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A Law Review Editor and Faculty Author Learn to Speak Honestly

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**A LAW REVIEW EDITOR AND FACULTY AUTHOR LEARN
TO SPEAK HONESTLY**

*Dan Subotnik**

(August 28 via ExpressO)(attachment)

Dear Articles Editor:

I am a law teacher of twenty-five years standing and am widely published in the areas of contracts, professional responsibility, and legal education.

Attached is an article for your consideration, “Forward to the Law School Past,” which I am sending to a select number of law reviews. It represents the culmination of years of thinking about how we are slowly reverting to a pre-Langdellian mode of ignoring high theory—the model for many years—and training “practice-ready” lawyers. In this system, you may have learned, most law teaching is done by practitioners and is supplemented through apprenticeships. This allows for the transmission of the most up-to-date skills.

The ironic twist, however, does not drive this article. Serious-minded lawyers, academics, and students should be intrigued because, by all accounts, the current system is unsustainable in this market, and a new foundation is needed. I believe that I have provided that foundation.

What might be most interesting to you in this regard will be that moving back to practitioner-based education will reduce the cost of

*Dan Subotnik is a professor at Touro College, Jacob D. Fuchsberg Law Center. For all their help, he thanks: the Touro Law Review staff; librarians Irene Crisci, Stacy Posillico, Laura Ross, Isaac Samuels; Dean of Scholarship Fabio Arcila; Academic Development colleagues Cynara Hermes McQuillan and Lillian Spiess; and above all his wife Rose Rosengard Subotnik.

legal education considerably. Who knows? Some states may make it almost free, as was once the case. And those who cannot afford legal services may finally be able to get them. No more \$150,000 debt.

Thanks for your kind consideration. I look forward to hearing from you.

Sincerely,

Professor S

(September 28 via ExpressO)

Dear Articles Editor:

It has been one month since I sent you an article and have heard nothing back. If you have not received the article, please let me know.

You might like to hear that an old friend recently told me about the splendid treatment she received from you on her article. That makes me especially anxious to hear from you.

Sincerely,

Professor S

The rest of the communications are via email. When an email is sent on the same day as a previous communication, the heading is omitted.

We did receive your submission. Sorry for the delay but we are inundated with articles these days. Thanks so much for passing on the compliment, which I am in turn passing along. I will endeavor to get to your article shortly.

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Date: October 7
To: Professor S
From: Jim
Re: Forward/Back

Fascinating article and I commend you for your boldness. It is very well written and deals comprehensively and candidly with the range of problems facing law schools, faculty, students, and the public. I have been on the law review for a little more than a year now and yours is among our most thought-provoking submissions. I would like to publish it. If you are agreeable, I will run it past my Managing Editor and EIC, who of course have to clear it. My EIC is dealing with a serious personal problem at home, so it may take a little time.

Date: October 16
To: Jim
From: Professor S
Re: Forward/back

Great. I again anxiously await your follow-up.

Date: October 25
To: Professor S
From: Jim
Re: Good news

I prevailed upon the Managing Editor and EIC to get to your piece, and they liked it as well. We want to move forward with this. Please advise by November 1.

That is terrific, Jim. I am very pleased.

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Date: November 3
To: Professor S
From: Jim
Re: no news

We have not heard back from you about acceptance of your piece. Please advise immediately.

Date: November 7
To: Jim
From: Professor S
re: bad news

I am overwhelmed with committee work and, to boot, my girlfriend is sick. Can I have a week or two? Also, can you tell me about your publication cycle? When is my last opportunity for making changes?

We have to get our articles settled. I have to limit you to one week. Sorry about your various problems. Don't worry about making changes. We will give you plenty of time.

Date: November 12
To: Professor S
From: Jim
Re: no news again

We have to hear from you right away. We all want to publish your fine article.

Date: November 14
To: Jim
From: Professor S
Re: The bottom line

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I regret that I cannot accept your offer. Sorry. Thank you for your consideration.

We are deeply disappointed. If you change your mind for any reason, please let us know. In the meantime, can you please tell us who is publishing the article? We are trying to figure out who we are losing articles to in the hope of competing better. Also, can you tell us who the “old friend” is who spoke highly of us. We would like to contact her.

Date: November 17
To: Professor S
From: Jim
Re: Can't we still be friends?

I'd be very grateful for a response to my email.

Date: November 19
To: Jim
From: Professor S
Re: Don't blame me

After consultation with my dean, I have determined not to accept publication this go-round and to rework and then re-submit the article next semester.

Oh my God. You are withdrawing your article after all that?

I'm afraid so.

We are so beyond—below—the pale that nothing is better than our journal?

Please don't put words in my mouth. I didn't say that.

How else should I interpret your message other than that everything you have said to us is a lie?

Date: November 21
To: Jim
From: Professor S
Re: it's not you

I just saw that my article had flaws that needed attention. Nothing more.

Students at lower-tier law schools are not as dim-witted as you think. Let's get real here for a change. The flaws seemed to have revealed themselves only after you failed to get the offer you had hoped for. The delays were for the purpose of leveraging our offer with higher ranking law reviews. Your dean then told you that we were not respectably enough ranked for our imprimatur to do your school any good.

You obviously know all about the ranking system. So what's your gripe?

*Simple. Why did you not look into that matter **before** you submitted and began toying with us? What did we do to you? We spent hours on your article and could not give other submissions the attention that they deserved.*

Date: November 29
To: Jim
From: Professor S
Re: Much ado

You are making an issue over that? You have nothing else to do?

