

GETTING THE LEAD OUT: REVISING LEAD HAZARD LEGISLATION TO REACH CHILDREN IN POVERTY

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INTRODUCTION

Eric has an I.Q. of fifty-one.¹ He is in the second grade, but is unable to identify the letters of the alphabet or recognize his printed name. He cannot count. Matthew sits next to him in class. Matthew is eight years old and frequently has emotional outbursts. Although he is repeating the second grade, he is eight inches shorter than most of the students in his classroom. Both of these boys have elevated levels of lead in their blood, a condition shared by 8.6% of the children tested in their hometown of St. Louis, Missouri.² These children have blood lead levels above ten micrograms per deciliter of blood,³ the Centers for Disease Control's threshold level for lead poisoning.⁴ Another statistic these children share is the presence of lead-based paint in forty-seven percent of their city's public schools.⁵

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¹ The author previously served as a teacher with Teach for America in St. Louis, Missouri. She taught several students similar to the ones profiled in this Note, but their names have been changed.

² Ctrs. for Disease Control and Prevention, Lead Poisoning Prevention Branch Survey: County-Level Summary Data for Missouri (2005), http://www.cdc.gov/nceh/lead/grants/Missouri/MO_CountyLevelSummary_2005.xls (Microsoft Excel spreadsheet).

³ Centers for Disease Control and Prevention, CDC Surveillance Data 1997-2005, <http://www.cdc.gov/nceh/lead/surv/stats.htm> (last visited Apr. 15, 2007).

⁴ Pamela A. Meyer et. al, *Surveillance for Elevated Blood Levels Among Children—United States, 1997-2001*, 52 MORBIDITY & MORTALITY WKLY. REP. 1, 2 (2003), available at <http://www.cdc.gov/mmwr/PDF/ss/ss5210.pdf>.

⁵ Bob Wilmott, *For Your Child's Sake, Get the Lead Out*, ST. LOUIS POST-DISPATCH, Oct. 24, 2005, at Healthy & Fit 5.

Humans have recognized lead as a toxin for thousands of years.⁶ Benjamin Franklin wrote about the “mischievous [e]ffect” of lead after observing the strange pain experienced by printing house apprentices working with lead type.⁷ Lead poisoning litigation began in the early twentieth century,⁸ and lead-based paint has been illegal for more than twenty-eight years.⁹ Despite the recognition of lead’s toxicity, childhood lead poisoning is still prevalent¹⁰ and costly.¹¹ Without an appropriate legislative solution to truly confront this problem, childhood lead poisoning will continue to be a crisis in the twenty-first century. While strides have been made to pass legislation that better addresses childhood lead poisoning,¹² more steps are needed so that fewer children experience developmental difficulties from this completely preventable condition.¹³

In 1992, Congress passed the Residential Lead-Based Paint Hazard Reduction Act¹⁴ (“RLPHRA”) with the goal of eliminating lead-

⁶ See Karla A. Francken, *Lead-Based Paint Poisoning Liability: Wisconsin Realtors, Residential Property Sellers, and Landlords Beware*, 77 MARQ. L. REV 550, 550 (1994) (discussing how the poet Nicander recognized lead’s toxicity in the second century B.C.); see also Ellen K. Silbergeld, *Preventing Lead Poisoning in Children*, 18 ANN. REV. PUB. HEALTH 187, 189 (1997) (stating that “[t]he toxicity of lead has been recognized for almost as long as this useful metal has been mined, smelted, and used by human societies.”). Some have even blamed the fall of the Roman Empire on lead’s detrimental effects. See The Franklin Institute Online, *History’s Lead Story*, <http://www.fi.edu/brain/metals.htm#historyslead> (last visited Apr. 15, 2007).

⁷ Letter from Benjamin Franklin to Benjamin Vaughn (July 31, 1786) reprinted in Francken, *supra* note 6, at 551-52 n.11. Franklin also describes the case of a family suffering from “[d]ry-[b]ellyach[e]” after habitually drinking rainwater contaminated by corroded lead roofs. *Id.*

⁸ See Mark L. Matulef, *On-The-Job Lead Poisoning: Early Judicial Treatment of Claims for Recovery from Exposure to Workplace Lead*, 10 U. BALT. J. ENVTL. L. 1, 2 (2002).

⁹ See 16 C.F.R. § 1303.4 (2007).

¹⁰ See County-Level Summary Data for Missouri, *supra* note 2.

¹¹ A group of scientists recently postulated that lead poisoning leads to a loss in I.Q. points, which in turn leads to major losses in wages earned in the United States. Philip J. Landrigan et al., *Environmental Pollutants and Disease in American Children: Estimates of Morbidity, Mortality, and Costs for Lead Poisoning, Asthma, Cancer, and Developmental Disabilities*, 110 ENVTL. HEALTH PERSP. 721, 724 (2002), available at <http://www.ehponline.org/members/2002/110p721-728landrigan/EHP110p721PDF.PDF> (estimating that “the present value of economic losses attributable to lead exposure in the birth cohort of current 5-year-olds amounts to \$43.4 billion per year”).

¹² See, e.g., Lead-Based Paint Poisoning Prevention Act of 1971, Pub. L. No. 91-695, 84 Stat. 2078; Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672, 3898 (1992).

¹³ Misty Edgcomb, *Clinton Praises Local Lead Paint Efforts: Senator Calls City a “National Model,” Touts Bill for Federal Credits for Removal*, ROCHESTER DEMOCRAT & CHRON., Mar. 28, 2006.

¹⁴ Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, 106 Stat.

based paint hazards in housing and educating the public about lead.¹⁵ In the year 2000, the President's Task Force on Environmental Health Risks and Safety Risks to Children predicted the end of lead-based paint hazards by 2010.¹⁶ Yet, given the inadequacy of current lead poisoning legislation¹⁷ and current rates of lead poisoning,¹⁸ these predictions are implausible.

Today's rates of lead poisoning among children in poverty are still too high.¹⁹ This "silent epidemic"²⁰ could be cured if current legislation were strengthened and if the public were adequately informed about the causes and prevalence of lead poisoning.²¹ The fundamental problem with this country's approach to addressing lead poisoning is that current legislation does not effectively reach those populations most susceptible to lead poisoning. The courts are split as to whether children have standing to sue under current laws for lead exposure.²² Parents with oral leases may not be informed of possible lead hazards.²³ Parents in poverty may be so concerned with finding affordable shelter that they fail to investigate the risks of lead poisoning.²⁴ Changes need to be made so that parents and children in poverty do not fall through the cracks and are adequately informed of possible lead hazards within their homes.²⁵

3672 (1992) (codified as amended in scattered sections of titles 12, 15, 29 and 42 U.S.C.)

¹⁵ 42 U.S.C. § 4851 (2007).

¹⁶ PRESIDENT'S TASK FORCE ON ENVTL. HEALTH RISKS AND SAFETY RISKS TO CHILDREN, ELIMINATING CHILDHOOD LEAD POISONING: A FEDERAL STRATEGY TARGETING LEAD PAINT HAZARDS 3 (2000) [hereinafter PRESIDENT'S TASK FORCE].

¹⁷ See *infra* Part II.

¹⁸ CTRS. FOR DISEASE CONTROL & PREVENTION, SAFEGUARDING THE PUBLIC HEALTH IN THE 21ST CENTURY (2003), <http://www.cdccoalition.org/resources/CDCFactSheet.pdf> (explaining that one million children under the age of six are currently affected by lead poisoning).

¹⁹ See Meyer, *supra* note 4, at 2 (stating that 16.4% of children from low-income families suffer from blood lead levels greater than ten micrograms per deciliter).

²⁰ Jonathan M. Stein, *An Overview of the Lead Abatement Program Response to the Silent Epidemic*, in LOW LEVEL LEAD EXPOSURE: THE CLINICAL IMPLICATIONS OF CURRENT RESEARCH 279, 279 (H.L. Needleman ed., 1980).

²¹ See *id.* at 279-84.

²² Compare *Mason ex rel. Heiser v. Morrisette*, 403 F.3d 28, 30 (1st Cir. 2005) (holding that a minor does not have standing to sue under RLPHRA), with *McCormick v. Kissel*, 458 F.Supp.2d 944, 947 (S.D. Ind. 2006) (holding that a minor child does have standing to sue under RLPHRA).

²³ Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9063, 9068 (Mar. 6, 1996).

²⁴ See Kara Kurtzman Daghlian, *Lead-Based Paint: The Crisis Still Facing Our Nation's Poor and Minority Children*, 9 DICK. J. ENVTL. L. & POL'Y 535, 544-45 (2001).

²⁵ See *infra* Part V for ideas on how to adequately reach those living in poverty.

This Note suggests that the RLPHRA should be strengthened by: 1) giving all individuals who lived in a lead poisoned environment standing to sue, and 2) explicitly covering oral leases. Further, targeted environmental lead testing should be mandated in those areas with the most elevated lead poisoning rates. Finally, the elimination of lead poisoning will only be possible with effective regulation and community support.

In Part I, this Note examines lead poisoning and its harmful effects. Part II discusses past and present lead poisoning legislation from the 1971 Lead-Based Paint Poisoning Prevention Act to the 1992 RLPHRA. Part III considers more recent government actions that attempt to work more closely with communities to help them deal with lead hazards. Part IV analyzes the effectiveness of current lead poisoning prevention laws. The analysis focuses on recent efforts to sue for damages under RLPHRA and problems with collecting lead poisoning data. Part V focuses on legal and policy changes necessary to make the government's lead reduction goals a reality.

I. WHY IS LEAD A HAZARD?

A. *How Is One Exposed?*

People can be exposed to lead from water running through lead pipes,²⁶ lead dust from lead paint, lead paint chips,²⁷ soil contaminated by leaded gas exhaust,²⁸ and a number of other environmental sources.²⁹

²⁶ See Beth Daley, *Concerns Raised on Lead Levels; MWRA Study Cites Pipes in 4,500 Homes*, BOSTON GLOBE, Nov. 17, 2005, at A1. The Environmental Protection Agency ("EPA") has recently encouraged (though not required) public schools and daycare centers to test the lead levels of their drinking water. See *Use New EPA Toolkit to Help Get the Lead Out of Drinking Water*, SCHOOL VIOLENCE ALERT, Vol. 12, No. 4, Apr. 1, 2006.

²⁷ Daghlian, *supra* note 24, at 538; Thomas F. Zimmerman, *The Regulation of Lead-Based Paint in Air Force Housing*, 44 A.F. L. REV. 169, 172 (1998).

