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Wild Nature, Sanity, and the Law

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In 1972 Christopher Stone published a ground breaking study in environmental law. For the first time, *Should Trees Have Standing?* raised the possibility that natural objects might be granted "legal rights." As lawyers use the word, "standing" means the right to take legal action. Stone's conclusion was startling. He agreed that we can pass more laws to give trees, bears, and rivers "standing," but the environment will never be reliably protected until people in industrial societies experience a radical "shift of consciousness." They must overcome the "sense of separateness" that makes them believe nature is the "dominion" of humankind.

No one is better qualified to take up Stone's challenge than James Thornton. A former senior attorney for is the Natural Resources Defense Council and now Executive Director of Positive Futures Foundation in Santa Fe, New Mexico, Thornton has approached the natural environment from both the legal and the spiritual direction. He is currently finishing a book . *Field Guide to the Soul* , which is a manual for meditation based upon his own deep communion with nature. In the essay that follows, he offers a magisterial critique of the legal issues raised by an environmentally-based definition of mental health,

"From a deep perspective," Thornton observes, "my body is the Earth, and so any harm to the life on Earth is a harm I suffer. Thus, the loss of a species of beetle in the Amazon is a real harm to me." But as he makes clear, taking that psychological insight into court will not be easy. Thornton's essay, though demanding and tightly argued, deserves the closest attention from every psychologist who hopes to bring about Christopher Stone's "shift of consciousness."

Theodore Roszak

Introduction

Imagine that we realize a dream of ecopsychology. Imagine that an environmentally-based definition of mental health becomes widely accepted, and embedded in the Diagnostic and Statistical Manual of the American Psychiatric Association.

Sanity, under the new definition, depends in part upon contact between humans and the natural world.

What are the legal implications of this change? What opportunities would such a change offer in the courts and legislatures? And what kinds of barriers would there be to using it? Finally, what kinds of research would allow us to use such a change in definition to its maximum advantage in effecting policy change?

This article will look into how such a change in the definition of mental health could help in environmental affairs.

What we will see is that for ecopsychological arguments to be genuinely compelling to policymakers, we need to construct theories connecting some of our basic social ills - such as gang violence, or depression in urban adults - to a lack of contact with the natural world. And we need to support the theories with compelling and illuminating data.

There are four areas of legal and policy argument in which it could help to have an environmentally-based definition of mental health. The *first* is in the law of torts, which is concerned with compensating injury; the *second* is in the law of equity, where we seek to enjoin an impending harm; the *third* is in the area of statutory rights; and the f*ourth* comes when we make arguments of environmental policy.

We will start with the law of torts for two reasons. It is largely common law, made by courts in the absence of statutes, and accreted over time. Courts could therefore apply our new definition in litigation brought before them, without the intervention of the legislature. Also, the barriers we need to surmount in the law of torts will give us a clear indication of the kinds of evidence we must amass to make any sort of legal argument convincingly.

I. Policy Arguments

A goal of ecopsychology is to enable environmental policy arguments based on human self-interest. As long as such arguments are based on moral or aesthetic considerations, they are fairly weak. But if they can be based on a clear showing of negative impact on humans, there is a much better chance of success.

A changed definition of mental health offers this opportunity. If we can get a consensus on the psychological need for human contact with nature, the tenor of the environmental debate will shift in a fundamental way. Preserving ecosystems will be easier to see as a matter of self-interest. When policymakers are moved by self-interest, they act.

This kind of argument of self-interest is what is needed in amending statutes, and in winning policy arguments.

In policy arguments, the standards for injury and causality are somewhat relaxed. A court will never consider a claim that the destruction of the rainforest in Amazonia harms me. Congress, however, might consider the notion as one of a set of policy inputs, given the evidence.

The question then becomes - what kind of psychological evidence do we need to make our case? What must ecopsychology show?

To make legal and policy arguments, specific types of evidence would be needed. Insofar as practitioners of ecopsychology want to effect changes in environmental policy, research needs to answer the following kinds of questions:

What are the clinical impacts on mental health from too little contact with nature?

Most Americans now live in dense urban areas, and have little or no contact with wild nature. Many of our problems as a culture derive from this lack of contact. When we put animals in zoos, and deprive them of contact with their environment, we expect them to become neurotic. We have built our own cages of chrome and glass and steel and call them cities, and not noticed that we have put ourselves in zoos.

