

A RISING TIDE: AN ARGUMENT FOR REQUIRING MUNICIPAL LIABILITY INSURANCE FOR PUBLIC UTILITY SERVICES IN ARKANSAS

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I. INTRODUCTION

Imagine being one of the thousands of Arkansans who live paycheck to paycheck. You work a full-time job, and your largest investment is your home. You come home from work to find that your home has been flooded with sewage. Now, you borrow money to clean and restore your damaged home after your insurance company does not cover the flood damage. Then, two weeks later, your home floods with sewage again. You investigate to find that your neighbors are having the same problem, and the blame falls on poorly maintained sewer lines. You complain to your city council to no avail. You try to hire an attorney to sue the municipality, but no attorney will take the case because the municipality will assert immunity. As a result, you are stuck in a home that will likely flood again, without the funds to make necessary repairs to your home, and no access to hold the negligent municipality accountable.

While the above example appears Kafkaesque at first glance, this story is reality for many Arkansans who face faulty municipal utility services. Municipalities can contribute to sanitary sewer overflows through negligent maintenance, poor design, intrusion

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on sewer lines, and failure to replace aging sewer systems.¹ Throughout the United States, an aging wastewater system is currently failing and is expected to degrade further with the additional strain of population shifts and increased rainfall attributed to climate change.² There are currently 800,000 miles of sewage lines throughout the United States which average forty-five years old, “while some systems have components more than a century old.”³ As a result, the Environmental Protection Agency (“EPA”) estimates that more than 400,000 basement backups, i.e., sewage backups into residences, occur annually, resulting in significant costs to citizens.⁴ Arkansas is one of two states in the United States that prevents a resident from recovering damages from an overflow due to the negligent design or maintenance of sewage utilities by a municipality.⁵

In this Comment, the impact of faulty infrastructure will be discussed. The failure of utilities is shown to fall disproportionately on minority populations and low-income neighborhoods.⁶ Further, this Comment will show how Arkansas precludes any tort claim against a municipality by statute. Finally, the balance of private and public interests will be weighed to show that liability insurance provides the optimum “middle ground” solution to provide individuals an opportunity to bring a cause of action for just compensation without becoming overly burdensome upon the public institution. This Comment therefore argues that Arkansas should require municipalities to obtain liability insurance sufficient to cover any damages

1. OFF. OF ENF'T & COMPLIANCE ASSURANCE, U.S. ENV'T PROT. AGENCY, EPA 325-N-06-001, EPA ENFORCEMENT: PREVENTING BACKUP OF MUNICIPAL SEWAGE INTO BASEMENTS I (2006).

2. OFF. OF WATER, U.S. ENV'T PROT. AGENCY, REP. TO CONG. EPA 833-R-04-001, IMPACTS AND CONTROL OF CSOS AND SSOS ch. 2, at 2-1, 2-5 (2004).

3. See AM. SOC'Y OF CIV. ENG'RS, 2021 REPORT CARD FOR AMERICA'S INFRASTRUCTURE 153 (2021).

4. See Kelly A. Reynolds, *Sewage Overflows Impact US Cities/Public Health*, WATER CONDITIONING & PURIFICATION INT'L MAG. (Dec. 15, 2014), [<https://perma.cc/5BWN-4XW7>].

5. See ARK. CODE ANN. § 21-9-301 (West 2021); GA. CODE ANN. §§ 36-33-1 to -2 (West 2002).

6. Hannah Gordon Leker & Jacqueline MacDonald Gibson, *Relationship Between Race and Community Water and Sewer Service in North Carolina, USA*, 13 PLOS ONE 1, 3 (2018).

sustained by its citizens as the result of negligent or reckless maintenance of sewage infrastructure.

This Comment will first address the origin of (II) Arkansas municipal immunity, before addressing (III) Arkansas municipal harms from the current statutory scheme. After considering the existing problem of sanitary sewer overflows (“SSOs”) and basement backups, this Comment presents two alternative regulatory schemes. One such alternative is to waive immunity for municipal proprietary functions like the (IV) Missouri model. Additionally, this Comment proposes an option to work under the current statutory scheme but (V) require municipalities to purchase liability insurance and therefore waive municipal utility immunity up to the coverage of the required policy.

II. ARKANSAS MUNICIPAL IMMUNITY

Arkansas municipalities are protected from private tort claims through a type of governmental immunity.⁷ Governmental immunity “provide[s] municipalities, local government entities, and political subdivisions immunity from tort-based claims” and acts to protect the essential governmental function that municipalities perform.⁸ Inherent in the operation of essential public services such as water utilities, garbage collection, and infrastructure maintenance are risks to the public.⁹ From a policy standpoint, legislatures across the country have adopted forms of governmental immunity to act as a shield against litigation that may bankrupt a public utility.¹⁰

Additionally, the United States has long held a belief that the public should not pay for the harm to an individual.¹¹ In fact, a

7. ARK. CODE ANN. § 21-9-301(b).

8. MATTHIESEN, WICKERT & LEHRER, S.C., MUNICIPAL/COUNTY/LOCAL GOVERNMENTAL IMMUNITY AND TORT LIABILITY IN ALL 50 STATES 1 (2022), [<https://perma.cc/VDF6-9QQH>]; accord Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 2, 5 n.11 (1924) (discussing the maxims “the state is above the law” and “the King can do no wrong” that originated in English law).

9. See HOWARD W. BRILL & CHRISTIAN H. BRILL, ARKANSAS LAW OF DAMAGES § 22:4, at 521-24 (6th ed. 2014).

10. See Gary Wickert, *Governmental Immunity and the Code of Pirates*, CLAIMS J. (Aug. 4, 2016), [<https://perma.cc/G2M5-XU5J>].

11. James D. Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations*, 16 OR. L. REV. 250, 253 n.7 (1937).

given taxpayer can in turn fund their own payout when the municipality is held liable.¹² Also, proponents of governmental immunity challenge the culpability of the community who would be required to finance a given municipal payout.¹³

Traditionally, municipalities were excluded from governmental immunity.¹⁴ As “creatures of the legislature,” municipal immunity is controlled by statute.¹⁵ “[B]y default, municipalities are liable for their [tort] actions unless shielded by state law.”¹⁶

The Arkansas Constitution establishes that “[t]he State of Arkansas shall never be made defendant in any of her courts.”¹⁷ Upon founding, Arkansas quickly adopted the English common law and claimed immunity for state and municipal actors.¹⁸ For 150 years, that immunity was upheld until June 1968.¹⁹ In *Parish v. Pitts*, the Arkansas Supreme Court found the projected costs to municipalities to be too speculative and overturned Arkansas’s municipal immunity scheme.²⁰ The Arkansas General Assembly passed Act 165 within five months of the court’s decision, which became section 21-9-301 of the Arkansas Code and codified the former interpretation of common law tort immunity.²¹

Since then, Arkansas has passed some of the most protective laws of any state for municipal liability.²² Arkansas bars all negligence claims against municipalities, except to the extent state law requires them to carry liability insurance.²³ In Arkansas,

12. See Steven A. Sindell, *Sovereign Immunity—An Argument Con*, 22 CLEV. ST. L. REV. 55, 58 (1973).

13. *Id.*

14. See MATTHIESEN, WICKERT & LEHRER, S.C., *supra* note 8, at 1.

15. *Id.*

16. *Id.*

17. ARK. CONST. art. V, § 20.

18. See ARK. CODE ANN. § 1-2-119 (West 1947).

19. ARK. MUN. LEAGUE, TORT IMMUNITY FOR ARKANSAS CITIES AND TOWNS, THEIR OFFICIALS AND EMPLOYEES 4 (rev. 2012), [<https://perma.cc/6F57-P3Y3>]; *Parish v. Pitts*, 244 Ark. 1239, 1252, 429 S.W.2d 45, 51 (1968), *superseded by statute*, ARK. CODE ANN. §§ 21-9-301 to -303 (West 1969).