²⁸ See Zimmerman, *supra* note 27, at 172 & n.34.

²⁹ See Jan Barry, *Toxic Lead Leaching from Ford Sludge*, RECORD (Hackensack, N.J.), Jan. 18, 2006, http://www.redorbit.com/news/science/362346/toxic_lead_leaching_from_ford_sludge/index.html (describing Ford paint sludge leaching into neighborhood lawns); Robin McKie, *Trust Chemicals, Beware of Nature: From Make-Up to Medicine, Scientists Warn That People Are Wrong to Think Natural Must Be Best*, OBSERVER (England), Jan. 22, 2006, at 14 (highlighting the presence of lead in natural cosmetics); Diana Washington Valdez, *Sierra Club Expert Says Asarco Lead Tainted Soil*, EL PASO TIMES, Jan. 31, 2006, at 1B (pointing out smelters as a source of lead contamination); Nicholas Wood, *Displaced Gypsies at Risk From Lead in Kosovo Camps*, N.Y. TIMES, Feb. 5, 2006, at 1 (finding lead contamination in refugee camps). The *Los Angeles Times* has reported high levels of lead

Soil is frequently contaminated in cities,³⁰ and many parents do not realize that by permitting their children to play on an open lot they are inadvertently allowing their children to be exposed to lead.³¹ Children often

in imported Mexican candies, in children's jewelry, and in lunch boxes featuring "Superman, Tweety Bird, [and] the Powerpuff Girls." Shari Roan, *An Unsavory Addition to Kids' Lunchboxes: Lead*, L.A. TIMES, Sept. 12, 2005, at F3. "The level of lead in one lunch box, an Angela Anaconda box made by Targus International, tested at 56,400 parts per million (ppm) of lead, more than 90 times the 600 ppm legal limit for lead in paint in children's products." Ctr. for Env'tl. Health, *A Back to School Warning: Children's Vinyl Lunch Boxes Can Contain Dangerous Levels of Lead* (Aug. 15, 2006), <http://www.cehca.org/AbacktoSchoolWarning.htm>. Even the Disney company marketed children's jewelry found to contain high levels of lead. Pictures are available at Center for Environmental Health, *Lead Jewelry Pictures*, <http://www.cehca.org/leadpics/index.html> (last visited Apr. 15, 2007).

³⁰ An estimated half of the residential lots in Omaha, Nebraska have lead contamination problems. Nancy Gaarder, *Officials: Arsenic Not the Big Worry Lead is the More Serious Problem, Says the Head of the Douglas County Health Department*, OMAHA WORLD-HERALD, Nov. 12, 2005, at 1B. Dallas has been dealing with lead contamination from factories for years. See Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POLY REV. 485, 511 (1997). Lead from factories and smelting plants frequently contaminates soil in cities. Michael Hawthorne, *EPA Finds High Lead in Pilsen; Smelting Plant Agrees to Clean Up Property, 2 Neighboring Sites*, CHI. TRIB., Sept. 9, 2005, at C1. David Johnson, who researches lead contaminated soil at the State University of New York at Syracuse, explained that "[i]f children in most urban areas get dirt in their mouths, they are going to get lead in their blood." *Id.*

³¹ See Megan Cooley, *Spokane Girl's Lead Poisoning Raises Suspicions About Home; Mother Fears Her 2-Year-Old Became Contaminated From Eating Dirt at Rental Property*, SPOKESMAN REV. (Spokane, Wash.), Nov. 16, 2005, at A1. Since Hurricane Katrina, lead poisoning in New Orleans has become an even greater concern:

As property owners rebuild, [Xavier University toxicology professor Howard] Mielke said they should cover lead-contaminated soil with at least a 6-inch layer of clean soil. "I certainly would like to see people come back into the city but I also want to make sure that the children are coming into a safe environment," he said. "If the city isn't safe for children, it isn't safe for anyone." Mielke said 14 percent of children citywide were being poisoned by lead before Katrina. According to the 2000 Census, there were 33,496 children under 5 years of age in New Orleans. In the inner city, the rate was much higher—20 percent to 30 percent. . . . Leaded gasoline, which is now illegal, and power sanding of lead-based paint are key soil contamination sources, said Mielke. To cover a built lot with soil, the average cost was \$3,377 around November, he said. The average price to cover a vacant lot was approximately \$2,600. Mielke said 40,000 properties in Orleans Parish should undergo the treatment.

Deon Roberts, *Orleans Parish Vote Will Determine Consolidation*, CITYBUSINESS (New Orleans), Feb. 13, 2006, <http://www.neworleanscitybusiness.com/viewStory.cfm?recID=14681>.

put non-food items in their mouths and are thus vulnerable to lead dust, lead paint chips, or soil.³²

Inhalation of lead dust or lead contaminated soil can also lead to lead poisoning.³³ Children are most at risk from these hazards in houses where the lead-based paint is deteriorating or where the paint is being disturbed through renovation.³⁴

B. *How Widespread Is Lead Poisoning?*

Although lead paint has been illegal since 1978, many houses remain covered in lead paint,³⁵ especially in the Northeast and Midwest.³⁶ In Rhode Island, for example, the former state health director testified that “half the houses in Rhode Island—roughly 230,000 to 250,000 units—are still coated with lead-based paints.”³⁷ In 2006, EPA estimated that “more than 38 million U.S. homes still contain some lead-based paint . . . , with two-thirds of the houses built before 1960 containing lead-based paint.”³⁸ An estimated twenty-four million (one-quarter of the nation’s housing)³⁹ of these houses had “significant lead-based paint hazards.”⁴⁰ Of these homes, 1.2 million are estimated to house low income families with children under the age of six.⁴¹

³² Many children put non-food items in their mouths, but some children also suffer from an eating disorder called pica where they do so frequently and habitually. Cynthia R. Ellis, Eating Disorder: Pica, <http://www.emedicine.com/ped/topic1798.htm> (last updated Feb. 18, 2006). As a result, these children are especially susceptible to lead poisoning. *Id.*

³³ Barbara B. Altera, *Lead-Based Paint Activities in Military Family Housing*, 54 A.F. L. REV. 101, 102-03 (2004).

³⁴ David E. Jacobs et al., *The Prevalence of Lead-Based Paint Hazards in U.S. Housing*, 110 ENVTL. HEALTH PERSP. A599, A599 (2002), available at <http://www.ehponline.org/members/2002/110pA599-A606jacobs/jacobs-full.html>.

³⁵ Terry J. Harris & Lisa J. Smith, *Back to the Future: Fixing the Lead Poisoning Prevention Program Act By Partial Repeal*, 9 U. BALT. J. ENVTL. L. 108, 109 & n.6 (2002).

³⁶ Jacobs et al., *supra* note 34, at A599 (explaining that “[h]ousing in the Northeast and Midwest had about twice the prevalence of hazards compared with housing in the South and West”).

³⁷ Peter B. Lord, *Half of State’s Houses Contain Lead-Based Paint, Nolan Testifies*, PROVIDENCE J. (R.I.), Nov. 15, 2005, at B1.

³⁸ *EPA Proposes New Regs for Renovations in Pre-’78 Units*, MULTI-HOUSING NEWS, Feb. 1, 2006, http://www.multi-housingnews.com/multihousing/search/article_display.jsp?vnu_content_id=1001918514.

³⁹ Jacobs et al., *supra* note 34, at A601.

⁴⁰ *Id.* at A599.

⁴¹ *Id.*

C. *How Much Is Too Much?*

In 1990, the Centers for Disease Control and Prevention (“CDC”) announced a goal to eliminate blood lead levels above twenty-five micrograms per deciliter of blood by the year 2000, and has a current goal of eliminating levels above ten micrograms per deciliter by 2010.⁴² Yet, many physicians and others consider this number to be arbitrary and claim that lead has hazardous effects at levels of five micrograms per deciliter and lower.⁴³ As lead is a toxin, “[t]here is no safe blood lead level in children” stated Dr. Jim Pirkle, deputy director for science at the Environmental Health Laboratory of the CDC.⁴⁴ The median lead level for U.S. children is two micrograms per deciliter of blood.⁴⁵

D. *What Does Lead Poisoning Do?*

Lead exposure can lead to both learning and behavioral disorders.⁴⁶ In fact, childhood exposure to lead is a “leading predictor” of criminal behavior later in life.⁴⁷ High lead levels can lead to “coma, convulsions and

⁴² Meyer et al., *supra* note 4, at 1.

⁴³ Telephone Interview with Rachel Outterson, Patricia S. Levinson Summer Fellow, Childhood Lead Poisoning Project for the Department of Community and Preventive Medicine, Mount Sinai School of Medicine (Feb. 26, 2006). Rachel Outterson is involved in surveying physicians in the New York City area about their knowledge of lead poisoning and methods for treating elevated lead levels. *See also* Theodore I. Lidsky & Jay S. Schneider, *Lead Neurotoxicity in Children: Basic Mechanisms and Clinical Correlates*, 126 *BRAIN* 5, 10-12 (2003), available at <http://brain.oxfordjournals.org/cgi/reprint/126/1/5>; Daley, *supra* note 26, at A1.

⁴⁴ *CDC Releases Extensive Survey of Americans' Exposure to Environmental Chemicals*, *LAB BUS. WEEK*, Aug. 21, 2005, at 218.

⁴⁵ Howard Bauchner, *Lead: Devastating Impact Even at Low Levels*, *J. WATCH PEDIATRICS & ADOLESCENT MED.*, May 9, 2003, <http://pediatrics.jwatch.org/cgi/content/full/2003/509/1>. This is lower than the median fifteen micrograms per deciliter of blood level when leaded gas was standard. *Id.*

⁴⁶ *ADVISORY COMM. ON CHILDHOOD LEAD POISONING PREVENTION, CTRS. FOR DISEASE CONTROL & PREVENTION, PREVENTING LEAD EXPOSURE IN YOUNG CHILDREN: A HOUSING BASED APPROACH TO PRIMARY PREVENTION OF LEAD POISONING* 8 (2004), available at <http://www.cdc.gov/nceh/lead/Publications/Primary%20Prevention%20Document.pdf>.