We set our life rhythms to those of the natural world for millions of years. We tested our growth and maturity against it, as indigenous people still do. What is the effect of living in an artificial landscape bereft of natural cues? What are the effects of not meeting the Other in the eyes of the wolf; of not growing our own food or hunting it; of never seeing stars? What is the result on human behavior: on moral values, on cooperation, on anger and violence, on the ability to connect with other people and sustain relationships?

We need to answer these questions both with compelling theory, and with data that illuminates the theory. We need an ecopsychological Piaget Project, which can model and document the developmental role of contact with nature in the growth and individuation of the healthy human psyche. And then we need hard data, to refine and substantiate the model.

Let me illustrate two kinds of theory that would be compelling, if supported by data:

Theory One: Arguing from Depression

Depression in the United States is epidemic. Federal government statistics attribute clinical depression to as many as a third of American adults. These same people largely live in urban areas and have no contact with wild nature. These two facts, the depression and the lack of contact with wild nature, are causally related. The data, adjusted to take account of other factors, show that

depression can be ended by sufficient contact with wild nature.

What kind of studies could we do to demonstrate, in rigorous controlled experiments, that the depression of urban people can be ameliorated by contact with wild nature? Could we do a study showing convincingly that Prozac users could drop the drug and improve their mental chemistry to an equivalent degree, by spending time in the wilderness, or working on a permaculture restoration of degraded land?

Theory Two: Arguing from Urban Violence

Violence in American cities has risen dramatically over the last couple of decades. Youth gang violence in particular is a recent urban phenomenon. Gangs flourish in inner cities. Gang members typically have no exposure to wilderness. They therefore have no chance to test themselves against its challenges, or to work together with others cooperatively to do so. A central reason for gang violence is that young men need to test their mettle, and have been deprived of a responsive living world against which to do so. There is a causal relationship between gang violence and severing the connection with nature.

A controlled study of gang members could be done, divided into three groups: a control group; a group that receives counselling; and a group that lives together in the wilderness for an extended period. The work I am aware of suggests that the group going to the wilderness will return with much higher social skills than the other groups. To show that gang violence could be ameliorated by wilderness experience would powerfully address a central fear of our culture.

These kinds of theories, if supportable and documentable, would play well both in the media and in the legislature.

These theories, and any others as interesting as they are, would, of course, be difficult to demonstrate convincingly. There would be arguments about confounding variables - gang members have also been deprived of jobs and so on.

But big powerful attractive theories of this kind are what we need. The theories will have to meet the real world at its most painful and devastated, and touch into the insane behavior in our culture in a way that ordinary people can be moved by.

Moreover, if significant deprivation of contact with wild nature leads to some form of mental illness, then most of us have this illness in some form. Significantly, all the policymakers we wish to influence will have it. The theories and data we present them must be so startling and convincing that people will be moved to examine their own case, and move beyond their presumption that they are fully sane.

This is a very high threshold to cross. But we will get nowhere in changing policy with psychological arguments unless we can cross it. If our arguments seem remote and speculative, or seem to deal with aesthetics instead of sociopathic behavior, they will never do much.

We need to show the causal connections between lack of contact with nature and violence, depression, the breakup of the family and so on. The things people most fear in our culture and are most deeply puzzled by is where we need to stand. They are what we need to understand and to explain. We suspect that these social problems derive at least in part from our alienation from wild nature. If we can capture these connections in theory and illuminate them with data, we can hope to change the way people think at a fundamental level.

Some Key Questions:

How much exposure do we need to the natural world? And how wild does it have to be?

This will be hard but crucial to document. Do we need the unpredictability of wild encounters - meetings with wild animals and plants, not just our pet dog and our potted philodendron? How can we quantify the amount of connection we need? What are the minimum requirements of biophilia? If these requirements can be met by less than a pristine rainforest, what does it take to meet them?

Most policy arguments are about how to balance competing interests. For the ecopsychological definition of mental health to be really valuable, we need to get a real sense, a practical sense, of what sacrificing this species, this wetland, or this forest would do to people. How much wilderness do we need in the continental United States? How close does it have to be to urban areas? Is a degraded forest near an urban area more "valuable" than one that is pristine but remote? We need to show what the minimum requirements for being sane are under the new definition in real world terms.

