

THE FLINT, MICHIGAN WATER CRISIS: CONCURRENT PRIVATE-PUBLIC FUNDS AS THE MOST EFFECTIVE LEGAL TOOL TO COMPENSATE VICTIMS

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INTRODUCTION

This Comment seeks to address the potential means of recourse available to residents of Flint, Michigan in response to the municipality’s recent water crisis. This Comment explores the legal tools available to Flint residents to obtain restitution and direct compensation, and concludes that a dual public-private compensation scheme modeled after the New Jersey Spill Fund and One Fund Boston, respectively, is more likely to provide Flint residents with direct compensation in a timely manner. Though a federal victims’ compensation fund—modeled after the 9/11 Victim Compensation Fund—would be the ideal legal tool to compensate victims of the Flint water crisis, this Comment recognizes the barriers to enacting federal legislation to provide direct

compensation without sufficient financial incentive. The fact that Flint residents have been living with lead-tainted water for three years without Congress enacting such legislation suggest that such federal legislation is unlikely to come to fruition. Accordingly, a hybrid state-private compensation scheme encompassing elements of the 9/11 Fund, such as the requirement that recipients waive their right to pursue tort litigation, is a viable alternative to compensate victims of the Flint water crisis as soon as possible.

I. FACTUAL BACKGROUND: THE WATER CRISIS IN FLINT, MICHIGAN

A. *Flint's former glory as the "Vehicle City"*

In 1903, Will Durant of the Buick Motor Company convinced Buick's suppliers, such as Champion Spark Plug Company, Weston-Mott (Axle) Company, and Fisher Body Company, to relocate to Flint, Michigan.¹ Shortly thereafter in September 1908, Durant founded General Motors ("GM"), the sole objective of which was to consolidate Buick Motor Company and its affiliates in Flint.² Not only was GM founded in Flint, but the city was also the birthplace of the United Auto Workers union.³ Accordingly, Flint flourished as an industrial hub, where generations of workers and their families benefited from the automobile industry boom that occurred after both World Wars.⁴ Communities surrounding Flint similarly benefited from GM's development, particularly after World War II, as advancements in the gasoline engine led to increased agriculture and farming, which overtook land use in the Flint River watershed.⁵

With Flint's economy tied to GM's prosperity, the housing market in Flint could not keep up with the influx of new residents seeking employment in the early twentieth century.⁶ By 1920, Flint's population of 91,600 was nearly seven

1. Joseph M. Leonardi & William J. Gruhn, FLINT RIVER ASSESSMENT, MICH. DEP'T OF NAT. RESO. 23 (July 2001), <http://www.michigandnr.com/PUBLICATIONS/PDFS/ifr/ifrilibra/Special/Reports/sr27.pdf> [<https://perma.cc/HLR3-QLCY>]; see also Wes Janz, *This is Flint, Michigan, in All Its Pain and All Its Glory*, GRIST (Feb. 17, 2011), <http://grist.org/urbanism/2011-02-15-this-is-flint-michigan/> [<https://perma.cc/EW2P-QVBG>] (describing the growth of Flint, Michigan as a company town during the twentieth century, earning itself the nickname "Vehicle City").

2. Leonardi & Gruhn, *supra* note 1.

3. Leonardi & Gruhn, *supra* note 1.

4. Janz, *supra* note 1 (noting that in the mid-twentieth century, 80,000 of the 190,000 Flint residents were employed by General Motors).

5. Leonardi & Gruhn, *supra* note 1, at 24.

6. Kayla Ruble, *The Unraveling of Flint: How "Vehicle City" Stalled Long Before the Water Crisis*, VICE NEWS (Jan. 26, 2016, 3:25 PM), <https://news.vice.com/article/the-unraveling-of-flint-how-vehicle-city-stalled-long-before-the-water-crisis> [<https://perma.cc/TU37-9WJG>].

times its population in 1900 of 13,103.⁷ As a result, the State sought to add new subdivisions to the city on Flint's undeveloped land.⁸ The city continued to experience overwhelming growth during the twentieth century; in 1968, the year of peak employment by GM, Flint had one of the country's highest per capita income levels for a city of its size.⁹

B. *Forces driving Flint's fiscal demise: the creation of an isolated urban center*

Because Flint's finances were dependent on GM, the 1973 oil embargo, after which more than 20,000 GM workers were laid off, inaugurated Flint's decline.¹⁰ Shortly thereafter, the recession of the 1980s, coupled with high gas prices, ushered in the end of economic prosperity in Flint.¹¹ By 1988, GM's employment began to steadily decline, driving former GM employees out of Flint in search of work elsewhere.¹² The closure of the Flint GM plant not only had an economic impact on the city itself, but it forced its suppliers in Flint and the surrounding cities to close their doors as well. For example, the AC Spark Plug plant in Flint ceased production, as did the iron foundry plants in Saginaw, which is connected to the Flint River through a web of lakes and streams.¹³

As a result, abandoned properties and demolished factories were left in place of the once booming city. One resident pointed specifically to a vacancy near "Buick City," an area in Flint's north side, where a 235-acre Buick plant formerly resided until it was demolished in 2002.¹⁴ Emblematic of the current state of Flint's economy, the area—one of the country's largest brownfields—now features a chain link fence with barbed wire surrounding an empty plot of overgrown land.¹⁵ With the exodus of major employers, Flint lost a large portion of its wealthy residents during the 1990s.¹⁶ Following a population decline of 17.4% in the 1970s, Flint's population dwindled by 18% in the first decade of the

7. GARY FLINN, REMEMBERING FLINT, MICHIGAN: STORIES FROM THE VEHICLE CITY 49 (2010).

8. *Id.*

9. GORDON YOUNG, TEARDOWN: MEMOIR OF A VANISHING CITY 2 (2013).

10. Brent D. Ryan, *Shrinking-City Urban Form as a Determinant of Urban Policy: The Case of Flint, Michigan, USA*, URB. FORM & URB. POL'Y: 48TH ISOCARP CONGRESS 3-4 (2012), http://www.isocarp.net/data/case_studies/2253.pdf [<https://perma.cc/255V-2DS6>] (internal citation omitted).

11. Ruble, *supra* note 6.

12. *Id.*

13. David Rosner, Editorial, *Flint, Michigan: A Century of Environmental Injustice*, 106 AM. J. PUB. HEALTH 200, 200 (2016).

14. Ruble, *supra* note 6.

15. Janz, *supra* note 1; Ruble, *supra* note 6.

16. Ruble, *supra* note 6.

twenty-first century.¹⁷ By 2014, half of the Flint population of its golden age had fled to the suburbs.¹⁸

In contrast to the early mid-twentieth century, when Flint's population exceeded its available housing, the rate of housing abandonment in the twenty-first century created long-term budgetary issues for the city.¹⁹ According to U.S. Census data, housing vacancy in Flint increased from 8.2% in 1990 to 21.1% in 2010, diminishing revenue and property values and limiting the municipality's budget to provide police, fire protection, and other services to protect public health and safety.²⁰ Since 2000, Flint has been on an arduous downward slide, losing 25% of its revenue from property taxes and income, 32% of the revenue sharing provided by the State, and 21% of its population in response to, and causing, declines in commercial activity.²¹ During this same period, the assessed value of all property in Flint has declined by 43% and its tax base is just slightly more than \$6,000 per resident at present.²² In light of the loss of population and attendant revenue, Flint no longer has the resources or the manpower necessary to deliver services. Underscoring the dire state of Flint's resources, the city was recently identified as both the most dangerous city in the United States and the murder capital of the country.²³

Not only did the shrinking population of Flint lead the city to economic decline, but it also perpetuated the water crisis that came to fruition in 2014. Of the more than 550 miles of water mains beneath the city, the majority are cast-iron pipes that were built more than seventy-five years ago. With the city's population measurably shrinking—from 141,553 to fewer than 100,000 by 2013—pools of water gathered in lead-service lines for extended periods time.²⁴ This wading water did not produce adverse health effects when Flint purchased treated Lake Huron water from Detroit; rather, those effects began with the

17. Eric Scorson & Nicolette Bateson, *Long-Term Crisis and Systematic Failure: Taking the Fiscal Stress of America's Older Cities Seriously*, MICH. ST. UNIV. EXTENSION 1, 2 (2011), https://www.cityofflint.com/wp-content/uploads/Reports/MSUE_FlintStudy2011.pdf [<https://perma.cc/2C7V-TUR2>].

18. Ruble, *supra* note 6.

19. Scorson & Bateson, *supra* note 17, at 4.

20. *Id.* at 5.

21. Stephen Henderson, *Flint's Long Misery, at the Hands of Urban Policy*, DET. FREE PRESS (Jan. 30, 2016, 11:18 PM), <http://www.freep.com/story/opinion/columnists/stephen-henderson/2016/01/30/flints-long-misery-hands-urban-policy/79531718/> [<https://perma.cc/5EXQ-BXMB>].

22. *Id.*

23. David Harris, *CQ Press Ranks Flint as Most Dangerous City*, MLIVE (Dec. 15, 2011 2:34 PM), http://www.mlive.com/news/flint/index.ssf/2011/12/cq_press_ranks_flint_as_most_d.html [<https://perma.cc/8UNZ-8JZD>].

24. Matt Pearce, *A "Man-Made Disaster" Unfolded in Flint Within Plain Sight of Water Regulators*, L.A. TIMES (Jan. 22, 2016, 6:51 PM), <http://www.latimes.com/nation/la-na-flint-water-20160122-story.html> [<https://perma.cc/R6AS-C22A>].

decision to source water from the Flint River.²⁵ Because the water from the Flint River is typically a higher temperature and contains more organic material than the water from Lake Huron, the idle pools of water fostered the growth of bacteria, such as *Legionella*.²⁶ Indeed, the post-industrial state of Flint after wealthier populations took flight from the city set the stage for Flint's impending financial – and consequently, public health – crisis.

C. *Structural impediments: hyper-local governance and budgetary constraints*

The recent water crisis in Flint is the culmination of the systemic disinvestment in the city's infrastructure. With recurring deficits in governmental funds, Flint sought temporary relief by appointing an Emergency Financial Manager ("EFM") for the first time in 2002.²⁷ From May 2002 to January 2006, a governor-appointed EFM allowed Flint to move from a General Fund deficit of \$26.6 million to a \$6.1 million surplus.²⁸ However, this economic improvement quickly reversed, as labor union settlements, litigation, and declining municipality revenues forced Flint to enter a deficit once again.²⁹ By 2008, Flint had returned to a deficit of \$6.8 million.³⁰

Subsequently, the State sought to end the cycle of returning to a deficit in Flint by replacing the Local Government Fiscal Responsibility Act of 1990 with the Local Government and School District Fiscal Accountability Act of 2011.³¹ The adopted statute incentivizes local governments to address budgetary constraints before the Governor assigns an EFM.³² As the revised statute failed to provide Flint with necessary economic resuscitation, the State declared a financial state of emergency in Flint on November 8, 2011 and seized control of

25. Mitch Smith, *A Water Dilemma in Michigan: Cloudy or Costly?*, N.Y. TIMES (Mar. 24, 2015), http://www.nytimes.com/2015/03/25/us/a-water-dilemma-in-michigan-cheaper-or-clearer.html?_r=1 [<https://perma.cc/Z3JZ-SFZA>].

26. Elisha Anderson, *Legionnaires' – Associated Deaths Grow to 12 in Flint Area*, DET. FREE PRESS (Apr. 11, 2016, 6:59 PM), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/04/11/legionnaires-deaths-flint-water/82897722/> [<https://perma.cc/GWH4-5DCC>] (noting that 12 deaths due to Legionnaires' disease have been confirmed, allegedly from consumption of contaminated water). For further discussion of the decision to switch Flint's water source from Lake Huron to the Flint River, see *infra* Part C.

27. Local Government Fiscal Responsibility Act of 1990, MICH. COMP. LAWS ANN. §§ 141.1101-18 (West 1990), repealed by Local Financial Stability and Choice Act, MICH. COMP. LAWS ANN. § 141.1541 (West 2013) (noting prior to repeal that an emergency financial manager would be allowed to exercise the authority and responsibilities provided in the act to the extent authorized).

