

# LEAD PAINT POISONING—MUNICIPAL, STATE, AND FEDERAL APPROACHES

WILLIAM F. GREER, JR.\*

About 200 children die from lead poisoning each year. Between 12,000 and 16,000 children are treated and survive. [Half of those who receive treatment are left mentally retarded.] But it is believed that as many as 400,000 children may be poisoned each year. Due to inadequate detection and diagnosis, the true count of lead intoxication in our Nation's children is not known. Any incidence of lead sickness is alarmingly high, because there is no reason for lead poisoning to threaten our children's lives.

Lead poisoning . . . is completely preventable . . .<sup>1</sup>

Lead paint poisoning results from young children eating quantities of lead-based paint which has peeled from walls and other surfaces of their home environment.<sup>2</sup> Lead was used as a pigment in most interior paints until approximately 1950 when the paint industry replaced it with other compounds.<sup>3</sup> The lethal nature of paints with a lead base has become apparent as older housing has deteriorated. The poisoning occurs in five to ten per cent of children between one and six years old who live in deteriorated areas.<sup>4</sup> Since poisoning occurs usually in poor housing, it is largely an ailment of lower

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\* B.A., Miami University, 1970; J.D., Washington University, 1973.

1. Statement of Senator Edward Kennedy, *Hearings on the Lead Paint Poisoning Prevention Act Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. 20 (1970) [Hearings hereinafter cited as *1970 Hearings*].

2. Medical aspects of lead paint poisoning are discussed in *1970 Hearings*; see especially Statement of Dr. Julian Chisolm, Jr., American Academy of Pediatrics, *1970 Hearings* 203-15; DR. J. LIN-FU, LEAD POISONING IN CHILDREN (Public Health Service, 1970), reproduced in *1970 Hearings* at 321-47; Public Health Service, Control of Lead Poisoning in Children (prepubl. draft, 1970) [Hereinafter cited as Control of Lead Poisoning in Children], reproduced in *1970 Hearings* at 51-174.

3. Statement of Harold Finger, Dep't. of HUD, *Hearings on the Lead Based Paint Poisoning Prevention Act Amendments of 1972 Before the Subcomm. on Health of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 17 (1972) [Hearings hereinafter cited as *1972 Hearings*].

4. Scientists' Institute for Public Information, *A Call for Help*, 10 SCIENTIST & CITIZEN 49 (April 1968), reproduced in *1970 Hearing* at 351.

socio-economic groups.<sup>5</sup> Preliminary analysis indicates that as many as 7,000,000 housing units are deteriorated and contain surfaces covered with lead paint, authorities estimate that 2,500,000 children live in substandard housing where a potential lead hazard exists.<sup>6</sup>

Health and government officials are understandably frustrated by the continuing existence of lead poisoning in children since the method of prevention is known. Avoiding the illness is accomplished by removing the dangerous paint and repainting or resurfacing the unit. The apparent ease of solution, however, is deceptive.

Significant costs are involved in a lead poisoning prevention effort. First, personnel must be committed to screening the populace to identify those children with presently dangerous levels of lead in their systems.<sup>7</sup> Acute cases require hospitalization, and if retardation occurs permanent institutionalization may be necessary.<sup>8</sup> Second, housing must be inspected to ascertain which units contain lead paint. Prevention programs in large eastern cities have been proposed with estimated annual budgets of as much as \$3,000,000.<sup>9</sup> In 1970-71 New York City continued the operation of its lead program with a budget of \$2,400,000.<sup>10</sup>

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5. One doctor has said: "This is primarily a disease of the poor, the black, the Spanish-speaking and other groups living in substandard housing. In New York, for example, as many as 86 percent of the reported cases of lead poisoning have occurred among black and Spanish-speaking persons although they make up less than 50 percent of the population." Statement of Dr. Merlin DuVal, Dep't. of HEW, 1972 Hearings 235.

6. 1972 Hearings 17.

7. Methods of screening children are discussed in DR. J. LIN-FU, *supra* note 2, 1970 Hearings 331-33; Control of Lead Poisoning in Children, 1970 Hearings 94-106.

8. The cost of treatment has been estimated by Dr. Julian Chisholm, Jr. to vary from \$1,050 to \$222,375, depending upon the severity of the poisoning. Statement of Dr. Julian Chisholm, Jr., 1970 Hearings 213.

9. It was revealed that in Philadelphia it is estimated that "\$3,000,000 would be needed for the first year to screen 45,000 children with blood lead tests and to inspect and test 50,000 dwelling units for lead hazards." Statement of the Medical Committee for Human Rights, 1970 Hearings 276. Dr. Jonathan Fine estimated that in Boston "an on-going program of education, identification and remediation, both of the child and his environment, [would cost] approximately \$1,400,000 per year . . . for the first two or three years, after which the need should diminish appreciably." Statement of Dr. Jonathan Fine, Boston Dep't. of Health & Hospitals, 1970 Hearings 235.

10. Statement of Dr. Vincent Guinee, New York City Health Services Administration, 1970 Hearings 282. The budget was based on a projection of testing 100,000 children and finding 2,500 to have significant lead levels. The total

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When a structure containing dangerous amounts of lead paint is discovered, the large cost of rehabilitating the unit must be allocated.<sup>11</sup> Enforcement problems would arise if the burden of repair were placed solely on the owner of a dwelling. An owner might attempt to abandon his investment in a deteriorating building, rather than expend money to abate a lead paint hazard. Similarly, the large expense involved could prohibit many communities from pursuing a rehabilitation program unless assistance were provided.<sup>12</sup>

The lead paint poisoning dilemma, therefore, has many facets. This note will consider solutions to the problem through housing code regulation by local governments, landlord-tenant innovations, and federal legislation.

