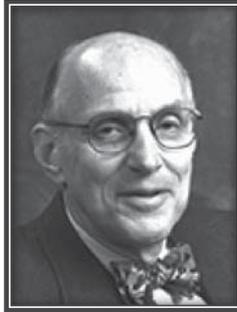


JOSEPH SAX, A HUMAN KALEIDOSCOPE

*Zygmunt Plater**



Joseph L. Sax

Probably more than any other person most of us will ever have the opportunity of knowing, Joe Sax was kaleidoscopic in the way he projected his mind and lived his life as a scholar, teacher, and citizen seer. Shifting his analytical gaze from challenging context to challenging context, he repeatedly threw rich new patterns of perceptive light, thoughts broad and deep, onto a remarkable range of puzzles. Joe's ability to think broadly and deeply influenced and reshaped the way that his students, friends, colleagues, and readers understood the intricacies, beauty, and challenges of the world around them. Others in this collection of essays are exploring the variegated dimensions of his work and teaching. This short piece—noting some selected vignettes of Joe's time away from the podium and his typewriter—tries to capture at least a partial sense of how he carried himself as a person through the years of his professional life.

Joe Sax was never one for chatter, nor great at small talk, but when you spent time with him it seemed that he would always ultimately engage you in some thoughtful inquiry. He enjoyed pondering—wondering deeply about things going on around him near and far, and what they meant—and sharing those thoughts with those around him.

Here's an example of Joe in the wild:

The Bruce Peninsula in Ontario is a narrow finger of bedrock and forest thrusting fifty miles out from the mainland, isolating beautiful Georgian Bay from the rest of Lake Huron. It's an extension of the long dolomite

* Professor of Law and Coordinator of the Land and Environmental Law Program at Boston College Law School. The author was one of Professor Sax's students, mentees, neighbors, colleagues, friends, and occasional hiking companions over the years, beginning in Ann Arbor in 1971. I gratefully acknowledge the assistance of Marika Plater in the preparation of the Essay; errors that remain are entirely parental.

limestone escarpment that forms Niagara Falls and ultimately traces a continuing arc beyond Lake Huron, partly encircling Lake Michigan. The Bruce Trail, especially the last twenty miles before the escarpment dives under the lake at Tobermory, was a wild, scraggily, ill-defined track along the heavily-forested crest of the bedrock ridge.¹ In a two-day trek we saw no other human. Vernal pools were perched here and there on high ground along the trail between thick stands of trees. Rugged cliffs dropped straight down 150 feet to the bay waters and continued their plunge far into its depths. Peering out and down from the cliffs one could see loons passing below; the waters were so clear you could not be exactly sure whether they were flying slowly above the surface or swimming fast beneath it chasing fish. It was indeed a beautiful place, but in many stretches the underbrush was extraordinarily thick with thorns, and mosquitos were everywhere—an attacking horde from hell. We did not talk much, tugging through tangles, slapping and itching, except for occasional rants from me exclaiming about the bites, scratches, and the constant whine of the hovering little bloodsuckers waiting to attack yet again. Joe was buddhic in his trudging along the trail, mostly lost in thought. We pitched our tent on a high ridge, making a smudge fire to cook a sparse dinner and keep the mosquitos at bay. Around a campfire like that, most people would gab about the tough going on the trail, good times hiking in the past, how any food tastes so good after a long day bushwhacking, the call of the loons, how beautiful the stars in the nighttime sky . . . but not Joe:

I've been wondering what it is we've been experiencing," he said, or words to that effect. "This place is wild, rugged. The sounds, smells, everything we see in this place—not shaped by humans, any of it . . . it feels as if civilization is very far away. . . so I've been thinking. . . would it make any difference to us, in how we feel, if for example we knew there was a highway tunnel 500 feet down there in the bedrock beneath us, completely imperceptible, carrying four lanes of busy traffic between Ontario and Michigan as we sit up here in the dark . . . ?