20. ARK. MUN. LEAGUE, *supra* note 19; *Parish*, 244 Ark. at 1250, 429 S.W.2d at 50.

21. ARK. MUN. LEAGUE, *supra* note 19; Act of Mar. 5, 1969, No. 165, 1969 Ark. Acts 455.

22. See MATTHIESEN, WICKERT & LEHRER, S.C., *supra* note 8, at 8; see also ARK. CODE ANN. §§ 21-9-301 to -303 (West, Westlaw through 2023 Legis. Sess.) (abolishing governmental versus proprietary distinction).

23. BRILL & BRILL, *supra* note 9, § 22:4, at 522. Compare ARK. CODE ANN § 21-9-301 (West 2021) (declaring all political subdivisions of the State of Arkansas “immune from

the only liability insurance currently required is for municipalities to carry liability insurance on their motor vehicles.²⁴ If a suit is brought, damages are capped at the statutory amount set for liability insurance.²⁵ Arkansas does not allow punitive damages to be awarded.²⁶ Municipal immunity, however, does not shield liability from intentional torts or negligent action accompanied by repeated failures to correct the harm.²⁷

III. ARKANSAS MUNICIPAL HARMS: STATUS QUO

In 1977, Arkansas declared it is public policy that “[s]afe and adequate sewage disposal promotes the health and welfare of the citizens of this state by minimizing the exposure of the citizens . . . to human excreta and domestic wastes.”²⁸ The management of sewage systems in Arkansas, however, has fallen well short of that goal.

liability and from suit for damages except to the extent that they may be covered by liability insurance”), with GA. CODE ANN. §§ 36-33-1 to -4, 33-24-51, 36-92-2 (West, Westlaw through 2022 Legis. Sess.) (extinguishing municipal liability for tort claims except for “loss[es] arising out of claims for the negligent use of a covered motor vehicle,” which are capped at specified statutory limits unless the municipality maintains liability insurance, in which case “governmental immunity shall be waived to the extent of the amount of insurance so purchased”), and DEL. CODE ANN. Tit. 10, § 4013 (West 1984) (establishing a cap of \$300,000 per occurrence, unless the municipality purchases liability insurance in excess of \$300,000, “in which event the limit of recovery shall not exceed the amount of the insurance coverage”), and FLA. STAT. ANN. § 768.28(5) (West 2022) (establishing a cap of \$300,000 per claim, but allowing municipalities to settle claims in excess of \$300,000 if the claim is within the limits of a municipality’s insurance coverage), and IDAHO CODE ANN. § 6-926 (West 2011) (establishing a cap of \$500,000 per occurrence unless the municipality purchases liability insurance in excess of \$500,000, then that is the limit), and ME. REV. STAT. ANN. Tit. 14, § 8116 (West 2007) (providing that immunity is waived when liability insurance is purchased up to the limits of the coverage), and *Olson v. City of Garrison*, 539 N.W.2d 663, 669 (N.D. 1995) (holding that a city is not liable for sewage system maintenance when no “statute, regulation, or polic[ies]” require maintenance and operation).

24. See ARK. CODE ANN. § 21-9-303(a) (West 1989).

25. BRILL & BRILL, *supra* note 9, § 22:4, at 523; ARK. CODE ANN. § 21-9-303(a) (providing that if a municipality does not maintain statutorily required insurance, then they must self-insure).

26. See *Mosier v. Robinson*, 722 F. Supp. 555, 556 (W.D. Ark. 1989) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259-60 (1981)).

27. *Robinson v. City of Ashdown*, 301 Ark. 226, 232, 783 S.W.2d 53, 56-57 (1990) (holding that repeated sewage flooding constituted inverse condemnation).

28. ARK. CODE ANN. § 14-236-102(a)(1) (West 1977) (declaring sewage regulation to be a priority for the State of Arkansas); cf. *EPA Enforcement: Preventing Backup of Municipal Sewage into Basements*, *supra* note 1, at 1 (detailing why the reduction of SSO-related health and property damage is a “top EPA enforcement priority”).

Across the state, and indeed the nation, municipalities are feeling the strain on their sewer systems.²⁹ Exploding populations in Northwest Arkansas are quickly outpacing the ability to maintain and treat wastewater via existing systems.³⁰ Many of the sewer systems throughout Arkansas are vastly outdated and prohibitively costly to replace.³¹ The EPA found that “[r]apid development has also caused sewage flows to exceed system capacity in a number of communities,” leading to sanitary sewer overflows and combined sewer overflows (“CSOs”).³² Public allocation of traditional funding mechanisms such as taxation, usage fees, and subsidies are proving inadequate to meet the growing problem of sewage.³³

Population booms overwhelm existing systems, creating sewage backups that can flow into residents’ households, which in turn causes damage that cannot be recovered from the municipality.³⁴ Ironically, the protection against municipal

29. See, e.g., *EPA Enforcement: Preventing Backup of Municipal Sewage into Basements*, *supra* note 1, at 2-4.

30. See Elizabeth Green, *Sewer Capacity Threatens Northwest Arkansas’ Growth, Environment*, Nw. ARK. DEMOCRAT-GAZETTE (Aug. 11, 2019, 1:00 AM), [<https://perma.cc/5GVC-3BAQ>] (documenting sewage issues in “rapidly growing areas” including Decatur, Bethel Heights, Pea Ridge, Prairie Grove, and West Fork); OFF. OF WATER, ENV’T PROT. AGENCY, No. 2000832-F-00-005, BENEFITS OF PROTECTING YOUR COMMUNITY FROM SANITARY SEWER OVERFLOWS (2000), [<https://perma.cc/8X64-BLU9>] (last visited Mar. 3, 2023) (detailing how Fayetteville, Arkansas, suffered an influx of SSOs due to rapid population growth and an aging sewer system).

31. See Neal Earley, *Monthly North Little Rock Sewer Service Rates Will Go up in Stages, Beginning in April*, ARK. DEMOCRAT-GAZETTE (Feb. 15, 2022, 6:54 AM), [<https://perma.cc/7WKH-PA3G>] (explaining that resident water bills will rise by an average of \$11 per month to fix a sewer system that is 70 years or older in some parts, which has led to as many as 120 sanitary sewer overflows per year); Tom Sissom, *West Fork Sewer Problems Finally Fixed*, Nw. ARK. DEMOCRAT-GAZETTE (March 8, 2021, 1:00 AM), [<https://perma.cc/F4E3-AJD7>] (noting that overflows of coliform bacteria were detected at 43,750% above the permissible level in West Fork, Arkansas; West Fork then agreed to connect to Fayetteville’s water treatment system, which raised costs by an average of \$28 per month).

32. *Why Control Sanitary Sewer Overflows?*, U.S. ENV’T PROT. AGENCY, [<https://perma.cc/XN7M-G9PD>] (last visited Mar. 3, 2023).

33. BIPARTISAN POL’Y CTR., AMERICA’S AGING WATER INFRASTRUCTURE 2 (2016), [<https://perma.cc/8LNX-U92K>] (“[F]rom 1982-2002 communities spent \$1 trillion on drinking water and wastewater treatment and disposal. However, this has proven insufficient to keep up with the public health and safety concerns that arise as these facilities age.” (citations omitted)).

34. See OFF. OF WATER, U.S. ENV’T PROT. AGENCY, *supra* note 2, at 2-5 (attributing SSOs, in part, to inadequate sanitary sewer system capacity “due to an increase in service population without corresponding system upgrades”).

payouts comes as tax revenues are increasing in the region due to an increase in population.³⁵ One researcher of municipal liability states that “[t]he injustice of the doctrine of immunity was not apparent when cities were small and the disbursement of municipal funds would have worked a hardship on the municipality. However, with the expansion of municipal activity the injustice has become evident, and dissatisfaction has increased.”³⁶ In other words, as the role of government expands with larger proprietary roles, bigger populations, and increasing funds, so, too, should judicial accountability expand.

