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MICHAEL A. LIVERMORE: Welcome to the *Free Range Podcast.* I'm your host Mike Livermore. With me today is Cale Jaffe, the director of the Environmental Law and community engagement clinic here at UVA Law. Prior to joining the law school, he was an attorney with the Southern environmental Law Center where he led the Virginia office. Hi, Cale. Thanks for joining me today.

CALE JAFFE: Good morning or good whatever time it is where you are.

MICHAEL A. LIVERMORE: A little later in the day.

CALE JAFFE: Yeah.

MICHAEL A. LIVERMORE: Yeah. So maybe one way we could, kind of, just get started is to start with how you got interested in environmental issues. I mean folks come to-- in my experience, folks come to Environmental Issues in different ways. Some folks have early childhood experiences playing on the coasts and that leads to a lifetime interest in coastal ecosystems. Or some people get involved in politics because they like politics and then end up getting attracted to environmental issues for various, kind of, specific reasons. So, yeah-- so I was just curious what drew you to these issues?

CALE JAFFE: Yeah. It is interesting to think of different folks getting into it from different angles. For me, it was coming through, when I was in high school, and as often happens when folks are in high school just a good teacher that really, sort of, sets you in a different direction.

And so spring of my junior year of high school, which was spring of 1990, was the 20th anniversary of Earth Day. And I happened to be participating in a program called the Mountain School, which is up in Vermont. It's sort set on a farm and it's this very environmental centered program or it was at the time and I think still is.

And it was through that experience-- that was actually the first time in my life I ever had gone camping as part of that experience. And the teachers there, a particular one teacher I'll just have to give a shout out to, the science teacher Kevin Mattingly who was just so brilliant and connecting all of these different concepts, literature, science, community engagement, just in getting us out into the natural world, that was really the eye-opener for me.

MICHAEL A. LIVERMORE: Oh, really interesting. And so did you, kind of, pursue environmental issues in undergrad and when you went to law school was that kind of on your mind as what you thought your career path would be?

CALE JAFFE: You know I-- it was absolutely on my mind heading to law school. I very much went to law school with the idea that I was going to want to get involved in environmental advocacy. And I in fact, I even though I didn't it at the time when I was going through college and thinking about why I would want to go to law school, I very much had in my head this idea of a clinical law professor, even though I had never met one.

I, sort of, liked the idea. I was like, oh, universities are fun, and that would be a neat place to be. But I really also want to be involved in the advocacy, I want to be boots on the ground on a particular project. And sort of imagined if there was a way to bounce back and forth from classroom to field working on the issues you care about, that would be a cool job. And, of course, that's essentially the job that I've found myself with many years later.

MICHAEL A. LIVERMORE: Right. Yeah, that doesn't happen very often where people actually end up doing the thing that they dreamed of doing when they were young.

CALE JAFFE: Yeah. Yeah. I definitely feel lucky.

MICHAEL A. LIVERMORE: Yeah. And so after law school you spent some time outside of the Academy. You worked at the Southern environmental Law Center for a number of years, which is obviously a really wonderful environmental organization that we have in our part of the world.

And so maybe I'd just be curious to hear about some of the maybe formative matters that you worked on at SELC that really contributed to your development as an environmental attorney now that you're a clinical law professor. The kinds of experiences maybe that you look back on to draw from as kind of important, informative in your own experience.

CALE JAFFE: Yeah, absolutely. So Southern environmental Law Center is another formative organization in terms of developing my own thinking about the issues I care about and how to engage on them. And I would put it with that, sort of, Mountain School experience that I had as a high school kid in terms of just important formative experiences.

I was at Southern Environmental Law Center or SELC for about 12 years. Was director of the Virginia office for the last couple of years I was there. But in terms of really formative experiences, I remember the very first, sort of, big case that I got to work on when I was there was Environmental Defense versus Duke Energy which is a case that went up to the US Supreme Court, a Clean Air Act enforcement case.

And what was interesting about getting put on that assignment was I had come to SELC really being more interested in water quality and water advocacy issues just because it felt to me like that was a good mix of there's this very concrete tangible thing we're doing trying to clean up a particular river. But it also felt big enough that it was going to have, sort of, broader systemic impacts.

So I liked water work as a new guy coming in, but when I got there, there they said that's not where we need you at all, we're going to put you on this air and energy team. And I had really not a lot of experience in that kind of work. So the first several months was just trying to learn all these things that, frankly, I should have paid more attention to when I was in my environmental law class with John Cannon in terms of just how the Clean Air Act works and how we're going to engage on it. Attending environmental Law Institute events to learn more about the Clean Air Act, just trying to get myself up to speed on it.

And getting to be a piece of that team, we worked with Sean Donahue, who's a great litigator and appellate advocate on that project, working with folks at Environmental Defense Fund. Just being a part of that broader team was remarkable. And, of course, getting to see the case and help prepare the case all the way up to going to the Supreme Court was pretty cool.

MICHAEL A. LIVERMORE: Yeah that's an awesome experience for a junior-- for a junior attorney. And those are-- there really are some great people that you are working with at that time who are still super active on all these issues. Just to-- it's interesting you mentioned the complexity of the Clean Air Act. And I think this is a-- maybe just a little bit of a side conversation.

But I think this can be a challenge for environmental attorneys, and I'm just curious how it lands for you. I think there's, kind of, like two schools of thought in some level about the complexity of environmental law. One school of thought is like well, you know, you just have to deal with it. It's-- that's the way things are. And so be it and these are important problems, social problems, and we need to tackle them. And if the law is complex, then we just-- you know you plow through it.

