LET THEM EAT PAINT: CHILDHOOD LEAD PAINT POISONING AS THE DENIAL OF CONSTITUTIONAL AND CIVIL RIGHTS

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ABSTRACT

Over forty years ago, the United States federal government banned the use of lead-based paint in residences. Yet, tens of millions of American homes still contain lead paint today—exposing huge numbers of children to a grave risk of irreversible brain damage. While most Americans are familiar with the devastating 2014 crisis caused by lead-contaminated water in Flint, Michigan, few realize that Flint is only a small piece of a much larger lead poisoning problem. In thousands of towns across the United States today, children suffer elevated blood lead levels at even greater rates than those observed in Flint. In many cases, the cause of lead exposure for these children is not water, but paint.

A child living in a home with deteriorating lead paint can easily suffer life-long harm—just by breathing in invisible lead dust or touching lead-contaminated surfaces and later putting their hands in their mouth. Despite clear evidence of the serious consequences of lead since the early 1900s, however, the lead paint problem has festered in America's shadows for over a century. Most recently, in the decades since the residential ban, landlords and sellers have

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* J.D. Candidate 2020, Columbia Law School; B.A. 2015, University of Virginia. I would like to thank Professor Kristen Underhill for her unwavering enthusiasm and her thoughtful, detailed suggestions throughout the writing process. I am also grateful to Professor Emily Benfer for her valuable guidance—and for her passionate dedication to the cause. I would like to thank the entire staff of the *Columbia Human Rights Law Review* for their tireless efforts and valuable contributions to this piece. Finally, I am extremely grateful to my family and friends for their input, expertise, and encouragement. A special thank you to my mother, Donna, for her unconditional support and wisdom, and to my father, Saul, for sparking my interest in the lead paint crisis—and generally inspiring my personal vision of what it means to be a great lawyer.

refused to adequately test for and remove lead paint from their properties—and governments and regulatory agencies have failed to enact effective laws and enforce regulations.

Why has this crisis been allowed to continue for so long? History, empirical data, and anecdotal evidence all strongly suggest that America has ignored the issue largely because lead poisoning mainly affects low-income communities and people of color.

This Note argues that the current legal remedies used to address the lead paint epidemic are inadequate and have failed to fix a completely preventable public health crisis. In addition, it demonstrates that all of the existing approaches to lead poisoning—legislative reform, regulatory action, lawsuits sounding in common law negligence, and the use of market share liability and public nuisance doctrine—do not address the underlying issues of racial and economic discrimination that have perpetuated this problem for decades.

In order to ensure enforcement of federal and state laws, to legitimize the experiences of children who have suffered at the hands of discriminatory policies, and to garner national attention to the issue, this Note argues that advocates should expand their response to lead paint by pursuing claims under constitutional and civil rights theories. In particular, this Note analyzes how litigators can bring successful lead poisoning claims under the Fourteenth Amendment to the U.S. Constitution, the Fair Housing Act, and Title VI of the Civil Rights Act of 1964.

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INTRODUCTION

"Today the continuing poisoning of half a million American children is tolerated partly because the victims are often low-income children of color."

—Nicholas Kristof, *The New York Times*[1]

In July of 2016, Crystal and Robin Lusters moved into their new home on Emerson Street NW in Washington, D.C. with their two-year-old in tow.[2] The move represented a step forward for the family, who were participants in a D.C. initiative intended to combat chronic homelessness, the "Targeted Affordable Housing Program." Thus far, the family's luck had been terrible. Crystal and Robin had moved to D.C. from Kansas City for a job that turned out to be a scam. By the time Robin was able to find another job in Arlington, their family had already been forced to move into a homeless shelter. The family's truck broke down, and they couldn't afford to fix it. Some time later, Crystal was diagnosed with cancer. That's why, when the Lusterses were offered the opportunity to live in the house on Emerson Street NW as part of the city's program, they were enthusiastic. The prospect of a more stable living arrangement in a safer neighborhood was a sign of hope for the future.

Before they moved in, the D.C. housing office inspected the house for lead paint hazards, following the federal Housing and Urban Development ("HUD") guidelines on lead poisoning prevention. The guidelines mandated visual inspections for public housing, which meant that the officials were required to check the house for peeling paint and deteriorating conditions. The unit passed inspection, and the Lusterses rested easy, thinking that experts had ensured the safety of the premises. Little did they know that underneath a fresh coat of paint—and all over the floor, doors, and windowsills—the

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1. Nicholas Kristof, *America Is Flint*, N.Y. TIMES (Feb. 6, 2016), https://www.nytimes.com/2016/02/07/opinion/sunday/america-is-flint.html (on file with the *Columbia Human Rights Law Review*).

2. Details from this story are covered in a 2017 article in The Washington Post. Terrence McCoy, *Washington's Worst Case of Lead Poisoning in Decades Happened in a Home Sanctioned by Housing Officials*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/local/social-issues/washingtons-worst-case-of-lead-poisoning-in-decades-happened-in-a-home-sanctioned-by-housing-officials/2017/01/30/f7a09aa6-dcde-11e6-acdf-14da832ae861_story.html (on file with the *Columbia Human Rights Law Review*).

house was covered in lead pigment that would have grave consequences for their child.[3]

Three months after they moved in, the Lusterses started noticing odd behavior in their daughter, Heavenz. She had begun to "babble," and "stare at nothing."[4] She no longer responded to her name. Heavenz stopped interacting with the family, became extremely anxious, and would scream loudly for no reason, rocking from side to side. The Lusterses took their daughter to the doctor, where tests showed that Heavenz had a blood lead level ("BLL") of 120 µg/dL (micrograms per deciliter of blood). This was twenty-four times the level at which the Centers for Disease Control and Prevention ("CDC") recommends intervention (5 µg/dL).[5] Inspectors would later confirm that lead dust and paint chips were "widespread throughout the home—on the doors and the windowsills, in the bathtub and kitchen."[6] The family moved out immediately and took Heavenz to countless medical appointments for treatment. But it was too late. After just a few months of living in the house on Emerson Street, the Lusterses' lives would never be the same.

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Unfortunately, experiences like these are not uncommon in America. Childhood lead poisoning caused by lead-based paint remains a chronic problem in the United States—even over forty years after the federal government banned the use of lead paint in residences.[7] Despite the recognition of the harmful effects of lead

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3. Unfortunately, painting over lead paint has little to no effect on the danger that the lead hazard poses to children. *Id.* ("To help a property pass an inspection, some landlords simply apply a fresh coat of paint and 'it looks good for one day,' said Kathy Zeisel of the Children's Law Center. 'If there's moisture, it starts peeling right away.'").

4. *Id.*

5. Despite this recommendation, the CDC maintains that *no* level of lead in the blood is safe. *Blood Lead Levels in Children*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nceh/lead/prevention/blood-lead-levels.htm [https://perma.cc/M989-6WEJ] [hereinafter *Blood Lead Levels in Children*] ("No safe blood lead level in children has been identified.").

6. McCoy, *supra* note 2.

7. *Lead in Paint*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nceh/lead/prevention/sources/paint.htm [https://perma.cc/RP34-FVNY] ("Lead-based paints were banned for residential use in 1978."); *see also* Press Release, U.S. Consumer Prod. Safety Comm'n, CPSC Announces Final Ban on Lead-Containing Paint (Sept. 2, 1977), https://www.cpsc.gov/Recalls/1977/

exposure as early as 1910,[8] tens of millions of American homes still contain lead in some form.[9] Although lead levels as high as Heavenz's are relatively rare today, experts agree that even very low levels of lead—including levels near 5 µg/dL—can cause immediate and permanent damage to a child's brain and nervous system.[10]

Lead poisoning has a range of effects, from reduced IQ and difficulty with speech and motor skills, to convulsions, coma, and severe mental and behavioral disability. Although advocacy groups, politicians, researchers, historians, and lawyers have long demanded the eradication of lead hazards in American homes, federal and state legislation on the issue has proven woefully inadequate.[11] This is due, in large part, to successful lobbying efforts by the lead industry and

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CPSC-Announces-Final-Ban-On-Lead-Containing-Paint/ [https://perma.cc/47MM-EV57] (announcing official ban).

8. Emily A. Benfer, *Contaminated Childhood: How the United States Failed to Prevent the Chronic Lead Poisoning of Low-Income Children and Communities of Color*, 41 HARV. ENVTL. L. REV. 493, 513 (2017). Although legislation to regulate the use of lead paint was not introduced in the U.S. Congress until around 1910, evidence demonstrates that researchers had actually discovered lead's harmful effects much earlier. Australian investigators had described childhood lead poisoning as early as 1892. Herbert L. Needleman, *Childhood Lead Poisoning: The Promise and Abandonment of Primary Prevention*, 88 AM. J. PUB. HEALTH 1871, 1871 (1998). In around 1904, researchers sufficiently connected poisoned children's symptoms to lead exposure, and by 1909 several European countries had already banned the indoor use of lead paint. MONA HANNA-ATTISHA, WHAT THE EYES DON'T SEE: A STORY OF CRISIS, RESISTANCE, AND HOPE IN AN AMERICAN CITY 147 (2018); *America's 'Lead Wars' Go Beyond Flint, Mich.: 'It's Now Really Everywhere*,*'* NPR (Mar. 3, 2016), https://www.npr.org/sections/health-shots/2016/03/03/469039064/americas-lead-wars-go-beyond-flint-mich-its-now-really-everywhere [https://perma.cc/3N2L-5CGL] [hereinafter *Beyond Flint*] (audio recording of NPR interview with renowned lead poisoning experts David Rosner and Gerald Markowitz, conducted by NPR host Terry Gross).

9. U.S. DEP'T OF HOUS. & URBAN DEV., AMERICAN HEALTHY HOMES SURVEY: LEAD AND ARSENIC FINDINGS 4 (2011), https://portal.hud.gov/hudportal/documents/huddoc?id=AHHS_Report.pdf [https://perma.cc/5RZC-PTEF] [hereinafter HEALTHY HOMES SURVEY] (survey conducted between 2005 and 2006 "measured levels of lead, lead hazards, allergens, arsenic, pesticides, and mold in homes nationwide").

10. Benfer, *supra* note 8, at 500; Elise Gould, *Childhood Lead Poisoning: Conservative Estimates of the Social and Economic Benefits of Lead Hazard Control*, 117 ENVTL. HEALTH PERSP. 1162, 1162 (2009).

11. *See generally* Benfer, *supra* note 8 (describing the failure of federal lead poisoning prevention strategies to protect the public from lead poisoning).

scant enforcement of the laws that do exist.[12] In addition, however, history, empirical data, and anecdotal evidence all strongly suggest that America has ignored this issue largely because lead poisoning mainly affects low-income communities and people of color.

The current remedies used to address the lead paint epidemic in the United States are insufficient and have failed to fix a completely preventable public health crisis. Furthermore, all of the existing approaches to eradicating lead poisoning—legislative reform, regulatory action, lawsuits sounding in common law negligence and other tort claims, market share liability, and public nuisance litigation—do not address the underlying issues of racial and economic discrimination that have perpetuated this problem for decades. Despite an abundance of research demonstrating the phenomenon's disproportionate impact on people of color and low-income groups, the legal system has never directly addressed the lead paint problem in its racial, class-based context.

This Note argues that in order to ensure enforcement of federal and state laws, to legitimize the experiences of children who have suffered at the hands of discriminatory policies, to garner national attention to the issue and, in turn, to push governments to remove lead paint from America's homes, advocates should expand their response to lead paint by pursuing claims under the Fourteenth Amendment to the U.S. Constitution, the Fair Housing Act, and Title VI of the Civil Rights Act of 1964.

Part I of this Note examines the medical effects of lead poisoning. It then lays out the magnitude of the problem of lead exposure today, and presents the history of the use of lead paint in the United States. Then, using history, empirical data, and anecdotal evidence, Part I demonstrates that lead poisoning in America is an issue heavily influenced by discrimination based on race and class. Part II analyzes the ways in which legal and political actors have attempted to address lead paint hazards in the past—through both legislation and litigation—and how these solutions have thus far proved inadequate. Part III advances possible ways to pursue a lead paint claim under a theory of civil rights or constitutional law. This includes action under the Fourteenth Amendment to the U.S.

12. *Beyond Flint*, *supra* note 8; *see also* Benfer, *supra* note 8, at 514–18 (discussing the lead industry's lobbying activities and the general lack of enforcement of lead poisoning laws); *infra* Section II.A.1 (describing federal legislative efforts to address lead poisoning).

Constitution, the Fair Housing Act, and Title VI of the Civil Rights Act of 1964. Finally, this Note will conclude with a discussion of the importance of—and the benefits in—approaching the lead poisoning problem from a constitutional and civil rights angle.

