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Defending the Environment: A Strategy for Citizen Action, by Joseph L. Sax

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DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION. By Joseph L. Sax. New York: Alfred A. Knopf, Inc., 1971. Pp. xix, 252. $6.95.

Defending the Environment is a strategy for depoliticizing administrative decision-making which the author argues is systematically destroying such valuble natural resources as wetlands, forests and scenic corridors. Since this is primarily a book concerning the U.S. Army Corps of Engineers, the Forest Service, and the Department of Transportation, rather than pollution control agencies, its general applicability to the full range of environmental problems is limited. Professor Sax has examined several major environmental controversies, such as land fills and transportation project locations, and finds wide-scale mismanagement of environmental resources on the part of administrative agencies through a series of incremental decisions. His basic conclusion is that in too many instances old-fashioned political pressures—the influence of the wealthy and their elected representatives[1]—operate to insure the continued development of our natural resources without regard to the environmental impact of the activity, thereby foreclosing environmentally preferable uses of the resource, primarily nondevelopment. Professor Sax argues that mechanisms do not exist to allow citizens to hold bureaucrats accountable for specific decisions where it is alleged that environmental considerations were given insufficient weight.

Professor Sax's basic remedy is to increase the role of the courts in adjudicating specific controversies in order to supplement the administrative process. Administrative agencies would continue to perform their usual functions such as investigation, standard setting and specific dispute management. Their role, however, would become more confined than it is today by emphasizing policy formulation and long range planning functions. Sole reliance on the traditional remedies to improve the administrative process, such as increased public hearings at the early stages of a decision and intergovernmental coordination, are rejected as are other traditional substitutes for a reordering of priorities. These

1. J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 56 (1971) [hereinafter cited as Sax]. The first chapter is a case study of a proposed landfill on the Potomac River across from Washington, D.C. Sax's purpose is to show that even agencies which have an environmental mission cannot be consistently trusted to reach the "correct" result. One excellent analysis of the response of mission agencies to new information suggests a need to alter their resource management policies. *See* A. SCHIFF, FIRE AND WATER: SCIENTIFIC HERESY IN THE FOREST SERVICE (1962).

remedies are not satisfactory to Professor Sax because "none of them gets to the heart of the matter—a fundamental realignment of power . . ."[2] Therefore, to effectuate the necessary policy changes, independent, outside forces—primarily citizen conservation groups—must be given increased power to challenge decisions. Being a good lawyer, Professor Sax finds the courts especially suited to the task. Judges "will spend only a tiny fraction of their time and energy dealing with environmental disputes. For this reason the process of judicial selection is not significantly affected by anyone's estimate of a given judge's attitudes about those issues."[3] Courts do not control their agendas and thus there is no struggle for priority.[4] This makes courts preferable to agencies, according to Professor Sax, because internal agency opposition to a project is often dropped when outside pressure is applied on the grounds that this is not the time to fight for a basic principle. In addition, a court has a duty to respond to every complaint brought before it if the issue is properly presented.

Having argued the case that courts are the best available institution to scrutinize specific decisions which effect the environment, Professor Sax criticizes current legal principles and standards of judicial review. The two major barriers to effective judicial supervision of administrative decision-making are the lack of a theory of public rights to a decent environment[5] and "the administrative-review syndrome of crabbed inquiries . . ."[6] into low visability decisions. These are valid criticisms. The major flaw in the book is the breadth of his suggested remedies. At many points in the book he argues for review of the merits of environmental controversies,[7] although at other points the author seems to draw back from the implications of this position and suggests an expanded role for courts in private suits characterized by traditional theories of judicial restraint.

The author's thesis is that "[t]he principal function of courts in environmental matters is to restrain projects that have not been adequately planned and to insist that they not go forward unless and until those who wish to promote them can demonstrate that they have considered, and adequately resolved, reasonable doubts about their con-

2. Sax at 64.
3. Sax at 109.
4. This is also the major weakness of reliance on the judiciary because the resources to mount a law suit must be mobilized before a court can intervene. W. GELLHORN, WHEN AMERICANS COMPLAIN 25 (1966).
5. Sax at 160.
6. Sax at 148.
7. *E.g.*, Sax at 149.