1. Much of Bruce Peninsula is now a part of Bruce Peninsula National Park, one of Canada's largest national parks and a designated UNESCO World Biosphere Reserve. Bruce Trail, the Park's Oldest hiking trail, has retained its rugged and wild nature. The trail runs 782 kilometers along the Niagara Escarpment.

Not your average trail conversation. When you think about it, he was posing for himself and his companion a really nuanced question probing into what it is about wild places that makes them special.²

On another tough hike, we grappled up a long-abandoned trail up Thunderhead Mountain on the Tennessee side of the Great Smoky Mountains with Lee Bollinger and Jeff Haynes. Much of the trail was at a forty-five-degree incline through tangled acres of wild rhododendron. Getting through what the mountain folk called these “laurel hells” often required crawling up on hands and knees below matted branches, the ground muddy from erratic rain squalls, dragging packs behind us. None of us talked much. Finally, reaching a high north-facing ridgeline overlooking 100 square miles of thick green-forested national parklands—including three clusters of mountains and the highest summit in the Eastern United States—we gasped. We had known that hidden within one of the deep valleys in the mountain-landscape lay the town of Gatlinburg, a linear inholding within the park along a branch of the Little Pigeon River, but the town had always been completely invisible from viewpoints within the Park. Except now it wasn’t. Now we saw a solitary, glistening, white tower thrusting up priapically right in the middle of the broad, wild mountain view-landscape. Despite pitched local opposition, the Sheraton Corporation had just constructed its Park Vista Hotel in Gatlinburg, its upper levels thrusting up over the valley ridgeline, offering spectacular 360-degree views of an unmarred 400 square miles of parkland—while from the high Great Smokies overlooks like Thunderhead Ridge it was hard for anyone’s eye to focus on anything but the Sheraton tower.³

Joe stared out from the ridgetop, silent, shaking his head in disbelief and distress. Later, at the campsite back down the mountain, he started wondering with us about how a national park agency might be able to raise legal preemptive questions about such aesthetic or physical impositions upon public parks. A very influential law review article resulted.⁴

A little-remarked upon experience of Joe’s in Alaska in the late 1980s showed how, in a politically hypercharged field setting, he could give a con-

2. That question echoes implicitly within *MOUNTAINS WITHOUT HANDRAILS*, JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* (1980), and I still use it with students when we explore the Wilderness Act of 1964, 16 U.S.C. §§ 1131-36 (1964).

3. The Park Vista tower, at 705 Cherokee Orchard Road, Gatlinburg, TN 37738, was subsequently a Hilton hotel and now is a Doubletree hotel. The view from the upper levels of the Park Vista Hotel is particularly impressive because, in the northwestern sector of the Park, only from there do you not see the Park Vista Hotel. *THE PARK VISTA*, <http://www.parkvista.com> (last visited Oct. 2, 2014).

4. *Helpless Giants: National Parks and the Regulation of Private Land*, 75 Mich L. Rev. 239 (1976).

structive good-faith ear to a multifarious spectrum of antagonistic voices, at least if he considered they were speaking in good faith: The Wrangell-St. Elias National Park and Preserve in south-central Alaska is the largest park managed by the National Park Service, bigger than Switzerland, more than 20,500 square miles, designated as an International Biosphere Reserve and UNESCO World Heritage site. The wilderness portion of the park (15,000 square miles) is the largest designated wilderness in the United States.⁵ Established in 1980 by the Alaska National Interest Lands Conservation Act,⁶ the new park was immediately the focus of pitched political battles coming from a wide variety of passionate stakeholders: some trying to decommission the park entirely, some trying to remove the residents who had moved into abandoned mining-era ghost towns, the latter wanting to stay where and as they were, some desiring the National Park Service to allow the land and the old mining structures to go wild, some advocating a variety of forms of commercial development, and so on. A few years after the park's inception an environmental activist living in the park asked Joe to come to Alaska to talk with all the contesting factions—local homeowners, low-income subsistence users, the National Park Service, potential commercial entrepreneurs, those interested in historic preservation, the American public generally, and more. He came, spent time listening to all, and produced a remarkably deft, helpful report,⁷ as one of the Alaskan participants recently recalled:

