the criteria should have been followed more completely. By allowing most civilians the chance to flee, the military gave them a possibility to escape the battlefield, but the military should have done so earlier in the attack. The military also should not have placed any restrictions on who could leave, either then or during the ceasefire. The intention and the action were still present, but should have been expanded. Civilian casualties were high, and the military should have prepared better for the intense fighting by allowing humanitarian aid easier access to the city. Had these initiatives been properly exercised, the civilian death count would have been reduced, and the U. S. military's adherence to Walzer's *jus in bello* siege criteria would have been more thorough.

## NOTES

<sup>1</sup> Walzer 161.

<sup>2</sup> Ibid., 162.

<sup>3</sup> Ibid., 168.

<sup>4</sup> Ibid., 169.

<sup>5</sup> Ibid., 179.

<sup>6</sup> Hills, 626.

<sup>7</sup> Sanchez.

<sup>8</sup> Barnard.

<sup>9</sup> Hills 626.

<sup>10</sup> Sanchez.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Matthews.

<sup>15</sup> Ibid., Sanchez, and Barnard.

<sup>16</sup> Hills, 626.

<sup>17</sup> “Iraq: Avoid Harm to Civilians.”

<sup>18</sup> Ibid.

<sup>19</sup> Barnard.

<sup>20</sup> “Iraq: Avoid Harm to Civilians.”

<sup>21</sup> Hills, 627.

<sup>22</sup> Ibid.

<sup>23</sup> Civic leaders in Fallujah often were at odds with the Sunni Muslim insurgents. The civic leaders were later made responsible for helping negotiate the insurgents’ surrender, but the military doubted their influence over them. See Chandrasekaran, Rajiv.

<sup>24</sup> Walzer, 169.

<sup>25</sup> Barnard.

<sup>26</sup> Schmitt.

<sup>27</sup> Mroue.

<sup>28</sup> Ibid.

<sup>29</sup> Constable.

<sup>30</sup> Ibid. and “Iraq: Avoid Harm to Civilians.”

<sup>31</sup> Walzer, 192-93.

<sup>32</sup> Barnard.

<sup>33</sup> Saadi.

<sup>34</sup> Sanchez.

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*The migrant labor system is a significant part of life within the Gulf States. This paper addresses the possible reasons for the present demand for foreign labor and outlines some of the current abuses present within the migrant labor system. The author then considers the economic, socio-cultural, and political impact this labor will have upon the nations that use it so prevalently.*

## **Migrant Labor In The Gulf States: Abuses And Impact**

Abby Simpson

Arbaiah BT Suluri, an Indonesian maid in Qatar, has been in a coma for over two years. On October 6, 2004, she was admitted to Hamad Hospital's ICU "after she suffered severe head injuries resulting from 'a blow with a blunt tool.'" Suluri received these injuries at the hands of her employers.

Extreme incidents like this are rare in the Middle East, but many foreign workers are subject to various degrees and forms of abuse daily: their wages are withheld; they often work and live in hazardous conditions; many domestic servants are physically and sexually abused; and overall, basic human rights are continually violated. Still, even with the alarming documented proof of abuse, the migrant labor system continues to be a significant part of life in the Middle East. This reality raises significant questions: why is there such a demand for this foreign labor, and what impact will this labor have on the states that use it prevalently? The answers can be found by looking at the Gulf States of Qatar, Kuwait, and the United Arab Emirates and exploring the consequences of large-scale migrant labor use in these countries.

It is naïve to think that a country where migrants make up to ninety percent of the workforce and the majority of the population, as is the case for these Gulf countries, can avoid any social, cultural, political, or economic strife. Unless measures are taken to improve the migrant labor system in some form, these Gulf States will suffer in the future.

### **Brief History of the Migrant Labor System**

With the oil price boom in 1973 there came a push in the Gulf States

for economic development that the local workforce was unable to provide. There was “an enormous surge of wealth for the Arab Gulf States,” and they embarked on many ambitious development plans that were too large and complicated for their tiny and technologically uneducated populations.<sup>2</sup> This surge of development resulted in the need for migrant workers to fulfill a variety of duties: domestic servants, engineers, doctors, nurses, managers, private sector employees, construction workers, drivers, hotel staff, and so on. These migrant laborers were and still are pulled from many different countries and regions such as Egypt, Jordan, India, Nepal, Sri Lanka, and Southeast Asia, among others.

There is an important distinction to be made concerning foreign laborers in the Gulf States, as they are classified differently based on the country of origin. The United States and other Western countries provide foreign workers to the Gulf States, but they are typically labeled “expatriates” and fill managerial and highly skilled or trained positions. Arab laborers are grouped into another classification; some are highly educated while others are not, but there is still an ethnic commonality that Gulf States recognize and respect. The focus of this paper, however, is on Third Country Nationals (TCNs) who come from less developed countries and therefore are more likely to be abused.

These laborers are hired by recruitment agencies in their home country and given contracts with sponsors in the Gulf States. Laborers may be contracted by large organizations, for example, those engaged in construction projects, or, in the case of domestic servants, they may have a contract under one authority (i.e., the master and mistress of the house). It is through these recruitment agencies that abuse begins, but abuse continues to manifest itself throughout the career of the migrant laborer.

### **Abuse of the Migrant Labor System**

The use of the migrant labor system is so ingrained within the culture of the Gulf region that abuse of the system and the workers within it has spread widely enough to gain attention from outside the region. This abuse is increasingly documented, and organizations like the International Labour Organization (ILO) are addressing the issue. The ILO held an “Asia-Pacific Regional Symposium for Trade Union Organizations on Migrant Workers” in early December of 1999, in which several trends were highlighted within the migrant labor system and recommendations were made as to how to alleviate the problems associated with the system. The ILO recognized the “vulnerability of

migrants” and the abusive conditions to which these migrants are exposed:

At the recruitment stage, migrants are vulnerable to incomplete or deceitful information by recruiters, to contract substitution, to excessive fees and to the promise of non-existing jobs. In the country of destination, migrants are vulnerable to abusive working conditions, they are required to work long hours, they experience non-payment or deferred payment of salary, they lack social security and health protection, and they experience maltreatment and violence. Migrant women are particularly vulnerable to violence and sexual abuse. Irregular migrants are subject to abusive conditions under the threat of repatriation.<sup>3</sup>

A major issue for many migrant laborers is the withholding of wages, which ultimately results in forced labor. Employers typically keep a worker’s identity papers while the worker is under contract and use them as a means of control. Without identity papers, workers will not run away from their place of employment for fear of being arrested and deported and thus not receiving their due wages. So migrant workers continue to work and hope that eventually their employer will compensate them; this “waiting to see” method becomes increasingly stressful, especially when many employers take years to pay their workers’ wages. These wages are especially important to the worker because most of the money earned is sent back to the worker’s home country; it is common for a migrant laborer to send home one-third to one-half of his income, and in reality, many workers send much more. These remittances “are an important source of income for the families of migrants, enabling them to pay off debts, purchase land, build new homes, send their children to school, and pay for weddings.”<sup>24</sup> These remittances are also very important to the economy of the worker’s home country as “a valuable source of foreign exchange.”<sup>25</sup> Recent research indicates that “[r]emittances sent home by migrant workers reached \$80 billion in 2002... These payments have become more important sources of finance for developing countries than private lending or official development assistance.”<sup>26</sup>