While population booms are crippling to some areas of the state,³⁷ fleeing populations and subsequently reduced tax revenues have simultaneously crippled aging sewer systems by removing necessary funding from other areas of the state.³⁸ Smaller towns like Monticello, Arkansas, in the Southeast corner of the state encompass this frustration, as attempts to increase taxes to update sewage systems have failed while residents continually report damage to their homes.³⁹

When populations flee these rural areas, the population left behind is often comprised of individuals who cannot afford to move, often the poor and persons of color.⁴⁰ Therefore, it can be

35. See Tom Sissom, *Northwest Arkansas Municipalities See Strong Sales Tax Revenue*, NW. ARK. DEMOCRAT-GAZETTE (Oct. 11, 2021, 1:00 AM), [<https://perma.cc/KB3U-UQF3>] (stating that tax distribution is based upon per capita basis and that revenue is up in the region, despite COVID-19).

36. See John B. Hussey, Jr., Note, *Local Government—Torts—Immunity of Municipality from Liability for Negligence*, 16 LA. L. REV. 812, 816 (1956).

37. See Green, *supra* note 30 (“Many of these cities’ problems stem from outdated and overcapacity sewer systems unable to keep up with growing populations.”).

38. *Id.* (“Cities lose potential property tax and sales tax revenue when development goes elsewhere.”); see also BIPARTISAN POL’Y CTR., UNDERSTANDING AMERICA’S WATER AND WASTEWATER CHALLENGES 5 (2017), [<https://perma.cc/6PAY-7WEN>] (“Population shifts from the Northeast to the South and West have left some areas with declining population, and therefore a declining revenue stream to pay for upgrades, while other areas face an immediate need to expand service.”).

39. Discussion on Establishing a City Claims Commission, held by the Monticello, Arkansas, City Council, MONTICELLO LIVE, at 01:15 (Feb. 5, 2021), [<https://perma.cc/8L6P-TZ4D>] [hereinafter Monticello City Council Meeting] (featuring Monticello Mayor Paige Chase, stating that she has received numerous questions and complaints about city-caused sewage backups and that her response is to claim immunity, admitting, “[T]hat seems a very cruel response, but that is the response that I have been taught.”).

40. Leker & Gibson, *supra* note 6, at 14.

inferred that health⁴¹ and repair expenses disproportionately impact lower socioeconomic classes and minority communities, because those communities remain in the area.⁴² At the same time these populations decline, poverty rates increase proportionally and make utility rate increases unlikely due to affordability concerns.⁴³ In other words, as wealthy individuals flee rural areas to larger urban areas, the poorer population is left behind and are often unable or unwilling to compensate for the loss of tax revenues that are fleeing.⁴⁴

Additionally, sewer overflows occur repeatedly and disproportionately “in areas with low income and minority populations.”⁴⁵ Further, while a political remedy is available for some residents,⁴⁶ an additional judicial remedy would benefit

41. OFF. OF WATER, U.S. ENV'T PROT. AGENCY, EPA 832-K-96-001, SANITARY SEWER OVERFLOWS: WHAT ARE THEY AND HOW CAN WE REDUCE THEM? 2-4 (1996), [<https://perma.cc/JDN5-J52Y>] (stating that bacteria, viruses, parasitic organisms, intestinal worms, and fungi found in raw sewage can cause illnesses like “cholera, dysentery, infections hepatitis, and severe gastroenteritis”; these diseases can be fatal and may be spread via sewage in drinking water sources, direct contact (e.g., in a basement), or even absorption through inhalation or skin).

42. See Monticello City Council Meeting, *supra* note 39, at 11:00 (discussing how the Mayor felt the impact of sewage backup when she had to replace her basement, which cost thousands).

43. BIPARTISAN POL'Y CTR., *supra* note 38, at 9.

44. See *id.*

45. *City of Fort Smith, Arkansas Settlement*, U.S. ENV'T PROT. AGENCY, [<https://perma.cc/N6WV-4JUU>] [hereinafter *City of Fort Smith*] (explaining that Fort Smith must “perform a supplemental environmental project (SEP) valued at a minimum of \$400,000 to repair and replace leaking private laterals for low-income residential homeowners whom quality [sic] for the program. The SEP will help reduce the potential exposure of residents living in low-income portions of the city to raw sewage.”); accord Leker & Gibson, *supra* note 6, at 16.

46. See Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALA. CIV. RTS. & CIV. LIBERTIES L. REV. 93, 96-97 (2018) (discussing challenges faced by minority voters and other insular political groups in “at-large elections and redistricting plans that either weaken or keep minorities’ voting strength weak”); Cedric Merlin Powell, *The Rhetorical Allure of Post-Racial Process Discourse and the Democratic Myth*, 2018 UTAH L. REV. 523, 529 (2018) (examining how the United States Supreme Court’s discussion of a post-racial society presents new challenges for participation by minority voters in the political process, remarking that the Court’s “neutrality . . . rationalizes structural inequality”); see also Freedom to Vote Act, S. 2747, 117th Cong. (2021) (as voted on by Senate, Oct. 20, 2021) (illustrating the failure of recent voting rights expansion efforts in Congress).

those most impacted.⁴⁷ Arkansas municipal immunity that prevents those harmed from seeking compensation for a negligently maintained sewer system is contra positional to the American belief that “the risk of wrongful injury should not be borne by the individual upon whom the misadventure fortuitously falls, but by society as a whole.”⁴⁸

IV. ANALYSIS OF TWO ALTERNATIVES

Clearly, the current approach to municipal liability is insufficient to protect the business interests and residents of Arkansas from negligent municipal design or maintenance of utilities such as sanitary sewers. Arkansas may choose to shift to a system like that adopted by Missouri, which waives immunity in cases with municipal utility maintenance. Alternatively, Arkansas municipalities and citizens may benefit most by the Legislature requiring municipalities to carry utility insurance within the current statutory scheme.

A. The Missouri Model

In Missouri, the construction and maintenance of sewer systems is a proprietary function that does not grant municipalities immunity.⁴⁹ Missouri represents the vast majority of states and has waived absolute immunity for negligent utility maintenance.⁵⁰ In *Fletcher v. City of Independence*, the Missouri Court of Appeals established:

A municipal corporation which lays out a system of sewers and drains exercises a proprietary function and owes a duty of reasonable care in its construction and maintenance not to

47. See *City of Fort Smith*, *supra* note 45 (“When the injunctive relief is implemented, the settlement will help reduce the direct exposure of these communities in Fort Smith to sewage discharges.”).

48. Gerald R. Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 DUKE L.J. 588, 590 (1959).

49. See MATTHIESEN, WICKERT & LEHRER, S.C., *supra* note 8, at 27 (explaining that there is “[n]o immunity for *proprietary* functions,” i.e., functions for the benefit or profit of a municipality, but that there is immunity “for *governmental* functions,” i.e., functions for the common good); MO. ANN. STAT. § 71.185 (West 1959) (granting municipalities immunity for governmental functions unless a municipality purchases insurance coverage, then any award may not exceed the coverage provided for the governmental function).