sequences."[8] This proposal suggests that the function of the courts is only to improve the planning and decision-making process by insuring an adequate consideration of the costs and benefits of a project as evidenced by the record presented by the agency rather than to make a decision on the merits of a project. This theory of judicial intervention is a synthesis and expansion of the principles developed primarily by the Second and District of Columbia Circuits and such state courts as Massachusetts and New Jersey. Starting with the now famous *Scenic Hudson Preservation Conference v. FPC*,[9] the courts have been controlling decision-making by agencies with broad mandates to approve or to undertake projects in the public interest by requiring a fuller administrative record than has been customary in the past. This approach was adopted by Congress in the National Environmental Policy Act of 1969 (N.E.P.A.).[10] To sustain a decision a record must demonstrate that all potential environmentally-detrimental side effects of a project have been identified and that alternative means of achieving the statutory objective under which the project is authorized—including not constructing the project[11]—have been considered. The basic problem of technology and development assessment is that those who favor a project have the resources to be heard. Thus, there is a substantial danger that the benefits of a proposed activity will be systematically overestimated and the costs similarly underestimated. To counteract this problem, the courts and now N.E.P.A. require the fullest possible social accounting.

Professor Sax would, however, go beyond these theories of judicial intervention. He argues that courts should go further and remand decisions to the legislature—thus bypassing the administrative process —"if the court finds the proposal at odds with an environmentally sound policy, though it may not be expressed in any legislation . . ."[12] As Professor Jaffe suggests, Sax may either be arguing "that the judge should himself perform the balancing which normally would be the function of the agency, or he may be saying that where there is a serious envronmental impact the balancing is to be done by the legislature."[13] Support for both positions can be found in the book but the latter interpretation is more probable because Professor Sax places his

8. Sax at 113.

9. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). The most complete statement of the "new" judicial review is Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971).

10. 42 U.S.C. § 4321 (1970).

11. Udall v. FPC, 387 U.S. 428 (1967).

12. Sax at 152.

13. Jaffe, Book Review, 84 HARV. L. REV. 1562, 1566 (1971).

ultimate faith in a democratized legislature. This is not the place to explore at length the merits of this belief but the experience of Congress with technology assessment suggests that except in such major controversies as the SST, legislatures are not the best forums to consider specific technological controversies.

Scenic Hudson and its progency are essentially modifications of the burden of proof requirements, and they do not require a court to reach the merits of a controversy. Consistent with our growing and widespread recognition of the potential adverse side-effect of the wide-scale application of technology, courts are now placing the burden on the initiator of development rather than on the objector, as was the case during the nineteenth century. Courts have a large and creative role to play in improving the process by which decisions are taken through a manipulation of the burden of proof requirements (more properly the burden of justification). In addition to shifting the burden of justification, the courts can make a more searching inquiry into the scope of authority delegated by the legislature by refusing to conclude automatically that the legislative purpose is expressed in a single enabling statute. Often legislative policy toward a specific problem will be found in a maze of conflicting statutes and the task of the court is to attempt to knit them together. A court has a number of techniques available to it, short of making a decision on the merits, when faced with an environmentally questionable proposal. Statutes which seem to express a conflicting purpose can be used to shift the burden of justification to the initiator.[14] Doubts about clear legislative authorization can be resolved against the initiator.[15] If a project must obtain approval from several agencies the court can resist efforts to expedite the project by finding either preemption or that the legislature has delegated exclusive authority to one agency.[16] Requiring the project to obtain approval from several agencies enourages more comprehensive review and legislative reconsideration of the problem.

14. The New Jersey Supreme Court did this in Texas E. Transmission Co. v. Wildlife Preserves, 48 N.J. 261, 225 A.2d 130 (1966), discussed in chapter 10. A private wildlife refuge contested a route selected by a pipeline company. Relying in part on federal and state legislation encouraging wildlife preserves, the court held that if the refuge introduced evidence of serious damage and the existence of reasonable alternative routes, a prima facie case of arbitrariness would be established and the burden of going forward would shift to the pipeline company.

15. Gould v. Greylock Reservation Comm'n, 350 Mass. 410, 215 N.E.2d 114 (1966), discussed in chapter 7.

16. Orange County Air Pollution Control Dist. v. Public Util. Comm'n, 4 Cal. 3d 945, 95 Cal. Rptr. 17, 484 P.2d 1361 (1971), held that a utility must obtain approval from both a local air pollution control district and the public utilities commission to construct a steam electric generating plant.