And then there's folks who enjoy the complexity. They like the ins and outs, and the provisions, they intersect with other provisions and the layers of interpretation and so on. So I'm curious which-- it's more of an aesthetic thing than an intellectual [INAUDIBLE].

CALE JAFFE: Yeah.

MICHAEL A. LIVERMORE: It's intellectual and aesthetic, but it's not really substantive or normative. But I'm just curious how the complexity of environmental law lands for you as someone who's been actively practicing in this area for a while?

CALE JAFFE: Well I think for me the complexity of it, and particularly in the Clean Air Act world or the energy world, it requires, if you're a lawyer coming into that, an immense amount of humility because you realize very quickly that you are going to have to rely on other experts to help you just understand the most basic aspects of the systems you're engaging on to be able to make persuasive arguments.

So you think about the Environmental Defense versus Duke Energy case, I remember we were hiring outside engineering experts to sort of-- who knew the nuts and bolts of how these multi-billion dollar coal fired power plants worked. We were hiring, at considerable cost, air modelers who could give us incredible insight into how the plumes from the smokestacks would move and what communities would be impacted by those plumes.

There was just this whole world of core information that you needed to have that you, as a lawyer, would not be able to develop. That you were going to have to rely on engineers and scientists and modelers and a whole panoply of experts that you were going to have to trust.

MICHAEL A. LIVERMORE: Yeah. It's so interesting, right. And that's on the way that the law touches the world part, which is so so incredibly-- it's complicated, it's very interesting, right. It's just like get to learn some of the science and you get to learn some of these modeling questions or engineering questions.

There's another funny thing about that case, right. As you mentioned it deals with provision of the Clean Air Act, there's all this important engineering and technical and economic and social consequences that come out of the decision in that case, which is a, kind of, interpreting a provision of the act. But if I recall correctly, you're correct, you'll let me if I'm wrong. I actually I think I teach this class. So. I don't teach this case, it's in the case book.

But it's so obscure that-- it's like this funny technical statutory interpretation question about if you're interpreting one provision in one place, how that means you should interpret the language somewhere else. And I feel like the court's decision is just so removed from the real world consequences that you were just talking about. Like what it means for the air quality, what it means for consumers prices, what it means for workers and what it means for local communities.

I mean, it has all those important consequences, but it's not like the court sits down and does the cost benefit analysis or grapples with all of this important-- all these important social consequences, it's just like thinks in the abstract about statutory interpretation questions. I mean one is am I right about the case? But the other one is just-- that's a funny thing about being an environmental lawyer too is that you sometimes find yourself making very funny kinds of statutory and very internal to the law and legal interpretation questions, but they have these enormous social consequences.

CALE JAFFE: Yeah I mean, I think-- right so it's this highly technical case dealing with the new source performance standard program and the prevention of significant deterioration program. And what the term modification means in those terms, which seems like it could be a somewhat common sense term and, of course, it's insanely wonkish.

You know what stood out for me was-- I remember being in the courtroom for oral argument. And I guess we could go back to the transcript of oral argument to see if my memory is correct or not. But I remember Sean Donahue, who was arguing the case for us, he opened with that the regulations, the EPA regulations that we were asking the court to interpret, Sean's opening statement was the regulations are clear on their face.

And before he even got to the next sentence, Chief Justice Roberts interrupted him and said, well, that's an audacious statement counselor. And then Justice Scalia intervened and said, yeah we've been poring over these regulations for weeks, and you're telling us that this should have been an easy case and just, sort of-- we were immediately on the back foot before we even got through the first paragraph of opening.

So, yeah it's-- but I think what-- this is, sort of, the nature of that case and I think it's the nature of a lot of environmental advocacy. The firm and the organizations that we're representing Duke Energy there, and there was, sort of, this large utility air regulatory group that was also involved. Other electric utilities that were involved that had implications for other cases involving Southern Company and other big utilities, they had, obviously, an immense amount of expertise.

And what was really fascinating about the case was back when we were at the district court level, was just mountains and mountains of pages in discovery and documents from the utilities, sort of, understanding the minutia of this. And what was clear in that case was one they certainly had a role in making it complex. That it wasn't that just government bureaucracy run amok, it was the industry very much, sort of, driving that complexity to serve their own advocacy interests.

And I mean, just to give you a sense of how intense that piece of the case was, my memory is there was 7 million pages of documents in the discovery phase of the case. I mean just essentially a warehouse full of information. And a lot of it was the industry having, sort of, years of plans on how to delay implementing these, what would be admittedly very costly pollution control programs that the Clean Air Act would require. So yes, the complexity is there, but frankly, it's, in some sense, weaponized by as stakeholders in the process who are trying to delay implementation that would be required through that language.

MICHAEL A. LIVERMORE: Yeah. And it's also just an interesting point where we're on this. The way that the legal system works in some sense. How at the district court level it's this very fact intensive exercise and the court is poring ov-- like a judge is like presumably really looking at these complicated documents and there's all the attorneys and the experts, and it's just a very fact intensive exercise. In some sense, it's grappling with these real world issues.

And maybe some of it is manufactured complexity, maybe some of it is just the reality is we're, kind of, managing very complex systems so some of the rules are going to be complex and the social consequences are going to be hard to understand in the first instance without serious amounts of effort. And so that happens at the district court.

And then gradually the issues get distilled distilled distilled distilled and the factual questions, in some sense, become blurred or fall away. And then by the time you get to the Supreme Court, where the question gets approached as, at least some of the judges approach it, as like if it was a transcendental question about the meaning of words--

CALE JAFFE: Yeah, yeah.