50. See MATTHIESEN, WICKERT & LEHRER, S.C., *supra* note 8, at 5, 27.

injure private property. The power to construct a system of sewers, moreover, does not authorize the municipality to create a nuisance.⁵¹

By opening the door to liability, many property owners have successfully brought claims against municipal utilities in Missouri.⁵² In *Fletcher*, the claimants were able to collect \$39,000 in damages after repeated sanitary sewer overflows flooded their home over an eleven-year period and the City failed to remedy the overflows within a reasonable time after the plaintiffs provided notice.⁵³ In *Collier v. City of Oak Grove*, the plaintiff suffered repeated sewage backups over a twelve-year period that resulted in a successful claim of condemnation and receipt of damages for personal injury, personal property damage, and the damage to her real property.⁵⁴ Even exposed to liability, municipal liability requires the plaintiff to illustrate a causal connection between the damage and the municipality's negligence.⁵⁵ Plaintiffs often struggle to prove the causal element between an act or omission by the municipality and the resultant damage.⁵⁶ Often, a municipality has the sole or only practicable expert in a given region with the permission or resources to "diagnose" the cause of an SSO or CSO.⁵⁷ In *Harvard Properties LLC v. City of Springfield*, the appeals court reversed a damage verdict for the plaintiff when there was insufficient evidence that a sewage backup into an apartment complex was caused by stormwater infiltrating the City's portion of the sewage line.⁵⁸

Additionally, the homeowner must illustrate that the blockage was not created by their private lateral sewage line (the

51. 708 S.W.2d 158, 167 (Mo. Ct. App. 1986) (citations omitted); see also Michael A. Rosenhouse, Annotation, *Municipal Liability for Damage Resulting from Obstruction or Clogging of Drain or Sewer*, 54 A.L.R. 6th 201 § 48 (2010).

52. See *Fletcher*, 708 S.W.2d at 162.

53. *Id.* at 175, 177 (noting the city utility failed to maintain the sewer system when the pipeline failed due to age and/or root intrusion).

54. 246 S.W.3d 923, 924-925 (Mo. 2008) (noting that the damage was caused by a failure to repair or replace failing sewer lines), *overruled on other grounds by* Badahman v. Catering St. Louis, 395 S.W.3d 29 (Mo. 2013).

55. *Harvard Props., LLC. v. City of Springfield*, 262 S.W.3d 278, 282 (Mo. Ct. App. 2008).

56. See *id.* at 282-83.

57. See *Fletcher*, 708 S.W.2d at 175; cf. 42 AM. JUR. PROOF OF FACTS 3D *Governmental Liability for Failure to Maintain Wastewater Sewage Lines* § 13 (detailing the process of conducting discovery from municipal utility managers).

58. 262 S.W.3d at 282.

privately owned pipe that connects a residence to the public sewer line).⁵⁹ In *Christ v. Metropolitan St. Louis Sewer District*, the Missouri Court of Appeals affirmed summary judgement against the plaintiffs when they were unable to show a causal link between a municipal failure to rectify a sewer defect when an improper private parallel line contributed to the plaintiff's sewage overflow.⁶⁰ Finally, a municipality can claim a lack of notice of a given utility failure and therefore claim they operated with reasonable diligence.⁶¹

Though Missouri represents the majority rule in that it allows residents to sue for negligent maintenance or design of a sewage utility,⁶² each state has its own unique regulations for municipal immunity that vary greatly.⁶³ Some states choose to cap damages at a certain amount per occurrence.⁶⁴ For example, Alabama has established a maximum cap of \$100,000 in damages per person and \$300,000 per occurrence, while Colorado caps damages at \$350,000 per person and \$900,000 per occurrence.⁶⁵ Alternatively, several states set no cap on tort liability.⁶⁶

Similarly, conservative states also waive immunity when public infrastructure fails, and the municipalities are at fault. For

59. See *Christ v. Metro. St. Louis Sewer Dist.*, 287 S.W.3d 709, 713 (Mo. Ct. App. 2009).

60. See *id.*

61. See *Governmental Liability for Failure to Maintain Wastewater Sewage Lines*, *supra* note 57, § 5 (“Where a municipality has actual or constructive notice of a defect in its sewers for a time long enough to enable it to remedy the condition before it causes injury, that is sufficient notice upon which to predicate liability for damages resulting from its failure to exercise reasonable care to keep them in repair and free from obstructions.”).

62. See MATTHIESEN, WICKERT & LEHRER, S.C., *supra* note 8, at 5, 27.

63. See *id.* at 1-2; Hussey, *supra* note 36, at 813-814 (criticizing the distinction between various state court interpretations of a governmental and proprietary function).

64. See ALA. CODE § 11-93-2 (1977) (establishing a cap of \$100,000 for the injury of a single person, \$300,000 for the injury of two or more persons, and \$100,000 for property damage); COLO. REV. STAT. ANN. § 24-10-114(1)(a) (West 2018) (establishing a cap of \$350,000 for the injury of a single person and \$900,000 for the injury of two or more persons); FLA. STAT. ANN. § 768.28(5)(a) (West 2022) (establishing a cap of \$200,000 per person and \$300,000 per occurrence).

65. ALA. CODE § 11-93-2 (1977); COLO. REV. STAT. ANN. § 24-10-114(1)(a) (West 2018).

66. See, e.g., ARIZ. CONST. art. II, § 31 (West, Westlaw through Nov. 2022 amendments) (prohibiting caps on damages for the death or injury of any person); CAL. GOV'T CODE §§ 815.2, 818 (West 1963) (stating that public entities in California may be liable for injuries caused by public employees, except for punitive damages); MATTHIESEN, WICKERT & LEHRER, S.C., *supra* note 8, at 7, 11, 13 (stating that Alaska, Connecticut, and the District of Columbia do not cap damages for municipal liability).

example, for almost seventy years, both Tennessee and Alabama have established liability against a municipality if it fails to maintain sidewalks.⁶⁷ As previously established, all but two states allow for some type of compensation for negligent management of sewers.⁶⁸

Certain states allow municipal liability for negligent maintenance, operation, or construction of sewage systems,

67. See *Johnson v. City of Opelika*, 71 So. 2d 793, 795 (Ala. 1954) (holding that a municipality has a duty to maintain sidewalks in a safe condition and is liable if it fails to do so); *Haindel v. Sewerage & Water Bd.*, 115 So. 2d 871, 878 (La. Ct. App. 1959) (holding that municipalities are liable for reasonable maintenance of sidewalks when provided notice of defect); *Shepherd v. City of Chattanooga*, 76 S.W.2d 322, 323 (Tenn. 1934) (holding that the City was responsible for safe repair of sidewalks in Tennessee); W. VA. CODE ANN. § 29-12A-4I(3) (West 1986) (stating that immunity is waived for negligent maintenance of sidewalks and sewers in West Virginia). *But see Dugan v. City of Burlington*, 375 A.2d 991, 992 (Vt. 1977) (holding that maintenance of sidewalks are immune but maintenance of sewers is not protected in Vermont).

68. See, e.g., *City of Seward v. Afognak Logging*, 31 P.3d 780, 785-86 (Alaska 2001); COLO. REV. STAT. ANN. § 24-10-106(4) (West 2022) (establishing that immunity is waived for the negligent maintenance of a sanitation facility in Colorado); CONN. GEN. STAT. ANN. § 52-557n(a) (West 1993) (establishing a cause of action for negligent construction or maintenance of storm water sewers in Connecticut); *Trtanj v. City of Granite City*, 884 N.E.2d 741, 749 (Ill. App. Ct. 2008) (establishing that negligent operation of a sewage system is an appropriate cause of action because it is a ministerial act in Illinois); *City of Frankfort v. Byrns*, 817 S.W.2d 462, 464 (Ky. Ct. App. 1991) (stating that the planning of a sewage system is “clothed with immunity,” but the construction or maintenance is not); MICH. COMP. LAWS ANN. § 691.1417(2) (West 2002) (providing that “sewage disposal system event[s]” are not covered by immunity in Michigan); *Nordlie v. City of Maple Lake*, No. A05-1321, 2006 WL 923649, at *4 (Minn. Ct. App. Apr. 11, 2006) (holding that a municipality is liable for negligent design, maintenance, or operation of a sewer system if there is no evidence the City balanced the costs and benefits of upgrading the system); *Desel v. City of Wood River*, 614 N.W.2d 313, 319 (Neb. 2000); *Henderson v. City of Columbus*, 811 N.W.2d 699, 712 (Neb. Ct. App. 2012) (holding that municipalities in Nebraska are not immune when a city fails to take reasonable action to prevent backup); N.J. STAT. ANN. § 59:2-3(d) (West 1972) (stating that liability exists if sewer backup was due to “palpably unreasonable” or negligent maintenance); N.M. STAT. ANN. § 41-4-8(A) (West 1976) (providing that New Mexico waives immunity for operating public utilities); *Matter v. City of Athens*, 21 N.E.3d 595, 602, 610 (Ohio Ct. App. 2014) (holding that immunity was available for the discretionary act of upgrading a water supply system, but immunity was unavailable for failing to maintain the same system); *Coleman v. Portage Cnty. Eng’r*, 975 N.E.2d 952, 960 (Ohio 2012) (holding that no immunity exists for failure to maintain a sewer, but immunity is available if the complaint alleges failure to design or construct a sewer); 42 PA. STAT. AND CONS. STAT. § 8542(b)(5) (West 2019) (stating that liability exists for “dangerous conditions” of sewer systems in Pennsylvania); TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a)(32) (West 2013) (stating municipalities are liable for damages caused by governmental functions such a water and sewer services); *Menick v. City of Menasha*, 547 N.W.2d 778, 781 (Wis. Ct. App. 1996) (holding that sewer design and construction are immune, but immunity is unavailable for sewer maintenance); WYO. STAT. ANN. § 1-39-108(a) (West 1979) (stating that immunity is waived for the negligent operation of public utilities, including “solid or liquid waste collection or disposal”).

