



# COLUMBIA LAW SCHOOL

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SABIN CENTER FOR CLIMATE CHANGE LAW

## Environmental Law: Time to Reboot

2016 David Sive Memorial Lecture<sup>#</sup>

By James Gustave Speth\*

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I have had more than a few heroes in my life, but David Sive has a special place on that list. Let me explain.

In the fall of 1968, I had a useful idea. I was riding the New Haven Railway into New York City reading the New York Times, and I read one story about the National Association for the Advancement of Colored People (“NAACP”) Legal Defense Fund’s litigation, and nearby in the Times I read another about an environmental issue. Lawyers are trained to think by analogy, and it hit me: get a group of my impressive Yale Law classmates together and start a public interest law firm for the environment!

Events then moved quite rapidly. Every fellow student I asked to join the group accepted, so that soon there were seven of us and we had to tell others who wanted to join with us to sit tight and wait. Lawyers tend to believe we can do anything, and it never occurred to us to doubt that we could do the job. But it did occur to us that we might not find the money.

At that point in the history of American environmentalism, there was hardly even the word “environment” as we now use it. There was no environmental law, no casebooks, and Yale offered no courses in the field. To the best of my knowledge, neither did any other law school. But I did identify one attorney in New York City who practiced environmental law. Numerous people told me: go see David Sive. So I did, and from that point on he was enormously helpful. Sive

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\* James Gustave Speth is a professor at Vermont Law School and the co-founder of the New Economy Law Center. Professor Speth co-founded the Natural Resources Defense Council and has served as chairman of the U.S. Council on Environmental Quality, administrator of the United Nations Development Program, founder and president of the World Resources Institute, and dean of the Yale School of Forestry and Environmental Studies. He presented the David Sive Memorial Lecture at Columbia Law School on October 20, 2016. This paper is based on his presentation.

mentioned something that turned out to be crucial. He said, “Do you know, recently someone was seated in that same chair that you are in who’s been asked by the Ford Foundation to do a study of the creation of exactly what you’re talking about.” So I said, “Well, can you tell me how I can reach him?”

He did, and I contacted the Ford Foundation’s consultant and asked him, after we had talked a couple of times, to come to Yale to meet with our group and some supportive Yale faculty. He expressed great interest in that, and he did come, on November 11, 1968. Apparently he liked what he saw, and that eventually led to a founding grant from Ford. I will always be thankful for David Sive who believed in us and connected us with the foundation.

The story of how we got from a ragtag group of law students to the Ford Foundation grant two years later—the grant that launched the Natural Resources Defense Council (“NRDC”) in 1970—is an interesting one, well told by John and Patricia Adams in their excellent book *A Force for Nature*, so I will not repeat it here. I will just say this. David Sive was a critical figure both in the launch of NRDC and in the overall development of environmental law. In that field he was our leader, for decades. As for NRDC, we asked David to join the NRDC board right away in 1970, and he served brilliantly for 22 years. David was a gracious and gentle man with a remarkably quiet mien, but when he spoke, everyone listened, and listened well.

Though one might not know it today, the American environmentalism of the 1960s and early 1970s was rather radical. For starters, the environmental realities were radicalizing.

Many of the nation’s leading environmental thinkers and practitioners of the period concluded that deep societal changes were needed. Gross domestic product (“GDP”) and the national income accounts were challenged for their failure to tell us things that really matter.

A sense of planetary limits was palpable. *Limits to Growth* appeared in 1972 and sold over a million copies. Its authors and others saw a fundamental incompatibility between limitless growth and an increasingly small and limited planet. Leading scientists Paul and Anne Ehrlich and John Holdren in 1973 argued for an economy that would be “nongrowing in terms of the size of the human population, the quantity of physical resources in use, and [the] impact on the biological environment.” Joined with this was a call from many sources for us to break from our consumerist and materialistic ways—to seek simpler lives in harmony with nature and each other. These advocates also recognized, as the Ehrlichs and Holdren put it, that with growth no longer available as a palliative, “one problem that must be faced squarely is the redistribution of wealth within and between nations.” They also recognized the need to create needed employment opportunities by stimulating employment in areas long underserved by the economy and by moving to shorter workweeks. And they saw that none of this was likely without a dramatic revitalization of democratic life.

Digging deeper, ecologist Barry Commoner was not alone in asking whether capitalism is compatible with ecological imperatives. In his 1971 bestseller, *The Closing Circle*, Commoner’s answer was “no.”