28. Scorsone & Bateson, *supra* note 17, at 9.

29. *Id.*

30. *Id.*

31. MICH. COMP. LAWS ANN. §§ 141.1501-31 (West 2012).

32. Scorsone & Bateson, *supra* note 17, at 9.

all budgetary decisions for the second time in a decade.³³ Rather than curb the use of an EFM, the revised statute perpetuated a forty-one months long state of emergency, spanning four EFMs and another change in Michigan's emergency manager statute.³⁴ For example, Governor Snyder appointed Michael K. Brown, a former mayor of Flint, as the EFM twice over the span of four years, allegedly to "cut the budget, at *any* cost."³⁵ In April 2014, EFM Darnell Earley apparently embodied that same mentality, as he chose to temporarily switch Flint's water supply from Lake Huron to the Flint River to construct a regional pipeline—a cost-saving measure that came at an immeasurable cost to public health almost immediately.³⁶

Michigan's approach to municipal finance, which is hyper-focused on specific cities, rather than systemic inequities, broad tax structure, and overarching infrastructure shortfalls, has led to the creation of poor, isolated urban islands.³⁷ Whereas Flint's population and tax base has steadily declined since Michigan first authorized the appointment of an EFM in 2002, surrounding suburban communities, which lack any economic connection to the city, have grown stronger. For example, Grand Blanc, fewer than nine miles from Flint, has experienced a 6% growth in its assessed property valuation in the past decade. Currently, Grand Blanc is valued at \$132,000 per capita—a valuation more than six times that of Flint.³⁸ Flushing is yet another example of a wealthy suburb that has experienced stable growth in population, an increase in its tax base, and a steady increase in median household income, while Flint, a city just a stone's throw away, entered into receivership.³⁹ As the stark dichotomy between Flint and its surrounding suburbs demonstrates, the municipal government responded to Flint's receivership by viewing its finances in a vacuum, rather than by focusing on holistic measures to mitigate the systemic effects of de-industrialization and suburban sprawl.

33. Sara Ganim & Linh Tran, *How Tap Water Became Toxic in Michigan*, CNN (Jan. 13, 2016, 10:53 AM), <http://www.cnn.com/2016/01/11/health/toxic-tap-water-flint-michigan/> [<https://perma.cc/5HBW-EJPY>].

34. MICH. COMP. LAWS ANN. § 141.1541 (West 2013); *A Look Back at Flint's Long Financial Emergency*, MLIVE (Apr. 2015), http://www.mlive.com/news/flint/index.ssf/2015/04/follow_flints_long_road_back_f.html#0 [<https://perma.cc/U3WK-SPZ8>].

35. Ganim & Tran, *supra* note 33 (emphasis added).

36. Smith, *supra* note 25; *A Look Back at Flint's Long Financial Emergency*, *supra* note 34.

37. See CLEMMENS ZIMMERMAN, *INDUSTRIAL CITIES: HISTORY AND FUTURE* 149 (2013) (describing Flint as epitomizing urban shrinkage, a condition common to the "Rust Belt," where officials engage in "smart growth" to minimize the effect of population decreases due to economic decline); see also Henderson, *supra* note 21 (identifying Flint's cycle of financial crisis as symptomatic of Michigan's political shortsightedness with regards to innovative urban policy).

38. Henderson, *supra* note 21.

39. *Id.*

II. BACKGROUND: THE CITY OF FLINT'S CONTAMINATED AND COSTLY WATER SUPPLY

A. *The toxicity of Flint's water supply*

Flint resident Melissa Mays recounted that “[d]epending on the day . . . the water flowing out of her home’s faucets might have a blue tint. Or it might smell like mothballs. Or it might fill her home with the scent of an overchlorinated [sic] swimming pool.”⁴⁰ Ms. Mays remembers that “she started having rashes, and clumps of her hair fell out.”⁴¹ As a result, similarly situated Flint residents have gone to extraordinary lengths to avoid even showering in Flint water; such efforts include joining inexpensive gyms outside of Flint to utilize their showers, rather than to exercise.⁴²

Two years ago, at an April 25, 2014 ceremony in a Flint water control facility, Mayor Dyane Walling lifted a glass of clear water to celebrate the decision to stop piping water from Detroit.⁴³ As onlookers counted down, Walling pressed a button switching the water supply, resulting in cheers of “Hear, hear!” as Flint officials drank some of the last clean water available to the city.⁴⁴ On that now infamous day, the city began treating Flint River water at the Flint Water Treatment Plant and distributing that water to the community in place of the more expensive Lake Huron water piped from Detroit.⁴⁵ Although Detroit treated its water supply with orthophosphate to coat leaded pipes and the Flint River is nineteen times more corrosive than Lake Huron,⁴⁶ the Michigan Department of Environmental Quality (“MDEQ”) failed to order that an anti-corrosive agent be added to the water to ensure its conformity with the requirements set forth in the EPA’s Lead and Copper Rule (“LCR”).⁴⁷ Rather,

40. Smith, *supra* note 25.

41. *Id.*

42. Abby Goodnough, *In Flint, Fears of Showering Bring Desperate Measures*, N.Y. TIMES (Apr. 13, 2016), http://www.nytimes.com/2016/04/14/us/in-flint-rashes-stirfears-of-showering-as-scientists-hunt-forculprit.html?_r=0 [<https://perma.cc/K9ST-4K9U>].

43. Pearce, *supra* note 24.

44. *Id.*

45. FLINT WATER ADVISORY TASK FORCE, FINAL REPORT 16 (Mar. 21, 2016), http://www.michigan.gov/documents/snyder/FWATF_FINAL_REPORT_21March2016_517805_7.pdf [<https://perma.cc/B2TJ-L4CM>].

46. Rob Jordan, *Q&A: Stanford Water Expert on Lessons of Flint, Michigan, Crisis*, STANFORD REPORT (Mar. 11, 2016), <http://news.stanford.edu/news/2016/march/flint-water-luthy-031116.html> [<https://perma.cc/9NMX-WQLP>]; *see also* Chad Livengood, Flint Mayor: Water Fix Could Cost as Much as \$1.5B, DET. NEWS (Jan. 8, 2016), <http://www.detroitnews.com/story/news/politics/2016/01/07/flint-water/78404218/> [<https://perma.cc/N59Q-F7RD>] (reporting that fixing up to 500 miles of pipes in Flint could cost upwards of \$1.5 billion).

47. Control of Lead and Copper Rule, 40 C.F.R. § 141.81 (1991) (requiring systems serving more than 50,000 persons to optimize corrosion control through specific steps, including monitoring,

the MDEQ directed the city to complete two six-month monitoring periods, after which the MDEQ would determine whether corrosion control was needed.⁴⁸

Almost immediately after Flint began sourcing its water from the Flint River, residents complained of the water's off-putting color, taste, and smell. These complaints fell on deaf ears, as state officials disregarded residents' concerns about the water's safety.⁴⁹ Indeed, as Flint was under the control of an EFM, the city's elected mayor was not authorized to modify the city's budgetary plan even if officials recognized the veracity of residents' complaints.⁵⁰

Shortly thereafter, however, abnormally high levels of *E.coli*, trihalomethanes, lead, and copper were identified in the city's water supply.⁵¹ The identification of fecal coliform bacteria in the city's first monitoring period, for example, led the city to issue warnings requiring citizens to boil water.⁵² Corroborating residents' concerns about the water quality, GM announced in October 2014 that it would cease to use Flint's water for its Flint Engine Operations facility, as the levels of chloride in the water correlated to the corrosion of metal parts.⁵³ Notwithstanding GM's announcement, Flint officials remained steadfast in their assertion that the water was safe, highlighting that GM officials continued to drink Flint water.⁵⁴ Rather than return to the Detroit water supply, the city responded by adding additional chlorine to the water supply.⁵⁵

Two months later, however, the MDEQ notified Flint officials that it had violated the Safe Drinking Water Act,⁵⁶ as the city's increased chlorine treatment resulted in further increases in trihalomethanes.⁵⁷ Although the MDEQ provided a sample notice letter to officials to send to residents, which warned that "[p]eople who drink water containing trihalomethanes in excess of the [Maximum

corrosion controlling studies, installation of treatment, and follow-up sampling).

48. FLINT WATER ADVISORY TASK FORCE, *supra* note 45, at 16.

49. Jacob Lederman, *Flint's Water Crisis is No Accident*, IN THESE TIMES (Jan. 22, 2016), <http://inthesetimes.com/article/18794/flint-water-crisis-neoliberalism-free-market-reforms-risk-snyder> [<https://perma.cc/ZX6R-4K7V>].

50. *Id.*

51. Alana Semuels, *Aging Pipes Are Poisoning America's Tap Water*, THE ATLANTIC (July 29, 2015), <http://www.theatlantic.com/business/archive/2015/07/dont-drink-the-water/399803/> [<https://perma.cc/ZCR8-ZLAL>] (citing 2013 Report Card for America's Infrastructure, AM. SOC'Y OF CIVIL ENG'RS (2013)).

52. Lederman, *supra* note 49.

53. Pearce, *supra* note 24.

54. *Id.*

55. Lederman, *supra* note 49.

56. MICH. SAFE DRINKING WATER ACT, Pub. Act 399 (1976).

57. Testimony of Susan Hedman, EPA Region 5 Administrator Before the H. Comm. on Oversight and Gov't Reform, 114th Cong. (2013) (referencing the Notice of Violation for Total Trihalomethane exceedances issued by the MDEQ in December 2014); FLINT WATER ADVISORY TASK FORCE, *supra* note 45, at 18 (noting that based on 100 samples, which were not necessarily drawn from the highest risk homes as intended by the LCR, the MDEQ recognized that the 90th percentile lead result was 6ppb, with 2 sample levels above 15ppb, the "action level" for lead).

Contaminant Level] over many years may experience problems with their liver, kidneys, or central nervous system, and may have increased risk of getting cancer,” the notice also expressly declined to accept that the city’s violation of drinking water standards was an emergency.⁵⁸ Further, even though the high lead content found after the first six-month round of LCR monitoring ended on December 31, 2014 would require that the Flint Water Treatment Plant implement corrosion control treatment under the LCR, the MDEQ failed to properly advise administrators of this regulation.⁵⁹

Notwithstanding the MDEQ’s admission that Flint’s water had reached an unsafe level of contamination, residents’ safety concerns were not fully substantiated until an outsider, Virginia Tech Professor Marc Edwards, turned his attention to the alleged contamination of the Flint water supply in 2015. Under Professor Edwards’s direction, Virginia Tech conducted a field study of 252 Flint homes to determine the corrosiveness of the Flint River and, in turn, the toxicity of the water supply.⁶⁰ Virginia Tech’s analysis revealed that 40.1% of samples collected were contaminated with more than 5 parts per billion (“ppb”) of lead.⁶¹ As the study could not target “worst case” homes with lead plumbing, as is required for EPA sampling, researchers extrapolated from the samples to determine that Flint’s ninetieth percentile lead value was 25ppb, greatly exceeding EPA’s allowed level of 15ppb for high-risk homes.⁶²

On September 8, 2015, after more than a year of residents’ complaints and officials’ undisclosed concerns about the safety of the Flint River water,⁶³ Virginia Tech posted the results of the 252 samples to FlintWaterStudy.org, finally bringing desperately needed transparency to the water crisis.⁶⁴ Shortly thereafter, the director of the pediatric residency program at the Hurley Medical Center, Dr. Mona Hanna-Attisha, reported in a press conference that the proportion of children with elevated blood lead levels increased since Flint

58. Notice from Mike Gasglow, Assistant Supervisor, Flint Water Plant to City of Flint (Jan. 2, 2015), <https://www.cityofflint.com/wp-content/uploads/TTHM-Notification-Final.pdf> [<https://perma.cc/3PL5-AAH6>].

59. FLINT WATER ADVISORY TASK FORCE, *supra* note 45, at 18.

60. *Flint Water Study Updates: Lead Testing Results for Water Sampled by Residents*, FLINTWATERSTUDY.ORG (Dec. 2015), <http://flintwaterstudy.org/information-for-flint-residents/results-for-citizen-testing-for-lead-300-kits/> [<https://perma.cc/CPT7-UVXD>].

