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Transformation of the Law: Thoughts on the Contributions of Professor Sax

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In his path-breaking book, *Defending the Environment* Joseph L. Sax wrote:

No magic wand can be waved over the multitudinous problems of environmental quality. No elegant declaration of rights will simply and quickly solve our problems. Protracted struggle lies ahead, and the citizen fighting to vindicate his rights will be a central figure in that struggle. Regulation in the name of the public interest can no longer remain a two-party enterprise carried on between the regulated and the professional regulator. Effectuation of the public interest must begin to embrace the active participation of the public.¹

The passage in many ways is characteristic of all of the pioneering legal scholarship of Professor Sax. That work is professional, profound, and innovative.

I begin with professional; I had the joy of working with Professor Sax as a student, an assistant in hearing officer work for government, a co-author and a mentee. He modeled to me and others who had the privilege to learn from him how to be an advocate and how to do so in a way that respects others' views, performs impressively, delivers superior results and does so without fanfare or hubris.

Some, when they hear "Joe Sax," "The Sax Act," and when they learn that Joe is an avid environmentalist might picture an informal person. But Professor Sax is formal in all the best connotations of that term. He taught us how to present

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1. JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT* xxiii (Knopf 1971).

clearly and impressively, how to articulate arguments persuasively, even how to look when appearing before agencies, courts, legislators, and hearing boards. He taught us, not that we would all reach the standard, how to be elegant in our work.

Professor Sax's impeccable legal scholarship is complemented by his innovation and creativity. He not only drafted the Michigan Environmental Protection Act (The Model Natural Resources and Environmental Protection Act), he wrote persuasively of its doctrinal roots, and then he looked back, several times, using empirical methods to see how that Act (and its cousins throughout the States) were actually being used. He takes from social science, philosophy and history knowledge that makes his writings convincing, exciting, and based in critical worldly appreciations.

Professor Sax's thoughts are deep and profound. Millions of words were written in the first decades of environmental law. Many of them will never be read, let alone quoted. But the ideas and their artful expression in *Defending the Environment*, in *Takings, Private Property and Public Rights*, in *Mountains Without Handrails*, in *Playing Darts with Rembrandt*, in *Helpless Giants: The National Parks and Regulation of Public Lands*—these have shaped the way we think of the environment, of property, and of our relationship to it. Listen to his articulation of our relationship to biodiversity in his recent Blue Planet lecture in Japan:

. any notion of the importance of protecting biodiversity builds on what may be thought of as the economy of nature, as contrasted with the transformational or developmental economy. In the economy of nature, land is not a passive entity waiting to be transformed by an owner. Nor is the world composed of distinct tracts of land. Rather the ecological perspective views land as a system defined by function, not by man-made boundaries. Land is already at work performing important functions in its unaltered state. Forests regulate global climate, marshes sustain marine fisheries, and prairie grass holds the soil in place. In the economy of nature, wetlands would be governed by laws based on their ecological role, not on lines drawn on a map. And their protection would be the responsibility of all those whose activities—

wherever carried on—adversely affected them. If today we are seriously to protect what remains of our biological heritage, to restore degraded rivers and landscapes, and to re-deploy forests to play a positive role in controlling human-induced climate change, we need a legal system that is as well-attuned to achieving those goals as the conventional legal system we have inherited was attuned through transformation of nature to achieving the goals of the industrial revolution.

No jargon, no superfluous phrasing: clear, communicative, transformative . . .

Professor Sax's writing also exhibits perfectionism. He does not write unless there is something important to say and when he says it he says it beautifully. One of my lasting memories is of the first time I witnessed his workmanship. In his lovely wood paneled office in the Michigan Law Quad, he would type, triple spaced, a draft of a manuscript. The editing of that draft would be elegant with hand written additions noted clearly, precisely in the margins and the interval spacing. Then another draft; then another; then a read by his wonderful wife Ellie, until every phrase was the clearest possible. Triple spacing and elegant editing . . . I have tried to emulate and teach this not-mysterious method to three decades of my students.

When I was asked by a group of Japanese historians to give a lecture on environmental law in the United States with particular emphasis on the 1960s, the first thought that came to my mind was Joe Sax. Professor Sax represents the roots of the most important thinking on law and the environment, not only in the United States, but in other places, including my host country of Japan, in India and in the international community. Professor Sax made Minamata a name that would haunt the world and lead, both in Japan and elsewhere, to major reforms in environmental safeguards. He made citizen environmental action a household concept—something talked about on network morning television and described in popular magazines. He added to the public policy calculus profound consideration of a public trust in natural resources and the environment. He moved us to thinking about property in ways that society must consider it if our natural environment is to be sustainable.