⁴⁷ Deborah W. Denno, *Considering Lead Poisoning as a Criminal Defense*, 20 *FORDHAM URB. L. J.* 377, 396 (1993). In her article, Denno describes a study of 487 subjects born in Philadelphia during the years 1959-1962. *Id.* at 379-80. The purpose of the study was to determine the factors that most correctly predict the likelihood that a certain individual will be an adult offender in the criminal justice system. *Id.* at 379. Researchers examined school records, criminal and juvenile police records, and kept extensive health records of the subjects from the time of their birth. *Id.* at 380. These researchers discovered that

death.”⁴⁸ Low levels of lead have been linked to reduced I.Q.,⁴⁹ “reduced physical stature and growth, impaired hearing, reduced attention span, hyperactivity, and behavior problems.”⁵⁰ A 2003 study in the journal *Brain* found that

[c]hildren are particularly sensitive to the effects of lead for several reasons. A greater proportion of ingested lead is absorbed from the gastrointestinal tract of children than of adults. In addition, a greater proportion of systemically circulating lead gains access to the brain of children, especially those 5 years of age or younger, than of adults.

the “number and seriousness of juvenile offenses was the strongest predictor of the subjects’ crimes as adults.” *Id.* at 385. Low levels of education of the subject’s mother and father were the next predictor. *Id.* The third predictor was a high level of lead at the age of seven. *Id.* A similar study of youth in the Allegheny County Juvenile Court system in Pennsylvania found that juvenile delinquents on average had much higher levels of lead than their non-delinquent counterparts. Julie Wakefield, *The Lead Effect?*, 110 ENVTL. HEALTH PERSP. A574, A576 (2002) available at <http://www.ehponline.org/members/2002/110-10/EHP110pa574PDF.PDF>. The study’s director Herbert Needleman discovered that “[a]mong boys, convicted delinquents were almost twice as likely to have higher bone lead concentrations . . . and four times as likely after adjusting for confounding factors.” *Id.*

⁴⁸ Daghlian, *supra* note 24, at 536-37. As of 2005, the last recorded death of a child due to lead exposure occurred during the year 2000 in Manchester, New Hampshire. Anne Evens et al., *Applying Law Throughout the Life Stage: Enforcement of Lead Hazard Remediation to Protect Childhood Development*, 33 J.L. MED. & ETHICS 40, 40 (2005). Recently, however, a boy in Minnesota died with a blood lead level of 180 micrograms per deciliter after swallowing a toy that came with a pair of Reebok shoes. *Death of a Child After Ingestion of a Metallic Charm—Minnesota, 2006*, 55 MORBIDITY & MORTALITY WKLY REP. 340, 340-41 (2006), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5512a4.htm>.

⁴⁹ Bauchner, *supra* note 45 (“The relation between intelligence and blood lead levels greater than 10 [micrograms per deciliter] is well defined: I.Q. declines by 2 to 5 points with every increase of 10 to 30 [micrograms per deciliter].”). A shift of five points in the I.Q.s of a population can have a devastating effect. Typically,

5% of the population has an intelligence quota (IQ) above 120 and about 5% of the population has an IQ below 80. If you shift the population’s IQ by five points, which is about what a child with a blood lead level of 20 [micrograms per deciliter] has lost in his or her life, no one in that lead poisoned population has an IQ above 120 and there is double the number of people with IQs below 80 (these are children who qualify for special education). Lead poisoning knocks the natural leaders out which is not only a tragedy for an individual child, but also has enormous effects on populations.

Evens et al., *supra* note 48, at 41.

⁵⁰ Daghlian, *supra* note 24 at 537.

Finally, the developing nervous system is far more vulnerable to lead's toxic effects than the mature brain.⁵¹

Philip J. Landrigan, a professor at Mount Sinai School of Medicine, stated that lead paint has created “sort of a perfect storm: little children crawling on floors, taking the chips into their bodies, with organs more susceptible” to lead's toxicity.⁵² This perfect storm has caused an epidemic. Anne Evens, Lead Program Director for the Public Health Department for the City of Chicago,⁵³ explains that “[i]n Chicago in 2001, we had neighborhoods where 30% of the children had elevated blood lead levels and if we went down to the block level, we had blocks where half of the

⁵¹ Lidsky & Schneider, *supra* note 43, at 10. Adult lead exposure often occurs at work, and “[w]orkers at particular risk include welders, iron cutters, abrasive blasters, painters, laborers, renovation and remodeling contractors, people who work at firing ranges; and those who are involved in the manufacture and disposal of car batteries and the maintenance and repair of bridges, water towers and other steel structures.” Sassan Farjami et al., *Getting the Lead Out—The News About an Old Problem* (Dec. 2004), http://www.thedoctorwillseeyounow.com/articles/other/lead_31/. Lead from bullets can also cause lead poisoning. Consider this case of a patient suffering from strange symptoms:

Because the man has both abdominal pain and anemia, his doctor orders a blood test to measure blood lead levels. Sure enough, they come back off the charts. He has lead poisoning. The next step is to find the source of the lead. An investigation of materials used at his construction job, as well as his household water, provides no answers. The man is admitted to the hospital, where x-rays turn up a clue. There is a bullet near his right pelvis and bullet fragments in his right lower leg. He explains that 18 years ago he was shot twice during a robbery. The mystery is solved; somehow, lead from 18 year-old bullets is finding its way into the man's bloodstream.

Id. Could the man shot by Vice President Cheney suffer from lead poisoning? See Daniel Engber, *How Does a Shotgun Pellet Migrate?*, SLATE, Feb. 15, 2006, <http://www.slate.com/id/2136337>.

⁵² Peter B. Lord, *Jurors in Lead-Paint Trial Say They're Proud of Verdict*, PROVIDENCE J. (R.I.), Mar. 12, 2006, at B1. Landrigan was testifying in a Rhode Island suit against the former manufacturers of lead-based paint. *Id.* After this trial (the longest civil trial in Rhode Island history), the jurors declared Landrigan to be one of the most persuasive witnesses. *Id.* The jurors reached a verdict requiring Sherwin Williams and two other paint companies to pay for the removal of lead from those houses in Rhode Island still covered in lead paint (estimated at 240,000 houses). *Id.* The cost of removal of lead from all these houses is estimated to be over one billion dollars. *Id.* While this type of litigation may allow states like Rhode Island to clean up its lead hazards, not every state court has supported such a theory of shared liability. See Editorial, *Take Responsibility*, ROCHESTER DEMOCRAT & CHRON., Mar. 6, 2006, at 12A.

⁵³ Sarah Karp, *Left Out*, CHI. REP., Sept. 2004, <http://chicagoreporter.com/2004/9-2004/lead/lead2.htm>.

children had lead poisoning. A map of failing schools is very consistent with these elevated blood lead level rates."⁵⁴

The current treatment for lead poisoning is chelation therapy.⁵⁵ During chelation therapy, a chelating agent is introduced to the body.⁵⁶ This agent binds to lead within the body, and this new compound comprised of the agent and the lead leaves the body through the urine stream.⁵⁷ Chelation therapy is expensive,⁵⁸ causes adverse side effects, and requires constant monitoring.⁵⁹ Often chelation therapy is not any more effective than simply removing a child from an environment in which he or she is exposed to lead.⁶⁰ For families in poverty it is difficult to find affordable housing or remove the lead currently present in their houses.⁶¹ As a result, many children may go through chelation therapy just to experience elevated levels of lead again.⁶²

E. Populations Affected by Lead Poisoning

Minority populations are affected disproportionately by lead poisoning.⁶³ Nationally, only 2.3% of non-Hispanic white children between the ages of one and five suffer from a lead blood level above ten micrograms per deciliter, while 11.2% of African-American children have levels of ten or higher.⁶⁴ When the threshold for lead poisoning is set to five micrograms per deciliter, "47% of African American children, 28% of Mexican American children, and 19% of non-Hispanic white children age one to five had elevated blood lead levels."⁶⁵

⁵⁴ Evens et al., *supra* note 48, at 42.

⁵⁵ Wilmott, *supra* note 5.

⁵⁶ Adrienne S. Ettinger, *Chelation Therapy for Childhood Lead Poisoning: Does Excretion Equal Efficacy?*, HARV. REV. ARTICLES IN PHARMACOEPIDEMIOLOGY, Apr. 23, 1999, <http://www.hsph.harvard.edu/Organizations/DDIL/chelation.htm> (citing R.A. Goyer et al., *Role of Chelating Agents For Prevention, Intervention, and Treatment of Exposures to Toxic Metals*, 103 ENVTL. HEALTH PERSP. 1048, 1048-52 (1995)).

⁵⁷ *Id.*

⁵⁸ Daghlian, *supra* note 24, at 537.

⁵⁹ Ettinger, *supra* note 56.

⁶⁰ *Id.*

⁶¹ See Silbergeld, *supra* note 6, at 189.

⁶² Ettinger, *supra* note 56.

⁶³ See N.Y. STATE DEPT OF HEALTH, ELIMINATING CHILDHOOD LEAD POISONING IN NEW YORK STATE BY 2010 (2004), http://www.health.state.ny.us/nysdoh/environ/lead/finalplan_hist.htm.

⁶⁴ *Id.*

⁶⁵ *Id.*

Children living in poverty are also disproportionately affected by lead poisoning. A National Health and Nutrition Examination Survey “found that 13% of Medicaid recipients had [blood lead levels] at or above 10 [micrograms per deciliter], and 42% had levels at or above 5 [micrograms per deciliter].”⁶⁶ These statistics exist because “[p]oor children are more likely to live in lead-contaminated environments, including older and dilapidated housing[,] and deposits of lead from years of leaded gasoline, hazardous waste disposal, and lead-related industry.”⁶⁷ Moreover, children living in poverty are more likely to suffer from deficiencies in iron, zinc, calcium or protein.⁶⁸ These deficiencies make children more susceptible to lead poisoning.⁶⁹

For a combination of reasons, lead strongly and disproportionately affects children in poverty. Thus, legislation attempting to solve this problem must address the specific needs of these children. Since the 1970s lead poisoning prevention legislation has improved to more closely reach children in poverty.⁷⁰

II. LEAD LEGISLATION

A. *The Lead-Based Paint Poisoning Prevention Act*

Congress passed the Lead-Based Paint Poisoning Prevention Act (“LPPPA”) in 1971.⁷¹ This law allowed the use of federal funds “to develop and carry out intensive local programs to eliminate the causes of lead-based paint poisoning and local programs to detect and treat incidents of such poisoning.”⁷² This law also authorized the Department of Housing and Urban Development (“HUD”) to try to remove lead-based paint from all public housing.⁷³ As a result, minority populations with access “to lead-free public housing” have lower levels of lead exposure than other groups.⁷⁴

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Lidsky & Schneider, *supra* note 43, at 13.

