

Conflict of Perspectives

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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 differing views from within or without. And claims of “universality” or “scientific truth” do not necessarily help those faced with such a choice of law problem or clarify the choice that should be made. Sometimes such claims even make the situation worse.

Particularly in times of plague, the urgency of the situation can bring disagreements to a fever pitch. One population and its government may believe that to end a plague one part of the biocentric community must be sacrificed for the good of the rest, while another population and its government may refuse to countenance making such a sacrifice. For some, successful past use of mosquito eradication campaigns and DDT (Dichlorodiphenyltrichloroethane) make them proven tools we should continue to use when threatened with epidemics. Others warn that these tools can have deleterious effects on our ecosystem, and remind us that those who consider their fellow beings as pests warranting destruction have too often included marginalized *humans* in that category. The menace of a stalemate looms. However, there is a resource that can help us navigate this difficult intellectual terrain—literature. Scholars who take a “law and literature” approach to policy draw on literary works to explore and elucidate legal matters. Thus, this law and literature note combines public health history and a multi-government history of DDT with literature and orature from the Native American canon to enrich a discussion on the public policy exception in conflict of laws.

I. THE ORIGIN OF MOSQUITO ERADICATION CAMPAIGNS AS A PUBLIC HEALTH TOOL

Their skin turned yellow; their vomit, black. Their loved ones reached out to stroke their brows, then snatched their hands away from the shocking heat as though their fingertips had grazed lit ovens. The next time their beloveds would stretch out their hands for a caress, the skin they touched would be corpse cool. And summer after summer, city after city, it would happen again and again.¹

By 1898, yellow fever had been haunting Americans for almost 200 years, and it was currently threatening the lives of over 15,000 troops serving in Cuba. The military was desperate to save its men—so desperate, they were willing to explore a wacky idea put forward by Dr. Carlos Finlay theorizing that yellow fever was passed from victim to victim through *mosquitos*, of all things. However, Major Walter Reed conducted some human experiments—of dubious ethics—that transformed Finlay’s reputation from hack to genius. U.S. Army troops promptly began a mosquito eradication campaign. The year before the campaign, 300 people turned yellow, vomited black, and died. The year after, only one died.²

A little more than a century later, on February 1, 2016, the World Health Organization declared a Public Health Emergency of International Concern. In areas affected by the Zika fever, babies were being born with microcephaly³ while adults suffered Guillain-Barré Syndrome.⁴ The symptoms had changed, but the culprit was the same—communicative mosquitos.⁵

So the response should be the same, right? Some would assert that we can defeat this fever the way we did its predecessor—by getting the government to undertake an eradication campaign. But is that really the best solution? And if it is, what chemical

¹ PBS, *American Experience: The Great Fever Transcript*, September 29, 2006, <http://www.pbs.org/wgbh/amex/fever/filmmore/pt.html> [hereinafter *Great Fever*].

² *Id.*

³ European Center for Disease Prevention and Control, *Zika Virus Infection* (2005), http://ecdc.europa.eu/en/healthtopics/zika_virus_infection/Pages/index.aspx [hereinafter *ECDPC*].

⁴ Anthony Fauci & David Morens, *Zika Virus in America – Yet Another Arbovirus Threat*, 374 *NEW ENG. J. MED.* 601-604 (2016).

⁵ *ECDPC*, *supra* note 3.

should (and should not) be used and which government, federal or state, should decide? And what happens if there is disagreement among governments about the answers to these questions?

We currently find ourselves right back where we were 100 years ago—in the midst of a plague. But to discover the solutions we need, one must take a journey through the history of government regulation of insect control and analyze who—the federal government or the states—behaved most responsibly. One must question whether the federal government is a sufficiently ethical actor to have charge of such public health responses, given that it embarked on its first mosquito campaign after paying soldiers and Spanish immigrants \$100 a pop to tuck themselves into bed with blankets encrusted with yellow fever infected vomit and diarrhea.⁶ And I charge, in addition to looking to the legal history of law regarding insects, one must also consider the history of law created by insects, recorded in traditional Aniyunwiya (Cherokee) stories as well as the ecological insights to be found in modern Native American literary works like Louise Erdrich's *The Plague of Doves*.