### I. MUNICIPAL HOUSING CODES

Several cities have passed ordinances dealing with lead paint poisoning,<sup>13</sup> placing it in the broad context of governmental code enforcement.<sup>14</sup> Municipal housing and health codes are a means of encouraging the maintenance of dwellings in an inhabitable condition.

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budget was divided into screening and administrative components: finding and testing children—\$1,240,200 (\$12.40 per child); testing dwelling units for presence of lead—\$579,050; administrative costs—\$651,335 (\$6.51 per child tested). *Id.* at 283-84.

11. "The cost of hazard elimination is high. . . . The total cost for a dwelling unit may vary considerably depending on how much work is done. Washington, D.C., reports estimated spending of about \$300 per dwelling unit, while Chicago costs run as high as \$2,000 a unit." Statement of Harold Finger, *1972 Hearings* 19-20. Methods of removing or covering lead paint are listed in *Control of Lead Poisoning in Children*, at VII-11 to VII-16, reproduced in *1970 Hearings* at 157-62.

12. Dr. Jonathan Fine predicted that "a successful national program . . . placing heavy emphasis on effective treatment of high-risk children and eradication of lead-based paint surfaces in their homes would cost roughly \$100 million per year for the first two or three years." Statement of Dr. Jonathan Fine, *1970 Hearings* 236. Another official estimated that 7,000,000 units presently constitute lead hazards and further estimated a potential cost per unit ranging from \$300 to \$2,000 to eliminate the hazard; his calculations, therefore, projected a total cost of \$2 billion to \$14 billion to rectify the problem. Statement of Harold Finger, *1972 Hearings* 20.

13. *See, e.g.*, St. Louis, Missouri, Ordinance 56091, January 27, 1972. *See also* ordinances reproduced in *1970 Hearings* at 310-20. HEW has prepared both a list of provisions which may be included in a lead paint ordinance and a model ordinance, *Control of Lead Poisoning in Children*, at V-9 to V-28, reproduced in *1970 Hearings* at 115-34.

14. For a discussion of the steps in one large city's code enforcement program see Moses, *The Enforcement Process—Housing Codes*, 3 URBAN LAW. 559 (1970).

The conservation effort advances the community's welfare by both preserving its standard of living and avoiding the economic costs of unchecked deterioration.<sup>15</sup>

A number of problems arise in attempting to enforce a municipal ordinance such as one dealing with lead paint. Some enactments are in the nature of reform movements, aimed at alleviating a particular problem. Unfortunately, passage of such legislation may be erroneously equated with resolution of the problem, resulting in a loss of momentum toward developing an effective solution.<sup>16</sup>

The two fundamental means of detecting a code violation are tenant-initiated complaints and periodic survey inspections by the municipality. Voluntary reporting by occupants is less expensive but perhaps not as satisfactory since occupants may refuse to disclose violations of which they are aware. Reporting an infraction may be against the tenant's self-interest due to the possibility of retaliatory eviction, condemnation of the building,<sup>17</sup> or rent increases.<sup>18</sup>

Alternatively, the city may implement an inspection program which may be both costly and administratively problematic. For instance, the same occupant who refuses to report his building's violations may deny a city inspector access to his unit.<sup>19</sup> Owners may also obstruct enforcement when the code is too strict and compliance

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15. One author has written:

Federal subsidy is available to help do the job of clearing the worst of the slums; but costs would be reduced and the federal dollar could go further if marginal areas were upgraded through the use of lesser measures. . . . Countless millions of renewal dollars might be saved in the long run.

The new emphasis on housing codes is thus in part a tool for a kind of cut-rate urban renewal.

L. FRIEDMAN, *GOVERNMENT AND SLUM HOUSING* 50 (1968) [hereinafter cited as FRIEDMAN].

16. FRIEDMAN 44; G. STERNLIEB, *THE TENEMENT LANDLORD* 180 (1969) [hereinafter cited as STERNLIEB].

17. See generally St. Louis, Missouri, Ordinance 56091 § 10(C)(1), January 27, 1972.

18. "Since the landlord is a businessman and since the system does not contemplate that he be anything but a businessman, he must . . . shift all or a part of the cost [of code compliance] to his consumers." FRIEDMAN 196. "Not infrequently, code enforcement, where successful, results in an upgrading of building standards and with it, an increase in rents. This in turn may cause, inadvertently, the very thing which code enforcement strives to do away with, the lessening of standards as tenants double up to pay increased rents." STERNLIEB 180, citing W. NASH, *RESIDENTIAL REHABILITATION* 113-14 (1959).

19. See Note, *The Law of Administrative Inspections: Are Camara and See Still Alive and Well?* 1972 WASH. U.L.Q. 313 (1972).

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would require large expenditures; they may induce variable enforcement by "purchasing" compliance reports with payments to corrupt inspectors.<sup>20</sup>

When a code provision reaches the stage of active implementation, a basic decision must be made; whether there should be strict enforcement (in which some occupants may be compelled to vacate condemned or abandoned substandard housing and seek shelter in a tighter market) or loose administration (which may maintain the housing market but involves the occupancy of perhaps unsafe and unsanitary units).

Owners' responses to a municipal program are affected by the substance of the code, the location of their holdings, tax considerations, and their overall profit picture. Landlords are hesitant to improve in hard-core slum areas, operating under the principle that it is essential "not to improve a parcel beyond the value of limitations implicit in the area itself."<sup>21</sup> Owners are reticent to invest when a neighborhood's property values are reduced as buildings age and the area's socio-economic status declines.<sup>22</sup> Moreover, if the cost of improvements is passed on to the tenants by increased rents, the owner may have difficulty finding occupants in such an area, or he may not be able to make improvements and increase rents for fear that his present tenants would vacate.<sup>23</sup>

Improvement is also inhibited by taxes, the largest single operating expense of inner-city slum housing.<sup>24</sup> "In the face of rent level plateaus, the increasing level of the tax rate [caused by greater demand for services and a static tax base] . . . has reduced the profitability of slum investment. The typical landlord response has been to reduce maintenance and avoid additional investment."<sup>25</sup> Although

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20. FRIEDMAN 41.

