
SPRING

INTRODUCTION

One of the problems that faces us today is what to do about public health in multi-government systems. Policy decisions in other fields are often relatively uncontentious parties are content to allow each other to make disparate choices. However, policy decisions about public health reflect community values. Sometimes these values are so deeply embedded in a population that the community holding them regards them as natural, failing even to realize that it has a choice in whether to accept or reject the principles. This note speaks to policy decisions that arise out of profound values and create difficult choice of law problems. Such problems arise because the laws in question reflect principles so fervently adhered to that communities are almost unable to tolerate

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s,
primarily protection of farmers from adulterated/ineffective products, until today when there are comprehensive objectives, including human health and environmental protection, as well as pesticide user protection.¹³ Sometimes state regulation of pesticide is even stricter than regulation at the federal level. F

chloropicrin use is not only the most exigent in the nation but is even stricter than the U.S.

¹⁴ States have the authority to design their own pesticide regulations provided they are not less rigorous than those constructed at the federal level.¹⁵

The history of state regulatory actions on DDT is a synecdoche for the diversity of state-level pesticide regulation. By 1975, DDT had been banned except for during emergencies by Illinois, Iowa, Massachusetts, New Mexico, New York, Rhode Island, Vermont, and Wisconsin. DDT had been limited in Alaska, Arizona, California, Colorado, Connecticut, Florida, Idaho, Kentucky, Maine, Maryland, Michigan, Minnesota, New Hampshire, North Carolina, Ohio, Utah, Virginia, and Washington. The
did not single out
DDT.¹⁶

Over time, the federal government regulated DDT more and more heavily. In 1957, the U.S. Department of Agriculture banned DDT use around the aquatic land it controlled. The next year, it began to phase out its usage of the chemical. Then in 1964, the Secretary of the Interior banned the use of chlorinated hydrocarbons on its lands when any alternative was available. Six years later, the Secretary banned DDT and fifteen other pesticides on its lands outright.¹⁷

¹³ ARNOLD L. ASPELIN, PESTICIDE USAGE IN THE UNITED STATES: TRENDS DURING THE 20TH CENTURY 1-8 (North Carolina State University, 2003).

¹⁴ Scott Smith, *California Now Has Strictest Rules on Pesticide Chloropicrin in U.S.*, L.A. DAILY NEWS, (Jan. 14, 2015), <http://www.dailynews.com/environment-and-nature/20150114/california-now-has-the-strictest-rules-on-pesticide-chloropicrin-in-us>.

¹⁵ National Pesticide Information Center, *State Pesticide Regulation* (Feb. 22, 2016), <http://npic.orst.edu/reg/regstate.html>.

¹⁶ Environmental Protection Agency, *DDT Regulatory History: A Brief Survey (to 1975)* (July 1975), <https://archive.epa.gov/epa/aboutepa/ddt-regulatory-history-brief-survey-1975.html>.

¹⁷ *Id.*

During the late 1960s, the USDA again restricted DDT use, cancelling its registration against house flies and roaches on the foliage of several crops and in milk rooms and
and reducing its own usage of the chemical in Federal-State pest control programs. The next year, the Department cancelled registrations of DDT products used on fifty edible

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A major change occurred on December 2, 1970 federal pesticide regulation primarily became the responsibility of the U.S. Environmental Protection Agency (EPA). From 1971-1972, the EPA cancelled all crop uses of DDT as well as registrations of the DDT metabolite TDE, citing the toxicological effects of DDT and the existence of safer replacements. The following year saw the EPA pass laws requiring the registration of all DDT products with the Agency. However, despite constricting the use of DDT, the EPA does grant emergency requests for its usage at the state and federal levels. The exceptions
onmental
Pesticides Control Act.¹⁹

III. THE INTERSECTION OF PEST CONTROL AND UNETHICAL EXPERIMENTATION ON HUMANS

ory of medical
experimentation. The disgusting but successful experiment Major Reed led to determine that disease could be communicated by mosquitos raised the ire of the Spanish Council of Cuba, but their opprobrium did not stop the federal government from treating people as pests (laboratory rats, specifically), setting aside ethical norms in the name of public health, or transforming plagues into weapons. Harriet A. Washington documented several of these instances in her instant classic *Medical Apartheid*.

¹⁸ *Id.*

¹⁹ *Id.*

because their larvae feed fish.²⁴ If you eradicate mosquitos, you might just eradicate salmon, tuna, and trout as well and the human communities who rely on them for food.

that certain beings are nothing more than the harm they cause, or are perceived to cause. From a pest perspective, some creatures, both human and not, can be sacrificed or slaughtered instead of treated with respect and, during adversarial interactions, dealt with with restraint. Thus, mosquitos are nothing more than vessels of disease, and vulnerable human populations particularly soldiers, immigrants, and people of African descent are laboratory rats. However, while one viewing the world through a pest perspective might regard any creature from a bug to a human community as worthless, there is a profound difference between those viewing the former and the latter as pestilential. Treating insects as pests is foremost ignorant and short-sided while treating people as pests is morally reprehensible.

IV. ATTITUDES TOWARDS PESTS AS AN EXPRESSION OF CULTURAL VALUES

In contrast to the pest perspective, *The Plague of Doves*, a novel by Ojibwa author Louise Erdrich, rejects such reductionism.

plagues of acknowledged loveliness, priests expected to be devout reveal themselves to be gluttonous drunks, the act of appreciation may be a sin,²⁵ and outlaws are honored as heroes. No one and nothing, human or not, is wholly good or pestilential. Villainy is framed as the failure to recognize this truth.

