

BOOK REVIEW

Neil Gorsuch, *A Republic If You Can Keep It* (Crown Forum 2020) ISBN 9780525576808, 338pp

Author: Seán Hurley, BCL (UCD), LLM (UCL)

In recent years a number of anthologies on the writings and speeches of US Justices have been published.¹ *A Republic If You Can Keep It* by Justice Neil Gorsuch is unique for the fact that it was published so shortly after the Justice's elevation to the US Supreme Court. Justice Gorsuch was inspired to publish this book as a result of the confirmation process he underwent following his nomination to the Supreme Court. A motivation of the book is to disavow some of the misapprehensions that materialised during the hearings as to the civic understanding of the Constitution and the role of the judge in American society. What follows is not only an excellent primer on the judge's legal philosophy, but also of the experiences that have shaped him and the values that animate him.

The Introduction begins by clarifying the reasoning behind the title of the collection. After the Constitutional Convention, a bystander asked what kind of government the delegates envisaged. Benjamin Franklin allegedly responded: 'A republic, *if you can keep it*'.² In Gorsuch's view the solidity of the republic depends on citizens' comprehension of it and the role respective actors place in it. In particular, Gorsuch places emphasis on the importance of judicial restraint; that judges should faithfully (and at times courageously) apply the law and eschew the temptation to incorporate policy preferences into judgments. Gorsuch is an adherent of Alexander Hamilton's oft-quoted phrase that 'the judge's job is to exercise "merely judgment," not "Force [or] Will."' ³ The Introduction also contains some compelling anecdotes such as when Gorsuch was whisked away down a dirt-track in a neighbour's car in an attempt to avoid reporters who were congregating at prospective Supreme Court Justices' houses following Donald Trump's release of the list of potential nominees.

Part 1 focuses on another bedrock concept that Gorsuch believes is necessary for any republic to flourish: the importance of civics and civility. Gorsuch makes reference to the crises of civics and civility in modern America. The crises are interconnected in that a majority of Americans 'say they pay less attention to politics today because of its incivility'.⁴ This trend is regarded as ominous as it could threaten the future of the republic itself. He references de Tocqueville to illustrate the success of the republic has always been underpinned by civility: "The manners of the Americans," he wrote, "are.. the real cause which renders that people... able to support a democratic government"⁵ Likewise, Gorsuch regards civility between Justices as essential to a properly functioning Supreme Court:

We eat lunch together regularly and share experiences and laughs along the way (Justice Breyer seems to possess an endless reservoir of knock-knock jokes). We flip burgers together at the Court's annual picnic and celebrate birthdays and the holidays with song... And whenever we gather for work,

¹ See for example Ruth Bader Ginsburg, *My Own Words* (Simon & Schuster 2016), and Christopher J. Scalia and Edward Whelan (eds), *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived* (Crown Forum 2017).

² Neil Gorsuch, *A Republic If You Can Keep It* (Crown Forum 2020) 8.

³ *ibid* 10.

⁴ *ibid* 31.

⁵ *ibid* 32.

no matter how stressful the moment, each justice shakes the hand of the other justice.⁶

Part 2 of the book can be best described as an apologia by Gorsuch for the orthodox understanding of the separation of powers. The first speech is an ode to the legacy of Justice Antonin Scalia, whose seat Gorsuch filled. Gorsuch describes Scalia as a 'lion' of the profession, who reinforced the separation between the judicial and legislative roles. For Gorsuch, Scalia's influence is summed up by fellow Justice Elena Kagan's remarks at a Harvard address that 'we're all textualists now'.⁷ The second speech considers the boundary lines between the executive and judicial, and executive and legislative powers respectively. Gorsuch is particularly critical of the delegated legislative powers exercised by executive agencies and the power they have to regulate almost every aspect of human existence. There are many parallels between Gorsuch's views on these issues and those expressed by Lord Johnathan Sumption in the Reith Lectures.⁸ Also included are three opinions written by Gorsuch while on the Court of Appeals, where excessive executive power was being exercised.

Part 3 describes the journey of how Gorsuch came to see 'textualism' and 'originalism' as the principal tools in a judge's toolkit. Gorsuch describes how he was inspired while at law school by a lecture Justice Scalia gave, which challenged the orthodox understanding at the time, that the Constitution is a 'living document' and that the meaning of statutes should be construed according to its purpose as garnered through legislative history, as opposed to purely its text.⁹ He relates how, through his experience as a lawyer and a judge, he witnessed examples of injustice when judges strayed from the written law, such as persons that were convicted for offences that the law did not prohibit or statutes rewritten based on obscure comments from congressional debates.¹⁰ A number of Gorsuch's opinions are included which illustrate the application of textualist and originalist methods of interpretation in particular cases.