Another abuse that many migrant laborers experience is hazardous working and living conditions. Construction workers are the most likely



victims as they are forced to live in labor camps outside the city of employment, and there are not many safety regulations on the job sites. According to a U.S. Department of State Report on the human rights practices in Qatar:

Diplomatic representatives conducted visits to four labor camps and found the majority of unskilled foreign laborers living in cramped, dirty, and hazardous conditions, often without running water or electricity. A visit to a camp adjacent to a paper factory where five workers had died after exposure to toxic gases found the workers, 4 days later, still being exposed to the same poisonous gases.<sup>7</sup>

*The Peninsula*, a newspaper in Qatar, reported that another labor camp inspection “resulted in several labor camps being found in gross violation of hygiene and safety standards.”<sup>8</sup> Also in Qatar, construction workers and road crews who are working around the clock to complete projects for the upcoming Asian Games are forced to work in extremely hot temperatures; deaths and injuries are not uncommon.

While hazardous conditions and the withholding of wages are important issues that must be publicized and dealt with, the most tragic aspect of the migrant labor system is the abuse of female domestic servants. This abuse is an important issue to consider when, according to a 1999 statistic for the U. A. E., there is “approximately one housekeeper for every two or three nationals.”<sup>9</sup> A statistic provided by the U. S. Department of State Report for Qatar mentioned above indicates that “[a]ccording to the Indonesian Embassy, 669 housemaids reported mistreatment by their employers during the year. Complaints included sexual harassment, physical torture, overwork, imprisonment, and maltreatment. Abused domestic servants usually did not press charges for fear of losing their jobs.”<sup>10</sup> One need only remember the case of Arbaiah BT Suluri to gain a more intimate understanding of the dangerous abuse that many maids are subjected to on a daily basis. Many domestic workers are “frequently worked 7 days per week, and more than 12 hours per day with few or no holidays, no overtime pay, and no effective way to redress grievances.”<sup>11</sup> Domestic servants in the Gulf States are typically live-in workers, and they perform nearly every domestic chore imaginable:

They clean, wash, serve meals, cook or prepare

food, care for children, tidy up, remove the garbage, water plants, shop, walk the dog, feed the cat and so on. The average length of the workday is between 16 and 17 hours, and they are often on call 24 hours a day, particularly if there are babies in the family. They rarely have days off. Some never have a day off.<sup>12</sup>

Many women are physically, sexually, psychologically, and emotionally abused on a regular basis. Different forms of abuse include:

hitting, slapping, pulling or even cutting of hair; pushing around, belittling, verbally insulting, name-calling and constant criticism of their work... withholding of food, not allowing the worker the freedom to prepare her own food and relying on 'handouts' from the mistress of the house, which may be leftovers from the family meal. There have been cases where locks were put on refrigerators and in one case an alarm was installed...and house arrest was instituted for some because the employers are afraid that female servants will socialize with males and become pregnant or socialize with other domestic workers and demand higher wages.<sup>13</sup>

These women are given little freedom and are treated as slaves. They usually do not have adequate personal living space, and "there are many instances in which they sleep in the laundry room on a mattress on the floor, or in the living room (which means they cannot retire until the whole family has gone to bed)."<sup>14</sup>

The plight of these domestic servants and other migrant laborers is beginning to be acknowledged, and attempts are being made to remedy the situation; the New York-based organization Human Rights Watch, ILO, UN, and governments worldwide have taken notice and documented the abuses. Perhaps the most promising step taken by any organization has been the action taken by the National Human Rights Committee (NHRC) set up by the government of Qatar; this is the most promising step because this is the first country in the Middle East to publish its own human rights report. A news item covering the

57-page report summarized the findings and reiterated the immense importance this document has coming from a Middle Eastern country:

There is a rising flesh trade in Qatar and women are brought under the guise of aiding them and then they are taken advantage of. Many women are hired by hotels and coffee shops as a cover-up for prostitution. Many housemaids are sometimes lured into prostitution as they find themselves stranded in the country while their work permits expire and they fail to find new jobs. The Committee received 116 individual and 15 group complaints last year. Maids are treated like chattel. They work for long hours. They are beaten, detained, sexually harassed and sometimes raped, says the report. This is the first time a government-backed rights group in a Middle East country has come out with such bold and candid revelations about the state of affairs with regard to foreign workers and women's status.<sup>15</sup>

The hope now is that all of the Gulf States will recognize the human rights violations and take strong steps towards remedying the situation. These steps towards improvement are so important because the lives at stake are not just those of the migrant workers but of the Arab nationals as well. The migrant labor system has been crucial for the development of the Gulf States and will continue to be important in years to come.

### **Impact of the Migrant Labor System on the Gulf States**

What are the cultural, social, political, and economic implications of this migrant labor force? What are the effects and consequences of being a minority in one's own country? What happens when a nation depends solely on migrant workers to keep the economy going? These are some of the many questions that Gulf State governments need to consider for the protection and well-being of their respective populations.

According to an article written by Myron Weiner entitled "International Migration and Development: Indians in the Persian Gulf," two-thirds of the labor force for Kuwait, Qatar, Bahrain, the United Arab Emirates, and Oman is imported.<sup>16</sup> This is significant because many of these imported laborers are skilled workers who "outnumber

the local skilled labor force.<sup>217</sup> These migrant workers are intended to be only temporary, but as Weiner indicates, they are becoming increasingly entrenched in the region and culture of the Gulf States.

The use of imported labor was justified by the governing elites of these Gulf States as they tried to answer two important questions that emerged as a result of the 1973 oil price boom: “how to use their abundant wealth to develop their countries; and how to do so with the least disruption of the existing political structure.”<sup>218</sup> The governing elites found answers to these questions by using migrant workers to modernize their economies. What is important to note about this method is that it allows elites to share the wealth, accumulated mostly through oil and gas revenues, without sharing political power with their own people. They succeed in this venture by providing extensive social services to their native population while at the same time not permitting migrants to become citizens. Weiner further elaborates on this exclusionary policy by stating that:

[A]s monarchies the Gulf states fear the political erosion that might accompany massive permanent migration from countries that have overthrown their monarchies; as small states, they fear being politically overrun by their larger neighbors if they allow foreigners to become citizens; and as tribal chieftains – notwithstanding pan-Arab and pan-Islamic rhetoric – their first concern is with maximizing the economic well-being of members of their own tribes.<sup>19</sup>

Weiner presents five major trends concerning migrant workers in the Arabian Gulf States: (1) the migrant labor workforce is a permanent phenomenon in the region and its abolition would create serious disruptions to the Gulf economies; (2) migration policies are controlled by government regulations as opposed to economic needs; (3) there is little chance of upheavals by these migrant workers because they are “dependent upon the present political order for their security;” (4) the native population is consumer-driven while the migrant population is oriented towards production “with the result that economic growth is occurring without the local population acquiring the values associated with modern productive life;” and (5) policies implemented by the Gulf government

have resulted in the majority of the population (i.e. migrant workers) “living in subordinate position and subject at any time to expulsion.”<sup>20</sup> These conditions persist in the Gulf States today, and so the question that presents itself again is whether the Gulf States will suffer or benefit economically, politically, culturally, and socially as a result of these trends.