II. THE MULTI-GOVERNMENT HISTORY OF DDT

As Zika migrates from Latin America to the United States of America, some citizens have suggested the insect control chemical DDT be used in a mosquito eradication campaign. Historically, DDT has been used against pests by the federal government as well as state governments and cities. For example, in 1947, the Bureau of Entomology and Plant Quarantine experimented with using DDT to save trees from Dutch elm disease in Princeton, New Jersey.⁷ Then, in 1950, the Plant Industry Division of the Michigan Department of Agriculture used USDA-recommended sprays to treat the spread of the disease to their state. By 1959, individual towns were spraying against Dutch elm disease. Similarly, multiple levels of government have also applied restrictions on the use of

⁶ Great Fever, *supra* note 1.

⁷ THOMAS DUNLAP, DDT: SCIENTISTS, CITIZENS, AND PUBLIC POLICY 80 (Princeton University Press, 1981).

DDT. For example, in the 1960s and 1970s, both states and the federal government constrained DDT use.⁸

However, it was the federal government, specifically the House Select Committee to Investigate the Use of Chemicals in Food Products, that sponsored the first public debate on DDT's safety in 1950 and 1951 by holding hearings. The hearings concluded with the Miller Amendment to the 1938 Food, Drug, and Cosmetic Act that streamlined the pesticide regulation process, placed the burden of proving pesticide safety (for humans) on manufacturers, and required pesticides to be registered before being sold. Under the bill, pesticide manufacturers would face the challenge of regulation by not one but two different agencies—the FDA and the USDA.⁹

In response to Rachel Carson's 1962 environmental science book *Silent Spring*, the President's Science Committee drafted the report *Use of Pesticides*. The report was not a wholesale affirmation of *Silent Spring*, but it did hold gaps in federal regulation responsible for environmental problems caused by pesticide use, as well as admit the ignorance on the possible harm pesticides could cause to both humans and nature.¹⁰ It is important to note here that the federal government did not speak with one voice. While *Use of Pesticides* recommended data collection on residue levels and more effective regulation, the National Research Council's Committee on Pest Control and Wildlife Relationships report promoted nothing more than the most minimal of safety standards.¹¹ The Ribicoff Committee, another federal voice, found that while current levels of pesticide use did not constitute a public health danger, since pesticide use would rise in the future, research should be conducted to guard against future problems and to evaluate the effect of pesticide on all forms of life.¹² The national government sought to balance the benefits pesticides provide, such as protection of health, the food supply, and the agricultural industry, with the harms they can cause to humans and nature.

⁸ *Id.* at 59.

⁹ *Id.* at 71.

¹⁰ *Id.* at 112-13.

¹¹ *Id.* at 116.

¹² *Id.* at 124.

At the national level, one sees a trajectory “starting from limited objectives, 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. For example, California’s regulation of chloropicrin use is not only the most exigent in the nation but is even stricter than the U.S. Environmental Protection Agency’s rules.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 remaining states created a category of “restricted use” pesticides but 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 any pests of “shade trees, aquatic areas, the house and garden and tobacco,” 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 crops, several types of livestock and wood, on flowers and “ornamental turf areas,” and “around commercial, institutional, and industrial establishments.”¹⁸

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 to DDT’s cancellations are permitted due to amendments to the Federal Environmental Pesticides Control Act.¹⁹

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

Earlier in this note, I referenced the federal government’s history 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.*