21. STERNLIEB 155.

22. "The market situation in the areas of the older city which are under consideration has degenerated to the point of reaching a dynamic spiral: lack of maintenance leads to poorer rent rolls, poorer rent rolls lead to lack of maintenance." *Id.* at 223.

23. *Id.* at 93. With increasing vacancy rates in the slums, the reaction of the typical landlord with extensive holdings has been "to reduce maintenance expenditures rather than to reduce rents, with a minority making improvements to secure tenantry. . . . The weak resale and finance markets definitely inhibit rehabilitation efforts." *Id.* at xix.

24. *Id.* at xx. See generally *id.* at 203-24.

25. *Id.* at 214 (emphasis deleted).

removing the lead hazard from a dwelling unit may not be an assessable improvement, general tax pressures on the owner may affect his investment scheme so as to preclude voluntary repair expenditures.

Some owners, such as new residential landlords, may simply be unable to pay for improvements in their buildings. When a high finance charge is imposed for the initial acquisition of property, little cash for improvements may remain.<sup>26</sup> Even if long-term financing were available for improvements, many owners might still refrain due to either a judgment that the building is not worthy of investment, or a fear of going into debt.<sup>27</sup>

The owner's reluctance to improve, therefore, may be interpreted as an economic decision based on market factors. A high rate of current return is required in order to consider further investment in a building due to "a compound . . . fear of costly code crackdowns; the basic weakness of the market, both in terms of rental increases and securing full tenancy; the risk of outright loss through the complete abandonment of a parcel; and in substantial part, the pejoratives which society heaps upon the 'slum lord.'"<sup>28</sup>

The foundation of the concept that slum landlords are unscrupulous profiteers has been challenged with the observation that "investors must be attracted by high returns into occupations of great risk and small prestige."<sup>29</sup> Under this view, the owner of an unprofitable building containing code violations is simply being pragmatic when he makes only minimal repairs for compliance. The alternatives facing an investor if he does not consider his return to be adequate

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26. *Id.* at 118-19.

27. *Id.* at 196-201.

28. *Id.* at 95-96 (emphasis deleted).

29. FRIEDMAN 41.

A belief that landlords were greedy villains was a necessity for the housing reformers. Since reform laws imposed costs on landlords without reimbursing them in any way, and since no one expected or wanted rents to rise, it was morally necessary to believe that rents were exorbitant and that costs could be absorbed without giving up a fair return. It was convenient, therefore, to assume that landlords were a class of evil men, overcharging ignorant tenants and callous to the point of criminality. . . . [N]othing impeded the progress of the notion that slum money was tainted money; and belief in the evils of slum ownership became a self-fulfilling prophecy. Bad reputation is a cost to a man, even if it cannot be measured exactly and valued in dollars . . . .

*Id.* at 40, 41.

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are continuing operation in violation of the code,<sup>30</sup> allowing the city to make the necessary repairs,<sup>31</sup> or abandonment.

The actual profitability of slum property, in which code violations are frequent, is a disputed topic. A 1969 New York City study indicated that the percentage of gross income allocated to repairs and painting and the net operating income is similar for both good-condition/well-maintained and poor-condition/poorly-maintained tenements.<sup>32</sup> Other authorities reveal that net income as a percentage of gross income has declined while costs have increased.<sup>33</sup> Professor Sternlieb concluded in *The Tenement Landlord* that the actual return on investment for the properties he studied in Newark, New Jersey, was ten to twelve per cent.<sup>34</sup> Another author, however, has criticized findings such as Sternlieb's as being too limited in scope to be conclusive and suggests that "it would be a great mistake to respond to a single study by replacing the stereotype of popular fable ["slumlord" as profiteer] with a stereotype derived from the study."<sup>35</sup>

Whether the owners of substandard housing are profiteering is one factor to be considered in the question of how code compliance can be achieved when owners initially refuse to repair. Among the legal methods which code enforcement agencies may be authorized to use are criminal sanctions, equitable remedies, and various other supplemental devices.

Criminal prosecution is the foremost method of enforcing municipal codes, with fines being used to deter infractions and induce repairs.<sup>36</sup> The criminal approach, however, has frequently been crit-

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30. The economic "impossibility" of repair for a landlord has been held to preclude conviction for code non-compliance, Gribetz & Grad, *Housing Code Enforcement: Sanctions and Remedies*, 66 COLUM. L. REV. 1254, 1270-72 (1966) [hereinafter cited as Gribetz & Grad]. See also Comment, *Nonprofitability as a Defense for Noncompliance with Minimum Housing Codes*, 1972 WASH. U.L.Q. 374 (1972).

31. See note 43 and accompanying text *infra*.

32. C. RAPKIN, *THE REAL ESTATE MARKET IN AN URBAN RENEWAL AREA* 72 (1959), quoted in STERNLIEB 77.

33. STERNLIEB 79, citing *Exchange of Rental Income and Operating Expense Data*, J. PROPERTY MANAGEMENT 7 (1964).

34. STERNLIEB 88.

35. Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor*, 80 YALE L.J. 1093, 1099-1100 & n.8 (1971).

36. Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 820 (1965) [hereinafter cited as *Enforcement of Municipal Housing Codes*]. The use of jail sentences is generally limited to coercing the payment of fines. *Id.* at 824-25.

icized.<sup>37</sup> Imposing a fine on an owner of substandard housing is difficult because it must be large enough to be considered more than a negligible cost of business, yet small enough to leave capital for the needed repairs.<sup>38</sup> Many owners may be willing to risk apprehension when poorly-funded enforcement efforts result in few prosecutions or when the cost of compliance is significantly greater than the amount of the probable fine.

A variation of the criminal fine, a fixed per diem civil penalty for each day a violation persists, would encourage rapid repair to avoid a large total fine. This would discourage violations by the landlords who consider a fixed criminal fine minimal in comparison to the cost of the needed repairs.<sup>39</sup> Yet, because the proposal would appear not to increase the number of violators apprehended and subjected to penalty, many would continue to risk prosecution. Further, a mandatory fine would eliminate the theoretically important function of judicial discretion in fitting the sanction to the code violator.

The equitable remedies of injunction and receivership are effective, when used, but involve large commitments from the enforcement agencies. An injunction may require the owner to repair or cease operating his building, with equity providing needed supervision of the compliance effort and contempt sanctions being available.<sup>40</sup> Receiverships are utilized when basically sound buildings are not repaired; the court-appointed receiver makes repairs and manages the building until the amount of rent collected equals the cost of repair.<sup>41</sup> It may be difficult to find a private citizen willing to be a receiver, however, and administrative problems arise when the city functions in that capacity.<sup>42</sup> Although injunctions and receiverships involve substantial enforcement efforts, considering the hazardous nature of the lead poisoning problem, their use can be desirable.

A direct municipal emergency repair program is a final alternative when an owner does not repair and immediate work is necessary for

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37. See generally FRIEDMAN 194-97; F. GRAD, J. HACK, & J. McAVOY, *Housing Codes and Their Enforcement* 90-98 (1966); Gribetz & Grad 1275-81; *Enforcement of Municipal Housing Codes* 820-24.

38. *Enforcement of Municipal Housing Codes* 820.

39. Gribetz & Grad 1281-90.

40. *Enforcement of Municipal Housing Codes* 827.

41. FRIEDMAN 65; *Enforcement of Municipal Housing Codes* 828.

42. FRIEDMAN 67-68; *Enforcement of Municipal Housing Codes* 828-30.



the welfare of occupants.<sup>43</sup> Since the cost of a city repair service would be high,<sup>44</sup> it might be limited to immediate necessities such as heat, hot water, electricity, and pest extermination.<sup>45</sup> Lead paint is a dangerous condition, but its incidence and cost of rectification could remove it from a city repair program due to budgetary limitations and a judgment by city officials that other items should have priority.

"When the apartment market is very strong the landlord need not improve; when the apartment market is very weak the landlord fears for his investment and does not improve. What can municipal authorities use to break this impasse?"<sup>46</sup> When one considers the unwillingness of many owners to repair, the inefficacy of criminal sanctions, and fiscal limitations on city governments, the prospect of solving the lead poisoning problem is poor. It has been suggested that the frustrations of a code enforcement program lead to "a tendency to negotiate the tenant's rights away with the hope that sooner or later an adequately financed rent-subsidy or public-housing program will eliminate the slums. In consequence, a vicious circle of non-action is created."<sup>47</sup>

Rent subsidy is a possible solution to the expensive problem of code enforcement. Assuming punishment to have been unsuccessful in achieving compliance, commentators have suggested that the government should subsidize slum dwellers or landlords in order to make it profitable to operate substandard housing at code level.<sup>48</sup> A supplement to the money an occupant has available for housing would enable him to pay the increased rent which the owner would charge for improving the building. To implement the suggestion, surely a skeptical public and legislature would have to be fully convinced that slum landlords are not profiting inordinately from their investments. Even the skeptic, though, might agree that a subsidy which retains present housing would be less costly than financing the public housing which would probably be necessary if private investors were to abandon the low-income housing market.

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43. See generally F. GRAD, J. HACK & J. McAVOY, *supra* note 37, at 105-08; Gribetz & Grad 1274-75.

44. *Enforcement of Municipal Housing Codes* 835-36 & nn.182-86.

45. M. LIPSKY, *PROTEST IN CITY POLITICS* 86-96 (1970).

46. STERNLIEB 226.

47. SAX & HESTAND, *Slumlordism as a Tort*, 65 MICH. L. REV. 869, 874 (1967).

48. FRIEDMAN 196-99; STERNLIEB 234.

## II. STATE LANDLORD-TENANT RELATIONS

The existence of a landlord's obligation to keep his tenants' premises free of lead paint hazards may be derived from specific state legislative enactments, more general statutory duties, or judicial interpretations of the common law. Three states have passed statutes aimed directly at the problem, imposing a duty not to apply lead paint to the interior surfaces of a dwelling.<sup>49</sup> When such paint has already been applied and is allowed to peel—creating a lead hazard—the situation may be within the broader legislation of several states which establish a landlord's duty to repair.<sup>50</sup> Related to legislative action is the judicial expansion of the doctrine of implied warranty of habitability in landlord-tenant relations.<sup>51</sup>

A few jurisdictions provide by statute<sup>52</sup> or judicial decision<sup>53</sup> that

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49. MD. ANN. CODE art. 43 § 117A (Supp. 1972); MASS. GEN. LAWS ch. 111, §§ 190-99 (Supp. 1972); N.Y. PUB. HEALTH LAW §§ 206(1)(n), 608(1)(g), 1370-76 (McKinney 1955). *See also* municipal ordinances cited and referred to in note 13 *supra*.