Is exploring the coverage of the Golden Rule too trite a project for a professor of ethics?

OK, I did not think much about my submissions at the time. But in any event, you were playing me the same way by not making me an

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offer, hoping that a higher-placed author than I would fall into your lap. My point is that there is a marketplace for law review articles and that marketplace has rules. I was playing by those rules. This is what we professors call a teaching moment. As a seasoned contracts person, I can assure you that there is no implied promise in a submission that the author will accept one of the offers received.

November 30

To: Professor S

From: Jim

Re: Cui bono?

Thanks for the lesson. At my school we have learned to always ask: Who made the rules? Do you think so little of your own law students, for example, that they would have agreed to a process that greatly advantages faculty and disadvantages themselves?

Again, I didn't make the rules. And in any event, as you recognize, we professors gave you power to determine our status. It ill suits you to play victim here. I can imagine that the system was designed to benefit law review students by exposing them to the widest range of articles.

December 1

To: Professor S

From: Jim

Re: View from the bottom

Professor S (December 1) – If you have given us that power, it is because we do the grunt-work of proofreading, cite-checking, and formatting for you—gratis—so that you can write more and get kudos and raises. As for trying to expose us to a wide range of articles, I can imagine that you imagine it. But do you really believe that faculty are driven by concern about students?

I do.

Then why do you come down against practice-centered legal educa-

tion? Remember: I read and accepted your article.

There are other factors. We try to contextualize the law so that students can find appropriate solutions to new problems. A sociological, economic, and political analysis is necessary to really understand the law. And that takes scholarly training. Another thing: Do you really want to have my salary cut so I have to go back to the office?

Date: December 2
To: Professor S
From: Jim
Re: A Socratic inquiry

Thanks for your honesty. Maybe it is asking too much to ask you that you sign on to the practice-centered education you describe to assess student-centeredness. So try this: Given the importance of regular measurement and feedback in the educational process, why does the entire grade in our law school classes depend on one end-of-the-semester exam? And why don't students get an answer key right away that might help them learn something from their final exam?

They wouldn't look at it.

Consider this then. When I went to my admin law professor at the end of last semester to complain about my grade, she told me—and the Dean's office confirmed—that grades cannot be challenged other than for computational errors. I don't know any other field of study that shuts student contestation down like that.

I also learned in law school that fundamental procedural rights include the right to appeal a decision made by someone who has no stake in the case—unlike professors who have a stake in their reputation for creating and administering sound grading systems. That grades are so important in job searches should make it more crucial for law schools to have an appeals process. Let me ask you then: Is the no-appeal rule also for the benefit of students, like the law review submission system?

I don't know about the no-appeals rule. I guess that was to prevent

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weak-minded faculty from capitulating to students as the course of least resistance.

Date: December 3
 To: Professor S
 From: Jim
 Re: A startling admission

Weak-minded faculty, eh, professor? Weak-minded, tenured faculty can defend themselves perfectly well in a courtroom or against law review editors but not against their own students? So they must be protected against themselves? I have to remember that.

What can I say?

Back to the main point. You know better than I that law professionals these days are put off by the morals of the marketplace. They are trying to elevate behavior through Statements of “Good Practices.” Can we—you—do better than to perpetuate a world in which words have no moral significance?

What do you mean?

*Was it good practice, professor, to tell us that you were limiting submissions to a “select” group of law reviews, that you were “anxiously” awaiting our evaluation of your article, that we were complimented by an “old friend”—when, as is clear from your nonresponse, she is entirely fictional—and that you were so, conveniently, busy with committee work **and** a sick girlfriend that you could not answer yes or no?*

You should have learned even before law school about “puffing.” Buyers and sellers do this; this is how the world works. Any alternate proposed morality is just cant. We do not operate independently here. Our realm is not so esoteric; authors **romance** law reviews. And vice versa.

Like my comment, which I now deeply regret, that your article was one of the most “thought-provoking” that I had seen?

Exactly.

Date: December 4
To: Professor S
From Jim
Re: A foolish consistency

I am afraid that the everyone-does- it routine does not work. There is no real symmetry in position here. Yes, we dragged out our response to you as you did to us. But my communications with you did not take more than five minutes of your time. Your submission, by contrast, not only tied us down. It also could not benefit us; indeed, it could only hurt us. You never had any intention of working out a publication arrangement with us. You have been unethical in using us as a “means” to your own ends. Students can cite Kant too.

I cannot continue this colloquy. My time is valuable, and I have to get back to work. All I can say is that I am sorry. I will not do it again.

Just tell me one thing: given your proclaimed ethical standard, how do I know that your apology is not just more marketplace claptrap?

My apology is sincere, I can assure you.

Let’s test that and try to take advantage of another teaching moment. I have been organizing our email exchange for the law review and have even spoken to the Managing Editor and EIC. We want your OK to publish it.

You want me as a character in your morality play?

Yes. You admit that you behaved unjustly in completely ignoring our needs. You can now redeem yourself. Who can get the message across better than someone with your background?

You want me to indulge you now, after all the guff you have given me? I can write my own article on the subject.

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But you won't. And I assure you, professor, there is no pleasure in this for us. We are no more keen having you as an author of ours as you are on publishing with us. But under our proposal, you will admit, justice, if only of a rough kind, will be done. And it will be perfect illustration for professors of negotiation that neither party gets entirely what it wants, but both parties get something.