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THE EVOLVING PARADIGM OF LAWS ON LEAD-BASED PAINT: FROM CODE VIOLATION TO ENVIRONMENTAL HAZARD

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I. INTRODUCTION

This article explores the significance of an ongoing paradigm[1] shift for the legal approach to lead-based paint in privately owned residential properties from a housing paradigm to an environmental paradigm.[2] The housing paradigm,[3] still prevalent in most state and local law, has resulted in general

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1. A paradigm, or model, as a form of legal classification, emphasizes the relationship between legal and social context. *See* Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 706-10 (1989) (arguing that paradigmatic classification avoids problems of overlap among doctrinal categories).

2. Environmental paradigms place a high value on nature, including existing people and future generations, and endorse careful planning and action to avoid health risks. These paradigms include government regulation to protect humans. LESTER W. MILBRATH, ENVIRONMENTALISTS: VANGUARD FOR A NEW SOCIETY 21-27 (1984) (finding that, in 1980 and 1982 surveys of American, English, and German citizens, sympathy for environmental values exist even when these values conflict with economic growth). The National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 102(2)(A)-(2)(B), 83 Stat. 852 (codified as amended in scattered sections of 42 U.S.C.) describes environmental approaches as "systemic," "interdisciplinary," and designed to insure that values other than cost and technology are considered. *See* Laurence H. Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315, 1317 (1974) (quoting the National Environmental Policy Act and rejecting human desires as the basis for environmental decisions and constructing a model of evolving processes of interaction and change). A common factor in environmental controversies is:

> interven[tion] [by citizens] in ongoing "official" or market decisionmaking, seeking to introduce values and considerations that would otherwise be ignored: long-term residual health effects, the value of undervalued natural or historical resources, the unquantified values of quality of life and aesthetic considerations, indirect diseconomies imposed on the commons, and so on.

Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. L. J. REF. 805, 805 n.1 (1986) (discussing the portrayal of environmentalism in litigation over the construction of a hydroelectric dam at a site where rare fish live); *see also* Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 495 n.1 (1992) (citing sources that discuss environmental paradigms).

3. This legal paradigm is part of a larger paradigm dominant in industrial nations: progress. The "Dominant Social Paradigm" has been defined as "belief in abundance and progress, our devotion to growth and prosperity, our faith in science and technology, and our commitment to a laissez-faire economy, limited governmental planning and private property rights." Riley E.

silence[4] on the lead-based paint issue in the community and, consequently, to little actual abatement of the hazard.[5] The shift to an environmental paradigm for addressing hazards of lead-based paint[6] in private housing[7] is reflected in some state[8] and federal legislation.[9] Because of its focus on the discovery of health hazards, on the handling of hazardous material, and on long-term planning, an environmental lens offers a paradigm more likely to lead to actual abatement of lead hazards.

This article first explores the existing framework of laws on lead hazards. Lead poisoning seriously affects the health of children and pregnant women and disproportionately affects ethnic minorities.[10] Federal legislation separate from the major environmental laws addresses the issue of lead-based paint in federally owned or subsidized housing,[11] but that law has not been extended to privately owned housing.[12] Participants in the housing system — owners,

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Dunlap & Kent D. Van Liere, *The "New Environmental Paradigm,"* 9 J. ENVTL. EDUC., Summer 1978, at 10, 10 (reporting study results indicating strong public endorsement of a new environmental paradigm that rejects the anthropocentric idea that nature exists for human use). A narrower view is that "[g]ood economic conditions . . . ought to be the dominant object of public policy." MILBRATH, *supra* note 2, at 9. Investment in housing with ever-increasing standards is one manifestation of the belief in the importance of economic growth.

4. Lead poisoning has been "called the 'silent epidemic' that no one wants to talk about." Garcia v. Freeland Realty, Inc., 314 N.Y.S.2d 215, 219 (N.Y. Civ. Ct. 1970) (permitting tenant father to recover the cost of abatement of removing lead paint from his apartment from the landlord who failed to abate the hazard after notice) (quoting the N.Y. TIMES of March 26, 1970).

5. In 1990, the United States Department of Housing and Urban Development reported to Congress that "it seems clear that nationally very little intentional abatement of lead-based paint is being accomplished in privately owned housing relative to the number of dwellings containing such paint." OFFICE OF POLICY DEV. AND RESEARCH, U.S. DEPT. OF HOUS. AND URBAN DEV., COMPREHENSIVE AND WORKABLE PLAN FOR THE ABATEMENT OF LEAD-BASED PAINT IN PRIVATELY OWNED HOUSING: REPORT TO CONGRESS 5-16 (Dec. 7, 1990) [hereinafter HUD PLAN].

6. While the focus of this article is on lead-based paint in the housing stock, application of an environmental paradigm to residential housing has much broader application. It would be consistent with the paradigm to conduct a comprehensive study of fumes, asbestos, radon, and other environmental hazards that occur in residences.

7. The term "private housing" refers to housing owned by a non-governmental entity that receives no direct form of federal assistance such as mortgage insurance, mortgage subsidy, or rent subsidy. This definition complements the definitions of "federally assisted" and "federally owned" housing established in The Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851b (7)-(8) (Supp. 1992); *see also infra* notes 212-13 (defining federally-owned and federally-assisted housing).

8. *See infra* notes 149-204 and accompanying text.

9. *See infra* notes 205-38 and accompanying text.

10. *See infra* notes 30-31 and accompanying text.

11. *See infra* note 34 and accompanying text.

12. Because inner city children in low and moderate income households are among the group most severely harmed by lead poisoning, the author's primary concern is multi-family rental

rental property managers, lenders — have resisted accepting responsibility for reduction of the environmental hazard of lead-based paint in part due to the expense of abatement[13] and the uncertainty of safe abatement techniques and standards.[14] State and local health, housing, criminal, and property transfer laws have been generally ineffective in bringing about change in the housing stock and in protecting the health of occupants from poisoning.[15] Examples of stalemates that arise when seeking legal relief from lead hazards are drawn from Maryland law.[16]

The article next distinguishes the housing paradigm, under which tenant-landlord disputes have provided the context for the development of the law, from an emerging environmental paradigm, which calls for discovery and response to hazards when occupants, workers, or the community around the dwelling may be affected. The article explores elements of this paradigm in Massachusetts law,[17] in 1992 federal legislation,[18] and in voluntary private market response of requiring an environmental assessment of residential property by the Federal National Mortgage Association (FNMA), a secondary mortgage market entity.[19] By requiring disclosure[20] of this hazard in housing to potential buyers and tenants, the federal government may force the residential real estate market to take the hazard into account in setting the rental amount and sales price. Market aversion to risks of liability and to loss of investment is likely to bring about voluntary compliance with hazard abatement laws. The interdisciplinary approach endorsed in the 1992 legislation is particularly appropriate for an area in which public knowledge and technology are changing.

The article concludes with recommendations about how state and federal law on lead hazards might further develop as the paradigm takes hold. At the federal level, the government should set uniform standards for lead dust levels and safe abatement, and should provide a funding mechanism for hazard abatement. At the state level, the law should require both testing and

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housing, where such children often reside.

13. *See infra* note 58.

14. *See infra* note 40 and accompanying text.

15. *See infra* notes 80-83 and accompanying text.

16. *See infra* notes 94-108 and accompanying text.

17. *See infra* notes 149-204 and accompanying text.

18. *See infra notes* 205-238 and accompanying text; The Toxic Substances Control Act, 15 U.S.C. §§ 2681-2692 (Supp. 1992) (adding lead in housing to its scope). This Act also covers other indoor hazards, asbestos in schools, and public and commercial buildings, 15 U.S.C.A. §§ 2650-2655 (West Supp. 1993), and indoor radon emissions, 15 U.S.C.A. §§ 2661-2671 (West Supp. 1993).

19. *See infra* notes 239-57 and accompanying text.

20. 42 U.S.C. § 4852d(a)(1) (Supp. 1992) (requiring the Environmental Protection Agency to promulgate regulations requiring owners of residential properties built before 1978 to disclose to potential buyers and tenants the risk of lead-based paint that may be present on the premises).

disclosure before the sale of real property, testing and hazard abatement before rental, and provisions for relocation of tenants at landlord expense during hazard abatement. Local registration laws for rental property could trigger the testing process. In addition, states should establish and enforce sanctions for knowing endangerment of persons by lead hazards.

II. LEAD HAZARDS IN PRIVATE HOUSING

In the United States,[21] despite federal legislation in place since 1971,[22] the problem of lead paint hazards persists in private housing.[23] An estimated 57 million homes in the United States have lead-based paint in the interior and/or exterior surfaces.[24] Approximately 1.8 million homes in the United States occupied by children under seven years of age readily produce lead dust or chips.[25] This residential lead[26] almost exclusively threatens the young

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21. The problem of lead poisoning of children is world-wide. Elsewhere in the world the predominant sources of lead poisoning are often leaded gasoline and poorly glazed pottery from which food absorbs lead. CENTER FOR DISEASE CONTROL, U.S. DEPT. OF HEALTH & HUMAN SERVS., PREVENTING LEAD POISONING IN YOUNG CHILDREN 25 (1991) [hereinafter CDC 1991 REPORT] (recommending primary prevention and treatment standards for children poisoned by lead). The European Community directs member states to use a common procedure for biological screening of the population to assess exposure outside of work environments. Council Directive 77/312/EEC of March 27, 1977 on Biological Screening of the Population for Lead, 1977 O.J. 10 (L. 105), *reprinted in* XV BERND RUSTER & BRUNO SIMMA, INTERNATIONAL PROTECTION OF THE ENVIRONMENT 7706 (1979).

22. Lead-Based Paint Poisoning Prevention Act of 1971, Pub. L. No. 91-695, 84 Stat. 2078 (codified as amended in scattered sections of 42 U.S.C.).

23. "In spite of the passage of the Lead-Based Paint Poisoning Prevention Act in 1971 and the ban on residential uses of lead-based paint in 1978, the American public generally has remained unconcerned about the potential hazard." HUD PLAN; *supra* note 5, at 5-16. Most voluntary abatement that has occurred has been part of structural renovations and rehabilitation of housing.

24. HUD PLAN, *supra* note 5, at xvii-xviii. More homes have lead paint on the exterior than on the interior surfaces. Excessive lead dust levels inside homes occur more often in housing with peeling exterior paint than with intact interior paint. *Lead-Based Paint Hazard in American Housing: Hearing Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing, and Urban Affairs*, 102d Cong., 1st Sess. 110-11 (1991) [hereinafter *Oct. 17, 1991 Sen. Hearing*] (statement of John C. Weicher, Asst. Sec. for Pol'y Dev. and Res., Dept. of Housing and Urban Dev.).

25. HUD PLAN, *supra* note 5, at xvii-xviii; *see also Mortgage Bankers Association of America, Environmental Hazards: A Real Estate Lender's View* 23 (1988) (*citing* Anne Pope, PEI Associates, Inc., "Exposure of Children to Lead-Based Paint" (1986) (report to the U.S. Environmental Protection Agency estimating 2 million homes containing lead paint are dilapidated)).

26. In addition to lead-based paint, other sources of exposing children to lead are: soil and dust; drinking water contaminated by lead pipes, connectors, or solder; parental occupations and hobbies involving lead; food exposed to lead glazes on pottery or lead-soldered cans; and air. CDC 1991 REPORT, *supra note* 21, at 17-25.

children and pregnant women exposed to it, because developing fetuses and young children are more vulnerable to its effects.[27] High blood levels of lead cause various adverse effects. Severe lead exposure (blood levels above eighty milligrams per deciliter (μg/dL)) can cause coma, convulsions, and death. Moderate levels (thirty to fifty μg/dL) can adversely affect the central nervous system, kidneys, and hematopoietic system. Low levels (ten μg/dL) can lower intelligence and impair neurobehavioral development. Further, maternal and umbilical cord blood levels of ten to fifteen μg/dL can reduce birth weight.[28] The federal government estimates that at least three million children in the United States (approximately seventeen percent) are at risk from lead poisoning.[29] A disproportionately high number of ethnic minority children live in poverty, in dilapidated housing, and are poisoned by lead paint.[30] The

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27. *See id.* at 7.

28. *Id.* at 9; *see also* U.S. DEPT. OF HEALTH AND HUMAN SERVS., PUBLIC HEALTH SERVICE, AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, CASE STUDIES IN ENVIRONMENTAL MEDICINE: LEAD TOXICITY 6-9 (1990) [hereinafter ATSDR] (discussing physiological effects of lead poisoning on children); KAREN L. FLORINI ET AL., ENVTL. DEFENSE FUND, LEGACY OF LEAD: AMERICA'S CONTINUING EPIDEMIC OF CHILDHOOD LEAD POISONING 1-4 (1990) [hereinafter LEGACY OF LEAD] (discussing private, U.S., and foreign governmental research finding toxic effects of lead on children and pregnant women).

The case of *Caroline v. Reicher*, 304 A.2d 831 (Md. 1973), involving a negligence claim for the poisoning of a one year old child, demonstrates a common fact pattern in serious cases of poisoning in rental housing:

> Miss Caroline testified that prior to renting the apartment she made an inspection tour of the dwelling and found the place to be in poor condition — in need of painting and wallpapering. She stated that throughout the dwelling [sic] the paint was "chipped and cracking and peeling." Nevertheless, she says she decided to rent it because Mr. Edward Reicher promised to paint and fix up the apartment after she moved into it. Some time during the fifteen months the Carolines occupied this apartment, Dawn became listless, lost her appetite and began to cry for long periods of time. In the summer of 1969, when these symptoms persisted, Miss Caroline had her daughter examined at the University Hospital; but, because her ailments were attributed to jealousy of her younger sister, she was sent home without any treatment. A short time later, Dawn suffered convulsions and was hospitalized. At this time the seriousness of her illness was unmistakable and was diagnosed as lead poisoning. As a result of this poisoning the young child suffered permanent blindness, retardation, and other neurological handicaps.

Id. at 832.

29. *See* The Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851(1) (Supp. 1992) (finding that low-level lead poisoning afflicts as many as three million American children under age six); ATSDR, *supra* note 28, at 2 (reporting that 17% of children are at risk and that in 1984, 400,000 fetuses were exposed to lead at levels associated with early developmental effects); *cf.* HUD PLAN, *supra* note 5, at 2-7 to 2-10 (analyzing the numbers of children exposed to lead according to race, family income, location of residence, and size of metropolitan area).

30. In 1988, in metropolitan areas of more than one million, approximately 68% of black children and 36% of white children in households earning under $6,000 have blood lead levels

government's neglect of this problem raises the issue of environmental racial inequity.[31]

The federal ban on the residential use of lead-based paint[32] has had the desirable effect of bringing new lead-free housing into the market since 1978.

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in excess of fifteen milligrams per deciliter; in households with incomes between $6,000 and $14,999, the estimates are 54% of black children and 23% of white children. LEGACY OF LEAD, *supra* note 28, at Appendix 1, Table A-1; *see also* HUD PLAN, *supra* note 5, at 2-8 & 2-9 (analyzing percentages and numbers of children estimated to exceed specified blood lead levels).

31. Environmental racial equity has been studied by the federal government. ENVIRONMENTAL EQUITY WORKGROUP, U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISKS FOR ALL COMMUNITIES (1992). It has received further attention in recent legal literature. *See, e.g.*, ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1990) (describing the integration of racial analysis into the environmental movement and discussing the results of studies correlating race and the location of an incinerator, lead smelter, chemical plant, petrochemical plant, or hazardous waste treatment and storage facility in the South); COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) (finding that race is the most significant variable in national citing of commercial hazardous waste facilities); Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69 (1991) (describing the minority grassroots environmental movement); Robert D. Bullard, *Race and Environmental Justice in the United States*, 18 YALE J. INT'L L. 319, 319-21 (1993) (concluding that poor, minority communities bear a disproportionate share of environmental problems and hazardous facilities); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619 (1992) (advocating the practice of environmental poverty law to address the burdens of pollution borne by minorities); Anthony R. Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335 (1993) (urging greater data collection and involvement of minority communities in decision making); Collin, *supra* note 2, at 495-97 (describing difficulties in bringing legal challenges to the citing of landfills on the grounds of disproportionate racial impact); Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739 (1993) (outlining the use of zoning to "disempower" communities of racial minorities and identifying constitutional arguments for protective zoning for communities of color); Paul Mohai and Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921 (1992) (discussing evidence of income and racial bias in distribution of environmental hazards in sixteen studies conducted between 1971 and 1992); Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 271 (1992) (evaluating federal and state grounds for challenging environmental racism and concluding that state environmental protection acts provide greater remedial protection); Samara F. Swanston, *Legal Strategies for Achieving Environmental Equity*, 18 YALE J. INT'L L. 337 (1993) (evaluating environmental quality review statutes and public health statutes that communities can invoke to challenge citing decisions); Walter Willard, *Environmental Racism: The Merging of Civil Rights and Environmental Activism*, 19 S.U. L. REV. 77 (1992) (discussing common-law nuisance and federal environmental statutes as bases for challenging environmental racism).

32. 16 C.F.R. §§ 1303.1-1303.5 (1993) (banning use of paints containing in excess of 0.06 percent by weight of lead).

Much new construction serves moderate income home buyers and tenants. An approach that primarily addresses this problem prospectively serves the more financially secure families in our society.

The solution of gradually replacing unsafe housing with lead-free housing is sound. If it were the sole approach, however, it would have disturbing social implications. Failure to bring about abatement of existing lead-based paint in deteriorated housing affects low income people, a disproportionate number of whom are ethnic minorities.[33]

For more than twenty years, federal law has governed the lead paint problem in housing that the federal government owns or assists.[34] Federal legislation banned the use of lead-based paint in federally owned or assisted residences in 1971.[35] Standards for abatement[36] in such housing have been developed.[37] Congress has established a timetable for risk assessments and

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33. *See supra* note 31.

34. *See generally* Lead-Based Paint Poisoning Prevention Act of 1971, Pub. L. No. 91-695, 84 Stat. 2078 (codified as amended in scattered sections of 42 U.S.C.).

35. 42 U.S.C. § 4831(b) (1988) (prohibiting use of lead-based paint in residential structures rehabilitated with federal funds or assistance). For a history of the Act, see Michele Gilligan & Deborah A. Ford, *Investor Response to Lead-Based Paint Abatement Laws: Legal and Economic Considerations*, 12 COLUM. J. ENVTL. L. 243, 259-267 (1987) (describing the federal and state statutory scheme and providing an economic analysis which concludes that abatement cost is factored into the price investors pay for residential rental property); Diane C. Freniere, *Private Causes of Action Against Manufacturers of Lead-Based Paint: A Response to the Lead Manufacturers' Attempt to Limit Their Liability By Seeking Abrogation of Parental Immunity*, 18 B.C. ENVTL. AFF. L. REV. 381, 385-87 (1991) (discussing federal and state legislative responses).

36. The National Institute of Building Sciences and the Department of HUD have identified several abatement strategies: encapsulation-sealing lead-based paint in its site so that it cannot deteriorate into particle form; enclosure—covering a painted surface with wall board; removal—stripping paint with chemical abrasion or heat gun; and replacement—removing window sills, doors, and molding, and installing new components free of lead-based paint. *See* Dewberry & Davis, U.S. DEPT. OF HOUS. & URBAN DEV., THE HUD LEAD-BASED PAINT ABATEMENT DEMONSTRATION (FHA) II-7 (1991) [hereinafter FHA DEMO] (study of cost, worker safety, and methods of abatement of lead-based paint in 172 HUD-owned single family properties evaluating abrasive removal, hand-scraping with a heat gun, chemical removal, enclosure, and removal and replacement). Abatement will be used to refer to all of these methods for brevity's sake.