61. *Id.*

62. *Id.*

63. See FLINT WATER ADVISORY TASK FORCE, *supra* note 45, at 16-20 (explaining the timeline of key events as the crisis in Flint was realized).

64. Marc Edwards, Siddhartha Roy & William Roads, *Lead testing results for water sampled by residents*, FLINTWATERSTUDY.ORG (Sept. 8, 2015), <http://flintwaterstudy.org/information-for-flint-residents/results-for-citizen-testing-for-lead-300-kits/> [<https://perma.cc/CPT7-UVXD>] (Virginia Tech researchers asserted: “[M]athematically, even if the remaining 48 samples returned have non-detectable lead . . . FLINT HAS A VERY SERIOUS LEAD IN WATER PROBLEM.”).

stopped piping Detroit's water.⁶⁵ After the Detroit Free Press published an analysis of Flint blood lead tests, corroborating Dr. Hannah-Attisha's findings, the Michigan Department of Health & Human Services ("MDHHS") issued a statement confirming that Dr. Hanna-Attisha's report was correct.⁶⁶

Just two weeks later, Governor Snyder, unable to escape the reality of the cost-cutting measure employed in 2014, worked with Mayor Walling to reconnect Flint to the Detroit Water Department's water supply.⁶⁷ Though orthophosphate treatment to rebuild pipes' protective scale and chlorine monitoring have reduced pathogen and lead contamination, unfiltered water is still unsafe to drink.⁶⁸ As a result, a city uniquely positioned in close proximity to the Great Lakes, an abundant supply of fresh water, is facing seemingly insurmountable challenges to providing safe water to its community.⁶⁹

B. *The expense of curtailing expenses*

Ironically, not only has the city's cost-saving measure proven expensive for Flint residents, but it has also forced the State to make expenditures it sought to avoid. Whereas Flint officials estimated the cost of buying water from Detroit to be \$16 million,⁷⁰ the American Society of Civil Engineers estimated in 2009 that \$13.8 *billion* would need to be spent to improve the State's drinking water infrastructure by 2029.⁷¹ Although Detroit offered to reconnect Flint to Detroit's system in January 2015, the current EFM declined because it would cost Flint an

65. FLINT WATER ADVISORY TASK FORCE, *supra* note 45, at 21.

66. *Id.* (citing Robin Erb, Number of Flint Children with Lead Poisoning Jumps After Flint Water Switch, Says Researcher, DET. FREE PRESS (Sept. 25, 2015, 6:44 PM), <http://www.freep.com/story/news/local/michigan/2015/09/24/water-lead-in-flint/72747696/> [<https://perma.cc/Q5CS-Q8SZ>]).

67. FLINT WATER ADVISORY TASK FORCE, *supra* note 45, at 21.

68. *See* Concerned Pastors for Social Action v. Khouri, 217 F. Supp. 2d 960, 980 (E.D. Mich. 2016) (ordering Flint to deliver bottled water to Flint households without properly installed and maintained faucet filters); MICH. DEP'T OF HEALTH & HUMAN SERVS., BLOOD LEVEL TEST RESULTS FOR SELECTED FLINT ZIP CODES (Feb. 26, 2016), https://www.michigan.gov/documents/flintwater/Flint_Blood_Testing_Report_26Feb16_515770_7.pdf [<https://perma.cc/28U3-LSHL>]; Nana Adwoa Antwi-Boasiako & Gretchen Frazee, *Lead Removal From Flint Water Making Progress, Researchers Find*, PBS (Aug. 11, 2016, 1:51 PM), <http://www.pbs.org/newshour/rundown/lead-flint-water/> [<https://perma.cc/TNU9-9BVP>] (noting that 54% of homes surveyed had detectable levels of lead in July 2016, as compared to 93% of homes surveyed in August 2015); Livengood, *supra* note 46.

69. *See* 2009 Report Card for Michigan's Infrastructure, AM. SOC'Y OF CIVIL ENG'RS (2009), <http://www.infrastructurereportcard.org/michigan/michigan-overview/> [<https://perma.cc/TVK8-2TC7>] (highlighting that in 2009, Michigan received a grade of a "D" on its 2009 infrastructure report and suggesting that failure to improve will lead to disastrous results in the future).

70. *Is Detroit Being Poisoned Through Its Water?*, ASSOCIATED PRESS (Mar. 4, 2015, 2:02 AM), <http://www.dailymail.co.uk/news/article-2978777/Protests-water-taste-smell-city-breaks-tie-Detroit.html> [<https://perma.cc/3R5V-WZUC>].

71. 2009 Report Card for Michigan's Infrastructure, *supra* note 69.

additional \$12 million per year.⁷² By October 2015, however, Snyder was forced to commit \$3.5 million of the city's funds to pay for water filters, free lead testing, and staff to conduct health exposure monitoring of lead in public water.⁷³ As of February 2016, Snyder estimated that the State was facing a staggering bill of more than \$7.5 million to replace Flint's water in addition to \$1.5 billion to improve the city's infrastructure on an accelerated time table.⁷⁴ Professor Richard Luthy, a Senior Fellow at the Stanford Woods Institute for the Environment, lamented: "The shame in all of this is they could have avoided the problem at low cost. Instead, money that could have gone to much-needed schools, social services and community centers will go to lawsuits, health studies and water pipes."⁷⁵

Accordingly, the administration's attempt to end a recurring cycle of budgetary deficits has transferred costs to private citizens. In the case of Flint resident Ms. Mays, a lead plaintiff in a recently filed class action lawsuit, the city's issuance of an order requiring citizens to boil tap water led her family to spend \$400 per month on bottled water and filters to avoid continued adverse health effects.⁷⁶ This additional cost was added to bills for polluted tap water, which ranged from \$120 to \$140 per month, eight times the national average for theoretically unpolluted water.⁷⁷ Although the National Guard has distributed free water bottles to residents, many water stations limit households to one twenty-four pack of water per week, which is insufficient to meet the needs of families who require clean water for cooking, cleaning, drinking, and bathing.⁷⁸

Because water bills consume two percent of an average Flint household's income, residents have begun ignoring unaffordable bills for "expensive poison," perpetuating the cycle of debt as the city loses revenue from nonpayment and increased collection costs.⁷⁹ While Flint officials have sought forgivable loans

72. Detroit Water Department Offers to Reconnect Flint to System, ASSOCIATED PRESS (Jan. 21, 2015, 6:28 AM), <http://www.crainsdetroit.com/article/20150121/NEWS01/150129965/detroit-water-department-offers-to-reconnect-flint-to-system> [https://perma.cc/9A28-CRE5].

73. *Lax Oversight, Manipulated Data Led to Flint Water Crisis, Researcher Says*, ASSOCIATED PRESS, (Oct. 8, 2015, 4:36 PM), <http://detroit.cbslocal.com/2015/10/08/lax-water-system-oversight-manipulated-data-lead-to-public-health-crisis-in-flint-researcher-says/> [https://perma.cc/GM4Y-QJGW].

74. *Gov. Snyder Estimates It Will Cost \$767,419,500 to Replace Flint's Water Supply*, CNN WIRE, (Feb. 3, 2016, 2:49 PM), <http://wtvr.com/2016/02/03/gov-snyder-estimates-it-will-cost-767419500-to-replace-flints-water-system/> [https://perma.cc/3TG5-E4VB]; Kane & Puentes, *supra* note 30.

75. Jordan, *supra* note 46.

76. Smith, *supra* note 25.

77. Bryce Covert, *Flint Ignored a Memo on How to Make Water Cheaper*, THINK PROGRESS (Jan. 27, 2016, 10:13 AM), <http://thinkprogress.org/economy/2016/01/27/3743059/flint-water-crisis-affordability/> [https://perma.cc/Y3KU-VTNS].

78. *Id.*

79. *Id.*

from the state and the federal government, the Michigan legislature appropriated \$9 million in January 2016, two-thirds of the \$12 million cost to reconnect Flint's water supply to Lake Huron.⁸⁰ In conformity with Flint's approach to financial struggle since 2002, the State determined that taxes would provide the remaining funds.⁸¹

III. POTENTIAL MEANS OF DIRECT COMPENSATION FOR FLINT RESIDENTS

With thousands of Flint children put at risk of lead poisoning, numerous reports of additional health problems, \$1.5 billion in corroded pipes and water heaters, and failures at every level of government, Flint residents and nonprofit organizations have turned to the courts to seek restitution and recovery from state and local government officials.⁸² As each day passes, additional class action and individual suits are filed in the U.S. District Court for the Eastern District of Michigan and the Michigan Court of Claims seeking compensation for the economic and physical injuries caused by the EFM's decision to switch Flint's water supply in April 2014.⁸³ Given the number of challenges that must be addressed to succeed through litigation and the dire state of Flint's finances, concurrent state and private victims' compensation funds ("VCF") are the best available means of direct compensation for Flint residents. A federal VCF modeled after the 9/11 Fund would be the ideal legal tool to provide Flint residents with direct compensation. However, as three years have passed since the initial insurgence of the water crisis, it is clear that Congress lacks the financial motivations that spurred the adoption of federal legislation implementing the 9/11

80. Livengood, *supra* note 46.

81. Lederman, *supra* note 49; Kathleen Gray, *Legislature Extends Flint Emergency Declaration*, DET. FREE PRESS (Apr. 13, 2016, 6:16 PM) (highlighting that in addition to the funds granted to reconnect the city's water supply to the Detroit Water and Sewage Department system, the State legislature has approved \$67 million in a state emergency funds, and the federal government, to date, has provided \$5 million in an emergency declaration). <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/04/13/legislature-extends-flint-emergency-declaration/82989030/> [<https://perma.cc/EBS2-GVVS>].

82. See Laura Bliss, *How Will Flint Residents Ever Be Compensated?* CITY LAB (Jan. 27, 2016), <http://www.citylab.com/politics/2016/01/flint-water-crisis-compensation-bills/426912/> [<https://perma.cc/D9HC-8JWC>] (examining the possibilities that Flint residents could be compensated via lawsuits, emergency aid, no-fault compensation, consumer protections or serious form).

83. See, e.g., Complaint at 2, *Abney v. Lockwood*, No. 16-10678 (E.D. Mich. Mar. 11, 2016) (personal injury suit) (seeking compensatory and punitive damages for injuries caused to Flint children due to the alleged "negligence, dereliction of duty, and lies that resulted in a public health crisis of historic proportions"); Complaint at 2, *Mays v. Snyder*, No. 15-14002 (E.D. Mich. Nov. 13, 2015) (class action suit) (seeking injunctive and declaratory relief as well as money damages for state or municipal employees' alleged violations of plaintiffs' due process rights under the Fourteenth Amendment while acting under color of state law).

Fund. Accordingly, a dual state-private compensation scheme incorporating elements of the 9/11 Fund is a more realistic method of directly compensating Flint residents for physical and economic harms suffered.

A. *Recourse through litigation*

On the face of things, it appears that the residents of Flint must succeed in a mass tort action against government officials who failed to fulfill their duty of protecting the health and safety of the community.⁸⁴ The plaintiffs, the majority of whom are children poisoned by lead-contaminated water, are undeniably sympathetic. Moreover, in light of evidence that Flint officials recognized the toxicity of the Flint water supply, it can hardly be said that the Flint administration was not negligent for placing the health of young children at risk.⁸⁵ However, the people of Flint face potentially insurmountable obstacles to recovering compensatory and punitive damages through the court system. Specifically, Stanford Law School Professor Nora Freeman noted that both class action and individual plaintiffs face two prominent challenges to recovery: sovereign immunity and proving specific causation.⁸⁶ Before Flint class action claimants seek to overcome these challenges to success on the merits, however, they must successfully move for class certification, which is unlikely under the circumstances.