What is the nature and the etiology of the harm to mental health from deprivation of contact with the natural world?

In family law, the dysfunctional family model has had an impact because the model was well developed in theory and documented in practice. That model is both predictive and explanatory of behavioral dysfunction. It points to the source of the harm, the nature of the harm, the conditions that will result in the harm, and the nature of the mental health impacts of the harm.

We are very far from the clarity of that model and those data at this point in the history of ecopsychology. In the dysfunctional family model you have what the law likes: a verifiable harm, a clear understanding of its nature, and a causal connection between the harm and specifiable conduct.

What causal connection can we show between particular environmental destruc-

tion and human mental health?

The main policy counter-argument will always be: "You may be right in the abstract that humans need contact with the natural world - but you can't convince me that cutting down these particular trees will have a negative psychological impact. There are so many other trees!"

If there were only one whale left, as there is in a story by the Japanese writer Oe, then its killing would have an impact. But how can we demonstrate an impact from the killing of whales from species of which there are still many members? What about species as yet unnamed living in rainforests? In general, what kind of mental health impact can be causally related with what type of environmental destruction?

How do we draw bounds?

From a deep perspective, my body is the Earth, and so any harm to the life on Earth is a harm I suffer. Thus the loss of a species of beetle in the Amazon is a real harm to me.

This, however, is not the perspective of the law. In law, we have to be careful that our argument does not prove too much. If we show that any harm to nature hurts every human, we will rule out redress for all harms. Law deploys its limited powers of redress by discriminating, drawing lines and boundaries. It is concerned not as much with what is real as with what is reasonable.

Everything brings us back to causation. What harms can we reasonably trace to what actions? The destruction of Siberian forest will be too remote for a California court to notice. And yet if we can make the causal links strong enough between harms we suffer and the destruction of Siberian forest, the right Congress might act. What harms are caused by cutting old growth forest in the Pacific Northwest? And what population suffers those harms? After we prove the harms, how do we draw the bounds?

II. Redressing And Preventing Mental Harms

The law of torts provides for the compensation of injury. How would a definition of mental health that required human contact with nature as a precondition of sanity, play out in tort cases?

a. Redressing Injury

Let us imagine a hypothetical case: A person living in California and deeply committed to the preservation of old growth redwoods sues Maxxam for cutting down virgin redwood groves on its land. Plaintiff relies on a theory that Maxxam's action will cause her and others like her a mental harm. Does she

have a case?

The law of torts does allow compensation for what is called the "negligent infliction of emotional distress," including the "fear of future harm." The barriers to recovery are formidable, however, since courts are extremely reluctant to compensate any injury they regard as remote or speculative.

The general rule in the United States is that recovery for any mental harm must be tied to proof of physical injury. In our hypothetical, there is no physical injury to the plaintiff, and the courts in a majority of states would therefore dismiss the claim, even with our new definition of mental health.

A minority of jurisdictions, however, led by Hawaii and California, allow recovery for mental injury absent physical harm. The barrier remains high, though. The plaintiff must show that: 1) the defendant acted negligently; 2) the defendant had a duty of care to the plaintiff; 3) The mental harm alleged is a reasonably foreseeable consequence of the defendant's action; and 4) in some cases, that the defendant's action is unreasonably dangerous.

Under this rule, a mother has recovered for her emotional distress occasioned by the negligent killing of her child by the defendant, which she was present at and witnessed. And a plaintiff recovered for her emotional distress when a hospital misdiagnosed her as having syphilis. These are examples of extreme distress caused by extreme situations. When a court can perceive the harm vividly, as in these cases, it will reach out to offer redress.

Let us return to our hypothetical redwoods case. Can the plaintiff recover? The difficulties are several. First, it would be hard to convince any court that it was negligent for Maxxam to cut down trees on private land when the state or federal governments had approved the cut under statutory rules, and after an Environmental Impact Statement or equivalent process. Second, the mental distress that must be shown is an extreme one, as in that brought on by the death of the child or the misdiagnosis with syphilis.

The test laid down by the Supreme Court of Hawaii for testing the quantum of the mental distress is: "whether a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." And this is the most liberal court in the country on such matters.