50. CAL. CIV. CODE ANN. § 1941 (West 1954); CONN. GEN. STAT. REV. § 19-343 (1958); GA. CODE ANN. § 61-111 to 112 (1955); IOWA CODE ANN. § 413.66 (1949); LA. CIV. CODE ANN. arts. 2692-93 (West 1954); MASS. ANN. LAWS ch. 144, § 66 (1965); MICH. STAT. ANN. § 5.2843 (1973); MONT. REV. CODES ANN. § 42-201 (1947); N.Y. MULT. DWELL. LAW § 78 (McKinney 1946); N.D. CENT. CODE § 47-16-12 (1960); OKLA. STAT. ANN. tit. 41, § 31 (1954); PA. STAT. ANN. tit. 53, § 25025 (1957); S.D. COMPILED LAWS § 43-32-8 (1967). The statutes are discussed in 1 AMERICAN LAW OF PROPERTY 346-49 (A. J. Casner ed. 1952).

51. *See generally* Note, *Judicial Expansion of Tenants' Private Law Rights: Implied Warranties of Habitability and Safety in Residential Urban Leases*, 56 CORNELL L. REV. 489 (1971); Comment, *Landlord and Tenant—Implied Warranty of Habitability—Demise of the Traditional Doctrine of Caveat Emptor*, 20 DEPAUL L. REV. 955 (1971); Comment, *Implied Warranty of Habitability: An Incipient Trend in the Law of Landlord-Tenant?* 40 FORDHAM L. REV. 123 (1971); Annot. 40 A.L.R.3d 646 (1971).

52. CAL. CIV. CODE ANN. § 1942 (West 1954); LA. CIV. CODE ANN. art. 2694 (West 1954); MONT. REV. CODES ANN. § 42-202 (1947); N.D. CENT. CODE § 47-16-13 (1960); OKLA. STAT. ANN. tit. 41, § 32 (1954); S.D. COMPILED LAWS § 43-32-9 (1967).

53. *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970) (the cost of "vital repairs" may be deducted from rent due to the landlord's implied duty to maintain the dwelling in an habitable condition); *Jackson v. Rivera*, 65 Misc. 2d 468, 318 N.Y.S.2d 7 (N.Y.C. Civ. Ct. 1971); *Garcia v. Freeland Realty, Inc.*, 63 Misc. 2d 937, 314 N.Y.S.2d 215 (N.Y.C. Civ. Ct. 1970) (based on New York's repair statute, the court concluded that the tenant may make emergency repairs to abate a lead hazard and may recover the reasonable cost of materials and the minimum wage for labor expended). *See also* Comment, *Landlord-Tenant—*

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a tenant in some circumstances may repair certain defects in his dwelling and deduct the cost incurred from his rental payment. "Repair and deduct" may be of limited utility, however, since the amount of repair which may be offset against rent may be limited,<sup>54</sup> preventing extensive repair efforts. Also, the tenant may have waived recourse to such activity by a lease provision. In addition, the possibility of eviction for a self-help tenant is great when his landlord's rental income is depleted by repairs, whether or not the repairs are justified.

Statutes in at least two states permit rent abatement, suspending the tenant's obligation to pay rent until the landlord repairs.<sup>55</sup> Other provisions permit rent withholding,<sup>56</sup> in which a court collects and holds the tenants' rent until repairs are made. Unauthorized withholdings—rent strikes—seek the same result, but may involve tenant eviction for nonpayment of rent.<sup>57</sup>

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*Landlord Liability for Tenant Self-Help—To Paint or Not To Paint: Garcia's Dilemma*, 20 DEPAUL L. REV. 544 (1971).

The *Rivera* court summarized the circumstances when a New York tenant may repair his premises and deduct the repair costs from his rent as being when: "(1) the condition in question creates an emergency seriously affecting the habitability of the home, (2) the landlord has refused to make the repairs, and (3) the condition cannot reasonably be permitted to continue until code enforcement proceedings have run their course." *Jackson v. Rivera*, *supra* at 471, 318 N.Y.S.2d at 10.

54. CAL. CIV. CODE ANN. § 1942 (West 1954) and MONT. REV. CODES ANN. § 42-202 (1947) permit repairs only in the amount of one month's rent per year.

55. MASS. ANN. LAWS ch. 239, § 8A (Supp. 1972); N.Y. MULT. DWELL. LAW § 302-a (McKinney Supp. 1972).

56. MASS. GEN. LAWS ANN. ch. 111, § 127F (1967); N.Y. REAL PROP. ACTIONS LAW §§ 755 (McKinney 1963), 769-82 (McKinney Supp. 1972); PA. STAT. ANN. tit. 35, § 1700-1 (Supp. 1973); R.I. GEN. LAWS ANN. § 45-24.2-11 (1970). Professor Friedman suggests caution in a withholding program:

[A] genuine withholding program can only work, that is, result in code compliance, for buildings which can be salvaged—not for the worst, but for the borderline cases. Rent withholding does prod some landlords into making improvements. The difficulty is to know when this is the normal result of pressure. In other cases rent withholding simply tips the scale toward demolition, thus decreasing the housing supply without corresponding gains for the tenants.

FRIEDMAN 63.

57. See Fishman, *St. Louis Rent Strike*, 28 NAT'L LEGAL AID DEFENDERS ASS'N 111 (1970); Note, *Rent Withholding and the Improvement of Substandard Housing*, 53 CALIF. L. REV. 304 (1965); Note, *Right to Deposit Rent Payments in Escrow Fund in Protest of Housing Code Violations*, 1970 WIS. L. REV. 607.