The foundation for Professor Sax's proposal for review on the merits is "the rejection of the expertise of administrative agencies in the resolution of important environmental disputes. Succinctly stated, it is believed that in any environmental controversy involving the weighing of conflicting values, the weigher should be a court, a generalist, rather than an administrative agency whose outlook is organically developmental and provincial."[17] Senator Philip Hart of Michigan has introduced legislation to implement the theory by allowing courts to create a federal environmental common law ranging from project location controversies to suits to enjoin pollution.[18] But Professor Sax's theories of judicial review are developed primarily from highway location cases and serious problems are raised when an attempt is made to apply them to all other environmental controversies, especially pollution abatement.

The reasons differ for permitting suits against such government agencies as the U. S. Army Corps of Engineers, the Forest Service and Department of Transportation and for permitting citizen pollution suits to supplant administrative regulation. The purpose of litigation in the first instance is to correct federal programs which give insufficient weight to environmental considerations. This reasoning, however, does not apply as readily to the activities of agencies whose primary mission is the development of environmental standards.[19] The integrity of an administrative enforcement program may be undermined if a judge has the power to reject the standards promulgated by an agency. Further disincentives for industry to comply are created by the threat of a law suit based on the grounds that compliance with administrative standards can still constitute pollution. This is not to argue that pollution agencies should be free from judicial scrutiny. For example, compliance with standards should not be a per se defense to a private nuisance action. I argue only that these agencies should have the discretion to deal with complex problems free from the threat of judicial rejection of their standards in a citizen's suit where a court is free to substitute its judgment for the agency's.[20]

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17. Sive, *The Role of Litigation in Environmental Policy: The Power Plant Siting Problem*, 11 NATURAL RESOURCES J. 467, 471 (1971).

18. S. 1032, 92d Cong., 1st Sess. (1971).

19. Professor Sax would not agree:

> So much in the real planning process is done by informal conversation and consultation, and there is a kind of wishfulness in feeling that by legal rules or institutional manipulation the "insider perspective" can be reformed and legislated into that all-embracing public interest perspective which is our ideal.

Sax at 102.

20. The counter argument is made in *Hearing on S. 1032 Before the Subcomm. on the Environment of the Senate Commerce Comm.*, 92d Cong., 1st Sess. 43-57 (1971), and

The constitutional problems of courts exercising the powers Professor Sax urges alone suggest that in the long run the best hope for a systematic strategy for arresting environmental degradation lies with restructuring administrative agencies.[21] N.E.P.A. has only made a start and the extreme judicial role projected by the book may hinder accomplishment of this objective by deflecting attention away from the less dramatic but more fundamental reforms by giving lawyers and the public a sense of satisfaction that something major has been done when in fact it has not. *Defending the Environment* does not deal adequately with the tension between the legal approach to the problems involved in environmental controversies and that of the scientific and technical professions. At the present time lawyers are approaching environmental problems through the traditional formulas of standard setting and law suits but it is likely that in the future power will flow from lawyers to the technical professions because the technicians have the capacity to take a more integrated view of the problems. Standards are increasingly unsuccessful not primarily because of lax enforcement—although this is, of course, a real problem—but becaue of insufficient scientific and engineering understanding of the issues and alternatives. For example, "[t]he Environmental Protection Agency, initially oriented toward lawyer directed regulation and control, and eager to make an initial impression upon industry and the public, has been discovering that it may not in many cases have the necessary scientific or technical support to make its directives 'stick'."[22] Lawsuits can sharpen the issues and question the factual basis for this assertion, but they cannot supply the missing information. Technicians cannot, of course, tell us how high our environmental quality should be. They can define the consequences of adopting alternative limits on environmental degradation but the ultimate answer to the question "how much?" must come through the political process. Few would dispute the proposition that we must change existing patterns of resource use to upgrade the quality of the environment because the important issue of today is to determine the best institutional approach to achieve this objective. The problem with *Defending the Environment* is that Professor Sax has overestimated the merits of shifting the resolution of environmental conflicts from administrative to judicial forums.

