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Book Review: Defending the Environment: A Strategy for Citizen Action

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BOOK REVIEW

DEFENDING THE ENVIRONMENT
A STRATEGY FOR CITIZEN ACTION

BY JOSEPH L. SAX

New York: Alfred A. Knopf, 1971. Pp. xix, 252.
$6.95

THIS is a most important book. Also, it is very good reading. Professor Sax advances far toward that elusive goal — giving coherence to the concept of "environmental law." Asserting that the public interest in a decent environment should be treated as a legally protected interest, he observes the recent trend toward judicial willingness at least to listen to citizens' environmental claims and suggests a line of substantive legal doctrine for the courts to employ in protecting the asserted public interest. The author's theory is woven from a number of case studies that he also uses convincingly to demonstrate two additional points: first, the limitations inherent in the traditional administrative agency approach to resource management and regulation and, second, the democratizing potential of greater judicial involvement in such issues.

Moreover, Sax's case studies, especially at the beginning of the book, emerge in the fashion of a Gay Talese — seemingly effortless storytelling, but, in actuality, a highly skilled marshalling of facts into a fascinating sequence. The reader is compelled to continue and, in so doing, has indelibly impressed upon him the fact patterns that, later on, lead persuasively to the author's creative legal theories.

Accordingly, *Defending the Environment* is both lawyer's reading and layman's reading, and the more important for its duality. To the lawyer, judge, or legislator, Professor Sax suggests a viable course of legal development, even to the extent of supplying a model statute as an appendix to the book. To the citizen, Sax presents a vivid, indeed, artistic, justification for the adoption of his suggested course of action by legislators, judges, and lawyers. In a democratic society struggling to achieve a quality environment, Sax thus excellently exemplifies the lawyer as political scientist.

I. JUDICIAL INTERVENTION: USURPATION OR ENHANCEMENT OF DEMOCRATIC POWER?

Essential to Professor Sax's plan is a substantial enlargement of the citizenry's opportunities to challenge in court both public and private decisions involving environmental and resource management issues. Partisans in the current controversy over citizen action and judicial activism, however, will find something new in this book.

Both traditionalist opponents and activist proponents tend to see expanded judicial intervention at the behest of "private attorneys general" as a displacement of administrative agencies' planning-managing-regulating functions and as an incursion upon or usurpation of legislative policy-making functions. If there be any romantic souls — trial-oriented young lawyers or others — who really believe such a fantasy either desirable or possible of accomplishment, this book is not their meat. Perhaps more significantly, this volume demolishes the straw-man that conventional critics would build out of such notions. Professor Sax repeatedly disclaims any suggestion of judicial displacement of other governmental branches. He seeks to make the present system more effective.

As already suggested, the foundation thesis of this book is that the public interest in a decent environment should be treated as a legally-protected interest. Let us momentarily forego inquiry into how that substantive legal rule may be given life and assume that the judiciary will impose it. Would that amount to a judicial usurpation of power? Not according to Professor Sax's plan.

The author invokes exclusively infra-constitutional doctrine[1] and points out that judicial adherence to the values of environmental quality normally would be effectuated through equitable relief. That is, the courts would in each such case suspend, interrupt, or substantially modify someone's promotional scheme or schemes. Any such injunctive relief would create, vis-à-vis the legislature, what Sax calls a "legislative remand" and a "judicial moratorium."

It would always be open to the legislature to modify or overrule the judicial decision or decisions. The legislature would be able to reconsider applicable public policies and, if it so chooses, nullify in whole or in part a judicial interference with any given resource development plan or class of such plans.

[1] Sax would oppose any attempt to develop a constitutional right to a quality environment or to promulgate an "environmental bill of rights."

Thus, the court's injunction would amount to a "remand" to the legislature — the "legislative remand." By the same token, the injunction would create, in effect, a time delay during which the proponents of the project would be required to seek a legislative reversal if they wish to carry out their planned resource use. That delay is the "judicial moratorium."

If the legislature approves the project or class of projects, the moratorium would be brought to an end by the imposition of legislative policy. If the legislature declines or omits to overrule the injunction, the judicial moratorium would, in effect, wash into a restrictive legislative policy. Either way, the judicial remand would lead to the establishment or refinement of legislative policy, and legislative attention would end the judicial moratorium.

Obviously, the concepts of legislative remand and judicial moratorium assume that the proponents of enjoined or seriously modified projects will seek legislative action. To the extent that they omit doing so, it would appear that they deem the defeated plan to be either not sufficiently important or unlikely to attract legislative support. In either case, public policy would seem to be served by the judicial intervention.