MICHAEL A. LIVERMORE: --rather than this, like, real world decision about coal and where it gets burned, and how much and what technologies we're going to put in place. And people are going to get sick or they're not going to get sick and energy prices are going to go up or they're not going to go up and all of that real world stuff that is really what we're arguing about.

We're not arguing about the meaning of the word modification, because we're interested in the platonic ideal of the word modification, right. We're interested in arguing about it because it has real world consequences. So it's just an interesting-- it is and-- I'm sure you've just seen this many times over the years of this fact-intensive complex thing that we're dealing with, kind of, gradually turning into some very obscure, in some sense, legal question.

CALE JAFFE: Well and there's a real art to that. Because in the district court case, in the district court stage of the case, of course, the court has no choice. They have to deal with it. You filed the case. As long as you've got jurisdiction and venue and all that squared away, they've got to deal with it. The Supreme Court, of course, has the freedom and the discretion to handpick the cases that it finds interesting.

So when you've been eyeballs deep in the weaves, it's very hard to think about how do we abstract this case out to a point that the Justices, or more specifically the Justices clerks, would find it interestingly eno-- interesting enough to move it up to where it might-- where cert might get granted. And that's-- I'll give-- I don't remember the specifics of how he tweaked the question presented that we drafted in our cert petition in Environmental Defense versus Duke Energy.

But I remember I was working on it, sort of, deep into the weeds, and other attorneys at SELC were working on it. Vicki Patton at Environmental Defense Fund was working on it. And then Sean was brought in and he just had a completely different way of thinking about the case. About what it that was just not something that had been in my mind at all. It was this very abstract, much more of an administrative law case and a due process case and not a clean Air Act enforcement case.

And of course, that's exactly what you needed for a cert petition to get granted. If we had stayed in the weeds and just drafted what we thought the case was about, the court would have thought, oh, hell no we're not digging into that mess.

MICHAEL A. LIVERMORE: Boring.

CALE JAFFE: Yeah, exactly.

MICHAEL A. LIVERMORE: Yeah, funny. Yeah and that's a real skill and it's just really interesting and that's the value of working in teams, of course. And lawyers are always doing that and bringing in people at different stages. And yeah it's really, really interesting, kind of, practical experience of how you do this stuff.

So over the course of your career, and especially if you go back to even longer like your, kind of, environmental awakening in high school, there's been a real shift in the environmental movement towards ever greater emphasis on environmental justice issues. And we could talk about whether there's enough emphasis now, I mean likely many would say no, but it's a lot more than it used to be.

And that's been a process that's been going on for quite a bit of time and a lot of people put a lot of effort into this. And there's been contestation and this is just-- this has been an important part of the conversation on environmental issues over the last couple of decades. So I'm curious about how that has tracked with your own career, your interest in environmental issues and where-- now you have a serious interest in environmental justice, you where does that-- where does that intersection start to become important for you.

CALE JAFFE: Yeah. Well I'll start with a story of how I began to think about environmental justice before I even had heard that term. Of course, you know, it dates back to the birth of environmental justice, environmental racism activism going back to Warren County, North Carolina in the early 1980s in communities protest over a toxic waste landfill in the County.

So that was obviously well before I had gotten into environmental law at all but was not something that I was really aware of for the first several years of my practice. I'll tell you one story about it. So shortly after the Environmental Defense Duke Energy case, around 2007 2008, we were working on another proposed coal plant case. This was going to be a new coal plant in a rural southeastern County of Virginia, Surrey County Virginia. And there was-- the plant would have been in this tiny little town of Dendron Virginia, about 300 people.

And there was a small community group that was forming unincorporated Association of folks, neighbors who were concerned about this proposal, and they had, sort of, reached out to us and to other environmental groups, and there have been grassroots activists engaged. And they were going to organize a house party in one of the, sort of, leader's homes in the town of Dendron in Surrey County and wanted us to come down. It was going to be a potluck. Bring some food and come on in.

And I was up in Charlottesville working up to the last minute right before this meeting. Raced out, realized, oh, I'd forgotten to bring any food, pulled over, bought some donuts at a roadside Dunkin' Donuts and then made my way there. And when I got there and, sort of, left the donuts and I gave my spiel. And then I left after giving my spiel about what the legal issues were and giving them some recommendations realized that everything I had done had just been completely tone deaf.

Like they were irritated with me. They thought I was arrogant. They thought I was disrespectful. They thought bringing donuts, as opposed to actually making a meal, was disrespectful. And it was, sort of, this good lesson in humility that, essentially, what I had done was sort of one small little gesture or after another was send this message that I thought of myself as the expert and I was parachuting in to direct this case, and that's not what they wanted at all.

They were the experts. It was their community, they knew what was at stake. I didn't live there, I didn't appreciate the risks. And I needed to have gotten there early in the day, spend more time with them, do more listening less talking. And that was sort of-- I didn't label it environmental justice at the time, but, essentially, that's what that was. This was a community that was going to be directly impacted and I was approaching it from a very top down hierarchical approach that was just absolutely wrong.

MICHAEL A. LIVERMORE: So what ended up happening with the proposed power plant, kind of, as things unfolded in that matter?

CALE JAFFE: It was really fascinating. The case moved forward. We continued to engage primarily on the environmental permitting side of with the Department of Environmental Quality. And meanwhile as we're engaging on that on a whole host of issues from the mercury and air toxics standard that the Obama administration was working on-- on best available control technology and whether greenhouse gas emissions would be covered by a BACT standard or not.