1. Hurdles to class certification

The threshold issue to pursuing monetary relief through class action practice in the mass tort context is whether a class will satisfy the requirements for certification under Federal Rule of Civil Procedure 23 or the equivalent rule in Michigan.⁸⁷ As of June 2017, no plaintiffs' class has been certified in a class

84. See Nora Freeman Engstrom, *The Courts Will Fail Flint, Too*, STAN. L. SCH.: LEGAL AGGREGATE (Mar. 10, 2016), <https://law.stanford.edu/2016/03/10/the-courts-will-fail-flint-too/> [<https://perma.cc/ZPQ4-KDTF>] (explaining that the causation requirement may prevent many tort victims of Flint from receiving compensation).

85. Shannon Driscoll, *The Flint Water Crisis: Professor Nora Freeman Engstrom Answers Critical Legal Questions*, STAN. L. SCH.: LEGAL AGGREGATE (Feb. 16, 2016), <https://law.stanford.edu/2016/02/16/the-flint-water-crisis-professor-nora-freeman-engstrom-answers-critical-legal-questions/> [<https://perma.cc/XK9M-L8D8>].

86. See *id.* (addressing how sovereign immunity could act as an impediment to holding the City of Flint liable).

87. Although the majority of class actions have been filed in federal courts, at least one federal class action has been dismissed for lack of subject matter jurisdiction. Flint claimants re-filed suit in state court, where the State's substantive equivalent of Fed. R. Civ. P. 23 would govern. See Jennifer Chambers, *Federal Judge Dismisses Class Action Lawsuit Over Flint*, DET. NEWS (Apr. 19, 2016, 3:52 PM), <http://www.detroitnews.com/story/news/michigan/flint-water-crisis/2016/04/19/flint-class-action-lawsuit/83229426/> [<https://perma.cc/Z7DH-3L3K>] (citing Order of Dismissal for Lack

action brought against the State, local officials, the MDEQ, MDHHS, or other contributors to the water crisis for physical harm, though numerous proposed class actions have been filed.⁸⁸ Because courts are often hesitant to certify classes in mass tort actions where monetary damages are the primary relief sought, the proposed classes face several procedural challenges even before reaching the merits.⁸⁹

For a class to be certified for monetary relief, the class must satisfy the requirements of Rules 23(a) and 23(b)(3).⁹⁰ The Flint claimants seeking class certification may satisfy the requirements of 23(a), but 23(b)(3), which requires predominance and superiority, will present significant difficulties. Under Rule 23(a), a class must satisfy four requirements: numerosity, commonality, typicality, and adequacy of representation. To satisfy the numerosity requirement, a class must be so numerous that joinder of all members is impracticable.⁹¹ As joinder is considered impracticable and numerosity satisfied where a putative class numbers at least 40, numerosity will be met by Flint claimants, particularly considering the 100,000 residents similarly affected by the contaminated water supply.⁹² Commonality is satisfied if there are questions of law or fact common to the class.⁹³ Because the Flint claimants can point to a common action or policy leading to their injuries—the decision of the EFM to switch the water supply as a cost saving measure—this requirement will likely be satisfied as well. Typicality is satisfied where the representative parties will fairly and adequately represent the interests of the class.⁹⁴ Since a claim is typical if it arises from the same event or practice or course of conduct, the Flint

of Subject Matter Jurisdiction, *Boler v. Earley*, No. 16-10323 (E.D. Mich. Apr. 19, 2016), ECF No. 56); MICH. CT. R. 3.501; *see also* *Mason v. Lockwood, Andrews & Newman, P.C.*, No. 16-2313, 2016 WL 6777325, at *5 (6th Cir. Nov. 16, 2016) (remanding proposed class action of Flint residents and property owners alleging state-law professional negligence to state court where local controversy exception of the Class Action Fairness Act applied).

88. *See* Annie Baxter, *Lawsuits Pile Up Over Flint Water Crisis*, MARKETPLACE (Jan. 20, 2016, 6:00 AM), <http://www.marketplace.org/2016/01/20/world/lawsuits-pile-over-flint-water-crisis> [https://perma.cc/9YQT-693J] (describing lawsuits filed against state and local public officials and public entities in Michigan).

89. *See* FED. R. CIV. P. 23(b) advisory committee's note to 1966 amendment (providing that a "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions . . . of damages . . . of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate into multiple lawsuits separately tried.").

90. FED. R. CIV. P. 23(a), (b).

91. FED. R. CIV. P. 23(a)(1).

92. *See* *Oplechenski v. Parfums Givenchi*, 254 F.R.D. 489 (N.D. Ill. 2008) (finding that joinder is impracticable when class members number at least forty).

93. FED. R. CIV. P. 23(a)(2).

94. FED. R. CIV. P. 23(a)(3).

claimants should succeed on this point as well.⁹⁵

The last prong—adequacy of representation—will present the greatest challenge to Flint claimants. The inquiry into adequacy of representation determines whether the representative parties will adequately protect the interests of the class.⁹⁶ There are two elements to representational adequacy: first, the representative parties must have no significant interests which are antagonistic to other members of the class; and second, the attorney must be capable of prosecuting the instant claim with some degree of expertise.⁹⁷ In a case where a subset of plaintiffs have been exposed to a toxic substance, but have not yet manifested injury, courts have found that there is an intra-class conflict requiring sub-classes and separate attorneys.⁹⁸ Even though current complaints in proposed Flint class actions have defined their classes narrowly—such as children exposed to lead contaminated water below a certain age—the proposed classes will have difficulty fulfilling this requirement.

In addition to satisfying the requirements of 23(a), the putative class members in an action for damages must also satisfy the 23(b)(3) requirements of predominance and superiority to achieve class certification. Under Rule 23(b)(3), an action may be maintained as a class action if “[t]he court finds that the questions of law or fact common to the members of the class predominate over any questions involving individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”⁹⁹ Here, the core dispute is the decision to switch the source of Flint’s water; however, individual issues will likely predominate over common questions, making certification unlikely. In particular, individuals’ medical histories, the amount of water each individual consumed, and the duration of consumption, among other individualized determinations, will swamp common issues.

On the other hand, as this is not a multi-jurisdictional dispute involving varying state laws, and courts retain broad powers of equity to ensure that those harmed may recover, the predominance inquiry will likely rise or fall with the particular judge hearing the matter. With regard to superiority, plaintiffs with demonstrated injuries from lead poisoning will be able to find attorneys willing to represent them on individual matters, undermining the need for class treatment. At the same time, given the number of individuals claiming adverse health effects from the conduct of the same defendants, a judge may find that it is in the interest

95. *Oplechenski*, 254 F.R.D. at 489.

96. FED. R. CIV. P. 23(a)(3).

97. *Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975).

98. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 815 (1999) (finding that a class divided between holders of present and future claims requires division into homogenous subclasses under 23(c)(5), with separate representation to eliminate conflicting interest of class counsel).

99. FED. R. CIV. P. 23(b)(3).

of fairness and efficiency to allow certification. Again, as this is a fact-intensive inquiry that may be swayed by the court's inherent equitable authority, the putative classes' success will likely hinge on the particular judges hearing the cases.

Litigation arising from lead contamination in Washington, D.C. demonstrates the difficulty of achieving class certification in the mass tort context. In *Parkhurst v. D.C. Water and Sewer Authority*, for example, the parents of seven children brought suit against the D.C. Water and Sewer Authority (D.C. Water) for supplying tap water with elevated levels of lead to D.C. homes from 2000 to 2004.¹⁰⁰ The plaintiffs alleged that numerous children six years and younger consumed tap water that passed through lines containing lead, that blood tests found blood lead levels of 10 micrograms per deciliter or higher ($\mu\text{g}/\text{dL}$), that the exposure to lead caused or would cause cognitive problems, and that D.C. Water did not adequately warn the public about the lead contamination and attendant health risks.¹⁰¹ Accordingly, the proposed class seeking certification was defined as children who, from 2000 to 2004, were six years or younger, residents of D.C. and consumed water supplied by D.C. Water that was delivered through a lead service line, and had blood lead levels of 10 $\mu\text{g}/\text{dL}$.¹⁰²

Despite the narrow class definition in *Parkhurst*, the court denied the plaintiffs' motion for class certification because the plaintiffs failed to satisfy their burden of proving identifiability, numerosity, typicality, adequacy of representation, predominance, and superiority.¹⁰³ With regard to identifiability, the court found that the class definition was overly broad and amorphous because records kept by the D.C. Department of Health and D.C. Water would not provide a readily ascertainable means of determining the current locations of children who had elevated blood lead levels from 2000 to 2004 or the location of specific homes served by lead lines.¹⁰⁴ To demonstrate numerosity, the plaintiffs relied on a study by Professor Edwards—the same professor who conducted research of lead contamination in Flint—for the proposition that “at least 1,000 children under seven developed elevated blood-lead levels during the Class Period.”¹⁰⁵ As the study did not provide a basis for determining a reasonably specific estimate of the class size, the court struck down the plaintiffs' use of this study as insufficient to establish numerosity.¹⁰⁶ In an overlapping analysis of commonality, typicality, and adequacy of representation, the court determined

100. *Parkhurst et al. v. D.C. Water & Sewer Auth.*, 2013 WL 1438094, at *1 (D.C. Super. Apr. 8, 2013).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

that the individualized proof necessary to determine class members' individual injuries and the latency of lead poisoning, as many putative class members had not yet exhibited injuries, made certification inappropriate.¹⁰⁷

Indeed, the court noted the difficulty of seeking certification in a class action for damages in a mass tort case. In its analysis of the plaintiffs' failure to satisfy the predominance requirement, the court noted, "[D]ifferent class members were exposed to different statements [from D.C. Water], different amounts of lead, for different amounts of time, in different ways, and over different periods; some . . . suffer no physical injury, while others suffer from significant cognitive or behavioral problems . . ." ¹⁰⁸ As a result, the individual issues concerning causation and damages negated any common issues of law or fact.¹⁰⁹ With regard to superiority of class treatment, the court found that the plaintiffs' ability to pursue individual causes of action from manifested injury; the presence of other litigation based on substantially similar claims; and the manageability issues resulting from individualized determinations of liability, causation, and damages precluded certification.¹¹⁰

Just as the D.C. plaintiffs faced substantial challenges in seeking class certification in their action against D.C. Water, Flint claimants will similarly have difficulty achieving class certification in actions against Flint authorities. Although the time elapsed between the water contamination and the date of filing suit weighed heavily in the *Parkhurst* court's determination that plaintiffs failed to satisfy their burden of proving the elements of Fed. R. Civ. P. 23(a) and 23(b)(3), the fact that Flint residents have filed suit almost immediately is unlikely to merit certification. As putative class members must satisfy all six requirements of 23(a) and (b)(3) in damages class actions, the need for complex individualized determinations of liability, causation, and damages due will likely preclude federal district courts in Michigan from granting certification. Moreover, the ever-growing number of individual suits, as well as individuals' ability to bring suit due to manifested injuries from lead poisoning, may lead courts to conclude that class treatment is not warranted.

107. *Id.* (quoting *Amchem Prods. v. Windsor*, 521 U.S. 591, 626 (1997) ("Class representatives who are 'currently injured' and want 'generous immediate payouts' may not be adequate representatives of 'exposure-only plaintiffs' who have an interest 'in ensuring an ample, inflation-protected fund for the future.'")).

108. *Id.* (citing *Amchem Prods.*, 521 U.S. at 625).

109. *Id.* (citing *Page v. Phila. Housing Auth.*, 2003 U.S. Dist. LEXIS 15563, at *9-12 (E.D. Pa. Aug. 18, 2003) (denying a motion for class certification of a class of children exposed to lead paint in subsidized housing because the individual issues of exposure and medical needs precluded certification)).

110. *Id.*

2. Obstacles to success on the merits

In both individual and class action suits, the largest challenge that litigants face is the doctrine of sovereign immunity. The doctrine of sovereign immunity, rooted in the maxim “the king can do no wrong,” shields federal and state government officials acting in their official capacities from tort liability.¹¹¹ Although the Safe Drinking Water Act includes a provision for citizen suits, providing a loophole around the doctrine of sovereign immunity, the provision only allows citizens to seek injunctive relief against governmental entities, not damages.¹¹² Moreover, while the city itself is not immune from suit, the current state of the city’s finances makes monetary recovery infeasible.¹¹³ Accordingly, the doctrine of sovereign immunity will continue to preclude Flint tort claimants from receiving compensatory and punitive monetary awards from state or local officials.