Part 4 is entitled the 'Art of Judging' where Gorsuch attempts to trace the archetype of a good judge. He regards courage as an indispensable virtue for a judge to be able to be faithful to the rule of law in trying circumstances. Judge Frank Johnson was given as an example of a judge who exemplified this virtue. Judge Johnson was appointed by President Eisenhower and he served on the District Court and Circuit Court of Alabama. For Gorsuch, this judge was a hero for his willingness to apply the law faithfully regardless of the consequences he suffered. For applying the precedent of *Brown v Board of Education*, he became a pariah in his community to the extent crosses were burned on his lawn and his life was threatened.¹¹ Gorsuch's intellectual prowess is demonstrated in a speech he gave in honour of Professor John Finnis at a symposium in Notre Dame. Gorsuch was a Marshall scholar at Oxford and completed his DPhil under Professor Finnis. In the speech, Gorsuch takes issue with the scholarship of Judge Richard Posner and Professor Glanville Williams who are critical of the traditional understanding of the concept of 'intention' in the tortious and criminal spheres. For Judge Posner, whether a person intended to commit a tort is immaterial to whether the same person should be held legally liable or not.¹² Rather, liability should be decided with

⁶ *ibid* 19.

⁷ *ibid* 48.

⁸ Johnathan Sumption, 'Law's Expanding Empire' (The Reith Lectures 2019: Law and the Decline of Politics).

⁹ Gorsuch (n 2) 106.

¹⁰ *ibid*.

¹¹ *ibid* 179.

¹² *ibid* 202.

regard to whether the impugned act or omission was conducive to achieving the optimal social balance or not.¹³ Professor Williams, for his part, sought to debunk the traditional concept of intention in the criminal sphere through equating it with foresight.

Gorsuch contends that although a person may foresee a particular result as the inevitable consequence of his or her actions, this is not to say the person intended such a result. He relies on a quote from Finnis to illustrate this point:

Those who wear shoes don't intend to wear them out...Those who fly the Atlantic foreseeing certain jetlag [likewise] don't do so with the intention to get jetlag; those who drink too heavily rarely intend the hangover they know is certain. Those who habitually stutter foresee with certainty that their speech will create annoyance or anxiety, but do not intend those side effects. Indeed, we might well call [William's] extended notion of [oblique] intent the Pseudo-Masochist Theory of Intention—for it holds that those who foresee that their actions will have painful effects on themselves intend those effects.¹⁴

Gorsuch's view on this issue is the fruit of serious reflection on the topic. In a previous work Gorsuch posited the distinction between the law permitting in some cases the refusal of life sustaining care and prohibiting euthanasia is predicated on the difference between intended and unintended consequences and the law should treat both issues separately.¹⁵ This of course has been an issue which Irish judges have grappled with at different intervals.¹⁶

Part 5 is entitled 'Toward Justice for All' and Gorsuch gives his take on how greater access to justice can be achieved in the US legal system. For Gorsuch, discovery is the *bête noire* of an efficient system of civil procedure. He regards the current rules which emphasise 'proportionality' as the overarching criterion as to whether discovery should be granted as outmoded.¹⁷ He favours a system of 'mandatory disclosure' where parties are required to disclose all the documents they believe are relevant at the outset of the case.¹⁸ The Irish legal system is undergoing a similar soul-searching process with the recent Administration of Civil Justice Report lamenting 'the current discovery regime is failing all parties involved in litigation' and noting that a radical overhaul is needed.¹⁹

Gorsuch blames the high cost of procuring legal services partly on the unnecessarily stringent accreditation requirements for law schools in the US. In order to receive the American Bar School accreditation, law schools must offer a three year graduate programme which increases the cost of study. He points out that many of America's leading jurists such as Robert Jackson, Benjamin Cardozo and Roscoe Pound did not have to undergo this process.²⁰ The overbroad definition of what constitutes 'the practice of law' is also identified as a problem. As a result of myriad advisory services falling within the definition of 'the practice of law', lawyers are insulated from competition which ultimately has a detrimental

¹³ *ibid.*

¹⁴ *ibid* 205-206.

¹⁵ See Neil M Gorsuch, *The Future of Assisted Suicide and Euthanasia* (Princeton University Press 2006) 53-75.

¹⁶ *Re a Ward of Court (withholding medical treatment) (No 2)* [1996] 2 IR 79; *Fleming v Ireland* [2013] 2 ILRM 73; [2013] IESC 19 and *In the matter of JJ (Unapproved)* [2021] IESC 1.

¹⁷ Gorsuch (n 2) 260-261.

¹⁸ *ibid* 262-263.

¹⁹ Review of the Administration of Civil Justice Report 186.