I. THE MEDICAL, HISTORICAL, AND RACE/CLASS DIMENSIONS OF CHILDHOOD LEAD POISONING IN THE UNITED STATES

To introduce the contours of the lead poisoning problem in America today, this Part explores the scientific effects of lead exposure on a child's brain and body. It then assesses the extent of the lead poisoning problem today, demonstrating the continuing urgency and magnitude of the phenomenon. This Part then reviews the history behind the spread of lead paint in U.S. homes, focusing particular attention on the lead industry's successful efforts to keep the pigment in circulation long after the medical community had discovered its dangers. Finally, this Part concludes with a discussion of the racial and class-based underpinnings of the epidemic. It supplies historical, empirical, and anecdotal evidence to demonstrate how social stratification and racial discrimination have played a role in America's willingness to neglect the crisis.

A. The Effects of Lead Poisoning and the Magnitude of the Problem Today

1. Lead's Effects on a Child's Brain and Body

It is undisputed in the scientific community today that "[t]here is no known level of lead exposure that is considered safe."[13] Because lead is a neurotoxin, exposure causes serious damage to nerves and nerve tissue, making elevated blood lead levels in children particularly dangerous.[14] Exposure is most hazardous for children

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13. *Lead Poisoning and Health*, WORLD HEALTH ORG. (Aug. 23, 2018), http://www.who.int/news-room/fact-sheets/detail/lead-poisoning-and-health [https://perma.cc/V7J3-UHUH]; *see also Blood Lead Levels in Children*, *supra* note 5 ("No safe blood lead level in children has been identified.").

14. *Beyond Flint*, *supra* note 8. Children face a more serious risk of harm from lead exposure than adults because they "absorb 4–5 times as much ingested lead as adults from a given source." WORLD HEALTH ORG., *supra* note 13. In addition, children's "blood-brain barrier and liver detoxification systems are biologically immature," rendering them particularly vulnerable to the harm

under the age of six, because lead interferes with the development of the brain and the nervous system.[15] For children, high levels of exposure can cause coma, convulsions, severe mental disability, behavioral disorders, and death.[16] Even at lower levels, where a child might not exhibit obvious symptoms right away, exposure can "affect nearly every system in the body."[17]

A wide range of effects can occur, including reduced IQ, reduced attention span, increased antisocial behavior, reduced educational attainment, anaemia,[18] high blood pressure, chronic kidney disease, immunotoxicity,[19] and toxicity to the reproductive organs.[20] Lead exposure can also cause ADD, ADHD, dyslexia,[21] and

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caused by lead exposure. Alan R. Abelsohn & Margaret Sanborn, *Lead and Children: Clinical Management for Family Physicians*, 56 CANADIAN FAMILY PHYSICIAN 531, 531 (2010).

15. WORLD HEALTH ORG., *supra* note 13.

16. *Id.*

17. *CDC's Childhood Lead Poisoning Prevention Program*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nceh/information/healthy_homes_lead.htm [https://perma.cc/KFA8-ZX6Q]; *see also* WORLD HEALTH ORG., *supra* note 13 ("At lower levels of exposure that cause no obvious symptoms . . . lead is now known to produce a spectrum of injury across multiple body systems.").

18. "Anaemia is a deficiency in the number or quality of red blood cells. The red blood cells carry oxygen around the body . . . When a person is anaemic, their heart has to work harder to pump the quantity of blood needed to get adequate oxygen around their body." *Anaemia*, BETTER HEALTH CHANNEL (2018), https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/anaemia?viewAsPdf=true [https://perma.cc/8L58-NXJB].

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> Immunotoxicity is defined as adverse effects on the functioning of both local and systemic immune systems that result from exposure to toxic substances . . . [a]lteration in the immune system may result in either immunosuppression or exaggerated immune reaction. Immunosuppression may lead to the increased incidence or severity of infectious diseases or cancer . . . immunostimulation can cause autoimmune diseases, in which healthy tissue is attacked by an immune system that fails to differentiate self-antigens from foreign antigens.

Kavita Gulati & Arunabha Ray, *Immunotoxicity*, HANDBOOK OF TOXICOLOGY OF CHEMICAL WARFARE AGENTS 595 (2009).

20. WORLD HEALTH ORG., *supra* note 13.

21. *Beyond Flint*, *supra* note 8.

trouble with hearing, visual-spatial skills, speech, language, and motor skills.[22]

The scientific literature demonstrates that even just a few particles of lead dust can cause immediate and permanent damage to a child's development.[23] Even at 5 µg/dL—levels once thought to be safe—exposure has been associated with decreased intelligence as well as behavioral and learning problems.[24]

Looming over all of the harmful effects of lead poisoning is the additional fact that the behavioral and neurological consequences of lead are irreversible.[25] In fact, lead is stored in the body and accumulates over time.[26] In addition to lead's ability to harm a fetus when a mother is exposed to the toxin *during* pregnancy,[27] older lead that has accumulated in a mother's bones can also be "remobilized" during pregnancy and transferred from the mother to the fetus.[28]

2. Avenues of Exposure

When lead paint exists in the home in some form, it is very easy for a child to become poisoned. This is true even if a child has not ingested any paint chips directly. In fact, poisoning through lead paint often occurs when paint in the home has begun to deteriorate,

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22. NAT'L CTR. FOR ENVTL. HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., EDUCATIONAL INTERVENTIONS FOR CHILDREN AFFECTED BY LEAD 4 (2015), https://www.cdc.gov/nceh/lead/publications/educational_interventions_children_affected_by_lead.pdf [https://perma.cc/A72C-8ADD].

23. Benfer, *supra* note 8, at 500.

24. WORLD HEALTH ORG., *supra* note 13.

25. Benfer, *supra* note 8, at 500, 548; WORLD HEALTH ORG., *supra* note 13.

26. *Beyond Flint*, *supra* note 8.

27. *See, e.g.*, Andrea E. Cassidy-Bushrow et al., *Burden of Higher Lead Exposure in African-Americans Starts* in Utero *and Persists into Childhood*, 108 ENV'T INT'L 221, 222 (2017) (study noting that *in utero* exposure to lead, "even at very low levels, has long-term health implications.").

28. OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, CAL. ENVTL. PROT. AGENCY, PUBLIC HEALTH GOALS FOR CHEMICALS IN DRINKING WATER: LEAD 6 (Apr. 2009), https://oehha.ca.gov/media/downloads/water/chemicals/phg/leadfinalphg042409_0.pdf [https://perma.cc/689E-D3WX]. The World Health Organization states that exposure to high levels of lead during pregnancy "can cause miscarriage, stillbirth, premature birth and low birth weight." WORLD HEALTH ORG., *supra* note 13. Public health researchers have likewise confirmed that "[m]aternal lead can also be transferred to infants during breastfeeding." OFFICE OF ENVTL. HEALTH HAZARD ASSESSMENT, CAL. ENVTL. PROT. AGENCY, *supra*, at 6.

and contaminated lead dust settles on the floor or windowsills as a result. A child might then inhale the dust, or crawl or play on the floor, later putting their hands or fingers in their mouth.[29] To further exacerbate the problem, lead paint chips taste sweet.[30] As a result, many young children also become severely poisoned when they pick peeling and flaking paint chips off of the walls in their home and ingest them directly.[31]

3. Current Lead Statistics in the United States

Overall, there is clear scientific knowledge of the dangers of lead poisoning, and the World Health Organization ("WHO"), the U.S. Environmental Protection Agency ("EPA"), and the CDC agree that there is no safe level of lead for a child.[32] Despite this clear danger, however, childhood lead poisoning is still a massive problem in the United States today. Although the federal government banned the use of lead paint in residences in the 1970s,[33] as of 2013 an estimated 535,000 U.S. children aged one to five years still had blood lead levels ("BLLs") greater than 5 μg/dL—the level at which the CDC recommends public health intervention.[34] Recent research found that

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29. *Beyond Flint*, *supra* note 8.

30. *See* HANNA-ATTISHA, *supra* note 8, at 146 ("White lead is noted for its sweetness, which is why lead paint tastes good to kids."). In fact, it has been demonstrated that "the more lead that paint chips contain the sweeter the taste to children." Daniel J. Penovsky, *Childhood Lead-Based Paint Poisoning Litigation*, 66 AM. JUR. TRIALS § 10 (2019).

31. Howard Markel, *How a Doctor Discovered U.S. Walls Were Poisonous*, PBS NEWS HOUR (Mar. 29, 2013), https://www.pbs.org/newshour/health/how-a-doctor-discovered-us-walls-were-poisonous [https://perma.cc/2MPH-YM4V].

32. *Basic Information About Lead in Drinking Water*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/ground-water-and-drinking-water/basic-information-about-lead-drinking-water [https://perma.cc/7FNC-VTKS] ("EPA and the Centers for Disease Control and Prevention (CDC) agree that there is no known safe level of lead in a child's blood. Lead is harmful to health, especially for children."); WORLD HEALTH ORG., *supra* note 13 (WHO fact sheet stating that there is "no known safe blood lead concentration").

33. Press Release, U.S. Consumer Prod. Safety Comm'n, *supra* note 7.

34. William Wheeler & Mary Jean Brown, *Blood Lead Levels in Children Aged 1–5 Years—United States, 1999–2010*, 62 MORBIDITY & MORTALITY WKLY. REP. 245, 245 (2013); CTRS. FOR DISEASE CONTROL & PREVENTION, CDC RESPONSE TO ADVISORY COMMITTEE ON CHILDHOOD LEAD POISONING PREVENTION RECOMMENDATIONS 6–7 (2012), https://www.cdc.gov/nceh/lead/acclpp/cdc_response_lead_exposure_recs.pdf [https://perma.cc/GUW4-AFXF]. As one point of comparison, a recent investigation of lead testing results across the

one in three homes with children under the age of six had significant lead-based paint hazards,[35] and as of 2016, an estimated *thirty-eight million* American homes still contained lead-based paint that would eventually become a hazard.[36]

All of this data begs the question: why is the completely preventable harm of childhood lead poisoning still such a widespread phenomenon in the United States? Part of the answer is that the current legal remedies used to address lead poisoning are inadequate. Failures include both statutory inadequacies in laws passed to fix the problem, as well as enforcement issues in how these laws are implemented. An important part of understanding the general complacency around the issue, however, and why the legal remedies have thus far been inadequate, requires an exploration of the history of lead paint and its introduction into American homes.

B. History: The Use of Lead Paint in America's Homes

1. Pre-1978: The Proliferation of Lead Paint in Homes and the Public Health Pushback

Lead paint was first used in American homes in the early twentieth century. The paint appealed to manufacturers and consumers because it was cheaper, brighter, and more durable than

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country found "nearly 3,000 areas with recently recorded lead poisoning rates at least double those in [Flint, Michigan] during the peak of that city's contamination crisis." M.B. Pell & Joshua Schneyer, *The Thousands of U.S. Locales Where Lead Poisoning is Worse Than in Flint*, REUTERS INVESTIGATES (Dec. 19, 2016), https://www.reuters.com/investigates/special-report/usa-lead-testing/ [https://perma.cc/AZ6G-DE27]. In addition, the report found that "more than 1,100 of these communities had a rate of elevated blood tests at least four times higher" than in Flint. *Id.*

35. ROBERT P. CLICKNER ET AL., OFFICE OF LEAD HAZARD CONTROL, U.S. DEP'T OF HOUS. & URBAN DEV., NATIONAL SURVEY OF LEAD AND ALLERGENS IN HOUSING: FINAL REPORT, VOLUME I: ANALYSIS OF LEAD HAZARDS, at ES-2 (2001), https://www.hud.gov/sites/dfiles/HH/documents/HUD_National_Survey_of_Lead_and_Allergens_in_Housing_Vol1_2001-04-18.pdf [https://perma.cc/D7ZK-JQ8C].