37. *See* Lucy A. Billings, *Development of Safety Procedures for Abatement of Lead-Based Paint*, 25 CLEARINGHOUSE REV. 1540 (1992) (describing the litigation by tenants and other lead poisoning victims against New York City and proposing ways to strengthen lead abatement procedures for sites occupied at the commencement of abatement). A New York court has held that New York City abatement regulations were inadequate to protect the health of occupants residing in a dwelling during lead paint abatement and, further, that the municipality could be liable in some circumstances for damages for failing to enforce statutes or regulations. New York City Coalition to End Lead Poisoning v. Koch, 524 N.Y.S.2d 314 (Sup. Ct. 1987) (injunction granted to require municipal defendants to conform their lead abatement regulations to the municipal code), *aff'd*, 526 N.Y.S.2d 918 (App. Div. 1988).

interim controls of lead paint hazards in this housing.[38] Compliance efforts, however, have stagnated.[39] An abatement demonstration project has yielded findings about efficient abatement methods.[40]

A mandate for removal of lead-based paint hazards in private housing does not appear in federal environmental laws[41] prior to passage of the Lead-Based Paint Hazard Reduction Act in 1992.[42] The federal environmental clean-up law, known as the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[43] directs federal and state governments to respond with clean-up actions when "release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare"[44] is present. CERCLA imposes strict liability on responsible parties for costs of removal or remedial action for release or threatened release of a hazardous substance.[45] Courts have held that a hazardous substance under

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38. 42 U.S.C. § 4822(a)(1) (Supp. 1992).

39. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, LEAD-BASED PAINT POISONING: CHILDREN NOT FULLY PROTECTED WHEN FEDERAL AGENCIES SELL HOMES TO PUBLIC (GAO/RCED-93-38) 31-45 (1993) [hereinafter GAO REPORT].

40. *See* FHA DEMO, *supra* note 36, at VII-5.

41. *See* Michael C. Blumm, *Studying Environmental Law: A Brief Overview and Readings for a Seminar*, 12 J. ENERGY NAT. RESOURCES & ENVTL. L. 309, 312-25 (1992) (categorizing and summarizing federal environmental laws). Federal environmental laws that pertain to nongovernmental action include various pollution control laws: the Clean Air Act, 42 U.S.C. §§ 7401-7671(q) (1988 & Supps. 1992); the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. 1992); and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992(k) (1988 & Supp. 1992) (controlling handling and disposal of solid and hazardous wastes). For cleanup laws which are also included, see Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 42 U.S.C.) (placing strict and joint and several liability on past and present owners of disposal facilities and on generators and transporters of hazardous waste). For relevant laws on chemical screening, see Subchapter IV of the Toxic Substances Control Act, 15 U.S.C. §§ 2681-2692 (Supp. 1992), and the Federal Pesticide Control Act, 7 U.S.C. §§ 136(a)-(y) (1988 & Supps. 1991 & 1992). For chemical inventorying laws, see The Emergency Planning and Community Right to Know Act, 42 U.S.C. §§ 11001-11050 (1988 & Supp. 1992).

42. 42 U.S.C. § 4852 (Supp. 1992); see *infra* notes 205-38 and accompanying text.

43. Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 42 U.S.C.).

44. 42 U.S.C. § 9604(a) (1988) (authorizing federal cleanup of a site).

45. The statute imposes strict liability on responsible parties for the cost of removal or remedial action, other necessary response costs, and damages due to a release. 42 U.S.C. § 9607(a). Responsible parties include the prior owner or operator of a facility at a time disposal of hazardous substances occurred at the facility; the present owner or operator of a facility; generators of a hazardous substance; a party arranging for transport, disposal, or treatment of hazardous substances; and a transporter of hazardous substances who selected the facility where the substances were transported. *Id.* The definition of "facility" includes buildings, but specifically "does not include any consumer product in consumer use." 42 U.S.C. § 9601(9) (1988).

CERCLA includes lead dust[46] and lead in soil on a development site.[47] Under Superfund, the federal government designates sites to be cleaned up,[48] and performs or arranges for cleanup by potentially responsible parties,[49] regardless of fault;[50] by state or local government; or one of its own federal agencies.[51]

Federal government remedial action and strict liability under CERCLA, however, are specifically unavailable for release "'from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures.'"[52] CERCLA's definition of facility includes buildings, but specifically excludes "any consumer product in consumer use."[53] Courts have held that CERCLA is inapplicable to the cleanup of asbestos insulation and hazardous substances in drinking water under the "consumer product" exclusion.[54]

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46. BCW Assocs. v. Occidental Chem. Corp., No. 86-5947, 1988 W.L. 102641 (E.D. Pa. Sept. 29, 1988). In this case, the court found that there was a "release" under CERCLA when lead dust existed within a structure and was carried out of the structure on the shoes and clothing of the workers. *Id.*

47. Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1342-43 (9th Cir. 1992); *see also* Jean M. McCarroll, *Contractors Get Caught in the Snare of CERCLA Liability*, N.Y.L.J., June 7, 1993, at 9 (discussing liability of building contractors that do not qualify for the response action contractor exemption under CERCLA, 42 U.S.C. § 9619(a) (1988), for transporting hazardous materials or for operating a site).

48. 42 U.S.C. § 9604 (1988).

49. *Id.* § 9607(a).

50. *Id.* § 9607.

51. *Id* § 9620.

52. First United Methodist Church v. United States Gypsum Co., 882 F.2d 862, 867 (4th Cir. 1989) (*quoting* 42 U.S.C. § 9604(a)(3)(B) (1988) and holding CERCLA was inapplicable to removal of asbestos insulation in buildings due to exemption found at 42 U.S.C. § 9604(a)(3)(B) for "products which are part of the structure of, and result in exposure within, residential buildings or business or community structures"), *cert. denied,* 493 U.S. 1070 (1990). This exemption was made express after the Environmental Protection Agency, which administers CERCLA, had received requests to take remedial action in situations involving contamination from building materials that created an indoor hazard. *Id.* at 868 (citing S. REP. NO. 11, 99th Cong., 1st Sess. 16-17 (1985)). Asbestos was apparently the hazard under consideration. *Superfund Improvement Act of 1985: Hearings on S.51 and S.494 Before the Senate Comm. on Environment and Public Works*, 99th Cong., 1st Sess. 40 (1985).

CERCLA does, however, apply to residential real estate containing hazardous waste such as buried chemicals on a rural property. *See* H. Glenn Boggs, *Real Estate Environmental Damage, the Innocent Residential Purchaser, and Federal Superfund Liability*, 22 ENVTL. L. 977 (1992) (proposing a national audit system for properties and protection from Superfund liability for residential purchasers).

53. 42 U.S.C. § 9601(9).

54. Dayton Indep. Sch. Dist. v. United States Mineral Prod. Co., 906 F.2d 1059 (5th Cir. 1990) (holding CERCLA inapplicable to sales of useful consumer products such as asbestos insulation); Vernon Village, Inc. v. Gottier, 755 F. Supp. 1142 (D. Conn. 1990) (holding CERCLA inapplicable to hazardous materials found in the useful consumer product: drinking

CERCLA does not provide a remedy for indoor lead paint pollution, although it applies to releases of lead when a building is razed or refurbished. Disposal of lead debris from abatement is subject to EPA regulations[55] governing hazardous waste under the Resource Conservation and Recovery Act.[56]

Considering the serious harm to public health caused by lead paint, a clear need exists for legal and private mechanisms to promote removal or containment of lead-based paint hazards in private housing.[57] Landowners often resist lead hazard abatement because they want to avoid the high costs.[58] Responsibility for past harm caused by lead-based paint should be fairly allocated. This issue, addressed in personal injury litigation against landown-

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water).

55. *E.g.*, 40 C.F.R. 256.01-.65 (1992) (specifying guidelines for state solid waste management plans); 40 C.F.R. 258.1-.74 (1992) (establishing criteria for municipal solid waste landfills).

56. 42 U.S.C. §§ 6901-6992(k) (1988); *see* Billings, *supra* note 37, at 1559; *see also infra* note 105 and accompanying text (discussing state prosecution for improper disposal of abated lead). Birmingham, Denver, and Seattle have treated waste generated by lead hazard abatement as hazardous waste. By contrast, Baltimore and Indianapolis have treated such wastes as solid wastes that can be disposed of in landfills. *See* FHA DEMO, *supra* note 36, at VII-5.

A court has held that razing dwellings as part of an urban renewal project does not trigger the need for an environmental impact statement to consider the architectural and historic significance of buildings not on the National Register of Historic Sites under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(c) (1988), despite some federal involvement. Saint Joseph Historical Soc'y v. Land Clearance for Redev. Auth., 366 F. Supp. 605 (W.D. Mo. 1973) (holding that NEPA does not require an environmental impact statement to consider architectural or historic significance before demolition of dwellings in urban renewal projects). However, today this holding is of questionable persuasiveness in light of increased knowledge of lead debris as hazardous material.

57. *See supra* notes 21-31 and accompanying text; HUD PLAN, *supra* note 5. Unfortunately, many individuals discount and deny the severity of the harm in many ways: (1) Many of us grew up with lead-based paint in our homes and fail to see the risk because we do not believe we have been affected or believe we were not affected, (2) It affects children from the ghetto who have so many problems, and this one problem cannot be distinguished, (3) The problem is too big, affects too many people, and affects their home investments — their life savings are at stake, and (4) Statistics can be manipulated to show anything. These evasions suggest frustration with the complexity of the problem. The environmental approach discussed in this article calls for methodical study of the problem and development of responsible remedies.

58. *See Oct. 17, 1991 Sen. Hearing, supra* note 24, at 112 (costs of abatement range from $2900 to $7700 for an average dwelling according to HUD; costs to abate priority hazards (paint is peeling and lead dust is present) range from $4200 to $10,400 to abate); *see also* FHA DEMO, *supra* note 36, at ix (finding average encapsulation costs of $2908 and average removal costs of $7703); *cf. Oct. 17, 1991, Sen. Hearing, supra* note 24, at 30-31 (cost ranges were between $1500 and $15,000 per unit according to Walter Farr, Vice-President of the Enterprise Foundation, Columbia, Md.).

Safe disposal of abatement debris under environmental laws contributes to the expense of abatement. However, disposal requirements are beyond the scope of this article.

ers,[59] inspectors,[60] property managers,[61] and manufacturers,[62] is beyond the scope of this article. This article, however, credits risk aversion to tort liability as a catalyst for behavior change by housing investors, property managers, and lenders.[63]

III. PARTICIPANTS FEEL BLAMELESS, RESIST RESPONSIBILITY

Innocent parties[64] abound in the dialogue about the public health hazard

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59. In addition to negligence actions based on the owner's actual knowledge of the hazard, plaintiffs pursue negligence claims against property owners based on constructive knowledge of the presence of lead paint or strict liability. *See, e.g.*, Hardy v. Griffin, 569 A.2d 49, 50-51 (Conn. Super. Ct. 1989) (holding owner strictly liable for child's poisoning from lead paint in residential rental unit and also liable under the state consumer protection act for rental of unfit premises); Tillman v. Johnson, 612 So. 2d 70, 70 (La. 1993) (per curiam) (holding that, in a personal injury case, a genuine dispute exists as to whether lead-based paint on defendant landlord's property presented an unreasonable risk of harm under state strict liability statute); Bencosme v. Kokoras, 507 N.E.2d 748 (Mass. 1987) (holding a landlord strictly liable under state statute for lead poisoning of tenant child); Acosta v. Irdank Realty Corp., 238 N.Y.S.2d 713 (Sup. Ct. 1963) (holding the landlord of a multiple-unit dwelling, who knew of presence of broken walls in violation of the Sanitary Code, liable for poisoning of tenant child and finding that the owner should have known that the wall paint contained lead that might be harmful to the occupants). *But cf.* Brown v. Marathon Realty, Inc., 565 N.Y.S.2d 219, 221 (App. Div. 1991) (granting summary judgment for defendant landlord for lack of notice to defendant of presence of lead based paint, stating that the "notice cannot be predicated upon the conclusory assertion that the use of lead-based paint in older buildings is 'commonly known'").

60. Holloway *ex rel.* Holmes v. City of New York, 592 N.Y.S.2d 371 (App. Div. 1993) (mem.) (allowing poisoned child to file late notice of claim against the city for negligent inspection of residential unit in which lead paint existed).

61. *See* Richwind Joint Venture 4 v. Brunson, 625 A.2d 326, 337 (Md. Ct. Spec. App.) (holding that landlord and property manager violated state consumer protection act by renting an apartment as habitable and failing to warn tenant of lead-based paint), *cert. granted,* 634 A.2d 47 (Md. 1993).

62. *See infra* note 133.

63. *See infra* notes 132-39 and accompanying text.

64. As a human attribute, "innocent" has several meanings which are relevant to this discussion:

> 1. uncorrupted by evil, malice, or wrongdoing; sinless: *an innocent child.* 2.a. not guilty of a specific crime or offense; legally blameless: *was innocent of all charges.* b. within, allowed by, or sanctioned by the law; lawful... 4.a. not experienced or worldly; naive. b. betraying or suggesting no deception or guile; artless. 5.a. not exposed to or familiar with something specified; ignorant..."

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 931 (1992) (emphasis in original).

Innocence as an image of childhood connotes a dependent, defenseless, new life. Children under seven are the primary victims of residential lead-based paint poisoning. *See supra* note 25 and accompanying text. Property owners also claim innocence, which connotes legal blamelessness, a failure of proof. The degree of social participation and responsibility of the two groups is vastly different, although both are free of wrongdoing. The law embraces the image

of lead-based paint. Children are innocent victims of poisoning. Homeowners and parents feel that they are innocent victims, unaware of the lead-based paint hazard when they bought or rented their residences.[65] Further, owners of private rental housing and their management companies believe that they are innocent parties[66] because, in the vast majority of cases, they did not apply the lead paint. Federal law banned the paint for residential use in the United States in 1978.[67] A small number of owners of private rental housing may feel particularly innocent because they made a good faith attempt to abate the hazard of lead paint according to standards set by a local housing code or health department. Unfortunately, such standards are now deemed inadequate.[68] Banks financing the purchase of housing feel innocent because they

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of innocence in the so-called "innocent landowner" defense under CERCLA. 42 U.S.C. §§ 9601(20)(A) & 9607(b)(3) (1988). CERCLA imposes strict liability upon owners, operators, and transporters for cleanup of releases of hazardous substances. A landowner may assert the defense that a third-party for whom the owner is not responsible caused a release of a hazardous substance. The owner must show that he had exercised due care, had taken reasonable precautions against the third party's actions, and had no contractual relationship with the third party. *See* Douglas M. Garrou, Note, *The Potentially Responsible Trustee: Probable Target For CERCLA Liability,* 77 VA. L. REV. 113, 129 (1991) (citing United States v. Serafini, 706 F. Supp. 346, 351 (M.D. Pa 1988) and discussing the availability of the innocent landowner defense to CERCLA liability to trustees). CERCLA does not apply to cleanup of lead-based paint in residences. *See supra* notes 52-54 and accompanying text.

65. *See, e.g.*, Caroline v. Reicher, 304 A.2d 831 (Md. App. 1973) (holding that if the landlord had actual knowledge of lead paint and of the presence of children in the apartment and the parent did not act unreasonably, it was improper to submit the issue of parental negligence to the jury in a tort action against the landlord); Morales v. Moss, 355 N.Y.S.2d 456 (App. Div. 1974) (affirming the dismissal of defendant paint company's counterclaim for contribution from father of poisoned child). *But cf.* Ankiewicz v. Kinder, 563 N.E.2d 684 (Mass. 1990) (holding that landlord could seek contribution on a negligence claim from a mother whose child ingested lead-based paint).

66. Regarding personal injury suits filed on behalf of children in Rhode Island, a newspaper reported that "Thomas J. Mulhearn of the Rhode Island Association of Realtors argued that such suits are unfair because landlords are innocent victims of a societal problem. 'If we are going to go to the extreme of castigating every owner of an older dwelling, the effect is going to be devastating,' he said." Bob Wyss, *28 Landlords Named in Suits Over Lead Damage*, THE PROVIDENCE JOURNAL-BULLETIN, Nov. 25, 1992, at A3.

67. Ban of Lead-Containing Paint and Certain Consumer Products Bearing Lead-Containing Paint, 16 C.F.R. § 1303.1-.5 (1993). In the first quarter of the 20th century, Austria, Belgium, Bulgaria, Chile, Czechoslovakia, Estonia, France, Latvia, Poland, Romania, Spain, and Sweden ratified a ban, organized by the International Labour Organization, on use of white lead, commonly used in paint until such ban. ENVIRONMENTAL DEFENSE FUND, THE HOUR OF LEAD: A BRIEF HISTORY OF LEAD POISONING IN THE UNITED STATES OVER THE PAST CENTURY AND OF EFFORTS BY THE LEAD INDUSTRY TO DELAY REGULATION 13 (1992); Convention Concerning the Use of White Lead in Painting, Aug. 10, 1949, 38 U.N.T.S. 175.

68. Health professionals and technologists studying abatement have realized that some traditional methods of removing lead paint, such as burning or sanding, actually release lead into the environment and increase the hazard to children who reside in the "abated" home. *See* Mark.

play no role in the physical construction or maintenance of the housing stock held as collateral under mortgages. Secondary mortgages lenders,[69] which buy mortgages and package them into securities for sale to investors, are one step further removed from the physical collateral and feel even less responsible for its condition.

Lead hazards in housing affect public health and housing markets, both of which warrant protection. The presence of lead-based paint in housing is harming children's health. Potential erosion in values of houses and apartment buildings containing lead-based paint threatens housing markets and financial markets in which residential real estate serves as collateral.[70] Uncertainty about safety standards poses a conundrum for both legislators and agency rule makers. Rather than viewing financial and health interests as competing, administrative agency personnel and health advocates are seeking ways to demonstrate the long-term financial benefit in abatement of lead hazards and minimizing hazard occurrence in the future.[71]

The emerging environmental approach to lead paint remediation in private rental housing calls for a study of hazards in the housing stock, disclosure of known hazards and risks, abatement of known hazards, civil liability for relocation expense, and criminal culpability for knowing, reckless, or negligent endangerment of people. This approach conflicts with the housing approach, which evolved in the context of property law strongly favoring the owner's rights over his realty. The housing paradigm protects the interests of housing investors[72] by keeping lead paint issues private and quiet.[73] The environ-

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R. Farfel & J. Julian Chisolm, Jr., *Health & Environmental Outcomes of Traditional & Modified Practices for Abatement of Residential Lead-Based Paint*, AMER. J. PUB. HEALTH, Oct. 1990, at 1240.

69. Secondary mortgage lenders include Federal National Mortgage Association, Government National Mortgage Association, and the Federal Home Loan Mortgage Corporation. CHARLES L. EDSON & BARRY JACOBS, SECONDARY MORTGAGE GUIDE §§ 5.01-5.03 (1991); MARSHALL W. DENNIS, MORTGAGE LENDING FUNDAMENTALS AND PRACTICES 103-15 (1981).

70. *See Oct. 17, 1991 Sen. Hearing, supra* note 24, at 79-80 (Prepared Statement of the National Association of Realtors supporting mandatory disclosure of lead hazards by sellers and opposing mandatory point-of-transfer abatement because the cost of abatement split between buyer and seller would increase the cost of dwelling by $3850 to a first-time home buyer).