Joe had good, stern, frank advice for *everyone* in a way that had not been seen or articulated before. . . . It was almost like he was having private conversations on the page. More people read and responded to that report than any other in the Park. He recognized that issues were complicated and layered. Everyone was handed responsibilities and goals. . . . He got people to think. If they chose not to follow it was more harsh for them to complain to someone else. . . . He showed that the Park Service and the state can't do everything, and that locals had responsibilities too. This was stunning to me and gave me reason to pause. . . . He had a high layer of

5. NAT'L PARK SERV., *Wrangell - St Elias Wilderness*, <http://www.nps.gov/wrst/wilderness.htm> (last visited Oct. 2, 2014).

6. 16 U.S.C. § 410hh (2013). Encouraged by Professor Sax, one of his students, Roger Conner, subsequently an active citizen environmentalist, took part in early reconnaissance explorations of the Wrangells, gauging the park's viability via extended backpacking and kayaking transits, in the face of wild rivers, grizzlies, and more.

7. Joseph L. Sax, *Keeping Special Places Special: McCarthy-Kennicott and the Wrangell-St. Elias National Park* (Option Paper, Nov. 1990), available at <http://friendsofkennicott.org/Resources/Keeping-Special-Places-Special%20.pdf>.

perspective and could look through the layers and see all of the roles. . . . He created a local response where more people realized it was not just the Park Service that was holding all of the cards.⁸

Subsequently the Sax report was used extensively by Park Superintendent John Jarvis in the mid to late 1990s. It has been given to each subsequent new superintendent (changing every three or four years on average) to encourage them to understand the local dynamics of our largest national park, and it is part of the current conversation as the National Park Service finalizes its operations plan for the abandoned Kennicott mining area. In Alaska, it is virtually unprecedented for a visitor from “outside,” who spent less than a month in the community, to gain so much widespread respect.⁹ It was a vivid example of how Joe, an instinctively shy person, was able to connect with many different audiences, listening attentively to all and working to find common ground,¹⁰ when an issue important to him was at stake.

Joe Sax was indeed instinctively shy. Once considering becoming a rabbi, he turned instead to the professoriat, perhaps sensing that the daily personal challenges and multi-layered duties of reactively ministering to a tumultuous modern congregation did not fit his strengths. He did not aspire to be “a leader of men”—he was drafted into the peacetime military after college, and thereafter took wry pride in the fact that the officer corps never considered promoting him. As a professor he instead was able, all his life, to focus with intensity upon the issues he found most important and best suited to his personal abilities, a focus that few except the most exalted in the Talmudic rabbinate (or the officer corps) are able to enjoy.

When he stood to deliver a sermon-like statement of his thoughts and analysis, Joe was masterful, his natural shyness cloaked in the opportunity to share an important inquiry with his listeners. Speaking without cant or advocacy artifice, he would speak of the problem at hand as a significant occasion for all in the audience to apply their concern and good faith efforts to address, understand, and resolve a challenge in the interest of the public. He would often take a mundane state or local policy issue and show its historical linkage to significant global issues. It would be immediately clear

8. Messages from Margot Higgins, Ph.D. Candidate, Department of Environmental Science, Policy and Management, Society and Environment Division, University of California at Berkeley, to author (June 20, 2014 and Aug. 12, 2014) (quoting Sally Gibert, Wrangell Mountains Center, who served as the 31-year ANILCA Coordinator for the state, NPS, and local communities in Alaska) (on file with author).

9. *Id.* (June 20, 2014 and Aug. 11, 2014).

10. Although, from Sax’s exposure to certain politicians and corporate minions, he had on a number of occasions decided that good faith was not theirs. At those he leveled sardonic comments and head-shaking non-engagement, wondering how they could be so shallow in thinking and motivation.

to all that he was not building a political platform for himself. He was presuming that what all parties ultimately wanted was what was best for society, and he would explore with them suggested paths and principles that might lead them there.

