Book Reviews

Taking to the Courts

Defending the Environment. A Strategy for Citizen Action. JOSEPH L. SAX. Knopf, New York, 1971. xxiv, 262 pp. $6.95.

In the United States we have traditionally looked to government to protect and enhance environmental values. Our legislatures have adopted laws intended to assure that certain governmental and private activities will be conducted in a manner appropriate from the standpoint of environmental considerations. Enforcement and administration of these laws have been delegated by the legislatures to administrative agencies, many of which are also empowered to perform the quasi-legislative function of establishing more specific environmental protection standards. The theory of democratic government underlying this structure is that the voice of the public will influence the legislatures to adopt policies reflecting public sentiment as to the weight to be given to environmental values, and the legislatures will influence the administrative agencies accordingly. That this system has not worked adequately is manifest in the environmental crisis we now perceive.

Until recently the courts played at best a trivial role in defending environmental values primarily because they had difficulty in concluding that a citizen or citizens' group had "standing" to initiate litigation intended to assert the interest of the public where no personal right of the plaintiff could be shown to be injured or threatened. This barrier was torn away in the 1965 decision of the United States Court of Appeals for the Second Circuit in the *Scenic Hudson* case. The decision opened the floodgates to a multitude of citizens' suits to defend and vindicate environmental values. The author of this book, Joseph L. Sax of the University of Michigan Law School, has been a pioneer in the rapidly developing field of environmental law. Although the legal profession has always been concerned with environmental problems, this concern was, until recently, subsumed within the various traditional categories of substantive law such as torts, property, water law, nuisance. The *Directory of Law Teachers* for 1968–1970 did not identify environmental law as a field. The 1970 edition shows it as a substantive area of law school curriculum and lists 85 law teachers who teach in this field.

Sax has been a leading exponent of the view that environmental litigation in the courts is essential to the maintenance of environmental quality. In this book, he explains at length the need for, and the role of, such citizen-initiated litigation. The book is addressed to a general audience and not particularly to lawyers; indeed, one of its deficiencies from the lawyer's standpoint is that Sax discusses the "case studies" involving legal action in so simplified and summary a manner that it would be difficult for a lawyer who had no other knowledge of them to accept the validity of the inferences Sax draws from them.

Sax's villain is the "administrative agency." We are, he says, a "peculiar people" because, although committed to democracy, we have permitted the administrative agency to stand between the people and those who abuse the natural environment. He points out persuasively that the administrative procedures tend to discourage and even prohibit public participation in the decisional process. As a consequence, when administrative agencies make decisions affecting the environment, supposedly in the public interest, they do not know what the public interest is. On the contrary, Sax points out, agency decisions are typically based on narrow interests and pressures to which the bureaucracy is particularly susceptible. Initiation of litigation is a means—in many cases the only effective means—whereby a citizen may gain access to the decisional process and make his voice heard. Unlike the proceeding before an administrative agency where the citizen appears as a "supplicant," he comes to court as a claimant of asserted rights. To the extent that these environmental rights are recognized by the court, a value or price is placed upon them.

Sax emphasizes throughout his book that he does not advocate that courts supplant legislatures and administrative agencies in the making of decisions that balance environmental values against other considerations. Rather, his objective is to provide "an additional source of leverage in making environmental decision-making operate rationally, thoughtfully, and with a sense of responsiveness to the entire range of citizen concern." Judges who are outsiders to the controversy, who are not absorbed in environmental matters, and who are generalists and not experts, can take a fresh view of the matter to determine whether all relevant considerations have been adequately taken into account. Sax does not argue that judges should finally resolve environmental issues on their merits. Instead, he points to the judicially imposed moratorium or the judicial remand to the legislature as means for perfecting the democratic process and assuring that the public voice will be heard and considered in the ultimate decision. Thus, when he speaks of litigation as promoting environmental values by placing a price on them, he points out that the price will not always be reckoned in dollars; rather, "the price exacted for environmental modifications is usually some form of genuine public assent." Litigation may be effective in achieving these results even if the proponent of environmental values loses. The mere fact that litigation is initiated may persuade the decision-makers to take a second look.

Sax's thesis is built on a narrow range of cases. His "case studies" all involve "projects"—landfills, highways, pipe-lines, and the like which have an immediate and obvious impact on the environment. The administrative agencies he discusses are not the typical regulatory ones, but rather those that have primarily operating and programmatic functions or a mix of these functions with some regulatory functions. It is by no means clear that his thesis can be applied fully to the more subtle forms of environmental

abuse attributable to technology-bred insults such as insecticides, radiation, and noise. Sax seems to recognize this possible limitation in pointing out that a "judicially declared moratorium" has not been invoked in any cases in which there is a high degree of uncertainty as to the nature and extent of possible environmental injury. Similarly it is not clear that Sax's criticisms of the "administrative agency" are equally applicable to the purer form of regulatory agency such as the Food and Drug Administration, the Federal Power Commission, and state pollution control boards.