⁶⁹ *Id.*

⁷⁰ See Silbergeld, *supra* note 6, at 193-97.

⁷¹ Lead-Based Paint Poisoning Prevention Act of 1971, Pub. L. No. 91-695, 84 Stat. 2078 (1971) (codified as amended at 42 U.S.C. §§ 4821-46 (2007)).

⁷² *Id.*

⁷³ Clifford L. Rechtschaffen, *The Lead Poisoning Challenge: An Approach for California and Other States*, 21 HARV. ENVTL. L. REV. 387, 396-97 (1997) (citing 42 U.S.C. § 4822 (1994)).

⁷⁴ Adrian J. Bailey et al., *A Tale of Two Counties: Childhood Lead Poisoning, Industrialization, and Abatement in New England*, 74 ECON. GEOGRAPHY 96, 98 (1998).

Unfortunately, HUD issued reports on lead poisoning but did not develop any uniform procedure for attacking the problem outside of public housing.⁷⁵ Critics of the law complained that “[n]o nationwide standards ha[d] been established to identify and eliminate the hazards and no program to prevent lead poisoning ha[d] been created.”⁷⁶ As a result, LPPPA did not significantly reduce childhood lead poisoning.⁷⁷ While rates of childhood lead poisoning reduced from 1978-1990, this reduction is largely attributed to the banning of leaded gasoline.⁷⁸

B. The Emergency Planning and Community Right-to-Know Act

Changes in the manner in which the government approached environmental issues encouraged the passage of environmental legislation that more closely affected people and their communities.⁷⁹ The passage of the Emergency Planning and Community Right-to-Know Act (“EPCRA”) demonstrates this new way of thinking.⁸⁰ This thinking was inspired by the Union Carbide disaster in Bhopal, India.⁸¹ In this accident, a poisonous gas escaped from the Union Carbide plant and killed more than 5,000 people in the surrounding area.⁸² Understandably, after the disaster, the public wanted to know exactly what kind of toxins were being used in their neighborhoods.⁸³

⁷⁵ See Ann Mariano, *Conference Warns of High Lead Risks; Lack of Funds Angers Health-Care Workers*, WASH. POST, Oct. 12, 1991, at E1.

⁷⁶ *Id.*

⁷⁷ Jennifer Tiller, *Easing Lead Paint Laws: A Step in the Wrong Direction*, 18 HARV. ENVTL. L. REV. 265, 266-67 (1994).

⁷⁸ See Silbergeld, *supra* note 6, at 195 (“The reduction in lead used in gasoline (greater than 100-fold, from 1976 to 1986) was associated with average reductions in [blood lead levels] of over 40%.”).

⁷⁹ See Julie Shambarger Mitchell, *Environmental Law—A Citizen Suit Under EPCRA is No Longer a Threat—Steel Company v. Citizens for a Better Environment*, 118 S. Ct. 1003 (1998), 21 U. ARK. LITTLE ROCK L. REV. 343, 345-47 (1999).

⁸⁰ See Emergency Planning and Community Right-to-Know Act of 1986, Pub. L. No. 99-499, 100 Stat. 1728 (1986) (codified at 42 U.S.C. § 11001 (2007)).

⁸¹ Mitchell, *supra* note 79, at 347.

⁸² EPCRA Project, Introduction, <http://www.wvu.edu/~lawfac/pmeginley/EPCRA/EPCRA%20Project.html> (last visited Apr. 15, 2007).

⁸³ See Sidney M. Wolf, *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act*, J. LAND USE & ENVTL. L. 217, 219 (1996).

The purpose of EPCRA was simple.⁸⁴ Under the presumption that people deserve the right to know about the environmental issues that affect them, Congress passed EPCRA to allow the public access to information about pollution levels in their community.⁸⁵ Section 313 of EPCRA required EPA to develop a public database that permits citizens to find “all annual information collected from industry on routine release of toxic chemicals to air, land, and water.”⁸⁶ This Toxic Release Inventory (“TRI”) served as an early model of how environmental information could be released to the public.⁸⁷ Former Clinton Administration EPA Administrator Carol M. Browner described the TRI as “a roadmap of toxic chemicals, right down to the local level, and it puts that information directly at the fingertips of citizens.”⁸⁸

EPA’s mechanism for collecting this data, however, is flawed.⁸⁹ Companies provide the pollution data to EPA, and EPA releases this data in the TRI.⁹⁰ Certainly this system is imperfect, as violators of environmental release laws could change data.⁹¹ Yet, as EPA lacks the resources it would require to regulate these organizations without the company’s help,⁹² the TRI serves as “among [EPA’s] most potent environmental weapons.”⁹³

⁸⁴ See Mitchell, *supra* note 79, at 347 (“EPCRA is unique because it is the first environmental regulation that is purely informational in contrast to the typical ‘command and control’ regulations enacted by Congress.”).

⁸⁵ Krista Green, *An Analysis of the Supreme Court’s Resolution of the Emergency Planning and Community Right-to-Know Act Citizen Suit Debate*, 26 B.C. ENVTL. AFF. L. REV. 387, 389 (1999) (“EPCRA has two purposes: to enhance the public’s knowledge about dangerous chemicals located in the community, and to establish national, state and local emergency response plans.”).

⁸⁶ Gary D. Bass & Alair McLean, *Enhancing the Public’s Right-to-Know About Environmental Issues*, 4 VILL. ENVTL. L.J. 287, 288 (1993).

⁸⁷ *Id.*

⁸⁸ Will Nixon, *Twenty Minutes With Carol Browner—EPA Chief—Interview*, E: THE ENVTL. MAG., Dec. 1993, http://www.24hourscholar.com/p/articles/mi_m1594/is_n6_v4/ai_14723345.

⁸⁹ See Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment*, 53 DUKE L. J. 1619, 1689-90 (2004).

⁹⁰ Wolf, *supra* note 83, at 220-21.

⁹¹ See Wagner, *supra* note 89, at 1697 (suggesting that corporations “may avoid disclosing more serious violations when they perceive that the probability of being caught by a regulator will be low, especially as compared against the economic benefits they gain by not installing the requisite pollution controls or satisfying other regulatory requirements in a timely fashion”).

⁹² See *id.* at 1689-90.

⁹³ Nixon, *supra* note, 88.

On January 17, 2001, EPA addressed the seriousness of lead contamination by “lower[ing] the reporting thresholds for lead and lead compounds[,]” thereby giving communities a better understanding of the lead pollution in their areas.⁹⁴

EPCRA shows a change in Congress’s thinking about effective environmental legislation.⁹⁵ With EPCRA, Congress finally recognized that environmental regulation works best within an informed community.⁹⁶ It also recognized that corporate support is sometimes necessary for environmental law to be economically feasible.⁹⁷ Such thinking influenced the writing of the Residential Lead-Based Paint Hazard Reduction Act,⁹⁸ which arguably helped make it a more effective law.

C. *The Residential Lead-Based Paint Hazard Reduction Act*

Realizing the flaws of the LPPPA of 1972, Congress passed the Residential Lead-Based Paint Hazard Reduction Act (“RLPHRA”) in 1992.⁹⁹ For the first time, the federal government could give grants for lead poisoning reduction to homeowners who did not live in federal housing.¹⁰⁰ RLPHRA is limited, however, by a lack of funding.¹⁰¹ The government cannot give grants to everyone living with lead paint in their house.¹⁰² Moreover, RLPHRA does not compel landlords to remove lead paint

⁹⁴ James Reginald Benjamin, Jr., *The EPA’s Final Rule Lowering Reporting Thresholds of Lead and Lead Compounds, EPCRA Section 313 and TRI: The Impact on Low-Income Communities*, 10 U. BAL. J. ENVTL. L. 101, 103 (2003).

⁹⁵ See Wolf, *supra* note 83, at 219-20.

⁹⁶ See *id.* at 220-21.

⁹⁷ See Wagner, *supra* note 89, at 1689-90.

⁹⁸ Clifford Rechtschaffen, *The Warning Game: Evaluating Warnings Under California’s Proposition 65*, 23 ECOLOGY L.Q. 303, 305-06 & n.8 (1996) (describing a right-to-know “trend [that] is likely to continue, especially given the current legislative movement to scale back environmental regulation and the increased interest in market-based incentives as an alternative to traditional direct regulation”).

⁹⁹ Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (1992) (codified as amended in scattered sections of titles 12, 15, 29 and 42 U.S.C.); Daghlian, *supra* note 24, at 540-41.

¹⁰⁰ *Id.* at 541.

¹⁰¹ *Id.* at 542. RLPHRA does not apply to “[h]ousing for the elderly and disabled,” “[z]ero bedroom dwellings,” housing built after 1978, and “[n]on-residential buildings.” OFFICE OF PROP. DISPOSAL, U.S. GEN. SERV. ADMIN., TITLE X: THE RESIDENTIAL LEAD-BASED PAINT PREVENTION ACT, NEW REGULATIONS, EFFECTIVE SEPT. 15, 2000 (2000) [hereinafter PROPERTY DISPOSAL REGULATIONS], available at http://propertydisposal.gsa.gov/ResourceCenter/Laws_Regs_All/Environmental/FINALBPFACTSHEET.pdf.

¹⁰² Daghlian, *supra* note 24, at 542.

hazards from their properties until there is evidence of lead poisoning.¹⁰³ Further, landlords are not forced to test for lead, but must merely make tenants aware that it could be present.¹⁰⁴

However, RLPHRA has significantly improved many residents' knowledge of lead poisoning.¹⁰⁵ It requires anyone renting or selling a house built before 1978 to disclose any knowledge of lead paint on the premises and to give the new owners or tenants a book describing lead poisoning.¹⁰⁶ It does not require the landlord to remove lead paint from the premises.¹⁰⁷ It does, however, require that the purchaser of a house be given ten days to get a thorough lead inspection (though this right can be waived).¹⁰⁸ This inspection, called a risk assessment, is an

on-site investigation to determine and report the existence, nature, severity, and location of lead-based paint hazards in residential dwellings, including (1) information gathered regarding the age and history of the housing and occupancy by children under age 6; (2) visual inspection; (3) limited wipe sampling or other environmental sampling techniques; (4) other activity as may be appropriate; and (5) provision of a report explaining the results of the investigation.¹⁰⁹

The law also requires that all purchasers read a warning sheet "printed in large type on a separate sheet of paper attached to the contract" that states:

Every purchaser of any interest in residential real property on which a residential dwelling 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, in-

¹⁰³ *Id.*

¹⁰⁴ Bob Bruss, *Lead-Based Paint Raises Flag in Real Estate*, ST. LOUIS POST-DISPATCH, Aug. 12, 2005, <http://db.inman.com/bruss/columns/column.cfm?StoryId=050802BB4&Display=story>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ 42 U.S.C. § 4852d(a)(1)(C) (2007).