36. Teresa Wiltz, *Decades After Ban, Lead Paint Lingers*, PEW CHARITABLE TRUSTS (July 27, 2016), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/07/27/decades-after-ban-lead-paint-lingers [https://perma.cc/C48F-WQ6A]; *see also* Benfer, *supra* note 8, at 493 ("[T]hirty-eight million [homes] have lead-based paint that will eventually become a lead hazard if not closely monitored and maintained . . . .").

other options.[37] The product was introduced during a period of rapid urbanization and consumerism in the United States, and the lead paint industry capitalized on the expansion of American cities.[38] This resulted in the widespread use of lead paint in homes throughout the country.[39] By the 1920s, however, the public health community in the U.S. had identified lead exposure as a major problem, and began forcefully advocating for the removal of lead from everyday products.[40] Many factory workers were becoming sick from lead exposure, and children had suffered serious harm and death.[41]

Pushback from the lead industry ensued. The companies disputed that lead was the cause of the children's ailments, and they successfully lobbied legislatures to refrain from passing laws that would hurt the industry's profits.[42] Despite their knowledge that the toxin was causing children to go into comas, suffer convulsions, and die,[43] the lead industry ran aggressive advertising campaigns, claiming that lead was actually a *more* sanitary alternative to wallpaper.[44]

As a whole, the lead paint industry was successful in its efforts to sabotage legislation that would address the public health crisis. These successes were largely due to the industry's recasting of the problem as one that affected people of color and low-income

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37. *Beyond Flint*, *supra* note 8; David Rosner & Gerald Markowitz, *Building the World that Kills Us: The Politics of Lead, Science, and Polluted Homes, 1970 to 2000*, 42 J. URB. HIST. 323, 326 (2016) [hereinafter *Polluted Homes*].

38. *Polluted Homes*, *supra* note 37, at 324–26.

39. *Id.*

40. *Beyond Flint*, *supra* note 8.

41. *Id.*

42. *Id.*

43. *Polluted Homes*, *supra* note 37, at 324.

44. Some campaigns even emphasized that lead paint was used on hospital walls. *Beyond Flint*, *supra* note 8; Gerald Markowitz & David Rosner, *"Cater to the Children": The Role of the Lead Industry in a Public Health Tragedy, 1900–1955*, 90 AM. J. PUB. HEALTH 36, 41 (2000) (compilation of advertisements used by the lead paint industry between 1900 and 1955); *see also* People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 530–34, 540–41 (Cal. Ct. App. 2017), *cert. denied*, Sherwin-Williams Co. v. California, 139 S. Ct. 378 (2018) (discussing how lead paint manufacturers promoted lead paint for interior use despite knowledge that the paint was unsafe; stating how between 1915 and 1950, lead paint manufacturer promoted the use of lead paint in children's "play rooms," advertised it for interior residential use, and created a promotional "paint book" for children, which repeatedly "instructed children to give their parents the 'coupon' in the middle of the book").

groups. Lead executives blamed the families living in lead-contaminated homes, saying that Puerto Rican and African-American parents were "ineducable," and that they were not intelligent or responsible enough to keep lead away from their children.[45] They described the crisis as "inevitable," and blamed the issue on the existence of "slums."[46] As leading scholars David Rosner and Gerald Markowitz put it, "racism was an intrinsic part of the argument for ignoring the huge number of children whose lives were being destroyed by lead in their homes."[47] It was not until 1978, many decades after the health risks became apparent, that the federal government finally banned the use of lead paint in residences[48]—largely the result of the rising social movements that had begun to take hold during the civil rights era.[49]

2. Post-1978: After the Federal Ban—The Problem of Existing Lead Paint in Homes

Despite this long overdue success, by the time the introduction of *new* lead paint into homes was banned, millions of houses throughout the country already contained paint that risked deteriorating into a significant hazard.[50] Faced with an enormous health disaster, government officials were now confronted with the major argument against removing lead from homes throughout the country: cost.[51] This problem resulted in a struggle between politicians, public health officials, and medical professionals over whether to require complete abatement of lead in homes—a measure that would cost billions of dollars—or partial abatement—a solution touted as financially feasible, but that would leave countless children at risk.[52] Multiple federal agencies were tasked with solving the problem, and they bounced different proposals back and forth, with

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45. *Beyond Flint*, *supra* note 8.

46. *Polluted Homes*, *supra* note 37, at 325; *see also* DAVID ROSNER & GERALD MARKOWITZ, LEAD WARS: THE POLITICS OF SCIENCE AND THE FATE OF AMERICA'S CHILDREN 35 (2013) [hereinafter LEAD WARS] (describing attempts to reframe the mounting lead-poisoning crisis as a basic problem of "slums").

47. *Polluted Homes*, *supra* note 37, at 325.

48. Benfer, *supra* note 8, at 517.

49. LEAD WARS, *supra* note 46, at 44.

50. *Polluted Homes*, *supra* note 37, at 324.

51. *Id.* at 328.

52. *Id.* at 333–34.

none taking full responsibility for the issue.[53] In the end, the federal laws that were enacted either endorsed partial abatement or were inadequately enforced—or, more commonly, both.[54]

Given that recent data shows over half a million children still experience elevated blood lead levels, it is clear that federal legislation has been inadequate.[55] Additionally, there is a strong counterargument to the "cost" concerns regarding the feasibility of complete abatement: it has been estimated that lead poisoning costs taxpayers around $55 billion dollars annually.[56] One study also found that every dollar spent on limiting lead exposure produced between a $17 and $221 return on investment, resulting from reduced spending on health care, special education, and crime.[57]

Although there are obvious benefits to the complete abatement of lead paint—measured not only by children's lives but also by the cost of lead poisoning to society—the problem persists. This Note argues that this is largely because lead poisoning is a problem that affects impoverished communities and people of color.[58] This conclusion, explored in the next Section, is bolstered by statistics demonstrating that lead poisoning disproportionately affects low-income groups and communities of color. In addition, general

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53. *Polluted Homes*, *supra* note 37, at 332. By the 1980s, lead paint "had become a national concern of more than sixteen federal agencies—among them the HHS [U.S. Department of Health and Human Services], the HUD . . . the CDC . . . the Food and Drug Administration . . . the EPA . . . and the Occupational Safety and Health Administration." *Id.* This resulted in a "fragmented" federal effort to control the lead problem, and "many of these agencies sought to limit their responsibility and to define the problem so that other agencies would assume their burden." *Id.* ("At times, the Children's Bureau in the HHS argued that lead poisoning was primarily a housing issue . . . [a]t other times . . . HUD officials argued that the EPA had the primary responsibility to address the crisis.").

54. See *infra* Section II.A.1 (describing federal legislative efforts to address lead poisoning); *see also* Benfer, *supra* note 8, at 516–18 (describing the inconsistencies and contradictions in government abatement efforts).

55. Wheeler & Brown, *supra* note 34, at 245.

56. 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); *see also* Wiltz, *supra* note 36 (noting study's findings).

57. Gould, *supra* note 10, at 1162.

58. As expert Emily A. Benfer noted, "[o]vert racism and social segregation of the pre-Civil Rights era resulted in an acceptance of the lack of interventions." Benfer, *supra* note 8, at 507.

comparisons to other public health problems and their corresponding responses—especially when those issues affect white children or wealthy groups—further support this argument.

C. The Race- and Class-Based Reality of Lead Poisoning in America

Empirical evidence demonstrates that lead poisoning disproportionately affects people of color and low-income communities.[59] Despite recent progress in reducing overall BLLs among children under six years of age in the United States, differences in the mean BLLs across racial and income groups endure.[60] The Housing and Urban Development American Healthy Homes Survey reported in 2011 that while the overall number of homes with lead paint hazards had decreased over a seven-year period, lower income households still had a higher prevalence of lead paint hazards (29%) compared to higher income households (18%).[61] The survey also found that African-American households were more likely than white households to have lead paint hazards.[62] While the percentage of white households with significant lead paint hazards had decreased over the seven-year period, a similar change among other racial/ethnic groups was not noted.[63]

Other studies based on the CDC's 2003–2006 National Health and Nutritional Examination Survey ("NHANES") likewise confirm that children of color and those living in low-income households are "disproportionately more likely to have higher-than-average lead exposures."[64] Another study examining data from 1988–2004

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59. *See, e.g.*, Claire Glenn, *Upholding Civil Rights in Environmental Law: The Case for Ex Ante Title VI Regulation and Enforcement*, 41 N.Y.U. REV. L. & SOC. CHANGE 45, 48–49 (2017) ("[R]esearch has shown race to be an independent factor, not reducible to class, in predicting the distribution of . . . lead poisoning in children."); *Polluted Homes*, *supra* note 37, at 325–26 (describing how lead poisoning became a "signature disease of poverty" in the United States); Mary Jean Brown et al., *The Effectiveness of Housing Policies in Reducing Children's Lead Exposure*, 91 AM. J. PUB. HEALTH 621, 621 (2001) ("The risk for lead poisoning is greatest in poor, urban, and minority communities.").

60. Wheeler & Brown, *supra* note 34, at 245.

61. HEALTHY HOMES SURVEY, *supra* note 9, at ES-1–3.

62. *Id.*

63. *Id.*

64. Gould, *supra* note 10, at 1162–63; *see also* Benfer, *supra* note 8, at 504–05 (discussing how lead poisoning is most prevalent in communities of color and low-income neighborhoods).

specifically found that non-Hispanic Black children were nearly three times more likely than white children to have elevated BLLs.[65] The list goes on—as a whole, empirical evidence of disparities in lead exposure across racial/ethnic and income groups is plentiful.[66]

In addition, it is clear that these differences have largely been caused, exacerbated, and maintained by the history of racial inequality in the United States. The U.S. government's discriminatory practices in housing, including policies such as redlining[67] and patterns of racially restrictive covenants, have prolonged and maintained the segregation of American neighborhoods and communities.[68] These practices have prevented

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65. ROBERT L. JONES ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, TRENDS IN BLOOD LEAD LEVELS AND BLOOD LEAD TESTING AMONG US CHILDREN AGED 1 TO 5 YEARS, 1988–2004 1, 2, 6 (2009); *see also* U.S. ENVTL. PROT. AGENCY, EPA-230-R-92-008, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 11 (1992) ("A significantly higher percentage of Black children compared to White children have unacceptably high blood lead levels.").

66. *See, e.g.*, Robert J. Sampson & Alix S. Winter, *The Racial Ecology of Lead Poisoning: Toxic Inequality in Chicago Neighborhoods, 1995–2013*, DU BOIS REV., Fall 2016, at 1, 1 (paper examining data from over one million blood tests administered to Chicago children from 1995-2013; finding "alarming racial disparities in toxic exposure"); Cassidy-Bushrow et al., *supra* note 27, at 222 (finding African-American children had "2.2 times higher lead levels in the second and third trimesters [of pregnancy] . . . and 1.9 times higher lead levels postnatally in the first year of life . . . compared to white children," and that lead levels in African-American children were also "higher during childhood.").

67. *See* JASON REECE ET AL., KIRWAN INSTITUTE FOR THE STUDY OF RACE AND ETHNICITY, HISTORY MATTERS: UNDERSTANDING THE ROLE OF POLICY, RACE AND REAL ESTATE IN TODAY'S GEOGRAPHY OF HEALTH EQUITY AND OPPORTUNITY IN CUYAHOGA COUNTY 18 (2015) ("[T]he highest incidence of lead paint exposure occur in traditionally red lined areas [in Cuyahoga County, Ohio].").

68. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017) (describing how government-sanctioned housing programs begun under the New Deal both promoted and maintained racial segregation in America); *see also A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america [https://perma.cc/AL2Z-ZP4S] (audio recording of NPR interview with Richard Rothstein, conducted by NPR host Terry Gross); REECE ET AL., *supra* note 67, at 17–18; *see also* Benfer, *supra* note 8, at 505 ("In 1935, the Federal Housing Administration . . . and the Veterans Administration . . . promoted racially restrictive covenants to create homogenous neighborhoods and discriminated against minorities by refusing to provide mortgage loans to anyone living in a neighborhood with even the smallest Black population."); Tracy Jan, *Redlining Was Banned 50 Years Ago. It's Still Hurting Minorities Today.*, WASH. POST (Mar. 28, 2018), https://www.washingtonpost.com/

people of color and low-income families from moving to neighborhoods free from lead and other environmental hazards.[69] This issue—and the broader problem of environmental justice—remains a large part of the problem of exposure today.[70]

Additionally, the mere persistence of lead poisoning and the inadequate governmental responses in the United States suggest that discriminatory attitudes, whether intentional or implicit, have played a large role in the country's complacency. Despite its far-reaching effects and a century's worth of research, the public health disaster caused by lead poisoning "rarely provokes the outrage one might expect."[71] Experts compare it to the treatment of diseases that have affected white and wealthy populations to demonstrate the varying responses:

> If this were meningitis—or even an outbreak of measles—lead poisoning would be the focus of national outrage and action. In the 1950s, for example, fewer than sixty thousand new cases of polio per year created a near-panic among American parents and a national mobilization that led to vaccination campaigns that virtually wiped out the disease within a decade.[72]

To further illuminate the contrast, studies have shown that the return on investment for vaccination can be up to $16.50 for every dollar invested, while the same investment in lead hazard control yields a $17–$221 return.[73] In light of these calculations, the typical complaint from politicians that complete abatement is not financially

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news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/ (on file with the *Columbia Human Rights Law Review*) (discussing recent study by the National Community Reinvestment Coalition finding "3 out of 4 neighborhoods 'redlined' on government maps 80 years ago continu[e] to struggle economically," and are "much more likely than other areas to comprise lower-income, minority residents.").