Remembering that we have momentarily assumed a standard of environmental quality to have been incorporated into applicable law, it can be seen that judicial review of administrative agency behavior amounts only to a monitoring function: an examination of how well the agency has applied environmental values to the case or class of cases at hand. Where the courts reverse an administrative decision, they again invite legislative review of the policy questions at issue — again a remand and, again, a moratorium, this time a moratorium on the application of administrative policy.

Such judicial interventions, and their mere possibility, clearly should cause administrative agencies and resource developers, both public and private, to incorporate environmental standards more consciously into their decision-making and policy determinations. Thus, both directly and through the ripple effect, Sax suggests, greater judicial involvement will increase the weight given environmental concerns in decision-making and will tend to keep administrative agencies honest. Moreover, such judicial intervention should assist legislatures in exercising their policy-making functions more effectively.

Sax sees that state of affairs as an enhancement rather than a detriment to the democratic process. *Inter alia,* the leg-

islature must openly and responsibly decide the important resource management questions, and the burden of going to the legislature is shifted to the proponents of resource development and environmental change.

While Professor Sax thus seeks to enhance the existing processes of democracy, his presentation is in a certain way flawed. That weakness stems from several instances throughout the book where a liaison between the compositional need for generality and the author's mostly successful inclination toward the well-turned phrase produces somewhat extravagant prose. A single example will suffice: Professor Sax gets off to a questionable start with the first paragraph of his foreword:

> We are a peculiar people. Though committed to the idea of democracy, as private citizens we have withdrawn from the governmental process and sent in our place a surrogate to implement the public interest. This substitute — the administrative agency — stands between the people and those whose daily business is the devouring of natural environments for private gain.[2]

To be sure, the second paragraph of the foreword immediately begins steering toward the author's real goal. Nevertheless, such heights of rhetoric, invoking images of a New England town meeting panacea and, possibly, even, a "bad man" theory, are misleading because they are quite contrary to points Sax is at great pains to make, and makes so eloquently, elsewhere in the book. One may expect negative critics to make good use of such passages.

An occasional misleading gloss, however, cannot take away from the author's real point which is otherwise persuasively stated. Clearly, Professor Sax seeks to use the powers and strengths of the judiciary to stimulate and improve the quality and responsibility of the other governmental branches' actions affecting resources and environment.

II. ADMINISTRATIVE AGENCIES AND RESOURCE DEVELOPMENT: POWER TO THE PROMOTERS

Implicit in this volume is Professor Sax's recognition of the elementary — but elsewhere frequently ignored — reality that environmental concern is a function of resource planning, management, development, and use. At the beginning, therefore, the author states what must be regarded as a truism: that the existing legal framework for resource planning, management, development, and use has failed miserably in protecting the

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[2] J. SAX, DEFENDING THE ENVIRONMENT xvii (1971) [hereinafter cited as SAX].

quality of our air and water and all other natural resources, and that the present legal institutions have proven inadequate to the task. But he goes a step further. Critically, and in great detail, Sax analyzes the now-traditional "administrative law" approach to solving such public problems. He argues, broadly, that to design additional management, regulatory, or advisory agencies, commissions, or procedures, or to devise coordination or super-coordination of such existing institutions or procedures will not get to the root of the environmental problem.

Professor Sax sees that root in the basic inequality of power between those embodying society's interest in developing our resources and those embodying society's interest in preserving environmental quality. Without espousing any "bad man" theory, one may notice that a person or entity seeking to use or develop a resource necessarily has at least a relatively specific plan, a set of usually well-defined purposes, financial backing, and, correlative to the foregoing, regularized lines of communication to centers of community power, both private and public. And that applies whether the subject be roadbuilding, timber cutting, electric power production, or real estate development. On the other hand, those whose interests in specific cases oppose such resource development or use ordinarily start out unorganized, seeking the more diffuse goal of "environmental quality," absent financial backing, and without regularized pipelines to community leadership or public officials. Moreover, in the nature of things, the developmental interests are the initiators and the opponents are the reactors. And that situation usually leads to myriad differentials in time advantage, ability to develop evidence bearing on environmental risks, and capacity to develop alternate proposals.

