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# WATER, LEAD, AND ENVIRONMENTAL JUSTICE: EASING THE FLINT WATER CRISIS WITH A PUBLIC WATER CONTAMINATION LIABILITY FUND

JONATHON LUBRANO\*

## INTRODUCTION

On April 25, 2014, the city of Flint, Michigan switched water sources from the Detroit Water and Sewage Department to the Flint River.<sup>1</sup> By the next month, residents were already complaining about color and smell.<sup>2</sup> It wasn't until August 2014, four months after the switch, that high levels of dangerous bacteria were detected, requiring residents to boil their water before using it.<sup>3</sup> By the beginning of 2015, tests were registering high levels of lead and carcinogens.<sup>4</sup> However, it wasn't until September 2015 that larger studies confirmed the problem and detected higher rates of excessive lead levels in children.<sup>5</sup> The mayor declared a state of emergency that December, followed by President Barack Obama the next month.<sup>6</sup>

The Flint water crisis has become a particularly salient issue in American consciousness and environmental law.<sup>7</sup> The problem of

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<sup>1</sup> Merrit Kennedy, *Lead-Laced Water In Flint: A Step-By-Step Look At The Makings Of A Crisis*, NPR (Apr. 20, 2016, 6:39 PM), <http://www.npr.org/sections/thetwo-way/2016/04/20/465545378/lead-laced-water-in-flint-a-step-by-step-look-at-the-makings-of-a-crisis> [<https://perma.cc/9DW5-LRUS>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Kennedy, *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> *E.g.*, Helen Marie Berg, *When a Disaster Is Not a "Disaster" and Why that Title Matters for Flint*, STAN. ENVTL. L.J. (Mar. 28, 2016), <http://journals.law.stanford.edu/stanford-environmental-law-journal-elj/blog/when-disaster-not-disaster-and-why-title-matters-flint> [<https://perma.cc/32CF-N2XE>]; David Bailey, *Lawsuit Filed over Student Exposure to Lead in Flint, Michigan, Schools*, REUTERS (Oct. 18, 2016, 3:50 PM), <http://www.reuters.com/article/us-michigan-water-idUSKCN12I2J8> [[https://web.archive.org/web/\\*/http://www](https://web.archive.org/web/*/http://www)

contaminated drinking water affects communities across the country;<sup>8</sup> according to the National Resource Defense Council, \$ 18 million people used water systems with lead violations in 2015.<sup>9</sup>

The goals of this Note are to 1) identify the multiple contours of the problem of contaminated water in Flint and other communities, 2) analyze the law surrounding these problems, 3) explore potential individualized policy solutions to each problem, and 4) recommend a solution that optimally addresses each of these problems.

In pursuit of these goals, Parts I, II, and III identify and examine three substantial issues present within the Flint water crisis, and the relevant law involved in each. Part I examines sovereign immunity as a barrier to recovery for those harmed by contaminated water. Part II explores the externalities of awarding damages in citizen-plaintiff suits, and Part III identifies the relevant environmental justice concerns raised by Flint and similarly contaminated cities.

Part IV examines hypothetical policy solutions to each discussed issue to combat their likely consequences. Ultimately, overly individualized solutions risk exacerbating other issues.

To optimally address each dimension of Flint's water problem invoked in Parts I, II, and III, Part V analyzes and argues for, a proposed solution to create a Water Contamination Liability Fund, which would cover the costs of correcting the water contamination and compensating injured citizens. The Fund would be financed by a nominal tax on water usage in municipal systems. It is likely that this program could circumvent barriers to recovery such as sovereign immunity—discussed in Part I—by implementing administrative hearings and avoiding formal lawsuits altogether.

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.reuters.com/article/us-michigan-water-idUSKCN12I2J8]; David Bailey, *Flint Water Class Action Belongs in State Court—6th Circuit*, REUTERS LEGAL (Nov. 18, 2016); Jeremy Dillon, *Oversight Panel Democrats Want Flint Investigation Reopened*, ROLL CALL (Jan. 19, 2017, 4:30 PM), <http://www.rollcall.com/news/policy/oversight-panel-democrats-want-flint-investigation-reopened> [<https://perma.cc/ZC2J-PJDY>]; Ben Klayman, *Michigan Attorney General Sues France's Veolia in Flint Water Crisis*, REUTERS (June 22, 2016, 10:28 AM), <http://www.reuters.com/article/us-michigan-water-idUSKCN0Z81PD> [[https://web.archive.org/web/\\*/http://www.reuters.com/article/us-michigan-water-idUSKCN0Z81PD](https://web.archive.org/web/*/http://www.reuters.com/article/us-michigan-water-idUSKCN0Z81PD)].

<sup>8</sup> Erik Olson & Kristi Pullen Fedinick, *What's in Your Water? Flint and Beyond*, NRDC (June 28, 2016), <https://www.nrdc.org/resources/whats-your-water-flint-and-beyond> [<https://perma.cc/2L92-SQPY>]. For example, “[a]ccording to the most recent data available, 5,363 active community water systems across the United States” faced issues relating to the Lead and Copper Rule in 2015. *Id.*

<sup>9</sup> *Id.*

Furthermore, this policy would spread the cost of water contamination suits across the entire state, thereby reducing the budgetary burden on a locality in crisis, and thus the proportion of damages funded by a plaintiff community's own residents by way of taxation. Finally, by implementing this program at the state or federal level, it could improve environmental justice by spreading the cost of water contamination more broadly across many neighborhoods of different classes, reducing the cost to already burdened communities with scant resources.

#### BACKGROUND: THE SITUATION IN FLINT

To save money during the construction of a new pipeline from Lake Huron, Flint switched from Detroit's water system to the Flint River.<sup>10</sup> Emergency manager Darnell Earley, appointed by Gov. Rick Snyder to continue addressing Flint's budgetary emergency in October 2013,<sup>11</sup> made the formal decision to switch.<sup>12</sup> The Flint River was contaminated with mercury, PCBs,<sup>13</sup> and other corrosives from years of industrial runoff that leech lead from the water pipes into Flint's water.<sup>14</sup> Residents noted distinct problems with their water including color and smell,<sup>15</sup> and soon after, Flint switched back to the Detroit water supply.<sup>16</sup> However, by that point, the protective coating on the municipal water pipes had been worn away, and lead was continuing to leech into the water.<sup>17</sup>

Many experienced law firms were wary to take on these cases due to the limitations of sovereign immunity,<sup>18</sup> a legal privilege held by the

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<sup>10</sup> Tribune News Services, *Class action suit filed by residents over Flint water crisis*, CHICAGO TRIBUNE (Mar. 7, 2016, 2:28 PM), <http://www.chicagotribune.com/news/local/breaking/ct-flint-water-crisis-class-action-lawsuit-20160307-story.html> [<https://perma.cc/J432-E2HM>].

<sup>11</sup> Detroit News Staff, *How Flint's water contamination crisis developed*, THE DETROIT NEWS (Feb. 2, 2016, 11:32 PM), <http://www.detroitnews.com/story/news/michigan/flint-water-crisis/2016/02/02/flints-water-contamination-crisis-developed/79736038> [<https://perma.cc/JU7B-MTQE>].

<sup>12</sup> Rita Ann Cicero, *In Flint, Lawsuits Over Drinking Water Contamination Start Trickling In*, 33 WESTLAW J. TOXIC TORTS 4 (2016).

<sup>13</sup> *Id.*

<sup>14</sup> Tribune News Services, *supra* note 10.