We're doing what we do as environmental lawyers, sort of, pressing DEQ, the Department of Environmental Quality on all those questions. Meanwhile, outside of our control, the price of methane gas is falling, costs of building a new coal plant are rising. And so after a couple of years of this, the power company that was proposing that facility, Old Dominion Electric Cooperative, ultimately decided to withdraw. They didn't end up building the coal plant in Surrey County.

So in that sense, it was a win for our clients and win for the community that we were supporting and win for us. They did end up building a gas fired power plant, I think, in Maryland to meet their anticipated need. And obviously there are a host of issues there that we did not get into because we weren't working in Maryland. But so it was a victory in that sense.

But there was one great story that I'll share about the case that's another, sort of, lesson in humility on, sort of, environmental justice on the front lines. One of the local zoning issues required that before the County or the town rezone to allow this multi-billion dollar industrial facility to come in, they had to, under state law, notice that decision at least two weeks before the meeting. And the County had failed to do that.

We had this meeting. It was in the-- it was actually in the garage part of the fire station because they didn't-- that was the only physical space they had that was large enough to hold all the people. So they moved the fire trucks out and we sat, sort of, on folding chairs in the fire station.

And there were a couple of us who were at that meeting who, sort of, raised the point that they had not properly noticed this as a decision-making event that they had to-- they couldn't actually rezone tonight, they had to do something else, and they disagreed. They got advice from the power company lawyer that said they could go forward. So they voted to rezone.

And then immediately the local community group said, well guys are going to sue them over this decision. And I said no I don't think it's really a great use of our time because frankly, all they have to do is just re notice it and vote two weeks later, and our case is moot. Like, let's not waste our time on that.

But one of the local folks disagreed is this guy who was a blueberry farmer. And so he filed a pro se case challenging the zoning. And instead of just moving the case by re-noticing the hearing and voting again two weeks later, the law firm representing the power company litigated it for several months and ultimately lost.

MICHAEL A. LIVERMORE: And they lost, yeah.

CALE JAFFE: Like they spent a ton of money, they were fighting this guy who was just trying to figure it out pro se, and I was just sort of could not understand it, and it was just all about hubris. It was this, we're not going to admit having made a mistake, especially to this blueberry farmer who's trying to tell us that it was our mistake.

MICHAEL A. LIVERMORE: Wow. And did that end up like-- so they spent all the money on litigation, did it end up, like was there stuff that happened that they had to then go red-- I mean obviously they had to redo that meeting but then did they have to go redo other stuff? Like did it actually end up, kind of, throwing a monkey wrench in the works?

CALE JAFFE: I mean I-- it's hard to how big a monkey wrench it threw but it absolutely impacted because it delayed moving forward on the project. They couldn't do any-- they couldn't do anything on the land until they'd gotten the zoning cleared. Of course, they were still way behind on the environmental permitting phase, so maybe they couldn't have done anything anyway, but it absolutely added to their cost. They're paying Richmond law firm rates to litigate a matter that they shouldn't have been litigating.

MICHAEL A. LIVERMORE: Right. And also just the complexity and the uncertainty and there's just like one more, kind of, front in the fight.

CALE JAFFE: Absolutely.

MICHAEL A. LIVERMORE: Right. Yeah I love that. I love that story. So yeah-- so those are-- yeah I mean it's really interesting illustrative cases of yeah like the lessons in humility, right. So that was a strategic-- the first one was just what's the right attitude to have as you come in and it's-- and it's kind of you to offer these stories, and they're representative, right. They're not like-- it's like this was your personal failing. This is the kind of indicative of how the whole environmental movement was-- certainly was perceived for a long time, and I think even to a certain extent still is.

And that's something that a lot of people are working very hard to change. And so, yeah. So maybe we could-- maybe we could shift a little bit to the clinical context and what you've been up to recently. And then maybe talk a little bit about how in teaching you take those lessons and impart them onto the students. So after SELC for several years and directing the Virginia operation, you decided to switch over to legal education, but also with this-- obviously with this advocacy component to it.

So what drew you to that? You said earlier it was kind of your dream job to being on a University but also engaging in advocacy. Obviously you're doing great work at SELC. What was it about being at a University setting that drew you away from that also great job?

CALE JAFFE: Yeah it's a really hard question. I think I really like-- the thing that is a lot of fun about a University is getting to work with people like you Mike. It is getting to just be around this very intellectually diverse and intellectually curious group. Obviously I think the lawyers at SELC are obviously incredibly intellectually curious and incredibly smart folks.

But it's just sort of the freedom to go wherever your interests drive you. So I think of the projects that I bring into the clinic as really needing to serve three missions. One is obviously, sort of, the pedagogical mission, the teaching mission. They need to be good projects for students to learn how to be lawyers. So that's number one.

Number two is I think they should serve, obviously, a public service mission where it's a pro bono clinic. We're not charging our clients anything for the legal services we provide. Maybe they should be worried, you get what you pay for. But they're getting free student labor on these projects and so there should be a public service mission.

And then the third piece, which is really the piece that I think distinguishes it from Southern Vermont Law Center work, is picking projects that are intellectually interesting to me, that are academically interesting. You know where, oh, this is something I've read about and I'm curious about it and I don't have to worry about, well here's our-- we have an organizational mission that's very specific and you're on our air and energy team, and so you can only work on air and energy cases, and that's it.

I get to bounce around. So I've worked on an environmental justice case involving a landfill in Cumberland County Virginia. I've worked on a CERCLA case out of Montana. I've worked on clean Water Act cases. I've worked on public Utility Commission cases. So it's just maybe I'm falling into the trap of Jack of all trades, master of none, but I'm getting-- that is the thing that's really different about working in a clinical environment at a University setting that you don't get-- that you don't really get if you're in an NGO working as part of a mission-driven organization and you have a specific role to play there. Here you've got a little more freedom.