### *Economic Impact*

The Gulf States rely on these migrant workers to maintain growth in their economy. It would be nearly impossible for this region to survive without this foreign labor because, as Weiner points out, it “is required in so many sectors of the economy that no government in the Gulf could end migration—or expel the migrant population—without damaging the economy and reducing social services.”<sup>21</sup> In order to create and maintain welfare states, the governing elites in the Gulf must import labor. This imported labor allows the Gulf governments to expand their economy rapidly and to reduce their dependence on oil exports. An example of this principle can be seen in the tourism industry. Great attempts have been made to attract tourists, especially in the opulent hotels, resorts, shopping malls, etc. of Dubai in the U. A. E. Migrant workers are also a necessity when the national population is small and relatively unskilled.<sup>22</sup>

### *Socio-Cultural Impact*

Some Gulf States fear that their cultures are being “eroded as their number diminishes in proportional terms to the total population.”<sup>23</sup> Others fear the influence that housemaids have on the children that they often have the majority of the responsibility for raising; some fear that these maids, “many of whom do not understand local culture and traditions and are not Muslim ... create language and behavioural problems among UAE children in elementary schools.”<sup>24</sup>

There is a deepening of migrant culture in the Gulf States, especially among the South Asian (Indian and Pakistani) workers. For example, there are numerous Indian restaurants, films, clothing stores, social clubs, and schools that are noticeable in the Gulf countries. However, these migrant laborers live a separate life from that of the local Arab population; there is little to no intermingling between the two groups outside of work. The two populations are especially segregated in terms of housing. Many migrant workers, especially construction workers, live in labor camps outside the cities. In Bahrain, as in Kuwait, labor camp zones have been established because “[m]unicipal councilors

have received many complaints concerning bad behaviour, misconduct and culture clashes, as well as social problems.<sup>25</sup> This happens because of a sense of Arab superiority and xenophobic attitudes towards migrant workers. Ray Jureidini clearly outlines three aspects of this xenophobic mindset in “Migrant Workers and Xenophobia in the Middle East:”

First, it is evident in the preference of temporary contract labour that excludes possibilities of citizenship. Second, preferential treatment is usually given to nationals, although particular kinds of menial work have now been “allocated” to foreigners. Third, the attitude of disdain toward those who are visibly different (particularly Asians) is observed in public places such as supermarkets, airports and government offices.<sup>26</sup>

Abuse is typically found with those native Arabs who are xenophobic.

The most serious and negative socio-cultural impact happens because of the immense wealth generated by the oil- and gas-rich Gulf States. Weiner makes a key point about this immense wealth and the negative impact that it has on the local Arab population:

Development in the Gulf appears to be taking place, in the sense that industries are established and incomes are rising, but the local population is not acquiring the values associated with modern productive life. A country with modern industries and other facilities is being developed, but largely through the efforts of expatriates. What has emerged is a social order in which the locals are consumers and the expatriates are the producers. Many young Arabs have been cut off from the traditional Arab way of life but have not acquired modern attitudes toward work, time, cause and result. They have, as one Arab intellectual put it, become “cultureless consumers.”<sup>27</sup>

Finally, because of the indentured servitude that they impose on migrant workers and witness everyday, local Arabs are not

learning to respect fellow human beings. This fact can be seen in the many cases in which domestic servants are raped. In the past, domestic servant positions were filled by local Arab women or girls. They were generally treated well because they were Arab:

There was a shared culture with an understanding that family honour was at stake ... However, in the case of Sri Lankan and Filipina women, their families are remote. They come from a different culture and, in the case of Sri Lankans, a different religion (mainly Buddhist). Mostly traveling alone and in a foreign country, with little or no communications with the outside world, their contractual arrangements are such that they have few rights, no freedom and are kept as virtual prisoners in the households in which they work.<sup>28</sup>

Some Arab men feel that it is acceptable to abuse and rape these women because they are “different.” Another shocking and unacceptable reason given for rape is in relation to the immense oil wealth enjoyed by many in the Gulf States. A pattern has emerged in rape cases in this region:

Most complaints of sexual abuse reported by foreign female domestic workers were against older men, either in Saudi Arabia, or in the Emirates. ... This phenomenon is one of the outcomes of the oil booms. ... Elderly males find themselves suddenly rich, but socially frustrated, and with no roles or pleasure. Their first source of pleasure is poor women, whose easier, cheaper and younger sexuality can alleviate their frustrations.<sup>29</sup>

### *Political Impact*

Each Gulf State has handled its large migrant populations differently in relation to domestic policy and political action. “Kuwait has long been one of the most demographically self-conscious countries in the world” because Kuwaitis have long been the minority in their own country.<sup>30</sup> As a result, the Kuwaiti government has instituted a plethora of migration policies. They have sought to “develop

Kuwaiti manpower; increase Kuwaiti labor force participation; limit the inflow of migrants by controlling demand for migrant labor and the entry of dependents; and minimize the migrants' length of residency.<sup>31</sup> Other Gulf States have limited migration primarily in order to promote local Arabs into the workforce; the priority has been and will continue to be the promotion of national workers versus foreign workers. This is done by promoting and sponsoring higher education and technical education for the local Arab population.

