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

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BOOKS

BOOK REVIEWS

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

Joseph Sax has the reputation of being the strongest writer on environmental law in the country—and with good reason. His articles on the police power¹ and the public trust doctrine² are definitive works in the field. In his new book, *Defending the Environment: A Strategy for Citizen Action*, Sax lives up to his reputation.

The book is directed to anyone interested in protecting the quality of the environment through legal controls. Its subtitle, "A Strategy for Citizen Action," may be somewhat misleading to the nonlegal book buyer. Sax's "citizen action" has nothing to do with recycling, organizing citizen groups, or drafting petitions. The "actions" he advocates are legislative reforms and a heavier reliance on the courts in guarding the environment. But he writes about his legal topics in a clear, readable style that will appeal to nonlegal readers as well as to those of the legal profession.

In his first two chapters, Sax illustrates the inadequacy of our present system. His vehicle is the Hunting Creek case,³ in which a politically influential land company attempted to acquire and fill a marsh area along the Potomac River for apartment sites. He covers the strategies, politics, and administrative maneuvers on both sides of the issue. The overwhelming impact of even slight political pressure may be a revelation to anyone who has never been deeply involved in environmental battles. It will sound depressingly familiar to those who have.

Many of the circumstances may seem familiar, too. The story begins with a request by developers for permission to acquire and fill marsh land. The request was presented in an uncontested hearing and approved without debate in the Virginia legislature. Then a survey by the Department of the Interior's Fish and Wildlife Service showed that the development would have an adverse effect on the environment. But Interior's position on the fate of the

¹ Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

² Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

³ The lawsuit arising from this controversy was *Fairfax County Fed'n v. Hunting Towers Operating Co.*, Civil Action No. 4963A (E.D. Va. filed Oct. 1, 1968).

development depended more on politics than on environmental facts. Interior officials ignored their own study as they vacillated between opposition and approval. Their position on the matter changed three times before they finally opposed the development.

These first two chapters are a good initiation into the realities of environmental battles. They should be required reading for any judge who is inclined to leave the environment to decisions by "government agencies acting within their administrative discretion."

Sax then develops his argument for legislative reform. He uses the Hunting Creek example and others to build a case showing the potential values of court involvement and the weaknesses of the present system. He shows that the governmental agencies claiming to represent the public interest have too often represented only themselves when the environmental chips were down. Some agencies have not only been indifferent to environmental threats, but at times have even opposed considering ecological values in their decisions. The reality of political influence is confirmed by a revealing dialogue quoted from a congressional hearing:

MR. REUSS: If there were political considerations as the primary cause of the overruling of the Fish and Wildlife Service judgment, in your opinion, is that good government?

DR. GOTTSCHALK: If we could put this on a hypothetical basis, I would be much more comfortable.

MR. REUSS: I want you to be comfortable. Let us put it on a hypothetical basis.

DR. GOTTSCHALK: I think there are undoubtedly situations which arise which require the Secretary to trade one kind of achievement, shall we say, for another.⁴

Sax's thesis is that "battles are best fought between those who have direct stakes in the outcome."⁵ To remedy the failures of agency decision-making, and to give the public the stake it needs, Sax advocates a change in the "balance of power."⁶ This is possible, he suggests, through liberalizing the rules of standing and establishing an environmental cause of action. His model statute describes the cause of action in these terms.

Sec. 3. (1) When the plaintiff in the action has made a prima facie showing that the conduct of the defendant has, or is likely to pollute, impair or destroy the air, water or other natural resources or the public trust therein, the defendant may rebut the prima facie showing by the

⁴ J. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* 54 (1971) (hereinafter referred to as SAX).

⁵ SAX, 56.

⁶ SAX, 61, 64.

submission of evidence to the contrary. The defendant may also show, by way of an affirmative defense, that there is no feasible and prudent alternative to defendant's conduct and that such conduct is consistent with the promotion of the public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources from pollution, impairment or destruction. . . .⁷

The Michigan legislature⁸ has adopted Sax's idea and several other states are considering it. The Hart-McGovern bill⁹ now pending in Congress contains much of Sax's proposal. California has not, at this writing, adopted such a bill, but the prospects appear optimistic for a related proposal. S.B.678 (Lagomarsino) now before the legislature would establish environmental causes of action to be enforced by the California Attorney General.