71. *See, e.g.*, ALLIANCE TO END CHILDHOOD LEAD POISONING & THE NATIONAL CENTER FOR LEAD-SAFE HOUSING, A FRAMEWORK FOR ACTION TO MAKE PRIVATE HOUSING LEAD-SAFE (1993) [hereinafter ALLIANCE] (combining ideas of health advocates and housing developers); LEAD PAINT POISONING COMMISSION, INTERIM REPORT PREPARED FOR THE HOUSE ENVIRONMENTAL MATTERS COMMITTEE AND SENATE ECONOMIC AND ENVIRONMENTAL AFFAIRS COMMITTEE OF THE MARYLAND GENERAL ASSEMBLY (1992) [hereinafter LEAD PAINT INTERIM REPORT] (drawing on members of the medical and tenant advocacy communities; paint manufacturers and retailers; property owners; environmental, health, and housing agency personnel; and the general public).

72. Uncertainty as to the effect of the presence of lead-based paint in housing on the housing's market value is one reason for keeping the issue quiet. Because the country is in early stages of

mental approach derives its concepts from public health and planning law. Public interest groups and governmental agencies support this approach.[74] It calls for the voicing and systematically addressing of the serious threat to public health from lead paint.

IV. THE CURRENT PARADIGM: THE OWNER'S RIGHT NOT TO KNOW ABOUT THE PRESENCE OF LEAD HAZARDS

Deeply ingrained in American property law is the right of land owners to use land "according to their pleasure, without accountability to others."[75] Historically, landlords were not liable for injuries sustained due to defective conditions in rented premises on the rationale that the lease conveyed control of the property to the tenant.[76] Fraudulent concealment of latent defects subjects a landlord to liability in tort, but few courts impose a duty on the landlord to inspect.[77] Further, real estate sellers are generally not required to inspect their land in order to discover its actual condition.[78] Vendors are liable for concealing or failing to disclose conditions which pose unreasonable risk to people on the land only if the vendee has no reason to know of the hazard and the vendor does know or has reason to know of it.[79] Residential property owners have been free until recently, however, to remain ignorant of latent hazards on their property.

Statutory approaches to lead-based paint, found in state and local health[80]

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addressing this problem, safety standards, technology for abatement and containment, and methods of training personnel are only now being developed.

73. Housing investors receive support from the paint industry in keeping the issue quiet. *See* City of New York v. Lead Indus. Ass'n, Inc., 597 N.Y.S.2d 698 (App. Div. 1993) (denying paint industry's motion to dismiss claims of fraudulent misrepresentation when complaint alleged industry manufactured lead-based paint for interior use while concealing knowledge of its hazards and lobbying against health regulations).

74. *See supra* note 71 and accompanying text.

75. HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROPERTY (ABRIDGED) § 3 (Renard Berman, ed., 3d ed. 1970).

76. ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT §§ 3:10, 4:1 (1980 & Supp. 1993).

77. *Id.* § 4:3.

78. RESTATEMENT (SECOND) OF TORTS § 353 cmt. b (1965).

79. *Id.*

80. Screening of the level of lead in children's blood is the primary public health strategy for prevention of serious poisoning. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 111, § 193 (West Supp. 1993) (mandating systematic screening program for children under six years of age for lead poisoning and permitting screening of older children, pregnant women, and persons with delayed cognitive development). The Early and Periodic Screening Diagnosis, and Treatment (EPSDT) program, 42 C.F.R. § 441.56(b) (1992), funded by the federal government to screen the health of children, may test blood lead levels. *See generally* ENVLT. DEFENSE FUND, AT A CROSS-ROADS: STATE AND LOCAL LEAD-POISONING PREVENTION PROGRAMS IN TRANSITION (1992)

and housing laws,[81] have been ineffective in bringing about abatement. Health laws call for screening of children, but typically require residential testing only after screening reveals a certain level of poisoning.[82] While health laws make it relatively easy to identify residential sources of lead through locating the poisoned child, the laws have accomplished few instances of residential abatement.[83] On the other hand, criminal statutes governing lead-based paint, housing codes, and tenant remedies could result in abatement of lead hazards in rental housing before a child is poisoned if the laws were enforced or remedies were triggered differently than they are now enforced or triggered. However, legal and practical difficulties prevent this from happening. The following section illustrates the ineffectiveness of laws relating to housing and landlord-tenant relations with examples in Baltimore, Maryland.

V. MARYLAND: STRUGGLING WITH THE LEAD PAINT ISSUE

Since 1984, the state of Maryland has been studying possible statutory frameworks defining responsibility for lead-based paint in housing.[84] The

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[hereinafter CROSSROADS] (reporting on blood lead screening programs of Massachusetts, New Jersey, Rhode Island, Ohio, and of the cities of Baltimore, Philadelphia and Chicago).

81. *See* Gilligan & Ford, *supra* note 35, at 267-78 (discussing both health and housing approaches to lead paint poisoning in state and local laws); Martha Mahoney, *Four Million Children at Risk: Lead Paint Poisoning Victims and the Law*, 9 STAN. ENVTL. L.J. 46, 57-64 (1990) (discussing state statutory protection against lead paint poisoning and tort suits against landlords and paint manufacturers).

82. In Baltimore, Maryland, the Health Department initiates environmental inspections of housing for lead-based paint largely in response to notice of the poisoning of a child resident beyond a blood lead level of twenty micrograms per deciliter (20 ug/dl). Baltimore's goal is to meet the "Time Frames for Investigations and Interventions" of the CDC 1991 REPORT, *supra* note 21, at 67 (stating that environmental interventions should occur for children having blood lead levels of 20ug/dL and above). Interview with Michael Wojtowycz, Director of the Childhood Lead Poisoning Prevention Program of the Baltimore City Department of Health, in Baltimore, Maryland (August 2, 1993).

83. Only ninety-eight lead paint violation notices were abated in Baltimore, Maryland, in fiscal year 1992. Baltimore City Health Department Childhood Lead Poisoning Prevention Program, *Fiscal Year 1992 Sanitarian Field Activity Report* (1992). This figure includes abatement of more than 600 notices carried forward into FY92 issued in prior years. Interview with Michael Wojtowycz, *supra* note 82. In 1992, 2562 children (10.5% of the children tested that year) in Baltimore had blood lead levels over 20 ug/dl. Maryland Dep't of the Env't, Childhood Lead Registry (Apr. 1993).

84. Groups of individuals representing diverse interests including tenants, landlords, the paint industry, health and housing agencies, retail merchants, and the general public have studied possible statutory solutions for many years. The current Lead Paint Poisoning Commission succeeds the Maryland Governor's Advisory Council on Lead Poisoning established in 1984. *See* MD. ENVIR. CODE ANN. §§ 6-801 to -809 (1993). That Commission supplements the Maryland Governor's Advisory Council on Lead Poisoning, MD. ENVIR. CODE ANN. §§ 6-601 to -608

study has identified gaps in information needed to plan comprehensively for the state.[85] The Maryland Lead Paint Poisoning Commission has proposed legislation setting standards for treatment of rental property between tenancies and for periodic testing of occupied properties.[86] It also provides a limitation on liability for landlords who comply with property standards and who make offers of settlement to tenants for relocation expense to and rental subsidy for lead-safe housing and certain medical expenses.[87] In the meantime, Maryland's current statutory scheme consists of criminal prohibitions,[88] tenant rent escrow remedies,[89] the reporting of children's blood lead levels by medical laboratories to local health departments,[90] and accreditation of lead paint abatement services.[91] Loans to low income families and to providers of low income housing are authorized as part of the state's housing rehabilitation program.[92] State regulations set standards for lead hazard abatement.[93]

VI. CRIMINAL ENFORCEMENT: AGENCIES RELUCTANT TO PROSECUTE OWNERS

Baltimore, like other cities, developed a housing code to set minimum maintenance levels for residential rental housing.[94] Criminal provisions

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(1993), which was established in 1986. The diverse interest among groups has led to stalemates in developing legislation. *See* CROSSROADS, *supra* note 80, at 16 (stating landlord resistance as the primary obstacle to lead-based paint abatement legislation in Maryland).

85. For example, neither a statewide database of dwelling units nor a listing of lead-safe units and units cited for lead violations exists. *See* LEAD PAINT INTERIM REPORT, *supra* note 71, at 7.

86. H.B. 970, 408th Leg. Sess., 1994 Reg. Sess., Md. A compromise version of this proposal, H.B. 760, was enacted, signed into law on May 2, 1994, and will take effect on October 1, 1994. The new legislation is beyond the scope of this article.

87. *See id.*

88. MD. ENVIR. CODE ANN. §§ 6-301 to -302 (1993) (prohibiting use of lead based paint); *id.* § 7-267 (1993) (setting maximum fine at $25,000 and imprisonment for up to two years for a first offense violation of environmental laws and regulations).

89. *See, e.g.*, MD. REAL PROP. CODE ANN. § 8-211.1 (1988) (allowing lessee to deposit rent in escrow if lessor fails to remove lead-based paint within 20 days after receiving notice); BALTIMORE, MD., CITY CODE OF PUBLIC LOCAL LAWS, § 9-9 (1980 & Supp. 1990) (codifying Baltimore's rent escrow law).

90. MD. ENVIR. CODE ANN. § 6-303 (1993) (requiring medical laboratories to report blood-lead tests to local and state departments of health).

91. *Id.* §§ 6-1001 to -1005 (1993).

92. MD. ANN. CODE art. 83B § 2-307 (1991 & Supp. 1993).

93. *See* MD. REGS. CODE tit. 26(02), §§ 07.01 to -.14 (1988) (mandating procedures for abating lead containing substances from buildings and requiring storage of residents' possessions during abatement).

94. BALTIMORE, MD., CODE art. 13, §§ 101 - 1304 (1983) (city housing code); *see* CROSSROADS, supra note 80, at 12. *See generally* CHARLES DAYE, ET AL., HOUSING AND

applicable to residential landlords, found in Baltimore's housing code, ban flaking, loose, or peeling paint in the exterior or interior of residences.[95] State statutes also govern the use and maintenance of lead paint in and on buildings.[96] Maryland is one of a few states or localities that regulate the abatement process itself.[97]

However, the government tests few properties for lead.[98] Testing for the

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COMMUNITY DEVELOPMENT 293-94 (1989) (discussing urban revitalization). This section discusses difficulties that have arisen in using these approaches in Baltimore, Maryland, which has state and local laws regarding lead-based paint and is viewed as a city in the forefront of lead poisoning prevention.

95. *See* BALTIMORE, MD., CODE art. 13, § 702 (1983) (requiring dwellings to be in good repair and safe condition); *id.* § 703 (defining "good repair and safe condition" to include being free of flaking, loose and peeling paint or paper); *id.* § 706 (requiring loose and peeling paint to be removed from exterior and interior surfaces prior to painting).

96. *See* MD. ENVIR. CODE ANN. § 6-301 (1993) (prohibiting the use of lead-based paint in residential interiors and on exterior surfaces including porches). Other states have similar provisions. *See, e.g.* DEL. CODE ANN. tit. 31, § 4114(d) (1985) (prohibiting lead-based paint on interior and exterior surfaces of dwellings, including fences and outbuildings); ILL. ANN. STAT. ch. 410, para. 45/3(b) (Smith-Hurd 1993) (prohibiting lead in buildings used care for children and buildings that are accessible to children); ME. REV. STAT. ANN. tit. 22, § 1316 (West Supp. 1993) (prohibiting lead-based substances on any exposed surface of a dwelling or child care facility); N.J. STAT. ANN. § 24:14A-5 (West Supp. 1993) (declaring lead-based paint on dwelling interiors and on exteriors accessible to children to be a public nuisance); N.Y. PUB. HEALTH LAW § 1372 (McKinney Supp. 1993) (prohibiting lead-based paint on interior surfaces, window sills, or frames, and porches); R.I. GEN. LAWS § 45-24.3-10 (1991) (deeming unsafe lead-based substances when on surfaces accessible to children age one through six and when such substances are either in a defective condition or on interior surfaces such as window sills or frames, doors, door frames, walls, ceilings, banisters, and porch railings); S.C. CODE ANN. §§ 44-53-1330 to -1340 (Law Co-op. 1985) (prohibiting lead-based paint on fixtures or exposed surfaces of a dwelling or child care facility); WIS. STAT. ANN. § 151.03 (West 1989) (prohibiting lead-based paint on an exposed interior surface of a dwelling, an exposed exterior surface of a structure used for childcare, on a fixture accessible to children).

97. *See* MD. REGS. CODE tit. 26(02), §§ 07.01 to -.14 (1988) (mandating procedures for abating lead containing substances from buildings, requiring storage of residents' possessions during abatement, and limiting people and pets from access). Other states also regulate this process. *See, e.g.*, N.H. REV. STAT. ANN. § 130-A:5-a (1990) (providing that children are not to be present during abatement); WIS. STAT. ANN. § 151.07-.12 (West 1989 & Supp. 1993) (prescribing compliance with agency abatement standards); *Rules and Regulations Governing Housing*, Regulation 5 § IV (1987) [hereinafter Regulation 5] adopted pursuant to BALTIMORE, MD., CODE art. 13, §§ 401-402 (1983) (setting abatement standards for interior, exterior, or other surfaces that present a potential biting surface (up to four feet in height and four inches in depth) and providing that a dwelling may not be occupied during abatement).

98. The three methods used to test for the presence of lead-based paint include: (1) placing an X-ray florescence (XRF) machine on potential sites of lead-based paint (walls, baseboard, window sills, ceilings); (2) removing and sending lead paint chips to a laboratory for analysis; and (3) using dust wipes, which are placed in a bag and sent to a laboratory for analysis. City regulations are silent on the methods for initial inspection, but specifically authorize these post-abatement inspection methods. *See* Regulation 5, *supra* note 97, at § V.B. Federal guidelines

presence of lead-based paint is not part of a regular housing inspection in Baltimore; testing is handled as part of a health inspection and is conducted to locate the source of lead only after a child has been poisoned.[99] In many areas, the shortage of staff to perform testing prohibits widespread testing.[100] Until inspection staffing is increased, agencies will be unable to perform many needed lead paint inspections.

Citation of code violations is largely ineffective in bringing about abatement.[101] Once a property owner is cited, the often over-burdened health or housing agency accepts delays in abatement rather than referring cases for prosecution.[102] This result may occur because inspectors are aware of the significant expenditures required to abate lead-based paint.[103] Landlords, who are seen as supplying necessary services to the community, successfully maintain that they will abandon properties if required to abate lead paint.[104] They may have a convincing argument that closing down dilapidated housing which contains lead-based paint will only aggravate the shortage of low-cost housing.

Recent prosecutions in Baltimore have targeted abatement violations by private lead hazard abatement contractors under contract with owners rather than targeting the property owners themselves.[105] Abatement contractors

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permit testing only by an XRF detector or laboratory analysis of a paint sample. OFFICE OF PUBLIC AND INDIAN HOUS., DEP'T OF HOUS. AND URBAN DEV., LEAD BASED PAINT: INTERIM GUIDELINES FOR HAZARD IDENTIFICATION IN PUBLIC AND INDIAN HOUSING 4.0 (Sept. 1990) [hereinafter INTERIM GUIDELINES].

99. *See* Regulation 5, *supra* note 97, § II. *See generally* CLINTON BAMBERGER, ET AL., THE LAW AND PRACTICE RELATING TO LEAD PAINT POISONING (1988) (discussing Maryland law and lead poisoning litigation).

100. The cost of testing is approximately $400 for a 2000 square foot dwelling. *Oct. 17, 1991 Sen. Hearing, supra* note 24, at 15 (testimony from Dr. John Weicher, Asst. Sec. for Policy Development and Research, HUD). XRF machines cost approximately $10,000, plus $2000 annual maintenance. Testing is labor intensive, and an operator of an XRF machines requires three to four hours to test a two-story row house. Interview with Michael Wojtowycz, *supra* note 82.

101. *See supra* notes 83-84 and accompanying text. *See generally* Mary A. Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 561-62 (1982) (citing studies finding that housing codes in general have not been strictly enforced).

102. Michael Wojtowycz, the Director of the Childhood Lead Poisoning Prevention Program of the Department of Health in Baltimore, Maryland, admits that his agency has not gone to court to prosecute a landlord during his tenure in that position, which began in April 1989. Interview with Michael Wojtowycz, *supra* note 82.

103. The average cost of abatement by removal is between $7700 and $11,900 per unit. HUD PLAN, *supra* note 5, at xix. Encapsulation costs averaged $5000 per unit in 1990. *Id.* at 4-22.

104. In addition to abatement costs, rental housing owners cite their inability to secure insurance to cover them against the risk of lead poisoning of tenants. Some insurers specifically exclude from coverage personal injury from lead paint. *See infra* note 134 and accompanying text.

105. *See* Bernard A. Penner, *Lead Paint Prosecution*, 5 DIG. ENVTL. L. 166 (1992)

violate lead abatement regulations and clean water statutes if they fail to take proper precautions to protect from lead paint debris the workers, occupants of the premises being abated, and waterways of the neighborhood.[106] These cases, which affect worker and occupant safety, and clean water, are brought under state law by the environmental crimes unit of the Attorney General's Office rather than by the locally based prosecutors of code violations.[107]

Criminal laws have not served as a significant deterrent against failure to abate lead paint because violations are rarely prosecuted. As a result of weak enforcement of existing state and local laws, the private sector has been slow to develop an industry to abate lead-based paint from residences. Therefore, research and development on techniques for removing or containing lead-based paint economically and safely for both occupants and workers has been slow to develop.[108]

VII. TENANTS' REMEDIES: MISPLACED BURDEN OF PROOF

The warranty of habitability implied by common law[109] or incorporated by statutes[110] into residential leases in some jurisdictions places on landlords the duty to rent premises free of lead-based paint and in compliance with the state and local laws on lead-based paint. A landlord's civil liability for breach

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(describing Maryland's first criminal prosecution for improper lead abatement against a contractor who, although trained in lead abatement and aware of the nature of the job — exterior work on a house built before 1930 - and of evidence of lead poisoning of a dog and a worker at the site, failed to test for lead, warn workers of danger, or ensure that all lead debris was removed from the site); *see also* Bernard A. Penner, Summary of the Statement of Facts submitted in *State v. Crosby Restorations or Mark Crosby, Inc.*, No. 191239002 (Baltimore City Cir. Ct. Jan. 21, 1992) (containing additional details on the first Maryland prosecution) (unpublished manuscript on file with the author); MD. ATT'Y GEN. NEWS RELEASE (Apr. 22, 1993) (reporting a guilty plea and payment of a $1500 fine by RIL FAX, Inc., a real estate firm that continued to discharge paint stripping waste containing lead into a storm drain after being warned against this practice by the city).

106. *See id.*

107. Procedures and remedies for violations of MD. REGS. CODE tit. 26(02), §§ 07.01 to -.14 are listed in MD. ENVTL. CODE ANN. §§ 7-258 to -268 (1993).

108. *Oct. 17, 1991 Senate Hearings*, *supra* note 24, (testimony of Nick Farr reporting on the field trials of lead abatement systems conducted by City Homes, Inc., a non-profit housing provider in Baltimore).

109. Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.) (finding that D.C. housing regulations imply a warranty of habitability into residential leases), *cert. denied*, 400 U.S. 925 (1970); *see* DAYE, *supra* note 94, at 189-214 (discussing development and issues surrounding the warranty of habitability); Glendon, *supra* note 101, at 524-28 (warranty of habitability spread through legislation rather than case law).

110. *See, e.g.*, BALTIMORE, MD., CITY CODE OF PUBLIC LOCAL LAWS, §§ 9-14.1 to 9-14.2 (1980 & Supp. 1990) (discussing the implied warranty of habitability). *See generally* SCHOSHINSKI, *supra* note 76, § 3:31 (discussing the statutory warranty of habitability).

of this implied warranty could deter rental of apartments that contain lead-based paint.[111] Rent escrow laws[112] permit tenants to pay rent into court while a court determines whether alleged serious threats to health and safety exist in a tenant's dwelling. If such threats are found to exist, tenants can continue to pay rent into court until the landlord takes remedial measures ordered by the court. Thus, rent abatement laws can theoretically provide leverage over landlords to spur abatement.[113]

Without mandatory inspections to assess the habitability of rental premises, however, these laws lose much of their force. To win a claim of breach of warranty of habitability for past rent and to escrow rent prospectively, a tenant must carry the difficult burden of proving that the landlord had notice of the lead-based paint and failed to abate the problem within a reasonable time.[114] In the absence of routine testing for lead-based paint by local housing or health inspection agencies that maintain records of landlord notification, tenants must be able to prove the presence of a lead hazard and that the landlord had notice of the hazard.[115] Tenants are rarely able to meet this burden.[116]

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111. *See* Housing Authority v. Olesen, 624 A.2d 920 (Conn. App. Ct. 1993) (finding that the state statute causes automatic forfeiture by the landlord of the right to rent when lead paint is present in rental premises); Haddad v. Gonzalez, 576 N.E.2d 658 (Mass. 1991) (finding that damages for breach of warranty of habitability caused by the presence of lead-based paint were properly calculated as the difference between the fair market value of the premises and the value of the premises in a defective condition); *cf.* Copeland v. People's Sav. Bank, No. CV872390-76S, 1993 W.L. 55284 (Conn. Super. Ct. Feb. 16, 1993) (holding that, when plaintiff raised breach of warranty of habitability as basis for a tort claim, a jury instruction, that if the defective condition existed before the tenants moved into the apartment, the landlord had the burden of showing a lack of notice or knowledge, was proper).

112. *See, e.g.*, MD. REAL PROP. CODE ANN. § 8-211.1 (1988) (stating that the failure of a lessor to remove lead-based paint can lead to lessee's rent escrow). *See generally* SCHOSHINSKI, *supra* note 76, § 3:39 (discussing rent escrow statutes).

113. *See Olesen,* 624 A.2d 920 (dismissing a landlord's eviction action brought for nonpayment of rent due to a finding that tenant properly withheld the rent because of lead paint violations on the premises).

114. *See* MD. REAL PROP. CODE ANN. § 8-211.1 (1988) (requiring landlord to abate within twenty days of receiving notice of the presence of lead paint). *See generally* SCHOSHINSKI, *supra* note 76, § 3:24 (discussing requirement that tenant notify the landlord for any deficiency or defect resulting in a breach of implied warranty of habitability).

115. *See* Ronald Fishkind Realty v. Sampson, 508 A.2d 478 (Md. 1986) (construing and applying MD. REAL PROP. CODE ANN. § 8-211.1, which requires that landlords remove lead-based paint after notice).

116. This assertion is primarily based on the author's observation of cases in Baltimore, Md. The cases are rarely appealed, and tenants usually appear *pro se* in disputes with their landlords. Tenant advocates have argued that an objective standard should be used regarding landlord knowledge of the presence of lead paint such as: a reasonable landlord should have known of the likelihood of the presence of lead-based paint in certain neighborhoods. For example, advocates argue that a landlord owning a house on a block of a street on which three other houses have

This burden of proof seems particularly unfair in urban areas where corporate landlords[117] and landlord associations are well aware of the presence of lead-based paint in housing in certain areas.[118] Local government maintains records of lead-based paint violations from which permit owners may easily deduce the likelihood of lead-based paint in a given neighborhood.[119] A requirement that landlords check these records when acquiring property to gain a sense of the risk in the neighborhood is advisable.

Even when a tenant in a rent escrow action proves that lead-based paint is present and that the landlord knew of its presence and has failed to abate within the statutorily prescribed time, a landlord is rarely required to remove that lead-based paint.[120] For removal to safely occur, the family must vacate

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been cited for lead paint according to public records should be deemed to have notice that other houses on that street may also contain lead-based paint unless abatement or substantial rehabilitation of the house has occurred. *See* Richwind Joint Venture v. Brunson, 625 A.2d 326 (Md. Ct. Spec. App.) (holding that property manager knew of the risks of lead poisoning when he had received lead paint violation notices on four other properties besides the property in question), *cert. granted,* 634 A.2d 47 (Md. 1993).

117. Ownership under corporate names makes it difficult to track concentration of real property ownership. The sophistication of property owners is reflected in some reported cases. *See, e.g.,* J.A.M. Assocs. v. Western World Ins. Co., 622 A.2d 818 (Md. Ct. Spec. App. 1993) (appellant group of related partnerships or joint ventures sought reformation of an insurance policy for more than 1,000 properties in and around Baltimore that excluded coverage for lead poisoning); Harford Mut. Ins. Co. v. Jacobson, 536 A.2d 120 (Md. Ct. Spec. App.) (holding that insurer was properly denied coverage for lead paint claims against owner's estate of sixty-nine one-family rental properties when poisoning was discovered prior to the policy period), *cert. denied,* 541 A.2d 964 (1988).

An analysis of lead paint violation data from Baltimore City shows that there are 395 cited owners that are joint ventures, partnerships, or corporations, suggesting that a certain level of business sophistication exists. *See* DEPARTMENT OF HEALTH OF BALTIMORE, LEAD POISONING PREVENTION OFFICE LISTING OF RESIDENCES CITED FOR LEAD PAINT VIOLATIONS (1987 - Apr. 1993) [hereinafter LEAD POISONING PREVENTION OFFICE LISTING].

118. *See, e.g.,* PROPERTY OWNERS ASSOC. OF GREATER BALTIMORE, INC., SURVIVAL GUIDE FOR RENTAL HOUSING MANAGEMENT IN GREATER BALTIMORE 27-31 (1989-1990) (describing toxic hazards, including lead paint, in rental housing).

This argument that the presence of lead paint is common knowledge was unsuccessfully made in a tort case. Brown v. Marathon Realty, Inc., 565 N.Y.S.2d 219, 221 (App. Div. 1991) (granting summary judgment to the defendant landlord when the plaintiff alleged, in a tort action, that use of lead-based paint is "commonly known" and that, therefore, the landlord had notice).

119. *See, e.g.,* LEAD POISONING PREVENTION OFFICE LISTING, *supra* note 117 (listing more than 2800 violation notices that have been issued in Baltimore City by owner and street address and showing date of notice and date of abatement approval). The data, admittedly incomplete as to ward, shows that 470 violation notices were issued in two of the city's twenty-eight wards.

120. In the University of Baltimore Housing Law Clinic, students brought twelve lead paint rent escrow cases under BALTIMORE, MD. CODE OF PUBLIC LOCAL LAWS § 9-9 in the Baltimore City Rent Court, a division of the District Court, from 1989 to 1992. Although students have secured abatement orders in their cases, they have never had a case in which lead paint has been abated in response to court order. The cases are settled for payments of up to $2500 as an

the apartment temporarily.[121] Families are typically faced with two choices: (1) temporarily relocating while an abatement is performed and returning to an apartment that may still contain a health risk if the abatement was not thorough, or (2) negotiating a financial compromise to move elsewhere. Most tenants understandably choose to move once rather than twice, preferring to move into an unquestionably lead-free environment. Strained relations with the landlord, due to the relevant rent escrow action or the potential for a tort action against the landlord if a child was poisoned, provide an additional incentive to move. Once the tenant moves, the health department will cease pursuing the violation notice. The landlord may sell the property, or simply wait and re-rent the property, often evading detection by the over-burdened inspection agency.

Moreover, courts are reluctant to issue and supervise abatement orders.[122] Rent escrow statutes provide no guidance concerning whether a court has authority to impose the tenant's moving costs on the landlord.[123] Further, the technical aspects of abatement make it difficult for a high-volume trial judge to supervise numerous abatements. While judges know that improper abatement and abatement of premises with vulnerable individuals such as pregnant women and children under seven is unsafe, what *is* safe is less clear.

State and local civil remedies for bringing about the abatement of lead-based paint in private rental premises have centered on the landlords' obligation to rent habitable premises. Tenant remedies under warranty of habitability and escrow statutes may result in a court-ordered refund of some

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inducement to tenants to move and disburse the escrow.

121. *See* Regulation 5, *supra* note 97, § (IV)(C); *see also* N.H. REV. STAT. ANN. §§ 130-A:1 to 130-A:9 (1990 & Supp. 93) (specifically disallowing children to be present during abatement). *See generally* Billings, *supra* note 37, at 1543-47 (describing laws of the cities of New York, Baltimore, Boston, Massachusetts, and Minnesota as well as HUD and CDC guidelines regarding the presence and relocation of residents during abatement).

122. This assertion is based on my personal experience as a clinical professor practicing before the Baltimore courts from 1989-92.

123. Consumer protection statutes, which provide a remedy of actual damages for misrepresentation, offer a basis for relief in cases when a landlord misrepresented premises as habitable. *See* JONATHAN SHELDON, NATIONAL CONSUMER LAW CENTER, UNFAIR AND DECEPTIVE ACTS AND PRACTICES §§ 5.5.2.2 (3d ed. 1991 & Supp. 1993) (rental of substandard housing has been held to violate unfair trade practices acts). However, this remedy does not well serve the need of a tenant who is unable to front the out-of-pocket cost and wait for reimbursement. Additionally, to prevail in a claim of misrepresentation under state consumer protection acts (CPA), the tenant bears the burden of proving the landlord knew or had reason to know of the defective condition. *See, e.g.*, Hayes v. Hambruch, 841 F. Supp. 706 (D. Md. 1994) (holding landlord renting property with lead paint not liable under state CPA for failure to state a material fact in renting the property unless the landlord can be shown to have known or to have had reason to have known of the defect); Underwood v. Risman, 605 N.E.2d 832 (Mass. 1993) (holding landlord has no duty to disclose lead paint to tenant if landlord has no prior notice of it).

rent, but those remedies have resulted in little, if any, abatement.[124] These laws are ill-suited to achieve abatement because they place the duty on tenants[125] to prove the presence of lead-based paint on their leased premises. A responsible landlord, however, 1) investigates residential premises prior to leasing them to determine whether the properties have lead-based paint and 2) should abate all hazards, rather than requiring a tenant to prove the presence of lead-based paint in court. The lead-based paint issue is too important to be litigated only as a landlord-tenant dispute, brought by tenants whose relationship to the leased premises is often transitory. State and local government should take an active role in requiring testing for and disclosure of lead hazards.

VIII. PROPERTY SALES: CAVEAT EMPTOR AND POINT-OF-TRANSFER DISCLOSURES

Sellers of private residential property have historically had few duties to disclose the condition of the property to the purchaser.[126] The doctrine of caveat emptor has placed the burden on the buyer to inspect and discover latent defects of wares regardless of the buyer's ability to judge the ware.[127] A seller who remains unaware of the presence of lead-based paint may commit

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124. *See* Gilligan & Ford, *supra* note 35, at 274-78.

125. Although a statutory grant of standing for tenants to seek relief directly from the courts on a matter such as the removal of lead-based paint is supported (as is found in CODE OF BALTIMORE, MD., CODES OF PUBLIC LOCAL LAWS § 9-9 and MD. REAL PROP. CODE ANN. § 8-211.1 (1988)), tenants are often ill-positioned in the legal system to bring about systematic change. *See* Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process,* 20 HOFSTRA L. REV. 533 (1992) (discussing the ways in which the conduct of the Baltimore City Rent Court systematically discourages tenants from voicing their claims in court).

126. Underwood v. Risman, 605 N.E.2d 832 (Mass. 1993) (disallowing purchaser's consumer protection act claim for seller's failure to disclose lead paint because purchaser failed to prove that seller actually knew of lead paint on the particular property, in spite of seller's experience in real estate, his awareness of lead hazards, and the fact that older houses have an increased likelihood of containing lead-based paint); *see also* Leo Bearman, Jr., *Caveat Emptor in Sales of Realty-Recent Assaults Upon The Rule*, 14 VAND. L. REV. 541, 574 (1961) (analyzing the trend of courts to uphold the doctrine of caveat emptor except when the facts heavily favor the buyer).

The treatment of private residential property differs from regulation of federally assisted housing, which provides a basis for purchasers to seek relief for land sales that occur without proper inspection for lead. *See* Tackling v. Shinerman, No. 521012, 1993 WL 34365 (Conn. Super. Ct. Feb. 9, 1993) (denying a mortgage company's motion to strike claims of negligence in granting a HUD/FHA loan to purchaser of house containing lead-based paint).

127. Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1135 (1931) (tracing the origins of the "buyer beware" concept and revealing that "caveat emptor," far from the ancient maxim its Latin terminology connotes, was coined in the seventeenth century and flourished more in the United States than in England).

no misrepresentation or deception in failing to disclose.[128] Use of a subjective standard to determine the owner's actual awareness of lead hazards provides an incentive to studied ignorance of the condition of the owner's property. An owner could easily apprise himself of outstanding violations, just as lenders financing a residence secure a report of liens on the property, including citations of lead-based paint violations.[129]

Recently, Maryland and many other states have required point-of-transfer disclosure by the seller regarding the condition of known defects on residential property.[130] Lead-based paint is now on the list of disclosures required in some states.[131] These disclosure laws affirm the broader societal implications of lead hazards in otherwise private real estate sales.

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128. *See e.g.*, *Underwood*, 605 N.E.2d at 835-36.

129. For example, Baltimore, Md. lien reports disclose lead-based paint citations. Interview with Michael Wojtowycz, *supra* note 82.

130. *See, e.g.*, ALA. CODE § 8-25-2 (1993) (requires disclosure of condition of property in rental-purchase agreements); CAL. CIV. CODE §§ 1102.6-1102.6a (West Supp. 1994) (requiring additional disclosure for real estate transfer); DEL. CODE ANN. tit. 6, §§ 2572, 2578 (1993) (requiring disclosure of the condition of real property); MD. REAL PROP. CODE ANN. § 10-702 (Supp. 1993) (requiring for single family home sales a written residential property condition disclosure statement on a form provided by the state real estate commission); OHIO REV. CODE ANN. § 5302.30 (Anderson Supp. 1993) (requires seller in real property transaction to provide disclosure form); TEX. PROP. CODE ANN. § 5.008 (West Supp. 1994) (requiring form of written notice to disclose condition of real property); *see also Bill That Would Force Disclosure of Home Defects Gains Support*, ST. PETERSBURG TIMES Aug. 30, 1992, at A4 (describing a home defect disclosure bill proposed in Florida).

131. Many recent statutes and proposals require disclosure by the seller, providing forms or other notification provisions. *E.g.*, CAL. CIV. CODE §§ 1102.6-1102.6a (West Supp. 1994) (providing form of written disclosure to buyer about condition of property including lead-based paint); ILL. ANN. STAT. ch. 765 para. 90/5 (Smith-Hurd 1993) (also providing a written disclosure form); MD. REAL PROP. CODE ANN. § 10-702 (Supp. 1993) (requiring the Maryland Real Estate Commission to provide a disclosure form for seller to complete about the condition of the property, including known lead-based paint); MASS. GEN. LAWS ANN. ch. 111, § 197A (West Supp. 1993) (requiring that notification of lead-based paint be given to prospective purchasers of residential premises built prior to 1978); MISS. CODE ANN. § 89-1-509 (Supp. 1993) (requires written disclosure statement to buyer and includes lead-based paint); OHIO REV. CODE ANN. § 5302.30 (Anderson Supp. 1993) (requiring transferor to disclose items proscribed on property disclosure form, which lists lead-based paint); R.I. GEN. LAWS § 5-10.6-6 (Supp. 1993) (requires real estate selling agent to provide disclosure form that includes lead-based paint); R.I. GEN. LAWS § 5-20.8-2(31) (Supp. 1993) (provides statutory notice be given to all buyers of property built before 1978 that such property may contain hazardous lead); S.D. CODIFIED LAWS ANN. § 43-4-44 (Supp. 1993) (requires disclosure of condition of property including any lead-based paint); TEX. PROP. CODE ANN. § 5.008 (West Supp. 1994) (requires seller to disclose property condition, including any lead-based paint); VA. CODE ANN. § 55-519 (Michie Supp. 1993) (requiring residential property owner to send purchaser a disclosure statement about property condition including any lead-based paint); WIS. STAT. ANN. §§ 709.02-709.03 (West Supp. 1993) (requires real estate condition report disclosing present unsafe conditions including lead-based paint).

IX. UNSTATED ASSUMPTIONS OF THE HOUSING PARADIGM IN THE CONTEXT OF LEAD

Several misguided property notions linger, framing the housing paradigm in the context of lead-based paint. They may be stated as follows:

- Lead-based paint violations are usually technical crimes. Tenants accept substandard housing "as is" in order to have housing they can afford. Prosecuting these violations unduly interferes with the housing market and would produce greater harm to tenants than the hazards do.
- Property owners do not know whether lead exists on their properties, and to require them to investigate would violate their rights to use their property.
- The property owner is an individual whose rights should be protected by the court. This image contrasts with an assumption that, as a business entity, a landlord has responsibility to the public and access to information and resources.

These outdated assumptions conflict with developments in other areas of the law, discussed in the next section, which contribute to the emerging environmental approach to the lead-based paint problem.

X. CATALYSTS TO CHANGE: OWNER AND LENDER LIABILITY

A confluence of legal trends in the commercial arena has caused the financial community to assume an important role in identifying environmental hazards in real estate. Personal injury actions against landlords[132] and products liability actions against manufacturers[133] have drawn attention to the

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132. Personal injury actions against landlords by tenants have been brought on two main theories — negligence, and when available, strict liability. For current personal injury cases, see *District of Columbia Plaintiffs Awarded $27 Million,* MEALEY'S LITG. REP. — LEAD 3 (Mar. 2, 1994) (citing Letitia Williams v. Vel Rey Properties, Inc., No. 92-CA-432 (D.C. Supr. Ct. 1994)), *$485,000 Massachusetts Settlement,* MEALEY'S LITIG. REP. — LEAD 6 (March 16, 1994) (citing Bailey v. Harkness, No. 92-1659 (Mass. Super. 1994)). For a discussion of reported cases, see Gilligan & Ford, *supra* note 35, at 278-82; Freniere, *supra* note 35, at 389-93.

133. Products liability actions against lead-based paint and pigment manufacturers have been generally unsuccessful due to problems in proving causation and procedural objections based on the delay in bringing suits. For case law addressing causation themes, see Hurt v. Philadelphia Hous. Auth., 806 F. Supp. 515, 530-36 (E.D. Pa. 1992) (mem.) (rejecting claim, primarily because of inability to prove proximate cause, brought by the City of Philadelphia against several pigment manufacturers and their trade association based on theories of products liability, strict liability, failure to warn, breach of warranties, fraud, restitution, indemnification, and joint and several liability); Santiago v. Sherwin Williams Co., 794 F. Supp. 29, 31 (D. Mass. 1992)

pattern of serious harm caused by lead-based paint and the attendant financial risk. Insurers have become more cautious in issuing and interpreting policies on certain dilapidated properties.[134] The passage of federal laws imposing

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(rejecting the application of the concert of action and enterprise liability tort recovery theories to an action filed against several lead-based paint manufacturers when plaintiff was unable to identify any one manufacturer as the cause of injury) *aff'd*, 3 F.3d 546 (1st Cir. 1993).