Nevertheless, it is difficult to quarrel with his general thesis. It is vitally important that administrative agencies be fully accountable to the public, and citizens' suits are an important means of achieving such accountability. Moreover, a highly useful purpose is served in subjecting environmental decisions made by experts, who typically have narrow experience and interests, to another forum, in which a fresh look will be given on a common-sense basis by an objective, detached judge. And beyond this, recognition that citizens have a "right," legally enforceable, to environmental quality seems to be an indispensable element in obtaining and maintaining environmental quality. Finally, Sax wisely does not argue that the courts should be the final arbiter of the balance between environmental rights and other considerations. He recognizes that in a democratic society this balance must be struck in the legislature, preferably with adequate inputs from the public, and that the role of litigation in the courts is primarily to vent public concern and to focus the issues for legislative consideration.

Sax's view that citizen-initiated litigation will improve the operation of the democratic process in resolving environmental issues is closely related to the broader question of technology assessment that is now being discussed. There seems to be broad agreement that some form of new governmental institution is required to assess technology in a manner which will appropriately identify, appraise, and balance pros and cons as a predicate for legislative action that will enable society to enjoy maximum benefits from technology with minimum costs and risks. Most of this discussion presupposes that the technology assessment function will be performed by one or more agencies staffed with appropriately interdisciplinary experts. Although a technology assessment board would not be the type of decision-making administrative agency that Sax criticizes, it would be subject to much the same criticism. Experts deeply immersed in technical problems have little basis for knowing what technological benefits the public wants and what price it is willing to pay for them. Assessment is therefore likely to boil down to what price the experts think should be exacted from the public in order that the public will have the benefits the experts think it should have.

It is easy to understand why environmental values, and human values generally, have so often in the past been sacrificed on the altar of progress. Whenever consideration is given to use of a technology or to some activity that will alter the environment, there are always strong vested interests, usually well-heeled, to articulate and advocate the benefits. Rarely, however, at least in the early stages, are many people to be found who are aware of the risks or who have sufficient interest or financial resources to articulate and argue the negative factors. Moreover, the benefits are usually obvious and immediate, whereas the risks tend to be speculative and more remote. It is to be expected that the authorities will give more weight to obvious, immediate benefits than to speculative and remote risks. This is another way of stating Sax's point that environmental values do not have a price put on them in the ordinary course of administrative decision-making.

Helpful though Sax's citizen-initiated litigation can be, use of the courts is a rather indirect and inefficient means of perfecting the democratic process for decision-making purposes. Some thought should be given to more directly improving the decisional processes of our legislatures and administrative agencies by assuring greater public participation and fuller consideration of environmental and human values at the time the decisions are first made. Although Sax does not dwell on this point, he does suggest at one point in his book that the essence of his thesis is "an enlargement of the adversary process." Lawyers generally think of the adversary process in terms of litigation in the courts. Much can be accomplished, however, by enlarging the adversary process within the forums of the administrative agencies and the legislatures as well. Perhaps we should think about creating governmental institutions whose sole role would be to represent environmental values vigorously in administrative agency proceedings. Such an agency might also play a major role in propagandizing environmental values and risks in the public arena and in our legislatures. The kind of adversary process which Sax views as indispensable would then come into play at a much earlier time. Such an approach, coupled with citizen-initiated litigation, would do much to enhance our ability to cope with the environmental crisis.

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Comparative Neurology

The Primate Brain. CHARLES R. NOBACK and WILLIAM MONTAGNA, Eds. Appleton-Century-Crofts, New York, 1970. xiv, 320 pp., illus. $18.75. Advances in Primatology, vol. 1.

Nothing excites our wonder and curiosity so much as the evolution of the mind of man. Hence our fascination with primates and especially the primate brain. For if the brain of primates does not hold all the secrets of man's mind, it provides, at the least, the starting point for the inquiry. The outstanding structural change in the brain as the primate scale is ascended from tree shrews and lemurs to apes and man is the increased differentiation of cortical architectonic areas—the number of areas increases as does the contrast between them. It is therefore remarkable that after an auspicious beginning architectonic analysis became discredited. Why? Suffice it to say that structural subdivision cannot stand by itself but requires support from some unifying functional principle; and the traditional principle that association areas of the higher primates constitute the most *specialized* part of the cortex serving "higher" integrative functions (which leaves simpler sensory processes to sensory areas) could not be supported. A welcome revitalization of cortical architectonics is achieved in this book in a chapter by Friedrich Sanides. According to Sanides, the cortex of man con-