Given such an imbalance between developmental interests and their opponents, Sax demonstrates that, even if the administrative agency is not itself the promoter (as in the case of timber cutting on public lands or roadbuilding), but is, rather, a regulator (as in various uses of navigable waters or developments affecting fish and wildlife), that agency generally is early presented with only the proponent's well prepared plans and arguments. And let us not rely too heavily on independent agency staff review, says the author. Too frequently, staff is insufficiently funded to perform its statutory functions. Furthermore, the agency decision-maker, always subject to the stresses and strains of the legislative-administrative relationship (*e.g.*, through the agency budget process), will be prone,

too often, to manipulate or disregard staff for reasons other than the merits of a given case. "Sub-optimizing" is Sax's expression for the later process; seeking "other achievements" was the euphemism of one of Sax's *dramatis personae*.

If the foregoing seems a trifle superficial, let the reader be assured that those tendencies of the bureaucratic system are amply demonstrated by several of Professor Sax's case studies, including, most prominently, the first and lengthiest — the "Fiasco at Hunting Creek." The Hunting Creek case is a fascinating story of an almost successful multi-million dollar real estate development on the Potomac River at Hunting Creek, Virginia, near Washington, D.C. The developers' plan called for the filling in of several acres of "waste" swampland in the river adjacent to their upland property. Thus, the promoters were required to obtain a grant from the Commonwealth of Virginia of its rights to the bed of that navigable stream. They also needed a permit from the United States Corps of Engineers in order to dredge and fill. The latter agency was, in turn, required by statute to consult with the Interior Department before acting on the permit application. Interior was responsible for evaluating the environmental impact of such a proposal and formulating a recommendation to the Corps reflecting that evaluation.

Professor Sax's account relies primarily upon the public record but is well supplemented by his own interviewing. He recounts the Virginia legislature's completely unnoticed authorization for the governor to deed away the Commonwealth's water rights. The story includes the governor's interminable "study" of the matter, throughout the years of which the governor's office remained totally noncommittal to environmentalists on the merits. At the federal level, the story depicts an extensive bureaucratic *pas de deux*, featuring the Corps and Interior, represented by various technical experts (including an Assistant Secretary), a number of lawyers (including an Under Secretary), and two Secretaries of the Interior, all of whom were subject to the (variously stated) "interest" or "neutrality" of a number of influential senators and representatives.

No brief sketch could do justice either to the facts of the case or to Professor Sax's fascinating text. It is enough, for present purposes, to say that the "waste" swamp turned out to have had considerable ecological and aesthetic value and that the developers came within a hair's breadth of obtaining, ineluctably, all legal rights and authorities necessary to carry

out their plan — a plan which would have destroyed those values. That near victory would have been achieved, moreover, despite intermittent clamor in the local community by persons who had been unable to move any federal, state, or local agency against the project until a congressional committee took special interest.

The strength of the Hunting Creek story in demonstrating Professor Sax's criticism of an exclusive "administrative law" solution to resources and environment problems is two-fold. First, the "fiasco" proceeded without any suggestion of venality or even of ideological favoritism. As Sax says, speaking of the actions in the Interior Department:

> [T]he villians of the piece were persons of more than ordinary competence and integrity and . . . both their personal inclinations and the mission of their agency were in consonance with the values that they betrayed.[3]

Second, to anyone familiar with matters of resource development and use, the story is a familiar one, atypical only in that it became a matter of public record and, thereby, had to become undone. The Hunting Creek story illustrates, at both state and federal levels, the everyday activities of honest government officials, respectable businessmen, and the lawyers who represent them — lawyers, frequently, of the most impeccable professional (including ethical) credentials.

III. The Legally Protected Common Law Interest in Environmental Quality

If Professor Sax finds inadequate an exclusive reliance upon the traditional institutions of "administrative law," then how does he propose to employ litigation to redress the imbalance of power now overly favoring society's interests in the development and use of resources?

Sax, quite literally, perhaps more literally than Professor Reich, suggests the creation of a variety of "new property": the substantive right of every person, as a member of the public, to a quality environment, a right enforceable in court. In essence, it would be a right to be extrapolated by the courts, both state and federal, in common law fashion, on a case-by-case basis.

Doctrinally, Sax relies upon the "public trust" concept,

[3] *Id.* at 52. Another Sax case study, pertaining to the Hudson River Expressway matter, also supports Sax's thesis but goes further. It suggests the controlling influence that can be exercised by highly placed government officials in their own private interest — in that case, influence at least of the "keep the highway out of my backyard" variety.

having its antecedents in Roman Law but recognized, to one degree or another, in a few American jurisdictions.[4] It is the idea that the sovereign holds certain common real property in trust for the benefit of the public (property such as waterways, seashores, and common parks); that the sovereign will be held to a trustee's standard of performance in its management and disposition of such property interests; and, moreover, that the sovereign will be so held at the suit of any beneficiary — any member of the public. Sax would expand the subjects of public trust to include *inter alia,* air and all publicly-owned resources.