For case law addressing the procedural defect problem, see LeBlanc v. Sherwin Williams Co., 551 N.E.2d 30 (Mass. 1990) (holding that the Boston Housing Court does not have jurisdiction over a plaintiff's claim against lead-based paint manufacturers because the claim is a products liability action rather than a housing action); Christopher v. Duffy, 556 N.E.2d 121 (Mass. App. Ct. 1990) (holding that the mother of a deceased child whose death was allegedly due to lead-based paint poisoning could not amend her complaint to add five lead-based paint manufacturers six years after the original complaint had been filed, because the manufacturers would be unduly prejudiced by the delay). *But cf.* City of New York v. Lead Indus. Ass'n, 597 N.Y.S.2d 698 (App. Div. 1993) (holding that action against paint manufacturers would not be time-barred when manufacturers intentionally concealed paint hazards).

For a discussion of products liability strategies, see Edmund J. Ferdinand III, *Asbestos Revisited: Lead-Based Paint Toxic Tort Litigation in the 1990s*, 5 TUL. ENVTL. L.J. 581, 598-99 (1992) (comparing asbestos to lead-based paint toxic tort suits in which courts reject a market-share theory when identification of the paint manufacturer is impossible); Freniere, *supra* note 35, at 393-94 and 419 (recommending that states develop and adopt a uniform act to preclude lead-based paint manufacturers from asserting claims of negligent parental supervision against a poisoned child's parents).

134. The inability of private landlords with low income housing to get insurance is a problem in Baltimore. *See Oct. 17, 1991 Sen. Hearing, supra* note 24, at 42 (testimony of Walter Farr, Enterprise Foundation). To address this problem in Pennsylvania, state law requires that insurers give two years notice on existing policies before failing to renew because of lead hazards. *Id.* at 43 (testimony of Karen Florini, Environmental Defense Fund).

Insurers argue that pollution exclusion clauses include lead-based paint poisoning claims. A general pollution exclusion clause has been held ineffective to foreclose claims of harm from lead-based paint. *See* Mount Vernon Fire Ins. Co. v. Valencia, No. 92 CV 1253 (RR), 1993 U.S. Dist. LEXIS 13265 (E.D.N.Y. July 6, 1993) (holding that insurance company was obligated to defend corporation in an action concerning lead paint poisoning as policy's "pollution exclusion" clause did not deny coverage); Atlantic Mut. Ins. Co. v. McFadden, 595 N.E.2d 762 (Mass. 1992) (declaring that insurance contract containing a "pollution exclusion" did not exclude coverage for lead poisoning because a reasonable insured might interpret the provision to exclude industrial pollution, but not to exclude injury from lead poisoning in a private residence); *see also* Lee H. Kozol, *The 'Absolute' Pollution Exclusion Inapplicable to Lead Paint Poisoning*, MEALEY'S LITIG. REP. LEAD April 14, 1993, at 20 (arguing that courts construe pollution exclusions narrowly against the drafting insurers in non-industrial contexts such as rental premises). *But cf.* Oates v. State, 597 N.Y.S.2d 550 (Ct. Cl. 1993) (finding that a pollution exclusionary clause in an insurance policy bars coverage of lead poisoning from interior paint). The date of the "occurrence" of lead poisoning, which is manifested over a period of time, is hotly contested because insurers resist claims that arise before the policy period begins. *See* Scottsdale Ins. Co. v. American Empire Surplus Lines Ins. Co., 811 F. Supp. 210 (D. Md. 1993) (finding that a test showing the doubling of lead in a child's blood within two weeks of the expiration of the policy was sufficient to show that poisoning occurred within the policy period in an action by one insurer to partially indemnify a second insurer); Hartford Mut. Ins. Co. v. Jacobson, 536 A.2d 120 (Md. Ct. Spec. App.) (denying coverage because tenants lead poisoning

liability on responsible parties for the costs of cleaning up properties containing hazardous substances and the development of lender liability theories[135] have alerted buyers and lenders to the wisdom of exercising environmental due diligence before acquiring or financing a business property.[136] Additionally, lenders have been held liable to purchasers for defects in single family homes.[137]

Environmental hazards in housing[138] also affect the soundness of investment in residential properties.[139] As the market becomes more sensitive to environmental risks, the presence of lead-based paint hazards will negatively affect the appraisal value of property. Therefore, property owners will have an incentive to clean up lead hazards in their properties. Investors will benefit in risk reduction and occupants will benefit in health protection.

XI. ENVIRONMENTAL PARADIGM: DISCOVER AND ADDRESS HAZARDS

Environmental laws are premised upon certain values and themes that place a high value on nature and promote careful action to avoid health

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was discovered prior to the effective date of the policy), *cert. denied,* 541 A.2d 964 (Md. 1988); *see also* Mitcheson v. Harris, 955 F.2d 235 (4th Cir. 1992) (dismissing the insurer's declaratory judgment action for an interpretation of "occurrence" for lower court's failure to abstain from deciding pending state claims).

135. Lender liability law has largely developed under CERCLA. Unless a lender was involved in the day-to-day operations of a borrower's facility or has foreclosed on property containing hazardous material, the lender is not liable under CERCLA. United States v. Maryland Bank & Trust Co., 632 F. Supp. 573 (D. Md. 1986) (denying summary judgment motion by lender on issue of whether lender was liable under CERCLA after the lender purchased a dump site at its own foreclosure sale). Section § 9601(20)(A) of title 42 provides an exemption from liability for "a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. § 9601(20)(A) 1988; *see also* 40 C.F.R. § 300.1100 (1992) (providing a security interest exemption under CERCLA). For an example of a lender exercising enough control to take it out of the secured creditor exception, see United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) (holding that participation in the financial management of a facility to a degree that indicates ability to influence the corporation concerning its treatment of hazardous wastes leads to a loss of exemption), *cert. denied,* 498 U.S. 1046 (1991).

136. *See generally* JOEL S. MOSKOWITZ, ENVIRONMENTAL LIABILITY AND REAL PROPERTY TRANSACTIONS: LAW AND PRACTICE (1989 & Supp. 1993).

137. *See* Craig R. Thorstenson, Note, *Mortgage Lender Liability to the Purchasers of New or Existing Homes,* 1988 U. ILL. L. REV. 191 (advocating a cause of action against lenders for failure to disclose information on defects in financed properties).

138. Identified hazards include lead-based paint, asbestos, radon, formaldehyde foam insulation, hazardous wastes, and contaminated ground water. *See* ENVTL. PROTECTION AGENCY, A HOME BUYER'S GUIDE TO ENVIRONMENTAL HAZARDS (1990).

139. Mark J. Bennett, *Home Sweet Home - Or Is It? Environmental Issues in a Residential Setting,* 56 BNA BANKING REP. 874 (1991) (recommending that buyers obtain environmental reviews before purchasing a residence).

risks.[140] Federal environmental laws call for inclusion of all potentially responsible parties and problem solvers, identification and development of needed resources, and methodical action to meet long-term goals.[141] Environmental advocates have sought comprehensiveness in environmental statutes[142] and coordinated strategies between governmental agencies and private actors to achieve statutory goals.[143]

The emerging paradigm for addressing lead hazards reflects environmental values: discovery and disclosure of hazards, relocation of people to safe housing during abatement, prioritization in hazard abatement, and penalties for endangerment of people. Key elements of a legal strategy are: mandated disclosure; incentives to infrastructure development; mandated federal and state agency coordination to develop uniform standards and safe abatement techniques; creation of funding mechanisms for abatement; and, sanctions for failure to comply.

The emerging approach of identifying and addressing lead hazards is interdisciplinary and broadly inclusive of the many occupations active in the housing rehabilitation, realty, and finance systems.[144] Environmental audits of property at sale and refinancing are becoming more commonplace.[145] An infrastructure of private testing and deleading companies is necessary to implement the new approach, and uniform standards for safe abatement must be developed. Legislative schemes in Massachusetts,[146] at the federal

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140. *See supra* note 2.

141. *See generally* VICTOR J. YANNACONE, JR., ET AL., ENVIRONMENTAL RIGHTS AND REMEDIES §§ 1:2-1:3 (1972) (positing that national mobilization on environmental issues involves the following: scientific study, data collection, development of techniques and staff capability, setting of timetables for achieving goals, regional planning, provision of socially relevant environmental data to the public, and interdisciplinary coordination).

142. In the area of residential landlord-tenant law, a trend from private ordering to statutory regulation began in the 1960's and continued until the early 1980s. *See* Glendon, *supra* note 101, at 504-05. The comprehensive statutory framework of the environmental paradigm is largely parallel to extension of this trend.

143. *See* Harold A. McDougall, *Social Movements, Law, and Implementation: A Clinical Dimension for the New Legal Process*, 75 CORNELL L. REV. 83, 93-94 (1989) (describing multi-faceted strategies of public interest lawyers seeking to implement actual change).

144. *See* ALLIANCE, *supra* note 71 (recommending a comprehensive plan of action); ALLIANCE TO END CHILDHOOD LEAD POISONING & CONSERVATION LAW FOUNDATION, MODEL STATE LAW LEAD POISONING PREVENTION ACT (1993) [hereinafter MODEL LAW] (providing a model law establishing a lead poisoning prevention program; mandating screening, reporting and developmental assessments; testing for and remediation of lead-based paint hazards, controlling lead hazards; requiring training and licensure of "deleaders;" providing for liability and enforcement; and providing financial assistance to property owners for abatement costs).

145. *See* George V. Cleve, *The Changing Intersection of Environmental Auditing, Environmental Law and Enforcement Policy*, 12 CARDOZO L. REV. 1215 (1991) (exploring the basis for risks and benefits of environmental audits in business settings).

146. *See infra* notes 149-204 and accompanying text.

level,[147] and in FNMA's contractual requirements[148] illustrate the emerging approach.

XII. MASSACHUSETTS: STATE PIONEER IN LEAD POISONING PREVENTION

The public health laws of Massachusetts concerning lead-based paint poisoning[149] demonstrate four main objectives consistent with a legal environmental paradigm: coordination of public and private sector actors, disclosure of hazards, an affirmative duty to abate, and sanctions (including treble punitive damages) for failure to abate.[150] In addition, the laws contain indurements to continued investment in housing. These features are discussed below.

A. Coordination

An interdisciplinary approach to the government's role in lead poisoning prevention is evident in these laws in that they create a lead poisoning control center to administer core detection, prevention, and hazard abatement programs.[151] To consider perspectives of private sector interests, the statute calls for appointment of an advisory committee for the lead poisoning prevention program.[152] The center coordinates statewide reporting and record keeping,[153] public education,[154] child blood lead screening,[155] priorities for methodical inspection of properties,[156] field testing of abatement and containment methods,[157] regulation of inspectors and deleaders,[158] and enforcement of criminal[159] and civil[160] provisions. Statewide compilation of data relevant to the prevention program facilitates interagency work. Data on cases of poisoning[161] and child blood lead

147. *See infra* notes 205-38 and accompanying text.

148. *See infra* notes 239-57 and accompanying text.

149. MASS. GEN. LAWS ANN. ch. 111, §§ 189A-199A (West 1983 & Supp. 1994).

150. *See id.*

151. *Id.* § 190 (West Supp. 1994).

152. *Id.* § 190 (West Supp. 1994) The governor appoints the advisory committee's fourteen members as follows: four from public health, one developer, two parents of lead-poisoned children, one banker, one landlord, one realtor, and one insurance industry representative. *Id.*

153. *Id.* § 191 (West 1983).

154. MASS. GEN. LAWS. ANN. ch. 111, § 192 (West 1983).

155. *Id.* § 193 (West Supp. 1994).

156. *Id.* § 194.

157. *Id.* § 192A.

158. *Id.* § 197B.

159. MASS. GEN. LAWS ANN. ch. 111, §§ 198, 199A (West Supp. 1994).

160. *Id.* § 199.

161. *Id.* §§ 191, 193 (West 1983 & Supp. 1994).

screening[162] provide a basis for determining emergency lead poisoning areas.[163] In addition, data on inspection of dwellings is geographically indexed to facilitate the location of emergency areas.[164]

Additionally, the laws foster infrastructure development. Interagency coordination[165] can spur development of technology for testing and abatement.[166] Massachusetts also has required creation of a state laboratory to conduct testing of blood samples, paint, and other material samples from properties.[167] The state requires its agencies to test abatement and containment methods,[168] and specifies statutory standards for the abatement process.[169]

In Massachusetts, the state requires physicians, hospital personnel, public health nurses, or other persons diagnosing lead poisoning to report cases of poisoning to a statewide registry.[170] Producers, sellers, and even donors are prohibited from making or providing to the public toys, furniture, cooking, and eating or drinking utensils to which any lead-based substance has been applied. Further, no one may apply lead-based paint to interior or exterior surfaces of dwellings or fixtures.[171] Deleaders (other than owners),[172] deleading operations,[173] and lead testing laboratories[174] must meet licensing standards. Deleaders and their superiors are subject to license suspension[175]

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162. *Id.* § 193 (West Supp. 1994).

163. *Id.* § 194A.

164. MASS. GEN. LAWS ANN. ch. 111, § 194 (West Supp. 1994).

165. Coordination occurs between the department of public health and the Bureau of Institute of Laboratories, § 195 (West 1983), the department of labor and industries, §§ 192A & 197B (West Supp. 1994), and the Massachusetts historical commission, if the premises are listed on the register of historic places. § 197(c) (West Supp. 1994).

166. An owner or deleader must inform the local department of health or code enforcement agency of the dates on which deleading will occur. MASS. GEN. LAWS ANN. ch. 111, § 197(c) (West Supp. 1994).

167. *Id.* § 195 (West 1983).

168. *Id.* § 197B (West Supp. 1994).

169. *Id.* §§ 197, 197B (West 1983 & Supp. 1994). Abatement requirements include the following: (1) remedial actions: peeling paint or other material, certain intact exterior paint, and intact interior paint below the five foot level on door and window sills, stairs and railing, doors, porch railing and other surfaces that may be chewed by children must be removed or covered, *id.* § 197(c)(1)-(2); owners must clean up paint chips, dust, and debris from the removal area, *id.* § 197(c)(5); contaminated soil must be removed or covered, *id.* § 197(c)(6); (2) licensure of deleaders and inspectors, *id.* § 197B; and (3) prohibition of occupancy during deleading. *Id.* § 197(e).

170. *Id.* § 191 (West 1983).

171. MASS. GEN. LAWS ANN. ch. 111, § 196 (West 1983).

172. *Id.* § 197B(b)-(c) (West Supp. 1994).

173. *Id.* § 197B(b)(2).

174. *Id.* § 197B(d).

175. *Id.* § 197B(f)(1).

and fines[176] for violations of the law and must comply with any cease-work orders if endangerment of residents, deleaders, or inspectors exists.[177] Coordination, therefore, is necessary under the Massachusetts program in order to regulate a broad range of occupations - health care, real estate investment, sales, leasing and inspection, housing rehabilitation/deleaders, laboratories, product manufacturers, and sellers.

B. Disclosure

The Massachusetts laws require disclosure of information to people who can take action to prevent future poisoning. Property inspections that reveal a dangerous level of lead must be reported not only to the owner of the building, but also to the affected tenants, mortgagees, lienholders, and enforcement authorities.[178] Results of the individual medical examinations must be reported to the individual and parents or guardians.[179]

The state regulates disclosure at the time of sale of a residence. When selling a dwelling, the seller and any real estate agent involved in the sale must provide a standard form notifying prospective purchasers of the possible presence of lead-based paint, the requirement for the removal or covering of lead-based paint, and any known information about the presence of lead-based paint on the premises or compliance with the removal law.[180]

The laws promote greater awareness of lead hazards by tenants. Prospective tenants after December 1, 1994 will be entitled by law to receive information from the owner about lead poisoning and any information actually known by the owner about lead hazards on the premises to be rented.[181]

Educational materials to be produced and disseminated under the lead poisoning prevention program are funded by surcharges on selected professional license fees.[182] Professions assessed the fees are those knowledgeable about the lead issue in real estate: real estate brokers and salespersons, licensed deleaders and inspectors, mortgage brokers, mortgage lenders and small lenders, and property and casualty insurance agents and writers.[183]

Testing by governmental inspectors is mandated when a poisoned child resides on the premises or has resided there within twelve months.[184] In

176. MASS. GEN. LAWS ANN. ch. 111, § 197B(f)(2) (West Supp. 1994).

177. *Id.* § 197B(f)(3).

178. *Id.* § 194.

179. *Id.*

180. *Id.* § 197A. The statute does not require the seller to test for lead-based paint, however; such testing remains up to the buyer. *Id.* § 197A(b)(1).

181. MASS. GEN. LAWS ANN. ch. 111, § 197A (d)(2) (West Supp. 1994).

182. Mass. Adv. Legis. Serv. ch. 482, § 22 (West No.10 1993).

183. *Id.*

184. MASS. GEN. LAWS ANN. ch. 111, § 194 (West Supp. 1994).

addition, testing may be requested by occupants of the premises.[185] The statute calls for testing to occur within ten days of the request "subject to appropriation" of funds for necessary staff and may be delayed up to thirty days from the request if a systematic inspection is to be held within that time in the neighborhood.[186]

C. *Abatement*

A property owner has an explicit, affirmative duty to search for and remove or cover lead hazards when a child under age six resides or is to reside in a dwelling.[187] The statute explicitly details the containment or abatement required to fully comply with the law, and once in compliance, property owners are further relieved from strict liability for any lead poisoning that may occur.[188] However, a property owner may obtain permission to use interim control measures short of abatement for one year, renewable once, while working towards a complete abatement or containment of the lead hazards on the property.[189] Property owners bear the cost of relocating a tenant during abatement and of any excess rent over that of the vacated unit.[190] Refusing to rent[191] or to renew a lease[192] to families with children under age six is not a compliance option.[193]

D. *Sanctions*

Criminal sanctions under the state sanitary code exist to punish persons engaging in conduct causing endangerment. Sanctions can be imposed under public health standards upon persons engaged in production or dissemination of lead-containing substances[194] or upon persons who fail to abate hazards in dangerous premises in which a child under six resides.[195]

Civil penalties and remedies under the state's unfair and deceptive practices act afford a major incentive to comply with the disclosure law. Civil

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185. *Id.*

186. *Id.*

187. *Id.* § 197(a). Massachusetts finances alternative housing for tenants during deleading with funds from the Maternal and Child Health block grant. *See* Billings, *supra* note 37, at 1546.

188. *Id.*

189. MASS. GEN. LAWS ANN. ch. 111, § 197(b) (West Supp. 1994).

190. *Id.* § 197(h).

191. *Id.* § 199A(b).

192. *Id.* § 199A(c).

193. Massachusetts law prohibits discrimination against families with children in rentals and the sale of housing. MASS. GEN. LAWS. ANN. ch. 151B, § 4(11) (West Supp. 1994).

194. *Id.* § 196 (West 1983).