Further, even if Flint claimants could break through the somewhat impenetrable shield of sovereign immunity, they will have great difficulty proving specific causation.¹¹⁴ To establish standing in a toxic tort matter, plaintiffs must demonstrate that lead exposure caused individuals’ injuries by a preponderance of the evidence.¹¹⁵ It is particularly difficult to establish specific causation in the context of lead exposure, as the behavioral and cognitive impairments caused by lead may be attributed to many other causes. As a result, even though plaintiffs may circumvent sovereign immunity by alleging that public officials were grossly negligent—another exception to governmental insulation from liability—“traditional tort suits targeting the state of Michigan are very unlikely to get off the ground” because of the obstacles to proving specific causation.¹¹⁶ Specifically, “[i]n lead contamination cases, the question always arises: Is this kid’s failure to thrive really due to lead exposure—or might it be the consequence of . . . unlucky genes, a chaotic home environment, or poor prenatal care?”¹¹⁷ Although general causation may be established because there is no doubt that lead is capable of causing the type of injuries alleged by Flint claimants,¹¹⁸ the impediments to proving specific causation will likely prevent

111. See FREDERICK W. PONTIUS, DRINKING WATER REGULATION AND HEALTH 549-50 (2003); Engstrom, *supra* note 84.

112. See 42 U.S.C. § 300h-2(b) (West 1986) (allowing a court to issue an injunction and a civil penalty no greater than \$25,000 “as protection of public health may require”).

113. Engstrom, *supra* note 84; see also Concerned Pastors for Social Action v. Khouri, 217 F. Supp. 2d 960, 979 (E.D. Mich. 2016) (granting Flint residents’ motion for preliminary injunction to provide Flint households with safe drinking water arising from State’s alleged violation of the Safe Drinking Water Act).

114. Engstrom, *supra* note 84.

115. *Id.*

116. *Id.*

117. *Id.*

118. Book Note, Causation in Environmental Law, 128 HARV. L. REV. 2256, 2261 (2015)

victims from achieving relief through litigation.

3. Compensation through the Fourteenth Amendment

The saving grace for litigants may be the constitutional claim that state and local officials' malfeasance deprived Flint residents of their rights to bodily integrity without due process of law in violation of the federal and state constitutions.¹¹⁹ A "crack in the sovereign immunity shield,"¹²⁰ federal suits may be brought for constitutional violations, such as the alleged violations of citizens' rights to substantive due process under the Fourteenth Amendment. Relying upon a novel legal theory rooted in the Fourteenth Amendment, multiple class actions have alleged that the federal and state constitutions impliedly prohibit violations of bodily integrity from contaminated water.¹²¹

The right to be free from unwanted interference of one's person is well-established in American jurisprudence.¹²² However, Flint claimants have creatively departed from the traditional doctrine to liken the consumption of contaminated water to a compelled surgical intrusion into one's body, which the Supreme Court has held to be unconstitutional on several occasions.¹²³ Although this is arguably directly comparable, as forcing individuals to drink contaminated tap water parallels forced physical intrusions, it is nonetheless a novel theory. As a result, this theory poses another impediment to Flint claimants' ability to recover in the courtroom because the novelty of a claim is a factor that weighs against class certification.¹²⁴ Overall, even though the constitutional argument is an end-run around sovereign immunity, it presents alternative obstacles to compensatory relief through litigation, particularly in the class action context.

(quoting *Heller v. Shaw Indus.*, No. 95-7657, 1997 WL 535163, at *6 (E.D. Pa. Aug. 18, 1997) ("[G]eneral causation addresses whether [products] of the same nature as [the] defendant's product are capable of causing the type of injuries alleged").

119. U.S. Const. amend. XIV, § 1 (West); MICH. COMP. LAWS ANN. CONST. ART. I, § 17 (West).

120. Engstrom, *supra* note 84.

121. *See, e.g.*, *Mays v. Snyder*, No. 16-000017-MM (Mich. Ct. Cl. Nov. Oct. 26, 2016) (permitting proposed class of Flint residents to sue state officials for alleged violations of state constitutional rights to bodily integrity and freedom from unconstitutional taking of property).

122. *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261, 288 (1990).

123. *See, e.g.*, *Rochin v. California*, 342 U.S. 165, 172 (1952) (finding that forcing a suspect to vomit to extract narcotics tablets shocked the conscience in violation of the Fourteenth Amendment).

124. *See Castano v. The American Tobacco*, 84 F.3d 734 (5th Cir. 1996) (decertifying a class action because the novelty of the tort claim rendered the tort premature, precluding a finding of superiority as required by Fed. R. Civ. P. 23(b)(3)).

B. *Victims' Compensation Funds*

1. Federal compensation fund

As Flint claimants face significant challenges to recovering through litigation, a VCF that operates outside of the tort system is more likely to provide Flint residents with the damages they seek, although not without its own difficulties. Aside from sending financial aid to Genesee County, Congress could enact a no-fault compensation plan that would settle all claims brought by aggrieved Flint residents and compensate them for death, physical injury, and property damages.¹²⁵ This method of compensation was most notably utilized to compensate family members of victims killed in the September 11 terrorist attacks. At a cost of approximately \$7 billion to taxpayers, surviving family members received as much as \$7.1 million.¹²⁶ Personal injury victims received even larger payouts, reaching \$8.6 million.¹²⁷

Though a federal VCF could provide Flint residents with a viable alternative to tort litigation, federal legislation creating a VCF for Flint modeled after the 9/11 Fund is unlikely to be enacted. In the aftermath of the September 11 terrorist attacks, Congress moved quickly to pass legislation establishing the fund in part because of looming financial concerns that affected the national economy. On September 14, 2001, the House and the Senate passed the Air Transportation Safety and System Stabilization Act of 2001 ("the Act")¹²⁸ as a solution to the impending liquidation of the airline industry after the Federal Aviation Agency grounded all airplanes and closed all airspace above the United States in response to the September 11 attacks.¹²⁹ Out of concern that large-scale litigation would further cripple the nation's airline industry, Congress added a VCF to the Act to limit victims' rights to sue the airlines for negligence.¹³⁰ Not only did the fund

125. Bliss, *supra* note 82.

126. John Culhane, *What Does Justice Require for the Victims of Katrina and September 11?*, 10.2 DEPAUL J. OF HEALTH CARE L. 177, 178 (2007) (citing the September 11th Victim Compensation Fund of 2001, which is codified in Title IV of the Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 401-08, 115 Stat. 230, 237-41 (West 2001)).

127. Kenneth R. Feinberg et al., FINAL REPORT OF THE SPECIAL MASTER OF THE SEPTEMBER 11 VICTIM COMPENSATION FUND OF 2001, 109 (2001). For another example of a federally funded compensation scheme, see U.S. GOV'T ACCOUNTABILITY OFF., GAO-00-165R, LOGAN SINKING HOMES 1-2 (2000) (describing Philadelphia's use of HUD's Community Development Block Grants and Special Purpose Grants to fund the city's acquisition of Logan Triangle and the relocation of residents after residences built on ash and cinder landfill began to sink).

128. 49 U.S.C. § 401 (2001).

129. Erin G. Holt, *The September 11 Victim Compensation Fund: Legislative Justice Sui Generis*, 59 N.Y.U. ANN. SURV. AM. L. 513, 513 (2004) (citing 147 CONG. REC. H5684-85 (2001)).

130. *Id.*; see also KENNETH R. FEINBERG, WHO GETS WHAT?: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL 41-42 (2012) (describing Congress's efforts to limit the

seek to compensate victims, but it also provided up to \$15 billion in cash and loan guarantees to compensate airlines for costs incurred from September 11.¹³¹ Further incentivizing Congress to establish the fund, the Act deducted collateral compensation outside of charitable donations from victims' awards.¹³² As a result, Congress saved 30% of calculated losses, amounting to \$10 billion of recovery.¹³³

Because the fund operated outside of the tort system, requiring claimants to waive their right to private litigation, it was successful in deterring costly litigation against the airlines. Specifically, 97% of the 2880 potential tort claimants who could have brought suit for the death of a victim and 2860 injured survivors opted to apply to the fund rather than file suit.¹³⁴ As the Act established an exclusive cause of action for claims "arising out of the hijacking and subsequent crashes" of September 11, the Act limited recovery against the airline industry to the maximum level of coverage held by the airlines prior to the attacks: \$6 billion.¹³⁵

The fact that the 9/11 Fund operated outside of, rather than concurrently with, the tort system benefited both the government and recipients. The fund provided numerous advantages to claimants to tort litigation. For example, claimants' awards were often greater than they would have been through tort litigation, lawyers' costs and fees to assist claimants to apply to the fund were marginal compared to the potential costs and contingent fees associated with tort litigation, and survivors and decedents' families were guaranteed recovery from the fund.¹³⁶ Further, whereas applicants received funds quickly, as all compensation had been paid out by 2004, many of the tort suits did not settle until 2007.¹³⁷ By providing applicants with speedy recovery, closure, and the ability to avoid the emotional stress of tort litigation, the 9/11 Fund successfully achieved its objectives of providing direct compensation to victims while protecting the national economy.

In stark contrast to the federal government's efforts to create a fund in response to the terrorist attacks of 9/11, however, Congress failed to enact a

financial liabilities of the airlines in tort litigation and provide adequate funding for the families of victims); Richard Lempert, *Low Probability/High Consequence Events: Dilemmas of Damage Compensation* 29 (Univ. Mich. Law Sch., John M. Olin Ctr. for Law & Econ., Working Paper No. 09-005, 2009), <http://ssrn.com/abstract=1371784> [<https://perma.cc/X5M8-VDDW>].

131. Lempert, *supra* note 130, at 28.

132. *Id.* at 29.

133. *Id.* at 30.

134. *Id.* at 29-30 (citation omitted).

135. Holt, *supra* note 129, at 514 (citing 49 U.S.C. § 408(a)); *see also* Feinberg, *supra* note 127, at 42 (noting that Title IV of the Act provided victims with the option of either filing suit in federal court in New York or waiving their rights to sue and opting onto a publicly funded compensation program where they would not need to prove defendants' liability).

136. Lempert, *supra* note 130, at 30-31.

137. *Id.* at 31 (citation omitted).

similar fund for the victims of Hurricane Katrina three years after the September 11 attacks. The distinction lies in part in the localized nature of Hurricane Katrina in comparison to the September 11 terrorist attacks, which Congress viewed as an attack on the nation as a whole. The discrepancy also lies in the party responsible; whereas government actors' wrongful conduct was responsible for infrastructural and emergency response shortfalls of Hurricane Katrina, "social risk" was to blame for the devastation of 9/11.¹³⁸ As societal forces, such as terrorism or contagious disease, are borne and shared by an entire society, distributive justice constrains available compensation for individuals because the needs and resources of the entire population must be considered.¹³⁹ Conversely, where wrongful conduct causes individuals harm, such aggrieved persons may be compensated from the entirety of the resources of the culpable party.¹⁴⁰ In the context of Hurricane Katrina, government officials were to blame for their failure to construct and maintain a levee system, plan for evacuation, and effectively communicate and engage in timely response efforts when evacuation became necessary in New Orleans.¹⁴¹ As Hurricane Katrina theoretically impacted a small subset of the population due to the wrongful conduct of a group of government officials, Congress was not called to action as it was in the case of 9/11, where the entire country was affected by a force that could not be attributed to domestic, private actors.