Not only, however, would acts of the sovereign become subject to judicial scrutiny, but a member of the public, both through the medium of the sovereign (as fiduciary) and directly as beneficiary, would be enabled to challenge any real property owner's use of realty in a fashion injurious to the common property — the environment. Thus would be created an analogue to the law of nuisance wherein the beneficiaries of the common property would stand equal to the holders of traditional real property interests. It would be a far-reaching precedent for a democratic system increasingly characterized by the concentration of traditional real property interests of all sorts in the hands of corporate (developmentally prone) operatives.

Professor Sax, then, is urging that courts adopt and expand the public trust doctrine and give the beneficiaries in virtually all cases the standing to seek protection of their interests in the judicial forum. But how may that be accomplished?

Theoretically, the common law courts of all fifty states might develop the necessary law and procedure, should they be so inclined. Similarly, the courts might employ existing federal and state statutes, as some have done already,[5] to hold specific agencies to a high degree of care in environmental matters. Any effective reform, however, obviously will require more.[6]

Sax suggests the enactment of a model statute authorizing members of the public to seek judicial enforcement of the "public trust" in law suits brought against any person or govern-

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[4] *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471 (1970).

[5] Udall v. FPC, 387 U.S. 428 (1967); Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971); Parker v. United States, 307 F. Supp. 685 (D. Colo. 1969), *aff'd,* 448 F.2d 793 (1971).

[6] Some might argue that at the federal level the National Environmental Policy Act of 1969 [42 U.S.C.A. §§ 4321-47 (Supp., May 1971), *amending* 42 U.S.C.A. §§ 4321-47 (1970)] may be sufficient if broadly construed as in *Calvert Cliffs' Coordinating Comm., Inc.* v. *AEC,* 449 F.2d 1109 (D.C. Cir. 1971).

mental agency. By legislatively establishing the "public trust" as the standard and by not defining that expression, the statute would leave the courts to extrapolate the doctrine in a case-by-case fashion. Sax describes the bill thus:

> Its purposes are essentially threefold: to recognize the public right to a decent environment as an enforceable legal right; to make it enforceable by private citizens suing as members of the public; and to set the stage for the development of a common law of environmental quality. As to the last consideration, the bill purposely refrains from defining pollution, environmental quality, or the public trust. At this early stage in the development of environmental law it is important to open the way to elucidation and consideration of a wide range of problems, many of which are still uncertain, rather than to create confining definitions. Use of the courts to evolve a common-law approach to environmental problems adds to the arsenal of the public interest a significant weapon: the ability to meet problems as they are identified and to formulate a solution appropriate to the occasion — flexible, innovative, and responsive.[7]

IV. Of Remands, Moratoria, and Other Essential Experiments

Defending the Environment makes a strong case for Professor Sax's theory and his model law. Both theory and statute, however, raise a number of questions, some of which are answered forcefully in the book, and some not. A few points deserve notice.

While demonstrating well the democratizing effects of his theories, Professor Sax does not specifically deal with the fact that delay in the administrative process is not always benign. Consider, for example, cases involving electric plant siting, design, and regulation. One need not adopt any particular position regarding pumped-storage plants, nuclear plants, or the proceedings of the Federal Power and Atomic Energy Commissions to recognize that litigation-borne delays in plant construction have played a significant part in the development of the electric energy crisis in the New York metropolitan area. Even conceding that basic environmental issues in electric plant cases may center ultimately on reducing the expansion of electric demand and on substantially revising governmental and corporate behavior patterns, the immediate social cost of crises such as New York's could be disastrous. Accordingly, the "judicial moratorium" and "legislative remand" deserve careful scrutiny.

Another point may be illustrated by electric industry cases as well as those in food and drug, pesticide-herbicide, and a

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[7] Sax at 248. The model statute has been in effect in Michigan since mid-1970 and has been introduced in several other state legislatures and in Congress.

host of other categories. Professor Sax does not come to grips with the problem faced by judges when they *cannot avoid* deciding complex, scientific, and technical issues, such as in ecology, hydrology, chemistry, and radiation matters. The question is whether lawyers in black robes are any more capable of proper decision-making in such instances than are the lawyers and others who populate administrative agencies.