If peeling lead paint is ignored and lead poisoning of a child occurs, the injured party may advocate several theories to obtain compensation.<sup>58</sup> A traditional tort action against a landlord for negligence in allowing a lead hazard to exist has been both approved and rejected by the courts. In *Acosta v. Irdank Realty Corp.*,<sup>59</sup> a lower New York court held a landlord responsible for hospital costs and damages to a child poisoned by lead paint, basing liability on the state's statutory landlord duty to repair<sup>60</sup> and the common knowledge that small children engage in oral exploration of accessible objects.<sup>61</sup> The poisoning was declared to have been foreseeable under the circumstances, thus recovery was found appropriate.<sup>62</sup>

Other cases, denying recovery, indicate that for a plaintiff to recover for lead paint poisoning, he must establish that the landlord had a duty to eliminate such paint and failed to do so, or that the landlord had or should have had actual knowledge that lead paint is a hazardous substance and existed in the premises. The Supreme Court of Pennsylvania held in *Kolojeski v. John Deisher, Inc.*<sup>63</sup> that the death of a child allegedly from lead paint ingestion was not actionable negligence in that particular situation: "[W]e take judicial notice that the use of such paint is common and widespread."<sup>64</sup> The court did state that the landlord would be liable to the tenant if the use of lead paint created a dangerous condition of which the landlord, but not the tenant, had knowledge.<sup>65</sup>

In another lead poisoning case, *Montgomery v. Cantelli*,<sup>66</sup> a Louisiana court of appeal found that the landlord "could not have reasonably foreseen that a child would pick paint flakes from the door and eat them."<sup>67</sup> A later Louisiana appellate court case, *Davis v.*

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58. See generally Moskowitz & Bales, *A New Threat—Lead Poisoning of Slum Children*, 3 CLEARINGHOUSE REV. 92 (1969); Note, *Lead Paint Poisoning: Legal Remedies and Preventive Actions*, 6 COLUM. J.L. & SOC. PROBS. 325, 327-32 (1970).

59. 38 Misc. 2d 859, 238 N.Y.S.2d 713 (Sup. Ct. 1963).

60. N.Y. MULT. DWELL. LAW § 78 (McKinney 1946).

61. 38 Misc. 2d at 860, 238 N.Y.S.2d at 714.

62. *Id.* at 860, 238 N.Y.S.2d at 714-15.

63. 429 Pa. 191, 239 A.2d 329 (1968).

64. *Id.* at 195, 239 A.2d at 331.

65. *Id.*

66. 174 So. 2d 238 (La. Ct. App. 1965).

67. *Id.* at 240. On the eating of paint, the court went on to say: "Such gastronomic culinary impulses are, to say the least, abnormal and unexpected, and

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*Royal-Globe Insurance Cos.*,<sup>68</sup> permitted the awarding of a \$115,000 jury verdict for the landlord's negligence which resulted in a child's lead poisoning, retardation, and institutionalization; but the State supreme court reversed the lower court, asserting that the jury's finding was a manifestly erroneous fact determination on several grounds.<sup>69</sup>

The Pennsylvania and Louisiana cases which denied recovery for alleged lead poisoning due to a lack of landlord negligence were decided between 1965 and 1970. Since that time, public (and landlord) awareness of the lead paint problem has increased due to concerned citizen groups and specific legislation at all levels of government. What is "reasonably foreseeable" is an evolving concept; it is more likely today that a plaintiff could succeed in a negligence suit against his landlord for lead paint poisoning. Two theories have recently been suggested for a plaintiff's recovery for defects in a dwelling: strict liability<sup>70</sup> and the tort of "slumlordism."<sup>71</sup>

### III. FEDERAL LEGISLATION

The federal government has recognized the lead poisoning problem and has attempted to deal with it through the Lead-Based Paint Poisoning Prevention Act of 1970.<sup>72</sup> The Act generally provided for federal grants to units of general local government for health and

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could not reasonably be anticipated by the lessor. Therefore, we are led to the inevitable conclusion that the defendant is not liable for the very unusual injury incurred by the plaintiff's child." *Id.* at 240-41.

68. 223 So. 2d 912 (Ct. App. La. 1969).

69. *Davis v. Royal-Globe Insurance Cos.*, 257 La. 523, 242 So. 2d 839 (1970), *cert. denied*, 403 U.S. 911 (1971).

70. See Note, *Products Liability at the Threshold of the Landlord-Lessor*, 21 HASTINGS L.J. 458 (1970).

71. See Sax & Hiestand, *supra* note 47.

The authors' proposed rule is:

[O]ne who undertakes to perform a service for his own economic benefit, but who performs it in a way both inconsistent with those standards which represent minimum social goals as to decent treatment and in a manner that itself is violative of the law, under circumstances where the victim had no meaningful alternative but to deal with him, commits a tort for which substantial damages ought to lie. . . . [I]f [landlords] undertake to provide services for their own economic benefit, they must serve adequately or be deemed wrongdoers in law.

*Id.* at 890-91.

72. 42 U.S.C. §§ 4801-43 (1970). Federal legislation has also dealt with code enforcement efforts, a category within which lead paint poisoning has been included. See generally Greenstein, *Federally Assisted Code Enforcement: Problems and Approaches*, 3 URBAN LAW. 629 (1971).

housing programs, a federal study of the problem, and a prohibition of the use of lead paint in certain structures.