<sup>15</sup> Cicero, *supra* note 12.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Amber Phillips, *Criminal charges were just filed in Flint. But suing over the water crisis remains very difficult.*, WASH. POST (Apr. 20, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/01/26/why-it-will-be-very-difficult-for-flint-residents-to-sue-the-state-of-michigan-for-money/> [<https://perma.cc/9T2J-4DMH>].

federal and state governments that insulates each from many lawsuits.<sup>19</sup> However, this has not stopped a few Michigan lawyers from pursuing creative legal theories to circumnavigate sovereign immunity, such as construing the harm as a constitutional violation.<sup>20</sup> For example, one of the first class lawsuits filed on November 13, 2015 was *Melissa Mays, et al., v. Governor Rick Snyder et al.* in which the plaintiffs claimed the actions of the Flint and State governments deprived residents of their rights without due process.<sup>21</sup> This lawsuit sought compensatory damages, punitive damages, as well as medical, educational, occupational, and nutritional support for Flint citizens.<sup>22</sup> However, it was dismissed on the grounds that claims regarding unsafe drinking water must proceed under the procedures in the Safe Drinking Water Act ("SDWA").<sup>23</sup> Unfortunately, if the plaintiffs in *Mays* did file a claim under the SDWA, they would only be able to receive injunctive relief and legal fees.<sup>24</sup> Under the SDWA there is no path to obtain the compensatory and punitive damages they originally sought.<sup>25</sup>

Other suits have arisen in federal court under the SDWA.<sup>26</sup> The claim filed by Concerned Pastors for Social Action under the SDWA sought equitable relief for Flint.<sup>27</sup> Specifically, the lawsuit sought replacement of all lead water pipes at no cost to the Flint taxpayer.<sup>28</sup> Ultimately, the parties settled in March, 2017.<sup>29</sup> The state of Michigan agreed to pay \$87 million to replace Flint's lead contaminated pipes with copper lines.<sup>30</sup> The plaintiffs also secured bottled water distribution in the interim, including a hotline for those who could not physically reach destination sites.<sup>31</sup> Medical costs and other damages caused by the contaminated water were

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<sup>19</sup> See Sovereign Immunity, *Black's Law Dictionary* (10th ed. 2014).

<sup>20</sup> *Mays v. Snyder*, No. 15-14002, 2017 WL 445637, at \*1 (E.D. Mich. Feb. 2, 2017).

<sup>21</sup> *Id.*

<sup>22</sup> Jennifer Chambers, *Flint water lawsuit dismissed by judge*, THE DETROIT NEWS (Feb. 3, 2017, 3:44 PM), <http://www.detroitnews.com/story/news/michigan/flint-water-crisis/2017/02/03/judge-dismisses-class-action-flint-water-lawsuit/97436892/> [<https://perma.cc/G6SF-RHT3>].

<sup>23</sup> *Mays*, 2017 WL 445637, at \*3.

<sup>24</sup> 42 U.S.C.A. § 300j-8(d).

<sup>25</sup> See *id.* § 300j-8(e).

<sup>26</sup> Concerned Pastors for Soc. Action v. Khouri, 194 F. Supp. 3d 589, 596 (E.D. Mich. 2016).

<sup>27</sup> *Id.* at 596–97.

<sup>28</sup> *Id.* at 595–96.

<sup>29</sup> See Settlement Agreement, Concerned Pastors for Soc. Action v. Khouri, 194 F. Supp. 3d 589, 596 (E.D. Mich. 2016), [http://www.michigan.gov/documents/flintwater/Settlement\\_Agreement\\_dated\\_032717\\_580103\\_7.pdf](http://www.michigan.gov/documents/flintwater/Settlement_Agreement_dated_032717_580103_7.pdf) [<https://perma.cc/VD52-XAGV>] [hereinafter Settlement Agreement].

<sup>30</sup> *Id.* at 20.

<sup>31</sup> *Id.* at 54, 57.

left notably unaddressed<sup>32</sup> because SDWA does not allow for their recovery.<sup>33</sup> The compensatory damages for the Crisis are not negligible. For example, United Way anticipates the medical costs for exposed children alone will reach \$100 million.<sup>34</sup> At present, the restrictions of the SDWA, and government torts generally, have created a legal environment in which these costs remain unaddressed.

If the citizens of Flint are limited to claims under the SDWA, they will be unable to obtain compensatory relief for any of the health effects of their lead-ridden water.<sup>35</sup> This Note strives to bridge this remedy gap and address other elements of the problem in Flint to ease similar problems in the future. To fully analyze the scale of the problem, this Paper explores the Flint water crisis in greater depth within the areas of 1) sovereign immunity as a barrier to recovery, 2) the negative externalities of citizen-class lawsuits, and 3) lack of environmental justice.

#### I. SOVEREIGN IMMUNITY AS A BARRIER TO RECOVERY

It should come as no surprise that numerous lawsuits have arisen seeking damages from the government agencies responsible for Flint's contaminated water system.<sup>36</sup> However, those who have been harmed face barriers to their recovery.<sup>37</sup> One such substantial barrier is the doctrine of sovereign immunity, which bars civil claims against the government.<sup>38</sup>

The concept of sovereign immunity in the United States is originally sourced from England.<sup>39</sup> It is based on the premise that "[t]he King could do no wrong."<sup>40</sup> Under the modern doctrine of sovereign immunity in the United States, the federal government cannot be sued unless it consents to be sued.<sup>41</sup> The United States maintains sovereign immunity "to shield the public from the costs and consequences of improvident

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<sup>32</sup> See *id.* at 59–62.

<sup>33</sup> 42 U.S.C.A. § 300j-8(d–e).

<sup>34</sup> *United Way estimates cost of helping children \$100M* (Jan. 19, 2016, 9:36 AM), WNEM, <http://www.wnem.com/story/30995770/united-way-estimates-cost-of-helping-children-100m> [[https://web.archive.org/web/\\*/http://www.wnem.com/story/30995770/united-way-estimates-cost-of-helping-children-100m](https://web.archive.org/web/*/http://www.wnem.com/story/30995770/united-way-estimates-cost-of-helping-children-100m)].

<sup>35</sup> See 42 U.S.C.A. § 300j-8(d–e).

<sup>36</sup> See Cicero, *supra* note 12.

<sup>37</sup> Phillips, *supra* note 18.

<sup>38</sup> *Id.*

<sup>39</sup> See, e.g., William Blackstone, *Commentaries on the law of England*, 238 (1765).

<sup>40</sup> *Id.*

<sup>41</sup> See *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

actions of their governments,”<sup>42</sup> such as lawsuits.<sup>43</sup> In *United States v. Shaw*, Justice Reed wrote, “[t]he reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants.”<sup>44</sup>

The 11th Amendment protects states from lawsuits filed by citizens of another state.<sup>45</sup> All states, besides Washington,<sup>46</sup> expressly limit government tort liability from their own citizens as well.<sup>47</sup> In the context of the Flint Water Crisis, Michigan is not liable for acts it performs in its governmental capacity unless it expressly waives immunity.<sup>48</sup> Michigan’s immunity extends to its political subdivision and municipalities.<sup>49</sup> This is often called “governmental immunity” when applied to these political subdivisions of the state of Michigan,<sup>50</sup> although there is little distinction between the two, conceptually.

Notably, sovereign immunity has an exception built into its framework; the government can consent to be sued.<sup>51</sup> This can be accomplished quite easily by statute.<sup>52</sup> For example, Congress passed the Federal Tort Claims Act (“FTCA”) in 1946,<sup>53</sup> which generally grants jurisdiction to the District Court to hear tort claims against the United States.<sup>54</sup> While the FTCA is codified in statute, the United States consents to suit for claims seeking money damages for any “negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.”<sup>55</sup> This liability extends to any act considered a tort according to the law of the place it occurred.<sup>56</sup> However, there are many

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<sup>42</sup> *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006).

