PACE UNIVERSITY SCHOOL OF LAW

2014 LLOYD K. GARRISON LECTURE

March 26, 2014

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

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*, 354 F. 2nd 608 (2d Cir., 1965). 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 are 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, Professor Joseph Sax, deliver the second lecture in the series. Lloyd Garrison 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 pre-eminent civil liberties attorney, former Dean of Wisconsin Law School, and a leader of the Bar in New York, 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 the Consolidated Edison Company decided to build a huge hydroelectric power plant on Storm King, the northern portal to the great fjord 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 Army's West Point Military Academy overlooks the river and Storm King.

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: preserve Storm King. He served as legal counsel to the Scenic

Hudson Preservation Conference. With his able associate, Albert K. Butzel, who delivered the Garrison Lecture in 2010, Lloyd Garrison won a landmark decision in which the US Court of Appeals for the Second Circuit granted the citizens standing, reversed the Federal Power Commission's (FPC's) grant of a license to Con Ed, and determined 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 the Club belonged there and worried the Club would be stretched too thin. Dave chaired the 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, the Hudson painter Frederick Church's home and studio. Allying with the prestigious Sierra Club meant a lot to the Storm King cause. Sive represented the Sierra Club in its intervention in the case.

While litigation over Storm King battled on, David Sive also agreed to represent a similar grassroots community movement in *Citizens Committee for the Hudson Valley v. Volpe.* Federal Transportation Secretary John Volpe had approved siting a super-highway on the Hudson River adjacent to the shore in Tarrytown and Sleepy Hollow, located there to accommodate Governor Nelson Rockefeller's proposal to connect his 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 Sive prevailed against the state and federal defendants in a full trial in the US District Court for the Southern District of New York. Upheld on appeal, Congress also backed the citizens when Congressman Richard L. Ottinger, now Pace's Dean *Emeritus*, 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 and the adjacent beaches and marinas, a rare location where a person can reach the River's banks without being barred by the New York Central's railroad tracks.[1] Had Joseph Sax's public trust scholarship been published a decade earlier, Sive might have relied on that legal doctrine as well.

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

[1] 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.

the Environment" at Airlie House near Warrenton, Virginia. David Sive and Joseph Sax were prominent among the 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 oppose development of the Colorado River and had become involved in a legal campaign launched by Victor Yannaconne to ban DDT in the wake of Rachael Carson's 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 that conference motivated to act.

On December 1, 1970, Congress enacted the National Environmental Policy Act, 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 Act of 1970, 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 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 US Attorney Whitney North Seymour (SDNY).[2] CEQ issued its NEPA "guidelines" on 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 CEQ in 40 CFR 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 Natural Resources Defense Council (NRDC), which became the pre-eminent 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 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 did not exist when they attended law school. Upon becoming a professor a Pace, Dave helped launch its Doctor of Juridical Sciences degree, mentoring Dr. Robert Goldstein in his thesis; Robert is now a Professor in

[2] See the 1971 CEQ Annual Report, Appendix, Membership of Legal Advisory Committee, at p. 355.

the Law Department at West Point. He vetted Prof. Robert F. Kennedy Jr.'s exposé of mismanagement in the NYC Catskill Watershed; Bobby Kennedy's work launched the much-remarked regime of ecosystem services between New York City and the Catskill communities. Sive, honored as a Member of the IUCN Commission on Environmental Law, was celebrated by its long-time Chairman, 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 US EPA's National Enforcement Training Institute, wrote last March 24th 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 with a 'thank you' to a leader and patriarch in the environmental movement: David Sive."

Joe Sax went on to become America's pre-eminent professor of environmental law. In that fertile year, 1970, he also had published "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention" (68 *Mich. L. Rev*. 47). 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 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.

Looking back at his four decades of cultivating environmental law in 2007, 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' listserv buzzed with praise for all his contributions. He mentored a generation of law professors. Another Garrison lecturer, Professor Oliver Houck, observed: "In late l969 I heard Joe Sax and David Sive speak in DC. 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 ten Garrison Lecture laureates, who were assembled at Pace in 2005 by Professor Robert Goldstein. John Cruden, President of ELI, observed this past week: "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 Rio Declaration on Environment and Development, adopted by the UN 1992 Earth Summit. This Principle embodies many of the reforms that they urged in the 1970s and beyond: rights of access to environmental information, public participation in environmental decision-making, and access to the courts.[3] 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 Reference Librarian Vicki Gannon, Senior Program Coordinator Leslie Crincoli and Professor 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 Professor J.B. Ruhl to deliver the 2014 Garrison lecture. J.B. is a pre-eminent 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.

Nicholas A. Robinson

March 26, 2014

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[3] Principle 10 of the *Rio Declaration on Environment and Development* 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.