The weakness of Professor Sax's expanded theory of judicial

in *Hearings on S. 3575 Before the Subcomm. on Energy, Natural Resources, and the Environment of the Senate Comm. on Commerce*, 91st Cong., 2d Sess. 38-41 (1970). The current version of the bill is S. 1032, 92d Cong., 1st Sess. (1971).

21. Jaffe, Book Review, *supra* note 13, at 1567-68.

22. 2 ENVIRONMENTAL REPORT 79 (1971).

intervention is illustrated by his proposals for a common law theory of public environmental rights. Most environmental controversies are not susceptible to being reduced to a consistent right-duty relationship between citizens and public agencies, as he recognizes in a brief discussion of the limits of the legislature's ability to set standards which determine the outcome of specific controversies.[23] As precedent for a theory of public environmental rights, he turns to the old navigable waters doctrine —the public trust—which governs the ownership and use of the beds of tide and submerged lands. The author argues that if the doctrine is read broadly "its underlying concept is readily adaptable to the whole range of issues that comprise our environmental dilemma . . ."[24] Specifically, he finds the doctrine contains three general principles:

> First, that certain interests—like air and the sea—have such importance to the citizenry as a whole that it would be unwise to make them the subject of private ownership. Second, that they partake so much of the bounty of nature, rather than of individual enterprise, they they should be made freely available to the entire citizenry without regard to economic status. And, finally, that it is a principle purpose of government to promote the interests of the general public rather than to redistribute public goods from public uses to restricted private benefit.[25]

His three principles cannot be derived from the doctrine for it cannot answer the crucial question: what level of environmental quality should be maintained. Also, except in a few extreme situations the doctrine has very little to say about the distribution of the benefits of these resources. The public trust theory, which expresses one simple idea, is not a general theory of resource allocation. The core concept is that "[t]he claim of citizens and inhabitants of a state or country to the free use of the waters of the sea and their shores [for navigation], for private advantage, is so obviously dictated by the law of nature, that in the first ages of all countries, they have been left open to public use."[26] The public trust works because custom supplies a limited set of standards which courts can apply to specific controversies. The doctrine does not prohibit government disposition or use of trust lands so long as public rights are

23. Sax at 234.
24. Sax at 172.
25. Sax at 165.
26. J. ANGELL, A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS 17 (2d ed. 1847).

protected.[27] It has not hindered legislative or administrative decisions to sever lands from the trust and thus free them from public rights[28] except in cases where use of an entire harbor or segment of coastline would be foreclosed.[29] In the nineteenth century vague and contradictory land grant legislation sometimes provided the basis for extravagent private claims to large tracts of coastal and harbor lands. To protect public rights of navigation courts applied a rule of strict construction to invalidate private grants.[30] The trust does, as Professor Sax argues, contain a theory of close judicial scrutiny of public resource disposition applicable to a wide range of decisions, but, as he recognizes, it provides no standards for a court to decide that any but extreme attempts to use natural resources violate public rights. He correctly argues that trust rights are not analogous to first amendment constitutional rights because the problem in the trust cases is that the "will" of a diffuse majority has been subject to the "will" of a concerted minority. Instead he views trust rights as an adaptation of the old maxim of equity *sic utere tuo ut alienum non laedes*.[31] The problem with a common law nuisance analogy is that a landowner's expectation that his enjoyment of his land will not be foreclosed by the use made of surrounding land is significantly greater than a citizen's expectations to use common resources such as airsheds, river basins and scenic corridors. The expectations of a landowner are greater because the competing claims are greater[32] and more trade-offs must follow.[33] A court can decide that *A*'s land cannot be used as a sink but should it question the conscious choice to use the waste assimilation capacity of a stream on the grounds that it is the most efficient method of treating a particular series of waste discharges? I would answer that it should not, although proposed legislation drafted by Professor Sax

27. *E.g.*, Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 (1928). (State may lease tidelands for extraction of oil).

28. Knudson v. Kearney, 171 Cal. 250, 152 P. 541 (1915). *See also* City of Long Beach v. Mansell, 3 Cal.3d 462, 91 Cal. Rptr. 23, 476 P. 2d 423 (1970).

29. The leading case is Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892).

30. *See, e.g.*, People *ex rel.* Pierce v. Morrill, 26 Cal. 336 (1864).