The Tuskegee Syphilis Study, begun by the U.S. Public Health Service in 1932, is perhaps the most famous public health experiment the government conducted—deceiving infected black men into believing they were receiving treatment while secretly observing the development of their untreated disease.²⁰ Two decades later, the Army Chemical Corps would test biological weaponry by releasing contaminated pigeons on Virgin Islands oat fields.²¹ A decade after that, the United States Army and the Central Intelligence Agency released mosquitos carrying a whooping cough virus in Florida to test whether the insects could be used to communicate disease among enemy combatants. Carver Village, a black-housing development that helped desegregate Miami, Florida, was a particular target of program.²² And, as recently as 1990, “the Department of Defense (DOD) sought and obtained from the Food and Drug Administration a waiver of the informed-consent requirements for human medical experimentation,” forcing soldiers to use experimental drugs such as a botulism vaccine.²³ Given the tragically immoral choices the federal government has made, both in the name of public health and through the weaponization of illness, if a DDT campaign against Zika were to be undertaken, I would prefer it be performed by state governments (authorized by the EPA) than by a federal agency. But my preference begs the question of whether a DDT eradication campaign be undertaken at all.

While mosquito eradication campaigns and DDT-based treatment of sick elms may be inspired by altruism and the destruction of syphilitic men’s health or islanders’ food supply by malice, both sorts of acts are based on a premise of the worthlessness of some beings, whether insect or human. While ethical people can easily see the problem with considering humans to be pests, even they are likely to view mosquitos as nothing more than disease vectors fit to be exterminated. The idea that they might have value is disregarded, as is their connection to the rest of nature. But mosquitos need to exist

²⁰ HARRIET A. WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* 157 (2006).

²¹ *Id.* at 365.

²² *Id.* at 360-61.

²³ *Id.* at 398.

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. I use the term “pest” in this note because it is common parlance, but the word suggests 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. In Erdrich’s fictional world, doves swarm in 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. When one of the guides rescues the cook’s dog from a wolf, the cook begins to respect

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, ultimately benefits everyone. The moral of Erdrich’s book is consistent with Anishinaabeg ethics. As Lawrence W. Gross observed, “The old Anishinaabeg felt they were in a relationship with other-than-human people or, more to the point, they saw other-than-human people as relatives.”²⁸

One of the apotheoses of the plague perspective in the novel is a scene in which future cult leader Billy Peace preaches on the coming of the Antichrist, the already present threat of Lucifer, and the incipient end times. Billy’s dialogue is presented without quotation marks so that his sermon, often in the second person, seems to be aimed at the reader of the novel herself rather than the characters in his fictional audience: “You have heard Luce, Light, Lucifer, the Fallen Angel.”²⁹ The reader is exhorted to be vigilant against, fear, and prepare for what is essentially a plague: an imminent one-dimensional invading evil. “Get under the bed! Get under the sheet!” Billy commands.³⁰ His fictional warning thus joins the collection of real warnings directed against readers each day—warnings against other imminent one-dimensional invading evils. Donald Trump’s presidential announcement contains an example of such second person speech: “When Mexico sends its people, they’re not sending their best. They’re not sending you. They’re not sending you. They’re sending people that have lots of problems, and they’re bringing those problems with us. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.”³¹ The last line is so mild in effect, I do not think it mitigates against the impression of Mexican immigrants as monolithically deviant.

Imperative sentences, sometimes ending in exclamation points (like those quoted above), further heighten the drama of commands seemingly aimed at the hapless reader.

²⁷ *Id.* at 107.

²⁸ LAWRENCE W. GROSS, ANISHINAABE WAYS OF KNOWING AND BEING 210 (2014).

²⁹ *Id.* at 142.

³⁰ *Id.*

³¹ Michelle Ye Hee Lee, *Donald Trump’s False Comments Connecting Mexican Immigrants and Crime*, WASH. POST (July 8, 2015), <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/>.

Anaphora is used to emphasize the urgency of readying oneself for the oncoming apocalypse, but also to reveal the frenzy with which Billy speaks: “I’m going to go out blazing. I’m going to go out like a light. I’m going to go burning in glory,” Billy says of his demise.

