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ESSAY

Judge Gorsuch on Qualified Immunity

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Introduction

In the wake of Tenth Circuit Judge Neil Gorsuch's nomination to the Supreme Court, there has been much buzz about his 2016 dissent in a case involving a seventh grader arrested for burping during gym class.[1] The Tenth Circuit shielded the arresting officer from suit, granting him qualified immunity.[2] Judge Gorsuch disagreed: "Respectfully, I would have thought [existing law] sufficient to alert any reasonable officer in this case that arresting a now compliant class clown for burping was going a step too far."[3] Commentators cited this dissent in praising Judge Gorsuch as "steadfast and surprising,"[4] "a gift" to liberals.[5] But it does not stand as an exemplar of his qualified immunity jurisprudence. Rather, it highlights an important trend: although Judge Gorsuch tends toward generosity in granting government officials qualified immunity, he is cognizant of and polices the doctrine's outer bounds.

This Essay teases out that trend by examining Judge Gorsuch's major qualified immunity opinions. Three common threads emerge: First, Judge Gorsuch harbors a robust—though not boundless—vision of qualified immunity. Second, he believes courts ought not decide unnecessary constitutional issues and often inverts the qualified immunity analysis to avoid doing so. Third, he is sensitive to the practical concerns qualified immunity is meant to mollify—namely, the realities of law enforcement. This Essay's final Part weaves together these threads in an effort to divine the influence a potential Justice Gorsuch might have.

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1. A.M. *ex rel.* F.M. v. Holmes, 830 F.3d 1123 (10th Cir. 2016).
2. *Id.* at 1150.
3. *Id.* at 1070 (Gorsuch, J., dissenting).
4. Kimberly Kindy et al., *Simply Stated, Gorsuch Is Steadfast and Surprising*, WASH. POST (Feb. 18, 2017), http://wapo.st/gorsuch-profile.
5. Radley Balko, Opinion, *In Gorsuch, Trump Gave Democrats a Gift. They Should Take It.*, WASH. POST (Feb. 1, 2017), https://wpo.st/6p8d2.

I. Background

Qualified immunity generally shields government officials from damages lawsuits, most notably under 42 U.S.C. § 1983.[6] The doctrine balances "the need to hold public officials accountable" with "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[7] In other words, it "gives government officials breathing room to make reasonable but mistaken judgments about open legal questions."[8]

But the immunity is, as its name suggests, qualified. A plaintiff can overcome it by pleading "facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct."[9] Courts may address either of these prongs first.[10]

II. Judge Gorsuch's Past Opinions

Judge Gorsuch's past qualified immunity opinions reveal his generous—though not boundless—view of the doctrine's coverage. As he has put it: "True, qualified immunity is strong stuff.... But even accounting for this," juvenile detention center staff who used the Pro-Straint Restraining Chair, Violent Prisoner Chair Model RC-1200LX—complete with "wrist, waist, chest, and ankle restraints"—to discipline a juvenile detainee could not claim qualified immunity's protection.[11]

A. "Strong Stuff"[12]

Wilson v. City of Lafayette[13] exemplifies Judge Gorsuch's generous conception of qualified immunity. In that case, parents sued a police officer under § 1983 after he killed their son by tasing him.[14] Judge Gorsuch, writing for the majority, held that the parents "falter[ed] on at least their second burden"—the "clearly established" prong—and the officer was therefore immune.[15] He noted the Tenth Circuit's "sliding scale" approach to the "violated right" prong: "[T]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the

6. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 & n.30 (1982); *see also* 42 U.S.C. § 1983 (2015).
7. Pearson v. Callahan, 555 U.S. 223, 231 (2009).
8. Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011).
9. *Id.* at 735 (quoting *Harlow*, 457 U.S. at 818).
10. *Pearson*, 555 U.S. at 236.
11. Blackmon v. Sutton, 734 F.3d 1237, 1239 (10th Cir. 2013).
12. *Id.*
13. 510 F. App'x 775 (10th Cir. 2013).
14. *Id.* at 776.
15. *Id.* at 777.

violation."[16] But he nonetheless followed what he saw as the Supreme Court's directive "to apply qualified immunity broadly."[17] And he heeded the Court's "admonition" to "proceed 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,'"[18] an admonition seemingly "intended for this deeply saddening case."[19]