although the standards and mechanisms for recovery vary.⁶⁹ For instance, in Maine, citizens may recover against a municipality for sewage backup, even though the municipality would traditionally be immune in that area, but only if the municipality carries liability insurance that addresses the substantive area, up to the policy limit.⁷⁰ This has recently allowed homeowners who were subjected to sewage overflow in their home to seek recovery from both the City and the insurance company.⁷¹

As another example, Arizona law holds that municipalities are liable for the negligent maintenance of their sewage systems.⁷² In Paradise Valley, Arizona, across two days in 2017, a manhole in the street in front of the home of Tim and Mirja Riester blew its lid and began to pour raw sewage into their home for several hours, forcing the Riesters out of their home for five months and causing over \$205,000 in damages alone.⁷³ The Town of Paradise Valley contracted with the City of Scottsdale, Arizona, to maintain part of its sewage system that failed.⁷⁴ Fortunately, the Town of Paradise Valley carried an insurance policy.⁷⁵ The insurance company and the Riesters were able to settle their claim out of court, with Paradise Valley paying the \$1,000 deductible, and Scottsdale and the insurance company splitting the remainder of the negotiated sum.⁷⁶

While adopting a model like Missouri's for municipal liability would bring Arkansas more in line with the national trend, the change would require abandoning the statutory scheme that has been in place in Arkansas since the 1960s.⁷⁷ Such a change would require legislative time, resources, and would likely require adoption of a new, comprehensive immunity statute. In other words, abandoning existing municipal immunity may be similar to throwing the baby out with the bathwater,

69. See sources cited *supra* note 68.

70. ME. REV. STAT. tit. 14, § 8116 (West 2007).

71. See *Burley v. Town of Searsport*, No. Wal-21-170, 2021 Me. LEXIS 104, at *1 (Me. Dec. 28, 2021).

72. See *City of Tucson v. Hughes*, 533 P.2d 561, 562 (Ariz. Ct. App. 1975).

73. See Wayne Schutsky, *Couple Sue City for \$1 Million in Sewage Back-Up*, SCOTTSDALE PROGRESS (June 11, 2019), [<https://perma.cc/MP8C-9R7A>].

74. *Id.*

75. See Delarita Ford, *Town Settles with Riester Family Following Sewage Civil Suit*, DAILY INDEP. (Oct. 2, 2019, 2:44 PM), [<https://perma.cc/2ZD6-W7UJ>].

76. *Id.*

77. See sources cited *supra* note 19.

meaning that Arkansas would simultaneously lose numerous beneficial immunity protections in an effort to adopt a scheme like Missouri's.

B. Requiring Arkansas Municipalities to Purchase Utility Insurance

A more desirable solution for many Arkansans would be to work within the current immunity scheme but specifically provide for municipal liability for negligent sewer maintenance. Recall that Arkansas allows for claims to be brought against a municipality, but only if the municipality is required or selects to maintain an insurance policy.⁷⁸ Damages cannot exceed the insurance coverage.⁷⁹

If Arkansas were to impose liability via an insurance requirement, it would be adopting an imperfect solution, but one that reaches a balance of public and private interests.⁸⁰ Both a municipality and those people that reside within it would benefit from (1) increased information gathering, (2) economic benefits, (3) equity/economic justice, and (4) improved public health.

1. Information Gathering

Currently, individuals in Arkansas who suffer from negligent utility management have no judicial recourse against a municipality.⁸¹ Those directly harmed by an overflow would benefit by establishing a record of negligent conduct, while the municipality would benefit from the reporting of SSOs to maintain compliance with numerous federal regulations.⁸²

The first benefit to individuals would be to establish a record of negligent municipal conduct. Arkansas allows for claims

78. See BRILL & BRILL, *supra* note 9, § 22:4, at 524.

79. See *id.*

80. It is important to note that the conflict between private and public interests is largely a false dichotomy; numerous scholars have argued the protection of individual rights furthers societal interests overall. See discussion *infra* Section IV.B.2.

81. See BRILL & BRILL, *supra* note 9, § 22:4, at 524-25 (“[T]he only feasible recourse for a party with a tort claim against a subdivision is to seek administrative relief from the board of directors of the city, the quorum court of the county, or the appropriate governing body of the subdivision.”).

82. See *infra* notes 110-14 and accompanying text.

against municipalities for reckless or intentional damages that constitute a continuing nuisance or inverse condemnation by repeated negligent sewer management leading to repeated SSOs.⁸³ These causes of action may be established by repeated negligent conduct that rises to the level of a taking.⁸⁴ In *Robinson v. City of Ashdown*, the Arkansas Supreme Court held that inverse condemnation was a compensable harm when a home flooded with sewage for a nine-year period, the sewage caused repeated damage to the plaintiffs' yard and home, plaintiffs' family suffered health impacts, and the plaintiffs had sought remedies prior through the mayor's office, city council and attempted to rectify the issue themselves.⁸⁵ Clearly, the bar to establish a taking via continuing nuisance is high and requires documented, repeated intrusion when weighing the duration of dispossession.⁸⁶

One major hinderance to any claims for reckless conduct via utilities is a lack of record of those prior intrusions.⁸⁷ Underreporting of SSOs and CSOs is common.⁸⁸ These claims may perform a monitoring function by recording claims against a municipality that are accessible to the general public.⁸⁹ Further, insurance markets will likely pressure municipalities to rectify sewer problems faster than traditional governmental regulation.⁹⁰ Insurance companies continually evaluate violations to assess

83. See BRILL & BRILL, *supra* note 9, § 18:6, at 447-48 (outlining factors to be considered when determining whether a taking has occurred, concluding that “[t]he interrelationship between the appropriate factors has not been resolved, and the court has not yet given a precise or definitive statement of what constitutes a taking”); *Robinson v. City of Ashdown*, 301 Ark. 226, 229-32, 783 S.W.2d 53, 55-57 (1990); see also 26 CAUSES OF ACTION 2D *Cause of Action for Private Nuisance Caused by Noise, Light, or Odors Emanating from Neighboring Property* § 43, Westlaw (database updated Mar. 2023) (discussing how the differences between permanent and continuing nuisance lies in the remedy, not the causal element).

84. See BRILL & BRILL, *supra* note 9, § 18:6, at 447.

85. *Robinson*, 301 Ark. At 227-29, 783 S.W.2d at 54-55; see also *City of Fayetteville v. Stanberry*, 305 Ark. 210, 216, 807 S.W.2d 26, 29 (1991) (explaining that a trespass does not need to be permanent, particularly, when there was continuing trespass of sewage for a seventeen-year period, and the owners attempted resolution through the city council and were still denied).