69. Benfer, *supra* note 8, at 506, 513.

70. *See, e.g.*, Sampson & Winter, *supra* note 66, at 1 (arguing that lead toxicity is a "major environmental pathway through which racial segregation has contributed to the legacy of Black disadvantage in the United States").

71. *Polluted Homes*, *supra* note 37, at 324.

72. *Id.*

73. Gould, *supra* note 10, at 1162, 1166; *see also supra* Section I.B (discussing concerns about the cost of complete abatement, summarizing counterarguments).

feasible carries little weight.[74] Furthermore, slow or indifferent governmental responses to lead-based hazards affecting people of color are not confined to lead paint. For example, in 2016, when the water in Greentown, Indiana (population 97% white) tested high in lead, then-Governor Mike Pence responded immediately and the problem was resolved within two months. By contrast, when residents of another Indiana town (population 43% African-American and 51% Hispanic or Latino) discovered that their housing complex had been built on the former site of a lead refinery—and that many residents were suffering from severe lead poisoning as a result—Governor Pence took no action at all.[75]

To compound the issue, the problems resulting from lead poisoning can also force families into a perpetuating cycle of poverty. Lead exposure is correlated with increased academic failure, involvement with the juvenile justice system, and a higher likelihood of contact with the criminal justice system as an adult.[76] These disadvantages expedite the school-to-prison pipeline from a young age, a phenomenon that "disproportionately impacts the poor,

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74. Furthermore, experience has shown that even when jurisdictions have ample access to funds to correct the lead poisoning problem, they fail to use them. As one example, HUD awarded Washington, D.C. a grant of $2.9 million to be used for lead paint hazard remediation in 2012. The District used such a small fraction of the funds that it was ultimately found ineligible to re-apply for the grant's next cycle. Morgan Baskin, *D.C. Chronically Failed to Spend Federal Funds to Remediate Lead Paint Hazards, HUD Says*, WASH. CITY PAPER (Feb. 21, 2019), https://www.washingtoncitypaper.com/news/housing-complex/article/21048191/dc-chronically-failed-to-spend-federal-funds-to-remediate-lead-paint [https://perma.cc/E4DE-JC28].

75. John Halstead, *Mike Pence's Environmental Racism*, HUFFINGTON POST (Jan. 14, 2017), https://www.huffpost.com/entry/mike-pences-environmental_b_14084084 [https://perma.cc/22NN-WACK]; Benfer, *supra* note 8, at 508.

76. Deborah W. Denno, *Considering Lead Poisoning as a Criminal Defense*, 20 FORDHAM URB. L.J. 377, 377–78 (1993) (describing the results of a large, longitudinal study that analyzed biological, sociological, and environmental predictors of crime; the study found that among males, lead poisoning was one of the strongest predictors of crime); *see also* Benfer, *supra* note 8, at 500–02 (summarizing the adverse effects that lead poisoning has on children and discussing the overall cost these effects have on society); CTRS. FOR DISEASE CONTROL AND PREVENTION: ADVISORY COMM. ON CHILDHOOD LEAD POISONING PREVENTION, PREVENTING LEAD EXPOSURE IN YOUNG CHILDREN: A HOUSING BASED APPROACH TO PRIMARY PREVENTION OF LEAD POISONING 8 (2004) [hereinafter PREVENTING LEAD EXPOSURE] ("Lead adversely affects children's cognitive and behavioral development, which is strongly related to their future productivity and expected earnings.").

students with disabilities, and youth of color, especially African Americans."[77] Some scholars even suggest that lead poisoning may play a role in the United States' modern mass incarceration crisis.[78]

To make matters worse, the consequences of lead exposure can be compounded by other characteristics typically associated with impoverished living. Most striking is the fact that foods to which low-income families often have decreased access, such as those rich in calcium, iron, and vitamin C, are vital in helping to combat lead absorption in the body.[79] Undernourished children are more susceptible to lead poisoning because "their bodies absorb more lead if other nutrients, such as calcium or iron, are lacking."[80] Nutritional inequalities thus put impoverished children at even higher risk of severe damage from exposure to lead.

The lack of an adequate response to the problem, combined with the history surrounding discriminatory housing practices in the

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77. Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and The School to Prison Pipeline*, F. ON PUB. POL'Y, no. 2, 2009, at 1, 1–2.

78. *See generally* Rick Nevin, *How Lead Exposure Relates to Temporal Changes in IQ, Violent Crime, and Unwed Pregnancy*, ENVTL. RES., May 2000, at 1 (study finding that widespread exposure to lead is strongly associated with increased rates of murder and violent crime); Kevin Drum, *Lead: America's Real Criminal Element*, MOTHER JONES (Feb. 11, 2016), https://www.motherjones.com/environment/2016/02/lead-exposure-gasoline-crime-increase-children-health [http://perma.cc/MDJ5-3T6E] (exploring evidence linking lead exposure and crime); Jennifer L. Doleac, *New Evidence that Lead Exposure Increases Crime*, BROOKINGS (June 1, 2017), https://www.brookings.edu/blog/up-front/2017/06/01/new-evidence-that-lead-exposure-increases-crime [http://perma.cc/VR2V-TPPQ] (discussing several studies that analyze the effects of lead exposure on juvenile delinquency and crime rates). Freddie Gray, whose horrific death was caused by police brutality in Baltimore in 2015, is known to have suffered from lead poisoning as a child. Terrence McCoy, *Freddie Gray's Life a Study on the Effects of Lead Paint on Poor Blacks*, WASH. POST (Apr. 29, 2015), https://www.washingtonpost.com/local/freddie-grays-life-a-study-in-the-sad-effects-of-lead-paint-on-poor-blacks/2015/04/29/0be898e6-eea8-11e4-8abc-d6aa3bad79dd_story.html (on file with the *Columbia Human Rights Law Review*) (Ruth Ann Norton, executive director of the Coalition to End Childhood Lead Poisoning, stating that "[a] child who was poisoned with lead is seven times more likely to drop out of school and six times more likely to end up in the juvenile justice system.").

79. Emily A. Benfer et al., *Duty to Protect: Enhancing the Federal Framework to Prevent Childhood Lead Poisoning and Exposure to Environmental Harm*, 18 YALE J. HEALTH POL'Y, L. & ETHICS 1, 47 (2019); Angela Hilmers et al., *Neighborhood Disparities in Access to Healthy Foods and Their Effects on Environmental Justice,* 102 AM. J. PUB. HEALTH 1644, 1644 (2012).

80. WORLD HEALTH ORG., *supra* note 13.

United States, the fact that lead poisoning disproportionately affects people of color and low-income households, and the knowledge that allowing lead poisoning to continue actually costs taxpayers billions of dollars, suggests an apathy that appears to rest on racist and classist attitudes. Overall, the U.S. government does not seem to view the problem as a high priority, evidenced by the lack of enforcement of lead hazard regulations and the general inadequacy of federal legislation in the first place.

The current legal solutions in America—the existing regulatory and legislative frameworks, common law negligence and tort lawsuits, market share liability theory, and public nuisance litigation—all serve as inadequate means to remedy the lead paint problem. Furthermore, they all fail to address the underlying issues of discrimination and structural racism that have perpetuated the crisis for decades. In Part II, this Note analyzes the deficiencies of the current legal solutions. It begins with an examination of federal and state legislative efforts, and concludes with a review of the litigation strategies commonly employed in the field, including common law tort (negligence) claims, the use of market share liability theory, and claims brought under public nuisance doctrine.

II. THE INADEQUATE LEGAL RESPONSES TO CHILDHOOD LEAD POISONING IN AMERICA

The current legal solutions addressing childhood lead poisoning in the United States have failed to create effective, meaningful change. Despite a myriad of attempts, the existing patchwork of solutions has only given American children partial relief. In reality, the only way to eradicate lead poisoning caused by paint in homes is to require the complete abatement of residential lead hazards across the country. However, various legal, political, and financial obstacles have blocked this solution. This Part describes the ways in which legal and political actors have attempted to address lead poisoning thus far, and how these avenues have proved inadequate. To illustrate the point, this Part begins with an analysis of two major federal lead poisoning laws: the Lead-Based Paint Poisoning Prevention Act and Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act. It then discusses state legislative efforts to solve lead poisoning. This Part then concludes with an exploration of several litigation strategies and the various barriers to their success, including lawsuits brought under common law tort

(negligence), the use of market share liability, and claims utilizing public nuisance doctrine.

A. Legislative Efforts

1. Federal Legislation

Although advocates for children and public health experts have made valiant efforts to introduce federal legislation combatting lead poisoning, these attempts have largely been unsuccessful. The most glaring problem with federal laws thus far has been that none has fully endorsed a plan of primary prevention or complete abatement.[81] Furthermore, the government agencies tasked with abatement have resisted the few laws that have approached these standards, ultimately leading to a complete lack of enforcement. As a result, "[w]ith few exceptions, and most of them on the local level, the law requires that children uncover the location of lead hazards with [their] rising blood lead levels . . . children must be lead poisoned before the lead hazard is contained or removed from their environment."[82]

Most of the federal laws addressing lead poisoning thus provide only a partial solution, and even claim in their own preambles that the laws are *not intended to end lead poisoning*, but are meant merely as transitional or temporary measures.[83]

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81. Primary prevention, as understood in the public health field, refers to "[i]nterventions undertaken to reduce or eliminate exposures or risk factors *before* the onset of detectable disease." PREVENTING LEAD EXPOSURE, *supra* note 76, at 16 (emphasis added). In the lead paint context, primary prevention would mean "prevent[ing] the dispersal of lead in the environment . . . and . . . remov[ing] lead from the environment before children are exposed." *Id.* However, as the CDC has noted, "[m]ost childhood lead poisoning prevention programs focus on identification and management of individual cases of elevated BLLs (i.e., secondary prevention)." *Id.* at 9. In other words, instead of identifying and controlling lead hazards, current policies wait until a child actually develops lead poisoning to intervene. Children are thus effectively "used as biologic monitors for environmental lead." *Statement on Childhood Lead Poisoning*, 79 PEDIATRICS 457, 463 (1987); *see also* Brown et al., *supra* note 59, at 621 ("Studies . . . indicate that the benefit of intervening when children are already poisoned is small.").

82. Benfer, *supra* note 8, at 514–15.

83. One prominent example is in the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Title X of the Housing and Community Development Act), enacted to amend the Lead-Based Paint Poisoning Prevention Act. There, the Senate explicitly stated in its report that the law was "intended to provide a

Compounding their inadequacies, federal laws often contain recommended BLLs of intervention and definitions of lead-based paint and dust that are not in line with CDC recommendations.[84] Additionally, federal laws often endorse the use of visual inspections, rather than complete risk assessments, to check for lead paint. Under HUD regulations today, for example, housing officials still use visual inspections for certain housing units receiving federal financial assistance.[85] Federal legislators continue to recommend these types of inspections, despite statements from the Government Accountability Office ("GAO"), the Lead-Based Paint Hazard Reduction and Financing Task Force, and the CDC Advisory Commission on Childhood Lead Poisoning Prevention emphasizing that visual assessments are "ineffective" for identifying lead hazards.[86]

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transition to support more effective strategies for *eventually* eliminating lead-based paint hazards." S. REP. NO. 102-332, at 136 (1992), https://www.hud.gov/sites/documents/HCDASR102-332.PDF [https://perma.cc/P93M-PT76] (emphasis added) (page numbers correspond to PDF). The report later states that Title X is "not intended to 'solve' the vast problem of childhood exposure to hazardous amounts of lead from residential lead-based paint." *Id.*; *see also* Benfer, *supra* note 8, at 521–22 (describing the limited scope of "transitional" legislation targeting lead poisoning).

84. These laws have often required public health intervention only at BLLs significantly higher than the CDC recommendations, and have based their definitions of "lead paint" and "lead dust" on outdated scientific standards. *See, e.g.*, Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance, 64 Fed. Reg. 50,140, 50,157 (Sept. 15, 1999) (codified at 24 C.F.R. pt. 35) (HUD regulations defined blood lead levels requiring intervention at 20 µg/dL); *see also* Benfer, *supra* note 8, at 525 n. 196 (CDC recommended blood lead level of intervention in 1999 was 10 µg/dL, and in 2012 it was reduced to 5 µg/dL). HUD has recently promulgated a rule correcting this discrepancy. The rule states that HUD adopts the position of the CDC that "no amount of lead in a child's blood can be considered safe, and that primary prevention is critical to protecting America's children." Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance; Response to Elevated Blood Lead Levels, 82 Fed. Reg. 4151, 4155 (Jan. 13, 2017) (to be codified at 24 C.F.R. pt. 35) [hereinafter Response to Elevated Blood Lead Levels]; *see also* Benfer, *supra* note 8, at 534–35 (describing HUD's adoption of the CDC position). However, it remains to be seen what impact this declaration will have in practice.