Another significant political impact concerning the Gulf State regimes occurred in Qatar. In 2004, Qatar instituted a new Labor Law (Law No. 14) that was intended to protect the sizeable migrant worker population located within the country; this new law replaced the Labor Law of 1962. The sheer size of the migrant labor population, the abuses towards the workers, and labor unrest within the country prompted changes in the political sphere of the country. The new law requires that the physical safety of the migrant workers be ensured. Specifically, it regulates work hours, mandatory rest periods, and annual leaves. It also requires employers to provide written protection of guaranteed wages to prevent the common practice of workers' wages being withheld for indefinite periods. These protections, however, do not extend to those employed in the domestic sphere.<sup>32</sup>

Perhaps the most important provision in the new law is the right of migrant laborers to form Workers' Organizations. There are certain restrictions placed on these organizations, but surprisingly for a government that seeks to maintain such extreme control over its workers, the right to strike is allowed under certain conditions:

approval of three fourths of the General Committee of the workers of the trade or industry; giving to the employer a period of not less than two weeks before commencing the strike and securing approval of the Ministry after coordination with the Minister of Interior Affairs in respect of the time and place of the strike; provided that there is no detriment to the property of the State and of the individual and their security and safety; prohibition of the strike in vital public utilities such as petroleum and gas related industries, electricity, water, seaports, airports, hospitals and transportation; non-resort to



strike before the amicable settlement between the workers and employer by conciliation or arbitration in accordance with the provisions of this law becomes impossible.<sup>33</sup>

This is a significant step for the government of Qatar to take. With an increase in strikes recently it remains to be seen if the government will uphold this right or if its response to strikes will be deportations. On some accounts, these new laws are put in place to restrict migrant laborers, but at least they have guaranteed some protections for these workers.

### **Conclusion**

The migrant labor system is an enduring institution that will remain in the Gulf States as long as oil and gas revenues persist. Grand construction projects require huge amounts of imported labor, local populations are so small and unskilled that foreigners must be present to maintain and improve currently accepted living conditions, and perhaps on a more honest note, “the dirty, dangerous and difficult jobs become associated with foreign (Asian and African) workers to such a degree that nationals in these countries refuse to undertake them, despite high levels of poverty and unemployment.”<sup>34</sup>

Two parties suffer as a result of this system: migrant workers on a deep and personal level and local Arab populations on a personal development level. Measures must be taken to ensure that the rights of migrant workers are protected and that their safety and personal well-being are the priority of their employers. For the Gulf States there is a more pressing issue that develops as a result of migrant labor; many Arabs, especially the youth, are not learning the value of hard work and what it takes to become truly economically independent and successful on one’s own efforts. There is a well-known Arab proverb that “implicitly captures (the) distinction between temporary wealth that results from good fortune and wealth that comes through productive enterprise: ‘My father rode a camel. I ride a Cadillac. My son flies a jet. My grandson will have a supersonic plane. But my great grandson, he will be a camel driver.’”<sup>35</sup> Is this outcome possible? If the Gulf States fail to make an effort to become economically independent and rely on their own skill and labor force, the words of this common proverb could become a reality.

## NOTES

<sup>1</sup> Abuzant, 3.

<sup>2</sup> Jureidini, 2.

<sup>3</sup> International Labour Organization Asia-Pacific Regional Symposium for Trade Union Organizations on Migrant Workers.

<sup>4</sup> Weiner, 5.

<sup>5</sup> Birks and Sinclair, 129.

<sup>6</sup> “Dubai: Migrant Workers at Risk.”

<sup>7</sup> U. S. Department of State.

<sup>8</sup> “Camp Raids Ease Woes of Workers.”

<sup>9</sup> Jureidini, 6.

<sup>10</sup> U. S. Department of State.

<sup>11</sup> *Ibid.*

<sup>12</sup> Jureidini, 8.

<sup>13</sup> *Ibid.*, 6-7.

<sup>14</sup> *Ibid.*, 8.

<sup>15</sup> “Qatar First in Mideast to Publish Human Rights Report.”

<sup>16</sup> Weiner, 1. This article was the most comprehensive source concerning migrant labor in the Gulf region that could be accessed at the time of this research. The statistic still accurately measures the current imported labor situation—if anything, these trends have intensified.

<sup>17</sup> Weiner, 1.

<sup>18</sup> *Ibid.*, 2.

<sup>19</sup> *Ibid.*, 2.

<sup>20</sup> *Ibid.*, 3-4.

<sup>21</sup> *Ibid.*, 26-27.

<sup>22</sup> *Ibid.*, 9-10.

<sup>23</sup> Birks and Sinclair, 135.

<sup>24</sup> Jureidini, 8.

<sup>25</sup> “Bahrain Mulls Labour Camp Zones.”

<sup>26</sup> Jureidini, iv.

<sup>27</sup> Weiner, 11.

<sup>28</sup> Jureidini, 1.

<sup>29</sup> *Ibid.*, 7.

<sup>30</sup> Stanton Russell and al-Ramadhan, 569.

<sup>31</sup> *Ibid.*, 569-587.

<sup>32</sup> State of Qatar Public Law.

<sup>33</sup> *Ibid.*, Article 120.

<sup>34</sup> Jureidini, iii.

<sup>35</sup> Weiner, 11.

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*The primary purpose of this paper is to provide an in-depth analysis of individual liberties pertaining to the right to refuse medical treatment and to explore the advent of physician-assisted suicide. In doing so, several key cases are examined in an attempt to understand the courts' decisions on this matter. This paper seeks to outline what the court has established as constitutionally protected as well as what it has left for the states to decide.*

## **Patients' Rights in Recent Constitutional Law**

Jason Weber

### **Introduction**

Within the last century, researchers have made vast strides within the medical field. Advances in areas such as cardiopulmonary resuscitation, defibrillation, and intubations have equipped medical practitioners with the ability to stabilize patients in critical condition, extending their physical existence far longer than was once possible. While many individuals gladly welcome the advances in medical care, others would prefer to decline from utilizing life support and simply let nature take its course. Those who are terminally ill may be tired of their dismal situation and may be ready to accept death. Because of these desires, the legal field has had to respond, develop, and test a new area of law, establishing living wills for individuals and expounding upon the rights of a patient. As such, the question becomes: do individuals have a constitutional "right to die," or do states have a legitimate interest in prohibiting physician-assisted suicide?

In order to understand the issue of euthanasia fully, one must first recognize that euthanasia can be broken down into two subcategories: passive euthanasia and active euthanasia. Passive euthanasia is generally less controversial. It involves physicians withholding surgical or medical treatment, which may otherwise prolong the life of a patient, after a fully informed and "decisionally-competent" adult patient or surrogate has requested that they do so.<sup>1</sup> Passive euthanasia also envelopes other practices such as advance directives stipulating "do not resuscitate" or "do not artificially prolong."

Conversely, active euthanasia is much more controversial because of the active role the patient or physician plays in hastening death. "As a general practice, this is the killing of a person motivated by mercy... a physician

administers a lethal drug to a suffering patient... with the patient's consent."<sup>2</sup>

### **Historical Perspective**

The practice of euthanasia has been around for some time. In fact, many primitive societies fully endorsed it, believing that it was an act of compassion that allowed one to alleviate suffering and to die gracefully. The Greeks viewed suicide as a "worthy, humane, and noble choice," which would explain why the Greek word "euthanasia" literally translates to "good death." Records indicate that even the Greek government approved suicide, distributing poison to whoever petitioned for it, so long as they used it with good cause.<sup>3</sup>

It was not until the second and third centuries that suicide began to be widely condemned when Christian doctrine served as a catalyst for the denunciation of suicide and its abolishment as a common practice.<sup>4</sup> Driven by the idea that only God has the right to determine one's death, the Church explicated that suicide was not an option no matter the severity of one's pain or affliction.<sup>5</sup> St. Thomas Aquinas expounded upon this centuries later, explaining that suicide "was not only a sin according to the Sixth Commandment [Thou shalt not kill], but was a particularly grievous sin because one who committed suicide had no opportunity to repent of the sin."<sup>6</sup> As a result, suicide became taboo, and individuals that attempted to or succeeded in killing themselves were ostracized from the Church as lost souls.