<sup>43</sup> *See United States v. Shaw*, 309 U.S. 495, 501 (1940).

<sup>44</sup> *Id.*

<sup>45</sup> U.S. CONST. amend. XI.

<sup>46</sup> Wash. Rev. Code Ann. § 4.92.090 (West).

<sup>47</sup> Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797, 804 (2007).

<sup>48</sup> *Shuey v. State of Mich.*, 106 F. Supp. 32 (E.D. Mich. 1952).

<sup>49</sup> *Id.* at 34.

<sup>50</sup> *See Hannay v. Dep’t of Transp.*, 497 Mich. 45, 58–59, 860 N.W.2d 67, 76 (Mich. 2014).

<sup>51</sup> *United States v. Sherwood*, 312 U.S. 584, 586 (1941).

<sup>52</sup> *E.g.*, 28 U.S.C.A. § 2674.

<sup>53</sup> Frank Hanley Santoro, *A Practical Guide to the Federal Tort Claims Act*, 63 CONN. B.J. 224 (1989).

<sup>54</sup> 28 U.S.C.A. § 1346(a), (b)(1) (West).

<sup>55</sup> *Id.* § 1346(b)(1).

<sup>56</sup> *Id.* § 1346.



notable exceptions that make the FTCA a much less substantial waiver of sovereign immunity than it appears.<sup>57</sup> The “intentional tort exception”<sup>58</sup> maintains sovereign immunity for assault or battery, false imprisonment or false arrest, malicious prosecution or abuse of process, libel or slander, misrepresentation or deceit, and interference with contract rights.<sup>59</sup> The act also does not curtail sovereign immunity for “discretionary functions”<sup>60</sup> which, in turn, provides rather broad protection for government actors carrying out policy.<sup>61</sup> The Supreme Court developed a two-part test to determine what qualifies as a discretionary function in *Berkovitz by Berkovitz v. United States*.<sup>62</sup> Generally, if 1) the government employee’s conduct involves a judgment or choice and 2) that choice was made in the fulfillment of public policy, then the discretionary exception applies.<sup>63</sup> Finally, the FTCA also contains exceptions relating to the postal service, tax collection, quarantines, operations of the Treasury, and the activities of the military during war.<sup>64</sup>

In regard to Flint, the State of Michigan codified some modest curtailments of sovereign immunity. These curtailments included actions within the context of providing medical care,<sup>65</sup> as well as liability under the MISS DIG Underground Facility Damage Prevention and Safety Act<sup>66</sup> involving the maintenance and protection of underground facilities.<sup>67</sup> However, Michigan maintains a provision that generally insulates agents of the government 1) acting within the scope of their authority, 2) in the discharge of a government function, and 3) that did commit an action (though not amounting to gross negligence) that is the proximate cause of alleged injury or damage.<sup>68</sup> Most relevant to the Flint Water Crisis, emergency managers are generally immune from tort liability.<sup>69</sup>

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<sup>57</sup> David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. ST. THOMAS L.J. 375, 376 (2011) (naming the exceptions as the central issue in lawsuits brought under the FTCA); *see, e.g.*, 28 U.S.C. § 2680.

<sup>58</sup> *Id.* at 379.

<sup>59</sup> *Id. citing* 28 U.S.C. § 2680(h) (2006).

<sup>60</sup> 28 U.S.C.A. § 2680 (West 2006).

<sup>61</sup> *See* Statutory Exceptions to Sovereign Immunity—Actions Under The Federal Tort Claims Act—The Discretionary Function Exception, 14 Fed. Prac. & Proc Juris. § 3658.1 (4th ed. 2017).

<sup>62</sup> *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988).

<sup>63</sup> *See id.*

<sup>64</sup> Fuller, *supra* note 57, at 380.

<sup>65</sup> Mich. Comp. Laws Ann. § 691.1407(4) (West 2014).

<sup>66</sup> *Id.* § 691.1407(7).

<sup>67</sup> *See* Mich. Comp. Laws Ann. § 460.271 (West 2017).

<sup>68</sup> *See* Mich. Comp. Laws Ann. § 691.1407(2) (West 2014).

<sup>69</sup> *Id.* § 691.1407(1).



As such, there are few viable pathways for citizens harmed by the Crisis to recover damages in tort for the actions of the emergency manager,<sup>70</sup> who ultimately made the decision to switch water supplies.<sup>71</sup>

Unless it is waived in statute, or creative *Mays*-like<sup>72</sup> lawsuits set precedent helpful to citizen-plaintiffs, sovereign immunity will continue to serve as a barrier to recovery.

## II. THE EXTERNALITIES OF AWARDED DAMAGES

Even if it was possible to overcome the hurdle of sovereign immunity, seeking damages from a government is unhelpful to a large class of citizens; the funding a government would use to pay damages or fulfill injunctive relief is ultimately derived from that community's own taxes. In other words, citizens bear the cost of their own awards after trial. This ironic phenomenon runs counter to predominate theories and justifications in support of tort liability.

There are two competing theories of tort liability: instrumentalist and noninstrumentalist, or "corrective justice."<sup>73</sup> Instrumentalism is more utilitarian in nature.<sup>74</sup> It states that one should either fulfill one's duties of precaution, short of wasteful activity, or pay the cost of failing to do so.<sup>75</sup> Conversely, corrective justice is more deontological.<sup>76</sup> It states that one has a duty to correct one's mistakes, irrelevant of consequence, and restore victims to the time before the harm.<sup>77</sup>

Instrumentalism is perhaps best expressed in *United States v. Carol Towing Co.* Judge Billings Learned Hand described duty in tort claims as a "function of three variables: (1) The probability [of injury,] (2) the gravity of the resulting injury . . . [, and] (3) the burden of adequate precautions."<sup>78</sup> The instrumentalist theory, which assumes the risk of payout, encourages caution; an individual or profit-motivated company should be motivated to apply Hand's formula to avoid costly lawsuits.<sup>79</sup>

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<sup>70</sup> See Phillips, *supra* note 18.

<sup>71</sup> Kennedy, *supra* note 1.

<sup>72</sup> See *Mays*, 2017 WL 445637, at \*1.

<sup>73</sup> Richard A. Posner, *Instrumental and Noninstrumental Theories of Tort Law*, 88 IND. L. J. 469 (2013).

<sup>74</sup> See *id.*

<sup>75</sup> *Id.*

<sup>76</sup> See *id.*

<sup>77</sup> *Id.*

<sup>78</sup> *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

<sup>79</sup> See generally Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

But governments are not similarly motivated; the monies in the government's possession are public funds, and as such, "government cares not about dollars, only about votes."<sup>80</sup> Thus, unless the payout from the lawsuit becomes large and salient enough to galvanize voters, it is questionable whether a costly lawsuit actually motivates a government to behave cautiously.

If a court orders damages for a tort claim in which the government is the defendant, corrective justice is not achieved either. This is because these costs are not solely shifted to, or borne by, culpable parties.<sup>81</sup> Additionally, localities heavily compete to provide residents with services at reasonable costs.<sup>82</sup> If a lawsuit puts greater pressure on the budget of a community, it may motivate residents and businesses to leave the locality as service costs go up or tax revenues go down, further undermining the local tax base and economy.<sup>83</sup> With these consequences in mind, the goals of corrective justice are not met because the harmed are not actually made whole. If the government faces substantial damages, it is the citizens who pay via taxes, lost services, or possibly a damaged economy.<sup>84</sup>

Therefore, neither major theory of tort of liability justifies government liability because the government lacks its own resources apart from public funds. This is particularly relevant for small localities like Flint, where all citizens were potentially harmed by their government. This evokes a situation in which citizens, as plaintiffs, would effectively fund their own legal damages. This concern was highlighted by the plaintiffs in *Concerned Pastors for Social Action et al.*, who specifically requested injunctive relief to replace corroded pipes at no cost to the system's customers.<sup>85</sup> The settlement agreement secures funding for injunctive relief from the State of Michigan, rather than the local government.<sup>86</sup> This, at least, reduces the proportional local tax burden to the citizens of Flint by pulling the funding from across the entire State.