If one took a transcription of the tape of almost any of Joe's talks, you could just about set it in type exactly as he had spoken it—that reportedly happened on at least one occasion¹¹—his words were that beautifully weighed, organized, phrased, and presented. It was like reading almost anything in *The New Yorker* magazine; you followed the flow of his talks for the grace of his words as well as their meanings.

In the privacy of his office Joe was a bit like a guru—a description which, if he had ever heard it, would have elicited a skyward rolling of his eyes and a wry little shake of his head. He would listen to his visitor, maybe giving a slight, knowing nod from time to time as he listened; make some sort of framing observation, putting things in context; give another slight nod of the head; gaze out the window or over his shoulder; then, often, turn and pose a penetrating question, or an important possible analogy, or “Maybe you should try thus-and-so. . . .”

For many years he sat in his office beneath a large framed pastel-colored Age of Aquarius-type poster depicting splashing water on a city sidewalk, with the motto “*Citerne rincer, rivière en danger!*”¹² He'd decided one day that he'd like to learn French, partly because he wanted to read Proust in the original,¹³ and he went at the task with such extraordinary focus that within two years he was able to teach an environmental law course in French at the Sorbonne in Paris. It was an indication not only of his personal abilities but also that he never considered himself only an American; he was a citizen of the world, and he attracted students and adherents from around the globe. His writings created linkages and friendships wide and far, both inside and outside the environmental law community. The distinguished British author Jessica Mitford once was brought to

11. See Joseph L. Sax, *The (Unhappy) Truth About NEPA*, 26 OHLA. L. REV. 239 (1973), which reportedly resulted from a transcript of the audio tape without his prior knowledge, though he was given an opportunity to edit and approve it before it was published. See also Joseph L. Sax, *An Environmental Agenda: the Task Before Us*, Mich. L. Env'tl. L. & Pol'y Program Lecture Series (April 11, 2011), <https://umich.box.com/s/zs01kdb58c7fyqqfo91d> (this lecture was typed out before it was delivered, except for the initial story, which reflects his normal clean-parsed spoken style); Joseph L. Sax, *Public Trust: Philosophical and Legal Implications for California's Future*, California Colloquium on Water (Aug. 2007), <https://www.youtube.com/watch?v=ZfPXMIZthlc> (also reflecting Professor Sax's familiar spoken style – speaking here from a sketch outline).

12. The poster had been removed surreptitiously from a wall in Paris in 1973 by Stefanie Plater Gullans; the French statute of limitations has presumably run.

13. Plus, Professor Sax always liked good food and fine wine.

the United States to be honored at a Washington D.C. award reception for her work, and was asked for a list of Americans she knew and wished to have invited. The hosts made a mistake: when an invited eminent lawyer, Joseph Sachs, was introduced at the reception she cried out, “*You’re not Joe Sax!*”—and the hosts had to rush out to find the real Joe, who providentially was in the capital at the time.

With his students, Joe worked hard to engage with them in personal terms despite his natural sense of privacy and reserve. Each September his home and backyard were thrown open for a huge student barbecue—to kick off the year, to introduce student leaders of ongoing projects, to build a sense of environmental camaraderie, and to hear a few words from Joe—from which most carried away a special sense of vision and purpose, not to mention becoming avowed Sax-ists. Over the years Joe shaped and changed hundreds of lives—this is absolutely not an exaggeration—including mine; and not a few of his students who went into teaching, including me, repeat the Sax barbecue gathering each year with their own students.