²⁰ *ibid* 264.

effect on consumers.²¹ This view bears resemblance to the dissent of Lord Sumption in *Prudential plc v Special Commissioner of Income Tax*, where he argued that legal privilege should be extended to other professionals providing legal services apart from solicitors and barristers.²²

Part 6 consists in a series of reflections on 'On Ethics and the Good Life'. In one speech, Gorsuch grapples with the frequently discussed theme of whether it is possible to be a good lawyer and to lead a good life.²³ Gorsuch is critical of the 'hired gun view' of a lawyer, where a lawyer is completely captive to the demands of the client:

What if the law says, as it did in antebellum America, that you can use legal process to compel a person hiding a runaway slave to return that slave to your client...Yet are we really confident a lawyer would bear no moral culpability for intentionally invoking such an obviously unjust law?²⁴

At the same time, Gorsuch acknowledges that a lawyer should not disregard client's orders lightly. He notes that litigation by its very nature is a zero-sum game, where one person's interests are advanced at the expense of another.²⁵ Gorsuch regards the key to navigating moral quandaries as a lawyer, is to 'avoid taking actions for our clients that involve using means or ends that intentionally do harm to other persons or goods.'²⁶ He regards this as a reason why the common law created the tort of 'abuse of process'.²⁷ He views this as giving a lawyer sufficient space to robustly represent his or her client, for example through 'vigorous cross-examination' or by pleading 'alternative defences'.²⁸ An intriguing speech from this Part is a commencement address Justice Gorsuch gave in Florida State University College of Law entitled 'Ten Things to Do in Your First Ten Years After Graduation'. His first tip to graduates was to 'Get in the Game'. In Gorsuch's opinion, you do not need to be sixty years old to be an effective trial advocate.²⁹ His take is: '[i]f you're willing to immerse yourself in the law and the facts of your case, and if you're willing to take guidance from those who've been in the trenches before, there's no reason why you can't be an effective trial lawyer right out the gate.'³⁰ Another tip he gave to graduates was to 'Find a Passion Outside the Law'. He bewails the story of the talented young-lawyer who died of a heart attack in his forties: '[h]e was super at what he did, but that's all he did. No sports, no hobbies, just a grind. Beware.'³¹ The book is replete with pictures of Gorsuch engaging in his favourite pursuit of fly-fishing in Colorado which suggests he has achieved the right balance in his own life.

The theme of Part 7 is Gorsuch's transition from the Court of Appeals for the Tenth Circuit to the Supreme Court. Gorsuch recalls the difficulties he faced as a result of the media attention he attracted during his confirmation process, ranging from the local milkman being tackled on the front lawn by marshals watching over his house, to journalists cold-calling

²¹ *ibid* 255-258.

²² [2013] UKSC 1 [138].

²³ See for example, Stephen L Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities' (1986) 11(4) *American Bar Foundation Research Journal* 613, and David Thunder, 'Can A Good Person Be a Lawyer' (2006) 20 *Notre Dame JL Ethics & Pub Policy* 313.

²⁴ Gorsuch (n 2) 297.

²⁵ *ibid*.

²⁶ *ibid* 299.

²⁷ *ibid* 298.

²⁸ *ibid* 299.

²⁹ *ibid* 302.

³⁰ *ibid*.

³¹ *ibid* 306.

priests in the local church.³² He also noted how friends rallied around him at the time, with former colleagues willing to testify at the hearing or to spend long evenings after work with him over cold pizza preparing for the hearings. Also included in this Part is the speech Gorsuch gave following his nomination being announced and his opening speech to the Senate Judiciary Committee. The latter speech is particularly compelling. It is permeated by ethos and Gorsuch masterfully makes the case for his appointment through his self-effacing frankness. In his speech he does not pinpoint his sparkling educational accomplishments or the merits of his judicial philosophy, but instead takes the opportunity to speak about the mentors who shaped his life and to remind the Senators that judges are flawed human beings. As a case in point, Gorsuch recalls on his first day as a judge, he tripped on his robes walking up the steps to the bench and sent all his papers flying. After reading the speech, it is difficult not to be left with a sense of admiration for the judge.

In conclusion, *A Republic If You Can Keep It* is an excellent primer into the legal philosophy of Neil Gorsuch and it gives a fascinating insight into the man behind the robes. The book is written in an elegant and engaging style, but it is written in such a way that the concepts articulated are accessible to non-lawyers. Gorsuch's style invites comparison with his predecessor Justice Scalia; in speeches defending legal hermeneutics such as originalism or textualism, Gorsuch does not hesitate to excoriate opposing views. It is telling that the two opinions Gorsuch includes to illustrate the merits of originalism and textualism are dissenting opinions. A drawback of the book is that it sometimes suffers from repetition, particularly where similar anecdotes are told in different speeches, or themes included in speeches are repeated in the judgments Gorsuch chose to include. The choice of including judgments in the book does help to illustrate the application of Gorsuch's legal philosophy in practice, but the absence of the other judgments leaves a question mark as to whether Gorsuch was on the correct side of the case. At fifty-four years of age, Gorsuch is likely to influence the US Supreme Court's jurisprudence for years to come and reading this book is an excellent way to gauge what direction that jurisprudence may take.

³² *ibid* 309-310.