Judge Gorsuch echoed this same admonition in *Cortez v. McCauley*.[20] In that case, the Tenth Circuit denied an officer qualified immunity because he lacked probable cause for an arrest made after receiving an unfounded report of child molestation.[21] Judge Gorsuch concurred in part and dissented in part. While he agreed the officer lacked probable cause, he also believed the plaintiff failed to satisfy the clearly established prong.[22] Judge Gorsuch admonished the majority for asking—under the violated right prong—"whether the officers might've, could've, or should've done more."[23] He explained that the Supreme "Court has repeatedly warned us against 'unrealistic second-guessing' of police judgments."[24]

Turning to the clearly established prong, Judge Gorsuch recalled qualified immunity's underlying purpose: "to protect diligent law enforcement officers, in appropriate cases, from the whipsaw of tort lawsuits seeking money damages."[25] He was unable to "blame law enforcement officers for having failed to divine" the Tenth Circuit's outcome on the evidentiary issues at play "while busy responding to a call reporting an alleged child molestation."[26] Rather, he blamed the majority—and the plaintiff—for failing to point to any precedent clearly establishing the right at issue.[27]

Judge Gorsuch again granted qualified immunity on the clearly established prong in *Kerns v. Bader*.[28] In that case, a police helicopter was shot down. Police subsequently searched Kerns's home, arrested him, and prosecuted him.[29] Kerns sued the officers who had searched his home, a sheriff who had attempted to obtain his psychiatric records, and various other law enforcement personnel.[30]

16. *Id.* (quoting Casey v. City of Fed. Heights, 509 F.3d 1278, 1284 (10th Cir. 2007)).
17. *Id.* at 780.
18. *Id.* at 779 (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).
19. *Id.*
20. 478 F.3d 1108 (10th Cir. 2007).
21. *Id.* at 1112-14, 1117, 1122.
22. *Id.* at 1141-44.
23. *Id.* at 1139.
24. *Id.* at 1138 (quoting United States v. Sharpe, 470 U.S. 675, 686 (1985)).
25. *Id.* at 1141.
26. *Id.* at 1142.
27. *Id.* at 1143.
28. 663 F.3d 1173 (10th Cir. 2011).
29. *Id.* at 1177-79.
30. *Id.* at 1180.

Judge Gorsuch, writing for the majority, decided all three qualified immunity issues with judicial minimalism and resources in mind. He first remanded the question of the searching officers' qualified immunity "to the district court to finish the work of answering the second qualified immunity question," which it had initially declined to do.[31] Judge Gorsuch echoed the Supreme Court's instruction "that courts should proceed directly to, 'should address only,' and should deny relief exclusively based on the second element" under certain circumstances.[32] In his words, "constitutional avoidance considerations trump and 'courts should think hard, and then think hard again, before turning small cases into large ones.'"[33]

Judge Gorsuch then granted qualified immunity to the sheriff who had requested Kerns's psychiatric records based on the clearly established prong. "[D]oing so," he noted, "allows [the court] to avoid rendering a decision on important and contentious questions of constitutional law with the attendant needless (entirely avoidable) risk of reaching an improvident decision on these vital questions."[34] And he upheld the final defendants' claims of qualified immunity under the violated right prong "because doing so turn[ed] out to be the easiest and most economical way to resolve their various appeals."[35]

B. But Within Limits

Though generous, Judge Gorsuch has by no means issued government officials a blank check when it comes to qualified immunity. His dissent in *A.M. ex rel. F.M. v. Holmes* is illustrative.[36] In that case, F.M., a seventh grader, "generated several fake burps" in gym class.[37] His teacher called the police, who arrested F.M. for "interfering with the educational process" in violation of New Mexico law.[38] F.M.'s mother sued the officer under § 1983, alleging a violation of F.M.'s Fourth Amendment rights.[39] The officer asserted qualified immunity,[40] the district court agreed, and the Tenth Circuit affirmed.[41] The

31. *Id.* at 1182.

32. *Id.* at 1180 (quoting Camreta v. Greene, 131 S. Ct. 2020, 2032 (2011)).

33. *Id.* (quoting *Camreta*, 131 S. Ct. at 2032).

34. *Id.* at 1183-84.

35. *Id.* at 1187.

36. 830 F.3d 1123 (10th Cir. 2016).

37. *Id.* at 1129.

38. *Id.* at 1130. A.M. also sued the officer and school officials over a separate search. *Id.* at 1129. But Judge Gorsuch did not address the qualified immunity claims related to that incident.

39. *Id.* at 1129, 1132; *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

40. *A.M.*, 830 F.3d at 1134.