I favor the institution of the Sax proposal on both the federal and state levels. It can build legal incentives into our present system without changing existing governmental organizations and without additional expense. It allows judicial evaluation of the benefits and the environmental risks of projects that may otherwise escape review entirely. Projects are therefore more likely to be carefully planned. However, I think that Professor Sax is in danger of overselling his product. While he does occasionally qualify his optimistic predictions,¹⁰ Sax nevertheless implies that adopting reform legislation will, almost singlehandedly, initiate an era of ecological sanity. But, as important as this legislation is, I suspect it may not be enough.

⁷ SAX, 250. The Model Statute also states:

....
 Sec. 2. (1) The attorney general, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

....
 Sec. 4. (1) The court may grant temporary and permanent equitable relief, or may impose conditions on the defendant that are required to protect the air, water and other natural resources or the public trust therein from pollution, impairment or destruction. . . .

Id. at 249, 250-51.

⁸ MICH. COMP. LAWS ANN. §§ 691.1201-02 (West Supp. 1971). *But see* Roberts v. Michigan, Civil No. 12428-c (Mich. Ctr., May 4, 1971) where the court found that part of the Act that authorizes the court to direct adoption of adequate standards, if it finds state or local pollution standards to be deficient, is an unconstitutional delegation of legislative power, at least to the extent that it pertains to pollution arising from the operation of motor vehicles.

⁹ S. 1032, 92d Cong., 1st Sess. (1971), (the "Hart-McGovern Bill") and companion bill, H.R. 5076, 92d Cong., 1st Sess. (1971).

¹⁰ See SAX, Chap. 11.

Sax's arguments look convincing, but the selection and treatment of his case examples may be misleading. In his examples of cases where plaintiffs' standing was approved, the courts imposed restraints protecting the environment. In other cases, where the courts gave no protection, he concludes that results would have been different if standing was more easily granted or if the law had allowed the courts to confront the environmental merits of the case directly. But "favorable" decisions are not necessarily evidence of objective courts and "unfavorable" decisions are not all caused by inadequate laws.

The list of cases in which courts have refused to protect the environment is a long one. It is true that when plaintiffs objected to decisions of governmental agencies, the courts have often cited the sanctity of administrative discretion or the issue of standing as one ground, among others, for denying relief. But, in many cases, courts have had a number of theories available which could have justified a decision protecting long-term environmental or resource values, but chose not to use them. The judges have practiced the fine art of dispensing justice as they saw it, and the availability of legal tools to protect the environment has often had little or no impact. For example, see the decisions in *Sierra Club v. Hickel*,¹¹ *U.S. v. Florida Power*,¹² *Pennsylvania Environmental Council v. Bartlett*,¹³ and the Tongass National Forest case,¹⁴ in all of which the court refused to order the requested relief. These opinions do not *prove* that the courts are unreliable guardians of the environment, simply because the plaintiffs lost, but neither should Sax's examples be taken as proof that courts will always be protectors of the environment. Sax's proposal could force some courts to deal with the environmental merits in cases where they may have otherwise found judicially acceptable ways to avoid them. But, they may still avoid them, even with Sax's law, if that is the route to justice from their viewpoint. Decisions will not uniformly protect the environment. The results will still be determined primarily by the equities at stake, the quality of advocacy, the information presented to the court, and by the court decisions on procedural issues which are individually unimportant but collectively controlling.

The quality of advocacy for plaintiffs in environmental cases has been remarkably high up to this point. In the future, however, it may not remain so. Moreover, if one relies primarily on court decisions, one must accept the risks involved. For instance, counsel for

¹¹ 433 F.2d (9th Cir. 1970), *cert. granted*, 401 U.S. 907 (1971).

¹² *U.S. v. Florida Power and Light Co.*, 311 F. Supp. 1391 (S.D. Fla. 1970).

¹³ 315 F. Supp. 238 (M.D. Pa. 1970).

¹⁴ *Sierra Club v. Hardin*, 325 F. Supp. 99, 2 E.R.C. 1385 (D. Alaska, 1971).

the defense will oftentimes be well compensated with adequate funds for investigation, etc., while counsel for plaintiff will frequently be operating on a minimal budget, sometimes even without funds for adequate pre-trial studies.