Instrumentalism does not justify holding a government liable in class water contamination suits because the government can only lose funds derived from the public at large. Thus, there is little loss aversion

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<sup>80</sup> *Id.* at 420.

<sup>81</sup> Rosenthal, *supra* note 47, at 820.

<sup>82</sup> See Vicki Been, "Exit" As A Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 511–14 (1991).

<sup>83</sup> Rosenthal, *supra* note 47, at 848.

<sup>84</sup> See Been, *supra* note 82, at 511–14.

<sup>85</sup> *Concerned Pastors for Soc. Action*, 194 F. Supp. 3d at 596.

<sup>86</sup> Settlement Agreement, *supra* note 29, at 596.

motivating caution. Neither does corrective justice justify government liability in class water contamination suits, because the plaintiff citizens are not truly compensated for their harm when they receive damages they funded with their own taxes. This issue would grow in severity as more plaintiffs join a suit. Hypothetically, a single plaintiff harmed by the government is proportionally paying very little of his or her damage award, but a class of every citizen in a tortfeasant locality must fund every cent of damages awarded. Any policy designed to remedy the problems of Flint should carefully consider funding sources to avoid a situation where plaintiffs pay for their own damages after a lawsuit.

### III. ENVIRONMENTAL JUSTICE

Flint is a clear example of the need for greater environmental justice in the United States. The EPA defines environmental justice as the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>87</sup> Here in the United States, poor and minority communities are disproportionately impacted by environmental harms and degradation.<sup>88</sup>

The lead issues in Flint are emblematic of the need for greater environmental justice nationally.<sup>89</sup> For example, the Center for Disease Control notes that poor and minority Americans have a higher risk for lead exposure.<sup>90</sup> Flint boasts a population that is fifty-seven percent African American.<sup>91</sup> Forty-two percent of Flint’s citizens live below the poverty line.<sup>92</sup> The Michigan Civil Rights Commission (“Commission”), under the Michigan Department of Civil Rights, blames the systematic racism of the housing market, even following the passage of the Fair Housing Act of 1968, for these racially and economically slanted demographic

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<sup>87</sup> EPA, ENVIRONMENTAL JUSTICE, <https://www.epa.gov/environmentaljustice> [<https://perma.cc/LV8K-UKHM>] (last visited Oct. 23, 2017).

<sup>88</sup> See Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 397 (1991); Mariaea Ramirez Fisher, *On the Road from Environmental Racism to Environmental Justice*, 5 VILL. ENVTL. L.J. 449, 452 (1994); Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 842 (1992).

<sup>89</sup> E.g., David A. Dana & Deborah Tuerkheimer, *After Flint: Environmental Justice As Equal Protection*, 111 NW. U.L. REV. ONLINE 93 (2017).

<sup>90</sup> CDC, AT RISK POPULATIONS, <https://www.cdc.gov/nceh/lead/tips/populations.htm> [<https://perma.cc/H2MW-QLYY>] (last visited Oct. 23, 2017).

<sup>91</sup> Dana & Tuerkheimer, *supra* note 89, at 93.

<sup>92</sup> *Id.*

statistics.<sup>93</sup> When racial minorities began purchasing homes in the area, it drove down the values of properties, which caused a “flight” from the community.<sup>94</sup> Financially stable and predominantly white families vacated Flint after the Fair Housing Act was passed.<sup>95</sup> The Commission looked beyond “economic flight” to blame racism directly, and on a systemic scale, for the current landscape of Flint.<sup>96</sup> If white citizens who left the city were only concerned about their property values or economics generally, many would not have thrown away money by leaving their homes unsold.<sup>97</sup> As the Commission explains, “[t]he result is a poor, less educated and disproportionately black population left behind with a shrinking tax base and a greater share of the city’s costs.”<sup>98</sup> Their report concludes confidently that racial and economic forces created an environment in which a crisis was “all but inevitable” in Flint.<sup>99</sup>

The Commission strove to avoid blaming any party or actor for the situation in Flint.<sup>100</sup> However, factually, it is well established that Gov. Rick Snyder appointed emergency manager Michael Brown in 2011 to control finances in the wake of Flint’s financial crisis.<sup>101</sup> Further, it was subsequent emergency manager Darnell Earley who ultimately made the decision to switch the city’s water supply to the Flint River, in order to save money.<sup>102</sup>

As demonstrated by Flint, the importance of accountability in government action can directly conflict with the doctrine of sovereign immunity, especially in the face of poverty and lack of resources. A lack of environmental justice played, and will continue to play, a role in the

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<sup>93</sup> See Michigan Civil Rights Commission, *The Flint Water Crisis: Systemic Racism Through the Lens of Flint*, 38 (Feb. 17, 2017), [https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17\\_554317\\_7.pdf](https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17_554317_7.pdf) [<https://perma.cc/85NC-W9ZN>].

<sup>94</sup> *Id.* at 69.

<sup>95</sup> *Id.* at 68–69.

<sup>96</sup> *Id.* at 69.

<sup>97</sup> *Id.*

<sup>98</sup> Michigan Civil Rights Commission, *supra* note 93, at 68–69.

<sup>99</sup> *Id.* at 114.

<sup>100</sup> *Id.* at 9.

<sup>101</sup> Detroit News Staff, *supra* note 11.

<sup>102</sup> Leonard N. Fleming, *Darnell Earley: The man in power during Flint switch*, THE DETROIT NEWS (Mar. 14, 2016 7:31 PM), <http://www.detroitnews.com/story/news/michigan/flint-water-crisis/2016/03/14/darnell-earley-flint-water-crisis/81788654/> [<https://perma.cc/X5F9-U3DG>]; See also Letter from Darnell Earley, Emergency Manager, City of Flint, to Sue McCormick, Detroit Water and Sewer Department (Mar. 7, 2014), [http://mediad.publicbroadcasting.net/p/michigan/files/201512/earley\\_letter.pdf?\\_ga=1.224901786.1036207224.1446746452](http://mediad.publicbroadcasting.net/p/michigan/files/201512/earley_letter.pdf?_ga=1.224901786.1036207224.1446746452) [<https://perma.cc/JVU2-KP8R>].

development of this crisis.<sup>103</sup> Any policy solution that seeks to meaningfully compensate victims, such as those in Flint, must account for these institutional pressures.

#### IV. A PROPOSAL AND EXAMINATION OF POSSIBLE POLICY SOLUTIONS

Each of the three aforementioned dimensions of the Flint water crisis can be addressed individually through policy. The following three sections propose and analyze individualized solutions to each of them.

##### A. *Reducing Sovereign Immunity at State Level for Water Contamination*

Sovereign immunity serves as a bar to recovery for Flint's harmed citizens.<sup>104</sup> As a possible policy solution, states could expressly consent to suit and compensatory damages for water contamination liability, when the negligent actions of governments or water authorities cause harm. To avoid the pitfall of overburdening an already harmed community, sovereign immunity could be pulled back at the state level, rather than the locality, to better distribute the cost of awarded damages over a wider area and reduce the proportional burden on the harmed plaintiffs in their community. Although relaxed sovereign immunity standards at the federal level would provide access to an even broader area to distribute damages, the federal government is far removed, and often constitutionally distinct, from the negligent actions of a locality. Thus, the state serves as the best place to implement this policy to distribute cost without removing a legal nexus of liability. Under this policy, when citizens of Flint are harmed by water contamination, all of Michigan pays for it.