86. See BRILL & BRILL, *supra* note 9, § 18:6, at 447.

87. See BRILL & BRILL, *supra* note 9, § 28:4, at 630 (defining temporary nuisances); *id.* § 28:3, at 628 (defining permanent or continuing nuisances).

88. OFF. OF WATER, U.S. ENV'T PROT. AGENCY, *supra* note 2, at B-11.

89. Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV., 197, 236-37 (2012).

90. *Id.* at 247.

proportionate premiums to potential payouts and often provide a more effective regulatory scheme than direct governmental oversight.⁹¹ Further, the dissemination of this information will provide valuable guidance on consumer activity in each municipality so that home purchasers may more accurately assess potential sewer issues in a given area.⁹²

A private cause of action allows for adequate monitoring and smaller, damage-capped lawsuits which may avoid larger federal payouts in the future.⁹³ Whether through the Clean Water Act, general National Pollutant Discharge Elimination System (“NPDES”) permits, or even through the Resource Conservation and Recovery Act (“RCRA”), municipalities are already charged with maintaining sewer systems without allowing SSOs.⁹⁴ Monitoring hundreds of miles of sewer system is a time-consuming and expensive process that may more effectively be conducted by providing an incentive for homeowners to report a perceived SSO, including a “basement backup[.]”⁹⁵ If a municipality fails to achieve compliance with federal regulation, which includes monitoring, then the municipality may lose control of their utilities, have their permit revoked, or be required to pay out fines to the regulatory agency.⁹⁶ Additionally, an increase of information to both parties may encourage more settlements, which is likely to save litigation expenses and compensate injured parties far quicker.⁹⁷

2. Economic Benefits

SSOs and especially “basement backups” create significant expenses for both the homeowner and the municipality.⁹⁸ First, SSOs place a significant financial burden on the homeowner.⁹⁹

91. *Id.* at 207-08.

92. *Id.* at 224.

93. *See City of Fort Smith, supra* note 45 (requiring the City of Fort Smith to invest \$255 million into renovations of its sewer system).

94. *See id.*

95. *Why Control Sanitary Sewer Overflows?, supra* note 32.

96. *See generally Basic Information on Enforcement*, U.S. ENV’T PROT. AGENCY, [<https://perma.cc/RGD9-NP4C>] (Nov. 2, 2022).

97. *See* Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV., 71, 133-34 (2020).

98. *Why Control Sanitary Sewer Overflows?, supra* note 32.

99. *Id.*

SSOs “can cause structural damage to building frames and foundations as well as water damage to electrical and gas appliances that are typically located in the basement.”¹⁰⁰ The average cost of cleaning up an overflow into a home has been estimated to be between \$700 and \$4,000.¹⁰¹ In many cases, the homeowner is required to remove damaged rugs, furniture, and drywall, while in other cases, the building may become uninhabitable.¹⁰² Simultaneously, four out of ten American adults cannot pay an unexpected expense of \$400.¹⁰³ Unfortunately for those impacted by residential SSOs, a basement backup requires immediate remediation, or else the damage may become substantially worse.¹⁰⁴

Further, homeowners need to be capable of winning monetary damages for a private cause of action to be effective.¹⁰⁵ Litigants weigh potential awards when deciding to pursue a judicial remedy, meaning that declaratory relief or enforcement of existing regulation would likely prove ineffective.¹⁰⁶ In other words, while some federal regulation would arguably provide injunctive relief to prevent new overflows, that injunctive relief would not repair damage already suffered. Additionally, a commonly expressed frustration is the lack of a voice or avenue for recovery when utility backups occur.¹⁰⁷ The right to sue is a key aspect in having that voice.¹⁰⁸ There is an expressive benefit

100. *Id.*

101. *Id.*

102. OFF. OF ENF'T & COMPLIANCE ASSURANCE, U.S. ENV'T PROT. AGENCY, *supra* note 1, at 2.

103. See Jeanna Smialek, *Many Adults Would Struggle to Find \$400, the Fed Finds*, N.Y. TIMES (May 23, 2019), [<https://perma.cc/XXT2-M7Y2>].

104. See *Why Control Sanitary Sewer Overflows?*, *supra* note 32.

105. Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI., 821, 823 (2008) (citations omitted) (“Such ordinary litigation, by and large, will proceed only on the threshold judgment that the suit will not result in a net economic loss even if there frequently may be other important noneconomic motivations for proceeding.”).

106. *Id.* at 822.

107. See *supra* text accompanying notes 22-26; see also Taft Stettinius & Hollister LLP, *Lessons in Government Immunity for Sewer Districts*, TAFT L. BULLS. (Apr. 12, 2011), [<https://perma.cc/H8NF-VM9Z>].

108. See Farhang, *supra* note 105, at 822.

to providing a cause of action even if the claim is ultimately unsuccessful.¹⁰⁹

Currently, negligent sewage or utility failures are also costly to municipalities. Various state and federal institutions monitor the application, maintenance, and byproduct of municipal waste and utilities.¹¹⁰ While numerous scholars are critical of this regulatory scheme, it does provide some oversight to ensure minimal standards through a regulatory process.¹¹¹ Regulation is inherently reactionary and occurs only when minimal standards of maintenance are not met, or in other words, when a market failure occurs.¹¹² Recently the City of Fort Smith, Arkansas, settled a lawsuit with the Environmental Protection Agency and was required to spend substantial funds to renovate its sewer system and to pay punitive damages.¹¹³ The individuals whose homes were flooded will not see any of those settlement funds and are left without a cause of action under current law.¹¹⁴

Further, a municipality may benefit from an increased “buy-in” to invest in infrastructure when awards are given to persons from their own community, placing a familiar face with the issue of SSOs.¹¹⁵ Federal punitive efforts fail to motivate a voter base that views federal enforcement as remote, and therefore, tax increases to pay for SSO reduction fail.¹¹⁶ Even if voters were concerned with federal regulatory fines, the federal government

109. See Kevin Farmer & Steven L. Meisel, *Developing the Competencies of Interactional Justice*, 7 ORG. MGMT. J. 155, 156 (2010).

110. See ARK. STATE BD. OF HEALTH, RULES AND REGULATIONS PERTAINING TO ONSITE WASTEWATER SYSTEMS 3, 10 (2014), [<https://perma.cc/3RGF-52GU>].

111. See Ellen Wolfgang, *Reclaiming the Clean Water Act: A New Approach to Wastewater Management*, 34 FLA. ST. U. L. REV. 1247, 1249, 1251, 1258 (2007).

112. See generally Andrew P. Morriss, *Implications of Second-Best Theory for Administrative and Regulatory Law: A Case Study of Public Utility Regulation*, 73 CHI.-KENT L. REV. 135, 178-83 (1998) (discussing the Second-Best theory of market monopolies on municipal utilities and how regulation and legal solutions fail to internalize costs).

113. See *City of Fort Smith*, *supra* note 45.

114. See, e.g., *Enforcement and Compliance Assurance in Arkansas*, U.S. ENV'T PROT. AGENCY, [<https://perma.cc/9P4K-E6SM>] (demonstrating a lack of enforceability of federal regulation when stating, “you should download all the Modules, that apply to the programs you have implemented,” with no cited oversight or penalty for violation).