85. *See, e.g.*, *supra* Introduction (discussing use of visual inspections in a D.C. affordable housing program that ultimately led to the severe lead poisoning of two-year-old Heavenz Lusters).

86. Benfer, *supra* note 8, at 527, 536; *see also* Response to Elevated Blood Lead Levels, *supra* note 84, at 4158 (publishing HUD's responses to public

To make matters worse, almost all major federal lead poisoning laws still apply only to federally assisted housing.[87] The laws in this area thus address only a small percentage of U.S. households,[88] leaving a massive regulatory vacuum in the private housing market.

Finally, federal laws suffer from a lack of options for private enforcement. Most federal statutes do not create a private right of action,[89] and as a result an aggrieved tenant or buyer has no

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comments noting that visual assessments are ineffective in preventing lead poisoning).

87. Benfer, *supra* note 8, at 496. One of the only exceptions to this characterization is Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (now codified at 42 U.S.C. § 4852d (2012)), which only requires disclosure of potential hazards, and does not require abatement. *See* discussion *infra*, Section II.A.1.ii.

88. Approximately 4% of all households in the United States and 12% of U.S. renter households received federal housing assistance in 2012. *Who Lives in Federally Assisted Housing?*, NAT'L LOW INCOME HOUSING COALITION: HOUSING SPOTLIGHT, Nov. 2012, at 1.

89. Although once thought to be a viable claim, attempts to enforce federal statutes using 42 U.S.C. § 1983 ("§ 1983") have been restricted in the courts. § 1983 was established as a means of enabling private individuals to bring lawsuits against state officials and local governments for violations of rights created by federal law. 42 U.S.C. § 1983 (2018); *see also* MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION 1 (2d ed. 2008) (describing the content of § 1983). However, in Gonzaga University v. Doe, 536 U.S. 273 (2002), the Supreme Court held that nothing short of an "unambiguously conferred right" in a federal statute would support a cause of action under § 1983. *Id.* at 283. Since *Gonzaga*, attempts to bring § 1983 claims under federal lead poisoning statutes have failed. *See, e.g.*, Johnson v. City of Detroit, 446 F.3d 614, 614 (6th Cir. 2006) (holding neither the LPPPA nor the United States Housing Act created private rights of action enforceable through § 1983); Mair v. City of Albany, 303 F. Supp. 2d 237 (N.D.N.Y. 2004) (holding that the Residential Lead-Based Paint Hazard Reduction Act did not create rights enforceable under § 1983); L.B. III v. Housing Authority of Louisville, 345 F. Supp. 2d 725 (W.D. Ky. 2004) (holding LPPPA does not create private rights in residents of public housing); *see also* Anna Snook, *A Narrowing of Section 1983 Claims: How Gonzaga Has Limited Recovery for Victims of Lead Poisoning in Federal Court*, 44 B.C. ENVTL. AFF. L. REV. 207 (2017) (arguing that where lead poisoned plaintiffs attempt to bring § 1983 claims to enforce federal lead poisoning statutes, *Gonzaga* severely limited their ability to do so).

§ 1983 remains a viable avenue to bring claims against state actors and local governments for violations of the federal constitution, however. Section III.A.1, *infra*, explores the potential benefits of pursuing § 1983 lead paint lawsuits against local public housing authorities, alleging violations of claimants'

statutory recourse when their child is injured. Even when a statutory remedy does exist, some courts still interpret these laws in ways that preclude recovery for a child—for example, by holding that a law's protection of a "lessee" does not include the *child* of the lessee.[90]

In light of the many twists and turns inherent in any area of federal legislation, this Section will illustrate several of the problems of federal lead paint legislation through an examination of just two major laws covering the subject: the Lead-Based Paint Poisoning Prevention Act[91] and Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992.[92]

i. The Lead-Based Paint Poisoning Prevention Act

The Lead-Based Paint Poisoning Prevention Act ("LPPPA") was the first major federal lead poisoning law, enacted in January 1971. The law prohibited the use of lead paint in federally constructed housing and authorized funding for abatement, among other measures.[93] Although it was a valiant effort for its time, the law was incomplete. While it established a federal definition of lead-based paint, the term exempted paint that was less than 1% lead—even though paint with much lower levels of lead could cause great damage to a child.[94] The LPPPA also suffered from a severe lack of enforcement—a phenomenon that has commonly plagued federal lead poisoning statutes since. As Emily A. Benfer, a renowned expert in the lead poisoning field, noted in her review of federal lead paint legislation, an earlier version of the bill would have conditioned local governments' receipt of federal housing funds on effective enforcement of the law.[95] An amendment to the bill, however, removed these requirements.[96]

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substantive and procedural due process rights under the Fourteenth Amendment to the U.S. Constitution.

90. *See L.B. III*, 345 F. Supp. 2d at 729 (holding that minor children were "neither purchasers nor lessees of the property in which they lived" and thus had no cause of action based on housing authority's alleged violation of the Residential Lead-Based Paint Hazard Reduction Act's disclosure provisions).

91. 42 U.S.C. §§ 4821, 4822, 4831, 4841–43, 4846 (2012).

92. Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, § 1018 (1992) (codified at 42 U.S.C. § 4852d (2012)).

93. *Polluted Homes*, *supra* note 37, at 328.

94. Benfer, *supra* note 8, at 517.

95. *Id.* at 516.

96. *Id.*

Events occurring after the LPPPA was enacted also illustrate the lack of federal commitment to enforcement. The Nixon administration exhibited great resistance when it came time to appropriate funds for the project.[97] And while amendments to the law in 1973 directed HUD to abate lead paint from federal housing, the agency continually pushed back.[98] Claiming that the measures were too costly, HUD simply refused to comply with the legislative mandate.[99] The GAO stated in a public report that HUD did not "fully comply[] with many of its own regulations and procedures directed at eliminating the hazards of lead-based paint."[100]

Eventually, later amendments to the LPPPA further weakened the law's standards—exempting housing that received less than $5,000 in federal funding, as well as zero-bedroom units, among other carve-outs.[101] Although the law is still in effect, HUD's extreme and effective resistance—even in the face of a clear mandate—is a classic example of the federal government's failure to enforce its own lead paint laws.

ii. Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act

One of the only federal lead paint laws applicable to the private housing stock in the U.S. is Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (codified today at 42 U.S.C. § 4852d) ("Section 1018").[102] Regulations promulgated in accordance with this law declare that a landlord renting or an owner selling housing built before 1978 must "disclose the presence of

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97. *Polluted Homes*, *supra* note 37, at 328–29.

98. Benfer, *supra* note 8, at 517–18.

99. *Id.* at 518.

100. U.S. GEN. ACCOUNTING OFFICE, CED-81-31, HUD NOT FULFILLING RESPONSIBILITY TO ELIMINATE LEAD-BASED PAINT HAZARD IN FEDERAL HOUSING, at i (1980).

101. Benfer, *supra* note 8, at 522 (additional carve-outs included limiting protections to homes with a child under the age of six residing, or expected to reside, on the premises, and effectively exempting tenant-based rental assistance programs).

102. 42 U.S.C. § 4852d, *supra* note 92; *see also* Benfer, *supra* note 8, at 496 ("The majority of federal lead poisoning prevention laws apply to federally assisted housing, despite the serious and extreme problem in private housing.").

known . . . lead-based paint hazards in the housing."[103] They must also provide the renter or buyer with records pertaining to the presence of lead hazards, and distribute a government-approved lead information pamphlet.[104] A seller (but not a landlord renting property) must also "provide purchasers with a 10-day opportunity to conduct a risk assessment or inspection for the presence of lead-based paint."[105] Many renters are familiar with the consequences of this law—in many states, landlords routinely provide EPA pamphlets and make disclosures as required. However, the law also falls short in many ways. Most generally, instead of requiring landlords and sellers to abate lead paint in homes, the federal government merely asks them to warn potential tenants and buyers of the existence of a hazard. While this law is a step in the right direction—mainly because it raises awareness of the toxin's harmful effects—it does nothing to reduce the amount of lead in homes across the nation.

In many ways, this law relies on a theory that landlords and owners will be incentivized to remove lead from homes in their possession, because prospective tenants will seek housing elsewhere upon learning of the hazards. In fact, the EPA explicitly stated that the information provided as a result of the rule would "lead[] many purchasers and lessees to modify their behavior in a way that will reduce risks from lead-based paint."[106] However, this regulation ignores the fact that low-income families are often not in a position to seek the same services elsewhere in the market. A renter or buyer's knowledge that a home contains lead paint will not affect the fact that residents may be unable to secure any lead-free housing in their community at all.[107] The lack of affordable, safe housing in low-

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103. Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9064, 9064 (Mar. 6, 1996) (codified at 40 C.F.R. pt. 745) ("Section 1018 . . . directs EPA and HUD to jointly issue regulations requiring disclosure of known lead-based paint and/or lead-based paint hazards by persons selling or leasing housing constructed before the phaseout of residential lead-based paint use in 1978. Under that authority, EPA and HUD are establishing the following requirements . . . .").

104. *Id.*

105. *Id.*

106. *Id.* at 9080.

107. Tina Moore, *City Moves Mom, 5 Kids Out of Homeless Shelter into Apartment with Peeling Lead Paint, Jutting Nails*, N.Y. DAILY NEWS (Nov. 16, 2010), https://www.nydailynews.com/new-york/city-moves-mom-5-kids-homeless-shelter-apartment-peeling-lead-paint-jutting-nails-article-1.455483 [https://perma.cc/SF8N-UC3U] (mother of five moved into New York City apartment with

income communities thus places the burden of this enormous public health problem on the shoulders of struggling families.[108] In reality, many families with children are forced to choose between homelessness and potentially hazardous housing.[109] A law that purports to fix the lead paint problem by informing tenants of hazards essentially serves to place the blame on parents for choosing to live in contaminated apartments. The fact of the matter is that they are often merely choosing what appears to be the lesser of two evils.

In general, although political will and effective federal legislation could theoretically provide a solution to the lead poisoning problem, past efforts to enact laws accomplishing meaningful change have been unsuccessful. Additionally, laws dealing with lead poisoning in the United States have failed to explicitly address the race and class dimensions of the problem. Unfortunately, state legislation has largely suffered from similar problems.

2. State Legislation

The deficiencies that have plagued state efforts to address lead poisoning parallel the problems of federal legislation. Within each state, local legislators are in tension with landlords and other political interest groups. Despite recognition by medical and public health professionals that complete abatement of lead paint would be the best solution, similar arguments about who will bear the cost arise. Additionally, in the state context there is an added reluctance to place the burden of abatement directly on private landlords, for fear that this will drive them out of business and result in abandoned

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peeling lead paint, saying "I didn't have anywhere else and . . . I would have to go back to [a] shelter."); Reuven Blau, *City Agencies Sent Two Families from Shelters to Apartments with Lead Paint, Records Show*, N.Y. DAILY NEWS (Oct. 30, 2018), https://www.nydailynews.com/new-york/ny-metro-lead-20181029-story.html [https://perma.cc/6XJZ-C6PB] (reporting on two other families in New York City that moved out of shelters into apartments containing lead paint); Dean Reynolds, *Fear of Lead Paint in HUD Housing Leads Family to Homeless Shelter*, CBS NEWS (June 21, 2016), https://www.cbsnews.com/news/chicago-mom-chooses-homelessness-over-hud-housing-to-protect-son-from-lead-paint [https://perma.cc/R5P7-5MUY] (discussing how fear of lead paint in HUD housing led a Chicago family to move to a homeless shelter).

108. *See supra* note 107.

109. *See supra* note 107.

property littered across the state.[110] As a result of these tensions and cost concerns, many states have likewise produced partial and inadequate solutions to the local lead poisoning problem.