However, this policy is unfavorable because 1) there is no consistent rule for determining a state's vicarious liability for the actions of a locality and 2) curtailing sovereign immunity comes with substantial costs and barriers.

##### 1. Legal Ambiguity of State Liability

For this policy to function and not burden the community itself with the entirety of liability and damages, a state must bear some responsibility for the negligence of localities within its borders. However, there is no

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<sup>103</sup> Michigan Civil Rights Commission, *supra* note 93, at 114.

<sup>104</sup> *Supra* Part I.

concrete rule for determining when a state is liable for the actions of a locality.<sup>105</sup> It is not entirely novel to hold a state liable in this manner; for example, the Fourth and Ninth Circuits have held states are liable for failures of their respective localities to implement the Food Stamp Act of 1964.<sup>106</sup> However, in *Milliken v. Bradley*, the Supreme Court did not consider the State of Michigan vicariously liable for the de jure segregation of Detroit schools.<sup>107</sup> As such, it is entirely possible that even if sovereign immunity is relaxed at the state level, liability will rest entirely with the locality government and burden citizens with their own damages.

Another key factor in a discussion of state liability for locality action is whether that state follows what is known as “Dillon’s Rule.” Dillon’s Rule, named after the late Eighth Circuit Court of Appeals Judge and former Iowa Supreme Court Chief Justice John F. Dillon,<sup>108</sup> outlines that “[a] municipal corporation can only exercise those powers: (1) granted to it by express words; (2) necessary or fairly implied in the express powers; and (3) that are indispensable to its ability to carry out its purposes.”<sup>109</sup> Dillon’s Rule may establish a greater liability link between the actions of localities and the state government, but there is no coherent standard to solidify this possibility.<sup>110</sup>

In contrast, “Home Rule” asserts that localities themselves have “an inherent right to self-determination.”<sup>111</sup> Relevantly, this second stance has been labeled “The Cooley Doctrine” after Michigan Supreme Court Chief Justice Thomas M. Cooley and his concurring opinion in the 1871 case *People v. Hurlbut*, in which he stated that “[a] local government is [a] matter of absolute right; and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state . . . at discretion sent in its own agents to administer it . . . .”<sup>112</sup> This historic language is representative of Michigan’s long-standing struggle to

<sup>105</sup> *The State’s Vicarious Liability for the Actions of the City*, 124 HARV. L. REV. 1036–37 (2011) [hereinafter *State’s Vicarious Liability*].

<sup>106</sup> *Id.* at 1039–40.

<sup>107</sup> *Milliken v. Bradley*, 418 U.S. 717, 749–50 (1974).

<sup>108</sup> JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS I (1872).

<sup>109</sup> 22A Summ. Pa. Jur. 2d Municipal and Local Law § 13:4 (2d ed. 2017). Dillon’s Rule is derived from Judge Dillon’s *Treatise on the Law of Municipal Corporations* and his jurisprudence. *Id.*

<sup>110</sup> *State’s Vicarious Liability*, *supra* note 105, at 1039 (stating that there is no coherent rule for determining the liability link between states and localities).

<sup>111</sup> CITIZENS RESEARCH COUNCIL OF MICHIGAN, MICHIGAN CONSTITUTIONAL ISSUES 3, Report No. 313-09 (Oct. 1994), <http://www.crcmich.org/PUBLICAT/1990s/1994/rpt31309.pdf> [<https://perma.cc/NKF5-37T9>].

<sup>112</sup> *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 108 (Mich. 1871) (Cooley, J., concurring).



assign responsibility between local and state actors, as well as its traditional strength as a Home Rule state, thus further complicating the situation. The debate between Dillon's Rule and Home Rule policies, and their modern implications, resurfaced in 2011 when Governor Rick Snyder sought to impose a program of state-assigned emergency managers on financially struggling cities in Michigan.<sup>113</sup> The effect of Dillon's Rule, and the ambiguous state of the law in this area, means the policy may not ultimately function as intended.

It is therefore very possible courts will not be able to hold states liable for negligence on the local level. If this is the case, curtailing sovereign immunity for water contamination liability at the state level would achieve nothing for the citizens seeking compensatory damages.

## 2. Barriers and Costs of Curtailing Sovereign Immunity

Consenting to suit for water contamination at the state level may prove unwise or ineffective. First, sovereign immunity at the federal level can be enforced constitutionally through the Appropriations Clause.<sup>114</sup> Article I decrees that "[n]o Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law."<sup>115</sup> This gives Congress substantial discretion to determine if and when it pays damages to harmed plaintiffs.<sup>116</sup> For example, in *District of Columbia v. Eslin*, Plaintiffs were awarded damages after they filed suit under a law created by Congress.<sup>117</sup> The District of Columbia appealed the ruling.<sup>118</sup> However, before the appellate hearing, Congress passed another law, which directed the Secretary of the Treasury not to pay the damages.<sup>119</sup> The Appellate Court dismissed the case for lack of jurisdiction stating it was the "one solution" after Congress passed the new law.<sup>120</sup> This indicates that even if the federal government consents to suits, Congress may nullify any damages through legislation, even after a court has awarded them.<sup>121</sup>

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<sup>113</sup> Jamess, *Michigan Has a History of 'Home Rule'—Despite the Unconstitutional Takeovers Using Dillon's Rule*, DAILY KOS (Apr. 30, 2011, 3:00 PM), <https://www.dailykos.com/stories/2011/4/30/971713/> [https://perma.cc/3LF5-4D83].

<sup>114</sup> See Rosenthal, *supra* note 47, at 802–03.

<sup>115</sup> U.S. CONST. art. I § 9, cl. 7.

<sup>116</sup> Rosenthal, *supra* note 47, at 802–03.

<sup>117</sup> *District of Columbia v. Eslin*, 183 U.S. 62, 62–64 (1901).

<sup>118</sup> *Id.* at 64.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 64–65.

<sup>121</sup> See generally *id.* at 64.



Michigan's constitution also contains an Appropriations Clause,<sup>122</sup> suggesting the state could potentially perform the same maneuver.<sup>123</sup> Ultimately, appropriations clauses in state and federal constitutions mean that any curtailment of sovereign immunity by statute would provide neither a permanent nor a dependable solution.

Furthermore, relaxing sovereign immunity comes with certain consequences and pitfalls.<sup>124</sup> First, immunity may disincentivize government action for fear of incurring a lawsuit.<sup>125</sup> For example, if a lawsuit can arise for any action taken, a legislature may pursue only the most cautious of steps rather than the most effective ones.<sup>126</sup> Secondly, some fear that lawsuits provide a pathway for courts to weigh in on policy actions of the other two branches; in determining reasonableness and negligence courts would have greater say in the allocation of resources and the direction of policy, which were previously immunized.<sup>127</sup> Third, sovereign immunity protects majoritarian government by insulating the democratically elected government from litigious minority factions.<sup>128</sup>

In the context of the Flint water crisis, these issues could also worsen the problems of environmental justice, by deterring government action;<sup>129</sup> the communities most at risk to experience problems requiring rapid government intervention<sup>130</sup> would be left helpless. Even if sovereign immunity was pulled back solely in the area of water contamination, one could imagine a toxic spill that required rapid cleanup might be approached slowly and cautiously by a lawsuit-adverse executive branch.<sup>131</sup>

Ultimately, addressing the problem of sovereign immunity by itself comes with substantial hurdles as well as externalities which undermine the other dimensions of the Flint problem.

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<sup>122</sup> Mich. Const. 1963, art. 9, § 17.