Reliance on courts also assumes that all the important issues will be brought before the courts. Conservation groups typically have "bare bones" budgets and their lawsuits are no better financed. In the past, they have invested their legal resources wisely and have been rewarded with some highly significant precedents for their efforts. Nevertheless, it is common knowledge that many important cases go unlitigated even under the present law, because there are not enough funds to cover the expenses of initiating a lawsuit. Some agencies consistently fail to prepare National Environmental Policy Act (hereafter N.E.P.A.)¹⁵ studies where the law requires them, because those agencies have calculated that they will not be taken to court for their omission. It would be far better to develop more comprehensive incentives within the system, than to entrust the nationwide policing of environmental mismanagement to groups with insufficient private funding. Another problem lies in the technical expertise of the judges and juries. But Sax anticipates this.¹⁶ He claims that courts are never asked to resolve technical questions¹⁷ and that the issue is a red herring.¹⁸ I disagree. One might examine the record in *Crowther v. Seaborg*,¹⁹ where the issues confronting the judge were as follows:

The ultimate issue of fact presented by these cases is whether the proposed flaring of gas from the Rulison cavity will endanger life, health and property of the plaintiffs or any other similarly situated, in contravention of the mandate of the Atomic Energy Act. In determining this issue, five subsidiary issues have been raised by the parties and must be disposed of. These are:

1. Do the Rulison plans make reasonably adequate provision for the protection of the health and safety of human, plant and animal life?
2. Are these plans for flaring within the radiation protection standards of the AEC and the Federal Radiation Council (FRC)?
3. Are the defendants prepared and equipped to actually implement the plans for flaring, thus insuring the protection of health and safety?
4. Are there safe economical alternatives to the proposed flaring as a means of determining the effectiveness of the Rulison detonation?
5. Are the FRC and AEC radiation protection standards themselves adequate to protect life, health and property?

The above issues required the judge to evaluate conflicting technical

¹⁵ Publ. L. No. 91-190, 83 Stat. 853 (1970).

¹⁶ Sax, 150, 151.

¹⁷ Sax, 150.

¹⁸ Sax, 151.

¹⁹ 312 F. Supp. 1205, 1211 (D. Colo. 1970).

arguments on radiation hazards presented by highly trained nuclear physicists. Their evidence had been the subject of sharp debate within the nuclear science establishment. Imposing such decisions on judges is asking and risking too much.

It is true, as Sax claims, that judges are used to confronting technical arguments in many cases, including medical malpractice, etc. But there is no assurance that judges have made the best decisions in those cases. While we urgently need objective decisions, we also need expert decisions. That is most important in environmental cases. In medical cases there is usually only one party affected by a court's decision, and the only question is compensation for a medical event that has already occurred and about which the judge can do nothing. A single decision in an environmental case may literally affect the health of millions of people. Perhaps a decision-making institution of greater competence could be devised.

Apart from the fact that judges cannot be expected to be experts in every area, there is also the problem that adequate information for making decisions may not be available. The only information available to the courts is that brought before them by the parties. In turn, this is information the parties have discovered from each other, that which their own experts can volunteer, or that revealed by environmental studies required by law (such as N.E.P.A.). At present, environmental studies are required only when projects involve federal action, participation, or licensing,²⁰ except in a few states where they are also required for state projects.²¹ But even when studies have been performed, they have often avoided objective examination of environmental issues. Incentives for objectivity are inadequate since studies are usually conducted and conclusions drafted by parties interested in promoting the project under study, and, as in the Hunting Creek case, administrators may ignore study results and construe ambiguities to support predetermined conclusions.

Perhaps more serious is a lack of long-range information. Even the N.E.P.A. does not require complete long-range studies on all problems which precipitate environmental crises. In cases not covered by the N.E.P.A., the courts have even less material available. Consider the information required in deciding a dispute over the location of a nuclear power plant. The court's decision is limited in light of N.E.P.A. studies or other evidence on alternative sites. But the problem may not have arisen if there had been a decision

²⁰ See Guidelines for Federal Agencies under the National Environmental Policy Act, Council on Environmental Quality, April 23, 1971.

²¹ For example, California has a new law requiring such studies in the Environmental Quality Act of 1970. CAL. PUB. RES. CODE §§ 21000 to 21151 (West Supp. 1971).

based on an objective study of the potential for other energy alternatives or the possibility of reducing power demands by changing existing rate structures.

To make valuable long-range environmental decisions, we need both better information and more objective decision-making institutions. The courts can help (but not guarantee) only the latter. Sax's solutions are a little like advocating a new surgery technique as a cure-all for lung cancer. A better "cure" perhaps would be greater prevention—and in the environmental context, that would mean better information and timely, objective decisions.

While the ultimate protection will come only with a culture holding increased respect for the beauties of the earth and the hazards of abusing its ecological fabric, in the interim we can design institutions that will be more effective than those now in use. But until such institutions exist, the Sax proposal deserves support. It sharply focuses the unique influences of the legal process (an objective decision-maker with power to enforce its decisions) on environmental issues which critically need that influence. We can then proceed to something better.