Just as private actors (albeit acting in an official capacity) were allegedly to blame for the harm suffered by New Orleans residents in the aftermath of Hurricane Katrina, Michigan and Flint officials committed "wrongful conduct" at the expense of the Flint community. Accordingly, there is a looming concern that just as with Hurricane Katrina, the Flint water crisis will not spur Congress into action to provide a no-fault compensation plan for Flint residents. Indeed, Stanford Law Professor and torts specialist Robert L. Rabin has referenced Congress' failure to establish a no-fault compensation plan for victims of Hurricane Katrina as evidence that establishing a compensation fund "is just really difficult as a policy matter."¹⁴² Confirming Professor Rabin's concerns, Kenneth Feinberg, the preeminent authority on compensation funds for mass tort victims and the administrator of the 9/11 Fund, is skeptical that such a fund will be able to provide victims of the Flint water crisis with similar relief.¹⁴³

138. Culhane, *supra* note 126, at 179; *see also* Linda S. Mullenix, *Designing Compensatory Funds: In Search of First Principles*, 3 STAN J. COMPLEX LITIG. 1, 19-20 (Winter 2015) ("Similar to natural disaster catastrophes, when a wrongdoer is unavailable to provide remediation, communitarian values may then prompt provision of aid to the distressed.").

139. Culhane, *supra* note 126, at 178.

140. *Id.*

141. *Id.*

142. Bliss, *supra* note 82.

143. David Bailey, *Despite Spotlight, Proving Flint Lead Damages No Slam Dunk*, REUTERS (Apr. 18, 2016, 2:52 PM), <http://www.reuters.com/article/us-michigan-water-lawsuits->

Highlighting the hurdles to proving a causal link between physical injuries and lead contamination, Feinberg asked: “How long do you monitor them?” and “If they are deemed injured, are they injured by the water or by other means, other sources?”¹⁴⁴

Validating academics’ apprehension about Congress establishing a federal VCF, lobbyists’ efforts to push Congress to create a fund to compensate victims have fallen short. Though the Water Resources Development Act did pass both houses in the final days of the 114th Congress, the bill will not provide direct compensation for Flint residents who were harmed by drinking contaminated water.¹⁴⁵ Instead, the bill authorizes \$100 million in grants to states such as Michigan that are enduring drinking water emergencies and \$70 million to subsidize state loans for water infrastructure development.¹⁴⁶ Though Congress’s initiative was a long-awaited start to help Flint recover from eighteen months of unusable city water at the time of its enactment, the federal government has not offered victims in Flint the direct, tax-free compensation that victims of the September 11 terrorist attacks received.¹⁴⁷

Though academics agree that a federal VCF would be the ideal mechanism to secure sufficient relief for victims of the Flint water crisis in lieu of tort recovery, establishing a federal VCF is not without its challenges, particularly political gridlock without national financial concerns motivating swift action.¹⁴⁸ A federal VCF would surmount the obstacles to recovery for personal injuries and prevent the city and the State from expending its limited resources to defend against citizen suits.¹⁴⁹ Moreover, a VCF is particularly appropriate in this case because it could account for the latency of injuries from lead contamination, providing both immediate relief and future relief to exposure-only claimants.¹⁵⁰

idUSKCN0XF0CS [https://perma.cc/R2RW-NJR4].

144. *Id.*

145. Water Resources Development Act, S. 2848, 114th Cong. (2016); Emmarie Huettelman, *Congress Approves Spending Bill, Averting Government Shutdown*, N.Y. TIMES (Sept. 28, 2016), <http://www.nytimes.com/2016/09/29/us/politics/congress-shutdown-flint-spending.html> [https://perma.cc/DEX4-VHYA].

146. Coral Davenport, *Senate Approves Funding for Flint Water Crisis*, N.Y. TIMES (Sept. 15, 2016), <http://www.nytimes.com/2016/09/16/us/politics/flint-michigan-water-senate-aid.html> [https://perma.cc/KH92-9H7R]. See also Catherine Ho, *Hope Fades for Compensation for Flint Residents—For Now*, WASH. POST (Sept. 27, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/09/27/hope-fades-for-compensation-for-flint-residents-for-now/> [https://perma.cc/K38R-UNGY].

147. Maya Rockey Moore, *Obama Should Propose a 9/11-Style Fund for Flint*, TIME (May 4, 2016), <http://time.com/4317690/obama-flint-visit/> [https://perma.cc/D3ET-DBSB].

148. See Feinberg, *supra* note 127, at 60 (stating that the 9/11 Fund should not serve as precedent, as “Congress certainly has expressed no interest in replicating the fund to deal with other natural or man-made disasters”).

149. Interview by Ryan Grimes with Noah Hall, Professor, Wayne St. Univ. L. Sch., in Ann Arbor, Mich. (Mar. 11, 2016).

150. See generally Paul Heaton, Ivan Waggoner & Jamie Morikawa, *Victim Compensation*

However, in light of the unique circumstances necessary for Congress to enact a fund modeled after the 9/11 Fund, Congress is unlikely to enact a federal VCF to provide direct compensation to Flint residents.

2. State and private compensation funds

Because a Congressionally-created VCF may not be a feasible source of direct funds for potential Flint claimants considering the localized nature of the tragedy, a dual public-private compensation scheme is a practicable alternative.¹⁵¹ As Professor Noah Hall of Wayne State University School of Law affirmed, “[I]nstead of the state investing its money in lawyers to fight the citizens . . . the state would be better off putting its money into a compensation fund . . . and moving forward with solutions and compensation.”¹⁵² Accordingly, in lieu of a federally-supported fund analogous to the 9/11 Fund, a fund—or, funds—generated by state taxes and donations from private parties may provide Flint residents with compensatory relief without the delays inherent in federal government.¹⁵³

While academics have focused on providing Flint residents with a federal compensation fund, a private fund that operates outside of the tort system in addition to a supplemental state fund may be a superior solution. Such a state fund could provide relief to those who have not, and may not, suffer personal injuries. Rather, a state fund could ensure that those who suffered purely economic loss from property damage due to corroded lead service lines would also be compensated. Specifically, Governor Snyder and Flint Mayor Karen Weaver may learn from Boston and Massachusetts’ response to the Boston Marathon bombings and New Jersey’s enactment of the New Jersey Spill Fund to provide direct compensation for Flint residents. In other words, a centralized

Funds and Tort Litigation Following Incidents of Mass Violence, 63 BUFFALO L. REV. 1263 (2015) (discussing the implementation of VCFs as an alternative to tort litigation, particularly where claimants suffer latent injuries).

151. Note that while the Eastern District of Michigan has approved an \$97 million settlement requiring the State of Michigan and the City of Flint to replace the lead pipes and galvanized steel service lines in Flint within three years, Flint residents have still not received any direct compensation. Settlement Agreement at 6, *Concerned Pastors for Social Action v. Khouri*, No. 2:16-cv-10277-DML-SDD (E.D. Mich. Mar. 27, 2017) (No. 147-1).

152. Interview with Noah Hall, *supra* note 149.

153. See John Culhane, *Battery and Deprivation of Liberty*, SLATE (Jan. 21, 2016, 12:37 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/01/flint_deserves_a_compensation_fund_for_its_drinking_water.html [<https://perma.cc/KAN2-24U2>] (advocating for the creation of a state compensation fund to provide recovery in proportion to delineated categories of harm); cf. Kenneth R. Feinberg, *Unconventional Responses to Unique Catastrophes*, 45 AKRON L. REV. 575, 576 n.7 (2012) (acknowledging that purely private compensation schemes, such as the private claims program established by private insurers to compensate insureds harmed by Hurricane Katrina, deprive recipients of administrative hearings critical to funds’ credibility).

VCF funded by private parties and a concurrent state VCF funded by state taxes will likely provide the greatest compensation to the greatest number of Flint residents as quickly as possible, so long as claimants are required to forgo private tort litigation analogous to the 9/11 Fund.

3. Lessons from The One Fund and Massachusetts's State Fund

The efforts of the City of Boston and the State of Massachusetts to compensate those affected by the Boston Marathon bombings provide a template for a dual state and private compensation scheme in Flint. In the aftermath of the bombings, former Boston Mayor Thomas M. Menino and former Massachusetts Governor Deval Patrick created The One Fund, a charitable organization, to benefit the 264 survivors of the bombings and the families of the three individuals killed.¹⁵⁴

The One Fund Boston model was an innovative alternative to traditional charitable models to compensate disaster victims. Under this model, government involvement in a charitable organization provides an opportunity for the public and private sectors to collaborate to provide victims of disasters with direct, speedy relief.¹⁵⁵ At the time of the Boston Marathon bombing, cities responded to mass violence by trusting an existing local foundation to collect private donations and administer funds to survivors and deceased victims' families.¹⁵⁶ Though a preexisting organization would have the benefits of a paid staff and 501(c)(3) status, city leaders recognized that channeling funds through existing foundations would not direct funds to survivors and families of victims as quickly as possible.¹⁵⁷ Accordingly, less than one day after the Boston Marathon bombings, city officials filed papers to incorporate One Fund Boston, Inc.;

154. Susan L. Abbott & Lisa A.H. McChesney, *Disaster Relief: The One Fund Boston Model*, 58 BOS. B.J. 22, 22 (2014) (hereinafter "Disaster Relief").

155. Susan L. Abbott & Lisa A.H. McChesney, *Creating A Disaster Relief Charity: The One Fund Boston Model*, 25 TAX'N EXEMPTS 29, 33 (May-June 2014) (hereinafter "Creating A Disaster Relief Charity").

156. Mitchell Weiss, *Lessons from Boston's Experiment with The One Fund*, HARV. BUS. REV. 1 (Jan. 22, 2016), <https://hbr.org/2016/01/lessons-from-bostons-experiment-with-the-one-fund> [<https://perma.cc/6FXG-HQ5F>].

157. *Id.* (citing Dana Liebelson, *Charts: Where Did the Money Donated to Columbine, Aurora, and Virginia Tech Mass-Shooting Victims Go?*, MOTHER JONES (Apr. 8, 2013, 5:00 AM), <http://www.motherjones.com/politics/2013/04/where-does-money-donated-victims-mass-shootings-go> [<https://perma.cc/XWR4-P3UN>]) (noting that victims of the 1999 Columbine shooting did not receive funds for years, and the funds they did received amounted to only 58% of the funds collected)); *see also* Joshua Corie Yesnowitz, *The One Fund Boston: Lessons for Leaders*, BOS. UNIV. 1 (Aug. 2014), https://open.bu.edu/bitstream/handle/2144/8943/City%20Insights-One%20Fund%20Boston_Lessons%20for%20Leaders.pdf?sequence=5 [<https://perma.cc/49TL-GQX3>] (discussing the consequences of compensation funds).

opened bank accounts; and established a single vehicle to receive funds, connected to PayPal.¹⁵⁸ By executive order of Mayor Menino, the city entrusted The One Fund Boston, Inc. to provide a single vehicle to collect community contributions to compensate victims of the Boston Marathon bombing and victims of attacks that may occur in the future.¹⁵⁹ After Mayor Menino appointed two-thirds of The One Fund's board of directors, The One Fund contacted local business for funds and recruited Kenneth Feinberg as administrator.¹⁶⁰ As a result of the city's unique compensation scheme, The One Fund collected nearly \$61 million in donations by June 26, 2013, just seventy-five days after the fund's creation.¹⁶¹

To expedite the release of funds to victims and their families, attorneys for The One Fund sought to apply for 501(c)(3) tax-exempt status with the IRS on an expedited basis.¹⁶² The IRS does not allow an organization to distribute funds to individuals solely because they are victims of a disaster.¹⁶³ Rather, funds must be provided only to recipients who lack adequate funds based on financial needs testing.¹⁶⁴ Accordingly, the Fund's need-blind distribution scheme was inconsistent with IRS policies.¹⁶⁵

To circumvent the barriers to tax-exempt status and avoid engaging in financial means testing for recipients, The One Fund attorneys worked with the IRS to satisfy criteria for 501(c)(3) status as a charitable organization that "lessens the burdens of government."¹⁶⁶ To establish that an organization lessens the burdens of government, the IRS first requires an objective manifestation by the government that it considers the activities the organization performs to be its burden.¹⁶⁷ Then, the IRS will look at the specific circumstances of the case to determine if the organization actually relieves the government of an activity that the government would otherwise be forced to perform.¹⁶⁸ After the IRS considers

158. Weiss, *supra* note 156.

159. Creating A Disaster Relief Charity, *supra* note 155, at 32.

160. Disaster Relief, *supra* note 154; Weiss, *supra* note 156.

161. Disaster Relief, *supra* note 154.

162. *Id.* See also Internal Revenue Serv., Pub. No. 3833, DISASTER RELIEF: PROVIDING ASSISTANCE THROUGH CHARITABLE ORGANIZATIONS 5 (revised 2014) (stating that a disaster relief organization may request expedited review of its Form 1023 by showing that "it is meeting an immediate need of disaster relief or emergency hardship victims and that its ability to prove immediate assistance to such victims will be adversely impacted in a material way" without expedited review).