¹⁰⁹ PROPERTY DISPOSAL REGULATIONS, *supra* note 101.

cluding 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.¹¹⁰

Clearly, this type of warning can work well with people who have the time and money to get a risk assessment and pay for lead abatement.¹¹¹ With families in a hurry to find a new home, this warning can turn into just another piece of paper and be easily ignored.¹¹² One Philadelphia real estate agent described his interactions with lead disclosure:

I go over the pamphlet with the buyers and tell them that, if they want to test for lead paint, they certainly will find it . . . I also tell them that sellers won't do anything to remediate it, and if they are really concerned about lead, they shouldn't be looking at older houses.¹¹³

As a result of attitudes like this, "[f]ew buyers bat an eye."¹¹⁴

¹¹⁰ 42 U.S.C. § 4852d(a)(3).

¹¹¹ See Signe Land Levine, Note, *Poison in Our Own Backyards: What Minnesota Legislators Are Doing to Warn Property Purchasers of the Dangers of Former Clandestine Methamphetamine Labs*, 31 WM. MITCHELL L. REV. 1601, 1639 (2005) (describing RLPHRA as a disclosure program rather than a remedial one).

¹¹² Alan J. Heavens, *Lead Hazards Brushed Aside Buyers Said to be Ignoring Health Risks Old Paint Poses for Kids*, BOSTON GLOBE, Feb. 1, 2003, at C1.

¹¹³ *Id.*

¹¹⁴ *Id.*

D. The President's Task Force

In 1997, President Clinton created the President's Task Force on Environmental Health Risks and Safety Risks to Children with Executive Order 13,045.¹¹⁵ The task force's stated goal is to eliminate lead poisoning by 2010 through:

[f]ederal grants and leveraged private funding to be used for the identification and elimination of lead paint hazard to produce an adequate supply of lead-safe housing for low-income families with children, outreach and public education [and] [e]nforcement and compliance assistance and monitoring.¹¹⁶

The task force also calls for "increased coordination across federal, state and local agencies responsible for outreach, education, technical assistance, and data collection related to lead screening and lead hazard control."¹¹⁷ These plans boil down to laundry lists of strategies from each state that explain how each state intends to combat lead poisoning and measure its success.¹¹⁸ In 2001 and 2003, President George W. Bush extended the task force's tenure.¹¹⁹ The example of a coalition of community groups in Rochester, NY, that developed as a result of this task force and the policies of this group will be discussed later on in this Note.¹²⁰

¹¹⁵ Exec. Order No. 13,045, 62 Fed. Reg. 19,885 (April 21, 1997); PRESIDENT'S TASK FORCE, *supra* note 16, at I.

¹¹⁶ PRESIDENT'S TASK FORCE, *supra* note 16, at 29.

¹¹⁷ *Id.* at 34.

¹¹⁸ National Center for Environmental Health, State and Local Programs, <http://www.cdc.gov/NCEH/lead/grants/contacts/CLPPP%20Map.htm> (last visited Apr. 15, 2007).

¹¹⁹ Exec. Order No. 13,229, 66 Fed. Reg. 52,013 (Oct. 9, 2001) (amending Executive Order 13,045 and extending the Task Force's tenure from four to six years); Exec. Order No. 13,296, 68 Fed. Reg. 19,931 (April 18, 2003) (further amending Executive Order 13,045 and extending the Task Force's tenure from six to eight years); Environmental Protection Agency, President's Task Force on Environmental Health Risks and Safety Risks to Children, http://yosemite.epa.gov/ochp/ochpweb.nsf/content/whatwe_fedttask.htm (last visited Apr. 15, 2007).

¹²⁰ See *infra* Part V.B.

III. TODAY'S LEAD POLICIES

A. "Common Sense" Approach

EPA adopted what it calls a "Common Sense" approach.¹²¹ The "Common Sense" approach is EPA's attempt to integrate the community's voice into decision making processes.¹²² By making industrial and environmental community groups stakeholders in this process,¹²³ EPA hoped to develop policies that would better fit communities.¹²⁴ Commentator Gregory Roberts suggests, however, that communities would be better off with "a strategy that enables a community to take control of the struggle itself, without having to rely on the government's good faith to include it in the decision-making process."¹²⁵ In the current environment, though, the Common Sense approach shows the government's awareness that effective legislation and regulation brings all parties involved to the table.

B. Executive Order 12,898

Under President Clinton, the government recognized racial disparities within environmental situations.¹²⁶ Executive Order 12,898, entitled "Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations," requires EPA to address environmental situations in which minorities are disproportionately affected.¹²⁷ The order "was the first of its kind to stress the coordination of government agencies in addressing environmental justice problems. [It] defined the federal government's stance on environmental justice, required federal

¹²¹ R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning From the Civil Rights Movement*, 48 AM. U. L. REV. 229, 243 (1998).

¹²² *Id.* EPA Administrator Carol Browner said, "[E]arly involvement and strong partnerships, founded on mutual respect and understanding, make good *common sense* and will result in sound public health and environmental policy. *Id.* at 243 n.76 (citing OFFICE OF ENVTL. JUSTICE, U.S. ENVTL. PROT. AGENCY, ENVIRONMENTAL JUSTICE STRATEGY: EXECUTIVE ORDER 12,898, at 2 (1995)).

¹²³ Uwe M. Erling, *Approaches to Integrated Pollution Control in the United States and the European Union*, 15 TUL. ENVTL. L. J. 1, 17 (2001).

¹²⁴ See Rena I. Steiznor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 110 (1998).

¹²⁵ Roberts, *supra* note 121, at 248.

¹²⁶ *Id.* at 241. See also Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

¹²⁷ Roberts, *supra* note 121, at 241; Exec. Order No. 12,898, 59 Fed. Reg. at 7,629.

agencies to develop an environmental justice strategy, and established an Interagency Working Group on Environmental Justice.”¹²⁸

This executive order dictates that the government develop strategies that should

at a minimum . . . : (1) encourage enforcement of federal and state health and environmental statutes in communities with high poor and minority populations; (2) increase public involvement; (3) conduct more accurate research and obtain more precise data regarding the health and environment of poor and minority communities; and (4) analyze disparities with respect to the use of [RLPHRA] natural resources by poor and minority populations.¹²⁹

Most importantly, the government and EPA must make an effort to be seen as an organization that makes the community better, and does not dictate unnecessary regulations.¹³⁰ An ideal revision of RLPHRA would take into account the goals of Executive Order 12,898 and EPA’s Common Sense approach by attempting to effectively reach those most affected by lead poisoning and involve them in decision-making.

IV. RLPHRA IN ACTION

A. “Re-Ghettoizing”¹³¹ the Problem

Before the advent of LPPPA, Ellen K. Silbergeld, Editor-in-Chief of the journal *Environmental Research* and Professor of Public Health at Johns Hopkins University,¹³² suggests that lead poisoning was “ghettoized,” meaning that it was “considered to be a risk exclusively to the urban

¹²⁸ Anne K. No, Note, *Environmental Justice : Concentration on Education and Public Participation as an Alternative Solution to Legislation*, 20 WM. & MARY ENVTL. L. & POL’Y REV. 373, 384 (1996).

¹²⁹ Roberts, *supra* note 121, at 241.

¹³⁰ Kary L. Moss, *Environmental Justice at the Crossroads*, 24 WM. & MARY ENVTL. L. & POL’Y REV. 35, 35 (2000). Moss explains how EPA was villainized as a “job killer” in Flint, Michigan after investigating a complaint which alleged that a new steel mill disproportionately burdened minorities in the area in terms of pollution. *Id.*

¹³¹ Silbergeld, *supra* note 6, at 198.

¹³² See *Environmental Research*, Editorial Board, http://www.elsevier.com/wps/find/journaleditorialboard.cws_home/622821/editorialboard#editorialboard (last visited Apr. 15, 2007).

minority poor.”¹³³ She explains that “[t]his assumption was based on very limited data and highly skewed attempts to identify children with elevated blood lead (PbB) levels.”¹³⁴ Doctors only identified those with the highest blood lead levels as having lead poisoning.¹³⁵ Silbergeld states that:

Concerns for lead poisoning waxed and waned with social concerns for the disadvantaged until the results of the first representative national survey of lead exposures in US children began to be published in 1982 . . . Although the median of poor urban black children measured [from 1976-1980] was the highest of all persons (nonoccupationally exposed), a significant proportion of *all* children had a [blood lead level greater than] 15 [micrograms per deciliter] and the median PbB for affluent white children was 13 [micrograms per deciliter].¹³⁶

By the late 1970s and early 1980s, the United States was motivated to confront the problem,¹³⁷ and, with the banning of leaded gas, rates of lead poisoning fell dramatically.¹³⁸ Yet, a downside of this positive result is that it “reduced the momentum to fully eliminate lead poisoning. The disease has to a large extent become ‘re-ghettoized.’ Now, children with [blood lead levels greater than] 10 are much more likely to be black, live in large cities, and to be poor.”¹³⁹

RLPHRA has helped home buyers and renters to be more aware of lead poisoning within their communities, but it has not helped buyers

¹³³ Silbergeld, *supra* note 6, at 191.

¹³⁴ *Id.*

¹³⁵ *Id.* In 1985, the CDC's threshold for lead poisoning was twenty-five micrograms per deciliter. In 1975 the threshold was thirty micrograms per deciliter, and in 1971 it was forty micrograms per deciliter. Katarzyna Bochynska, Facts and Firsts of Lead (Oct. 21, 2005), <http://www.lead.org.au/fs/fst29.html>.

¹³⁶ Silbergeld, *supra* note 6, at 191.

¹³⁷ *Id.*

¹³⁸ *Id.* at 198. See Press Release, U.S. Env'tl. Protection Agency, EPA Takes Final Step in Phaseout of Leaded Gasoline (Jan. 29, 1996), available at <http://www.epa.gov/history/topics/lead/02.htm>. The press release quotes EPA administrator Carol Browner stating, “The elimination of lead from gas is one of the great environmental achievements of all time Thousands of tons of lead have been removed from the air, and blood levels of lead in our children are down 70 percent.” *Id.* Silbergeld puts this number at forty percent, but one thing is clear: making leaded gas illegal reduced rates of childhood lead poisoning. See Silbergeld, *supra* note 6, at 195.