MICHAEL A. LIVERMORE: Yeah that's really interesting. And it makes a ton of sense. I mean I can totally see the fun in that, right, and then just the intellectual stimulation. And also, like, there is something just very different, whereas in some sense, every organization, like SELC, or Environmental Defense Fund, or Earth Justice, or I mean-- or outside the environmental domain, for that matter, the ACLU or any advocacy organization, they have limited litigation resources. They're only going to be able to take some cases, right.

And the way that a lot of the NGO world, the advocacy world is going to do that is they're going to be looking to maximize their impact on a specific set of broader policy goals. Like the Sierra Club was funded with a big grant from the Bloomberg foundation to shut down coal-fired power plants or stop coal-fired power plants from being built.

And so then they're going to pick cases that align with that broader, kind of, strategic mission, right. And the ACLU is going to pick up certain kinds say first amendment style cases or whatever their kind of broader institutional missions are. Whereas with the clinic, there is the public service mission, but it's a little different, right. It's not like this is you about pursuing some particular ideological or broader policy agenda.

I mean obviously it's kind of generally stuff that's good for the environment and whatever. But it's not-- it's not like you're like, OK, we're going to use the clinic resources to do impact in this particular area, it's you want to work with groups who might otherwise struggle to find legal representation.

CALE JAFFE: Absolutely. I mean we get a lot of cold calls of folks, sort of, looking for help. And so then that's where almost all of the work generates from is from those, sort of, cold calls and then talking strategically. The other thing I would say about the way NGOs work that is-- I totally understand it and it makes for a more effective environmental community or advocacy community, but can be a little constraining is it's not just that an organization will have its own mission that it's charted out a 10-year plan of here's how we're going to get here and here's how we're going to fund it, and here's where we're going to make our impact, but they're also incredibly mindful of what their coalition partners are doing.

And so you might say, well, maybe we're-- so where it comes up, I think where you really see it right now in the environmental world is on nuclear power. There are some groups that are very clearly opposed to the development of nuclear power. Either continuing to operate existing, aging nuclear fleet or expanding and building new nuclear units or investing in small modular reactors, whatever it might be.

There are some groups that are very opposed to moving that direction as part of a climate strategy. Other groups that I think internally are probably more open to nuclear as a core component of a climate strategy, but are mindful of not wanting to step on the toes of their partners, and so everybody is just, sort of, I don't know somehow, sort of, holding themselves back, sort of restraining themselves from engaging on an issue because of their partners strategic plans.

And that kind of coalition advocacy is important. I think it's really helpful when the environmental community writ large speaks with one voice on the issues of greatest concern. But it can also be very frustrating when you have a different vision of what you think the community should be doing but you're constrained by what the broader coalition is trying to do.

MICHAEL A. LIVERMORE: Yeah. It's a really-- and that's a very interesting dynamic too because you could, kind of, imagine two different views on this. Like on the one hand, it's good for there to be, kind of, a bit of a lock step amongst environmental groups. It might actually be worth articulating why that is, actually, from an advocacy perspective. Because I think some folks might initially just say, well, that sounds terrible, right.

That sounds almost like totalitarian or something, right. Like everyone has to agree about everything, and you wouldn't it be better if we had like a diversity of voices and lots of different groups that hold different positions and some were pro-nuclear and some were against nuclear or whatever and some favored distributed generation and some wate-- you know whatever the issues were. So maybe just-- I think it probably be worth articulating why it is that there is value in this kind of cohesion within the environmental community in terms of their political messaging and advocacy.

CALE JAFFE: Well I think there are two reasons why there's strategic value in having a unified front. The most obvious is it gives you more resources to push in one specific direction. So you'll have a grassroots group that's able to turn folks out for public hearings, you'll have legal groups, you'll have groups with, sort of, in-house economists or scientists sort of this broad range of groups all rowing in the same direction can be helpful.

But the other reason that I think is frankly probably more important is that the rest of the world, the regulated industries that you're offering going toe to toe with, the legislators that you're trying to lobby, the media that's covering all of this, they are going to write about and think about the environmental community as a monolith. And I saw this all the time. I did some state level lobbying at Southern Vermont Law Center for a few years when I was there.

And you would go into a Committee room, and if there was one environmental group that supported a bill that the rest of the community opposed, the Committee members, the legislators on that Committee would say, well we've got-- this is a consensus bill, we've got environmental community supports it, the industry supports it, everyone supports it, even though it was a minority, one environmental group supporting it in opposition to others. That was all they needed. They needed one group to sign off so they could say they had the environmental community support.

And if another group got up at the hearing and said, actually, we oppose the bill, the response would be well you know we know can't please absolutely everyone. There's always going to be some, sort of, dissenters, but we've got broad support here, we've got the environmental community. So if one group breaks away, that makes it really hard for the other groups to continue to get their message out.

MICHAEL A. LIVERMORE: Yeah. No it's really interesting. And I think part of the dynamic on this is environmental organizations, in some sense, don't have the same kind of power that other interest groups have. It's a very different kind of power that they wield. Obviously they have a lot less money than a lot of the times the folks that are going up against.

But one of their major sources of power is the ability to say this is or is not good for the environment, right and the public cares about what is or is not good for the environment. A lot of these issues as you know are like super complicated. So it's not like a regular person walking around can understand whether a particular piece of legislation or a regulatory decision is good or bad for the environment in some broad sense.