Billy’s description of Lucifer as a “hijacker of the planet” who “fell out of the air” could equally apply to a swarm of doves or a swarm of mosquitos. The first descriptor, in particular, could indicate any population one sees as unworthy of the earth or derailing a society’s trajectory—the fictionalized Ojibwa of Erdrich’s novel, the real African Americans who helped desegregate Miami, or the real Mexican immigrants who cross the border into the United States. Similarly, Billy’s anaphora is the anaphora of George Wallace ranting, “Segregation now, segregation tomorrow and segregation forever,” as well as the anaphora of Trump.

Billy’s sentences become unwieldy, incomplete run-ons, as though bubbling forth from him, too imbued with passion to be checked by punctuation. Consider, for example, this “sentence” in which he refers to credit card numbers being related to the Antichrist: “Because the number of the beast is a fathomless number and banking numbers are the bones and the guts of the Antichrist, who is Lucifer, who is pure brain.”³² The line has the same characteristics of the following sentence from Sarah Palin’s speech endorsing Donald Trump for President: “And he, who would negotiate deals, kind of with the skills of a community organizer maybe organizing a neighborhood tea, well, he deciding that, ‘No, America would apologize as part of the deal,’ as the enemy sends a message to the rest of the world that they capture and we kowtow, and we apologize, and then, we bend over and say, ‘Thank you, enemy.’” This sentence shares with Billy’s sentences not only syntactical similarities but also similarities of content. Present is the idea of an external and one dimensionally evil enemy—one who contrasts with a perfectly righteous protagonist. Furthermore, Palin’s pest perspective mocks the idea of recognizing others, framed as enemies, as members of one’s global community or peer threads in the

³² DR. LAWRENCE W. GROSS, ANISHINAABE WAYS OF KNOWING AND BEING 210 (2014).

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. See this sentence: “Antichrist is here, all around us in the tunnels and webs of radiance, in the transistors, the great mind of the Antichrist is fusing a pattern, in a destiny, waking up never by nerve.”

The line is a rhythmic masterpiece. Parataxis not only provides percussion but lends Billy the authority of the most famous work using the technique—the Bible. Yet there is also a rhythmic symmetry between the first comma divided sentence segments—clause, description, description, clause. Billy handles language here as skillfully as Jefferson limns the supposed inferiority of blacks (whom he framed as pests):³⁴ “Are not the fine mixtures of red and white, the expressions of every passion by greater or less suffusions of colour in the one, preferable to that eternal monotony, which reigns in the countenances, that immoveable veil of black which covers all the emotions of the other race?” The first three separated phrases flow together, sinuously unfurling with an auditory affect whose pleasantness is meant to mirror that of the claimed loveliness of the white race. This contrasts with the bluntness of the last two comma-separated phrases whose introductory words “which” and “that” add a percussion that disrupts the languorous feel of the sentences’ beginnings just as, supposedly, the unattractiveness of blackness mars the beauty of the human species. Jefferson maneuvers rhythm in this sentence like a master drummer.

The way Billy speaks about apocalypse, Trump, Mexican immigrants, Palin, enemies, Jefferson, and blacks is jarringly similar to how people talk about literal plagues and how to solve them. Consider Jay Ambrose’s call for a DDT campaign against

³³ Michael Barbaro, *The Most Mystifying Lines of Sarah Palin’s Endorsement Speech*, N.Y. TIMES (Jan. 20, 2016), <http://www.nytimes.com/2016/01/21/us/politics/sarah-palin-endorsement-speech-donald-trump.html>.

³⁴ Paul Finkelman, *The Monster of Monticello*, N.Y. TIMES (Nov. 30, 2012), <http://www.nytimes.com/2012/12/01/opinion/the-real-thomas-jefferson.html>.

mosquitos in the wake of the Zika virus.³⁵ He rails against “[w]arrior greenies:” “You’ve done enormous hurt in this world, you appear prepared to keep it up, and it’s time to allow people their health, their lives and a chance to fight back more effectively against mosquitos that have been having at us from ancient times.”³⁶ Here, once more, is the run-on sentence, the anaphora, and the paratactic rhythm.