195. MASS. GEN. LAWS ANN. ch. 111, §§ 197(a), 199A(b)-(c) (West Supp. 1994).

penalties apply for failure by a person engaged in the conduct of trade or commerce to make required disclosures.[196] The statute authorizes a treble damages award against an owner notified of dangerous levels of lead who does not satisfactorily correct the hazard.[197] Civil damages are also available under the state unfair and deceptive practices act.[198]

XIII. INDUCEMENTS TO INVESTMENT IN HOUSING

The statutory scheme includes incentives to property owners to continue investment in housing. These incentives include direct financial incentives. Property owners are eligible for tax credits for abatement expense.[199] Additionally, relief from the owner's strict liability for lead poisoning is provided for full and interim compliance.[200]

Additional inducements include controls on the financial and insurance industries to promote continued support of housing investment. The statutes prohibit banks and other lenders from discriminating in the financing or refinancing of housing solely because of lead hazards in the housing.[201] Further, to dissuade mortgage lenders from rejecting properties containing lead hazards as collateral due to liability they may incur upon taking possession of a property after default, the law allows secured lenders ninety days to bring a property into compliance after taking possession and permits recovery of cost of lead hazard reduction from the mortgagor.[202] Property liability coverage for premises for which a letter of compliance has been issued may be denied only for injury that results from gross or willful negligence.[203] Insurers who continue to insure property that is not in compliance with the lead laws must offer additional coverage to their insureds for personal injury from lead poisoning.[204]

These inducements flow from the political accommodations of the legislative process that pits the health concerns of children against the financial interests of investors. Selected owner incentives and industry control, such as those in the Massachusetts lead laws, appear designed to change the behavior of the industries that contribute to the problem of lead poisoning.

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196. MASS. GEN. LAWS ANN. ch. 111, § 199 (West Supp. 1993).
197. *Id.*
198. MASS. GEN. LAWS ANN. ch. 93A, § 9 (West 1984 & Supp. 1994).
199. MASS. GEN. LAWS ANN. ch. 62, § 6(e) (West Supp. 1994).
200. MASS. GEN. LAWS ANN. ch. 111, § 197(b)-(c) (West Supp. 1994).
201. MASS. GEN. LAWS ANN. ch. 167, § 48 (West Supp. 1994).
202. MASS. GEN. LAWS ANN. ch 111, § 197D(a) (West Supp. 1994).
203. MASS. GEN. LAWS ANN. ch. 175, § 111H(a) (West Supp. 1994).
204. *Id.* § 111H(c).

XIV. FEDERAL LAW: STIMULATING COORDINATED PUBLIC AND PRIVATE ACTION

Federal legislation has only recently addressed the issue of lead based paint in private housing. The federal government has made little progress in abating lead found on property it controls, namely public and federally-assisted housing. In 1992, Congress found that "despite the enactment of laws in the early 1970's requiring the Federal Government to eliminate as far as practicable lead-based paint hazards in federally owned, assisted, and insured housing, the Federal response to this national crisis remains severely limited . . . ."[205] The law referred to was the Lead-Based Paint Poisoning Prevention Act, enacted in 1971, which provided funds for screening and treatment of children, identification and abatement of structures containing lead-based paint, and research and development. The Act also prohibited future use of lead-based paint in residential structures that were federally owned or assisted.[206] Federal agencies were slow to implement regulations under the Act.[207] In 1992, the Residential Lead-Based Paint Hazard Reduction Act[208] set more comprehensive goals than the earlier legislation. Its purposes are:

> (1) to develop a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing as expeditiously as

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205. The Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4851(b)(7) (Supp. 1992).

206. Residential Lead-Based Paint Poisoning Prevention Act of 1992, Pub. L. No. 102-550, 106 Stat. 3897 (codified as amended in scattered sections of 42 U.S.C.); *see also* Gilligan & Ford, *supra* note 35, at 259-67 (discussing the federal response to lead based paint in federally subsidized housing).

207. Public and Indian housing regulations under the 1976 law were published in interim form only in 1990. 55 Fed. Reg. 14,556 (1990).

208. 42 U.S.C. §§ 4851-4856 (Supp. 1992). This legislation authorizes HUD to award grants to state and local governments with an approved comprehensive housing affordability strategy (CHAS). 42 U.S.C. § 4852. Government units receiving grants must then provide assistance to priority housing for the purposes of inspections, interim controls, abatement, education campaigns, relocation, and other activities promoting the purposes of the Act. The Act also sets up a task force to make recommendations on expanding resources to evaluate and reduce lead-based paint hazards in private housing. 42 U.S.C. § 4852a. HUD must issue guidelines on the conduct of federally supported risk assessments, inspections, interim controls, and abatement of lead-based paint hazards. 42 U.S.C. § 4822. The Act also requires HUD to promulgate regulations requiring disclosure of lead-based paint hazards in housing offered for sale or lease as well as to provide an inspection period before any contract becomes binding. *See* 42 U.S.C. § 4822(a)(1) (providing requirements for federally assisted housing); *id.* § 4852(d) (private housing). The Act also requires HUD to study the nature and extent of childhood lead poisoning and to develop and undertake a campaign to increase public awareness of its dangers. 42 U.S.C. § 4821.

possible;

(2) to reorient the national approach to the presence of lead-based paint in housing to implement, on a priority basis, a broad program to evaluate and reduce lead-based paint hazards in the Nation's housing stock;

(3) to encourage effective action to prevent childhood lead poisoning by establishing a workable framework for lead-based paint hazard evaluation and reduction and by ending the current confusion over reasonable standards of care;

(4) to ensure that the existence of lead-based paint hazards is taken into account in the development of Government housing policies and in the sale, rental, and renovation of homes and apartments;

(5) to mobilize national resources expeditiously, through a partnership among all levels of government and the private sector, to develop the most promising, cost-effective methods for evaluating and reducing lead-based paint hazards;

(6) to reduce the threat of childhood lead poisoning in housing owned, assisted, or transferred by the Federal Government; and

(7) to educate the public concerning the hazards and sources of lead-based paint poisoning and steps to reduce and eliminate such hazards.[209]

The Act's definitions of lead-based paint hazard, lead-contaminated dust, and lead-contaminated soil clearly extend the scope of lead hazards beyond the interior of a dwelling.[210]

The 1992 legislation establishes separate strategies for target housing[211] built before 1978 that is federally assisted[212] or owned[213] and for target

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209. 42 U.S.C. § 4851a (1992).

210. *See id.* § 4851b(15)-(17) (broadly defining the terms lead-based paint hazard, lead-contaminated dust, and lead-contaminated soil).

211. 42 U.S.C. § 4851b(27). Target housing includes housing built before 1978, but excludes housing for the elderly or disabled persons unless a child under six years of age lives with or is expected to live with the elderly or disabled person. Studio apartments (0-bedroom dwelling) are also excluded from the category. *Id.*

212. Federal assistance includes housing "covered by an application for mortgage insurance or housing assistance payments under a program administered by the secretary or otherwise receives more then $5,000 in project-based assistance under a Federal housing program." 42 U.S.C. § 4822(a)(1).

213. "[F]ederally owned housing" means residential dwellings owned or managed by a Federal agency, or for which a Federal agency is a trustee or conservator. For purposes of this paragraph, "Federal agency" includes the Department of Housing and Urban Development, the Farmers Home Administration, the Resolution Trust Corporation, the Federal Deposit Insurance Corporation, the General Services Administration, the Department of Defense, the Department of Veterans Affairs, the Department of the Interior, the Department of Transportation, and any other applicable Federal agency.

42 U.S.C. § 4851b(8) (Supp. 1992).

housing that is private. For private housing, the three main strategies include: infrastructure development, disclosure, and interdisciplinary study of the issue.

A. Infrastructure Development in Private Target Housing

The 1992 legislation provides for the development of infrastructure[214] for abatement under the Toxic Substances Control Act[215] to address the problem. It calls for the development of abatement standards to protect occupants of residential housing[216] and to protect abatement and renovation workers.[217] To facilitate testing, the Act funds research and development on abatement and lead measurement procedures[218] with the goal of producing less expensive abatement and testing technology[219] and providing uniform

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214. The law states the need to build "infrastructure - including an informed public, State and local delivery systems, certified inspectors, contractors, and laboratories, trained workers, and available financing and insurance" to combat this problem as quickly as possible. 42 U.S.C. § 4851(8) (1992).

215. 15 U.S.C. §§ 2601-29, 2641-92 (1988 & Supp. 1992). The laws pertaining to lead exposure reduction are found at §§ 2681-92 (Supp. 1992).

216. The federal legislation promotes state enactment of abatement standards. *See* 15 U.S.C. § 2684. Questions that tenant advocates have formulated as New York City revises its abatement regulations exemplify the different areas of regulation. These questions include:

(1) Who should be removed from an apartment during lead abatement?

(2) How should the relocation of occupants and the removal of their possessions be handled?

(3) How is a "chewable" surface defined?

(4) How is an "intact" surface defined? What is a "defective" paint surface?

(5) What procedures must be followed to "contain" that part of an apartment being abated?

(6) What provisions must be followed regarding the training and licensing of lead abatement workers?

(7) What abatement methods are prohibited?

(8) Should dust sampling be required after the abatement process is completed?

(9) Which regulations require polyurethane to be used on floors, and why?

(10) What procedures must be followed in disposing of lead-based paint debris? Is it a hazardous waste?

Billings, *supra* note 37, at 1540-41 (comparing approaches to these questions found in statutes in Massachusetts, Minnesota, and Maryland; local law in New York City, Baltimore, and Boston; and Federal Department of Housing and Urban Development regulations regarding lead abatement).

217. 15 U.S.C. § 2682 (c)(1) (Supp. 1992).

218. *Id.* § 2685.

219. *See id.* § 2685. As of 1990, the lead-based paint testing industry was capable of testing only 350,000 to 500,000 homes per year. HUD PLAN, *supra* note 5, at xx. Given the 57 million homes estimated to contain lead-based paint, the expansion of the testing industry's capacity to test more homes per year either through industry growth, more efficient technology, or both is an important goal. *See* HUD PLAN, *supra* note 5, at 1-4 to 1-8 (containing the recommendations of the U.S. Dept. of Housing and Urban Development on testing and

standards for environmental audits.[220]

The 1992 Act leaves to the states the task of developing standards and statutory schemes on lead paint. Given the groundwork done in these areas for federal public and Indian Housing,[221] it appears inefficient to leave these complicated determinations regarding health risks and abatement procedures to state and local governments.

B. Disclosure

To encourage the public to safeguard its health, the legislation requires that modest steps be taken to inform consumers of the lead hazards in unassisted private housing. Designated federal agencies must prepare a pamphlet on lead hazards by 1994.[222] Persons who renovate target housing for pay will be required to provide the hazard information pamphlet to owners and occupants of housing prior to starting the renovation.[223] Further, the law requires the Environmental Protection Agency to promulgate regulations, by October of 1994, that will require disclosure of the risk of lead-based paint to potential tenants and buyers of private dwellings.[224]

This federal requirement parallels some state statutes requiring sellers[225] to disclose the presence of lead-based paint upon a transfer of real property.[226] The federal law supplements state home sale disclosure laws by adding a requirement of disclosure to tenants of any known hazards.[227]

In addition, the 1992 legislation requires sellers of residential property to

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abatement).

220. *See* 15 U.S.C. § 2684. *See generally* R.B. Ruhl, *Environmental Quality: Devising Standards for Property Transfer Environmental Audits,* NAT. RESOURCES & ENV'T., Summer 1989, at 30 (advocating the development by environmental consultants and lawyers of standards for environmental audits for commercial property transfer).

221. *See* INTERIM GUIDELINES, *supra* note 99.

222. 15 U.S.C. § 2686(a) (requiring the Environmental Protection Agency in conjunction with the Dept. of Housing and Urban Development and the Dept. of Health and Human Services to prepare the brochure).

223. 15 U.S.C. § 2686(b).

224. 42 U.S.C. § 4852d(a)(1) (Supp. 1992).

225. *E.g.*, MASS. GEN. LAWS ANN. ch. 111, § 197A(b) (West Supp. 1994) (requiring real estate agents to disclose the presence of lead-based paint on a residential property to be sold).

226. One court has found an obligation to disclose under state law prohibiting unfair and deceptive practices. Richwind Joint Venture 4 v. Brunson, 625 A.2d 326 (Md. Ct. Spec. App.) (finding that sufficient evidence was presented for the jury to determine that the landlord and property manager violated the state consumer protection act by renting premises unfit for human habitation because the premises contained loose lead-based paint), *cert. granted,* 634 A.2d 47 (Md. 1993); *cf.* Underwood v. Risman, 605 N.E.2d 832 (Mass. 1993) (holding that owner's failure to disclose to prospective childless tenants the likelihood that rental apartment contained lead-based paint was not an unfair or deceptive practice under state law).

227. *See supra* notes 130-31 and accompanying text.

provide buyers with a "Lead Warning Statement"[228] and gives purchasers of residences a right to test the property for lead-based paint.[229] Unless agreed otherwise, a residential property buyer has ten days to test for lead-based paint before becoming obligated to buy the property.[230] The Act sets penalties for a seller's failure to comply.[231]

The opportunity for hazard discovery should, over time, affect rental and home buying choices and lead to gradual cleanup of the nation's housing stock. How frequently buyers will actually test for lead-based paint remains to be seen. Informed consumers will likely avoid dwellings with lead-based paint or seek to eliminate lead-based paint from dwellings that may house small children or pregnant women.

C. Interdisciplinary Task Force

The 1992 legislation establishes a task force to make recommendations to EPA regarding the feasibility of assessment of lead-based paint hazards throughout the real estate finance system: in property appraisal guidelines, in mortgage origination guidelines, and in underwriting standards.[232] The diversity and sheer size of membership of the task force[233] to study solutions to lead hazard abatement in private housing suggests the complexity of the issue.[234] The Task Force is to recommend liability standards for landlords

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228. 42 U.S.C. § 4852d(a)(3) (Supp. 1992). The statute specifies the required disclosure language:

> Every purchaser of any interest in residential real property on which a residential building was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

Id.

229. 42 U.S.C. § 4852d(a)(1)(C).

230. 42 U.S.C. § 4852d(a)(2)(C) (1992).

231. *Id.* § 4852d(b)(1) (establishing penalties to be assessed in accordance with 42 U.S.C. § 3545(f)(2), which sets a maximum penalty of $10,000 per violation); *id.* § 4852d(b)(3) (permitting treble damages as a civil remedy); *id.* § 4852d(b)(4) (providing for costs, attorneys fees, and expert witness fees to a prevailing civil plaintiff). The statute specifically bars the remedy of invalidating a contract or lien. *Id.* § 4852d(c).

232. 42 U.S.C. §§ 4852a(c)(1)-(3) (Supp. 1992).

233. *See* 42 U.S.C. § 4852a(b).

234. The task force has representatives from the Environmental Protection Agency, the Dept.

and lenders, consider a "safe harbor" concept,[235] and propose ways to increase availability of insurance coverage for contractors and alternative compensation systems for poisoning victims.[236] The Act further requires the task force to recommend whether risk assessments or notices should be given to prospective rental tenants,[237] and whether additional loan programs are necessary to fund abatement.[238]

Further, the Task Force may stimulate industries to take private, voluntary actions to contribute to the solution of the lead problem. An excellent example of this voluntary action is the Federal National Mortgage Association's (FNMA's) independent modification of its underwriting standards for multi-family properties, discussed in the following section.

XV. UNDERWRITING STANDARDS OF THE SECONDARY MORTGAGE MARKET: FANNIE MAE'S ENVIRONMENTAL POLICY REGARDING MULTI-FAMILY HOUSING

The Federal National Mortgage Association, commonly know as Fannie Mae, is a profit-making[239] corporation first chartered by Congress[240] in 1938 and reconstituted in 1968 into a federally chartered corporation owned by shareholders.[241] As the largest private investor in home mortgage loans in the United States, Fannie Mae provides financial products and services that increase the availability and affordability of housing for low-, moderate-, and middle-income Americans. To accomplish this, Fannie Mae serves as the intermediary between the mortgage markets and the private capital markets. It increases the liquidity of mortgage investments and helps distribute investment capital available for home mortgage financing across the nation.

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of Housing and Urban Development, the Farmers Home Administration, the Veterans Administration, the Federal Home Loan Mortgage Corporation, the Federal National Mortgage Association, employee organizations in the building trades, landlords, tenants, mortgage insurers, single- and multi-family real estate interests, nonprofit housing developers, property liability insurers, public housing authorities, low income advocacy groups, lead poisoning prevention advocates, and community-based organizations in areas where substantial rental housing is located. 42 U.S.C. § 4852a(b).

235. "An approved way of complying with a statute when the statute is phrased in general terms." ORAN'S DICTIONARY OF THE LAW 377 (1983).

236. 42 U.S.C. § 4852a(c)(6)-(7) (Supp. 1992).

237. *Id.* § 4852a(c)(8).

238. *Id.* § 4852a(c)(3).

239. In 1990, FNMA had a profit of $1.7 billion. Its earnings in the first half of 1991 were up 15%. H. Jane Lehman, *Firms Agree to Fund Low-Income Housing; Fannie Mae, Freddie Mac Offer $3.5 Billion*, THE WASH. POST, August 1, 1991, at B8.

240. 12 U.S.C. § 1717 (1988 & Supp. 1992).

241. UNITED STATES CONGRESSIONAL BUDGET OFFICE, CONTROLLING THE RISKS OF GOVERNMENT-SPONSORED ENTERPRISES 128-29 (1991) [hereinafter CONTROLLING THE RISKS].

Because Fannie Mae operates at the heart of the mortgage finance system,[242] it has played a key role in setting and promoting nationwide industry standards for mortgage documents and underwriting standards and practices. As a government-sponsored entity (GSE), Fannie Mae enjoys certain benefits such as exemption from securities regulation except to the extent that government securities are regulated. Among other financial activities,[243] Fannie Mae buys mortgages from primary lenders such as thrift institutions, commercial banks, and mortgage banks, and holds them until maturity.[244] It obtains financing through floating securities backed by mortgages.

Fannie Mae's underwriting standards for multi-family properties[245] take

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242. Fannie Mae provides funds for residential mortgages in two ways. First, Fannie Mae purchases mortgage loans for its portfolio from local lenders, including mortgage banking companies, commercial banks, and savings and loan associations, replenishing their funds for additional lending. The Corporation acquires funds from capital market investors. As of September 30, 1993, Fannie Mae had a net portfolio of over $180 billion of mortgage loans. Comments from Elizabeth Snyder, Vice President of Fannie Mae, to Jane Schukoske, January 27, 1994. Fannie Mae also expands the availability of funds for home mortgages by issuing mortgage-backed securities (MBS) in exchange for pools of mortgage loans from lenders. MBS outstanding as of September 30, 1993 totaled nearly $482 billion. *Id.*

243. Fannie Mae is primarily a guarantor of mortgages. In addition, in 1990 it had about 28% of its assets in portfolio lending, which involves owning mortgage loans purchased until maturity. CONTROLLING THE RISKS, *supra* note 241, at 4-5 (discussing characteristics of government-sponsored entities).