163. Disaster Relief, *supra* note 154.

164. *Id.*; see also Pub. No. 3833, *supra* note 162, at 11 (providing that after the immediate aftermath of a disaster, a charity must provide funds to an indefinite list of beneficiaries based on an objective evaluation of the victims' needs).

165. Disaster Relief, *supra* note 154.

166. Creating A Disaster Relief Charity, *supra* note 155, at 31 (citing Treas. Reg. § 1.501(c)(3)–19(d)(2) (2014)).

167. *Id.*

168. *Id.*

the circumstances and determines that the organization's activities actually lessen the burdens of government, it determines whether the organization serves private interests; if so, it must consider whether the public interests served by the organization outweigh benefits to private parties.¹⁶⁹

This was the first time this innovative technique has been employed in the disaster relief context.¹⁷⁰ Notwithstanding, the IRS determined that The One Fund lessened the burdens of government in several ways, including by providing the structure to coordinate the collection, administration, and distribution of funds collected after the bombing.¹⁷¹ Therefore, as a result of state and municipal officials' efforts, the IRS granted The One Fund 501(c)(3) status, leading The One Fund to disburse 100% of the \$61 million collected and allowing recipients to avoid paying taxes on the millions of dollars of relief they received in accordance with a protocol developed by Feinberg.¹⁷² As The One Fund distributions were considered a gift, victims did not need to waive their rights to sue for injuries to be compensated, in stark contrast to the 9/11 Fund.¹⁷³

Those who qualified for The One Fund were limited to families of those killed, individuals who lost multiple limbs, those with permanent brain damage, single amputees, those who spent at least one night in the hospital, and those who received outpatient care on the day of the marathon.¹⁷⁴ Though Mayor Menino and Governor Patrick aimed to create a single vehicle to collect and distribute funds to survivors and victims' families, Massachusetts Attorney General Martha Coakley and the Massachusetts Office for Victim Assistance ("MOVA") sought to provide additional compensation for those affected by the bombings.¹⁷⁵ Accordingly, Attorney General Coakley and MOVA also administered a longstanding state fund to provide eligible victims and their families with

169. *Id.*

170. Disaster Relief, *supra* note 154.

171. Creating A Disaster Relief Charity, *supra* note 155, at 33.

172. Disaster Relief, *supra* note 154; Treas. Reg. § 139 (exempting qualified disaster relief payments from federal income tax payments); see also Mark Arsenault & Todd Wallack, *One Fund Payments Will Include Those Treated as Outpatients*, BOS. GLOBE (May 15, 2013), <http://www.bostonglobe.com/2013/05/15/one-fund-payments-will-include-those-treated-hospital-outpatients/y0rsHCwTEgx5sJZLARwil/story.html> [<https://perma.cc/W4TC-EJUJ>] (discussing the payment distribution scheme from The One Fund). *But see* Weiss, *supra* note 156 (stating that to overcome contrary IRS policies, Mayor Menino engaged in "hacking the bureaucracy" by signing an executive order stating that the fund was performing an "essential government function").

173. Lenny Bernstein, *Boston Marathon Fund Releases Compensation Formula for Bombing Victims*, WASH. POST (May 15, 2013) https://www.washingtonpost.com/national/health-science/boston-marathon-fund-releases-compensation-formula-for-bombing-victims/2013/05/15/187cb4c0-bcd7-11e2-9b09-1638acc3942e_story.html?utm_term=.df84638a5955 [<https://perma.cc/QA7J-9FQV>].

174. Arsenault & Wallack, *supra* note 172.

175. Press Release, Attorney General Maura Healey, Resources Available to Victims of the Boston Marathon Attack (Apr. 22, 2013), <http://www.mass.gov/ago/news-and-updates/press-releases/2013/2013-04-22-victim-resources.html> [<https://perma.cc/UHT3-MJU5>].

uninsured medical and dental care, mental health counseling, funeral and burial costs, and loss of income.¹⁷⁶ The objective of the state fund was to provide aid to those who were not sufficiently injured to qualify for The One Fund, but were still affected by the bombing, either emotionally or physically.¹⁷⁷ In contrast to The One Fund and the 9/11 Fund, Massachusetts's fund was not created for the victims of a specific disaster. Rather, the Massachusetts fund was established in 1967 to benefit victims of all violent crimes.¹⁷⁸ Funded by financial penalties paid to the State as a result of criminal convictions and federal grants, the fund has provided victims and their families with up to \$25,000.¹⁷⁹

As The One Fund and the Massachusetts state fund operate outside of the tort system, recipients need not relinquish their tort claims, unlike the 9/11 Fund or settlements in the class-action context, which typically seek global resolution of future claims.¹⁸⁰ Under Boston and Massachusetts's scheme, therefore, the tort system "remains the apex source of compensation for victims of personal injury."¹⁸¹ As victims view the tort system as both an outlet to hold wrongdoers accountable as well as a means to compensation, research conducted by the Rand Institute reveals that VCFs do not wholly deter victims from bringing suit if they have not released their claims as recipients of VCF funds.¹⁸²

Accordingly, a compensation fund for victims of the Flint water crisis would be most effective if recipients were required to release individual and class claims, analogous to the 9/11 Fund. If fund recipients were not barred from bringing tort suits, it would undercut the benefits of providing a fund altogether. Specifically, the City of Flint and the State of Michigan would be forced to expend their resources to defend lawsuits, and victims would confront the numerous barriers to recovery for injuries on a personal and class-wide basis, just as if a fund did not exist. In fact, if a fund allowed for personal suits, those suits

176. *Id.*

177. Martine Powers, *State Fund Could Aid Marathon Bombing Victims*, BOS. GLOBE (May 20, 2013), <https://www.bostonglobe.com/metro/2013/05/20/state-victim-fund-may-also-provide-relief-boston-marathon-victims/5Ywk4mKqJH9IV7HtjgPArK/story.html> [<https://perma.cc/V4U2-DT42>].

178. *Id.*

179. *Id.*; see also Press Release, U.S. Dep't of Justice, Attorney General Announces \$8.3 Million to Support Victims of Boston Marathon Bombings (Jan. 13, 2014), <https://www.justice.gov/opa/pr/attorney-general-announces-83-million-support-victims-boston-marathon-bombings> [<https://perma.cc/3YSH-JKFW>] (stating that the Office for Victims of Crime awarded MOVA with the Antiterrorist and Emergency Assistance Program Grant to provide crisis and longer-term recovery to victims).

180. Heaton, Waggoner & Morikawa, *supra* note 150, at 1264.

181. *Id.* at 1266.

182. *Id.* at 1264; see also Lempert, *supra* note 130, at 31 (recognizing that a VCF is unlikely to satisfy victims' emotional needs, unlike the tort system, because it does not uncover the root of the tragedy or hold the responsible party accountable for the consequences of its actions).

may even be less fruitful than if there were no fund in place, for victims' potential recoveries may be limited by the amount they received from the fund even though public defendants would be forced to expend resources available to defend the lawsuits.¹⁸³ In other words, municipal defendants sued in an official capacity would utilize claimants' tax dollars for legal fees and yet claimants' recovery would be reduced by the amount of public funds received.¹⁸⁴

Even if individual claims or class actions are foreclosed by a fund for Flint residents, there are additional hurdles to consider. Unlike the Marathon bombings, the contamination of Flint's water was not the result of criminal activity, but rather, a government misstep. As a result, victims of the water crisis will not qualify for funds collected by the Michigan Victims Compensation Board—the parallel entity to MOVA.¹⁸⁵ The Michigan Attorney General has charged Nick Lyon, the Director of Health and Human Services; Earley, the former Manager of the City of Flint Water Department; and the Drinking Water Chief and Water Supervisor of the Michigan Department of Environmental Quality with involuntary manslaughter of multiple Flint residents due to their negligent omission to inform the public of a foreseeable Legionnaires' Disease outbreak from contaminated water.¹⁸⁶ Lyon has been additionally charged with misconduct in office for intentionally misleading and withholding information about the Legionnaires' Disease outbreak in Flint from the Governor.¹⁸⁷ While prosecutors were skeptical that Flint officials would be charged for negligent omission from an environmental disaster, prosecutors have still not expressed

183. Heaton, Waggoner & Morikawa, *supra* note 150, at 1266.

184. As Flint is a municipal corporation, the problems Flint would face if residents could litigate class actions mirror the effects of securities fraud litigation on commercial businesses. Just as legal fees from securities class actions are borne by investors, tort litigation against Flint would shift city funds generated by taxpayers to attorneys. Tammy E. Hinshaw & Sally J.T. Necheles, 7 MICH. CIV. JUR. Municipal Corporation § 6, Westlaw (database updated February 2017); Andrew J. Pincus, What's Wrong With Securities Class Action Lawsuits?, U.S. CHAMBER INST. FOR LEGAL REFORM 6 (Feb. 5, 2014), http://www.instituteforlegalreform.com/uploads/sites/1/Securities_Class_Actions_Final1.pdf [<https://perma.cc/LCH2-CG4P>]; *see also* Paul Egan, No Grand Jury on Snyder Using Public Money for his Flint Legal Bills, DET. FREE PRESS (Oct. 25, 2016) (noting that the Ingham County Circuit Court denied the request for a grand jury investigation of Governor Snyder paying his criminal defense fees with taxpayer dollars).

185. *See* Crime Victims Compensation Act of 1976, Pub. Act 223, MICH. COMP. LAWS ANN. §§ 18.351-61 (1976).

186. OFFICE OF SPECIAL COUNSEL, INVESTIGATOR REPORT: FLINT WATER INVESTIGATION 2 (June 14, 2017); Press Release, Attorney General Bill Schuette, Schuette Charges MDHHS Director Lyon, Four Others with Involuntary Manslaughter in Flint Water Crisis (June 14, 2017), <http://www.michigan.gov/ag/0,4534,7-164-46849-423854--,00.html> [<https://perma.cc/GNB2-HRLB>].

187. INVESTIGATOR REPORT: FLINT WATER INVESTIGATION, *supra* note 186; Schuette Charges MDHHS Director Lyon, Four Others with Involuntary Manslaughter in Flint Water Crisis, *supra* note 186.

confidence in their ability to successfully convict these officials.¹⁸⁸

Not only is the source of the harm in Flint distinguishable from the attack in Boston, but the number of individuals harmed by the Flint water crisis greatly exceeds those affected by the bombings. While a few hundred individuals have sought funds from The One Fund and the Massachusetts state fund, the entire population of Flint was arguably harmed by lead-contaminated water. Therefore, not only must Michigan state funds derive from different sources than the Massachusetts fund, but there must also be greater funds available to effectively compensate all those in Flint who have been or will become injured by the contaminated water.

To properly contour a cooperative state and private compensation scheme to account for the unique situation in Flint in light of these challenges, several strategies may be utilized. In addition to barring recipients from pursuing tort litigation, the qualifications for the VCF should not flow from severity of injury. Whereas the protocol of The One Fund created four categories of recipients, reserving the greatest amount of compensation for families of those killed, double amputees, and those who suffered permanent brain damage from the bombings,¹⁸⁹ protocol for administering funds to Flint residents must account for the latency of lead poisoning. As the adverse health effects from lead exposure are not immediately apparent, in contrast to physical injuries from a violent attack, qualifications based upon proximity to contaminated water sources or the frequency and duration of consumption are better suited to the Flint water crisis than the severity of manifested injuries. By administering funds in proportion to demonstrated need based upon categories derived from these modified qualifications for recipients, a dual state-based and private compensation scheme could serve as a source of relief for those who could not prove specific causation in a court of law.