Gary L. Widman*

ORGANIZING AND THE LAW. By Stephen I. Schlossberg and Frederick E. Sherman. Washington, D.C.: Bureau of National Affairs, Inc. 1971. Pp. 304. \$10.00.

Every year there is virtually a publication bonanza of books concerned with how to perform a variety of activities—the so called "how to" books, e.g. Guptill's *How to be a Pastor in a Mad, Mod World*; Greenberg's *How to be a Jewish Mother*; and Cuppy's *How to Become Extinct*. The revised edition of *Organizing and the Law* is in a sense a "how to" book, designed to provide union organizers with some knowledge of labor law and thereby aid them in organizational drives for new union members. In simplified and readable form, the book undertakes to set out major legal principles in the labor law field affecting union organization.

The union organizer must be an amalgamation of many specialized talents. Mainly, his goal is to achieve a union member-

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ship majority in a given unit of employees and to ultimately establish a bargaining relationship between the union and the employer which will culminate in the execution of a collective bargaining agreement. In the performance of this job, the organizer becomes *inter alia* a salesman, politician, psychologist, and lawyer. The job is a rugged and demanding one. In certain parts of the country, union organizing may still be fraught with physical dangers where the general community and the specific employer entertain an overabundance of hostility to the presence of unions and their organizational efforts.

The organizational drive is often a combat between an employer and the union, spearheaded by the organizer, for the minds, loyalty, and votes of employees. The ground rules for contests between employers and unions are provided in part by the National Labor Relations Board in decisions interpreting the National Labor Relations Act and by various rules¹ developed therefrom. It is therefore imperative that an ambitious union organizer have at a minimum a familiarity with that aspect of labor law which may affect the success of his endeavor. In most cases, the organizer is not a lawyer, and this book is not designed to provide him with the skills of a competent labor attorney. It will, however, supply him with valuable information concerning the law's interplay with union organization and alert him to problems or situations where consulting a labor lawyer would be advisable.

For example, in achieving employer recognition of the union as a bargaining representative, the organizer may find that he is taking the election route, or, perhaps, the card route where the employer will grant recognition upon the presentation of authorization cards signed by his employees without resorting to an election. In either event, the organizer's actions will be influenced by the Board's decisions in these areas and the final accomplishment of his goal may be determined by his understanding of the significance of labor law. Thus, the book sets forth information with respect to authorization cards, how they should be worded, and how they may be used to achieve a collective bargaining relationship.

The book also presents the reader with a fundamental knowledge of employer unfair labor practices. It explains how these actions by an employer may be used to gain recognition without an election, or, as a basis for setting aside an election which the union has lost, possibly because of the employer's unlawful behavior.² The book stresses the importance of the organizer's awareness of unlawful events and his recordation of these incidents for future use by an

¹ See 29 C.F.R. §§ 101.1-.43, 102.1-.134, 103.1 (1971).

² S. SCHLOSSBERG AND F. SHERMAN, *ORGANIZING AND THE LAW* 59 (rev. ed. 1971).

attorney should there be an unfair labor practice case before the Board.

Additional information and advice is offered concerning the Board's entire representation procedure from the filing of a petition for an election to certification of the union as the bargaining representative.³ The organizer is cautioned, however, that the definition of what the appropriate unit might be is critical for purposes of his organizational campaign. Furthermore, if the employer has retained counsel to present his evidence at a Board hearing, the union organizer may be under a handicap and should obtain counsel to elucidate the union's views.⁴

In addition to presenting what an organizer should do in specific circumstances, the book also outlines some "don'ts" by describing union unfair labor practices and warning union organizers about possible activities which might run afoul of the law. Such complex sections of the Act as Section 8(b)(7)⁵ are succinctly noted in language comprehensible to laymen. The book also discusses problems in organization which may arise when the employees are represented by a union but are interested in changing to another union.

The authors of the book, Schlossberg and Sherman, are, respectively, the General Counsel for the United Auto Workers and an assistant professor of labor education at the University of Wisconsin. They submit that the book is based on the simple premise that the unionization of workers is a social and economic necessity. Their purpose in writing the book is to eliminate some of the mysteries of labor law for the union organizer and to thus accelerate unionization. There is no doubt that the authors have created not only a valuable handbook for union organizers in an understandable and usable form, but have produced a book which any person interested in acquiring a quick overview of labor law should find informative and rewarding.

*Herman M. Levy**

³ *Id.* at 283 *et seq.*

⁴ The size and composition of the unit decided upon at the hearing can well mean the difference between victory or defeat for the union in an election.

⁵ 29 U.S.C. § 158 (Supp. IV, 1963).

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