Today's environmentalists could benefit from going back to these ideas of the 1960s and early 1970s, rediscovering their movement's more radical roots, and stepping outside the system in order to change it before it is too late. That's what I want to talk with you about this evening: stepping outside the system and changing it before it is too late. We need to reboot American environmentalism and build a new environmental law in the process.

If environmental protection in America were working as we hoped it would on the first Earth Day in 1970, there would be no need for talk about re-booting. But here we are, forty-six years after the burst of energy and hope at the first Earth Day, headed toward the very planetary conditions we set out to prevent.

Internationally, there has been strong progress under the Montreal Protocol in protecting the ozone layer and some progress on trans-boundary acid rain. And now the robust Montreal Protocol has been applied to curb emissions of hydrofluorocarbons ("HFCs"), one of the most potent greenhouse gases. But, most of the threatening global environmental trends highlighted in the early 1980s have worsened. Global-scale problems are now deeper and more urgent than ever. It would be nice to think that the international treaties and action plans, the main focus of efforts to date, have at least given us the policies and programs we need, so that we could at last get on with it. But that is not the case. Despite all the conferences and negotiations, the international community has not laid the foundation that would now allow rapid and effective action.

In general, the issue with the major treaties is not weak enforcement or weak compliance; the issue is more fundamental: weak treaties. Typically, these agreements are easy for governments to slight because the treaties' impressive—but nonbinding—goals are not followed by clear requirements, targets, and timetables. And when there are targets and timetables, as in the recent Paris climate accord, the targets are often inadequate and means of enforcement are lacking. I am delighted with the progress reflected in the Paris agreement, but it requires too little and is not binding. In the end, the climate convention is not protecting climate, the biodiversity convention is not protecting biodiversity, the desertification convention is not preventing desertification, and even the older and stronger Convention on the Law of the Sea is not protecting fisheries.

In sum, global environmental problems have gone from bad to worse, and governments are not yet prepared to deal with them.

How could this happen? In international negotiations, governments have been far more effective representatives of their countries' business interests than of their citizens' environmental interests. Here and more broadly, the findings of political analysts David Levy and Peter Newell are pertinent: "Government negotiating positions in Europe and the United States have tended to track the stances of major industries active on key issues, such that the achievement of global environmental accords is impossible if important economic sectors are unified in opposition."

And there have been other problems. The underlying systemic drivers of global deterioration have not really been addressed; intentionally weak multilateral institutions have

been created, none of them, for example, rivaling the clout of the World Trade Organization; debilitating, consensus-based negotiating procedures have been left in place; and the economic and political context in which treaties must be prepared and implemented has been largely ignored.

The lion's share of the blame for all this must go to the wealthy, industrial countries and especially to the U.S., which has been a principal footdragger. That a tougher approach has not been used to protect the global environment reflects conscious decisions by the U.S. and others to stick with a weak and largely ineffectual approach, decisions made primarily at the behest of economic interests. The list of major international environmental and other treaties that the U.S. has failed to ratify is long indeed.

If that's the unfortunate track record at the global level, what can we say about our domestic issues? First, it must be said that the vigorous U.S. air and water pollution laws of the early 1970s have had a major impact. The air is much better; the water is much cleaner.

What is distressing, though, is that serious air and water quality problems have persisted even in the face of some very tough pollution control laws. In 1972, the Clean Water Act set the goal of returning U.S. waters to fishable and swimmable quality by 1983. Yet, the Environmental Protection Agency ("EPA") reports that more than half of the rivers and lakes surveyed were still too polluted to meet this standard and that barely half of the nation's estuaries are in "good" health, with almost two-thirds impaired for fishing.

On the air quality front, the American Lung Association reports that a third of all Americans live in counties where they are exposed to unhealthful levels of air pollution. Fine particulate matter and ground-level ozone levels (e.g. smog) have shown only modest improvement, with many counties in the East and in California having levels of these pollutants consistently exceeding EPA standards.

Outside of air and water pollution, America's environmental efforts have been dramatically less successful. U.S. energy consumption has climbed by more than 40 percent since 1970, accompanied by major growth in carbon dioxide emissions. (Carbon dioxide emissions are up by 30 percent despite a slow drop over the past decade.) We still depend on fossil fuels for over 80% of our energy. Our government's failure to deal with the grave threat of global warming and climate disruption is the greatest dereliction of civic responsibility in the history of the republic.