Although variations among lead poisoning laws across the states are great, there are several systemic inadequacies that continually appear across state programs. These include the implementation of laws that theoretically require abatement but do not actually compel it, and a general failure to enforce the lead paint laws that do exist.[111] In addition, many states have seriously deficient inspection and risk assessment practices, with laws that essentially enable a landlord to fulfill his obligations by simply painting over deteriorating lead paint.[112]

One jurisdiction where the letter of the law has gotten close to requiring the complete abatement of lead paint in housing—but where this legislative mandate has failed to have any real impact—is the District of Columbia. In D.C.'s Lead Hazard Prevention and Elimination Act of 2008, as amended in 2010, the District declared that the presence of lead-based paint hazards in residential units was illegal.[113] The law gave the government broad authority to conduct risk assessments of units, and theoretically required the complete abatement of all lead paint in D.C. homes. The law was well

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110. Interview with Saul E. Kerpelman, founding partner of Saul E. Kerpelman & Associates, P.A., in Los Angeles, CA (Jan. 4, 2019) [hereinafter Interview with Saul E. Kerpelman] (Saul E. Kerpelman & Associates, P.A. was a Baltimore law firm that exclusively represented lead poisoned children in Maryland, Washington D.C., and New York from 1983 to 2016); *see also* Timothy B. Wheeler, *Md. Court Strikes Down Landlord Protection in Lead Paint Law*, BALT. SUN (Oct. 24, 2011) https://www.baltimoresun.com/news/maryland/environment/bs-xpm-2011-10-24-bs-gr-lead-law-20111024-story.html [https://perma.cc/PNC2-9VT] (quoting the president of Property Owners Association of Baltimore claiming that a law restricting damages in lead paint cases had "preserved affordable housing in [Baltimore]"). For further discussion of this concern, *see generally infra* Section II.B.1.i (discussing how landlords defending against tort suits have asserted that requiring landlords to fund abatement will impact availability of affordable housing).

111. *See*, *e.g.*, D.C. Official Code § 8-231.01 et seq.; *see also infra* notes 121–124 and accompanying text (discussing New York City Housing Authority's recent failure to conduct lead hazard inspections).

112. Interview with Saul E. Kerpelman, *supra* note 110 (discussing Baltimore City Housing Ordinance). Unfortunately, painting over lead paint has little to no effect on the danger that lead hazard poses to children. *See* McCoy, *supra* note 2.

113. D.C. Official Code § 8-231.01 et seq.

intentioned; however, it did not yield promising results. Despite the law's effective date of March 31, 2011, the CDC reported 145 children with confirmed BLLs greater than 5 µg/dL and 30 children with confirmed BLLs greater than 10 µg/dL in D.C. in 2016.[114] Furthermore, while HUD had awarded the District a grant of $2.9 million for the purpose of remediating lead paint hazards in 2012, it used only a "fraction" of those funds.[115] In fact, the District left such a large portion of the funds unspent that it was rendered ineligible to apply for the grant's next cycle.[116] One article in the *Washington City Paper* noted that "[i]n the last three years of its grant cycle, [D.C.'s Department of Housing and Community Development] remediated lead hazards in a total of 35 of its targeted 225 units."[117] This suggests that many homes in the District still contain lead paint—even five years after D.C.'s law took effect. While the statute does successfully give an injured child a form of recourse *after* he or she has been poisoned, laws like these continue to use children as "biologic monitors"—the authorities effectively wait until a child becomes poisoned to intervene.[118]

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114. CTRS. FOR DISEASE CONTROL AND PREVENTION, TESTED AND CONFIRMED ELEVATED BLOOD LEAD LEVELS BY STATE, YEAR AND BLOOD LEAD LEVEL GROUP FOR CHILDREN <72 MONTHS OF AGE 2 (2018), https://www.cdc.gov/nceh/lead/data/CBLS-National-Table-508.pdf [https://perma.cc/S2BJ-TUXT].

115. Morgan Baskin, *D.C. Chronically Failed to Spend Federal Funds to Remediate Lead Paint Hazards, HUD Says*, WASH. CITY PAPER (Feb. 21, 2019) https://www.washingtoncitypaper.com/news/housing-complex/article/21048191/dc-chronically-failed-to-spend-federal-funds-to-remediate-lead-paint [https://perma.cc/UW9L-C6W6].

116. *Id.* Anne Cunningham, a senior attorney at the Children's Law Center in D.C., noted that the "loss of this grant is emblematic of the broader problem about how we approach lead in D.C." She lamented, "[w]e just clearly did not use this resource that could have been so useful." *Id.*

117. *Id.*

118. *Statement of Childhood Lead Poisoning*, *supra* note 81, at 463 ("Children are used as biologic monitors for environmental lead"); *see also* Emily A. Benfer, *Contaminated Childhood: The Chronic Lead Poisoning of Low-Income Children and Communities of Color in the United States*, HEALTH AFF. BLOG (Aug. 8, 2017), https://www.healthaffairs.org/do/10.1377/hblog20170808.061398/full [https://perma.cc/JZ2N-T2Y5] ("[T]he overwhelming majority of laws follow a 'wait and see' approach. With few exceptions, federal, state, and local policies only require lead hazard identification and remediation after a child develops lead poisoning."). Just one example of the D.C. law's failure was illuminated by the tragedy of the Lusters family, described in the Introduction to this Note. *See supra* Introduction.

As in federal law, one of the largest deficits in state law is lax enforcement.[119] Extreme examples include the recent discovery that New York City Housing Authority ("NYCHA") officials had failed to inspect apartments for lead paint, as required by local law, from at least 2012–2016.[120] This resulted in the lead poisoning of at least 820 children living in New York City public housing.[121] Even more alarming, the NYCHA chairwoman had signed off on paperwork certifying that the inspections had been performed, despite her knowledge that they had not.[122] While this example may be an outlier, it demonstrates states' own problems with the enforcement of local lead paint laws. It also illuminates the real consequences that can follow from a lack of enforcement. Officials might not only fail to perform mandated inspections in the first place; without a system to uncover these violations, it may also take years to discover these lapses at all.[123]

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119. Brown et al., *supra* note 59, at 621 (study finding that the risk of identifying one or more children with blood lead levels of 10 μg/dL or greater was four times higher in areas where state enforcement of lead poisoning prevention statutes was limited).

120. Luis Ferré-Sadurní, *820 Children Under 6 in Public Housing Tested High for Lead*, N.Y. TIMES (July 1, 2018), https://www.nytimes.com/2018/07/01/nyregion/nycha-lead-paint-children.html (on file with the *Columbia Human Rights Law Review*).

121. *Id.*

122. J. David Goodman, *City Filed False Paperwork on Lead Paint Inspections, Inquiry Finds*, N.Y. TIMES (Nov. 14, 2017), https://www.nytimes.com/2017/11/14/nyregion/nyc-lead-paint-inspections.html (on file with the *Columbia Human Rights Law Review*).

123. On January 31, 2019, HUD Secretary Ben Carson and New York City's mayor Bill de Blasio announced an agreement intended to address the recent lead paint scandal at NYCHA. In order to avoid a complete federal takeover, de Blasio agreed to spend $2.2 billion over the next ten years to repair NYCHA's buildings, and HUD appointed a federal monitor to oversee the housing authority's operations. Benjamin Weiser, Luis Ferré-Sadurní, Glenn Thrush & J. David Goodman, *De Blasio Cedes Further Control of NYCHA but Avoids Federal Takeover*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/2019/01/31/nyregion/hud-nycha-deal.html (on file with the *Columbia Human Rights Law Review*).

Despite appearances, however, commentators have forcefully argued that this agreement is inadequate, including interim NYCHA chairman Stanley Brezenoff, who refused to sign the settlement deal. (Brezenoff has since "opted" to leave his post at NYCHA.) J. David Goodman, *'Where the Hell is HUD and Money?' De Blasio's Own Ally Pans NYCHA Deal*, N.Y. TIMES (Feb. 11, 2019), https://www.nytimes.com/2019/02/11/nyregion/brezenoff-nycha-hud.html (on file with the *Columbia Human Rights Law Review*).

B. Litigation

1. Holding Landlords Accountable: Common Law Tort (Negligence) Claims

Where legislation fails and children are exposed to lead paint hazards, families can seek private recourse by filing lawsuits to hold landlords accountable. These claims fall within the realm of tort law and are judged under a negligence standard.[124] Depending on state and municipal law, a plaintiff might be able to demonstrate negligence or negligence per se if the landlord violated the jurisdiction's housing code.[125] Housing codes vary widely, however,

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A recent article in the *Washington Post* explained that the deal places the financial burden on the city—and that NYCHA does not have the funds necessary to fix its public health problem on its own. Emily A. Benfer notes, "[s]hockingly, the new NYCHA agreement with HUD provides no supplemental federal funding for . . . lead-hazard inspection and remediation. . . . [i]nstead, the agreement mandates the use of 'visual assessments' for lead hazards." Benfer emphasizes that visual inspections are "one of the 'key weaknesses of [the] federal guidelines.'" Emily A. Benfer, *New York's Public Housing System Is the Size of a City. It's Failing Children*, WASH. POST (Feb. 11, 2019), https://www.washingtonpost.com/opinions/new-yorks-public-housing-system-is-the-size-of-a-city-its-failing-children/2019/02/11/458f63c2-2bb7-11e9-984d-9b8fba003e81_story.html (on file with the *Columbia Human Rights Law Review*).

124. Although this is the most common form of lawsuit for a child suffering from lead poisoning in the states, alternative causes of action do exist. A tenant may bring suit alleging a landlord's breach of the implied warranty of habitability and contract, for example. However, cases have held that under these theories a plaintiff is only entitled to contractual damages and cannot recover damages for personal injuries. Bryce M. Baird, *Cause of Action Against a Landlord for Lead Paint Poisoning*, *in* 28 CAUSES OF ACTION 2D § 1, Westlaw (database updated Oct. 2019) (citing McIntyre *ex rel*. Howard v. Philadelphia Hous. Auth., 816 A.2d 1204 (Pa. Commw. Ct. 2003); Valdez v. MGS Realty and Mgmt. Corp., No. 96-CV-5122 SWK, 2000 WL 511024 (S.D.N.Y. Apr. 28, 2000); Brown v. Dermer, 744 A.2d 47 (Md. 2000)) (other citations omitted). Plaintiffs also often allege that local housing authorities have failed to comply with their obligations under HUD regulations, and might also bring actions under state consumer protection statutes that cover residential real estate. Interview with Saul E. Kerpelman, *supra* note 110.

125. *See, e.g*., Brooks v. Lewin Realty III, Inc., 835 A.2d 616, 620 (Md. 2003) (stating that, in the lead paint context, "where there is an applicable statutory scheme designed to protect a class of persons which includes the plaintiff, another well-settled Maryland common law rule has long been applied . . . in negligence actions . . . stat[ing] that . . . the violation of the statute or ordinance is itself evidence of negligence."); Price *ex rel*. Massey v. Hickory Point Bank & Trust, Trust No. 0192, 841 N.E.2d 1084, 1089 (Ill. App. Ct. 2006) (finding a statutory violation itself is *prima facie* evidence of negligence) (internal citation omitted).

and as a result, cases often turn on the specific language of the code and the case law precedent in the state. Many states have adopted codes with language stating that a unit must be "habitable" or "fit for human habitation."[126] However, states vary on whether a plaintiff must demonstrate that a landlord had notice that the lead hazard existed, and whether or not a landlord has any duty to inspect the premises.[127] Although it is possible for a plaintiff to prevail in a lead paint negligence case, and children in many states have recovered substantial damages,[128] several trends in state law have hampered the recent success of tort claims. These trends include: courts' and legislators' weighing of the policy risks in holding landlords accountable, exemptions for lead hazard injuries in insurance policies, and statutory caps on damages.

i. Depleting the Housing Stock: A Common Policy Argument Against Landlord Liability

Landlords defending tort claims have had growing success arguing that they should not be held accountable for lead poisoning

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126. *See, e.g.*, CONN. GEN. STAT. § 47a–7 (West through 2019 Jan. Sess. and 2019 July Sess.) ("A landlord shall . . . make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition."); S.D. CODIFIED LAWS § 43-32-8 (West through 2019 Sess., Exec. Order 19-1, and Supreme Court Rule 19-18) ("[L]essor shall keep the premises and all common areas in reasonable repair and fit for human habitation."); 35 PA. STAT. AND CONS. STAT. ANN. § 1700-1 (West through 2019 Sess. Act 75) ("[W]henever [listed health departments] certif[y] a dwelling as unfit for human habitation, the duty of any tenant of such dwelling to pay . . . shall be suspended . . . until the dwelling is certified as fit for human habitation."); *see also* LEAD WARS, *supra* note 46, at 199–200 (discussing introduction of housing codes in Baltimore during the 1960s).

127. *See, e.g.*, *Brooks*, 835 A.2d at 622 (Maryland court holding that a plaintiff need not prove that the landlord was aware of the housing code violation); *Hickory Point*, 841 N.E.2d at 1089 (Illinois court stating plaintiff is not required to show a defendant's awareness of the statutory violation).