It was during the Renaissance that the concept of suicide was reexamined, and it began to reemerge as an acceptable remedy for a person suffering from a debilitating disease or an extreme misery.<sup>7</sup> While this liberal stance towards suicide continued to be endorsed by some well into the twentieth century, it never gained enough recognition to be accepted by the United States and introduced into legislation.

### **Reemerging Interest**

However, a turning point occurred in 1975 when a twenty-one year old woman named Karen Ann Quinlan overdosed on a drug and lapsed into a coma. Her medical condition required that she be put on a respirator, and though her physicians maintained that she was not brain dead, it was clear that she had suffered irreparable brain damage. After three months, Ms. Quinlan was still comatose, and no progress had been made. Her parents then requested that her ventilator be removed; however, "the doctors refused to honor their request, which they viewed

as tantamount to murder.”<sup>8</sup> Her parents responded by petitioning a trial court to appoint them as legal guardians so that they could terminate her life support. The court rejected their petition and accepted the hospital’s holding that brain death had not occurred. The case was then appealed to the New Jersey Supreme Court that overturned the lower court’s ruling. The New Jersey Supreme Court reasoned that “Karen Ann Quinlan had an individual right to privacy which superseded the state’s interest in keeping her alive by artificial means.”<sup>9</sup>

As a result of the precedent established in Quinlan’s case and the national publicity it received, the stagnant climate of patient medical rights began to change. Within a few years, legislation began to be introduced around the country. States such as Arkansas, Oregon, and Texas passed treatment refusal laws, and by 1984, twenty-two states had passed statutes recognizing advance directives.<sup>10</sup> In 1990, the U.S. Supreme Court responded to the increasing attention surrounding individual rights of dying patients by granting certiorari to *Cruzan v. Director*. While the case did not specifically address physician-assisted suicide (PAS), the “discussion of rights to die, the right to bodily integrity, and the extent of the liberty interests of patients would prove pertinent for the PAS cases.”<sup>11</sup>

### **Right to Die: Burden of Proof & Due Process**

In 1983, Nancy Cruzan, a twenty-five year old woman, sustained serious head trauma following an automobile accident that rendered her brain dead. While Cruzan’s unique state did not require her to be on a ventilator, a feeding tube was necessary to supply her with nutrition and hydration. When it became clear that Cruzan’s vegetative state would not improve, her parents requested that the hospital remove her feeding tube. The hospital refused, citing their interest in sustaining the patient’s life as a fundamental responsibility. As a result, Cruzan’s parents petitioned the court to permit them to discontinue the feeding. Arguing that their daughter would not want the feeding tube, they asserted that she had a constitutional right for the removal to be recognized and that to deny them the right to represent their daughter would deprive her of “equal protection of the law.”<sup>12</sup>

The lower court sympathized with Cruzan’s parents, claiming that a person in Cruzan’s condition “had a fundamental right under the State and Federal Constitutions to refuse or direct the withdrawal of ‘death prolonging procedures.’”<sup>13</sup> Adding to the parent’s testimony, one of Cruzan’s friends said that Cruzan had “expressed thoughts at the age of

twenty-five in a somewhat serious conversation... that if sick or injured, she would not wish to continue her life unless she could live at least halfway normally."<sup>14</sup> The court found this testimony to be sufficient evidence that she would personally want the feeding tube removed.

While the court's decision appeared to be a huge victory for Cruzan's parents, the case was soon appealed to the Missouri Supreme Court, where the decision was overturned. The court agreed that individuals have a right to refuse medical treatment; however, the court refused to say this "broad right of privacy" can be construed to apply to every circumstance in which medical treatment is necessary.<sup>15</sup> It went on to add that it did not believe such a right existed within the Constitution of the United States. In fact, the court's opinion seemed to parallel that of the Karen Ann Quinlan case, reaffirming the state's interest in the preservation of life. Also, the court found that the testimony "regarding her [Cruzan's] desire to live or die under certain conditions were unreliable for the purpose of determining her intent;" and thus, it was impossible to ascertain what exactly Cruzan's wishes were.<sup>16</sup> The court made it undoubtedly clear that Cruzan's parents did not have the legal capacity to act on their daughter's behalf and that Cruzan's liberties did not afford her the right to refuse medical treatment. Soon after the decision, however, the U.S. Supreme Court granted certiorari to the case, slating it on the docket in 1990.

The case was granted certiorari not because the Court was concerned with determining if the lower court had properly gauged Cruzan's wishes, but because the case drew upon a deeper issue: a patient's constitutional right to refuse medical treatment. The Court did not even touch on Cruzan's intentions, deferring to the lower court's ruling that "there was insufficient evidence that Ms. Cruzan would have chosen to forgo treatment [a feeding tube]."<sup>17</sup> Instead, the Court systematically examined whether the Due Process Clause of the Fourteenth Amendment permitted one to refuse life sustaining treatment for one's self or for another whom one legally represented.

In a narrow 5-4 opinion, the court found that the refusal of medical treatment is a liberty interest based upon the Fourteenth Amendment.<sup>18</sup> Chief Justice William Rehnquist, writing the majority opinion, stated:

The notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment...every human being of adult years and sound mind has a right to



determine what shall be done with his own body, and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages.<sup>19</sup>

The Court established that a patient has the right both not to consent and to refuse treatment. With this decision, the Court was stepping onto new ground. Very few right-to-refuse-treatment decisions had been established, and those that had primarily dealt with First Amendment issues, particularly one's religious rights.

Since this decision was prototypical, it is important to consider how the majority formed its opinion. The Court drew upon tort law, citing the fact that even touching a person without consent or legal justification can be grounds for battery.<sup>20</sup> As a result, this liability created the need for informed consent. The Court contended that "the logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent."<sup>21</sup> In other words, a patient has the right to refuse treatment, based upon the liberty clause contained within the Fourteenth Amendment.

The Court, however, was decidedly against ubiquitously allowing refusal-treatment decisions without any state regulation. It still felt that it had to balance individual liberties with the state's interest in preserving life. In doing so, it initiated procedural safeguards, such as "clear and convincing" evidence that an incapacitated patient would wish to terminate life.<sup>22</sup> If a living will was not established, the burden of proof would fall upon the patient's family members and friends to prove the patient had no desire to prolong his or her life by artificial means.