¹³⁹ Silbergeld, *supra* note 6, at 198.

or sellers to cover the costs of removing lead paint. RLPHRA disclosure only works to get rid of lead paint in “those housing markets able to sustain the investment required, that is, where the value of property can absorb an abatement¹⁴⁰ ‘penalty’ borne by the seller (either as reduced sale price or investment in abatement prior to sale).”¹⁴¹

Lead paint removal is costly. The Connecticut Department of Economic and Community Development estimates that it costs between \$25,000 and \$50,000 to remove lead paint from a contaminated house.¹⁴² In order to ensure a thorough clean up, those who perform lead paint removal must be specially trained.¹⁴³ In public housing and in many state and local jurisdictions, power sanding techniques are illegal for lead paint removal¹⁴⁴ because these methods spread lead dust around the home, exposing all those breathing in the vicinity to lead.¹⁴⁵

Despite the potential tragic effects, many contractors still use this method because it quickly removes paint.¹⁴⁶ The Director of the Office of Healthy Homes and Lead Hazard Control at the U.S. Department of Housing and Urban Development, David E. Jacobs,¹⁴⁷ documents the case of a family who lived in their house while lead was improperly removed.¹⁴⁸ The family dog died with a blood lead level of over 177 micrograms per deciliter.¹⁴⁹ The three children all had blood lead levels of at least nineteen micrograms per deciliter.¹⁵⁰ The improper removal of lead also contaminated the soil in the yard, and the clean up of all the contaminated areas

¹⁴⁰ “Abatement encompasses any set of measures designed to permanently eliminate lead-based paint hazards.” PROPERTY DISPOSAL REGULATIONS, *supra* note 101, at 2.

¹⁴¹ Silbergeld, *supra* note 6, at 201.

¹⁴² Connecticut Department of Economic and Community Development, Lead Based Paint Hazards—2000 Consolidated Plan, <http://www.ct.gov/ecd/cwp/view.asp?a=1105&q=250538> (last visited Apr. 15, 2007).

¹⁴³ See David E. Jacobs et al., Commentary, *The High Cost of Improper Removal of Lead-Based Paint from Housing: A Case Report*, 111 ENVTL. HEALTH PERSPECTIVES 185, 185 (2003), available at <http://www.ehponline.org/members/2003/5761/5761.pdf>.

¹⁴⁴ *Id.*

¹⁴⁵ N.Y. State Department of Health, True/False Questions on Lead, <http://www.health.state.ny.us/nysdoh/environ/lead/leadq.htm> (last visited Apr. 15, 2007).

¹⁴⁶ See Jacobs et al., *supra* note 143, at 185.

¹⁴⁷ David E. Jacobs, Director of Healthy Homes and Lead Hazard Control, U.S. Dep’t of Housing and Urban Dev., Testimony Before the Subcommittee on Housing and Transportation of the Senate Committee on Banking, Housing, and Urban Affairs (June 5, 2002), <http://www.hud.gov/offices/cir/test060502j.cfm>. Before coming to HUD, Jacobs “conducted research on residential lead hazard detection and control” as a faculty member at the Georgia Institute for Technology. *Id.*

¹⁴⁸ See Jacobs *supra* note 143, at 185.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

cost \$180,000 more than was originally anticipated.¹⁵¹ To tackle the problem of improper removal, EPA has proposed new regulations for remodeling or repairing older homes containing lead.¹⁵² These regulations include more required safety restrictions for the removal of lead, as well as more training for contractors allowed to remove lead paint from a residence.¹⁵³

The costs associated with removing lead paint can be reduced through a process called encapsulation.¹⁵⁴ Encapsulation is “the application of a liquid coating that dries to form a watertight jacket over the lead paint” and “generally saves homeowners 80 percent of the cost associated with lead paint removal.”¹⁵⁵ Encapsulants cannot be used on all surfaces. “[F]riction will wear away the protective coating and render it ineffective;” thus, encapsulants cannot be used on “window sash[es], door-jamb, or high traffic areas where abrasion is going to occur.”¹⁵⁶

Removing lead contamination from housing requires both time and money,¹⁵⁷ two luxuries that people in poverty seldom have.¹⁵⁸ It is not surprising that rental units are more likely than owner-occupied units to contain lead-based paint hazards.¹⁵⁹ The problem remains that “[t]he poor are more likely to be renters than owners, and their housing is in many cases insufficiently valued to absorb the costs of abatement without

¹⁵¹ *Id.* at 185-86.

¹⁵² Lead; Renovation, Repair, and Painting Program; Proposed Rule, 71 Fed. Reg. 1588 (Jan. 10, 2006) (to be codified at 40 C.F.R. pt. 745). See Michele Derus, *Getting the Lead Out; Remodeling Provisions May Go Too Far, Some Say*, MILWAUKEE J.-SENTINEL, Mar. 5, 2006, at F1.

¹⁵³ Lead; Renovation, Repair, and Painting Program; Proposed Rule, 71 Fed. Reg. at 1588.

¹⁵⁴ Deb Alden, Encapsulating Lead-Based Paint, http://www.bobvila.com/Howto_Library/Encapsulating_Lead_Based_Paint-Miscellaneous_Paint_and_Wallpaper-A1620.html (last visited Apr. 15, 2007).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See generally N.Y. ST. DEP'T OF HEALTH, PHYSICIAN'S HANDBOOK ON CHILDHOOD LEAD POISONING PREVENTION: CHAPTER 9, ENVIRONMENTAL MANAGEMENT (2002), available at <http://www.health.state.ny.us/nysdoh/lead/handbook/phc9.htm>. Replacement, chemical removal, and handscraping are all methods of removing lead paint from homes. *Id.* All removal methods are more expensive than encapsulation, especially chemical removal. *Id.* Handscraping and chemical removal are labor intensive for those not skilled at lead paint removal, and replacement should be done by skilled workers. *Id.*

¹⁵⁸ See Heavens, *supra* note 112. “One in six low-income children living in older housing are believed to have lead poisoning . . .” *Id.*

¹⁵⁹ Jacobs et al., *supra* note 34, at A602.. Jacobs' study “suggests that rental properties are somewhat more likely to have lead-based paint hazards than are owner-occupied properties (30% vs. 23%, respectively), perhaps because of the increased turnover rates and lower maintenance levels that may be more common in rental units.” *Id.* at A605.

public subsidy.”¹⁶⁰ The Lead-Based Paint Hazard Reduction and Financing Task Force, created by RLPHRA,¹⁶¹ explains that “[w]ithout additional subsidies, rigid mandates for lead-based paint hazard control would threaten the economic vitality of many low income units and/or force residents to be increased to unaffordable levels.”¹⁶² Thus, the solution for the lead poisoning problem requires both an increase in restrictions as well as increase in grants available for lead abatement purposes.

B. Problems with Lead Reporting

Unfortunately, many of the efforts previously discussed seem full of rhetoric and cooperative language and less focused on the logistical steps necessary to enforce new restrictions.¹⁶³ Take, for example, the experience of Dr. Nathan Graber, Pediatric Fellow in Environmental Health at Mount Sinai School of Medicine. Determined to study the practices of physicians in East Harlem and Brooklyn (areas which have New York City’s highest rates of lead poisoning),¹⁶⁴ Graber’s research assistants gathered “lists of practices and clinics from the Citywide Immunization Registry.”¹⁶⁵ Researchers found that the city’s list was dramatically outdated and took to the street and internet to discover the actual location of these offices.¹⁶⁶ For lead poisoning prevention plans to actually work, the government must have such health data available.¹⁶⁷ Similarly, the researchers found that only thirty-seven percent of those children born in the year 2001 had their blood lead levels tested at the ages of one and

¹⁶⁰ Silbergeld, *supra* note 6, at 201.

¹⁶¹ Rafael Mares, *Enforcement of the Massachusetts Lead Law and its Effect on Rental Prices and Abandonment*, 12 J. AFFORDABLE HOUSING 343, 360 n.15 (2003), available at <http://www.duncankennedy.net/documents/Housing%20other%20articles/Enforcement%20of%20the%20MA%20Lead%20Law.pdf>. Mares explains that the members of this task force are named by the Secretary of Housing and Urban Development. *Id.*

¹⁶² LEAD-BASED PAINT HAZARD REDUCTION AND FINANCING TASK FORCE, PUTTING THE PIECES TOGETHER: CONTROLLING LEAD HAZARDS IN THE NATION’S HOUSING 45 (1995), available at <http://www.hud.gov/offices/lead/reports/report.pdf>.

¹⁶³ Telephone Interview with Rachel Outterson, *supra* note 43.

¹⁶⁴ This area makes up part of the so-called “lead belt.” See Marjory Garrison, *Will the City Get the Lead Out?*, BROOKLYN RAIL, Oct. 2003, <http://www.thebrooklynrail.org/local/oct03/lead.html>.

¹⁶⁵ Rachel Outterson, *Barriers to Lead Poisoning Screening in East Harlem and Bushwick* (Aug. 8, 2005) (on file with author).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

two.¹⁶⁸ This result is contrary to New York law, where, since 1992, children have been required to have their blood lead levels tested at both ages one and two.¹⁶⁹ Without data from the doctors who are measuring children's lead levels, how can the government accurately describe whether lead levels are declining? Lead poisoning affects people in poverty, and people in poverty are forced to move frequently.¹⁷⁰ Before the government can declare the war on lead poisoning won they must find a better way to measure its prevalence.¹⁷¹

Dr. Graber's frustrations were echoed by the Commission for Environmental Cooperation in its recent report, *Children's Health and the Environment in North America*.¹⁷² The Commission, made up of government officials from Mexico, Canada and the United States, found "that North American children remain at risk from environmental exposures and that children's health reporting must be improved to address the data gaps identified in the report."¹⁷³ These data gaps exist, at least partially, because of the difficulties of keeping records about people who are constantly moving.¹⁷⁴ People in poverty suffer from "[a] lack of affordable housing [that] contributes to housing instability, resulting in frequent residential moves and, for some families, periods of homelessness."¹⁷⁵ Appropriate legislative solutions must recognize the importance of keeping residences both affordable and lead free.