Another area of major failure has been the loss of the American land, including precious wetlands. In recent decades, Americans have protected an area the size of California as "forever wild" wilderness, an extraordinary accomplishment, but since 1982 the country has also paved, built on and otherwise developed an area fully the size of Florida. Amazing! And despite a federal policy of no net loss of wetlands, tidal marshes, swamps, and other wetlands continue to disappear at a rate of about 100,000 acres a year.

The U.S. has a rich wildlife heritage, but much of it is now threatened despite decades of effort to protect it. Estimates are that about 40 percent of U.S. fish species are threatened by

extinction, about 30 percent of flowering plants, and between 10 and 20 percent for birds, mammals, reptiles, and amphibians.

Between 1970's Earth Day and now, the miles of paved roads in the U.S. went up by more than 50 percent. Vehicle miles traveled almost tripled. The size of the average new single family home went up about 50 percent. Municipal solid waste generation went up over 40 percent. Huge trash dumps now rise like manicured mountains around our cities.

Americans' exposure to a chemical cocktail remains a serious concern. An additional 5 to 6 billion pounds of insecticides, herbicides, and other biocides are added to the world's environment each year, with roughly one-quarter of this amount released or sold in the U.S. It has been estimated that far less than one percent of this material may actually reach a pest. EPA's Toxics Release Inventory reports that some 4 billion pounds of chemicals were disposed of in the environment, as opposed to being treated or recycled. About a third of this huge amount was released to the surrounding air or waterways. And now we realize from Flint and elsewhere that we still have serious drinking water issues.

The latest Environmental Performance Index from Yale and Columbia ranks most of the world's countries. The U.S. is 43rd in air quality, 84th in fisheries, 90th in biodiversity, 44th in climate and energy and so on.

There are by now, I'm sure, many overarching critiques of U.S. environmental law. One of the most trenchant is Mims Wood's Nature's Trust, which I would recommend to you. Political scientist Richard Andrews has noted that U.S. environmental programs were never designed to deal with the underlying causal factors driving environmental decline. "Not surprisingly," he adds, "by and large they failed to do so."

Indeed, all we have to do—to destroy the planet's climate, impoverish its biota, and toxify its people—is to keep doing exactly what we are doing today, with no growth in the human population or the world economy. Just continue to release greenhouse gases at current rates, just continue to degrade ecosystems and release toxic chemicals at current rates, and the world in the latter part of this century won't be fit to live in. But human activities are not holding at current levels—they are accelerating, dramatically. It took all of human history to grow the \$7 trillion world economy of 1950. Now, we grow by that amount in a decade. The potential for much larger and continuing environmental losses is omnipresent.

Those of us in the U.S. environmental community certainly tried hard over several decades to address these issues, both domestically and internationally. A great experiment has been conducted. The evidence is in. Current approaches have been tried for over four decades. And look what has happened. We have won many victories, but we are losing the planet.

It is important to ask why. Something is terribly wrong. Clearly more of the same cannot be the answer. We've had decades of more of the same.

We American environmentalists must take some responsibility for what has happened, and I will return to this matter shortly.

But our part of the blame is decidedly the lesser part. To chronicle the much larger part, Frederick Buell writes that “a strong and enormously successful anti-environmental disinformation industry [quickly] sprang up. It was so successful that it helped midwife a new phase in the history of US environmental politics, one in which an abundance of environmental concern was nearly blocked by an equal abundance of anti-environmental contestation.” Nowhere has this disinformation campaign been more important—and successful—than with climate change, all brilliantly chronicled in Naomi Oreskes and Erik Conway’s book, *Merchants of Doubt*.

The disinformation industry was part of a larger picture of reaction. That reaction can perhaps be dated from Lewis Powell’s famous 1971 memorandum to the U.S. Chamber of Commerce urging business to fight back against environmental and other regulations. Powell, then a corporate attorney who would soon become a Supreme Court justice, urged corporations to get more involved in policy and politics. Since then, well-funded forces of resistance and opposition have arisen. Especially since Reagan became president, virtually every step forward has been hard fought. It is not just environmental protection that has been forcefully attacked but essentially all progressive causes, even the basic idea of government action in the interests of the people as a whole.