128. *See, e.g.*, Checkey Beckford, *NYC Jury Awards Family $57 Million in Lead Poisoning Suit*, NBC N.Y. (Jan. 26, 2018), https://www.nbcnewyork.com/news/local/Bronx-Family-Awarded-57-Million-Infant-Girl-Lead-Poisoning-Suit-471381284.html [https://perma.cc/H8SH-S5BS] (discussing a Bronx family that was awarded $57 million after suing NYCHA over lead poisoning); *Maryland Plaintiff Awarded over $1 Million in Damages from Lead Paint Exposure*, MD. PERS. INJ. BLOG (Oct. 19, 2018), https://www.marylandpersonalinjuryblog.com/maryland-plaintiff-awarded-over-1-million-in-damages-from-lead-paint-exposure [https://perma.cc/W5CX-K7AR] (discussing a $1.3 million jury verdict in a lead poisoning case that was upheld by the Court of Appeals of Maryland).

because of the impact this could have on the affordable housing stock in a given community.[129] Unlike the federal government or the lead paint industry, individual landlords often lack the financial capacity to completely remove lead from every property that they own. Obviously, this is not to say that landlords are justified in continuing to rent out units that they know or should know contain lead paint hazards. The argument does point out, however, that tort lawsuits put the financial burden of abatement on the owners of the property—a group of people who may not necessarily have the funds to fix the problem. Placing liability on landlords could ultimately force them to raise rents, or otherwise to abandon their properties if they cannot perform the required abatement. This could have the unintended effect of forcing more families into homelessness because of a complete lack of affordable housing. Once again, this forces low-income communities to choose between homelessness and available, yet unsafe, housing. In some places, homeless shelters may even present the same risks of exposure, as many shelters have been found to contain lead paint as well.[130]

As a result, placing the financial burden of abatement on landlords may not solve the underlying problem. Although it is possible that holding landlords responsible could cause them to

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129. Wheeler, *supra* note 110 (president of Property Owners Association of Baltimore claiming that a law restricting damages in lead paint cases had "preserved affordable housing in [Baltimore]").

130. One audit of New York City homeless shelters in 2015 found 87% of the 101 shelters visited had at least one health violation, including many with peeling paint—a classic sign of a lead hazard. Laura Nahmias, *Feds Investigating Conditions in NYC's Public Housing, Shelters*, POLITICO (Mar. 16, 2016), https://www.politico.com/states/new-york/city-hall/story/2016/03/feds-investigating-conditions-in-nycs-public-housing-shelters-032453 [https://perma.cc/YX9F-H727]; *see also* Mark Segraves, *Report: Officials Allowed Families to Live in Rooms With Dangerous Lead Levels at D.C. General Homeless Shelter*, NBC UNIVERSAL (May 28, 2015), https://www.nbcwashington.com/news/local/Report-Officials-Allowed-Families-to-Live-in-Rooms-With-Dangerous-Lead-Levels-at-DC-General-Homeless-Shelter-305378581.html [https://perma.cc/4P76-BLK2] (describing how after two children in D.C.'s largest homeless shelter tested positive for elevated BLLs, an internal review revealed that officials were aware that rooms in the center had dangerous lead levels but continued to allow families to live in those rooms); Barbara Basler, *Lead Hazards Are Cited in Shelter for Homeless*, N.Y. TIMES (Mar. 11, 1986), https://www.nytimes.com/1986/03/11/nyregion/lead-hazards-are-cited-in-shelter-for-homeless.html (on file with the *Columbia Human Rights Law Review*) (Legal Aid Society reports that homeless families in a Manhattan shelter had been exposed to lead and asbestos).

pressure state legislatures to address the crisis, unfortunately the trend appears to be moving in the opposite direction. Instead, landlords have pressured governments and courts to write and interpret laws in their favor, resulting in regulations and court decisions that exempt landlords from liability. Many states have adopted laws favoring landlords in lead paint cases, leaving injured children with little recourse through negligence claims.[131] While still a viable option in some states, many obstacles now exist to a plaintiff's recovery in tort as a result. The next Section will discuss two such barriers: insurance exemptions and damage caps.

ii. Insurance Exemptions and Statutory Caps on Damages

Some of the policy arguments against holding landlords liable for childhood lead poisoning[132] could be addressed through a state requirement that landlords obtain insurance to cover lead hazard injuries. In the past, many plaintiffs have been able to prevail in lead paint cases due to the availability of such insurance.[133] More recently, however, landlords have begun to successfully avoid such liability through a combination of two factors: they have obtained insurance policies that exempt lead hazard injuries from coverage, and they have placed their property interests in the name of a shell corporation

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131. *See* discussion *infra* Section II.B.1.ii.

132. *See* discussion *supra* Section II.B.1.i.

133. *See, e.g.*, Luke Broadwater, *Family Wins Lead Paint Judgment for Poisoned Son; But Will They Ever Get the Money?*, BALT. SUN (Aug. 23, 2016), https://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-lead-paint-folo-20160822-story.html [https://perma.cc/CF9M-LSS4] (describing how the $1.3 million award to a lead-poisoned child was in jeopardy because of landlord insurer's attempt to rescind the landlord's insurance policy; stating, "[a]rea lawyers say the company's actions could put the cases of at least 100 families in jeopardy because smaller landlords typically don't have enough cash or assets to cover damages awarded to families in lead-poisoning lawsuits."); *New York Lead Poisoning Lawyer Obtains $3 Million Settlement for Child Poisoned by Lead Paint*, LEVY KONIGSBERG LLP (Jan. 20, 2011), https://www.levylaw.com/lead-poisoning-lawyer-settlement-01202011/ [https://perma.cc/5NUA-TZCU] (announcing lead poisoned child in New York obtained $3 million settlement, noting settlement was to be paid out by defendants' insurance carriers); *see also* Interview with Saul E. Kerpelman, *supra* note 110 (discussing experience litigating lead paint cases in Baltimore, noting that in the past, judgments were often paid out by landlords' insurance companies).

with minimal assets.[134] These practices, when combined, ensure that the plaintiff will not have recourse to the individual landlord's private assets, and that the plaintiff will likewise be unable to collect damages from insurance. Despite the fact that these practices leave poisoned children without recourse for their injuries, several state courts have upheld lead exclusions in insurance policies.[135] Other state courts have explicitly held that these exclusions are *not* void as against public policy.[136] If the trend in insurance exemptions continues in this direction, it will become difficult for a plaintiff to seek a remedy in the state courts under a theory of negligence at all. Since lawyers for these cases often work on a contingency fee basis, attorneys will likewise become reluctant to take lead paint cases if they expect that insurance will be unavailable to pay the damages.[137]

Furthermore, even where a landlord has insurance that does not exempt injuries caused by lead paint, plaintiffs may face an additional obstacle to recovery in states with statutory caps on damages. As of June 2019, at least nine states had caps on non-economic damages for general tort or personal injury cases.[138] These

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134. *See, e.g.*, Olga Khazan, *Being Black in America Can Be Hazardous to Your Health*, ATLANTIC (2018), https://www.theatlantic.com/magazine/archive/2018/07/being-black-in-america-can-be-hazardous-to-your-health/561740/ [https://perma.cc/9A8R-HWYB] (stating "landlords who hid behind shell companies" hindered Baltimore's lead paint enforcement efforts in the 1990s); *see also* Interview with Saul E. Kerpelman, *supra* note 110 (discussing experience representing lead poisoned plaintiffs in Baltimore, noting difficulties in obtaining judgments against landlords who created shell companies and landlords whose insurance coverage exempted injuries caused by lead paint).

135. *See, e.g.*, Ga. Farm Bureau Mut. Ins. Co. v. Smith, 784 S.E.2d 422, 426 (Ga. 2016) (holding that bodily injuries resulting from the ingestion of lead paint are within the "pollution exclusion" clause of the insurance policy, declining to strike down the policy).

136. *See, e.g.*, Brownlee v. Liberty Mut. Fire Ins. Co., 175 A.3d 697, 711 (Md. 2017) (holding that interpretation of "pollution exclusion" as excluding coverage for injuries resulting from lead paint exposure did not violate Maryland public policy).

137. *See Lead Poisoning in Children & Adults: How Lawyers Help*, LAWYERS GROUP, http://www.lawyersgroup.com/lawyers-specializing-lead-poisoning-help-children-adults/ [https://perma.cc/HZ5F-9K2K] (explaining that attorneys generally take lead poisoning cases on a contingency fee basis).

138. *Fact Sheet: Caps on Compensatory Damages: A State Law Summary*, CTR. FOR JUSTICE & DEMOCRACY (June 20, 2019), https://centerjd.org/content/fact-sheet-caps-compensatory-damages-state-law-summary [https://perma.cc/93YH-9WDW]; *see, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 11-108(b)(1) (West 2019) (personal injury award for noneconomic damages may not exceed $350,000 in

non-economic damages can be quite substantial in lead poisoning cases.[139] As a result, the existence of these upper limits can create a huge difference between a jury's verdict and the amount actually awarded, leaving a child with little to show for her debilitating injuries.

While these are just a few examples of the difficulties a plaintiff might face in state court, obstacles to recovery in common law tort and negligence abound.[140] Litigators have thus turned to new

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Maryland); COLO. REV. STAT. ANN. § 13-21-102.5(3)(a)–(c) (2019) (damages for derivative noneconomic loss or injury shall not exceed $250,000, adjusted each year for inflation since 2007).

139. *See, e.g.*, *Baltimore Jury Awards $5.7M in Lead Paint Case*, INS. J. (Feb. 29, 2008), https://www.insurancejournal.com/news/east/2008/02/29/87799.htm [https://perma.cc/2DPC-65P8] (man who was lead poisoned as a child awarded $5.1 million in non-economic damages and $600,000 in economic damages; statutory cap did not apply in this case because the plaintiff was injured before the cap became law in 1986); *Jury Awards $4 Million in Lead Case,* BALT. SUN (Aug. 11, 2007), https://www.baltimoresun.com/news/bs-xpm-2007-08-11-0708110070-story.html [https://perma.cc/7CW9-Q7W7] ($4 million dollar verdict for two lead poisoned children could be reduced to a maximum of $350,000 for each sibling under statutory damage caps); *Maryland Man Who Suffered Brain Damage from Lead Paint Wins $2M*, INS. J. (Feb. 28, 2019), https://www.insurancejournal.com/news/east/2019/02/28/518957.htm [https://perma.cc/6HPA-XGXR] (man who was lead poisoned as a child awarded $1.1 million in economic damages and $1.1 million in non-economic damages, with non-economic damages to be reduced under the cap).

140. For example, one additional obstacle to holding landlords accountable when a child has been exposed to lead arises when the owner of the property is the State or an entity that can claim sovereign immunity. State courts have held that local housing authorities can claim limited sovereign immunity, as they act as an "instrumentality of the State," and are "therefore immune from tort actions." Knowles v. Hous. Auth. of Columbus, 95 S.E.2d 659, 660 (Ga. 1956); *see also* State *ex rel*. St. Louis Hous. Auth. v. Gaertner, 695 S.W.2d 460, 462 (Mo. 1985) (holding that a housing authority exercises only governmental functions, which are traditionally subject to sovereign immunity). Many states have promulgated laws waiving sovereign immunity claims in certain situations, but these laws often include great restrictions on a plaintiff's rights to recovery, including strict procedural requirements and very low caps on damages. *See, e.g.*, D.C. CODE §12–309 (2015) ("[A]n action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant . . . has given notice in writing . . . ."); MD. CODE ANN., STATE GOV'T § 12-104(a) (West 2015) (waiving sovereign immunity in tort actions, but limiting liability for the state and its units to $400,000 per claimant for injuries from a single incident).

One example of a law waiving sovereign immunity but placing strict limits on a plaintiff's ability to recover is a statute promulgated by the District of Columbia.

theories of liability—including those that seek to hold paint companies directly liable.

2. Holding Paint Manufacturers Accountable

Attorneys and public health advocates have pursued an alternative solution to the lead poisoning crisis by attempting to hold lead pigment manufacturers liable for children's injuries. The two most promising claims in this area involve either bringing a negligence or products liability lawsuit against manufacturers and using a market share theory to apportion liability, or pursuing a public nuisance action. These options are particularly appealing because they place the burden on actors who appear to be the cause-in-fact of the lead poisoning problem in the first place. Both of these theories have seen limited success, however, and it is unclear how receptive courts will be to these arguments in the future.

i. Market Share Liability Theory

The market share liability doctrine is a special means of apportioning liability among defendants in specific types of negligence and products liability cases. Some courts allow litigants to use the doctrine when it is otherwise impossible for a plaintiff to identify which manufacturer of a product caused his or her injury.