The California courts appear to be narrowing rather than expanding the availability of redress for claims of mental distress. For example, a series of cases were dismissed in which patients with artificial hearts sued the manufacturer of the heart valves. It was undisputed that a certain percentage of the heart valves the manufacturer had sold were defective. It was undisputed that if a valve malfunctioned while in an artificial heart, the patient would suffer sudden death. Plaintiffs sued on a theory that because they knew of the real possibility

of their own death from a defective valve, they suffered mental distress. Nevertheless, the courts denied recovery. The harm, they said, was too remote and speculative. Why? Because the ratio of defective valves to good valves was low. These cases illustrate both the difficulty courts have believing in the veracity of a claim of mental harm, and their tendency to want a physical injury before considering a mental one.

Finally, for a plaintiff to succeed on a claim for mental distress, she needs to show not only that the defendant was negligent, and that she suffered an actual mental injury, but that the harm was reasonably foreseeable to the defendant, and actually caused by the defendant's conduct. The foreseeability requirement has been interpreted by some courts to require that the defendant actually know the plaintiff, and actually be aware of the likely impact of its actions on this particular plaintiff's mental health.

In our hypothetical, Maxxam would argue that it was not negligent, owed no duty of care to the plaintiff, and that if the plaintiff did suffer any mental harm it could not be caused by its action, because there are many other redwoods left standing in California for the plaintiff to use and enjoy. And the plaintiff would almost certainly not recover damages.

The most difficult task for courts asked to compensate mental harms has been how to assure themselves that the harm is real and substantial, not subjective or trivial. Where a court perceives a real injustice, it will labor hard to find a way to compensate it.

The question is to what extent a revised definition of mental health, and its supporting theory and data, can make the nature of the harm so vivid that the judge can imagine herself suffering it. Only if we can do that - help the judge experience the harm as real in her imagination - can we use a revised definition of mental health to compensate environmentally caused mental harms.

Once the nature of the harm is clarified and substantiated, however, we can imagine success in the following hypothetical case:

A group of low income children lives in a public housing project. They have access to an adjoining marsh, the only natural area they can ever visit during their childhood, in practical terms. The state housing authority, which owns both the housing project and the marsh, then fills in the marsh to make a parking lot for its utility vehicles.

Will an action for damages lie? Under current law, probably not. If the definition of mental health were revised? Perhaps.

Here we have a defendant with a duty of care to its tenants. If we can establish that the children will suffer mental harm by being deprived of contact with the marsh and thereby of all contact with the natural world - and here the revised definition would help - it is likely that the right court would find grounds

for compensation. (What would the nature of the compensation be? Perhaps damages plus the restoration of the marsh; perhaps a permanent fresh air fund to bring the children into the wilderness in the summer.)

b. Preventing Injuries

Even without a statutory right, it is possible to get a court to enjoin obnoxious behavior, if it is bad enough. How bad is bad enough? The action must threaten "grave, irreparable and immediate injury". Under this standard, it becomes possible, for example, for a woman whose husband beats her to enjoin him from visiting her.

Let us revisit the hypothetical of the children and the marsh. Could we prevent the destruction of the marsh? If we could by clear theory and convincing behavioral, statistical evidence, show that the children will be mentally harmed by being deprived of contact with the marsh, we would have a good case for enjoining the state agency from destroying the marsh.

The same kind of evidence that would allow the recovery of damages would be needed to enjoin threatened conduct. That is, the injury would have to be specific and real, compellingly demonstrated, and causally connected with the threatened action.

Both the damages and injunctive remedies would be most readily available in cases in which there was a unique relationship demonstrable between the plaintiff and the natural resource, that relationship would be or was ruptured by the defendant's conduct, and the mental injury is, or threatens to be, a severe one, one that the judge can realistically imagine feeling within herself in similar circumstances.

III. Statutory Rights

The area of statutory rights offers us somewhat more scope for experiment and success.

What is a statutory right?

The legislature can create substantive legal interests, the infringement of which is actionable. The right to social security benefits, for example, makes a deprivation of those benefits actionable. The legislature also delimits the beneficiaries of the rights it creates. When the rights created are broad, like the right to clean water, the question is: who falls within the zone of interests meant to be protected, and who can therefore claim to be adversely affected by actions impinging on the right? Those adversely affected will have standing to sue.