The story of the conservative assault on environmental protections has now been well told in Judith Layzer’s important 2012 book, *Open for Business*. Here is her summary: “Since the 1970s, conservative activists have disseminated a compelling antiregulatory storyline to counter the environmentalist narrative, mobilized grassroots opposition to environmental regulations, and undertaken sophisticated legal challenges . . . [their] antiregulatory rhetoric . . . emphasizes distrust of the federal bureaucracy, admiration for unfettered private property rights and markets, skepticism about science, and disdain for environmental advocates. By employing arguments rooted in this formula, conservatives have been instrumental in blocking efforts to pass major new environmental legislation or increase the stringency of existing laws.”

This constantly building opposition is, to my way of thinking, the obvious, immediate reason for our mounting environmental failure. But this exercise of power and control is, as I will discuss, merely the surface political manifestation of deeper systemic imperatives.

Before turning to these deeper issues, let me return to the biggest mistake I believe we environmentalists made. As federal environmental laws and programs burst onto the scene in the early 1970s, we eagerly pursued the important goals and avenues those laws opened up. There, the path to success was clear. But in doing so we left by the wayside the more difficult and deeper challenges highlighted by leading environmental thinkers of the 1960s and 1970s—Barry Commoner, Paul Ehrlich, Donella Meadows, and others that I mentioned. Their overall point back then was that we should strike at the root causes of environmental decline. They and others saw that doing so would require us to seek fundamental changes in our prevailing system of political economy—to proceed down the path of system change. They saw that the problem was the system.



Most of us ignored these calls for systemic change. In particular, we should have revisited these deeper issues when our momentum stalled after 1980, especially in light of the anti-environmentalism of the Reagan years. What happened instead was that the 1970s' successes locked us into patterns of environmental action that have since proved no match for the system we're up against. We were drawn ever more completely inside the D.C. Beltway. Once there, inside the system, we were compelled to a certain tameness by the need to succeed. As Washington became more conservative, mainstream environmentalists became more cautious.

In sum, we opted to work within the system of political economy that we found, and we neglected to seek transformation of the system itself.

Today's environmentalism is usually quite good as far as it goes, but it doesn't go nearly far enough. The problem has been the absence of huge, complementary investments of time, energy, and money in other, deeper approaches to change. And here, the leading environmental organizations must be faulted for not doing nearly enough to ensure these investments in system change were made.

System change is essential because our environmental problems are actually rooted in defining features of our current political economy. An unquestioning society-wide commitment to economic growth at virtually any cost; a measure of growth, GDP, that includes not only the good but also the bad and the ugly; powerful corporate interests whose overriding objective is to generate profit and grow, including profit from avoiding the social and environmental costs they create; markets that systematically fail to recognize these costs unless corrected by government; government that is subservient to corporate interests and the growth imperative; rampant consumerism spurred endlessly by sophisticated advertising; social injustice and economic insecurity so vast that they paralyze action and empower often false claims that needed measures would cost jobs and hurt the economy; economic activity now so large in scale that its impacts alter the fundamental biophysical operations of the planet—all these combine to deliver an ever-growing economy that is undermining the ability of the planet to sustain human and natural communities.

It's clearly time for something different—a new environmentalism. And here is the core of this new environmentalism: It seeks a new economy. It seeks to escape from the system just described and move to the next system. And to deliver on the promise of a new system, we must build a new politics.

We must ask again the basic question: What is an environmental issue? Air and water pollution, of course. But what if the right answer is that environmental issues include anything that determines environmental outcomes. Then, surely, the creeping plutocracy and corporatocracy we face—the ascendancy of money power and corporate power over people power—these are environmental issues. And more: The chartering and empowering of artificial persons to do virtually anything in the name of profit and growth—that is the very nature of today's corporation; the fetish of GDP growth as the ultimate public good and the main aim of

government; our runaway consumerism; our vast social insecurity with half U.S. families living paycheck to paycheck. These are among the underlying drivers of environmental outcomes. They are environmental concerns, imperative ones, but they rarely appear on the agendas of our main national environmental groups.

The agenda of the new environmentalism should embrace a profound challenge to consumerism and commercialism and the lifestyles they offer; a turning away from growthmania and a profit-centered economy; a redefinition of what society should be striving to grow; a challenge to corporate dominance and a transformation of the corporation and its goals; a commitment to deep change in both the reach of the market and the ownership of productive assets; and a powerful assault on the materialistic, anthropocentric, and contempocentric values that currently dominate American culture.

