

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

2014

In Memoriam: David Sive (1922-2014) and Joseph Sax (1936-2014)

Nicholas A. Robinson

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Environmental Law Commons](#)

Recommended Citation

Nicholas A. Robinson , In Memoriam: David Sive (1922-2014) and Joseph Sax (1936-2014), 44 *Envtl. L. Rep.* 10929 (2014), <http://digitalcommons.pace.edu/lawfaculty/980/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

In Memoriam: David Sive (1922-2014) and Joseph Sax (1936-2014)

by Nicholas A. Robinson

Nicholas A. Robinson is University Professor on the Environment and Gilbert and Sarah Kerlin Distinguished Professor of Environmental Law Emeritus at Pace University School of Law, where he also serves as Co-Director for the Center for Environmental Legal Studies.

In 1995, Professor of Law David Sive and Pace's Law Faculty established this lectureship, in honor of Lloyd K. Garrison, to commemorate *Scenic Hudson Preservation Conference v. Federal Power Commission*.¹ Known as the *Storm King* case, this ruling inaugurated what we today call environmental law. Two individuals above all others guided and framed the jurisprudential foundations for environmental law. We honor these founders today. Their lives were intertwined.

Pace's faculty insisted that David Sive give the inaugural Garrison lecture. David did so, but insisted that his friend and fellow legal pioneer for the stewardship of nature, Prof. Joseph Sax, deliver the second lecture in the series. Lloyd had passed away four years before. It was timely to commemorate Lloyd's remarkable civic career and his seminal contribution to the birth of contemporary environmental law in the battle to safeguard Storm King Mountain. A descendent of abolitionist William Lloyd Garrison, Lloyd was a preeminent civil liberties attorney, former dean of the University of Wisconsin Law School, and a leader of the New York Bar Association, who had been called to service on many governing boards for federal agencies under three presidents. I came to know Lloyd before his passing, conferring with him on historic preservation law matters.

When Consolidated Edison Company (Con Ed) decided to build a huge hydroelectric power plant on Storm King, the northern portal to the great fiord of the Hudson River highlands, citizens and local governments were appalled. This was no NIMBY response. Con Ed had forgotten that these fabled highlands had inspired the Hudson River School of landscape painting. This artistic rendering of nature in turn engendered the birth of America's conservation movement of the late 19th century. The Hudson

was also instrumental to the birth of this nation: Here, the patriots' control of the highlands had kept the British from uniting their forces. Here, above Storm King, George Washington assembled soldiers from across the freed colonies for their final encampment before being demobilized. The U.S. Military Academy at West Point overlooks the Hudson River and Storm King Mountain.

Con Ed had assembled the political and legal power to secure approvals for its plan. A small coalition of citizens, led by Francis Reese and others, persuaded Lloyd to represent their cause of preserving Storm King. Lloyd served as legal counsel to the Scenic Hudson Preservation Conference. With his able associate, Albert K. Butzel, who delivered a Garrison Lecture in 2010, Lloyd Garrison won a landmark decision of the U.S. Court of Appeals for the Second Circuit granting the citizens standing, reversing the Federal Power Commission's (FPC's) grant of a license to Con Ed, and determining that aesthetics, history, and nature conservation had equal standing to economic interest, and must be considered before the FPC could lawfully act.

Among those who joined the Scenic Hudson Preservation Conference's legal battle was the Atlantic Chapter of the Sierra Club. David Sive and Alfred Forsythe had formed the Atlantic Chapter in the early 1960s, despite heated opposition from Californians who felt that the Sierra Club belonged there and were worried that the organization would be stretched too thin. Dave chaired the Atlantic Chapter. In those days, I recall how its Conservation Committee debated issues from Maine to Florida. The chapter's center was with Sive in New York, campaigning, for example, to save Olana, home and studio of the Hudson painter Frederick Church. Having the prestige of the Sierra Club meant a lot to the Storm King cause. Sive represented the Sierra Club in its intervention in *Storm King*.

While litigation battled on, David Sive also agreed to represent a similar grassroots community movement in *Citizens Committee for the Hudson Valley v. Volpe*.² Federal

Editors' Note: This Comment was originally presented at the 2014 Lloyd K. Garrison Lecture on Environmental Law on March 26, 2014, at the Pace University School of Law. For more about the lecture series, see <http://www.law.pace.edu/lloyd-k-garrison-lecture-environmental-law>.

1. *Scenic Hudson Preservation Conf. v. Federal Power Comm'n (FPC)*, 354 F.2d 608 (2d Cir. 1965).

2. 302 F. Supp. 1083, 1 ELR 20001 (S.D.N.Y. 1969), *aff'd*, 425 F.2d 97, 1 ELR 20006 (2d Cir. 1970).

