

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. 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 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."

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 vw