244. Rules applying to all securities, including government securities, are found at 17 C.F.R. Parts 240 and 400 (1993). The Congressional Budget Office has summarized these benefits as follows:

> GSE debt and mortgage-backed securities are exempt from Securities and Exchange Commission (SEC) regulation except to the extent that U.S. government securities are regulated. Most debt and mortgage-backed securities issued by the GSEs are eligible to be bought and sold by the Federal Reserve when it seeks to change the money supply, may be used as collateral for Federal Reserve advances, are of equal standing with Treasury debt for investment by most banks and thrifts, and are eligible to collateralize public deposits . . . .
>
> [T]he enterprises' obligations are generally believed to carry an implicit federal guarantee for several reasons. First the GSEs were chartered by or pursuant to acts of Congress and are subject to varying degrees of federal oversight. Second, the government gives GSE securities the attributes of and the same preferred investment status as Treasury debt, and exempts the obligations of most of the enterprises from the protections for investors deemed to be necessary for all debt that is publicly issued by wholly private firms. In doing so, the government signals that investors should consider GSE securities to be extremely safe. Investors infer that the government stands ready to provide financial assistance to a GSE if the enterprise gets into serious financial trouble . . . .

CONTROLLING THE RISKS, *supra note* 241, at 6-7.

245. Approximately 12% of the mortgages that FNMA held in its 1990 portfolio fell into the multi-family (five or more units) category. FNMA had financed $14.2 billion in conventional multi-family mortgages at the end of 1990, when its net mortgage portfolio was $113.9 million.

lead hazards into account. In 1991, Fannie Mae amended its property appraisal standards for multi-family dwellings[246] to require physical testing of properties that were constructed before 1978 and have no valid certification of compliance with lead-based paint abatement laws from a state or local authority. If lead based paint[247] is found on the property, Fannie Mae will purchase the mortgage only if the borrower takes remedial action or enters into a contract for remedial services[248] to bring the common areas and multi-bedroom units up to environmental standards within ninety days after loan delivery.[249]

Because the Fannie Mae underwriting standard refers to lead-based paint that is "in violation of applicable rules, laws, and regulations,"[250] applicable state or local laws set the standard. If a property presently meets local law standards, as intact lead-based paint meets the standards under some housing codes,[251] the primary lender must confirm the environmental safety status of the property to Fannie Mae over the life of the loan.[252]

CONTROLLING THE RISKS, *supra* note 241, at 130, 150.

246. FEDERAL NATIONAL MORTGAGE ASSOCIATION, UPDATE TO MULTIFAMILY DELEGATED UNDERWRITING AND SERVICING GUIDE (1991) [hereinafter FANNIE MAE GUIDE] (completely replacing the section on environmental hazard management procedures).

247. Lead-based paint is one of eleven unacceptable environmental conditions identified in § 101.04 of the FANNIE MAE GUIDE, *id.* at x-5 to x-7: "[The] presence of lead based paint on site that is in violation of applicable rules, laws and regulations; or that cannot be abated and/or managed in a reasonable manner in order to prevent exposure to sensitive populations." *Id.* at x-7. Lead in soil and in groundwater under the property are also unacceptable under the Guide. *Id.* at x-6 to x-7.

248. Under a document entitled "Lead Based Paint Acknowledgement and Indemnification Agreement," a borrower must agree to develop, implement, and carry out an operations and maintenance plan for lead based paint and to indemnify the noteholder for any liability arising from the presence of lead-based paint. This agreement is then assigned to Fannie Mae when FNMA purchases the loan. *See* FANNIE MAE GUIDE, *supra* note 246.

249. FANNIE MAE GUIDE, *supra* note 246, § 101.05. This provision is less stringent than an earlier draft of the DUS. If lead-based paint was found on the property, Fannie Mae would have found the property acceptable for purchase of the mortgage on the secondary market only if no violations of applicable law would occur and if the borrower agreed to a repair agreement and escrow to bring the common areas and multi-bedroom units up to abatement standards within one year. FANNIE MAE MULTIFAMILY DELEGATED UNDERWRITING AND SERVICING PRODUCT, Line Phase I Assessment (Proposed Draft August, 1990).

250. FANNIE MAE GUIDE, *supra* note 246, § 101.04(9).

251. *Compare* MD. REAL PROP. CODE ANN. § 8-211.1 (1988) (requiring abatement of intact lead based paint) *with* BALTIMORE MD. HOUSING CODE art. 13, § 703 (1983) (requiring rental provisions to be free of loose and peeling paint); *see also* Ronald Fishkind Realty v. Sampson, 508 A.2d 478 (1986) (discussing § 8-211.1 of the Maryland Real Property Code).

252. The Guide states:

> Some Properties may have conditions that are currently acceptable but must be confirmed through the life of the loan with ongoing operations and maintenance (O&M) actions. Examples include . . . lead based paint . . . . It is the Lender's

Fannie Mae's standard only applies to the multi-family properties that Fannie Mae finances. Properties that do not qualify for conventional mortgage financing, including many properties in deteriorated condition apt to contain the most dangerous lead hazards, are not financed by Fannie Mae.

Fannie Mae's appraisal requirement for single family homes, which constitute the bulk of Fannie Mae's investments,[253] is weaker. Without specifically naming lead-based paint, it calls for the appraiser to address in a comment section "adverse environmental conditions (such as, but not limited to, hazardous wastes, toxic substances, etc.),"[254] thus leaving it to the appraiser to interpret. For single family properties, Fannie Mae requires the lender to disclose to both the appraiser and the borrower only the information it has about environmental hazards.[255] The impact of Fannie Mae's environmental policies[256] will increase as it expands its investments in multi-family properties to meet the goals that the Department of Housing and Urban Development has set,[257] or as it extends its multi-family property policies on

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> responsibility to recognize when regulatory standards and/or good management practices require O&M programs. It is also the Lender's responsibility to assess the Borrower's ability to carry out any such program. The loan is not eligible if the Borrower and/or its agent is clearly not financially or organizationally capable of performing necessary O&M functions.

FANNIE MAE GUIDE, *supra* note 246, § 101.06.

253. FNMA purchased 1.1 million conventional, single-family loans in 1990, and 19.1% of those loans met the HUD definition of low and moderate income housing. Home Mortgage Disclosure Act data showed that 19.1 % of Fannie Mae's business served borrowers with incomes below median income, according to an analysis prepared by the Federal Reserve Board. H. Jane Lehman, *Fed Finds Wider Low-Income Loan Gap; Fannie Mae, Freddie Mac Programs Fall Short, Analysis Shows*, THE WASH. POST, November 2, 1991, at F1. This data conflicts with earlier reports of 36%. CONTROLLING THE RISKS, *supra* note 241, at 127-28.

254. FANNIE MAE, ANNOUNCEMENT NO. 93-11, REVISED APPRAISAL REPORT FORMS, Uniform Residential Appraisal Report (Form 1004) 3-4 (June 30, 1993).

255. Regarding single family properties, the policy is as follows:

> If the real estate broker, the property seller, the property purchaser, or any other party to the mortgage transaction informs the lender that an environmental hazard exists in or on the property or in the vicinity of the property, the lender must disclose that information to the appraiser and note the individual mortgage file accordingly. (We also require the lender to disclose such information to the borrower, and to comply with any state or local environmental laws regarding disclosure.)

FANNIE MAE, PROPERTY AND APPRAISAL ANALYSIS § 303, at 728 (1990) (entitled "Special Appraisal Considerations, Properties Affected by Environmental Hazards").

256. Data on experience under the 1991 FANNIE MAE GUIDE is not available because FNMA does not centrally compile data on files in which lead-based paint is an issue. Letter from Elizabeth A. Snyder, Vice President and Assistant to the Chairman of Fannie Mae, to Jane Schukoske (June 28, 1993).

257. 12 U.S.C. 4562(a) (Supp. 1992) requires the Secretary of the Department of Housing and Urban Development to set percentage targets for the purchase of low- and moderate-income mortgages out of the total number of mortgages purchased by FNMA and Federal Home Loan Mortgage Corporation. Section 12 U.S.C. 4564(a) mandates the Secretary to set targets for the

environmental audits to cover single-family mortgages.

XVI. FEATURES OF THE EMERGING PARADIGM

The emerging environmental paradigm regarding lead abatement has seven features that build upon the existing tort liability and criminal code enforcement systems already in place.[258] First, the paradigm includes the requirement that owners disclose known and possible lead-based paint hazards to purchasers and tenants of residential properties and further that government agencies collect, study, and publish data about the presence of lead-based paint in residences so the public can gauge the extent of the problem in privately owned housing and in turn decide how to respond.[259] Second, as a result of pressure from lenders and the secondary mortgage market, the paradigm includes an increase in private market use of environmental assessments in real estate transactions. Third, the paradigm includes federal governmental adoption of clear abatement and testing standards, application of safe abatement techniques (including relocation of children and pregnant women), and standards for training of abatement personnel.[260] Fourth, the paradigm emphasizes hazard abatement,[261] such as removing the most prolific sources of lead dust, such as friction surfaces of windows and loose and peeling paint, to protect children from poisoning. Fifth, the paradigm offers incentives to development of a responsible abatement industry.[262] Sixth, the paradigm

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purchase of a percentage of mortgages in central cities. For 1993 and 1994 the Secretary has proposed targets of 30% of mortgages for properties housing low- and moderate-income people. Federal National Mortgage Assoc.; Interim Housing Goals, 58 Fed. Reg. 53,048, 53,049 (1993). For 1993 the Secretary has set 28% as the target for purchase of mortgages in central cities, rising to 30% as the target in 1994. *Id.*

258. This emerging paradigm is as envisioned by the author. *See* YANNACONE ET AL., *supra* note 141, §§ 1:2-1:3 (discussing features of environmental law).

259. This element draws its inspiration from the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70 (1988 & Supp. 1992), which requires public disclosure of hazards by federal agencies. *See* Michael C. Blumm, *The Origin, Evolution, and Direction of the United States National Environmental Policy Act*, 5 ENVTL. & PLAN. L. J. 179 (1988).

260. Federal standards for testing and abatement of lead paint hazard exist for public and Indian housing. *See* INTERIM GUIDELINES, *supra* note 98. A feature of federal pollution control laws is the setting of federal standards. *See* Blumm, *supra* note 41, at 314-18 (discussing the characteristics of federal environmental laws); *see also* Carolyn H. Eckert, Comment, *Preventing the "Silent Epidemic" from Crippling Our Children: Recommended Revisions of the Illinois Lead Poisoning Prevention Act*, 24 J. MARSHALL L. REV. 843, 863-67 (1991) (recommending that Illinois lead-based paint statutes be strengthened by requiring inspection of rental units for lead-based paint, specifying abatement standards, certifying personnel performing abatement, and routinely screening children between six months and six years of age).

261. This element draws on the principles behind CERCLA. *See generally* text accompanying *supra* notes 43-51 (discussing the Superfund and CERCLA).

262. Civil penalties for pollution control violations are often set at a level that removes

emphasizes criminal prosecution of persons who engage in improper hazardous abatement conduct. Seventh, the paradigm includes a concern about release of lead dust during the disposal of lead abatement debris and during housing demolition.

The disclosure provision marks a shift from the "property owner's right not to know" that the common law has protected. This provision extends into the private sector the principles behind the National Environmental Policy Act of 1969, which requires federal agencies to evaluate the environmental effects of their actions, to consider alternatives, and to inform the public.[263] The following section discusses strengths of this approach.

XVII. DISCLOSURE TO TRIGGER PUBLIC AND PRIVATE ACTION

Disclosure of hazards permits members of the public to inquire about hazard information and to consider such information[264] in making purchase, leasing, maintenance, and demolition decisions about residential real estate. Failure to detect lead hazards has occurred both in private transactions and in governmental handling of this health problem.[265] Discovering and disclosing "socially relevant environmental data"[266] is key to good public and private decision making.[267]

The federal requirement of disclosure of the actual or possible presence of lead-based paint prior to sale or rental of residential real estate,[268] necessarily will create discussion of the issue by consumers and real estate professionals. That discussion may facilitate informed decision-making by buyers and renters.

As an informational remedy,[269] the notification requirement signals a

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economic advantages from noncompliance. Blumm, *supra* note 41, at 316 (discussing the economic incentives to promote compliance).

263. *See* Blumm, *supra* note 41, at 312-13 (citing Michael C. Blumm, *The Origin, Evolution and Direction of the United States National Environmental Policy Act*, 5 ENVTL. & PLAN. J. 179 (1988)).

264. Some states have mandated general community education booklets with consumer information on environmental hazards. *See, e.g.*, CAL. BUS. & PROF. CODE § 10084.1 (West Supp. 1994).

265. *See generally* YANNACONE, ET AL., *supra* note 141, § 1:2 (describing the tendency of entrenched bureaucracies to suppress information).

266. *Id.* § 1:3, at 5.

267. *See* Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001-11050 (1988); Blumm, *supra* note 41, at 320 (observing that the statute is intended to bring about a change in behavior by disclosure of information that will cause chemical manufacturers to recycle chemicals when possible) (citing Robert F. Blomquist, *The Logic and Limits of Public Information Mandates Under Federal Hazardous Waste Law: A Policy Analysis*, 14 VT. L. REV. 559 (1990)).

268. 42 U.S.C. § 4852d (Supp. 1992).

269. On informational remedies as a way of increasing democratic participation, see Cass R.

minor change in the traditional legal principle that property owners have an absolute right not to inquire about or be responsible for their own property. Until now, this property rights perspective focused on isolated transactions between buyer and seller or landlords and tenants. This perspective has viewed a family's choice to assume the risk of living with a hazard as a private matter. However, without complete information, the buyer's or tenant's decision is not an informed one.

Further, a disclosure requirement is important even when the property is not intended for immediate occupation. Renovation or razing of housing may release lead dust and debris into landfills[270] and the water supply.[271] A jurisdiction appropriately could require an environmental impact statement prior to issuance of a housing demolition permit to elicit identification of hazards that may be released during the process.[272] Ultimately, owners or their agents must be required to learn about the impact of their actions on the community.

XVIII. LEGAL BASIS FOR THE EMERGING ENVIRONMENTAL APPROACH

The emerging approach to lead-based paint problems on the state level supplements existing law — regulatory systems in place regarding occupational safety, health and housing laws, real estate transfer laws, landlord-tenant laws, planning laws, and financial assistance laws. The Massachusetts law, for example, seeks to protect health and welfare under the state's police power in a traditional manner, but does so more comprehensively than traditional approaches.

The 1992 Act, which requires the Environmental Protection Agency to promulgate regulations governing disclosure by private entities, is clearly within the federal commerce power.[273] An environmental vision of a pollution problem exposes complex, interstate relationships.[274] Intrastate

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Sunstein, *Informing America: Risk, Disclosure, and the First Amendment*, 20 FLA. ST. U. L. REV. 653 (1993). Prof. Sunstein cautions that information has a limited effect on disadvantaged persons who may not be able to read and understand it. *Id.* at 669.

270. *See* MINN. STAT. ANN. § 116.875 (West Supp. 1994) (governing permissible landfills for disposal of residential lead-based paint waste).

271. *See supra* notes 105-07 and accompanying text (regarding release of abatement debris into the storm drains).

272. *See* San Diego Trust & Sav. Bank v. Friends of Gill, 174 Cal. Rptr. 784 (Ct. App. 1981) (holding that city code provision regulating demolition permits must be read in conjunction with the city's environmental quality ordinance and the state Environmental Quality Act which require submission of an environmental impact report for discretionary projects that affect the environment, such as the demolition of a historic site).

273. "The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cls. 1, 3.

274. Thomas Jorling, *The Federal Law of Air Pollution Control, in* FEDERAL ENVIRONMENTAL

commercial activity, such as a sale of real property, is subject to regulation under the Commerce Clause when the class of such actions can reasonably be deemed to have national, interstate commercial consequences.[275] To effectuate the federal government role in pollution control, the Commerce Clause also authorizes land use control by the federal government. Federal disclosure laws that force speech withstand scrutiny under the First Amendment if they are rationally related to a proper exercise of congressional Commerce Clause power.[276] Disclosure laws reasonably related to a goal of preventing consumer deception do not violate the First Amendment free speech protection.[277]

Environmental matters disproportionately affecting ethnic minorities raise serious civil rights issues that justify a federal mandate of disclosure under Congress Fourteenth Amendment powers to afford equal protection to all citizens. While disclosure of environmental hazards in housing is within a state's police power, only a few states have opted to require disclosure.[278] The federal intervention which will take effect in 1995 requiring disclosure to tenants and buyers of lead-based paint is desirable due to the disproportionate poisoning of ethnic minority children.[279] Historical inequalities in minority communities, often resulting from zoning and planning practices that make a

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LAW 1062-63 (Erica L. Dolgin & Thomas G.P. Guilbert eds., 1974).

275. *See* McLain v. Real Estate Bd., Inc., 444 U.S. 232, 245 (1980) (holding that defendant's involvement in residential real estate title insurance and financing matters substantially affected interstate commerce); *see also* Preseault v. I.C.C., 494 U.S. 1, 18-19 (1990) (holding the National Trails Systems Act as a valid exercise of congressional power under the Commerce Clause and that plaintiffs takings claim was not ripe); United States v. Pozsgai, 999 F.2d 719 (3d Cir. 1993) (upholding a conviction under the Federal Clean Water Act and finding that the regulation of defendants' discharge of materials into wetlands did not violate the Commerce Clause), *cert. denied,* No. 93-733, 1993 WL 481913 (U.S. Feb. 22, 1994); Preseault v. United States, 24 Cl. Ct. 818 (1992) (determining whether plaintiffs had present property interests for which compensation might be due); RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.8 (1992) (describing modern commerce power tests and the decline in interpretation of the Tenth Amendment as a restriction on federal regulation of private entities); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 5-3 to -6 (1978) (asserting that, under "cumulative effect," "necessary and proper," and "substantial economic effect" tests used by contemporary courts, federal commerce power extends to activities previously viewed as local).

276. *See* Buckley v. Valeo, 424 U.S. 1, 61-63 (per curiam) (upholding disclosures by political candidates as not overbroad, and discussing disclosure laws), *extension granted by* 424 U.S. 936 (1976); American Home Prods. Corp. v. FTC, 695 F.2d 681 (3d Cir. 1983) (upholding FTC requirement that drug a company disclose presence of aspirin in its product).

277. Zauderer v. Office of Disciplinary Counsel of the Supreme Court, 471 U.S. 626 (1985) (finding no First Amendment violation by state law requiring lawyer's advertisement to disclose client's potential liability for litigation costs).

278. *See, e.g.,* MASS. GEN. LAWS ANN. ch. 111, § 194 (West Supp. 1994) and *supra* notes 130-31 (citing state disclosure statutes).

279. *See supra* note 30.

community less residentially suitable, may be actionable under federal statutes.[280]

XIX. SIGNIFICANCE OF THE EMERGING PARADIGM

The federal government's application of environmental principles to residential real estate is a pioneering action. Potential liability draws the attention of insurers and housing financiers who are risk-averse. Although the housing industry initially ignored the lead-based paint problem, its progressive members now advocate, over the long term, the solution for both the public and the private sector of investing in environmentally safe properties.[281]

Participants in the affected industries and government agencies that confront lead poisoning are turning to the emerging environmental paradigm.[282] The interdisciplinary approach, arising out of diverse coalitions and government agencies and often culminating in a statutorily created task force, offers a positive example of comprehensive problem-solving in which the law serves as a carrot - providing incentives to localities and individual property owners to maintain safe properties.

Task forces are less likely, however, to devise sticks - standards for civil liability and criminal culpability. The compromise involved in collaboration by disparate interest such as real estate investors and guardians of the public health will typically lead away from penalties and financial disincentives. There remains a role for these disincentives. State legislatures are the appropriate entities to draw lines with respect to endangerment of people through lead poisoning as they legislate prohibition of other behaviors that harm people.[283]

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280. *See* 42 U.S.C. §§ 3601-31 (1988); *see also* Dubin, *supra* note 31, at 790 n.240 and accompanying text (discussing the impact of zoning on minority communities and addressing arguments for protective zoning).