31. Sax at 158-59.

32. Hanks & Hanks, *The Right to a Habitable Environment*, in THE RIGHTS OF AMERICANS 146, 149-54 (N. Dorsen ed. 1970).

33. Pollution problems involve trade-offs between sources of pollution. For example, Pittsburgh cleaned up its air by dumping its residuals in the Ohio River. Thus, a judicial decision which required a company to stop its air pollution might create a more severe water or solid waste disposal problem. On balance, it would seem that a basin or regional agency would have a better chance of avoiding these problems through the development of a coordinated approach to the recycling of residuals. *See* A. KNEESE, R. AYRES & R. D'ARGE, ECONOMICS AND THE ENVIRONMENT (1970); Jaffe, *The Administrative Agency and Environmental Control*, 20 BUFFALO L. REV. 231, 235 (1970).

would seem to allow a court to consider this question.[34]

In order for a claim to be classified as a right, there must be a consensus—generally through custom or legislation—that in a given range of conflicts, the claim should be given priority. No such consensus exists with respect to environmental claims. In the absence of administratively imposed standards or damage that would support a public or private nuisance action, a court has no basis to determine that an activity such as a highway or discharge from a power plant should not take place, whereas it can mandate a broadened perspective on the part of decision-makers. Environmental conflicts are disputes over the allocation of natural resources and should be solved by an elaborate accounting effort which includes substantial public participation at crucial stages of the decision-making process. Costs and benefits must be estimated and where they cannot be, the costs of alternatives and the opportunity cost of preservation of the resource in its existing condition are calculated. Risks need to be defined so that the consequences of trade-offs can be estimated. In the end of a choice must be made and no general theory of public rights can state a principle to guide a court. Judicial intervention can improve the process by which a decision is reached but it cannot and should not decide the merits of the issue. As I have mentioned, the theory of separation of powers precludes a court from making this kind of judgment when the legislature has clearly delegated the authority to an administrative agency. This may, however, be an unfair criticism of the book's argument. The examples of the possible use of the public trust doctrine he gives suggest that it is basically a rationale for a common law theory to give members of the public standing to object to activities which threaten the environment. This is needed. Combined with a liberalized theory of standing, the techniques of statutory construction discussed earlier and the National Environmental Policy Act of 1969 should be a sufficient basis for citizen's suits to contest the location or desirability of such large-scale projects as highways, power plants and timber harvesting and thus the potential problems of an expanded theory of trust rights are avoided.

34. Section 4(a) of S. 1032 provides that any citizen may bring an action for declaratory relief upon a showing that an activity may result in "unreasonable pollution, impairment, or destruction of the air, water, land or public trust of the United States . . ." The defendant then has the burden of establishing that there is no feasible and prudent alternative and "that the activity at issue is consistent with and reasonably required for promotion of the public health, safety, and welfare in light of the paramount concern of the United States for the protection of its air, water, land, and public trust from unreasonable pollution, impairment, or destruction."

A more fruitful approach to defining public rights to a decent environment in airsheds and river basins has been suggested by a University of Toronto political economist, John H. Dales.[35] An administrative body would be delegated the task of establishing region-wide environmental ceilings on the use of common resources based on ecological and economic information. The number of tons of waste that could be discharged within the ceiling would then be calculated and those wishing to discharge would buy the necessary rights from the public. Those who wished to preserve resources could also buy rights in order to foreclose other uses. Citizen suits should be allowed to enjoin users who discharge in excess of the rights they have purchased.

No one can dispute the failure of the administrative process to prevent environmental deterioration. *Defending the Environment* is a well written, perceptive account of why the process has failed. It is a call to action but, unlike most polemical wrting, it is balanced. Professor Sax carefully constructs his arguments, deals candidly with possible objections to them and is aware of the limitations of judicial action. Although I disagree with some of the implications of his proposals, his basic goal "to create *additional* leverage for the citizen—to add to, not diminish, the opportunities for rederess; to improve and provoke the democratic process, not to constrain it," is one that all lawyers should support.[36] On the whole, *Defending the Environment* is a realistic strategy for needed increased judicial intervention in the administrative process and one can trust the courts to temper it as they put this creative book to use.

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35. J. DALES, POLLUTION, PROPERTY & PRICES (1968). Professor Sax does agree that a system of effluent charges is preferable to a series of private law suits to control conventional air and water pollution. Sax at 121.

36. Sax at 239 (emphasis added).

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