Transportation Secretary John Volpe had approved siting a superhighway along the Hudson River adjacent to the shore in Tarrytown and Sleepy Hollow, located there to accommodate Gov. Nelson Rockefeller's proposal to connect his Hudson estate to the Tappan Zee Bridge. Without the benefit of any environmental statutes, which would only be enacted beginning in the 1970s, and relying upon a slender but critical provision of a late 19th century navigation law, after a full trial in the U.S. District Court for the Southern District of New York, Sive prevailed against the state and federal defendants. The decision was upheld on appeal, and the U.S. Congress also ended up backing the citizens. Pace's Dean Emeritus, then-Congressman Richard L. Ottinger, successfully blocked a bill intended to overturn the court decisions. Sive had won major victories on procedure, granting standing to sue, and on substance, a ruling that the government acted *ultra vires*. David Sive saved this lovely part of the Tappan Zee, Kingsland Point Park, beaches, and marinas, a rare location where a person can reach the River's banks without being barred by the New York Central Railroad's tracks. Had Joseph Sax's public trust scholarship been published a decade earlier, Sive might have relied on that legal doctrine as well.

Parenthetically, I served as Dave Sive's law clerk in 1969 on the appeal of the Hudson River Expressway case, and every summer since 1972, I have swum in the Hudson where the highway would have been built. My daughters learned to swim there, and my grandchildren and I swim there still.

Public interest litigation to safeguard the environment was born in these cases. Citizen outrage about pollution and degradation of nature was then widespread. In September 1969, the Conservation Foundation convened a conference on Law and the Environment at Airlie House near Warrenton, Virginia. David Sive and Joseph Sax were prominent among participants. Their essential conclusion was that "environmental law" needed to exist. Like Sive, Sax, while a young professor at the University of Colorado, had helped the Sierra Club in its opposition to development of the Colorado River, and had become involved in a legal campaign, launched by Victor Yannacone, to ban DDT in the wake of Rachael Carson's 1963 book *Silent Spring*. At Airlie House, I was privileged to listen to Sive and Sax debate strategies about how to expand beyond the scope of administrative legal remedies to forge this new field of environmental law. Participants took heart from the civil rights movement, and argued that if the NAACP Legal Defense Fund could engage courts to remake the law against all odds, so could those who defended the environment. They left the conference motivated to act.

On December 1, 1970, Congress enacted the National Environmental Policy Act (NEPA),³ creating the world's first environmental impact assessment procedures and establishing the President's Council on Environmental Quality (CEQ). In Michigan, Joe Sax wrote and saw

enacted the Michigan Environmental Protection Act of 1970,⁴ with provisions for citizen access to justice to enforce environmental rights. In the wake of both NEPA and his Michigan legislation, Joe Sax articulated and published doctrinal and civic foundations to support public interest litigation and to define the environmental duties government owed its citizens. His landmark book, *Defending the Environment: A Strategy for Citizen Action*, appeared in 1971. The CEQ named a Legal Advisory Committee to recommend how agencies should implement NEPA. Dave Sive and Joe Sax emerged as the environmental leaders on this Committee, which was chaired by Whitney North Seymour, U.S. Attorney for the Southern District of New York.⁵ The CEQ issued its NEPA guidelines on the recommendation of this Committee. That year launched the golden age of NEPA litigation. Courts everywhere began to hear citizen suits to protect the environment. Nicholas Yost later codified the case law for the CEQ in 40 C.F.R. Part 1500.

Dave Sive, with his law firm, Sive Paget & Riesel, went on to represent citizens in a number of NEPA cases, winning rulings of first impression. Sive was a founder of the Natural Resources Defense Council (NRDC), which became the preeminent champion of public environmental rights before the courts. Sive also led the establishment of the leading environmental lobby group in Albany, now known as Environmental Advocates, and campaigned for stronger state legislation. To continue the Airlie House conference precedent, Sive institutionalized the professional study of the environmental law as a discipline through creation of the Environmental Law Institute (ELI). With ELI and ALI-ABA, he launched nationwide continuing legal education courses to educate thousands of lawyers in environmental law, a field that had not existed when they attended law school. On becoming a professor at Pace, Dave helped launch its Doctor of Juridical Sciences degree, mentoring Dr. Robert Goldstein in his thesis; Robert is now a professor in the law department at West Point. He vetted Prof. Robert F. Kennedy Jr.'s exposé of mismanagement in the New York City Catskill Watershed; Bobby Kennedy's work launched the much-remarked regime of ecosystem services between New York City and Catskill communities. Sive, honored as a member of the International Union for the Conservation of Nature (IUCN) Commission on Environmental Law, was celebrated by its longtime chair, Wolfgang E. Burhenne, as being a legend in his time.