<sup>123</sup> Michigan lacks definitive precedent to determine if this is possible. However, *District of Columbia v. Eslin* indicates Michigan holds powers to pass laws effectively revoking tort damages when the State is a defendant to a tort claim. *District of Columbia*, 183 U.S. at 64–65.

<sup>124</sup> Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1530–31 (1992).

<sup>125</sup> *Id.* at 1537.

<sup>126</sup> *Id.* at 1541.

<sup>127</sup> *Id.* at 1536–67.

<sup>128</sup> *See id.* at 1530.

<sup>129</sup> *See* Krent, *supra* note 124, at 1537.

<sup>130</sup> *See generally* Michigan Civil Rights Commission, *supra* note 93, at 12.

<sup>131</sup> *See generally* Krent, *supra* note 124, at 1537.

*B. Don't Make Plaintiffs Pay for Their Own Damages: Freezing Plaintiff Taxes as a Remedy in Water Contamination Lawsuits*

To directly prevent a situation in which a class of Plaintiffs effectively provides for a substantial portion of their own damages when filing suit against a government for water contamination,<sup>132</sup> a policy could be designed that directly prevents a locality from increasing taxes on plaintiffs in a water contamination suit for a set period of time. This could be implemented by establishing, in statute, a “tax freeze” as an available remedy in water contamination suits in which localities are liable for the harm. Theoretically, this policy would force the locality to pay damages through means other than taxing the plaintiffs, and take the situation a step closer to the ideals of corrective justice.

Unfortunately, under this hypothetical policy, the locality would be left with less palatable options for raising the funds to pay damages when they cannot raise taxes on plaintiffs. One can imagine the locality would either have to put the entire tax burden of the lawsuit on the only citizens who escaped the harm in the first place (i.e., persons who did not join in the suit), reduce services for the whole community, or appeal to outside funding. It is unrealistic to expect the few citizens that did not join the lawsuit to pay the tax burden and reducing services would still harm the class plaintiffs as well. Ultimately, this is also an undesirable option because, even by shielding the plaintiffs from a tax increase, they will likely still experience economic harm though as the cost is placed on their community.

*C. Policies to Address Environmental Injustice*

Environmental justice is generally described as a systematic problem;<sup>133</sup> therefore, it can be addressed by a variety of initiatives and policies. This variety is beneficial because it provides more potential pathways forward, which would hopefully avoid exacerbating other dimensions of the Flint water crisis.

There are a variety of existing recommendations to improve environmental justice including 1) recognizing, when conducting cost-benefit analysis, that benefits do not defuse easily throughout an impoverished

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<sup>132</sup> *Supra* Part II.

<sup>133</sup> *E.g.*, Michigan Civil Rights Commission, *supra* note 93, at 10.

area,<sup>134</sup> 2) encouraging the government and large well-funded environmental organizations to engage with grass roots organizations in disadvantaged communities,<sup>135</sup> 3) establishing a claim for disparate impact on the federal level in regards to hazardous waste facility siting,<sup>136</sup> and 4) upgrading energy facilities, promoting green energy, and funding distributed generation in disadvantaged communities to reduce emissions in these areas.<sup>137</sup>

The Commission in Michigan provides a litany of policy recommendations for improving environmental justice and preventing the next Flint-like crisis; they include recommendations to 1) develop mechanisms to identify when the civil rights of a community are being ignored, 2) relocate agency meetings to the threatened communities they involve, 3) aggregate and transmit community concerns to other relevant government agencies, even when the aggregating agency is not adopting those concerns as an official policy stance, 4) invite psychologists to government agencies to provide training on avoiding implicit bias, and 5) train all levels of government on the role of structural racism in the development of disparate outcomes.<sup>138</sup> Most relevant to the Flint water crisis itself, the Commission also recommended revising the emergency manager laws to 1) direct manager focus to the root of fiscal problems, rather than the financial symptoms, 2) empower elected local representatives to perform emergency manager functions, and 3) make emergency managers accountable to the elected officials, among other provisions.<sup>139</sup> Depending on how this relationship between the State government, the local government, and the emergency manager is altered, it could potentially clarify the liability link between the actions of a locality and the actions of state.

Many of these solutions do not directly involve the barriers to recovery discussed in this Note. Therefore, Michigan and other states can implement them with little effect on the issues of sovereign immunity and the externalities of locality-paid damages.

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<sup>134</sup> See generally Shannon M. Roesler, *Addressing Environmental Injustices: A Capability Approach to Rulemaking*, 114 W. VA. L. REV. 49, 50, 53 (2011).

<sup>135</sup> See generally Fisher, *supra* 88, at 451–52.

<sup>136</sup> Godsil, *supra* note 88, at 421–22.

<sup>137</sup> James M. Van Nostrand, *Energy and Environmental Justice: How States Can Integrate Environmental Justice into Energy-Related Proceedings*, 61 CATH. U. L. REV. 701, 722 (2012).

<sup>138</sup> Michigan Civil Rights Commission, *supra* note 93, at 117–19.

<sup>139</sup> *Id.* at 122–24.

V. THREE BIRDS WITH ONE STONE: ESTABLISHING THE WATER CONTAMINATION LIABILITY FUND—FOLLOWING THE EXAMPLE OF THE UNDERGROUND STORAGE TANK INSURANCE PROGRAMS

In 1988 the EPA established regulations under 40 C.F.R. § 280(H), which defined the financial responsibilities of the owners of underground storage tanks for petroleum and other hazardous substances.<sup>140</sup> The EPA's goal was to ensure there were funds available to finance the clean-up of any spill, and compensate anyone harmed by a spill.<sup>141</sup> As part of this program, EPA gave tank owners a variety of options to comply with this regulation, such as participating in a state-administered assurance program that offers coverage from \$500,000 to \$1 million depending on the size of the tank.<sup>142</sup>

Many states, including Michigan,<sup>143</sup> created public funds to meet the needs of storage tank owners.<sup>144</sup> In Michigan the program was funded by charging owners a \$100 registration fee and a one cent per gallon tax on motor fuel.<sup>145</sup> The concept for these state-based funds mirrors a similar program at the federal level for federally regulated storage tanks implemented in 1986 called the Leaking Underground Storage Tank ("LUST") Trust Fund.<sup>146</sup> The LUST Trust Fund money was used to "oversee cleanups of petroleum released by responsible parties; [e]nforce cleanups by recalcitrant parties; [p]ay for cleanups at sites where the owner or operator is unknown, unwilling, or unable to respond, or which

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<sup>140</sup> 40 C.F.R. § 280.93. See also *1988 Underground Storage Tanks; Technical Requirements; Final Rule and Underground Storage Tanks Containing Petroleum—Financial Responsibility Requirements and State Program Approval Objective; Final Rule*, EPA, <https://www.epa.gov/ust/1988-underground-storage-tanks-technical-requirements-final-rule-and-underground-storage-tanks> (last visited Oct. 23, 2017) [<https://perma.cc/8CX2-9FSH>] [hereinafter *1988 Underground*].

<sup>141</sup> *EPA Study On The Effectiveness Of UST Insurance As A Financial Responsibility (FR) Mechanism* at 1 (Dec. 2011), <https://www.epa.gov/sites/production/files/2014-03/documents/epa-insurance-paper.pdf> [<https://perma.cc/7MJ2-4A9Y>] (last visited Oct. 23, 2017).

<sup>142</sup> See 40 C.F.R. § 280.93; 40 C.F.R. § 280.101.

<sup>143</sup> *Michigan Underground Storage Tank Authority*, DEP'T OF ENVTL. QUALITY, [http://www.michigan.gov/deq/0,4561,7-135-3311\\_4109\\_9977\\_73545---,00.html](http://www.michigan.gov/deq/0,4561,7-135-3311_4109_9977_73545---,00.html) [<https://perma.cc/5TQ4-82CW>] (last visited Oct. 23, 2017).