41. *Id.* at 1136.

majority "center[ed] [its] analysis on the clearly-established-law question"[42] and held that it was not clearly established at the time that arresting a burping student violated the Fourth Amendment.[43]

Judge Gorsuch disagreed.[44] He lauded his colleagues for "reach[ing] a result they dislike[d] but believe[d] the law demand[ed]."[45] But he did not "believe the law happen[ed] to be quite as much of a ass as they" did.[46] Rather, Judge Gorsuch thought it sufficiently clear at the time "that arresting a now compliant class clown for burping was going a step too far."[47] He pointed to a New Mexico case interpreting the statutory language at issue—albeit in a separate statute—that ought to have "alerted law enforcement that the statutory language on which the officer relied . . . does not criminalize 'noise[s] or diversion[s]' that merely 'disturb the peace or good order.'"[48]

Browder v. City of Albuquerque[49] is similar. That case involved a police officer who, after his shift ended, sped off from the police station at about sixty-six miles per hour.[50] He ran a red light and hit a car containing Ashley and Lindsay Browder, killing Ashley and severely injuring Lindsay.[51] Lindsay and her parents sued for damages under § 1983.[52] Judge Gorsuch—writing for the majority—denied the officer qualified immunity.[53] Addressing the clearly established prong, he again noted the Tenth Circuit's "sliding scale": "[T]he more obviously egregious the conduct" is, "the less specificity is required" for the clearly established prong.[54] This case, Judge Gorsuch explained, was "perhaps a case along these lines."[55]

But he did not stop there. Judge Gorsuch also concurred, addressing an argument the officer had waived and issuing an "invitation to restore the balance between state and federal courts" by reinvigorating *Parratt v. Taylor* in future cases.[56] In *Parratt*, the Supreme Court held that state tort remedies that "could

42. *Id.* at 1139.

43. *Id.* at 1138, 1151.

44. *Id.* at 1169 (Gorsuch, J., dissenting).

45. *Id.* at 1170.

46. *Id.* (alluding to CHARLES DICKENS, OLIVER TWIST 520 (Dodd, Mead & Co. 1941) (1838)).

47. *Id.*

48. *Id.* at 1169 (quoting State v. Silva, 525 P.2d 903, 907 (N.M. Ct. App. 1974)).

49. 787 F.3d 1076 (10th Cir. 2015).

50. *Id.* at 1077.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 1082 (quoting Shroff v. Spellman, 604 F.3d 1179, 1189-90 (10th Cir. 2010)); *see supra* note 16 and accompanying text.

55. *Browder*, 787 F.3d at 1083.

56. *Id.* at 1085 (Gorsuch, J., concurring); *see* Parratt v. Taylor, 451 U.S. 527 (1981).

have fully compensated" a plaintiff for the deprivation of his rights "are sufficient to satisfy the requirements of due process" and therefore defeat a § 1983 procedural due process claim.[57] Judge Gorsuch believed the same principle applied in *Browder*: a state court could have provided "relief using established tort principles (e.g., negligence) and there's little reason to doubt it would."[58] "To entertain cases like this in federal court," he warned, risks creating a regime in which "'any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional violation' in federal court and thus 'make of the Fourteenth Amendment a font of tort law.'"[59]

III. Justice Gorsuch's Future Opinions?

Over the past few decades, the Supreme Court has slowly expanded qualified immunity protection for government officials.[60] There is little reason to believe a Justice Gorsuch would divert this trend. Indeed, Justice Gorsuch would bring with him a view that "qualified immunity is strong stuff."[61] He has interpreted the Court's precedent—and will likely continue to do so—as instructions "to apply qualified immunity broadly."[62] But "broadly" does not mean unboundedly. In particularly egregious cases, a Justice Gorsuch may—as Judge Gorsuch has—allow plaintiffs latitude on the clearly established prong, perhaps under a sliding scale approach.[63] Put simply, though, Judge Gorsuch's like-mindedness on the doctrine and respect for stare decisis[64] indicate that his qualified immunity opinions would likely be in line with those the Court has recently issued.

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57. 451 U.S. at 544.

58. *Browder*, 787 F.3d at 1084 (Gorsuch, J., concurring).

59. *Id.* at 1084-85 (quoting Albright v. Oliver, 510 U.S. 266, 284 (1994) (Kennedy, J., concurring in the judgment)).

60. *See* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 78 (2016) ("In recent years, the Supreme Court opinions applying the qualified immunity defense have engaged in a pattern of describing the defense in increasingly generous terms . . . .").

61. Blackmon v. Sutton, 734 F.3d 1237, 1239 (10th Cir. 2013).

62. Wilson v. City of Lafayette, 510 F. App'x 775, 780 (10th Cir. 2013); *see also* Hopper v. Fenton, No. 16-5006, 2016 WL 6958137, at *2 (10th Cir. Nov. 29, 2016) (noting that "the Supreme Court has instructed" courts to apply the doctrine broadly).