¹⁶⁸ Rachel Outterson & Nathan Graber, Pediatric Healthcare Provider Beliefs Regarding Low-Level Lead Exposure and Adverse Effects in Children, Presentation Before the Connecticut Pediatric Conference (March 23, 2006) (slides on file with author).

¹⁶⁹ ELIMINATING CHILDHOOD LEAD POISONING IN NEW YORK STATE BY 2010, *supra* note 63; STATE OF N.Y. OFFICE OF THE ATTORNEY GENERAL, HEALTH CARE BUREAU, GETTING THE LEAD OUT: ARE NEW YORK'S MANAGED CARE PLANS COMPLYING WITH THE STATE'S CHILDHOOD LEAD SCREENING LAW? 5-6 (July 2004) *available at* http://www.oag.state.ny.us/press/reports/getting_the_lead_out_report.pdf (citing N.Y. PUB. HEALTH LAW §1373-c (2004)).

¹⁷⁰ *See infra* note 176 and accompanying text.

¹⁷¹ Telephone Interview with Rachel Outterson, *supra* note 43. Outterson also found that a large percentage of doctors in New York's Lead Belt do not believe that children suffer adverse effects from lead at blood lead levels below ten micrograms per deciliter of blood.

¹⁷² *See* Comm'n for Env'tl. Cooperation, North American Report on Children's Health and Environment Indicators a Global First (Jan 26, 2006), <http://www.cec.org/news/details/index.cfm?varlan=english&ID=2693>.

¹⁷³ *Id.* *See also* COMM'N FOR ENVTL. COOPERATION, CHILDREN'S HEALTH AND THE ENVIRONMENT IN NORTH AMERICA (2006), *available at* http://www.cec.org/files/PDF/POLLUTANTS/CEH-Indicators-fin_en.pdf.

¹⁷⁴ National Low Income Housing Coalition, Housing and Education, http://www.nlihc.org/detail/article.cfm?article_id=2776&id=46 (last updated Mar. 1, 2007).

¹⁷⁵ *Id.*

C. *The Law in Action: Mason v. Morrisette*

The effectiveness of RLPHRA can be examined through a recent U.S. Court of Appeals case in which two children sued their landlord¹⁷⁶ for failing to disclose the presence of lead paint in their New Hampshire apartment.¹⁷⁷ In *Mason ex rel. Heiser v. Morrisette*, the defendant landlord argued “that the protections and remedies of . . . RLPHRA apply only to written leases.”¹⁷⁸ While the court in *Mason* declined to hear this issue, the issue raises a question about the parties protected by RLPHRA.¹⁷⁹ Some legal scholars think that courts would likely find that RLPHRA still applies to oral leases.¹⁸⁰ The Virginia Department of Health informs lessors that they must follow RLPHRA procedures when committing an oral lease.¹⁸¹ The fact that Defendants brought the argument that RLPHRA does not apply to an oral lease suggests that: 1) there is confusion about RLPHRA’s applicability, and 2) that many tenants with oral leases are not being informed of lead hazards within their homes. Oral leases¹⁸² are

¹⁷⁶ Many have discussed whether or not lead clean-up is the landlord’s responsibility and how tort liability should work in lead poisoning cases. See, e.g., Brett P. Barragante, *Time for Legislative Action: Landlord Liability in Ohio For Lead Poisoning of a Tenant*, 43 CLEV. ST. L. REV. 529 (1995); Daniel G. LeVan, *Landlord Liability for Lead Poisoning of Tenant Children Caused By Defects in the Premises*, 70 U. DET. MERCY L. REV. 429 (1993); Mark L. Matulef, *On-The-Job Lead Poisoning: Early Judicial Treatment of Claims for Recovery from Exposure to Workplace Lead*, 10 U. BALT. J. ENVTL. L. 1 (2002).

¹⁷⁷ *Mason ex rel. Heiser v. Morrisette*, 403 F.3d 28, 29 (1st Cir. 2005).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 29 n.4.

¹⁸⁰ See John P. Fernsler & Leonard A. Bernstein, *New Federal Rules Impose Lead Paint Disclosure Duties*, N.J. L.J., June 24, 1996, at S-8.

¹⁸¹ See Va. Dep’t of Health, *Lead Hazard Disclosure in Real Estate Transactions* (n.d.), <http://www.vahealth.org/leadsafe/publicationscontractors.asp> (follow the “Lead Hazard Disclosure Presentation for Property Owners and Managers” hyperlink) (PowerPoint presentation).

¹⁸² “[B]ecause nothing is written down, the major disadvantage [of an oral lease] is the possibility of misunderstandings between the landlord and the tenant about the conditions of the tenancy.” American Bar Association, *Leases: What are the Disadvantages of an Oral Lease*, http://www.abanet.org/publiced/practical/lease_disadvantageoral.html (last visited Apr. 15, 2007). New York allows for certain strict protections for those participating in oral leases:

In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous, or detrimental to their life, health

much more likely to be entered into by people lacking knowledge of their legal rights or people with an urgent need for housing.¹⁸³ These people are likely to be living in poverty.¹⁸⁴ If courts find that RLPHRA does not apply to oral leases, then RLPHRA's lead paint protections cannot reach those who need its protection most.¹⁸⁵ Congress should amend RLPHRA to state explicitly that it applies to oral lessees.

In *Mason*, the court also ruled that the children of lease holders lacked standing to bring claims under the RLPHRA.¹⁸⁶ The court "determined that Congress inten[ded] to limit recovery under . . . [the RLPHRA] to a 'purchaser or lessee.'"¹⁸⁷ By choosing to limit the RLPHRA in this manner the court is limiting the effectiveness of the RLPHRA to adequately prevent lead poisoning. In contrast, the Third Circuit has found that children can have standing under RLPHRA if they meet certain basic standing requirements.¹⁸⁸ In 2006, a Federal District Court in Southern

or safety.

N.Y. REAL PROP. LAW § 235(b)(1) (McKinney 1984).

¹⁸³ Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9063, 9068 (Mar. 6, 1996).

¹⁸⁴ See Silbergeld, *supra* note 6, at 200.

¹⁸⁵ RLPHRA may also be discriminatory when damages are awarded as a result of lead poisoning suffered by a child. See Laura Greenberg, *Compensating the Lead Poisoned Child: Proposals for Mitigating Discriminatory Damage Awards*, 28 B.C. ENVTL. AFF. L. REV. 429, 429-30 (2001). Damages may be awarded differently for families of African-American and white children:

Their compensation in such suits is measured, in large part, by the calculation of their loss of earning capacity. Typically, economists and rehabilitation experts rely on both race-based statistics and examinations of the vocational and educational achievements of the plaintiff's family to determine the loss of earning capacity. Lead paint plaintiffs—young, poor and often African-American or Hispanic—are disadvantaged by the traditional determinations of loss of earning capacity.

Id. (citation omitted).

¹⁸⁶ *Mason ex rel. Heiser v. Morrisette*, 403 F.3d 28, 28 (1st Cir. 2005). The First Circuit cites other courts that have found similarly. See *L.B. III v. Hous. Auth. Of Louisville*, 345 F. Supp. 2d 725, 729 (W.D. Ky. 2004) (holding that minor children of lessees "fail to fit the statutory [standing] requirement because they were neither purchasers nor lessees of the property in which they lived"); *Gladysz v. Desmarais*, No. 02-208-B, 2003 U.S. Dist. LEXIS 4252 at *2 (D. N.H. Mar. 17, 2003) (holding that grandchildren of lessee do not have standing because the "civil liability provision in RLPHRA limits recovery to 'purchasers or lessees'" (citation omitted)).

¹⁸⁷ *Mason*, 403 F.3d at 32. The court did, however, suggest that "the *Mason* children are not left without remedy: they can pursue claims against the Appellees in the New Hampshire state courts." *Id.* at 33.

¹⁸⁸ *Cudjoe ex rel. Cudjoe v. Dep't of Veterans Aff.*, 426 F.3d 241 (3d Cir. 2005).

Indiana found that as an “individual’s standing to sue may go beyond what is explicitly stated in the statute,” a child could have standing to sue under RLRHRA.¹⁸⁹ This court found further that the children of lessees fell within the “zone of interests sought to be protected by Congress under RLPHRA.”¹⁹⁰ The court also determined that if it were to deny children standing to sue, their parents could only collect damages “for the medical care of [the child] until [his parents] no longer had to take care of him.”¹⁹¹ The court found that the “permanent injuries” suffered by a child with lead poisoning could only be addressed with damages by allowing the child to have standing to sue.¹⁹² Congress should address this split.¹⁹³

V. SOLUTIONS TO THE LEAD POISONING PROBLEM

A. *Stricter Law: The Massachusetts Solution*

Massachusetts has passed laws declaring that renting a home with lead hazards to a family with children is a strict liability offense.¹⁹⁴ The law provides that “the owner of any residential premises shall be liable for all damages” caused by his failure to comply with the law for a household containing a child under six, upon proof of an elevated lead level and evidence that the premises does not conform to regulations.¹⁹⁵ Not surprisingly, there have been numerous reported cases of landlords who refused to lease to tenants with children in order to avoid lead liability.¹⁹⁶

¹⁸⁹ *McKormick v. Kissel*, 458 F.Supp.2d 944, 947 (2006).

¹⁹⁰ *Id.* at 948.

¹⁹¹ *Id.*

¹⁹² *Id.* at 949.

¹⁹³ Allowing children standing to sue under RLPHRA would be similar to the statutory expansion of claims under § 2-318 of the Uniform Commercial Code. U.C.C. § 2-318(a) (2007) states that a “seller’s warranty whether express or implied extends to any natural person who is in the family or household of his buyer.” U.C.C. § 2-318(a) is the least flexible of the warranties provided under § 2-318 of Uniform Commercial Code. If such warranties are possible for the sale of regular goods and services, it makes sense to have similar protections applicable to rental and sales agreements.

¹⁹⁴ Erik B. Bluemel et al., *Assessing the Impacts of New York City’s Lead Paint Legislation on the Housing Market*, 13 N.Y.U. ENVTL. L. J. 197, 224 (2005). Massachusetts has created a fund where landlords can get loans to help them pay for abatement. See MASS. GEN. LAWS. ANN. CH. 111, § 197E (2005).

¹⁹⁵ Kevin C. Cain & Harry A. Pierce, *Analysis of the 1993 Amendments to the Massachusetts Lead Paint Law*, 39 BOSTON BAR J. 4, 4-5 (1995).