Also, while Professor Sax has taken great pains to show that he does not advocate the abolition of administrative agencies, his thesis nevertheless limits the legislature's power to delegate policy-making functions to executive and administrative agencies. The "legislative remand" requires the legislature itself to take (or decline or omit to take) action wherever a court has enjoined the carrying out of an administrative policy. Patently, such judicial power limits the delegability of policy-making. But is such an undefined limitation wholly a blessing? To the extent that the elected legislature has had "remanded" to it the responsibility for deciding the major environmental issues, democracy is served, and intuition suggests that, under present circumstances at least, the quality of environment may be served also. A legislature, however, cannot itself establish every peppercorn of policy, and thus two questions appear. First, since it is essential that there be some line-drawing between the "major" questions of policy that may be subject to "remand" and the lesser questions that the legislature may appropriately be empowered to delegate with finality to administrators for policy extrapolation, how is that line-drawing to be accomplished and by whom? Second, and perhaps more important, how can administrative processes be enhanced so that delegated policy-making may be better legitimated? Can rule-making proceedings be opened up further in both a democratic and a due process sense? Can this be accomplished without piling on more and greater impediments to the achievement of finality in decision-making and policy-making? Professor Sax might not concede these even as appropriate questions, and yet they seem vital.

Reference again to the example of the electricity issue is useful. It will be agreed that national electric energy policy — perhaps aimed at long-term leveling of demand and production — must be determined in a fashion consistent with both democracy and due process. It also will probably be agreed that electric energy policy is sufficiently "major" to demand open and explicit congressional attention. But, surely, every detail of

plant-siting, system interconnection, and environmental trade-off cannot be decided by Congress and, viewed realistically, will not be. How shall we determine, in the open, how to divide the necessary legislative responsibility from the properly administrative? And what steps can we take to build greater national confidence in the administrative processes for policy-making? Irrespective of one's response to such questions, one thing is certain: no answer may be allowed to comprehend the possibility of total electric power failure in a metropolitan area such as New York City pending action on a "legislative remand."

Having advanced those several questions, one must point out an important strength in Professor Sax's thesis, an element that may provide the setting for the resolution of such issues. That strength is the author's reliance on judicial experience in decision-making to sort out the socially important from the socially unimportant, the frivolous from the significant, as particular cases are presented. Given the crisis proportions of America's environment and resources problems, it is probably appropriate to rely on such judicial expertise to resolve issues of the kind raised above. That same judicial expertise and good sense probably should be relied on as well to avoid the proliferation of litigation feared generally by many opponents of greater citizen participation in public decision-making.

In addition it is clearly essential that other approaches to improving the administrative process be pressed simultaneously — including experimentation with the ombudsman, with the "consumers' counsel," with the traditional "reorganization" and "coordination" of existing structures and the creation and abolition of structures, and with reforms of both rule-making and adjudicatory procedures. Reforms designed, for example, to increase the portion of environmental decision-making based on a written public record and written, principled decisions most likely would complement the sort of reform Professor Sax wants.[8] Even the efforts to increase effective public access to agency files could have an important effect.

If closer judicial scrutiny of the sort Professor Sax proposes will help keep administrative agencies "honest," the Sax reforms should work in synergism with other essential reforms.

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[8] It may be noted that Professor Sax's telling criticisms of the administrative process were directed, for the greatest part, at the more informal procedures; but this, of course, is not to say that the more formal, quasi-judicial proceedings and the agencies employing them are not also a part of the environmental problem.

V. CITIZEN PARTICIPATION: THERAPY FOR DEMOCRACY

However one reacts to the questions raised by its thesis, *Defending the Environment* compells us to give Professor Sax's theory a fair trial.

This book is valuable, however, not only because it presents a lucid, creative, and well-thought-out plan to help solve environmental problems. Professor Sax offers a hope to the individual citizen. It is a hope that could be generally therapeutic in a society presently so distrustful of its own democratic instrumentalities, and in which large portions of the citizenry perceive themselves impotent to affect their government's policies and, ultimately, their own lives.

One wonders about the effects of expanded citizen participation in the governmental process should it prove successful in the sphere of environmental problems. Professor Sax's own postscript is suggestive. Referring to a number of other social problems in respect of which existing democratic government appears to be failing as it has failed in protecting the environment, the book closes with the following:

> Environmental problems simply illustrate our failings with special poignancy . . . ironically, because environmental disruption affects the rich and powerful just as it does the most humble citizen. The plunder of our natural heritage at last brings home to us our equality — we all must breathe the same foul vapors. The well-to-do are not accustomed to being so dealt with; their frustration is now a seed that will bloom in many gardens.[9]

Let us hope so.

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[9] SAX at 245.

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