<sup>144</sup> Haitao Yin et al., *Risk-Based Pricing and Risk-Reducing Effort: Does the Private Insurance Market Reduce Environmental Accidents?*, 54 J.L. & ECON. 325, 331 (2011).

<sup>145</sup> *Id.*

<sup>146</sup> *Leaking Underground Storage Tank (LUST) Trust Fund*, EPA, <https://www.epa.gov/ust/leaking-underground-storage-tank-lust-trust-fund> [<https://perma.cc/YX8U-FX9N>] (last visited Oct. 23, 2017).

require emergency action; and [c]onduct inspections and other release prevention activities.”<sup>147</sup> It was funded by a one cent per gallon tax on motor fuel.<sup>148</sup> The program is well used, funding over 9,000 cleanups in the 2015 fiscal year.<sup>149</sup>

This framework could be applied to the situation in Flint by creating a “Water Contamination Liability Fund” (“Fund”) at the state level to finance the cleanup and liability of water contamination caused by government action. The Fund would spread the risk of water contamination across a larger group, so those harmed by toxic drinking water are better proportionally and economically compensated for harms.

In conjunction with the tax, the state should route any claims through an administrative hearing to avoid the burden of formal litigation on the locality and state. Administrative hearings cost less to both sides, require fewer government resources, and utilize adjudicators who specialize in the field and maintain familiarity with the relevant issues.<sup>150</sup> When citizens are harmed by lead poisoning, for example, these administrative adjudicates can award them compensation. The Fund could be sourced from a nominal tax on water usage, similar to the LUST tax on gasoline.

A. *The Water Contamination Liability Fund Can Address the Varied Dimensions of the Flint Water Crisis*

As discussed in Parts I through III, the water crisis in Flint contains multiple dimensions including 1) sovereign immunity as barrier to recovery, 2) the externalities of winning damages in a suit against a citizen’s own government, and 3) the violation of environmental justice. The Water Contamination Fund Policy can be designed to effectively address all three.<sup>151</sup>

The Fund could circumnavigate sovereign immunity by providing procedures for an administrative hearing to assess a claimant’s damages from water contamination, instead of having plaintiffs rely on the tort

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<sup>147</sup> 1988 *Underground*, *supra* note 140.

<sup>148</sup> *Id.*

<sup>149</sup> *Leaking Underground Storage Tank Trust Fund Corrective Action Program*, CATALOG OF FEDERAL DOMESTIC ASSISTANCE, <https://www.cfda.gov/index?s=program&mode=form&tab=step1&id=2a8cd17a0ba4277511f7ed10c04f08a6> [https://perma.cc/RAM5-G5NS] (last visited Oct. 23, 2017).

<sup>150</sup> Christopher B. McNeil, *The Marginal Utility of Consolidated Agency Hearings in Ohio: A Due Process Analysis from an Economic Perspective*, 32 OHIO N.U.L. REV. 127, 131 (2006).

<sup>151</sup> See *supra* Parts I–III.

liability system. By using an administrative hearing, this policy would avoid the dangers of relaxing sovereign immunity, such as the burden of litigation on local governments.<sup>152</sup>

The Fund could also reduce the ironic cost of citizen-plaintiff suits brought against a locality;<sup>153</sup> the harmed would pay a proportionally lower cost for any damages (rather than footing the entire bill as a city) because the Fund would redistribute risk by collecting the tax across the state. Furthermore, withdrawing resources from the Fund would be less disruptive to the activities of a locality than an unexpected lawsuit, particularly because a Fund, unlike an expansive lawsuit, is already budgeted. Finally, administrative hearings regarding the Fund would better serve the corrective justice of tort liability, as they could provide compensatory damages to make the harmed whole utilizing expertise, and without perverse effect.

The breadth of this policy can also address environmental justice concerns. By collecting funds from water use across the state, poorer localities, that might otherwise face hardship in meeting their responsibilities due to lack of resources, will still be able to compensate their community's victims while they continue existing services.<sup>154</sup> Those harmed by water contamination will have the ability to recover from the Fund regardless of race or economic class. The use of administrative hearings will also reduce cost and procedural complexity for claimants,<sup>155</sup> which could improve accessibility to compensation. Since 1977, roughly ten to twenty percent of Disability Insurance and Supplement Security Income claimants have proceeded completely without an attorney in administrative hearings,<sup>156</sup> although some argue this is unwise.<sup>157</sup> A government can also establish provisions to provide representation at the hearings, assuming the cost is manageable for the state.

It is important to recognize that collecting this tax from a commodity such as water could harm poorer populations; because water is

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<sup>152</sup> See *supra* Section IV.A.

<sup>153</sup> See *supra* Section IV.B.

<sup>154</sup> Adam Babich, *Environmental Justice in Louisiana*, 51 LA. B.J. 90, 91 (2003) (discussing how part of environmental injustice is that costs are distributed unfairly on the poor and minority communities).

<sup>155</sup> McNeil, *supra* note 150, at 127.

<sup>156</sup> Social Security Advisory Board, *Aspects of Disability Decision Making: Data and Materials*, 60 (Feb. 2012) [http://ssab.gov/Portals/0/OUR\\_WORK/REPORTS/Chartbook\\_Aspects%20of%20Disability%20Decision%20Making\\_2012.pdf?ver=2012-06-12-152148-000](http://ssab.gov/Portals/0/OUR_WORK/REPORTS/Chartbook_Aspects%20of%20Disability%20Decision%20Making_2012.pdf?ver=2012-06-12-152148-000) [<https://perma.cc/H3Z6-769E>].

<sup>157</sup> See generally Lisa Brodoff, *Lifting Burdens: Proof, Social Justice, and Public Assistance Administrative Hearings*, 32 N.Y.U. REV. L. & SOC. CHANGE 131 (2008).



a necessity, price has little effect on consumption, and thus the poor will have minimal ability to avoid the tax.<sup>158</sup> Therefore, the needs of the Fund would have to find an equilibrium regarding efforts to keep the tax burden low on low-income communities, possibly accomplished by providing hardship exceptions or scaling the tax based on city income.

*B. Analyzing the Water Contamination Fund Policy: Addressing Potential Pitfalls and Determining Efficacy*

The Fund avoids a few pitfalls of the other policy options. A public fund enables victims to recover for their harm without relaxing sovereign immunity and slowing down the state and local governments with litigation. Unlike the tax freeze policy, a public fund provides a real payout to plaintiffs, without a substantial increase in the local tax burden; the cost is spread across the entire state.

1. The Issue of Moral Hazard

One likely negative externality of this policy is moral hazard. Moral hazard is the phenomena by which increasing protection against a risk incentivizes riskier behavior in that area.<sup>159</sup> For example, studies showed that rates of dangerous driving and car accidents rose after drivers acquired airbag-equipped cars.<sup>160</sup> Although airbags reduced the number of fatal accidents, the phenomena of moral hazard curbs the positive effect on safety.<sup>161</sup> The explanation for this phenomenon was that when drivers felt protected by the airbags, they were less fearful of the consequences of accidents, and intuitively drove more recklessly.<sup>162</sup>

In the context of a public water contamination liability, the Fund separates the tortfeasor from the consequences of the payout and the danger of risking harm. The Fund may incentivize a government or water authority to take greater risks within their legally authorized discretion,

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<sup>158</sup> See S. T. Wong, *A Model on Municipal Water Demand: A Case Study of Northeastern Illinois*, 48 LAND ECONOMICS, 34, 40–41 (1972) (describing analytics that show how price has little effect on consumption of water).