¹⁹⁶ Tamar Ezer, *Practitioner’s Note: Delivery of Legal Services to Children in the Boston Area*, 8 U.C. DAVIS J. JUV. L. & POL’Y 95, 109-11 (2004).

Legal services attorneys have been systematically bringing cases against landlords discriminating against tenants, “based on the family status of having children under six, when renting apartments in order to avoid the lead law.”¹⁹⁷ While the Massachusetts law has been widely hailed as a national model,¹⁹⁸ it has brought a dilemma to many Boston families.¹⁹⁹ One Boston resident described her conflict as follows: “Should we lie to realtors and landlords and risk exposing our child to lead, or should we pay a rent we can barely afford for a certified deleaded [sic] apartment?”²⁰⁰

B. *The Rochester Model: A Targeted Solution*

History shows that environmental legislation is most effective when it is cost effective²⁰¹ and involves the community as stakeholders.²⁰² In Rochester, New York,²⁰³ community groups came together to revise the city’s property code in order to confront the city’s lead hazards in a cost effective manner.²⁰⁴ This group lobbied the city, and the city council passed an ordinance that requires all rental properties built prior to 1978 be inspected for the presence of lead paint.²⁰⁵ As a result, all apartments within

¹⁹⁷ *Id.*

¹⁹⁸ Amy E. Souchuns, *Old Paint, New Laws: Achieving Effective Compliance With The Residential Lead-Based Paint Hazard Reduction Act*, 47 CATH. U. L. REV. 1411, 1426 (1998).

¹⁹⁹ Crystal Brunelli, *Letter to the Editor: Protecting our Children from Lead Paint*, BOSTON GLOBE, Sept. 1, 2000, at A100.

²⁰⁰ *Id.* See also Jeremy Pressman, *Sure the Apartment’s Available (But Not If You Have Young Children)*, BOSTON GLOBE, Aug. 26, 2000, at A15. Pressman describes his search for an apartment in Boston to share with his wife and young son. While landlords and real estate agents were initially happy to speak with Pressman, their attitudes usually changed quickly when they found out about his infant child. One told him: “No, the apartment is not deleaded [sic] . . . It doesn’t make sense for you. Not safe for kids; That’s what the government says. Even if you liked it, you couldn’t take it.” *Id.*

²⁰¹ See Bass & McLean, *supra* note 86, at 288 (noting that inefficient dissemination of information standards under the Emergency Planning and Community Right-to-Know Act creates increased costs for businesses that need to be informed of toxic chemical releases).

²⁰² See Green, *supra* note 85, at 389.

²⁰³ “Some studies have placed Rochester among the [ten] U.S. cities with the worst lead problems.” Matt Leingang, *UR Expert Fired from Panel*, ROCHESTER DEMOCRAT & CHRON., Aug. 9, 2003, at 1B.

²⁰⁴ See The Coalition to Prevent Lead Poisoning, About the Coalition, <http://leadsafeby2010.org/AbouttheCoalition/tabid/70/Default.aspx> (last visited Apr. 15, 2007).

²⁰⁵ See ROCHESTER MUN. CODE §§ 90-50 to -65 (2007), available at http://www.afhh.org/res/res_pubs/City_Code_final_Rochester_ordinance.pdf. The code was effective July 1, 2006. Brian Sharp, *City’s Lead-Paint Measure Gets a ‘Go’*, ROCHESTER DEMOCRAT & CHRON., March 16, 2006, at 5B.

an area of the city called the “Crescent” are required to be tested for lead hazards before they are rented.²⁰⁶ Over the past fifteen years, ninety-two percent of the city’s cases of lead poisoning have been found in this area,²⁰⁷ and an estimated ninety percent of the homes in the Crescent contain lead hazards.²⁰⁸ As this procedure “targets exactly where we know the pollution is[,]” it is both cost effective and reaches those most at risk for lead poisoning.²⁰⁹ During these inspections, inspectors will examine the apartments’ chipping paint, but will also use dust wipes.²¹⁰ Apartments that fail these inspections will be in violation of the code, and certificates of occupancy will not be issued for these residences until the lead hazard is properly removed or encapsulated.²¹¹ By inspecting all rental units in this area (regardless of whether children are present), and not permitting anyone to live in apartments with lead hazards, Rochester avoids many of the landlord discrimination issues common in Massachusetts.²¹²

The Rochester solution is in no way perfect. In an ideal world all residences, and not just rentals, would be thoroughly inspected for lead.²¹³ Moreover, in an ideal world, legislation would somehow reach those living illegally in apartments without an occupancy certificate. This code, however,

²⁰⁶ Misty Edgecomb, *Anti-Lead Paint Plan Saluted*, ROCHESTER DEMOCRAT & CHRON., Dec. 23, 2005, at 1B. The idea to test only rented apartments is similar to current law in Maryland, where the state only tests rental housing. See Souchuns, *supra* note 198, at 1440. Maryland chooses to test only rental housing built before 1950. *Id.* By choosing this restriction, however, the state is not testing an estimated 350,000 units with lead hazards. *Id.* at 1440 n.183.

²⁰⁷ Coal. to Prevent Lead Poisoning, *The Case for Targeting* (unpublished PowerPoint presentation, on file with author).

²⁰⁸ Edgecomb, *supra* note 206, at 1B.

²⁰⁹ *Id.* (quoting Derrick Hazle, Leader of Rochester’s Coalition to Prevent Lead Poisoning).

²¹⁰ City of Rochester, N.Y., *Let’s Get the Lead Out*, http://www.ci.rochester.ny.us/PublicSafety/lead/get_safe.cfm (last visited Apr. 15, 2007). Dust wipes allow for more accurate testing for lead hazards and will only be used if a residence passes visual inspection. *Id.* A dust wipe is “[a]n individually wrapped cloth, similar to a baby wipe, [that] is simply swept across the wall or windowsill, picking up any lead dust that may be present, so that it can be analyzed in a laboratory.” Edgecomb, *supra* note 206, at 1B.

²¹¹ ROCHESTER MUN. CODE § 90-57(D) (2007), *available at* http://www.afhh.org/res/res_pubs/City_Code_final_Rochester_ordinance.pdf.

²¹² Rochester will inspect all households in the Crescent, not just those with children. Brian Sharp, *Lead-Paint Sweep On Track*, ROCHESTER DEMOCRAT & CHRON., Dec. 4, 2005, at 3B, *available at* <http://www.democratandchronicle.com/apps/pbcs.dll/article?AID=/20051204/NEWS01/512040324/1002/NEWS>.

²¹³ See ROCHESTER MUN. CODE § 90-62(B), *available at* http://www.afhh.org/res/res_pubs/City_Code_final_Rochester_ordinance.pdf (explaining that the lead inspection code does not apply to single family owner-occupied dwellings).

allows everyone who rents an apartment the ability to discover if it has lead contamination and have it safely removed before they take up residence.²¹⁴

A necessary part of this plan is also providing financing in order to ensure that landlords can remove lead hazards in a way that is economical.²¹⁵ Rochester has asked the federal government for two million dollars to help defray landlords' costs.²¹⁶ Without financing to help pay for lead abatements, Rochester risks creating an underground system of landlord/tenant arrangements that would completely circumvent the new code.

CONCLUSION

Eric and Matthew, the examples featured in the introduction, will never be able to reverse the devastating impact lead has had on their lives.²¹⁷ Many other children in poverty will continue to suffer from lead poisoning as lead paint still exists in twenty-five percent of the nation's homes.²¹⁸ With appropriate legislation, the nation should be able to reduce the number of Matthews and Erics.

Over time, Congress has been developing techniques that may be able to confront this problem. Through the small improvements shown under LPPPA²¹⁹ and the new awareness of community needs displayed with EPCRA,²²⁰ Congress and EPA produced a new approach to environmental hazards. With RLPHRA, Congress showed an understanding of the public's need for knowledge.²²¹ The President's Task Force²²² and the "Common Sense"²²³ approach show a recognition that the community must be involved in decisions.

Changes must be made to RLPHRA so that it addresses the specific needs of people in poverty by explicitly covering oral leases and

²¹⁴ See Edgecomb, *supra* note 206, at 1B.

²¹⁵ See *Thinking Team*, Editorial, ROCHESTER DEMOCRAT & CHRON., Mar. 29, 2006, at A10.

²¹⁶ Brian Sharp, *Funding Sought for Lead Cleanup*, ROCHESTER DEMOCRAT & CHRON., Feb. 22, 2006, at 1B.

²¹⁷ Agency For Toxic Substances & Disease Registry, Case Studies in Environmental Medicine, Lead Toxicity: Physiologic Effects, http://www.atsdr.cdc.gov/HEC/CSEM/lead/physiologic_effects.html (last visited Apr. 15, 2007). Studies show that neurological effects of lead persist into adulthood. *Id.*

²¹⁸ See Jacobs, *supra* note 34, at A601.

²¹⁹ See Tiller, *supra* note 77, at 267.

²²⁰ See Mitchell, *supra* note 79, at 347.

²²¹ RLPHRA seeks to inform all lessees or purchasers of lead hazards within their home. Bruss, *supra* note 104.

²²² PRESIDENT'S TASK FORCE, *supra* note 16.

²²³ Roberts, *supra* note 121, at 248.

by giving any child harmed by a violation of RLPHRA standing to sue. More importantly, Congress should look to Rochester's model for a way to more closely reach those people living in poverty. By examining every residence in the areas most commonly marred by lead hazards, Congress could use its limited environmental funds in a most useful manner. The Rochester Code gives a right to the poor that previously belonged only to those with the time and leisure to have their houses inspected for lead. At the same time, Congress must give greater incentives to landlords to abate apartments.

Successful legislation must focus on both the needs of the community and the costs to landlords. If the burden is not balanced between the costs to the landlord and the needs of their tenants, a system of discriminatory practices by landlords may emerge.²²⁴ The government's goal is to eliminate childhood lead poisoning by 2010,²²⁵ but with current legislation that goal does not seem likely.²²⁶ A strengthening of RLPHRA and an adoption of a community-supported lead prevention plan like that of Rochester, New York, could make the elimination of childhood lead poisoning more likely.

²²⁴ Brunelli, *supra* note 199, at A100.

²²⁵ PRESIDENT'S TASK FORCE, *supra* note 16, at i.

²²⁶ See 42 U.S.C. § 4852d (2007) (requiring that a landlord or seller provide a pamphlet, disclose the presence of lead paint and allow for an inspection by the prospective buyer or renter).