A host of significant student-run projects sprang from the annual barbecues and the office visits he shared with students. Because they weren’t yet able to bring courtroom litigation, he reminded students that his Michigan Environmental Protection Act (MEPA, the Sax Act¹⁴) included a provision applying the public trust law to administrative agency actions in a fashion that allowed them as students much easier citizen interventions.¹⁵ A number of different student initiatives followed. In just one three-year period¹⁶ they undertook: an embarrassing monitoring of a Water Resources Commission enforcement file demonstrating a twenty-five-year disregard for abject acid pollution of the Looking-Glass River,¹⁷ successful pressure

14. Andrew Cohen, *Professor and Environmental Law Pioneer Joseph Sax Dies at 78*, BERKELEY LAW NEWS ARCHIVE, Mar. 11, 2014, <http://www.law.berkeley.edu/16842.htm>.

15. MICH. COMP. LAWS ANN. § 324.1705 (West 2014) (“In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare.”).

16. The three-year period referenced here constituted three of the years personally observed by the author, 1971-1974.

17. See *The Utilex Case File*, in Z. PLATER, R. ABRAMS, ET AL., ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY 198-201 (4th ed. 2010)(the agency file hounded by the University of Michigan Environmental Law Society, 1970-1974). The most expeditious enforcement action noted there in that agency file’s twenty-five-year chronology is: “Spring, 1971: Environmental Law Society has been investigating WRC files; at next meeting WRC passes resolution limiting citizen access to its files.” *Id.* at 199.

and drafting for passage of the state wetlands regulations,¹⁸ conflict-resolution rules for conflicting river recreation modes,¹⁹ a Lake Erie estuary protection,²⁰ assistance for the Detroit Wayne County Air Pollution Commission enforcement actions,²¹ passage of the Ann Arbor (and thereafter statewide) returnable bottles ordinance (subsequently the model for a host of other states' returnable bottles statutes),²² and at least a half dozen more.

In 1972 Joe's students organized and instituted a University of Michigan Arts & Sciences environmental law course for undergraduates. Within two years it was running five or six sections taught by two-person law student teams, enrolling upwards of 200 undergraduates plus a number of graduate students, including at least one M.D. post-doc in the School of Public Health,²³ in a program subsequently echoed at a half a dozen or more other colleges and universities, generating thousands of undergraduate

18. The wetlands regulations comments prepared by the Environmental Law Society were used in preparation of the first set of state rules, antecedent to the current regulations (R 281.921) under the current statute, Part 303, Wetlands Protection, of the Natural Resources and Environmental Protection Act (NREPA), as amended. MICH. COMP. LAWS ANN. § 281.701-.722 (West 2014).

19. The Environmental Law Society drafted the original regulations promulgated under the Michigan Natural Rivers Act, balancing competing uses for the state's natural rivers—commercial canoe-rental franchises versus wading trout anglers and other non-commercial recreational river users. MICH. COMP. LAWS ANN. § 324.30501ff (West 2014).

20. The Pointe Mouillée state wildlife refuge at the outlet of the Huron River had been compromised by erosion of a barrier island, and the site was proposed as a dredging material dumping area for Detroit River channel improvements. See generally *Pointe Mouillee Confined Disposal Facility and State Game Area*, U.S. ARMY CORPS OF ENG'RS, DETROIT DIST., <http://w3.lre.usace.army.mil/OandM/ptmllee/ptmlleebak.html> (last updated March 1998). Pressure upon the state Water Resources Commission and the Army Corps of Engineers helped force a compromise that incorporated extensive environmental monitoring and mitigation, and an artificial barrier island.

21. At the request of Morton Sterling, Director of the Detroit and Wayne County Air Pollution Control Board, the Environmental Law Society under Professor Sax's direction researched and assisted in framing public nuisance actions to provide a simple, effective alternative to the byzantine enforcement procedures of the state code, which were proving extremely complicated to implement.

22. The Environmental Law Society (ELS) was instrumental in pushing the Ann Arbor City Council to pass the city's first bottle bill and subsequently the state bottle bill that followed it. The ELS efforts on the bills were catalyzed by an energetic Ann Arbor High School senior who enlisted the society in the crusade; the local law was declared unconstitutional by Washtenaw County Judge Robert Deakes on the stated ground that "it attempts to regulate a legal ongoing business" (or words almost exactly so), but that problematic holding was soon mooted by the state law's passage.