The Cruzan appellants contended that this added burden of proof jeopardized Cruzan's right to equal protection. They alleged that it did not present her an equal opportunity to decline medical treatment. The court rejected this notion, stating:

The differences between the choice made by a competent person to refuse medical treatment, and the choice made for an incompetent person by someone else to refuse medical treatment, are so obviously different that the State is warranted in establishing rigorous procedures for the latter class of cases which do not apply to the former class.<sup>23</sup>

To summarize, the court established the precedent that the state has a valid interest in protecting an individual's life, specifically that of one who cannot coherently represent one's self. As a result, a higher burden of proof, satisfied through clear and convincing evidence, is necessary to ascertain an incompetent patient's will properly. More importantly, the chief principle established in this case was that the right to refuse medical treatment is a liberty vested within the Fourteenth Amendment.<sup>24</sup>

### **Legislation**

During the same time the Cruzan case was being decided, legislators recognized the need for a policy to be drafted addressing individual liberties. In November of 1990 the Patient Self-Determination Act (PSDA) was enacted. The PSDA was to ensure that patients were still able to protect their right to consent or refuse treatment, even if they became unable to consciously express this desire. In crafting the PSDA, legislators tailored three provisions within the Act aimed at detailing the responsibilities of the health care providers, the individual states, and the Secretary of Health and Services.<sup>25</sup>

Health care providers became required to inform their patients fully about advance directives as well as their right to consent or refuse treatment. The law further facilitated this by requiring each state individually to formulate a law concerning advance directives that would be distributed by health care providers and hold them accountable. Lastly, legislators encouraged the Department of Health to develop and implement a campaign that would inform the public about their right to participate actively in decisions concerning their health care. Thus, advance directives, such as a living will, were strongly encouraged in order to insure a patient's wishes were upheld, should he or she become incapacitated.

As the decade progressed, the public increasingly appeared not only concerned about attending to the rights of patients to refuse treatment, but also willing to go one step further in empowering terminally ill patients with the control to end their lives in a painless manner. Though the public's opinion was controversial, the passage of Oregon's Death with Dignity Act in 1994 made it clear that there was an emerging trend, at least in Oregon, supporting terminally-ill patient suicide. The law sought to expand the rights of a patient who is terminally ill by granting individuals who fit certain requirements a legal way to terminate their life. Under Oregon's law, a patient may petition a

doctor for a lethal medication, which the patient must self-administer, preferably under the supervision of another individual. Oregon fashioned the requirements to be quite comprehensive in an effort to balance carefully the state's interest in the preservation of life with an individual's own liberties. As such, several provisions were created:

The request must be voluntary; no doctor is forced to comply; the patient must be an adult who is terminally ill [less than 6 months left to live] and mentally competent; there is a 15-day waiting period to ensure the request is enduring; an examination by a health professional may be required; the request must be made orally and in writing; the request must be witnessed; all the alternatives must be explained to the patient; and the patient may change his or her mind at any time.<sup>26</sup>

As one may infer, Oregon was very meticulous in framing this law. The state recognized that an individual who utilizes this liberty is making a permanent and irreversible decision. The law aimed to minimize any aberrant decisions by compelling doctors to inform patients fully about their options and repercussions and to require a waiting period to ensure that patients used sound judgment.

Even though the law was passed, it met a firestorm of controversy all over the nation for its religious and ethical implications. As *Time* magazine reported, many apprehensive citizens worried that "approving assisted suicide would set off an inexorable, countrywide slide toward euthanasia."<sup>27</sup> New York Attorney General Dennis Vacco further expounded upon this fear: "[by legalizing PAS] we have the prospect of managed-care organizations saying it's cheaper to pay for assisted suicide than to pay for treatment or life-sustaining devices." In other words, people were not only concerned about the ethical implications such a law aroused, but they were also fearful that it may evolve into a cost-effective solution to minimize rising health care costs. As the decade progressed, the controversy did not subside. PACs such as the Oregon Catholic Conference pressured the government to decide, "Will nature take its course, or will we turn doctors into angels of death?"<sup>28</sup>

While opponents of PAS succeeded in having the law reexamined in Oregon in 1997, their efforts were futile. In the end, legislators

made it abundantly clear that the majority (60-40) supported the act.<sup>29</sup>

### **Assisted Suicide: Due Process & Equal Protection**

During that same year, the Supreme Court also touched upon the issue of “trying to balance the alleged liberty interest of the individual . . . against the interests of the state to preserve life by prohibiting physician-assisted suicide.” Many around the nation were shocked that the Supreme Court was accepting such a case, because it created the possibility of physician-assisted suicide being legalized. As one doctor noted, “That the Supreme Court is even considering it [PAS] is breathtaking to many of us.”<sup>30</sup>

The court slated *Washington State v. Glucksberg* and *Vacco v. Quill* for the docket, seeking to determine whether Washington or New York’s prohibition of physician-assisted suicide violated the Fourteenth Amendment. The cases were strikingly similar. Each questioned the legality of bans on PAS, citing contentions based upon the Fourteenth Amendment, and each was challenged by several physicians. The only major difference between the two was the precise point that each argued, allowing the court to conduct hearings over the two cases at the same time. In *Washington State v. Glucksberg*, the respondents argued that their rights were violated based upon the Due Process Clause, whereas *Vacco v. Quill* was formulated based upon the Equal Protection Clause.<sup>31</sup>

Coincidentally, both cases originated from pertinent decisions that the Second and Ninth Circuit Court of Appeals had recently handed down. In 1996, the Ninth Circuit Court had judged that the Due Process Clause of the Fourteenth Amendment “protected a fundamental right for terminally ill patients to hasten death.”<sup>32</sup> The respondents in *Washington State v. Glucksberg* founded their argument upon this assertion. Similarly, the Second Circuit Court ruled that the Equal Protection Clause of the Fourteenth Amendment guaranteed terminally ill patients the right to seek assistance from a physician in committing suicide.<sup>33</sup> The respondents in *Vacco v. Quill* cited this ruling as grounds for their case. However, both cases were struck down, causing the Second and Ninth Circuit Court’s rulings to be reversed.