David Sive epitomized the best of what makes law a learned profession. He was a true role model. Michael J. Walker, director of the U.S. Environmental Protection Agency (EPA) National Enforcement Training Institute, wrote last March 24 of his hope that each of the 54 new law clerks being trained at EPA that week "will continue the work that Mr. Sive began 50 years ago. We will begin

3. National Environmental Policy Act (NEPA), 42 U.S.C. §§4321-4370f, ELR STAT. NEPA §§2-209.

4. MICH. COMP. LAWS ANN. §§691.1201-.1207 (Supp. 1973), MICH. STAT. ANN. §§14.528(201)-(207) (Supp. 1973).

5. See 1 CEQ ANN. REP. 355 app. (1971).

with a ‘thank you’ to a leader and patriarch in the environmental movement: David Sive.”

Joe Sax went on to become America’s preeminent professor of environmental law. In the fertile year of 1970, he also published *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*.⁶ His teaching and research in water law brought him perceptions about the public trust doctrine hidden to others. His article inspired a generation of law professors and public interest litigators who engaged the courts to protect public trust interests, especially access to public shores along rivers like the Hudson. The idea of legally protected public rights, which citizens can defend, is fundamental to environmental law. Sax’s work inspired Bob Boyle and other founders of the Hudson Riverkeeper, and in turn the worldwide Waterkeeper movement. Pace’s Environmental Litigation Clinic recently won a major public trust case in New York State courts. Law schools nationwide are indebted to Joe Sax for his inspired scholarship and vision. In his prolific career, Joe’s many books and articles engaged the minds of environmental law professors across America. Internationally, he was a laureate of the Elizabeth Haub Prize in Environmental Law, and lectured to law professors of the IUCN Academy of Environmental Law at its annual colloquium in Sydney, Australia, in 2004. His ideas won a global audience. When India’s Supreme Court recognized the public trust doctrine in that nation, the research of Prof. Joseph Sax was evident.

In 2007, looking back at his four decades of cultivating environmental law, Sax reflected on the duty of the state to protect the people’s common heritage: “Only when this precept is expanded into a general principle of our domestic law governing all our natural resources will we be able to say we have truly implanted environmental jurisprudence into our legal system.” When Joe passed, the law professors’ Internet listserve buzzed with praise for all his contributions. He mentored a generation of law professors. Another Garrison lecturer, Prof. Oliver Houck, observed: “In late 1969 I heard Joe Sax and David Sive speak in D.C. Like watching dawn break. I’ve never looked back”

David and Joe were both humble and self-effacing men. They would have been pleased to be celebrated together, each basking in the earned accolades of the other. That was their demeanor when they were here together with the first 10 Garrison laureates, who were assembled at Pace in 2005 by Prof. Robert Goldstein. John Cruden, president of ELI, last March 20th observed:

I have now had the opportunity, in three separate events, to pay homage to Joe and David. It is a rare audience that people do not know one or both, and everyone has heard of them. Each time I speak about them, stories follow. Joe was an inspiration for me, David a mentor. Their legacy is golden, but thinking about them both challenges me to do more.

The ripples from their professional work have spread far and wide. It is fair to observe that the reforms that Sive and Sax engendered in time produced Principle 10 of the Declaration of Rio de Janeiro on Environment and Development, adopted by the U.N. 1992 Earth Summit. This principle embodies many of the reforms that they urged in the 1970s and beyond: rights of access to environmental information, to public participation in environmental decisionmaking, and of access to the courts.⁷ These are today recognized as global norms. The combined legacy of their lives is global.

We are honored that David’s wife, Mary Sive, a great outdoors woman, and his daughter Helen, are with us here today. In his last years, when he was able, Dave enjoyed attending the Garrison lectures. On behalf of us all, may I thank the Pace Law Library and Environmental Law Program staff, especially Leslie Crincoli and Prof. Lin Harmon, for the commemorative exhibits that accompany this 2014 lecture, honoring Joe and Dave. David Sive would have been pleased to have been here today to welcome Prof. J.B. Ruhl to deliver the 2014 Garrison lecture. J.B. is a preeminent environmental law scholar, and is very much the heir to Joe Sax’s scholarly legacy of innovation. This year, especially, the spirit of Sive and Sax infuses the Garrison Lecture.

6. Joseph Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

7. Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev. 1, 31 I.L.M. 874 (1992). Principle 10 of the Rio Declaration provides:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

This norm today is embodied in national statutes and constitutions around the world, as well as in a number of treaties.