23. The teaching program and materials were organized by Peter Schroth and the author, SJD students, with the support of ten JD students including Robert Abrams, '73. For a time the course pulled a number of Public Health School students into an active alliance with the Law School's Environmental Law Society.

course alumni around the nation who have learned environmental law, policy, and the structure of the legal system through its classes.

If compiled in one place, the research and writing of Joe's students before and after their graduation over the years would form a voluminous and significant mass.²⁴ The course materials created for the A&S course, for example, ultimately became ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY, a national textbook now in its fourth edition, which in most of its editions carries an index entry that reads: "Sax, Joseph L., *passim*."²⁵ And Joe's students and adherents have carried his ideas and approach to environmental problemsolving—"Saxism"—into a host of courtroom environmental enforcement actions, including Roger Conner's precedent-setting Pigeon River litigation and its progeny,²⁶ the Tennessee endangered species controversy that was carried up through the Supreme Court and an environmental Star Chamber by the author and his students,²⁷ John Dernbach's public trust impact on the Pennsylvania Supreme Court,²⁸ and Mary Wood's public trust initiatives on climate disruption.²⁹

When you saw Joe on a family canoe trip with Elli and their three girls, or talking with the girls about their school projects, or later about the grandchildren, you could see how deeply bonded Joe felt to his family (although he several times expressed a general mystification about how the mind of young females worked, a mystification shared especially in those days by many fathers of daughters). When Joe moved west to Berkeley, in part to serve Elli's health needs, it was no surprise to find soon that the

24. See, for example, many of the works noted in this group of memorial essays, 4 MICH. J. ENVTL. & ADMIN. L. (2014).

25. Z. PLATER, R. ABRAMS, ET AL., ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY ref. 71 (3d ed. 2004); Z. PLATER, R. ABRAMS, ET AL., ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY ref. 67 (2d ed. 1998); Z. PLATER, R. ABRAMS, ET AL., ENVIRONMENTAL LAW & POLICY: NATURE, LAW & SOCIETY ref. 32 (1st ed. 1992).

26. See, e.g., W. Mich. Envtl. Action Council, Inc. v. Natural Res. Comm'n, 275 N.W.2d 538 (1979) (first major MEPA case).

27. See Tenn. Valley Auth. v. Hill et al., 437 U.S. 153 (1978) (the "snail darter" case); Z. PLATER, THE SNAIL DARTER AND THE DAM: HOW PORK-BARREL POLITICS ENDANGERED A LITTLE FISH AND KILLED A RIVER (2013); The Snail Darter and the Dam, DIGITAL COMMONS @ BOSTON COLLEGE LAW SCHOOL, (last visited Oct. 2, 2014), <http://www.bc.edu/snaildarter>.

28. See Robinson Twp., Washington Cnty., PA. v. Pennsylvania, 83 A.3d 901 (Pa. 2013) (the court relied on Dernbach's work to support its conclusions).

29. See MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE (2014) (advancing Sax's public trust doctrine theories in environmental enforcement); Mary Christina Wood, *Nature's Trust: A Legal, Political and Moral Frame for Global Warming*, 34 B.C. ENVTL. AFF. L. REV. 577 (2007) (applying Sax's public trust doctrine theories in a federal environmental enforcement context); OUR CHILDREN'S TRUST, www.ourchildrenstrust.org (last visited Oct. 2, 2014) (information on advancing a lawsuit under Mary Wood's atmospheric public trust theory rooted in Sax's teachings).

whole family had become a California clan.³⁰ He devoted himself to Elli's care, meanwhile insisting that she was his own best support, and when suddenly she left us last December it was not totally surprising to those who knew and loved them that he would follow soon.

Joe Sax, in all his remarkable dimensions, will live on in our hearts and work, and he will forever have a special place in our nation's environmental history.

30. At Boalt Hall, Prof. Sax's parental and ethical instincts also led him to take on an active leadership role in the University of California-Berkeley's sexual harassment council.