115. See Farhang, *supra* note 105, at 822.

116. See generally Ben-Shahar & Logue, *supra* note 89, at 231 (“Unlike government regulation, which institutes uniform safety levels, insurers’ regulation results in a spectrum of decentralized choices, whereby people choose greater precautions when their costs are lower or when the risks they face are greater.”).

cannot afford to monitor each municipality and bring administrative claims for each utility failure.¹¹⁷

SSOs also harm a municipality's ability to attract industry. Global businesses look to existing infrastructure when determining locations for investment.¹¹⁸ The EPA found that "[i]n communities that are experiencing capacity problems and/or SSOs, manufacturers" may struggle to expand because of limits on processing or capacity of the municipal utilities.¹¹⁹ Arkansas ranks poorly on numerous surveys of state infrastructure quality.¹²⁰ For example, the U.S. News and World Report ranks Arkansas's infrastructure 43rd in the United States, and the EPA estimates Arkansas needs to invest an additional \$715 million in wastewater management.¹²¹ The lack of suitable infrastructure can force manufacturers to relocate, and the "[l]oss of major manufacturers can cripple a local economy."¹²²

A primary objection to expansion of municipal liability is the cost associated with paying out claims.¹²³ In fact, the State Legislature passed the municipal immunity statutes partly to deter costs of litigation and because the payouts to recipients were unpredictable.¹²⁴

Insurance premiums offer a solution to the predictability arguments by establishing a set cost to be paid out while also holding municipalities accountable during contract renegotiations.¹²⁵ Locations that have higher rates of failure will

117. See *Interior and Environment Funding Bill Would Reduce EPA Regulations*, NAT'L ASS'N OF CNTYS. (May 28, 2018), [<https://perma.cc/6NU6-7VT8>] (discussing reduced funding to the EPA).

118. See J. Hill, *Infrastructure Investing: What to Know*, INV. U (June 17, 2021, 12:11 PM), [<https://perma.cc/QU9W-ATG6>].

119. *Why Control Sanitary Sewer Overflows?*, *supra* note 32.

120. See *Infrastructure Rankings: Measuring States' Energy, Transportation and Internet*, U.S. NEWS & WORLD REP. [<https://perma.cc/WLD5-DYBL>]; U.S. ENV'T PROT. AGENCY, EPA-830-R-15005, CLEAN WATERSHEDS NEEDS SURVEY 2012, REPORT TO CONGRESS A-1 to -2 (2016) [hereinafter EPA SURVEY] (stating Arkansas needs an additional \$715 million in investments to address wastewater issues).

121. See *Infrastructure Rankings: Measuring States' Energy, Transportation and Internet*, *supra* note 120; EPA SURVEY, *supra* note 120, at A- to -2.

122. *Why Control Sanitary Sewer Overflows?*, *supra* note 32.

123. See *supra* notes 10-11 and accompanying text.

124. See *supra* notes 20-22 and accompanying text.

125. See Christopher Serkin, *Insuring Takings Claims*, 111 NW. U. L. REV. 75, 97, 99 (2016).

likely face higher premiums.¹²⁶ Requiring the purchase of liability insurance will be an additional cost to a municipality, and that cost is likely to be passed on to the citizen of the municipality.¹²⁷ While assessing expenses would be impractical without an individualized assessment by an insurer, rates in at least one other state provide some indication of the relative expense and may be as low as \$6.00 per homeowner, annually.¹²⁸

In a similar context, private markets have benefitted from environmental liability insurance to provide for cleanup costs that an individual business would be unable to afford without coverage.¹²⁹ If the annual cost of the wastewater liability insurance was passed directly onto Searsport, Maine, citizens, the cost would be roughly \$6.00 per person.¹³⁰ In the case of Searsport, Maine, the city had no settlement amounts which exceeded insurance coverage for at least the prior four years.¹³¹

Even given the relatively low cost, the cost of coverage would be further reduced by the increased market of scale.¹³² The market for utility liability insurance would be exponentially increased by requiring municipalities to carry a minimum coverage amount.¹³³ One of the main benefits to having liability

126. *See id.* at 86.

127. *See* Stephen R. McAllister & Peyton H. Robinson, *The Potential Civil Liability of Law Enforcement Officers and Agencies*, 67 J. KAN. BAR ASS'N 14, 15 (1998) (describing how the resulting expense from the expansion of civil liability for police misconduct is passed on to taxpayers).

128. *Compare* Independent Auditors' Report from William H. Brewer, Certified Pub. Acct., to Town of Searsport, Maine, at 18 (Dec. 31, 2021) [hereinafter Independent Auditors' Report], [<https://perma.cc/E9VU-VX7M>] (noting that the Town of Searsport's Wastewater Department had a total insurance operating expense of \$16,000 for 2021), with *Is Searsport the Best Maine City for Your Business?*, ME. DEMOGRAPHICS, [<https://perma.cc/UD4K-LH9Q>] (last visited Mar. 26, 2023) (noting that the Town of Searsport had a total population of 2,661 in 2021).

129. *See* Ben-Shahar & Logue, *supra* note 89, at 225-26.

130. *See* sources cited *supra* note 128.

131. *See* Independent Auditors' Report, *supra* note 128, at 40 ("Settlement amounts have not exceeded insurance coverage for the current year or the three prior years.").

132. *See generally* BRILL & BRILL, *supra* note 9, § 22:4, at 523-24 (noting that Arkansas requires "all political subdivisions . . . to carry liability insurance on their motor vehicles of a specified minimum amount," which "reflects the policy that governments should be responsible for negligent acts, while being protected from excessive judgments that might cripple government services").

133. *See generally id.*

insurance is to spread the cost of payouts to various policyholders.¹³⁴

In a similar context, private markets have benefitted from environmental liability insurance to provide for cleanup costs that an individual business would be unable to afford without coverage.¹³⁵ In turn, business interests are furthered by protecting the company from overly burdensome payouts while also providing adequate funding for cleanup.¹³⁶

By increasing the number of policyholders in Arkansas, a financial safety net would be established that would act to reduce expenses to any individual municipality.¹³⁷ Similarly, municipalities across the country have expanded liability coverage when the reduction of police immunity increased municipal liability.¹³⁸ Municipalities then purchased private insurance coverage, self-insured, or formed cost sharing risk-pools.¹³⁹ Further, by increasing expenses to a municipality by allowing for liability, there is likely to be self-protective behavior to reduce payout expenses.¹⁴⁰ Stated clearly:

Self-protection—the prevention of losses—is a compliment to the insurance-focused forms of handling liability. Municipalities can potentially reduce their cost of engaging in the insurance-focused approaches by reducing the frequency and severity of the liabilities they incur. An economically rational party will engage in loss prevention as long as the cost of loss prevention is lower than the benefits it generates—in the insurance context, up to the point at

134. See Kenneth S. Abraham, *Police Liability Insurance After Repeal of Qualified Immunity, and Before*, 56 TORT TRIAL & INS. PRAC. L.J. 31, 35-37 (2021).

135. Ben-Shahar & Logue, *supra* note 89, at 225 (“[F]irms face enormous potential liability for the environmental harms they cause, including substantial cleanup costs.”).

136. *Id.* at 226 (noting that owners of fuel storage tanks in Michigan saw “an aggregate cleanup-cost savings of \$400 million” over eight years after Michigan forced owners to obtain private insurance).

137. See generally Abraham, *supra* note 134, at 40 (illustrating that insurance premiums typically decrease when more applications for coverage are approved); see Serkin, *supra* note 125, at 101 (explaining that municipal insurance pools have allowed smaller municipalities to “take advantage of the law of large numbers” and “maintain coverage over risks that private insurers refused to provide”).

138. See Abraham, *supra* note 134, at 37-38.

139. *Id.* at 33; see also Serkin, *supra* note 125, at 91, 93, 100.