<sup>159</sup> See generally David Rowell & Luke B. Connelly, *A History of the Term “Moral Hazard,”* 79 J. RISK INS. 1051 (2012).

<sup>160</sup> Steven P. Peterson & George E. Hoffer, *The Impact of Airbag Adoption on Relative Personal Injury and Absolute Collision Insurance Claims*, 20 J. CONSUMER RES. 657, 661–62 (1994).

<sup>161</sup> *Id.*

<sup>162</sup> See *id.*



because each would know it will never have to pay for large scale mistakes. As part of implementing the Fund, legislatures should conduct a regulatory and statutory review to ensure water authorities do not have too much discretion to increase risk.

An examination of Michigan's Underground Tank Storage Fund program reveals the detriment of moral hazard. Michigan's Fund became insolvent in the 1990s.<sup>163</sup> Michigan transitioned to a system in which tank owners purchased their own insurance.<sup>164</sup> During this time, technology and improved practices were reducing the underground tank storage leakage rates in many states, but Michigan's rates improved 20% more than adjacent states.<sup>165</sup> The primary explanation for this reduction in spill rates is the reduction of moral hazard; private insurance companies charge clients based on risk.<sup>166</sup> Underground tank storage owners paid more each year for insurance for risky practices, and thus saved money by taking greater precautions.<sup>167</sup>

This should not, however, suggest that the Fund would prove inefficient at mitigating accidents. The lesson from Michigan's early public fund is that the Fund should attempt to incentivize caution. One possible mechanism for incentivizing caution can be borrowed from the National Flood Insurance Program's Community Rating System ("NFIP CRS").<sup>168</sup> Under NFIP CRS, as communities improve their flood management beyond the minimum standards, the citizens receive reduced insurance premiums for flood insurance.<sup>169</sup> This can be adapted to the Fund by designing a framework in which communities could complete certain projects and decrease the risk of water contamination, in exchange for a lower water usage tax rate on their citizens.

Furthermore, requiring localities to purchase private liability insurance would not address all dimensions of the Flint problem. Sovereign immunity remains a barrier to lawsuits because even if the state consents to suit as part of this program, the state with an appropriations clause in its constitution can simply nullify the damages.<sup>170</sup> Furthermore, liability insurance does not provide the benefits of administrative hearings, which

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<sup>163</sup> Yin et al., *supra* note 144, at 332.

<sup>164</sup> *Id.* at 341.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 344, 346–47.

<sup>167</sup> *Id.*

<sup>168</sup> See generally COMMUNITY RATING SYSTEMS, <https://www.fema.gov/community-rating-system> [<https://perma.cc/85UG-2DKG>] (last visited Oct. 23, 2017).

<sup>169</sup> *Id.*

<sup>170</sup> See *supra* Section IV.A.2.

would reduce costs and improve accessibility.<sup>171</sup> Finally, a risk based pricing model in a private insurance market would likely hamper environmental justice concerns because the communities most in need of this program, like Flint, are also the communities most at risk for water contamination,<sup>172</sup> and thus would also pay the highest rates for private insurance.

Finally, the private option may be unnecessary because moral hazard may be curbed by other existing frameworks, particularly criminal law. One primary function of criminal law, after all, is to prevent harmful conduct.<sup>173</sup> In the case of Flint, Michigan, numerous state and local officials are currently facing criminal charges for their actions.<sup>174</sup> This includes Darnell Early, the emergency manager who made the switch to the contaminated Flint River, who is charged with false pretenses, conspiracy, misconduct in office, and willful neglect of duty;<sup>175</sup> false pretenses and conspiracy are both 20-year felonies.<sup>176</sup>

Incentivizing caution with a framework similar to the NFIP CRS, and enforcing existing criminal laws, should serve well to curb moral hazard for the Fund.

## 2. Political Barriers

The greatest barrier to this program is likely political. There is often great resistance to tax increases, particularly on services well liked or utilized by political bases.<sup>177</sup> Unfortunately, this policy will likely not provide a salient benefit to wealthier tax payers. This policy protects from an intangible risk of water contamination, which is higher for lower income communities.<sup>178</sup> This is a particularly noteworthy hurdle because governments are motivated to provide services that benefit those who

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<sup>171</sup> McNeil, *supra* note 150, at 127, 130–31.

<sup>172</sup> Michigan Civil Rights Commission, *supra* note 93, at 121 (stating the conditions of Flint made a crisis “all but inevitable”).

<sup>173</sup> See Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857 (1994).

<sup>174</sup> Paul Egan & Elisha Anderson, *New criminal charges in Flint water crisis*, DETROIT FREE PRESS (Dec. 20, 2016, 9:24 AM), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/12/20/schuette-flint-water-charges/95633422/> [<https://perma.cc/PN2X-39T4>].

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> See Eric M. Zolt, *Politics and Taxation: An Introduction*, 67 TAX L. REV. 453, 455 (2014).

<sup>178</sup> *E.g.*, Michigan Civil Rights Commission, *supra* note 93, at 101.

pay the bulk of taxes.<sup>179</sup> The benefit to the tax payers is security, but this benefit may not be sufficiently worthwhile to wealthier tax payers to enable legislation.

This program is further hampered by the fact that localities with substantial tax bases already have a high level of water security; these wealthier localities have more funds to monitor and repair water systems and a larger budget with which to combat any problems when they do arise.<sup>180</sup> Conversely, the lower income localities who need this security the most would have less resources to pay the tax than higher income localities.<sup>181</sup> The irony of this situation, that those who need the policy the most are those least able to fund it, highlights the need for a state or federal level program to distribute costs, but also serves as a potential barrier to legislating this policy. This observation should display how poverty can perpetuate environmental risks in communities most in need of environmental justice.

Ultimately, the Fund can effectively protect precariously situated localities that cannot bear the weight of a large class action suit for water contamination, optimally monitor water system with their current budget, or leverage sufficient funding to correct problems when they arise. As such, the Fund will likely face resistance from those in more developed, high income areas that are less at risk for the problems this policy solves. Therefore, the tax should remain as small as possible while still maintaining the solvency of the Fund, to reduce resistance against the program.

## CONCLUSION

A Water Contamination Fund would solve many of the problems facing Flint in the wake of their water crisis. The Fund would compensate the harmed without the need for a civil lawsuit, circumventing the barrier of sovereign immunity. This program spreads risk across the entire state to reduce proportion of damages paid for by citizens' taxes, and to promote environmental justice by pulling Fund resources from economically stable areas with potentially lower risks of water contamination. Neither the "tax freeze,"<sup>182</sup> nor the direct reduction of sovereign

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<sup>179</sup> Zolt, *supra* note 177, at 455 (citing Jeffrey F. Timmons, *The Fiscal Contract: States, Taxes, and Public Services*, 57 *WORLD POL.* 530 (2005)).

<sup>180</sup> Michigan Civil Rights Commission, *supra* note 93, at 101–02 (citing poverty as a catalyst for the problems faced by Flint).

<sup>181</sup> *Id.*

<sup>182</sup> *Supra*, Section IV.B.

immunity<sup>183</sup> would address these problems without missing or exacerbating another.

Although a mandate requiring localities or water authorities to purchase private insurance for contamination issues is tempting to avoid moral hazard, such a program would 1) charge higher-risk communities more, inhibiting environmental justice, 2) sidestep the procedural ease and cost saving benefits of administrative hearings and 3) may be hampered whenever damages are awarded by sovereign immunity and the constitutional powers of the appropriations clause.

Ultimately, the Fund is an effective policy to restore Flint, Michigan and communities like it, when government action hurts citizens.

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<sup>183</sup> *Supra* Section IV.A.