4. Lessons from the New Jersey Spill Fund: An Alternative to MOVA

In light of the absence of a comparable state fund in Michigan to MOVA under the circumstances, a hybrid compensation scheme based upon The One Fund and the New Jersey Spill Fund, a state fund generated in response to environmental contamination, may reconcile the needs of those affected by the

188. Matthew Dolan, *Michigan Health Director Lyon Targeted in Flint Water Criminal Probe*, DET. FREE PRESS (Oct. 18, 2016, 10:15 PM), <http://www.freep.com/story/news/local/michigan/flint-water-crisis/2016/10/18/nick-lyon-flint-water-subpoena/92370664/> [https://perma.cc/2MJA-PZY3]; David M. Uhlmann, Opinion, *Can the Flint Prosecutions Succeed?*, N.Y. TIMES (Apr. 22, 2016), <http://www.nytimes.com/2016/04/23/opinion/can-the-flint-prosecutions-succeed.html> [https://perma.cc/EB63-CXZC].

189. Bernstein, *supra* note 172.

Marathon Bombings with the needs of those harmed by the Flint water crisis. With regard to drawing state funds to provide relief for environmental harm, Michigan may look to New Jersey for guidance.¹⁹⁰ In 1976, the New Jersey Legislature adopted the Spill Compensation and Control Act (Spill Act) to provide compensation for property damage and personal injuries resulting from the discharge of petroleum and other hazardous substances from potable well treatment systems.¹⁹¹ By levying taxes on the initial transfer of petroleum and other hazardous substances from corporate facilities, the Fund has provided \$86 million to individuals, businesses, and governmental entities.¹⁹² Specifically, the Fund has been used to pay for clean-up and removal costs incurred by the New Jersey Department of Environmental Protection for contaminated sites and for real property and personal injury damage claims relating to potable well treatment systems, public waterline installations, and remediation of contaminated sites.¹⁹³ Although corporate actors were not responsible for the contamination of Flint's water, unlike the environmental contamination in New Jersey, a similar tax may be levied against the Flint water treatment plant and related officials on any income earned from switching and maintaining Flint's unsafe water supply.

The funds drawn from Michigan taxpayers would supplement those privately donated, analogous to the innovative approach of The One Fund, to provide expedient direct relief to those affected by the Flint water crisis. As of October 2016, non-profit organizations in Flint have raised funds for the children of Flint in coordination with a committee of community members, Hurley Children's Hospital, Mott Children's Health Center, Greater Flint Health coalition, United Way of Genesee County, and the Community Foundation of Greater Flint.¹⁹⁴ Additionally, the Safe Water Safe Homes Fund seeks to provide

190. Note that to the extent that Flint officials are charged with "violent" crimes for switching Flint's water supply and tampering with evidence of contamination, Michigan may also draw state funds from the Michigan's Crime Victim Compensation Fund. *See supra* note 185 and accompanying text (analyzing the qualifications for a victim to be eligible for Michigan Crime Victim compensation based on the Crime Victims Compensation Act of 1976).

191. New Jersey Spill Compensation Fund (Spill Fund): Frequently Asked Questions, ENVTL. CLAIMS ADMIN., http://www.nj.gov/dep/srp/finance/spillfund/spillfund_faqs.pdf [<https://perma.cc/U2CC-WBYL>] (last updated Feb. 1, 2016) (citing N.J. STAT. ANN. § 58.10-23.11 (West. Supp. 1987)).

192. *Id.*; *see also* *Buonviaggio v. Hillsborough Twp. Comm.*, 583 A.2d 739, 740-41 (N.J. 1991) (discussing the legislative history of the New Jersey Spill and Compensation Control Act, which taxes corporations upon their first transport of petroleum to provide for a Spill Fund for aggrieved property owners).

193. *Buonviaggio*, 583 A.2d at 740-41.

194. Jacqueline Gullede, Flint Residents Still Need Help With Water Crisis, CNN (Oct. 30, 2016, 11:03 AM), <http://www.cnn.com/2016/01/13/us/iyw-flint-michigan-water-crisis-how-to-help/> [<https://perma.cc/2U7J-HNSQ>]; Flint Water Crisis Response – Community Foundation of Greater Flint, COMMUNITY FOUNDATION OF GREATER FLINT, <https://www.cfgf.org/cfgf/GoodWork/FlintArea/WaterCrisis/tabid/855/Default.aspx> [<https://perma.cc/4WF7-B5UE>] (last updated 2016).

“high-risk households”¹⁹⁵ with funds to repair or replace damaged infrastructure, the Flint WaterWorks Fund aims to deliver clean water and safe food to Flint residents, and the Flint Child Health and Development Fund is raising donations to provide medical services to those suffering adverse health effects from lead exposure.¹⁹⁶

Unlike The One Fund, which derived its success from being the only fund created for the purpose of compensating marathon victims and their families, the numerous Flint non-profits are competing for the same donations.¹⁹⁷ Whereas the centralized The One Fund Boston raised \$60 million in six days, all of which was distributed directly to victims and their families, less efficient compensation schemes with multiple divergent funds are unlikely to provide victims with speedy financial aid.¹⁹⁸ If Michigan’s Governor Snyder and Flint’s Mayor Weaver are not able to follow the example of Governor Deval and Mayor Menino and create a single private fund administered by state actors at this point, these non-profits may provide sufficient direct compensation comparable to The One Fund. To do so, however, these non-profits must seek to raise funds for all those harmed by lead-contaminated water, rather than solely children or other “high-risk” individuals. Aside from providing tax credits to institutions and individuals who donate to the fund, the groups administering the fund could also collectively raise additional funds through crowdfunding,¹⁹⁹ just as Boston families did to supplement aid generated by The One Fund and MOVA.²⁰⁰ Further, if Michigan officials were willing to expend the resources necessary for a Flint fund to achieve 501(c)(3) status, it may lessen the need for additional funds to compensate recipients for taxes paid on awards. Overall, if Michigan and Flint officials looked to New Jersey’s tactics to generate state funds, as well as Boston’s efforts to facilitate The One Fund, a dual state and private compensation

195. *How Can I Help?*, CITY OF FLINT, <https://www.cityofflint.com/how-can-i-help/> [<https://perma.cc/XYS3-9625>] (last updated 2016) (“[H]igh-risk households” includes “those with children ages 0-6 years of age, children with elevated blood levels, pregnant women, senior citizens, residential day care facilities, people with compromised immune systems and households where water tests indicate a high level of lead at the tap”).

196. *Id.*

197. Mike Schneider, *OneOrlando Fund Changes Course, Will Give Money to Victims*, ASSOCIATED PRESS (June 17, 2016, 5:24 PM), <http://bigstory.ap.org/article/cb1a48969c1a445c825ec8fc0c5f895e/oneorlando-fund-changes-course-will-give-money-victims> [<https://perma.cc/DR2Q-LCGE>] (“The minute you have competing funds, all vying for donations, with all their uncoordinated criteria, their wildly divergent amounts that are distributed, it becomes competition.”).

198. *Id.*

199. See Kathleen Gray, *Tax Credits for Charitable Donations May Be Restored*, DET. FREE PRESS (Feb. 2, 2016), <http://www.freep.com/story/news/politics/2016/02/02/tax-credits-charitable-donations-may-restored/79714466/> [<https://perma.cc/Z7JS-QSFC>] (noting that the State of Michigan Senate Finance committee unanimously voted to restore tax credits for donations to charitable organizations, which were eliminated as part of governor Snyder’s tax freeform policies).

200. Arsenault & Wallack, *supra* note 172.

scheme may serve as a substitute for a federal VCF for Flint residents.

5. Business Implications

Though a funding scheme with a centralized private fund would serve as an efficient source of direct compensation, it may pose risks to corporate donors. For example, outside of benefit corporations and non-profits, corporations may face dissatisfaction from investors or shareholders. Shareholders may urge the corporation to increase shareholder wealth through dividends and share buybacks.²⁰¹ Alternatively, corporations risk discontent from shareholders who want the business to reinvest surplus capital in the business.²⁰² Moreover, investors critical of corporate contributions may argue that donations consume company resources to further the objectives of management, not shareholders.²⁰³

However, even though there are attendant risks with a corporation donating to a private fund, there are many benefits. Specifically, corporations may claim a tax deduction for charitable contributions.²⁰⁴ Further, contributing to a well-publicized tragedy may increase the company's positive brand recognition, even if increased perception is difficult to quantify in terms of added value for shareholders.²⁰⁵ And for companies that conduct business in Michigan, or Flint specifically, donations may help foster relationships with community leaders, reducing any special interest group obstacles the corporation may face.²⁰⁶ Additionally, because of the centralized nature of the proposed Flint fund, corporations interested in donating need not expend resources on research and development or due diligence to find an appropriate charity. Thus, not only would donating to the centralized fund benefit corporate donors, but the single-fund structure may also attract more contributions than several individual funds

201. See Justin Fox, *The Social Responsibility of Business Is to Do . . . What Exactly?*, HARV. BUS. REV., Apr. 2012 (citing Fulton Friedman, *A Friedman Doctrine*, N.Y. TIMES (Sept. 13, 1970), http://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html?_r=0 [<https://perma.cc/5W6X-3NP5>]) (“There is only one social responsibility of business—to use its resources and engage in activities designed to increase its profits”); see also Alfred Rappaport, *Ten Ways to Create Shareholder Value*, HARV. BUS. REV., Sept. 2006 (noting that value-conscious companies with excess capital and limited value-creating investment opportunities should return money to shareholders in the form of dividends or share buybacks to allow them to earn higher returns from other investments and prevent the company from making poor investments).

202. Fox, *supra* note 201.

203. Matteo Tonello, *Making the Business Case for Corporate Philanthropy*, HARV. L. SCH. FORUM (Aug. 20, 2011).

204. I.R.S. Pub. 542 (Dec. 2016).

205. Tonello, *supra* note 203 (finding that corporate giving programs can provide businesses with a competitive advantage by increasing name recognition and reputation among consumers).

206. Tonello, *supra* note 203.

that would require administrative expenditures on the part of corporate donors.

CONCLUSION

The dire consequences of Governor Snyder's approach to urban policy in Flint illustrate the shortfalls of viewing systemic financial problems in a vacuum. In Flint, the pattern of financial delinquency resulted from changes in the commercial landscape, housing policy, suburban flight, and endemic racial and socioeconomic injustice in the region. At the same time, the overarching deficiencies in the state's infrastructure and economic strategy contributed to the toxicity of the public water supply in Flint.

The same tension between local economic needs and federal spending inheres in the available methods for compensating Flint residents. Although the contamination of Flint's water supply had a city-wide impact, Flint claimants' inability to prove specific causation for individual injuries will likely continue to impede their ability to recover in a federal court of law on an individualized basis. At the same time, the predominance of individualized determinations will, ironically, weigh against claimants' ability to seek compensatory and punitive damages on a class-wide basis.

Accordingly, Flint claimants would benefit from a VCF that operates outside of the tort system. Although academics have opined that a federal VCF is the most promising source of recovery for Flint residents, a federal VCF is unlikely to come to fruition. As the Flint water crisis is a localized emergency that does not pose a threat to a revenue-generating industry, similar to Hurricane Katrina, Congress lacks the financial incentives that motivated the enactment of the 9/11 Fund. This is particularly true in light of the current uncertain political climate with the change of administration.

As such, Governor Snyder and Mayor Weaver should seek to unify non-profits in the Flint community to quell competition between local charities seeking donations from private actors across the country, analogous to The One Fund. At the same time, Michigan and Flint would benefit from working together to administer a state fund comparable to the New Jersey Spill Fund that responds to local needs, such as the cost of repairing damage to real property in Flint from corroded pipes. Following the example of Boston, Massachusetts, and New Jersey, collaboration between government officials, private corporations and individuals, and community organizations may provide aggrieved Flint residents with compensation. If Michigan state and Flint officials choose to forgo Governor Snyder's hyper-localized, numbers-driven approach to municipal economic policy, they may facilitate a large-scale compensation scheme that operates in both the public and private sectors. By recognizing the overarching harm to the city, while providing funds in accordance with individual need, parallel private-state compensation funds would inject needed resources back

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into the Flint community—a strong step in the direction of restoring the Vehicle City to its former glory.