Grants by the Department of Health, Education and Welfare (HEW) were authorized to the extent of 75% of the cost of developing and carrying out programs "to detect and treat incidents of lead-based paint poisoning."<sup>73</sup> The programs include informational efforts, development and implementation of screening methods to detect lead poisoning, medical treatment, follow-up programs, and other actions to eliminate the hazard.<sup>74</sup> HEW was also authorized to fund local efforts to identify areas of lead poisoning risk and to then eliminate the hazard.<sup>75</sup>

The health and housing programs were to be conducted consistent with each other, and were to employ residents of the areas involved to the extent feasible.<sup>76</sup> Further, a study by the Department of Housing and Urban Development (HUD), in consultation with HEW, was directed "to determine the nature and extent of the problem of lead-based paint poisoning . . . and the methods by which lead-based paint can most effectively be removed . . ."<sup>77</sup> HEW also was directed to "prohibit the use of lead-based paint in residential structures constructed or rehabilitated after January 13, 1971, by the federal government, or with federal assistance in any form."<sup>78</sup>

The Act authorized appropriation of \$10,000,000 in 1971 and \$20,000,000 in 1972 to carry out its provisions.<sup>79</sup> An initial sponsor of the Act, New York Congressman William Ryan charged, however, that despite the authorizations "[t]he Nixon administration steadfastly refused to request a single penny to fund it for fiscal year 1971 and only after great public pressure did it finally submit a belated amended budget request for a mere \$2 million for fiscal year 1972."<sup>80</sup>

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73. 42 U.S.C. § 4801(a), (b) (1970).

74. *Id.* § 4801(c).

75. *Id.* § 4811(a). HEW regulations governing grants authorized by §§ 4801 and 4811 are published at 37 Fed. Reg. 9188 (1972).

76. 42 U.S.C. §§ 4801(d), 4811(b)(1)-(2) (1970).

77. *Id.* § 4821.

78. *Id.* § 4831. HUD regulations are published at 37 Fed. Reg. 16,872, 23,732 (1972). *See also* City-Wide Coalition Against Childhood Lead Paint Poisoning v. Philadelphia Housing Authority, 2 CCH POVERTY L. REP. ¶ 16,864 (E.D. Pa. May 12, 1973).

79. 42 U.S.C. § 4843 (1970).

80. Statement of Congressman William Ryan, 1972 *Hearings* 118.

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Congress in fact appropriated \$7,500,000 for that year.<sup>81</sup> The 1973 Administration budget called for \$9,500,000 specifically under the Act,<sup>82</sup> but the lead poisoning prevention effort by the federal government has thereafter been funded by other authorizations.<sup>83</sup>

It was apparent in the 1970 Senate hearings on the proposed Act that a fundamental difference as to funding existed between Administration officials and proponents of the Act. The sponsors favored and focused specifically upon a categorical approach to the problem of lead paint poisoning.<sup>84</sup> The Administration contended that a broader approach was more appropriate<sup>85</sup> and that federal authorities already existed in 1970 to conduct the activities envisioned in the Act.<sup>86</sup>

The urgency of a situation in which children are being poisoned calls for a specific approach, but such an approach could involve both a delay in implementation (due to the time necessary to establish administrative machinery) and a costly duplication of functions performed by existing agencies. The broader approach, proceeding through established channels, could minimize administrative costs,

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81. Statement of Senator Edward Kennedy, 1972 *Hearings* 237; Statement of Congressman William Ryan, 1972 *Hearings* 118. A HEW official testified in 1972 concerning the ways in which the \$7,500,000 appropriated by Congress was going to be spent. Statement of Dr. Merlin DuVal, 1972 *Hearings* 237-49.

82. OFFICE OF MANAGEMENT AND BUDGET, APPENDIX TO THE BUDGET FOR FISCAL YEAR 1973, at 399 (1971). See also OFFICE OF MANAGEMENT AND BUDGET, SPECIAL ANALYSES OF THE UNITED STATES GOVERNMENT FISCAL YEAR 1973 (1972): "In 1973, \$9.5 million in grants will be awarded to about 50 communities to screen approximately 1.5 million children at risk of having or acquiring lead poisoning and to support the development of community organization and public education to prevent future lead poisoning." *Id.* at 171.

83. OFFICE OF MANAGEMENT AND BUDGET, APPENDIX TO THE BUDGET FOR FISCAL YEAR 1974, at 386-87 (1972). See 42 U.S.C. §§ 241, 246(e), 247 (1970).

84. Statement of Senator Richard Schweiker, 1970 *Hearings* 190-91. See also dialogue between Senator Edward Kennedy, Dr. Merlin DuVal, and Mr. Robert Novick, 1972 *Hearings* 238-40.

85. "It has occurred in the past that over emphasis sometimes on the categorical approach may leave other problems that may be equally or even more pressing, . . . wanting for attention, because of the focus upon what is categorically attacked." Statement of Dr. John Hanlon, 1970 *Hearings* 190.

86. "These Federal authorities are those included in section 314 of the Public Health Service Act and in Title V of the Social Security Act." Statement of Dr. John Hanlon, 1970 *Hearings* 183. See also Control of Lead Poisoning in Children, *supra* note 2, Part VI, Table 1, listing agencies and programs which may be sources for funding of a lead poisoning prevention effort; reproduced in 1970 *Hearings* at 137-46.

but would result in intragovernmental jurisdictional problems<sup>87</sup> and perhaps a decreased emphasis on the severity of the specific hazard.

Funding authorized by the 1970 Act expired at the end of fiscal year 1972,<sup>88</sup> prompting the introduction of an amendment to the Act.<sup>89</sup> The Administration opposed the categorical approach of the amendment because it ran "counter to the constructive efforts of the Administration to simplify and consolidate Federal health grant programs and to encourage States and localities to meet their own individual requirements."<sup>90</sup> An Administration official suggested that the federal government's role was to fund child-screening projects and to develop community organization and education for minimizing future lead poisoning problems, while the local role was to deal with housing by such means as building codes.<sup>91</sup> A slightly altered amendment<sup>92</sup> passed the Senate notwithstanding attack by the Administration, but the amendment died in a House committee when the session ended.<sup>93</sup>

The Senate, however, resurrected the issue in 1973. Within one

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87. The Act provided for health and housing programs to be conducted by HEW, both HEW and HUD were to study the lead paint poisoning problem, and HEW alone was charged with prohibiting the use of lead paint in certain federal construction and rehabilitation projects. 42 U.S.C. §§ 4801-31 (1970). During consideration of the statute, however, one city health official had recommended that funding be through one federal body; when more than one is involved, he stated that there are often "different sets of guidelines, resulting in a great deal of confusion within the city, lack of coordination in implementation, and much delay that comes about . . ." Statement of Dr. Jonathan Fine, 1970 *Hearings* 236.