In both cases, the Supreme Court ruled unanimously in favor of the states, asserting that their bans on physician-assisted suicide did not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment. While the court was split on their reasoning, they agreed that the Washington statute did not violate the Due Process Clause by prohibiting assisted suicide. In drawing this conclusion, Chief Justice

Rehnquist, writing the majority opinion, explained that “an examination of our Nation’s history, legal traditions, and practices demonstrates that Anglo-American common law has punished or otherwise disapproved of assisting suicide for over 700 years.”<sup>34</sup> The respondents argued that their alleged right in violation was similar to a woman’s right to choose an abortion, citing *Planned Parenthood v. Casey*. The court struck down this notion: “That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected.”<sup>35</sup> In effect, the court concluded that assisted suicide is not protected as a fundamental liberty interest.<sup>36</sup>

The court found that New York’s law against assisted suicide did not violate the respondents’ “asserted rights” contained within the Equal Protection Clause of the Fourteenth Amendment. In arguing before the court, the respondents claimed there was no difference between refusing medical treatment and assisting in or committing suicide. Drawing upon *Cruzan v. Director*, which established the right to refuse medical treatment, they contended that there is no difference between a physician who assists in suicide and one who withdraws his or her patient from life support.<sup>37</sup> The Supreme Court found this argument flawed: “when a person refuses lifesaving treatment, the cause of death is the underlying disease . . . in contrast, if a physician were to inject a lethal dose of morphine into a patient, then morphine would be the cause of death, independent of the patient’s disease.”<sup>38</sup>

Perhaps the fundamental principle established within this pair of cases was that the Supreme Court did not find suicide or assisted suicide to be a liberty interest protected by the Constitution. While one who has committed suicide cannot be prosecuted, states are free to enact legislation prohibiting individuals from assisting others in committing suicide. Both Washington and New York were well within their rights to adopt legislation banning the practice of physician-assisted suicide. At the same time, however, the court left open the possibility that states also have the legal right to enact legislation permitting physician-assisted suicide.

While the court did not expound upon this possibility in either of the preceding cases, by merely asserting that assisted suicide was not recognized as a liberty interest, it hinted that physician-assisted suicide may be tolerated as legally permissible if a state chose to do so. Justice Ginsberg revisited this case years later in *Gonzales v. Oregon*, commenting: “Everyone on the court in that case [*Washington v. Glucksberg*] seemed to

assume that physician-assisted suicide was a matter for the State and the Government. . . "State legislatures undoubtedly have the authority to create the kind of exception to assisted suicide fashioned by the court of appeals."<sup>39</sup>

### **Challenging Oregon's Death with Dignity Act**

Even though the Supreme Court avoided directly challenging the legality of assisted suicide, the issue soon took a new twist in 2001. Rather than attack Oregon's Death with Dignity Act as tantamount to murder, Attorney General John Ashcroft accused the act of violating the Controlled Substances Act of 1970. He was essentially attempting to invalidate Oregon's law by contending that the drugs used in the manner prescribed (for assisting in inducing death), were illegal as outlined within the CSA.<sup>40</sup>

Ratified in 1970, the Controlled Substances Act sought to create a legal basis upon which drugs could be classified and regulated by the United States. The Act outlined five Schedules (categories) within which a drug could be classified based upon characteristics such as potential for abuse and potential for addiction, which were determined by the Department of Health and Human Services.<sup>41</sup> For example, a highly illegal and highly addictive drug such as LSD would be classified as a Schedule I drug, whereas a drug such as Tylenol that is freely available and has a very low potential for abuse would be labeled a Schedule V drug. However, Ashcroft did not stop at condemning Oregon's Death with Dignity Act by accusing it of violating the CSA. Taking the matter one step further, he threatened to revoke the licenses of any physicians abetting their patients in committing suicide.<sup>42</sup> Oregon retaliated by suing Ashcroft in federal district court, igniting a debate that would eventually land the case within the courtroom of the United States Supreme Court.

In 2005, the U.S. Supreme Court granted certiorari to *Gonzales v. Oregon*, once again drawing national attention to the issue of assisted suicide. To the dismay of many, the case did not hinge upon the constitutionality of physician-assisted suicide. Instead, it focused upon statutory limitations within the Act. The case challenged whether the Controlled Substance Act endowed the Attorney General with the right to accuse Oregon's Death with Dignity Act of violating the law by improperly using controlled substances. While this was not a direct ultimatum against physician-assisted suicide, the implications it drew would invariably affect the permissibility of Oregon's Death with Dignity Act.<sup>43</sup>

In presenting the federal government's oral argument, Solicitor General Paul Clement argued, on behalf of the petitioners, exactly

why the government felt the practice of assisted suicide violated the Controlled Substances Act. In his opening statement, he explained: “Before Oregon became the first State to authorize assisted suicide, the prescription of federally controlled substances to facilitate suicide generally violated State law and also violated Federal law.”<sup>44</sup> The federal law Clement was specifically referring to was the Controlled Substances Act. He contended that the Attorney General was justified in revoking the license of a physician should he or she prescribe medication abetting suicide, regardless of whether the state had legalized such actions.

However, the court was critical of fully accepting this contention. Justice O’Connor questioned if a doctor who prescribed drugs that would facilitate the execution of a convict would also be guilty of violating the CSA. While Clement assured the court that this was not possible, the court was concerned that his reasoning could allow a future Attorney General with a dim view of the death penalty to exercise the same action and challenge the legality of state executions. As Justice Souter noted, “On the theory the Government is advancing this morning, it would be unlawful for a doctor to engage in that [a state execution], because that was, in fact, not within the limits of the practice of medicine, the doctor was using a controlled substance for something outside the practice of medicine, and hence, it would be illegal.”<sup>45</sup>

The point the Court was trying to make was that the primary purpose of the CSA is to stop drug addiction and abuse and that it has “nothing to do with the death penalty.”<sup>46</sup> Furthermore, the Court wondered whether the CSA was ever intended to apply to assisted suicide. Solicitor General Clement contended that this was not the case. He asserted that Congress’ primary purpose in drafting the CSA was because of the debilitating effects harmful drugs have, as well as the devastating impact they can have on one’s life.<sup>47</sup> Clement ended by explaining that Congress was not only concerned about the addictive qualities of particular drugs but also the possibility of them being used for non-medical purposes, such as physician-assisted suicide.

Following Solicitor General Clement, Assistant Attorney General Robert Atkinson argued on behalf of the respondents that Oregon’s Death with Dignity Act did not violate the CSA. Mr. Atkinson contended that the CSA intended to allow each state to define legitimate medical practices individually. This position led the court to question whether Mr. Atkinson was arguing that a physician could legally provide drugs such as heroin for recreational use by contending

that it was a legitimate medical practice as long as it was permitted by state legislation. In response to this question, Atkinson explained that “we [on behalf of the state of Oregon] think that the answer would have to be that Congress intended to leave the definition of what is a legitimate medical practice to the States.”<sup>48</sup> As such, Atkinson was affirming the respondents’ belief that states should be afforded the autonomy to decide individually if controversial drugs, prescribed to lessen pain, should be incorporated as a legitimate medical practice.

Atkinson clearly understood the difficulty in arguing whether the drugs used in physician-assisted suicide qualify as a legitimate medical practice, so he took the position that the states should be recognized as the deciders of a drug’s legitimacy. Consequently, Chief Justice Roberts was prompted to question, “If one State can say it’s legal for doctors to prescribe morphine to make people feel better, or to prescribe steroids for bodybuilding, doesn’t that undermine the uniformity of the Federal law and make enforcement impossible?”<sup>49</sup> In response, Atkinson asserted that his interpretation of the CSA statute led him to conclude that only Schedule I drugs are indefinitely prohibited by Congress, leaving states to decide the acceptable use for Schedule II drugs and so forth. Therefore, since the drugs prescribed for physician-assisted suicides are Schedule II drugs, their permissibility should be determined by each state rather than by the Federal government.