And so if there's a mixed message coming out of the quote unquote environmental community, then that ability to, kind of, deem something an OK compromise or a totally inadequate selling out in the environment is itself, kind of, undermined.

CALE JAFFE: Yeah, absolutely. And I think what folks in the environmental community sometimes may fail to appreciate, or maybe they do appreciate, is that we still have a lot of work, environmental groups still have a lot of work to build that, sort of, broad credibility across the spectrum of folks making decisions or engaging on issues.

There is this really somewhat dispiriting frankly study that came out a few years ago 2019 out of the Duke University's Nicholas Institute for environmental policy on understanding rural attitudes towards the environment. And it was just sort of polling data that environmental advocacy groups were seen by survey respondents as a trusted source of environmental information by only 13% of respondents.

That it was sort of this sobering reality that that's part of why we need-- to the extent that we're bickering or disagreeing, that's only undercutting that meager support even further. So there needs to be a significant concerted effort to raise that percentage.

MICHAEL A. LIVERMORE: Yeah it's a disaster. I mean, it's-- no that's a whole other interesting line of the kind of path that we could go down is the way that the environmental community is kind of seems to have lost the confidence of a substantial chunk of the American people. It has the confidence of another group, and we should say in fairness, there are-- if you polled a different group, you would get a much higher number, right. That's a very specific--

CALE JAFFE: Absolutely.

MICHAEL A. LIVERMORE: --group of people. But it's a major-- it's a major challenge. Thinking about this notion of the environmental community and kind of coherence, the environmental justice and the-- has been a part of this dynamic over the last 30 years. In some sense, the environmental justice movement, I think said we're not going to go along with what all the big green groups-- like a big part-- there was a big part of the environmental justice, kind of, when it really burst on the scene, in some sense, was when they said, look, we don't like how the big green groups are doing business.

We think they're not paying attention to the right issues, they're not-- the composition of their leadership, and the folks who are staffers there, we don't think is reflective of our communities. And they kind of had to be willing to break ranks in some sense and point out these internal problems within the environmental movement as just a necessary precondition of getting the, kind of, changes that they were interested in.

CALE JAFFE: Yeah, yeah. And I may have it wrong but the emergence of even the term the big greens comes, sort of, in that same moment of thinking of not-- I mean it must have been a bit of a shock if you're at Sierra Club or Natural Resources Defense Council to think you've been this positive force public interest force and now folks that you thought of as allies are referring to you as big greens in the same way that you might talk about big oil, right. That's got to be a bit of a wake up call.

I think what the environmental community has struggled with is-- to really break through on the environmental justice issue you really need-- and I-- and there are a lot of folks who have led on this. I've talked to-- I was at a conference last year where I ran into Abby Dillon who's the president of Earth Justice now. And she is amazing, and she absolutely gets this in terms of leading Earth Justice on environmental justice issues.

But it really requires a deep level of humility and a deep level of listening. And what that really means is you're not just going to community meetings, you're not just going to Surrey County with your box of donuts, but you're actually listening to them and taking direction from them. So that you may come into an issue with an idea of how we're going to engage on it or what's important to do.

But you need to be willing to set that aside and really follow the community and just-- it's hard because I think, for lawyers, we spend so much time thinking about what we're supposed to do. OK let's meet with the client, learn what their goals are, and then boom, we can move in. We can seek a TRO, Temporary Restraining Order, we can go for money damages. We've got all these different strategies that we're going to jump on right away, and there's really not much in the lawyers playbook of listening for listening sake. Just, sort of, having the patience to let that sink in.

I'll share this one case that we're working on here in the clinic involving Cumberland County, and this proposed landfill that is immediately adjacent to this historic African-American school that was built by the Black community in Cumberland County in 1917 at a time when public schools were absolutely closed to children of color. They were barred from attending.

So and this community builds it's own school almost entirely on its own with some help from the Rosenwald fund but almost entirely on its own. Maintains this school all the way up until 1964 Civil Rights Act when finally public schools begin to being open to children of color in places like Cumberland County and elsewhere.

But anyway, so we're working to help them preserve this school and resist the impact of a proposed mega landfill on land that's immediately adjacent to where the school is. And we're working on this, and I was talking with the leader of the community group, who this woman Muriel Miller branch, who was a student at Pine Grove Elementary school, the Black community built school in the 1950s.

And I had said something to her about pledging-- that I'll pledge to keep listening to whatever she has to say. And she emailed me back. And I printed out her email. She said the most powerful words spoken in this entire thread are I pledge to keep listening. That's all my community has ever asked. To be heard, to be valued, and to have equal access to resources.

We don't mind doing the work, but when our two centuries of hard work is overshadowed or devalued, it is incumbent upon me, as one of our community's storytellers, to correct the record. Thank you for giving my community that platform.

And what stands out to me about Muriel's email there is I'm thinking I'm a lawyer, I'm going to come in and help her, sort of, navigate this complex environmental permitting process, and she's not mentioning any of that. Like she's-- the only thing that she says that she is looking for is to be heard, to be listened to. And so it's like, oh, wow, I've completely misunderstood what my role as an environmental lawyer is and that's sort of what I'm learning by engaging on these environmental justice cases is thinking about just what my role is.

MICHAEL A. LIVERMORE: Yeah, that's-- it's a really powerful case, it's a powerful story about this-- the importance of listening and the importance of-- which we should just note. And we've had other podcast guests when we've talked about the environmental justice movement over the years. Gerald Torres is who I'm thinking of specifically.

CALE JAFFE: That was great.

