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NOTES

Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions

Jeffrey Omar Usman*

Young children have a strong sense that changing the rules after the game has been played is wrong and unfair.[1] As they move through various stages of moral development, children's understanding of rules becomes more sophisticated.[2] They transition from viewing rules as semi-divine revelations of enduring truth to comprehending that rules can be, and sometimes should be, changed or modified.[3] While modification of rules comes to be seen as morally permissible, and even an interesting common area of childhood cooperation in moral exploration,[4] children, nevertheless, proceed with a firm understanding that the players are bound by the rules of the game.[5] Playing by the same rules becomes an aspect of relationship-building among children and impacts the perception of the children's character among both their peers and adults.[6]

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* Professor Jeffery Omar Usman is assistant professor of law at Belmont University College of Law in Nashville, TN. L.L.M., Harvard Law School, 2006. J.D. Vanderbilt University Law School, 2003. A.B., Georgetown University, 2000. I offer my appreciation to Christine Davis, Brett Knight, Nate Lykins, and Nan Steer for their excellent assistance and for the able and skillful editorial aide provided by Brittany Llewellyn and Robert Stewart of the *Nevada Law Journal*. My thanks as always to Elizabeth Usman and Emmett Usman.

[1] *See* Fergus P. Hughes, Children, Play, and Development 142–43 (4th ed. 2010); Anthony D. Pellegrini et al., *A Short-Term Longitudinal Study of Children's Playground Games Across the First Year of School: Implications for Social Competence and Adjustment to School*, 39 Am. Educ. Res. J. 991, 992 (2002); Mille Almy et al., *Recent Research on Play: The Teacher's Perspective*, *in* 5 Current Topics in Childhood Education 14 (Lillian G. Katz ed. 1984); Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 Ala. L. Rev. 1329, 1330 (2000).

[2] Michael Pressley & Christine B. McCormick, Child and Adolescent Development for Educators 74–75 (2007).

[3] *Id.*

[4] *See* Marjorie J. Kostelnik et al., Guiding Children's Social Development and Learning 208–09 (7th ed. 2012). In fact, children will often be more concerned with changing the rules of a game than actually playing it. Michael Reiss & Harriet Sants, Behaviour and Social Organisation 92 (1987). Working with their peers in changing rules, children come to learn mutability and learn to integrate change into social order through structuring and inventing rules. *Id.*

[5] Hughes, *supra* note 1, at 142–43; Harry M. Johnson, Sociology: A Systematic Introduction 139–40 (1960).

[6] *See* Marilyn Ellis, *Play and the School-Age Child*, Univ. Me. Cooperative Extension Publ'ns (2002), http://umaine.edu/publications/8048e/; Luther Halsey Gulick, A Philos-

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FINDING THE LOST INVOLUNTARY PUBLIC FIGURE

Jeffrey Omar Usman∗

Though their quarry is shrouded in mystery,[1] and indeed sometimes thought to be only a creature of myth or legend,[2] a number of judges, both those acting alone[3] and those concentrated in groups,[4] claim to have seen an involuntary public figure cross their paths. Descriptions have been offered, and those descriptions have been dutifully reported.[5] It is not clear though that the judges saw either the same thing or the same thing from the same angle.[6]

∗ © 2014 Jeffrey Omar Usman. Assistant Professor of Law, Belmont University School of Law. L.L.M., Harvard Law School; J.D., Vanderbilt University Law School; B.A., Georgetown University. I offer my appreciation to Christine Davis, Brett Knight, and Nate Lykins for their excellent assistance and for the able and skillful editorial aide provided by the members of the *Utah Law Review* most especially Mark Capone, Larissa Lee, and Christopher Mitchell. My thanks as always to Elizabeth Usman and Emmett Usman.

[1] *See* Susan M. Gilles, *From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law*, 75 TEMP. L. REV. 231, 270 (2002) (recognizing "the confusion surrounding that near-mythical plaintiff, the 'involuntary public figure'"); 3 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 23:4, at 23-69 (2014) (stating the U.S. Supreme Court's reference in *Gertz v. Robert Welch, Inc*. to involuntary public figures "has generated much confusion"); J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 546 n.314 (1985) ("The Court's confusion in *Gertz* became evident in its attempted application of the *Gertz* rule to other involuntary public figures."); Nat Stern, *Unresolved Antitheses of the Limited Public Figure Doctrine*, 33 HOUS. L. REV. 1027, 1096 (1996) (indicating that "the potency of the involuntary public figure doctrine remain[s] uncertain"); *see also* Rosanova v. Playboy Enters., 411 F. Supp. 440, 443 (S.D. Ga. 1976) (observing that "[d]efining public figures is much like trying to nail a jellyfish to the wall").

[2] *See* Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551, 559 (E.D. Mich. 1979) (indicating that the continuing vitality of the involuntary public figure has been called into question); LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 81 (2004) (noting that "the lower courts have split on how to define involuntary public figures and, indeed, whether the category even continues to exist"); 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 2:33 (2d ed. 2014) (expressing skepticism about the existence of involuntary public figures).

[3] *See, e.g.*, Zupnik v. Associated Press, Inc., 31 F. Supp. 2d 70, 73 (D. Conn. 1998); Foretich v. Advance Magazine Publishers, Inc., 765 F. Supp. 1099, 1108 (D.D.C. 1991); Price v. Chi. Magazine, No. 86 C 8161, 1988 WL 61170, at *4–5 (N.D. Ill. June 1, 1988).

[4] *See, e.g.*, Dameron v. Wash. Magazine, Inc., 779 F.2d 736, 740–42 (D.C. Cir. 1985); Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175, 186 (Ga. Ct. App. 2001); Daniel Goldreyer, Ltd. v. Dow Jones & Co., 687 N.Y.S.2d 64, 64 (App. Div. 1999); Wilson v. Daily Gazette Co., 588 S.E.2d 197, 208–09 (W. Va. 2003).

[5] *See, e.g.*, *Dameron*, 779 F.2d at 742 (indicating that an otherwise private individual became an involuntary public figure by "assum[ing] special prominence in the resolution of [a] public question" by "bec[oming] embroiled, through no desire of his own, in [a public]