140. Abraham, *supra* note 134, at 36-37; see also Haitao Yin et al., *Risk-Based Pricing and Risk-Reducing Effort: Does the Private Insurance Market Reduce Environmental Accidents?*, 54 J.L. & ECON. 325, 333-34 (2011).

which additional expenditures on loss prevention yield no greater savings on the cost of insurance.¹⁴¹

In summary, requiring municipal liability insurance benefits both the residents and the municipality. By requiring each municipality to purchase liability insurance, the market scale would dramatically increase, reducing premiums for municipalities and subsequently to the taxpaying residents.¹⁴² Additionally, the insured pool provides peace of mind that municipalities would be able to afford a payout, while homeowners may rest assured that there is a sufficient pool of funds to collect any SSO damages.¹⁴³

3. Environmental Justice and Equity

A third benefit would be furthering environmental equity and justice. As previously stated, the majority of utility failures and overflows impact areas of poverty and illustrate a correlation with racial makeup.¹⁴⁴ For reasons too numerous and complex to delve into here, these communities are also some of the least likely demographics to vote in an election, making political remedies a remote possibility.¹⁴⁵ While these communities also have the fewest assets to engage in litigation, contingency-based legal representation would be the norm for compensation.¹⁴⁶ Therefore, the justice system would expand to include a large population of individuals whom are largely excluded from compensation now.¹⁴⁷

Further, litigation has proven to be an effective remedy in other states to challenge racial injustice. In *Hawkins v. Town of Shaw*, the Fifth Circuit held that the Town must take affirmative steps to undo deeply entrenched patterns of discrimination when it discriminated in the distribution of municipal services,

141. Abraham, *supra* note 134, at 36-37.

142. *See supra* notes 127-33 and accompanying text.

143. *See supra* note 137 and accompanying text.

144. *See supra* notes 45-48 and accompanying text.

145. *See, e.g.*, Brandon Haase, *Guaranteeing the Right to Vote for Twenty-First Century America*, 43 J. LEGIS. 240, 245 (2016).

146. *See* Legal Info. Inst., *Contingency Fee*, CORNELL L. SCH., [<https://perma.cc/5FQF-3SLJ>] (last updated July 2022).

147. *See id.*

including sewers and water services.¹⁴⁸ Additionally, there is potential for issue preclusion resulting from administrative law settlements that would allow persons of color to directly recoup damages from a municipality.¹⁴⁹ For example, in the case of the Fort Smith settlement agreement, where it was alleged that the City discriminatorily impacted minority communities with overflows, those individual homeowners arguably would have had a claim as a matter of law against the municipality, including discriminatory design, but only if municipal utility immunity were waived or abridged.¹⁵⁰

In summation, the harm of municipal negligence via utility design or maintenance falls disproportionately on low income and minority communities. These same populations are among the least likely to have a political solution to their injuries via the ballot box. Instead, by requiring municipal insurance, which waives partial municipal immunity, the municipality would empower those underserved communities. Meanwhile, the municipality should view the empowerment and equitable treatment of these populations as a benefit as well.

4. Improved Public Health

A fourth benefit would be improved health outcomes by those effected. The aftermath of a sewage backup into a residence is expensive and can result in a variety of health complications that can cause significant medical expenses and even death.¹⁵¹ A resident who suffers an overflow into their residence may be exposed to or suffer from the stomach flu, upper respiratory infections, potentially fatal cholera, dysentery, Hepatitis B, and cryptosporidiosis, amongst other diseases.¹⁵² The EPA has labeled sewage backups into homes and neighborhoods as a

148. 437 F.2d 1286, 1288, 1293 (5th Cir. 1971), *aff'd on reh'g*, 461 F.2d 1171, 1173-74 (5th Cir. 1972).

149. *See City of Fort Smith*, *supra* note 45.

150. *See id.*

151. *See* OFF. OF WATER, U.S. ENV'T PROT. AGENCY, *supra* note 41, at 2 (“Because SSOs contain raw sewage they can carry bacteria, viruses, protozoa (parasitic organisms), helminths (intestinal worms), and borroughs (inhaled molds and fungi). The diseases they may cause . . . range in severity from mild gastroenteritis (causing stomach cramps and diarrhea) to life-threatening ailments such as cholera, dysentery, infections hepatitis, and severe gastroenteritis.”).

152. *Why Control Sanitary Sewer Overflows?*, *supra* note 32.

“special concern . . . due to the increased chance of human exposure.”¹⁵³ Further, “[c]hildren, the elderly, and people with suppressed immune systems face added risk of contracting serious illnesses.”¹⁵⁴

Once the initial cleanup is finished, mold and other issues can still develop long term.¹⁵⁵ Exposure may be delayed or persist for months after a sewage backup into a building when walls, floors, or furniture become saturated, allowing fungi and molds to thrive.¹⁵⁶

One of the key reasons cited for not seeking medical care is the expense.¹⁵⁷ With claims of negligence precluded, there is no hope of recovering the expense of medical treatment, and therefore, municipal immunity acts as an active deterrent to seeking necessary medical care.¹⁵⁸ Many of the aforementioned illnesses develop greater complications if left untreated.¹⁵⁹

Requiring municipalities to compensate victims for medical expenses via insurance coverage incentivizes municipalities to rectify the causes of utility harms. Currently, municipalities have limited motivation to do so because they cannot be held liable under traditional tort theories.¹⁶⁰ By repairing these defective conduits for sewage, water, etc., further harm is prevented, and additional health complications are avoided. For those in poverty, municipal immunity continues the cycle of poverty as generation upon generation of families who live in low-income communities are burdened with the decision to seek medical attention after contracting diseases from sewage backups or to decide to save the money and endure the illness.¹⁶¹

153. OFF. OF ENF'T & COMPLIANCE ASSURANCE, U.S. ENV'T PROT. AGENCY, *supra* note 1, at 2.

154. *Why Control Sanitary Sewer Overflows?*, *supra* note 32.

155. OFF. OF ENF'T & COMPLIANCE ASSURANCE, U.S. ENV'T PROT. AGENCY, *supra* note 1, at 2.

156. *Id.*

157. See Jennifer M. Taber, Bryan Leyva & Alexander Persoskie, *Why Do People Avoid Medical Care? A Qualitative Study Using National Data*, 30 J. GEN. INTERNAL MED. 290, 290 (2014) (“[M]any participants reported traditional barriers to medical care (58.4%), such as high cost (24.1%), no health insurance (8.3%), and time constraints (15.6%).”).

158. See generally discussion *supra* Part II.

159. See OFF. OF WATER, U.S. ENV'T PROT. AGENCY, *supra* note 41, at 2, 6.

160. See discussion *supra* Part II.

161. See *supra* notes 41-43 and accompanying text; see also *supra* notes 157-58 and accompanying text.

Overall, Arkansas and the EPA have established that the health impacts of SSOs and basement backups are of special significance.¹⁶² While the EPA and Arkansas espoused goals to reduce these overflows, over two decades have elapsed without achieving those results in Arkansas. By adopting a requirement for municipalities to purchase insurance, the persons directly impacted with sewage backups would be able to fund necessary medical expenses and, at a minimum, subsidize the replacement of personal property.

V. CONCLUSION

In summation, the right of a plaintiff to seek compensation for damages caused by the negligence of another furthers all societal interests. When compared to the backdrop of governmental immunity and statutory protections, the bar on litigation for torts against municipalities provides an affront to the individual's property interest.¹⁶³ For many, the courts are the only potential remedy to property damage.¹⁶⁴ By capping damages to the mandated liability limit, municipalities are encouraged to practice self-protection and reduce incidents of sanitary sewer overflows.¹⁶⁵ The economic benefit to private citizens is clear, while the benefits to public institutions can also be established when they avoid federal or state regulatory fines.¹⁶⁶ Additionally, the monitoring of private causes of action and insurance industries provides a far more effective mechanism than federal or state enforcement actions already provide.¹⁶⁷ Every citizen should have a right to a home free of sewage, but when that right is violated, then that citizen should have a method of recourse.

162. See sources cited *supra* note 28; see also OFF. OF ENF'T & COMPLIANCE ASSURANCE, U.S. ENV'T PROT. AGENCY, *supra* note 1, at 2.

163. See discussion *supra* Part III.

164. See *supra* notes 46-47 and accompanying text.

165. See *supra* note 93 and accompanying text.

166. See *supra* notes 82, 93 and accompanying text.

167. See *supra* note 93 and accompanying text.