MICHAEL A. LIVERMORE: Talking about this-- in that other conversation we were, kind of, talking about the procedural versus substantive questions in environmental justice. Is it, kind of-- is the main focus about ensuring substantive justice and fairness and kind of outcomes? Or is it about a process that's open and inclusive and where people's voices are respected and there's room for people to have their voices heard and their stories told and/or to tell their stories?

And so-- and that's always been a big part of the environmental justice movement is focusing on both of these things. Both substantive outcomes and fair and inclusive processes. And so what you're describing is kind of that reality in a very concrete situation where we're talking about, it's not just about the outcome. Obviously the outcome matters, with respect to this landfill and this historic school, but the process of getting to the outcome.

If someone parachuted in and didn't listen to anybody and just adopted a litigation strategy. And even if it was successful, that wouldn't-- that's not what folks are looking for.

CALE JAFFE: Yeah, absolutely. And I would say it's process-- this is essentially what you just said, but it's process with substance.

MICHAEL A. LIVERMORE: Right.

CALE JAFFE: You know what you see from you know whether it's this project or another project is sort of the regulated industry that's proposing something, all the time you hear folks on that side say, well, we are listening, we've had so many different community events, we've had so many public listening sessions you know, of course, we're listening to the community. And you think well no you're not because you haven't been willing to reconsider every aspect of your project in response to community concerns, including maybe concluding that well this isn't the right place for this kind of project.

Really that kind of community engagement requires giving everybody an equal seat at the table. And an equal seat means that they have just as much say in what the project look like-- looks like as the company that's proposing it. That is-- that's a hard thing for anyone to essentially give up that level of control. But I think that's what's really required when you talk about process. And it's not just about we've had this many listening sessions, therefore process is done, we've checked all the necessary boxes, it really is about how the substance comes through that process.

MICHAEL A. LIVERMORE: Right. Now, that's a really important point that-- and this is something-- this comes up in law more generally, right. Like when you create an environmental impact statement, you can-- an agency that wants to move forward with a decision or a landfill, for that matter, and they create a huge document that details all of the negative environmental effects, and then doesn't change.

They don't have to under the law-- under the National Environmental Policy Act, they don't have to. As long as they say that what the negative consequences are going to be. Obviously there's other environmental laws. But in some sense process for process's sake or a listening session. What is it-- well we even say a listening session where you don't change your mind about anything is maybe it's a little bit of a misnomer, it's more of a talking session, right. And so yeah, that's a really important point.

It's about-- it's about substantive outcomes, it's about process, but where process means power too. It doesn't just mean an opportunity to literally stand up and say your piece and have someone sit there, but it means that you actually have genuine influence and power over the outcome.

CALE JAFFE: Yeah that's a-- I love that phrase Mike. Process means power. That's-- I think that's exactly right. That's a perfect way to phrase it.

MICHAEL A. LIVERMORE: Yeah. So yeah. So one of the questions that this brings to mind or this kind of notion of listening to the environmental-- listening to the folks you're working with basically, right. When you're in your clinical context, and you're representing a community, a group or whatever the kind of situation is that over the years, you've learned that the fewer preconceived ideas you have and the more you're listening and responding to the needs and articulated desires and goals of the community, the better you're going to serve your role.

I'm just curious about your thoughts on how this fits in with the environmental movement more generally, right. Because as you noted, you're in a bit of a privileged position in the clinical context, right. You choose the matters that you're going to work on based on, you know you have these, kind of, criteria of good for the students, good for the community, in some broad sense also intellectually interesting. And it doesn't have to be a, kind of, fit into as a cog in a bigger strategic machine, right, in some sense.

Whereas you take Sierra Club or Earth Justice or SELC or any group, they very understandably have a bigger strategic set of goals, right. They want to improve air quality or they're trying to address climate change. Really big picture things.

And any-- what they would ideally want, I think, is for any particular matter that they're working on, whether it be litigation or legislation or a regulatory thing or whatever it is, it-- there's an ideal that it would fit into the strategic picture. And then you could say, OK, this is the grand plan, and this is how everything that we're doing fits into the grand plan, right.

And in a sense, there's something there's some conflict there between having that grand plan where everything fits together and the kind of listening forward bottom-up work with the community--

CALE JAFFE: By listening for listening sake, yeah.

MICHAEL A. LIVERMORE: --and let the comm-- exactly. Listening for listening sake and letting the community direct the show, to a certain extent. It's not just listening, it's also like what they want is going to, kind of, be the way things work. And even if that doesn't fit in with your grand strategic plan. So, yeah. So how do you think the big groups manage this or what do you think the good way to think about this stuff is?

CALE JAFFE: Well I think-- part of the way to think about this is to see that it's a challenge across the board. It's not just-- it's not just about fights against greenhouse gas emitting industries or landfill companies. It's something that pops up everywhere. So you can have maybe a holistic strategy to it.

Just to give you what I'm thinking about in terms of where it pops up in a slightly different context is I was-- this was back when I was at Southern Environmental Law Center, and we were supporting a proposed wind farm in, sort of, far South-- in the coalfield region of the Commonwealth of Virginia right near Bluefield West Virginia. So right on the West Virginia, Virginia line.

And we thought this is great. This is-- environmental community had termed this a just transition project. If we're going to transition away from greenhouse gas polluting resources, we need to help, sort of tho-- those sort of coalfield communities transition to other options and here was a wind farm that they should support. And it was running into problems.

There was a-- I won't name the developer of the wind farm, but they sort of parachuted in and ultimately the local zoning that had to be changed, at least at this time, maybe things have moved forward in the years since I left, but the local zoning was-- they rejected that change. And one of the issues that one of the supervisors mentioned at the sort of public hearing on it was a complaint that the executive for the company developing the project had flown in on a private jet to come to the meeting, and then flown back out and didn't spend a night in the community.

