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A REPLY TO PROFESSOR DAN SUBOTNIK

William E. Nelson

I wrote “The Emerging American Police State” in an effort to address two important issues of constitutional dimension. It would have been much easier to “get over it,” as Professor Subotnik has advised, and simply pay the \$180 tribute that the state was demanding.¹ After all, I’ve spent \$180 for which I’ve received no value on many occasions in the past and cannot even remember the times I’ve done it. But I remain convinced, especially after reading Professor Subotnik’s response, that paying tribute and getting over it would have been wrong.

The first important issue that concerned me was the relationship between traffic fines, on the one hand, and race and ethnicity, on the other. I totally agree with Professor Subotnik that municipal politicians “need[] money to operate, but do[] not want to alienate voters by raising taxes. Well placed stop signs can generate ticket income and help solve such money problems.”² But what if, as I believe my article persuasively suggests, traffic fines are paid disproportionately by people of color? Should professors such as I “get over it” and not object to the racist impact of such government funding? Or should we use whatever capacity we possess to litigate and write against it?

Of course, arguments exist in favor of local governance by local people. Professor Subotnik makes some of them. But, as cases such as *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel* show,³ policies of local government can have a devastating impact on poor people and people of color, who often are precluded from participating in local politics. It is important to discuss the policies in the context of their impact. I hope my article will facilitate

¹ Dan Subotnik, *The Simple Meaning of Stop Signs: A Response to Professor William Nelson*, 33 TOURO L. REV. 739, 739 (2017).

² *Id.* at 740.

³ 456 A.2d 390 (N.J. 1983).

discussion of the practice of funding government through traffic fines in conjunction with the impact of that practice on the poor and on racial and ethnic minorities.

The second important issue that concerned me was the impact of the proliferation of stop signs on the environment and the economy. This issue is obviously an important one of policy. It is also a legal and constitutional issue. Professor Subotnik misreads *Byrne v. City of New York*⁴ when he states it holds “that the guidelines are just that, guidelines, and not binding.”⁵ On the contrary, the Richmond County Supreme Court held that the standards set forth in the *Manual of Uniform Traffic Control Devices* were dispositive of the case – i.e., that the city was not negligent precisely because it had followed the standards set out in the *MUTCD*. Does *Byrne* mean that a municipality is negligent if it fails to follow the standards? Would failure to follow the standards be unlawful as well as negligent? Determining the precise relationship between the national standards and local preferences is a difficult and important constitutional question of federal preemption that I had hoped my case would raise. I expect that, with publication of this article, the constitutional question will not go away.

With regard to injustice and unconstitutional policy, Professor Subotnik seems, in sum, to suggest that I should “get over it” when I see it. He seems to be urging that I should not have litigated my case or written an article about it. He asks why I am “talking about race and class where they do not belong?”⁶ Professors, in his view, apparently should allow their “equilibrium” to be upset only when some government policy has a significant effect on their personal lives or fortunes.⁷

As a historian of American law and constitutionalism, I have a different view. I am influenced by the thinking of leaders like John Adams, Thomas Jefferson, and George Washington, who could easily have gotten over Parliament’s imposition of the Stamp Act which, if obeyed, would have had little impact on their personal well-being. But these leaders saw the important constitutional issues that the Stamp Act raised, and they resisted it. Although I will never come close to accomplishing what they did, they continue to inspire me to work to

⁴ 861 N.Y.S.2d 56 (Sup. Ct. Richmond 2007).

⁵ Subotnik, *supra* note 1, at 742.

⁶ Subotnik, *supra* note 1, at 743.

⁷ Subotnik, *supra* note 1, at 739.

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preserve what they created and to be concerned that, if I and others cease to resist injustice and unconstitutional policies, we may find ourselves living, as did Tories in the Revolutionary era, in a country somewhat different from the one we have grown to love.