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. Maybe one would have difficulty with one’s animal relatives for a while, but the expectation was the relationship would eventually return to normal. As an extreme manifestation of ill will, though, illness might result from bad relations with both human and non-human family members. But there were ways of dealing with even these types of extremes.³⁷

Thus, one can both recognize that humans affected by Zika are indeed having trouble with mosquitos that has resulted in illness, while still regarding mosquitos as part of our family, searching for a response to the problem governed by the same sober-mindedness and care one would use when dealing with a problem with human family.

At one end of the spectrum of individual or communities’ relationships with others there is such profound exclusivity that not even all one’s fellow humans are regarded as equal. On the other end of the spectrum, there is such profound inclusivity that all beings

³⁵ Jay Ambrose, *Jay Ambrose: Let’s Hear it for DDT*, TRIB. NEWS SERV. (Feb. 11, 2016), <http://www.tbo.com/list/news-opinion-commentary/jay-ambrose-lets-hear-it-for-ddt-20160211/>.

³⁶ *Id.*

³⁷ GROSS, *supra* note 32.

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 Federal Environmental Pesticides Control Act, granted State A an exception to use DDT to combat Zika. However, downstream State B sues State A in State A's courts for injunctive relief, praying that State A will stop its DDT use because it is causing the bald eagle population of State B to decline. Under *Loucks v. Standard Oil Co.*, State A might be able to refuse to protect the right of State B to maintain its bald eagle population because helping State B would, as Justice Benjamin Cardozo put it, "violate... some deep-rooted tradition of the common weal."³⁸ In this case, the violation would be of the right of State A's citizens to have their health protected. It could be considered against the public policy of State A to not take an action that could protect human's public health just because that action would harm eagles.

However, *Loucks*, decided in 1918 in New York's highest court, is not the last word on actions contrary to public policy. Suppose State B has a statute that prohibits causing the decline of bald eagles. State B could argue that, per *Hughes v. Fetter*, argued in the Supreme Court in 1951, the Full Faith and Credit Clause of the United States Constitution mandates State A's enforcement of the rights protected by State B's statute.³⁹ Whether this argument would triumph would depend on the judge's worldview.

The judge could still find that State A's valuation of the "common weal" (of humans) over the well-being of eagles grants State A the right to use DDT. Or the judge could believe that both humans and eagles deserve protection, and that while State A has a right to combat Zika for the sake of its human population's health, it is not freed from enforcing the aquiline rights protected by State B's statute.

³⁸ 224 N.Y. 99, 112, 120 N.E. 198, 202 (1918).

³⁹ 341 U.S. 609, 71 S. Ct. 980 (1951).

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 bar their courts being used as a forum for cases animated by another state's cause of action.⁴⁰ Thus, State A could prevent State B from suing in State A's courts.

In *Cooney v. Osgood Machinery*, decided in New York's highest court, the court stated, "In view of modern choice of law doctrine, resort to the public policy exception should be reserved for those foreign laws that are truly obnoxious."⁴¹ Is State B's law 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. Justin Worland notes, "Public health officials are now advocating a 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 will help reduce the population."⁴²

Originalism would also help determine whether State B'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* humans? Is State B's statute obnoxious 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 other words, did State B's policymakers see the citizens of State A as pests who need not be protected? Or was State B's statute 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.

"Pest" control has always aroused passions in this country, because the issue 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-

created statute. The logical result would be *worse* illness. Even Western science has observed that one consequence of some DDT eradication campaigns is DDT-resistant mosquitoes.⁴³ These insects are ultimately *more* empowered to sicken humans than before. With public policy conflict of law cases on the horizon, let me offer this warning: From my point of view as a Cherokee, it is the pest perspective—not those identified as pests themselves—that ultimately poses the greatest threat to us all.

⁴³ Mark E. Ridley, *The Theory of Natural Selection (Part 1) – Are There Examples of Rapid Evolutionary Change?*, http://www.blackwellpublishing.com/ridley/tutorials/The_theory_of_natural_selection__part_1_13.asp (last visited May 17, 2017).