63. *See, e.g.*, Browder v. City of Albuquerque, 787 F.3d 1076, 1082 (10th Cir. 2015).

64. Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]he principle of *stare decisis* was one 'entrenched and revered by the framers' precisely because they knew its importance 'as a weapon against . . . tyranny.'" (second alteration in original) (quoting Michael B.W. Sinclair, Anastasoff *Versus* Hart: *The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695, 707 (2003))). *But cf. id.* at 1158 ("[I]t seems to me that in a world without *Chevron* very little would change—except perhaps the most important things.").

In writing those opinions, Justice Gorsuch would likely keep his view of the courts' proper role—and the need to avoid deciding unnecessary constitutional questions—front and center. As Judge Gorsuch has put it, "[o]ften judges judge best when they judge least."[65] This reasoning underlies his consistent admonitions to avoid addressing unnecessary constitutional issues and instead rely on the clearly established prong to keep from "turning small cases into large ones" and risking "improvident governing appellate decision[s]."[66] This avoidance would likely become all the more significant to a Justice Gorsuch given the long-lasting and far-reaching influence of Supreme Court opinions.

But Justice Gorsuch would not counsel avoidance in every case. Rather, where the violated right prong represents "the easiest and most economical way to resolve" the case, one might expect him to advise lower courts to begin there.[67] And though resource constraints are markedly different in the Supreme Court, there is still reason to believe Justice Gorsuch would begin with the violated right prong where it promises an easier and more straightforward resolution.[68]

Also likely to weigh heavily on Justice Gorsuch's mind are the practical dangers that attend restrictions on qualified immunity. Judge Gorsuch has oft spoken of the Court's warning "against 'unrealistic second-guessing' of police judgments."[69] One might expect him to echo this same warning from the Court, reminding lower courts that law enforcement officers act in "highly tense, uncertain, and rapidly evolving circumstances without any *clear* direction in the law."[70]

Finally, one might expect Justice Gorsuch—given the opportunity—to reinvigorate *Parratt* and expand it beyond the procedural due process context, thereby skirting the qualified immunity analysis.[71] As Judge Gorsuch sees it, courts "are not in the business of expounding a common law of torts" and the Constitution "isn't some inkblot on which litigants may project their hopes and

65. Cordova v. City of Albuquerque, 816 F.3d 645, 666 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment).

66. Kerns v. Bader, 663 F.3d 1173, 1181-82 (10th Cir. 2011) (quoting Camreta v. Greene, 131 S. Ct. 2020, 2032 (2011)); *see also* Painter v. City of Albuquerque, 383 F. App'x 795, 801 (10th Cir. 2010) ("Even if Officers Kelly and Porlas lacked probable cause to effect an arrest, Mr. Painter has not shown that they violated 'clearly established' law . . . .").

67. *Kerns*, 663 F.3d at 1187.

68. *See, e.g.*, Martinez v. Carr, 479 F.3d 1292, 1295 (10th Cir. 2007) ("[W]e are able to resolve Mr. Martinez's claim at the first step . . . and thus need not reach the second.").

69. Cortez v. McCauley, 478 F.3d 1108, 1138 (10th Cir. 2007) (Gorsuch, J., concurring in part and dissenting in part) (quoting United States v. Sharpe, 470 U.S. 675, 686 (1985)).

70. Wilson v. City of Lafayette, 510 F. App'x 775, 779 (10th Cir. 2013).

71. Cordova v. City of Albuquerque, 816 F.3d 645, 665 (10th Cir. 2016) (Gorsuch, J., concurring in the judgment) ("I cannot think of a good reason why [*Parratt*] should be limited to [procedural due process] or any particular class of cases . . . ."); *see supra* notes 56-59 and accompanying text.

dreams."[72] Rather—"out of respect for considerations of judicial modesty, efficiency, federalism, and comity"—he would have courts ask not "which amendment the plaintiff might happen to invoke" but rather "whether state law is adequate to vindicate the injury he alleges" in deciding whether the plaintiff has a § 1983 claim at all.[73] If confirmed, Justice Gorsuch would be poised to make this vision a reality.

Conclusion

In opinions peppered with concerns about the avoidance of unnecessary constitutional issues and the reality of law enforcement, Judge Gorsuch has championed a robust though not limitless conception of qualified immunity. Should the Senate confirm a Justice Gorsuch, he might be expected to join the Court in expanding qualified immunity protection but within principled and practical boundaries.

72. *Cordova*, 816 F.3d at 661.

73. *Id.* at 664-65.