88. 42 U.S.C. § 4843(a)-(c) (1970). Amounts appropriated under the Act but not expended remained available. *Id.* § 4843(d).

89. S. 3080, 92d Cong., 2d Sess. § 9406-14 (1972). Provisions of the amendment included: (1) an increase in the federal share of funding for a local program from 75% to 90%; (2) an expansion of the definition of "lead-based paint" to encompass paint with 0.5% and eventually 0.06% lead content, rather than the 1% content permitted by the 1970 Act; (3) a yearly total authorization of \$100,000,000, as compared to the 1970 Act's annual authorizations of \$10,000,000 and \$20,000,000 in 1971 and 1972, respectively; (4) the establishment of a National Childhood Lead Based Paint Poisoning Advisory Board to advise HEW on the administration of the Act, with two-thirds of the members of the Board being residents of areas affected by lead-based paint poisoning; (5) an exclusion of the lead-based paint poisoning problem from the scope of the Public Health Service Act § 314(e). 1972 *Hearings* 408-13.

90. Statement of Dr. Merlin DuVal, 1972 *Hearings* 259.

91. *Id.* at 258.

92. 118 CONG. REC. S9406-14 (daily ed. June 14, 1972).

93. CCH 1971-72 CONGRESSIONAL INDEX 2541.



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week an amendment to the Lead-Based Paint Poisoning Prevention Act passed both houses of Congress.<sup>94</sup> The 1973 amendment incorporates most of the elements of the previous Senate amendment, namely: (1) an increase of federal funding from 75% to 90% of the cost of local programs; (2) an expansion of the definition of "lead-based paint" from 1% lead content to 0.5% and, after December 31, 1973, 0.06%; (3) exclusion of the lead-based paint poisoning problem from the scope of the Public Health Service Act; and (4) the creation of a National Childhood Lead Based Paint Poisoning Board to advise HEW.<sup>95</sup> The new law goes further than the previous Senate amendment by directing the Secretary of HEW to prohibit use of lead-based paint in residential structures receiving federal assistance or on "any toy, furniture, cooking utensil, drinking utensil or eating utensil."<sup>96</sup> The Act appropriates \$63,000,000 a year for two years with \$25,000,000 for detection and treatment of lead poisoning, \$35,000,000 for elimination of the poisoning and \$3,000,000 for research.<sup>97</sup>

The extent of the Administration's defeat in this area is expressed by the strong approach of the new Act. Whereas the 1970 Act had granted the funds appropriated thereunder to local government units,<sup>98</sup> the new amendment grants said funds only to "public agencies of units of local government."<sup>99</sup> In dealing with the lead-based paint poisoning problem, the specific categorical approach of federal funding at the local level is the method that has been adopted.

### CONCLUSION

"Lead paint poisoning costs this Nation about \$200 million annually. This estimate includes the lost earnings and the costs of treatment, education, and institutional care of those afflicted. In addition, there is an unquantified cost to society of approximately 200 deaths per year traceable to lead poisoning."<sup>100</sup>

The existence today of widespread lead paint poisoning in the United States is a striking example of the problems of societal alloca-

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94. S. 607, 93d Cong., 1st Sess. (1973).

95. *Id.* §§ 1(b), 6, 7(e), 8.

96. *Id.* § 5. The prohibition of the use of lead-based paint in residential structures receiving federal assistance was also contained in the 1970 Act. 42 U.S.C. § 4831 (1970).

97. St. Louis Post-Dispatch, Oct. 25, 1973, § A, at 5, col. 7.

98. 42 U.S.C. §§ 4801(a), 4811 (1970).

99. S. 607, 93d Cong., 1st Sess. §§ 1(a), 2(a) (1973).

tion of resources; the health of thousands of children is one of many interests competing for funding from limited governmental sources. The burden of eliminating the lead paint hazard may, of course, be placed on the private investors and landlords who operate the affected housing units. As this Note has suggested, to hold such parties responsible for the costly process of removing lead paint which exists in their premises could result in owners' abandonment of existing property, discouragement of future investments, or an increase in rent beyond tenants' means. That course may be advocated by some with the expectation that in the absence of private housing, public facilities would, of necessity, be constructed.<sup>101</sup>

Even without affirmative action the lead paint problem could diminish eventually. Those units presently containing lead paint will eventually deteriorate to the point of being demolished, and if lead paint will no longer be utilized in construction and maintenance of dwellings, there would be no hazardous paint source from which a child could be poisoned. The new federal Act by prohibiting lead-based paint use furthers this future solution.

The resource allocation decision as to lead poisoning will be made by voters and legislatures throughout the United States. The crucial period is between today—when the problem can be solved through a massive effort—and that future date when the housing cycle reaches the point where residences containing lead dangers no longer exist. In the balance are the lives and health of thousands of children who will be exposed to dangerous levels of lead paint during the coming years.

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100. Statement of Dr. Merlin DuVal, 1972 *Hearings* 235-36.

101. *See* Sax & Hiestand, *supra* note 71.

## COMMENTS