The Federal Clean Water Act, for example, both gives citizens a right to water

clean enough to meet certain standards, and creates a citizen right of enforcement, so that a citizen can sue a company that violates those standards. Thus if you live on Chesapeake Bay and Bethlehem Steel discharges more than the permitted amount of chromium into the Bay, and you can prove it, you can go to Federal court and get an injunction to make Bethlehem desist from its illegal discharges and an order to make it pay penalties. I have brought such actions in Federal court on behalf of citizens, and won them.

There are two distinct aspects of statutory law to pay attention to. The first is the matter of substantive rights, and the second is standing to sue.

Let us take standing first. If we clarify the definition of mental health in ecopsychological terms, we may enhance standing to sue to enforce rights already existing.

For example, a person would now have the right to enforce the Clean Water Act against an entity that pollutes any stream they use recreationally. If we can appropriately shift the definition of mental health, we would be in a position to argue that anyone has standing to sue to enforce the Clean Water Act against an entity that pollutes a stream they would use recreationally if it were clean, but which they cannot comfortably do knowing it is polluted. Here we can again see that the primary utility of the expanded definition of mental health is that it would sharpen the notion of injury in an area that may otherwise seem subjective.

Standing to enforce existing rights is important, because conservative judges appointed in recent years have been laboring to restrict access to court by citizens seeking to enforce environmental rights.

To move to substantive rights, an ecopsychological definition of mental health would make it easier to expand substantive rights in the legislature. Again, the usefulness of the change would lie in sharpening the perception of the injury.

Where courts or legislatures cannot perceive the nature of the injury clearly, they will deny relief. When the injury speaks so clearly they can vividly imagine suffering it themselves, then relief is easier to actuate. This is equally true whether one is trying a case in court, or lobbying the legislature to change a law.

So the evidence must be good, both as a matter of theory and a matter of data. We will return to this again below. Assume for the moment we have the theory and data in place. We could then, ultimately, convince the right Congress to change the substantive rights codified in environmental statutes, to protect mental health.

Congress would need to rewrite statutory language of a variety of statutes, so as to change the contour of the rights. The Wilderness Act, for example, could be amended to include in the definition of "wilderness" any area that contains

"ecological, geological, or other features of scientific, educational, scenic, psychological, or historical value."

IV. The Way Ahead

One can imagine other statutes being opened up in this way too. The National Environmental Policy Act (NEPA) could include psychological impacts within its ambit. This would trigger the requirement that for every major federal action affecting the human environment, that is, for every action for which an Environmental Impact Statement is prepared, there would have to be a study of the human psychological impacts of the action.

Under this amended NEPA, there would have to be a discussion of the psychological impacts of expanding an airport, allowing a greater number of marine mammals to be killed, selling offshore oil leasing rights, building a highway, and so on. While the discussion might not change the outcome of actions, it would do a good deal to help create a climate in which psychological impacts of environmental actions were taken more seriously.

We need to be clear on the different kinds of mental harms that we wish to address. One class will be those caused by the generalized deprivation of contact with the natural world. Another may arise out of specific incidents of habitat destruction. The two are linked, but different. In what ways are they different? Or is the prime problem the lack of an adequate quantum of contact? If so, is habitat destruction primarily of importance from the ecopsychological point of view because it narrows the pool of potential contacts between people and the natural world?

We would argue that certain kinds of contact with the natural world are a necessary condition for a human being to enjoy full mental health. We will be met, however, with the argument that it is not a sufficient condition.

No amount of contact with the natural world guarantees honesty, civility, humanity, or sanity. Ghengis Khan had a good deal of contact with nature. So traditionally have all manner of pirates, cutthroats, cannibals and so on. Some of the Nazi doctors were fine gardeners as well as Schubert *aficionados.*

What is our reply?

How important a part can we prove contact with nature plays?

How important is it?

I have no question that intimate experience of the living Earth plays a vital role in sanity and in awakening our full human potential.

The question is: How can we capture its contribution in theory and illuminate it with data, so as to make an impression on policymakers who discount its importance in their own lives?

It should be possible to do so. If we can, we will change how we think and act as a culture.

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