281. *See* ALLIANCE, *supra* note 71, at i.

282. The coalition approach that has been used to advance an environmental paradigm is evident in ALLIANCE, *supra* note 71. This approach is distinct from the six stages of environmental statutory evolution describing the 1960s and 1970s. *See* E. Donald Elliott, et al., *Toward A Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J. L. ECON. & ORGANIZATION 313 (1985) (describing federal development of environmental law as industry-driven pre-emption of more progressive state approaches).

283. Several states have established task forces to recommend approaches to devise methods to better prevent childhood lead poisoning. *See, e.g.*, MD. ENVIR. CODE ANN. § 6-802 (1993) (establishing lead paint poisoning commission); MASS. GEN. LAWS ANN. ch. 111, § 192A (West Supp. 1994) (task force to review, evaluate, and recommend methods of lead testing); N.H. REV. STAT. ANN. ch. 130-A:5 (Supp. 1993) (allowing investigations of lead exposure hazards); N.Y.S. PUB. HEALTH § 1370-b (McKinney Supp. 1994) (establishing advisory council on lead poisoning prevention); WIS. STAT. ANN. § 151.09 (West 1989 & Supp. 1993) establishing program to recommend how to minimize exposure to lead hazards and to identify and treat lead poisoning victims).

Market forces may play a significant role in bringing about environmentally sound responses to the hazard of lead-based paint.[284] However, to operate efficiently, market forces require government intervention to establish five prerequisites: technology, laws requiring disclosure, laws requiring safe abatement, laws setting civil and criminal liability, and government funding mechanisms for abatement. Once these elements exist, the private market can operate as a force to create compliance with laws requiring lead-based paint hazard abatement in housing operated for profit. Subsidies will be necessary to abate hazards in housing operated on a low-profit or non-profit basis.

XX. RECOMMENDATIONS

The environmental paradigm offers a useful framework for devising ways to adjust the legal system to bring about safer housing. The 1992 federal act uses the paradigm in that it will further the necessary research and development of technology and requires disclosure to residential buyers and tenants; however, it leaves further implementation of the paradigm to state legislatures.

Implementation of the paradigm entails abatement issues, such as when to mandate testing, where to set the lead level that is considered dangerous, what methods of initial and post-abatement testing are acceptable, what methods of abatement are safe for workers, and what standards are necessary for abatement worker training. It also includes planning issues, such as requiring an environmental impact statement before beginning work that may disturb a hazardous substance (*e.g.* renovation or demolition),[285] and before depositing hazardous debris in a landfill.[286]

Existing tort liability and criminal sanctions create some pressure on

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284. *See* Michael C. Blumm, *The Fallacies of Free Market Environmentalism*, 15 HARV. J. L. & PUB. POL'Y 371, 389 (1992) (citing various sources, and criticizing the thesis of TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (1991) that free markets automatically incorporate environmental costs into the setting of market prices as simplistic in its treatment of both private markets and governmental enforcement, and suggesting that the proper role for markets is to implement environmental policy rather than to establish the policy).

285. A few states require that a permit be obtained before demolishing a building. *See, e.g.*, CAL. BUS. & PROF. CODE § 7031.5 (West Supp. 1994) (mandating that cities or counties that require a permit to construct, alter, repair, or demolish a building further require the certification of the contractor's license); CONN. GEN. STAT. ANN. § 29-402 (West 1990 & Supp. 1993) (defines demolition permit as one obtained under the state building code to demolish a structure); D.C. CODE ANN. § 5-705 (1988) (requires demolition to be conducted under conditions of permit required by law or regulation); KY. REV. STAT. ANN. § 198B.060 (Michie/Bobbs-Merrill 1991) (no permit for construction, renovation, or demolition may be issued unless permit seeker shows that contracts are insured); MO. ANN. STAT. § 99.875. (Vernon Supp. 1993) (defining permits for rehabilitation and demolition of structures).

286. *See* MINN. STAT. ANN. § 116.88 (West Supp. 1994) (barring disposal of lead paint waste in unlined landfills or by incineration by a mixed municipal solid waste incinerator).

property owners to reduce lead hazards in housing, but these mechanisms touch very few property owners. To quicken the pace of lead poisoning prevention, policy makers could fill gaps in existing law by taking the following actions:

(1) *Require property owners to test for and abate lead hazards at point-of-transfer, upon registration of property for rental, and periodically thereafter.*

Testing of property for hazardous material such as lead-based paint should occur at points in time when the owner contracts with buyers or tenants. Point-of-transfer disclosure laws[287] are a first step toward hazard disclosure, but these laws fall flat if no testing has occurred. Mandated testing will insure that hazards are discovered and revealed.

State or local law should require landlords to register rental properties and to test for environmental hazards including lead based paint as a part of the registration process. In jurisdictions that have housing codes requiring removal of lead-based paint or paint hazards, the landlord is presumed to be aware of the code requirement. Rather than permit landlords to rely on archaic law that forces tenants to prove the presence of lead-based paint in a property, the law should make sure owners are aware of and responsible for the potential hazard.

Localities could provide a landlord with notice[288] of potential lead-based paint hazards at the time of application for a rental license. This information would educate the landlord with one or two properties who is much less likely than a professional landlord to know of lead hazards. Present laws, which fail to require testing of rental property for lead or to notify landlords of known lead-based paint hazards at the time of registering units for rental, miss a clear opportunity for self-enforcement of the lead-based paint laws.

Until recently, rental property owners have resisted systematic efforts to abate lead-based paint in part by successfully asserting that imposition of the costs of lead-based paint abatement would lead to massive disinvestment in rental properties in urban centers. However, a recent study has shown this investor response to be unfounded in some markets due to discounted purchase prices.[289]

The segment of the community concerned about lead poisoning continues to devise low-cost abatement mechanisms.[290] Maryland property owners, in

287. *See supra* notes 130-31 and accompanying text.

288. The notice should include environmental hazards relevant in that geographic area, including lead-based paint for houses built prior to 1978.

289. *See* Gilligan & Ford, *supra* note 35.

290. Dr. Barbara Sattler, an occupational and environmental health specialist, has suggested that an updated version of the Conservation Corps be established, that youth be trained to abate

conjunction with the Maryland Lead Paint Poisoning Commission, have developed draft guidelines for periodic testing by landlords.[291]

(2) *Provide for safe alternative housing for tenants during abatement of lead-based paint in leased premises.*

Existing rent escrow laws are toothless if they do not place an obligation on the landlord or the locality to house tenants during court-ordered lead-based paint abatement. Some local laws make it clear that tenants are prohibited from occupying a unit during abatement, but do not address the issue of relocation cost, thereby leaving the cost to be borne by the tenant.[292] State law should place responsibility on landlords to pay relocation expenses and any extra costs to the tenant as a result of renting alternative housing during lead-based paint abatement.[293]

(3) *Set uniform standards for lead dust and safe abatement at the federal level.*

Uniformity in environmental standards arguably facilitates participation in the national housing market because lenders and investors can rely on one set of standards rather than varying standards among the states. On health issues, arguments for the use of uniform standards are compelling because it is inequitable to knowingly permitting some individuals to face greater risks in housing than other individuals based on their state of residence. The Center For Disease Control has determined the blood-lead level that damages children.[294] However, at the present time, levels of lead dust from deteriorating lead-based paint in areas where children live and spend time are not set by federal law, but are left to local housing codes and state laws.

The 1992 legislation should be amended to require the Environmental

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lead and other environmental hazards, and that fees for the work be set on a sliding scale based on property owners' ability to pay. For example, abatement services could be offered to owner-occupants and to tenants whose landlords agreed to keep the rent level below the regional median. Conversation between Dr. Barbara Sattler, Director, Lead Training Center of the Environmental Health Education Center of the University of Maryland School of Medicine and Jane Schukoske, Sept. 21, 1993.

291. H.B. 970, 408th Leg. Sess., 1994 Reg. Sess., Md. (outlining testing to be done between occupation by tenants and during the occupancy - both as part of a reform package to limit owner's tort liability). A compromise version of this proposal, H.B. 760, was signed into law on May 2, 1994 as this article went to press.

292. *See, e.g.*, MINN. STAT. ANN. § 144.874 (West Supp. 1994) (requiring a board of health to ensure that tenants are relocated from rooms or dwellings during abatement that generates lead dust, but specifying that the board of health is not required to pay for the relocation).

293. *See* Billings, *supra* note 37, at 1546-47.

294. *See* CDC 1991 REPORT, *supra* note 21, at 7-11.

Protection Agency to set uniform standards regarding levels of lead dust that require remedial action when children or pregnant women may be present and to provide safety standards for the lead-based paint abatement process.

(4) *Establish funding sources for abatement for low income property owners.*

Several prerequisites are necessary to accomplish safe abatement: abatement technology, government by clear regulatory standards, competently trained abatement workers,[295] and funding for the abatement work.[296] States have begun to establish abatement funds funded by deleading permit fees[297] or rental unit fees.[298]

In addition, Congress should pass a bill proposing creation of a lead abatement fund, to be funded by an import fee on lead.[299] This fund would be the source of grants to states, urban counties, cities, and consortia of small towns for a variety of activities, including conducting housing inspections and abatement, relocating tenant families during abatements, training of abatement workers, and developing testing abatement methods.

Through the private lending sector, loans provided under the Community Reinvestment Act[300] may be targeted to alleviating neighborhood blight.[301] Neighborhood banks can channel some of these funds to be used for lead-based paint abatement.

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295. *E.g.*, MD. ENVIR. CODE ANN. §§ 6-1001 to -1005 (1993) (regulating accreditation of abatement services); *see* Eckert, *supra* note 260, at 863-67.

296. Lead Paint Abatement Program, MD. ANN. CODE art. 83B, § 2-307 (1991) (providing loans for rehabilitation of low income owner-occupied or rental units).

297. *See, e.g.*, LA. REV. STAT. ANN. § 30:2351.41 (West Supp. 1994) (establishing a Lead Hazard Reduction Fund supplied by deleading permit fees).

298. *See, e.g.*, MD. ENVIR. CODE ANN. § 6-809 (1993) (establishing a Lead Paint Poisoning Prevention Fund supplied by fees of $2 per rental unit paid by landlords); MODEL LAW, *supra* note 144, §§ 44, 46 (proposing to establish a Lead Hazard Control Fund fueled by penalties, paint taxes, and bond proceeds).

299. For a proposal by Rep. Benjamin L. Cardin (D.-Md.) analogous to Superfund, see the Lead-Based Paint Hazard Abatement Act, H.R. 2922, 102d Cong., 2d Session (1992), reintroduced as H.R. 2479, 103d Cong., 1st Sess. (1993); *see also* Freniere, *supra* note 35, at 420-21 (outlining a proposal for an Indoor Lead Paint Hazard Abatement Fund).

300. The Community Reinvestment Act of 1977, 12 U.S.C. §§ 2901-2906 (1988 & Supp. 1992).

301. *See generally* WARREN L. DENNIS & J. STANLEY POTTINGER, FEDERAL REGULATION OF BANKING: REDLINING & COMMUNITY REINVESTMENT ¶ 9.04[1] (1980) (describing statutory rights of ethnic minorities to obtain credit).

(5) Seek disgorgement of profit landlords[302] made in violation of lead-based paint laws as a penalty for such violations.

Bringing private housing into an environmental framework significantly expands the breadth of civil penalties invoked for violation. For example, CERCLA provides penalties based on economic benefits of noncompliance.[303] The Environmental Protection Agency's penalty policy provides that "penalties generally should, *at a minimum,* remove any significant economic benefits resulting from failure to comply with the law."[304] This policy applies even for statutes that do not explicitly call for consideration of economic benefits in setting penalties, such as the Toxic Substances Control Act.[305] The policy continues:

> The first goal of penalty assessment is to deter people from violating the law. . . . If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion.[306]

Economic benefits to be recaptured in the context of rental housing with lead-based paint hazards include money saved by failing to comply with the law and profits accrued from renting the housing in an illegal condition.[307] Following this theory, one court has held that rent is automatically forfeited under state law for the period in which a tenant has occupied a dwelling when lead-based paint is present in violation of state statute.[308] By contrast, damages for breach of the warranty of habitability focus on the difference in the value of the premises as rented from the value of the premises as

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302. This recommendation should also be explored as to profit taking by paint manufacturers. However, that subject is beyond the scope of this article.

303. *See* Philip Saunders, Jr., *Civil Penalties and the Economic Benefits of Noncompliance: A Better Alternative for Attorneys Than EPA's BEN Model*, 22 ENVTL. L. REP. 10,003 (1992) (criticizing the methodology used by the EPA in its computer model, BEN, for assessing economic benefits of noncompliance).

304. *Id.* at 10,0003, (quoting ENVIRONMENTAL PROTECTION AGENCY, POLICY ON CIVIL PENALTIES (Feb. 16, 1984), ELR ADMIN. MATERIALS 35083).

305. 15 U.S.C. §§ 2601-29, 2641-92 (1988 & Supp. 1992).

306. Saunders, *supra* note 303 (quoting EPA, POLICY ON CIVIL PENALTIES (Feb. 16, 1984), ELR ADMIN. MATERIALS 35083). When seeking fines against contractors for violation of lead-based paint abatement regulations, Maryland state prosecutors consider the cost of equipment (such as a High Efficiency Particle Accelerator Vacuum ("HEPA-vac") that would comply with the regulations so that contractors face the risk of a fine that would exceed the cost of compliance. Interview with Bernard Penner, Assistant Attorney General, Environmental Crimes Division, Maryland Attorney General's Office (July 2, 1993).

307. *See* Saunders, *supra* note 303, at 10,004.

308. Housing Auth. v. Olesen, 624 A.2d 920 (Conn. App. Ct. 1993).

warranted.[309] This focus on the value of shelter to the tenant, rather than on the landlord's impropriety in renting the dwelling, inappropriately tips the scales in favor of the landlord renting unsafe premises because the landlord may be allowed to retain profits derived from the illegalities.

(6) Expand enforcement and civil and criminal liability of landlords, their corporations, and their agents for knowing endangerment.

A landlord's refusal to abate lead hazards after citation by an agency should lead to criminal prosecution in cases involving the endangerment of children or pregnant women. However, little prosecution presently occurs under state and local housing and health code provisions governing lead-based paint or neglect of unsafe property conditions, because the owner's role is perceived to be that of a passive investor. When property owners are landlords, their passivity has the potential to endanger their tenants. Broadening the net of people who can be held liable for endangerment from lead-based paint to include property managers and real estate agents who rent properties is appropriate in the setting of residential real estate because these professionals have reason to know, or should be trained to know, of the existence of lead-based paint hazards in housing.

State criminal enforcement of regulations regarding lead-based paint is a new field, focusing on abatement violations by deleading contractors.[310] The release of lead-based paint and debris at the time of lead abatement or renovation fits within environmental concepts of harmful activity that should be subject to state criminal sanctions.[311]

Penalties are often disproportionately low compared to the harm caused when environmental crimes are prosecuted at the federal[312] or state level.[313] Causes cited for weak prosecution of federal and state environmental crimes at the state level are lack of adequate enforcement programs,

309. *See* SCHOSHINSKI, *supra* note 76, §§ 3:16, 3:25 (discussing the warranty of habitability as developed in case law and statutes).

310. *See, e.g.,* Penner, *supra* note 105.

311. Environmental crimes involving lead-based paint include water pollution, failure of a business entity to determine the risk of exposure of employees to lead, use of prohibited abatement methods such as dry scraping, and failure to clean up lead debris at a deleading site. *See id.*

312. *See* Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 803-808 (1991) (analyzing criminal enforcement of environmental laws by the Environmental Protection Agency and the Department of Justice and proposing ways to strengthen enforcement).

313. *See, e.g.,* Penner, *supra* note 105, at 167 (discussing the Crosby prosecution, in which the defendant was convicted and received an 80-hour community service sentence valued at $2000.)

inadequate data on compliance, and isolation of regulation drafters from the concerns of the enforcement personnel in the field.[314]

The sophistication of the participants in the housing industry justifies broadening the net of responsibility on this issue. States should hold mid-level corporate managers, realtors, and property managers responsible for civil and criminal environmental liability.[315] Mandatory liability insurance provisions can serve as warnings and protection to landlords who own one or two properties.

XXI. CONCLUSION

Perception of the problem of lead-based paint hazards in housing as an environmental hazard, known to affect low income children for decades, has caught the attention of the realty, housing finance, and insurance industries. These industries, central to the fiber of economic activity, can create substantial compliance with lead hazard abatement laws through private means of risk avoidance.

Efforts at law reform applied to physical assets, such as housing, will stagnate until there are structures in place to effect change. These structures include abatement standards, requirements that owners test to determine whether the standards are violated, entities capable of physically correcting the environmental problem, and funding mechanisms to pay for abatement of non-profit and low-profit housing stock. To succeed, the struggle to remove lead-based paint from the nation's housing requires interdisciplinary work among lawmakers, deleading contractors, health officials, and financial and insurance industry personnel. Products liability and personal injury law, which provides appropriate individual remedies, have drawn the problem of lead-based paint to the attention of major investors. This attention, first drawing defensive resistance and denial, is now leading to a pooling of resources to stimulate solutions such as victim compensation funds and property maintenance standards.[316]

The effect of past exclusion of the release of toxic substances from products in residential structures from federal environmental law coverage is clear: standards for testing and acceptable abatement of lead-based paint have only been established recently, development of more affordable methods of testing and abatement has stagnated, and the public has only been informed belatedly of the risks involved with lead-based paint. Governmental neglect of the lead-based paint problem violates the civil rights of the ethnic minorities

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314. *See* Adler & Lord, *supra* note 312, at 810-15.

315. The development of a comprehensive set of sanctions, however, is beyond the scope of this article.

316. *E.g.*, Maryland Lead Paint Poisoning Commission, discussed in text accompanying *supra* note 84, and the Federal Task Force authorized in 42 U.S.C. § 4852a(b) (Supp. 1992), discussed in text accompanying *supra* notes 232-38.

who are disproportionately poisoned by lead-based paint.

Further, the secondary mortgage market is a remarkably powerful tool for changing behavior of its participants. Once the market adopts practicable measures, such as its underwriting guideline on testing for lead-based paint in multi-family properties, that will encourage abatement of lead-based paint, then the methodical pressure of the market will change the behavior of the lending institutions, appraisers, and, ultimately, buyers and sellers of residential housing. Although environmental change is not the motivation for Fannie Mae's actions, its policy choices carry influence that can be harnessed to bring about change. This is particularly significant as the federal government imposes new goals on Fannie Mae to increase its support of affordable housing.[317]

To address conditions in slum properties and others which do not appear in secondary mortgage market portfolios, traditional housing code enforcement and tenant remedies remain necessary. To this sector, an environmental approach means increased testing and abatement. Disclosure of lead-based paint problems, if required by states at the point of sale and rental of property, will increase pressure on landlords to actually test for lead-based paint hazards themselves, because they will no longer be able to deny awareness of the risk.

The emerging environmental paradigm offers an appropriate set of social values and legal incentives for causing change in the nation's housing stock. This model invites society to consider health as a matter of economic and racial equity and causes society to question the housing categories that have led to inequitable distribution of environmental health risks.

317. *See supra* note 257 and accompanying text.