For example, among the novel's antagonists are white citizens, living adjacent to the Ojibwa reservation in the book, who regard Native Americans as a plague to be allowed to starve or even indiscriminately murdered.²⁶ In contrast, on an expedition some of the characters undertake, a white cook mocks two mixed-race Native American guides.

²⁴ GILBERT WALDBAUER, *THE HANDY BUG ANSWER BOOK* 252 (1998).

²⁵ LOUISE ERDRICH, *THE PLAGUE OF DOVES* 8 (2008).

²⁶ *Id.* at 92.

the guides. And the dog ultimately saves the lives of all the men.²⁷ The message is clear—valuing others, no matter their race or species

ecological web of life to suggest that the only appropriate way to deal with an enemy is through violence.³³

Yet unlike Palin in her speech, Billy never fully loses control. One component of the bewitching personality that allows him to beguile his audience is the ability to handle language with a self-disciplined dexterity.

mosquitos in the wake of the Zika virus.³⁵ He ra

allow people their health, their lives and a chance to fight back more effectively against

on sentence, the anaphora, and the paratactic rhythm. ³⁶ Here, once more, is the run-

The difference between Jay Ambrose and others who call for the use of DDT to fight disease and Trump, Palin, Jefferson, and those who experiment unethically on human beings, of course, is that many of those who take a pest perspective against mosquitoes express a noble concern for their fellow humans, often marginalized, who frequently make up the majority of the victims. But is frenzy, immoderation, violence, and eradication of one species the best way to protect the vulnerable members of our own? As Gross notes:

The old Anishinaabeg would have looked at trouble with the world, including animals, in the same way family troubles would have been viewed.

in the animal kingdom are considered to have personhood and are recognized as relatives. And as states consider undertaking DDT mosquito eradication campaigns, issues are likely to arise if different states locate themselves in different places along the spectrum.

V. THE PUBLIC POLICY EXCEPTION IN CHOICE OF LAW PROBLEMS

For example, suppose the EPA, under the

Despite the Supreme Court ruling, state courts have not always decided in a manner consistent with *Hughes*. For example, in *Marchlik v. Coronet*, decided by the Supreme Court of Illinois in 1968, the court found that the public policy of a state allows states to action.⁴⁰ Thus,

In *Cooney v. Osgood Machinery*, decided in _____, the court

should be reserved for tho _____ 41
 against causing the decline of the bald eagle population obnoxious? In a zero-sum world where we must choose between protecting humans from microcephaly and Guillain-Barré Syndrome and sustaining avian populations, the answer is yes. But is that the world in which we live? Anishinaabe principles might suggest it is not that any problem humans have with our non-human relations is resolvable without us treating mosquitoes like an enemy to be entirely exterminated with a dangerous poison. This view is not inconsistent with Western science.

comprehensive approach to addressing the virus that includes studying the species of mosquito that spread the virus, developing a Zika vaccine, eliminating places where mosquitoes can breed and potentially introducing genetically modified mosquitoes that

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Originalism would also help determine whether S _____ statute is obnoxious. Did the statute arise from a privileging of eagles over humans? Or did it come from a belief that the well-being of all creatures is connected and a concern, such as that articulated in *The Plague of Doves*, that harm to any part of nature would eventually have deleterious repercussions on the rest of nature, *including* _____ because it was originally crafted by racists who were openly and vocally indifferent to how bans on DDT might affect the health of the predominantly non-white population of _____

⁴⁰ 40 Ill. 2d 327, 332, 239 N.E.2d 799, 802 (1968).

⁴¹ 81 N.Y.2d 66, 79, 612 N.E.2d 277, 285 (1993).

⁴² Justin Worland, *Why Bringing Back DDT to Fight Zika Mosquitoes Could Backfire*, TIME (Feb. 3, 2016), <http://time.com/4205214/zika-virus-ddt-mosquitoes/>.

State A, part of whose territory is tropical and thus vulnerable to viruses like Zika? In
o need not
be protected? atute crafted by Native American lawmakers with
beliefs similar to those of the Anishinaabeg as a reflection of their socio-legal
cosmology?

As Zika continues to be mentioned in the news each day, I predict calls for DDT
mosquito eradication campaigns will become more frequent. Furthermore, if states apply
to the EPA for an exception allowing them to use DDT, given the grave consequences of
Zika fever, the possibility that they might be granted it is not outlandish. Should that
possibility come to pass, it is not unlikely for conflict of law cases centering on public
policy to arise.

compels us to explore how to protect what we most value and how to address what we
most fear. It demands that we consider what and who might be sacrificed in the name of
the common good and exactly what and who we mean when we talk about the common.

CHEROKEE PUBLIC HEALTH POLICY

Allow me to close with one final thought. I am a Cherokee woman, and, for my
people, law and literature are often the same. The policies by which we once lived and
to some extent continue to live are contained in our stories. One story of my people
teaches that territories are spaces of legal pluralism governed not just by law created by
humans but law created by animals. To protect themselves from being wrongfully killed
by humans, animals invented sickness. Rheumatism arises, for example, if one kills a
deer without asking it for forgiveness. Species from across the animal kingdom, including
fish, birds, and insects, invented sicknesses to check the behavior of humans. Thus,
sickness, in the Cherokee worldview, is not a natural phenomenon. It is the legal penalty
imposed by the animal legislature and their executive Little Deer.

For this reason, from a Cherokee perspective, even if a state had permission from the
EPA to pursue a DDT eradication campaign, and no other state had any objections, there
would still be a conflict of laws issue because the campaign would likely violate animal-