On January 17, 2006, the court delivered its decision regarding *Gonzales v. Oregon* in a 6-3 opinion tailored by Justice Anthony Kennedy. The court held that “the CSA does not allow the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide under state law permitting the procedure.”<sup>50</sup> The ruling also established that the CSA cannot prohibit states from authorizing the use of controlled substances for physician-assisted suicide, should a state enact such legislation. Contrary to the petitioners’ claim that the CSA served as an aid in defining legitimate medical practices, the court found that the purpose of the CSA was to ensure that physicians are prevented from abusing their power and prescribing illicit drugs.<sup>51</sup>

Writing the majority opinion of the court, Justice Kennedy sought to explain that the court found the Attorney General’s interpretation of the CSA over-exaggerated:

The Government, in the end, maintains that the prescription requirement delegates to a single



Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it.<sup>52</sup>

While the petitioners argued that the Interpretive Rule granted the Attorney General the capacity to revoke the licenses of medical practitioners prescribing medication for PAS, the Court found this reasoning illegitimate. The Court asserted that the Attorney General overstepped his authority in criminalizing physicians who assisted in a medical practice that he deemed illegitimate. The majority noted that decisions regarding medical judgments should be left to those who possess medical expertise in the matter. “The authority claimed by the Attorney General is both beyond his expertise and incongruous with the statutory purposes and design.”<sup>53</sup>

While much discourse ensued over whether or not PAS comprised a “legitimate medical purpose,” the concept was never fully defined. This concerned Justice Scalia, who contended in his dissent that “if the term ‘legitimate medical purpose’ has any meaning, it surely excludes the prescription of drugs to produce death.”<sup>54</sup> As such, Scalia believed that while the CSA never directly cited PAS as an illegitimate medical practice, it could logically be inferred as such because “death” is far from being a purpose of medicine. Moreover, Scalia was also concerned that if the Federal government could not regulate physician-assisted suicide, that prohibition may easily create a slippery slope towards banning the Federal government from regulating the recreational use of drugs: “Unless we are to repudiate a long and well-established principle of our jurisprudence, using the federal commerce power to prevent assisted suicide is unquestionably permissible.”<sup>55</sup>

Many people throughout the nation shared Scalia’s discontent with the outcome of the case. While they had a mutual dissatisfaction in the ruling, many were upset that the constitutionality of PAS was not addressed. Rather than Oregon’s Death with Dignity Act being challenged directly, the case was challenged on statutory limitations, confronting only the legality of controlled substances used to induce death. Although this did not quench many people’s desire for the court to confront physician-assisted suicide directly, the case did

effectively indicate the court's opinion in the matter. Perhaps Judge Richard Tallman, who presided over the case when it was addressed earlier by the Ninth Circuit Court of Appeals, provided the most direct comment on physician-assisted suicide: "The principle that state governments bear the primary responsibility for evaluating physician-assisted suicide follows from our concept of federalism, which requires that the state lawmakers, not the federal government are the 'primary regulators of professional [medical] conduct.'"<sup>56</sup>

While some anticipate that physician-assisted suicide will once again be revisited by the courts, many others believe that the Court has clearly established its position. By upholding Oregon's Death with Dignity Act, the Supreme Court provided an insightful picture of the majority's attitude toward PAS as well as its deference to the states' prerogative to define patient rights widely. Thus, *Gonzales v. Oregon* helped expound upon patient rights and affirm states' autonomy in regulating legitimate medical practices.

## Conclusion

In short, the United States has witnessed a series of events leading to the expansion and revision of individual patient rights to refuse treatment or to seek death. Advances in medical technology have created the demand for a new area of law to be developed, safeguarding the rights of patients and their decisions to accept or refuse medical treatment. In addition, the legal field has been challenged with the question of determining whether an individual's rights extend to the self-determination of death. In response, the courts have consistently indicated that this is a matter for the states to take up individually. While the concept of a fundamental right to refuse treatment has clearly been established, the courts have been hesitant to advance the notion of a constitutionally protected right of physician-assisted suicide. If prior court cases are any indication, the issue will have to be addressed within the jurisdiction of each state.

## NOTES

<sup>1</sup> Lewis, 184.

<sup>2</sup> Behuniak, 11.

<sup>3</sup> Jasper, 7.

<sup>4</sup> Smith, 61.

- <sup>5</sup> Ibid.
- <sup>6</sup> Jasper, 8.
- <sup>7</sup> Ibid.
- <sup>8</sup> Ibid, 9.
- <sup>9</sup> Ibid.
- <sup>10</sup> Ibid., 10.
- <sup>11</sup> Behuniak, 44.
- <sup>12</sup> Jasper, 14.
- <sup>13</sup> Kerr, 20.
- <sup>14</sup> Ibid.
- <sup>15</sup> Ibid.
- <sup>16</sup> Ibid.
- <sup>17</sup> Jasper, 15.
- <sup>18</sup> Mereiness, 235.
- <sup>19</sup> *Cruzan v. Director*
- <sup>20</sup> Kerr, 20.
- <sup>21</sup> Ibid., 21.
- <sup>22</sup> Jasper, 14.
- <sup>23</sup> *Cruzan v. Director*.
- <sup>24</sup> Mareiniss, 238.
- <sup>25</sup> Jasper, 19.
- <sup>26</sup> Ibid., 23.
- <sup>27</sup> Biema.
- <sup>28</sup> Ball, 186.
- <sup>29</sup> Jasper, 23.
- <sup>30</sup> Ball, 183.
- <sup>31</sup> Mariner, 204.
- <sup>32</sup> Ibid., 205.
- <sup>33</sup> Ibid.
- <sup>34</sup> *Washington v. Glucksberg*.
- <sup>35</sup> Ibid.
- <sup>36</sup> Ibid.
- <sup>37</sup> Mariner, 260.
- <sup>38</sup> *Vacco v. Quill*.
- <sup>39</sup> *Gonzales v. Oregon*.
- <sup>40</sup> Schneider, 10-11.
- <sup>41</sup> U.S. Drug Enforcement Administration.
- <sup>42</sup> Mathes, 180.
- <sup>43</sup> *Gonzales v. Oregon*.

<sup>44</sup> Oral Argument: *Gonzales v. Oregon*

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> *Gonzales v. Oregon*, 2.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid., 28.

<sup>53</sup> Ibid., 20.

<sup>54</sup> Ibid., 58.

<sup>55</sup> Ibid.

<sup>56</sup> *Oregon v. Ashcroft*.

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