Environmentalists must also join with social progressives in addressing the crisis of inequality and deprivation now unraveling America's social fabric. Similarly, environmentalists must make common cause with those seeking to reform politics and strengthen democracy. Environmentalists need to embrace public financing of elections, new anticorruption ethical restrictions on legislatures, the right to vote, tougher regulation of lobbying and the revolving door, nonpartisan Congressional redistricting, and other political reform measures as core to their agenda. We must join in the campaign Move to Amend to forge a new Constitution that recognizes that corporations are not people and money is not speech.

The new environmentalism must work with a progressive coalition to build a mighty force in electoral politics. This will require major efforts at grassroots organizing, strengthening groups working at the state and community levels, and both supporting and fielding candidates for public office. It will also require developing motivational messages and appeals. Our environmental discourse has thus far been dominated by lawyers, scientists, and economists. Now, we need to hear a lot more from the poets, preachers, philosophers, and psychologists.

Above all, the new environmental politics must be broadly inclusive, reaching out to embrace the concerns of working families and union members, blacks and other people of color, frontline communities, religious organizations, the women's movement, and other communities of complementary interest and shared fate. Much stronger alliances are needed, alliances powerful enough to overcome the "silo effect" that separates the environmental community from those working on domestic political reforms, a progressive social agenda, gender equality, racial justice, international peace, consumer issues, world health and population concerns, and world poverty and underdevelopment.

The final goal of the new environmental politics must be, "Build the movement." Environmentalists are still said to be part of "the environmental movement." We need a real one—networked together with other progressives, protesting, demanding action and accountability from governments and corporations, and taking steps as consumers and communities to realize sustainability and social justice in everyday life.



Can we see the beginnings of a new social movement in America? Perhaps I am letting my hopes get the better of me, but I think we can. In particular, we can hope for a post-2016 election fusion of forces: the followers of Bernie Sanders and Elizabeth Warren, those who appreciate the powerful message of Pope Francis, the movements for Black Lives Matter and climate justice, the rights of Native Americans, and more.

Here is how it might all come together. As conditions in our country continue to decline across a wide front, or at best fester as they are, ever-larger numbers of Americans lose faith in the current system and its ability to deliver on the values it proclaims. The system steadily loses support, leading to a crisis of legitimacy. Meanwhile, traditional crises, both in the economy and in the environment, grow more numerous and fearsome. In response, progressives of all stripes coalesce, find their voice and their strength, and pioneer the development of a powerful set of new ideas and policy proposals confirming that the path to a better world does indeed exist. Demonstrations and protests multiply, and a powerful movement for pro-democracy reform and transformative change is born. At the local level, people and groups come together to take control of their communities' futures and thus plant the seeds of change through a host of innovative initiatives that provide inspirational models of how things might work in a new political economy devoted to sustaining human and natural communities. Internationally, a global citizens movement coalesces and becomes a powerful force for change. Sensing the direction in which the current is moving, our wiser and more responsible leaders, political and otherwise, rise to the occasion, support the growing movement for change, and frame a compelling story or narrative that makes sense of it all and provides a positive vision of a better America. It is a moment of democratic possibility.

One sure sign that the search for a new political economy has begun is the way that constituencies have formed around new concepts of the economy—including the solidarity economy, the caring economy, the sharing economy, the restorative economy, the regenerative economy, the sustaining economy, the commons economy, the resilient economy, and, of course, the new economy. There is ongoing discussion of the need for a “next system” and a “great transition” and for a “just transition” rooted in racial, gender, and class justice. In 2012 the most searched words on the Merriam-Webster site were “capitalism” and “socialism.”

Whether driven by climate and fossil fuel insults; poverty, low wages, and joblessness; deportation of immigrants and other family issues; treatment of women; or voter suppression, movements are now challenging key aspects of the system, seeking to drive deep change beyond incremental reform, and offering alternative visions and new paths forward. There are groups that are marching in the streets, state capitals, and local congressional offices. Others are starting to run people for office around alternative agendas. There are places where the needed research is occurring, and new coalitions are bringing diverse groups together. Strong movements can be found in other countries, and, indeed, many countries are further along than we Americans are. These are among the grounds for hope, the reasons to believe that real change is possible.

I hope today's young people will not worry unduly about being thought "radical" and will find ways to short circuit the long and tortuous path I took. If it seems right to you, embrace it. A wonderful group of leaders and activists who are trying to change the system for the better are building new communities in which we can all participate.