I mean, it's not a factor that is frankly relevant to the local zoning decision whether the applicant has spent a night in one of the local motels or not.

MICHAEL A. LIVERMORE: It's not part of the law, right.

CALE JAFFE: It's not-- yeah, it's not a legally defined consideration. But it was obviously important to this particular supervisor and others. And it was a great example of well we're supporting this wind farm, and this coalfield community is resistant to it in part for the same reasons that we're seeing in a coal plant in southeastern Virginia or the landfill project or any of these other projects is that same problem that that's not just about polluting industry versus environmental interests, it sometimes it's going the other way.

And so there has to be some sort of broader holistic mindset that we adopt that's going to work regardless of what the different problems are on the ground.

MICHAEL A. LIVERMORE: Yeah. Yeah it's a really interesting story. And often just puts me in mind of these narratives that inform just a lot of how we structure our lives and our advocacy and fundraising and, kind of-- there's a lot of us versus them out there. And to a certain extent that has to be and to a certain extent it tracks reality.

But it can also be, kind of, dangerous because when you adopt that kind of mentality then some collateral damage becomes OK, right. It's like, OK, this community isn't happy with this wind farm, but like so what we've got to make a transition here, right. And that might not be actually-- it might not be good for various reasons, right. It's not fair for the community, it's not probably good politics at the end of the day and-- but it's hard to get away from those narratives.

CALE JAFFE: Yeah there's a little book by Shalanda Baker who's now in the Biden administration called*Revolutionary Power.* And she uses the term-- she talks about a bunch of these sort of environmental justice cases in the climate context. And she uses, as a pejorative term, the term climate fundamentalists. Folks who just are so focused on decarbonization and if a local community doesn't like it, so what, we've got to make that transition.

And when I first read that book, I thought of myself, as like well, I sort, of think I'm a climate fundamentalist, I mean. Like it's a pretty big freaking problem.

MICHAEL A. LIVERMORE: In fairness, right. It is a big deal. That's right. Climate change is not just a trifling matter.

CALE JAFFE: Yeah. So that-- I mean, I haven't fully wrestled with that of OK I get it Maricopa have done a bad job of listening for listening sake. I need to work on that, I need to bring humility to that. But I'm also can't shake this voice in the back of my head that's reading the latest summary for policymakers from the IPCC and thinking, oh my God, we really do need to be climate fundamentalists.

MICHAEL A. LIVERMORE: Right. This is an emergency, right.

CALE JAFFE: Yeah.

MICHAEL A. LIVERMORE: Yeah it's a hard balance. It's a really, really, really tough balance. So we just have a couple more minutes. Thanks for spending so much time with me today Cale.

CALE JAFFE: Oh yeah.

MICHAEL A. LIVERMORE: So I guess my final question would be in teaching and working with clinic students, like how do you think about how to kind of impart these lessons. Obviously you don't want the clinic students to make all the mistakes that the environmental community has made over the years. Is there a way that you structure the clinic or structure the relationship that the students have with clients to try to, kind of, build some of these insights into that educational experience that they have?

CALE JAFFE: Oh I'm so glad you asked that because as I was sitting here thinking the one thing I hadn't talked about yet was the teaching. And of course, that is a huge motivation here. It's so much fun to get to work with students, sort of, young people, sort of, at the earliest stages of their career. Shortly after college, maybe a little bit-- some with more experience than others. But they're coming in here really just trying to figure out where they're going and how to get there.

And that opportunity of just, sort of, teaching it's been so much fun about this job. I-- our former colleague of ours here at the University of Virginia, Toby Heytens, who is now a federal appellate judge, I remember at his investiture when he was sworn in as a judge on the Fourth Circuit, one of his colleagues, sort of, said that Toby's teaching philosophy was essentially just you need to genuinely like your students, really like them, and they need to know that. It's just that simple.

And I think that that's absolutely right. That that's, for me, part of the fun is, a clinic setting I get to a small group of students pretty well because we're not just sitting in a classroom, we're also working on cases together, meeting, sort of, for strategy sessions outside of the classroom, meeting with-- traveling to meet with clients. And you get to genuinely really like all these young budding law students.

And I think my job is just simply to let them know that. That I'm excited for them. That-- and they'll, sort of, find their way from that. I can, sort of, share whatever insights I have from my own experiences. But another way of thinking of it is I-- there was a-- I recently read the obituary for this wonderful art teacher that I happen to know from my high school. He died not that long ago at age, I think 89 or 90.

But in his obituary it wrote that his teaching philosophy was just simply that he saw the light in his students and reflected it back to them. And I think there's-- you know I know I'm not teaching high school art, we're teaching at a professional school trying to prepare people for a complex career. But I think there's still some of that simplicity of seeing the light in our students and reflecting it back to them.

MICHAEL A. LIVERMORE: Well that sounds-- that sounds great. That sounds-- that sounds totally right. And, yeah, it's a great way for us to end the conversation today. Thanks so much for chatting with me and all these really super interesting insights from your career. And thanks for all the work you've done on these issues over the years.

CALE JAFFE: Thank you so much for letting me sit-in on the podcast. I've been, as they say in talk radio, a long time listener, first time caller. So I'm excited to-- excited to be here.

MICHAEL A. LIVERMORE: Yeah it's been fun having you on.

CALE JAFFE: Thanks.

MICHAEL A. LIVERMORE: And listeners, if you enjoyed this episode, let us know. You can give us like, a rating, subscribe to the podcast and follow us on social media. It'd be great to hear from you. Till next time.

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