The relevant law requires that a claimant must, in order to maintain an action against the District for personal injury, give written notice to the Mayor within six months "after the injury or damage was sustained." D.C. CODE §12–309 (2015). Courts have interpreted the provision strictly, holding that the law should be construed *against* claimants. In one D.C. case, a woman took her daughter to a doctor because she had seen her ingest lead paint chips in a D.C. housing project. The doctor warned the mother to get her child tested in the years ahead, but said that because of the daughter's young age he could not diagnose any neurological conditions that may have resulted at the time. Three years later, the daughter was diagnosed with a serious neurological disability. At that point, the mother sent notice to the District and prepared to bring a lawsuit. The District of Columbia Court of Appeals held that the six-month period had started to run when "the harmful material entered [the daughter's] body, was discovered, and resulted in significant medical procedures." District of Columbia v. Ross, 697 A.2d 14, 18–19 (D.C. 1997). As a result, the mother's claim was completely barred—despite the actual impossibility of obtaining medical documentation of her daughter's neurological condition within six months of the injury.

The market share theory was first adopted by the California Supreme Court in *Sindell v. Abbott Laboratories*.[141] In that case, the court granted relief to plaintiffs who had been harmed by the drug diethylstilbestrol ("DES"), using a system that apportioned liability among the manufacturers of the drug according to their share of the market. This was a deviation from standard tort law, under which a plaintiff must ordinarily prove which specific individual or entity caused her harm.[142] The court held, however, under the market share theory, that if the plaintiff joined enough defendants to constitute a substantial share of the market of the product, the burden would shift to each defendant to prove that they were not responsible.[143]

In order to get the benefit of this theory, plaintiffs must demonstrate that the product at issue meets several practical requirements. First, the product should cause a "signature disease," meaning an ailment that can essentially *only* be caused by that product.[144] In addition, each different manufacturer's version of the product should be as close to chemically identical as possible.[145] This ensures that each defendant's product caused a level of harm proportionate to its share of the market, because each product contains the same amount of toxic material. Finally, data about market share from the relevant time period must be available, and the plaintiff must be able to join a substantial share of the market as defendants in the suit.[146]

In theory, the concept of market share liability should be capable of extension to the lead paint context. Similar to a victim's difficulty in identifying which manufacturer distributed the specific DES drug that injured her, it is virtually impossible for a child injured by lead paint to identify the maker of the paint used in her home.[147] As a result, it might appear that courts would be willing to

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141. Sindell v. Abbott Laboratories, 607 P.2d 924, 936–38 (Cal. 1980).

142. Donald G. Gifford & Paolo Pasicolan, *Market Share Liability Beyond DES Cases: The Solution to the Causation Dilemma in Lead Paint Litigation?*, 58 S.C. L. REV. 115, 117–18 (2006).

143. KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 143–45 (5th ed. 2017).

144. *Id.* at 144.

145. *Id.*

146. *Id.* at 144–45.

147. Baird, *supra* note 124, § 2 ("Because it is often impossible to identify the manufacturer of the paint involved in a lead poisoning case, such causes of action [negligence, product liability] are often unsuccessful.").

allow recovery based on market share. Otherwise, every lead-poisoned child would be left without recourse against the very companies that created the lead paint problem in the first place. The extension of this theory to lead paint, however, poses several problems.

In the first place, exposure to lead paint does not result in a "signature disease."[148] It can often be difficult to determine when someone's symptoms are the result of lead poisoning, or if the symptoms may have resulted from some other cause. Indeed, this fact contributed to the lead industry's ability to claim plausibly that lead was not harmful during the first few decades of the twentieth century.[149] Furthermore, different lead paints "do not pose a uniform risk of harm because paints with higher concentrations of lead are more harmful than those with less."[150] In other words, lead paint is not considered a sufficiently "fungible" product. Finally, in the lead paint context, commentators have noted that it is nearly impossible to determine manufacturers' varying market shares, "given the hundred-year period in which manufacturers have entered, exited, and re-entered the market."[151]

The case law dealing with attempts to extend market share liability to lead paint confirms the difficulties in applying the theory. Only one state court that has addressed the issue—the Supreme Court of Wisconsin—has held that a version of market share liability could be applied where a plaintiff was poisoned by lead paint.[152] After

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148. *See* ABRAHAM, *supra* note 143, at 144 (discussing rarity of signature diseases).

149. *Beyond Flint*, *supra* note 8.

150. Donald G. Gifford & Paolo Pasicolan, *Market Share Liability Beyond DES Cases: The Solution to the Causation Dilemma in Lead Paint Litigation?* 3 (Univ. of Md. Sch. Of Law, Legal Studies Research Paper No. 10, 2006).

151. *Id.*

152. Thomas *ex rel*. Gramling v. Mallett, 701 N.W.2d 523, 532–33 (Wis. 2005). *Compare* Jefferson v. Lead Indus. Ass'n, 930 F. Supp. 241, 245–46 (E.D. La. 1996) (holding Louisiana law did not permit application of market share liability theory to supplant proof of proximate causation in action against lead paint manufacturers); City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007) (declining to allow plaintiff to use market share liability to hold lead paint manufacturers liable for plaintiff's injury); Brenner v. Am. Cyanamid Co., 699 N.Y.S.2d 848 (N.Y. App. Div. 1999) (held market-share theory of liability did not apply to case where parents brought action against lead paint pigment manufacturers); Santiago v. Sherwin Williams Co., 3 F.3d 546, 550–51 (1st Cir. 1993) (same); City of Philadelphia v. Lead Indus. Ass'n, 994 F.2d 112, 123–27 (3d

the decision, however, the Wisconsin legislature promptly enacted a statute in an attempt to overrule the court's decision.[153]

Viewing the cases as a whole, especially in light of Wisconsin's immediate attempt to overrule a finding favorable to lead paint plaintiffs, it appears the trend in the states is—and will continue to be—toward a rejection of market share liability in the lead poisoning context.

ii. Public Nuisance Doctrine

Perhaps the most promising current legal solution to childhood lead paint exposure—and one that has recently garnered great attention—is the use of a public nuisance theory to hold lead pigment manufacturers accountable. In the *Restatement (Second) of Torts*, a public nuisance is defined as an "unreasonable interference with a right common to the general public."[154] Although state law definitions vary, a plaintiff must generally prove that an actor engaged in "affirmative conduct that assisted in the creation of a hazardous condition."[155]

Although the public nuisance theory has been invoked in the lead paint context before, in the past it has been rejected in almost every state court that has addressed the issue.[156] In general, plaintiffs

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Cir. 1993) (same, where city and housing authority sued manufacturers of lead pigment under market share liability theory).

153. WIS. STAT. § 895.046 (2013). A later challenge to the statute on constitutional grounds was successful, and on appeal the Seventh Circuit held that the state's constitution prohibited retroactive application of the new law. *See* Gibson v. Am. Cyanamid Co., 760 F.3d 600, 610 (7th Cir. 2014).

154. RESTATEMENT (SECOND) OF TORTS § 821B (AM. LAW INST. 1979).

155. People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 529 (Cal. Ct. App. 2017), *review denied* 2018 Cal. LEXIS 1277 (Feb. 14, 2018), *cert. denied sub nom.* ConAgra Grocery Products Co. v. California, 139 S. Ct. 377 (2018), *and cert. denied sub nom.* Sherwin-Williams Co. v. California, 139 S. Ct. 378 (2018).

156. *See* State of Rhode Island v. Lead Indus. Ass'n, 951 A.2d 428 (R.I. 2008) (jury awarded verdict that imposed liability on lead pigment manufacturers under public nuisance theory for the first time in U.S. history, but Supreme Court of Rhode Island reversed, holding exposure to unabated lead paint did not violate a "public right" sufficient to state cause of action for public nuisance); *In re* Lead Paint Litigation, 191 N.J. 405 (2007) (held distribution of lead-based paint products did not constitute actionable conduct for purposes of a public nuisance action); *Benjamin Moore*, 226 S.W.3d at 116 (city sued paint manufacturers to recover costs of remediating lead paint; court held that widespread public nuisance of lead paint on private residences, and city's efforts to remediate, did

have had difficulty establishing that exposure to lead paint violates a "public right" sufficient to state a cause of action under the doctrine.[157] In some cases, even where a party was successful in proving that the presence of lead paint in the community was a public nuisance, courts still went on to reject the argument because the plaintiffs were unable to establish causation—i.e., they were unable to determine which manufacturers were responsible for the paint. As a result, some state courts seem to have effectively linked the market-share liability and public nuisance issues together—essentially holding that if a court will not accept *both* a relaxed standard of causation as well as a public nuisance argument, it will not be possible to prevail on the public nuisance claim.

Most recently, however, in *People v. Atlantic Richfield Co.*,[158] a California trial court fully adopted the public nuisance theory in the lead paint context for the first time. The successfully alleged basis for the defendants' liability was the "affirmative promotion of lead paint for interior use, not the[] mere manufacture and distribution of lead paint or the[] failure to warn of its hazards."[159] As a result of its findings, the lower court ordered paint manufacturers to pay $1.15 billion into a fund for residential lead paint abatement in ten counties represented by the State of California.[160] The California Court of Appeals upheld the ruling (although reducing the payout significantly to omit damages caused by homes built after 1950), holding that the

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not lessen the causation requirement that the city identify the product and manufacturer of the paint in order to recover its remediation costs); City of Chicago v. Am. Cyanamid Co., 823 N.E.2d 126, 139 (Ill. App. 2005) (city failed to show that lead-based paint manufacturers' products were the cause-in-fact of the alleged public nuisance; the court further held that defendants' conduct in "promoting and lawfully selling lead-containing pigments decades ago . . . cannot be a legal cause of plaintiff's complained-of injury . . . ."); City of Milwaukee v. NL Industries, 762 N.W.2d 757, 770 (Wis. App. 2008), *review denied* 765 N.W.2d 579 (Wis. 2009) (holding that liability for intentional public nuisance required proof that manufacturer anticipated the public nuisance found by the jury, namely hazardous lead exposure caused "not only by chewing on lead painted surfaces, but also from ingestion of lead dust and chips through normal hand-to-mouth activity.").

157. *See, e.g.*, *Lead Indus. Ass'n*, 951 A.2d at 453–54 (holding exposure to unabated lead paint did not violate a "public right" sufficient to state cause of action for public nuisance).

158. People v. Atlantic Richfield Co., No. 100CU788657, 2014 WL 1385823 (Cal. Super. Ct. Mar. 26, 2014).

159. *ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 535.

160. *Atlantic Richfield Co.*, 2014 WL 1385823, at *61.

interior residential lead paint interfered with a public right and thus constituted a public nuisance.[161] The U.S. Supreme Court denied certiorari on an appeal, leaving the ruling intact.

This recent development shows promise for the future of the public nuisance theory in the lead paint context. However, it is unclear how this area of the law will develop going forward. The California decision may represent a shifting trend toward holding paint manufacturers liable—but it could also become an outlier.[162] In addition, it is unclear who will have standing to bring a public nuisance claim in these cases. Although traditional public nuisance doctrine appears to allow an individual with a physical injury to bring an action, the plaintiffs in *People v. Atlantic Richfield* were the representatives of a number of cities and counties in California. As a result, it is possible that the lead-paint-specific cause of action will be limited to lawsuits brought by municipal entities. If so, it will be the responsibility of the local or state authorities to bring these cases, and injured children might once again rest at the mercy of unwilling government officials.

III. LEAD PAINT POISONING AS INFRINGEMENT ON CONSTITUTIONAL AND CIVIL RIGHTS

As Part II demonstrated, the legal landscape in the lead paint area is fraught with obstacles. Each of the solutions explored in Part II forms a piece of a patchwork of answers to a looming, enormous problem. While there is some merit in each attempt, no one entity has successfully addressed the lead paint crisis as a whole. This has left the United States without a mandate for complete abatement in homes. Unfortunately, one of the only options available for advocates seeking change is to continue to pressure local, state, and federal governments to take action.

In order to push the problem forward, advocates fighting lead poisoning should pursue litigation strategies that have gone largely

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161. *ConAgra Grocery Prods. Co.*, 227 Cal. Rptr. 3d at 551–52.

162. To be sure, California law appears to have been particularly congenial to the plaintiffs' claim in this case. While the defendants argued that interior residential lead paint did not interfere with a "public right" because it only caused "private harms in private residences," the court held that the paint interfered with the "community's 'public right' to housing that does not poison children," and ruled that residential housing was, indeed, a shared community resource. *Id.* at 552.

untouched. The most important of these avenues—and one with great capacity to pressure governments to take action—is the use of constitutional and civil rights frameworks. This strategy not only presents a novel way of bringing the problem into the light—even more importantly, it directly addresses the race- and class-based aspects of the epidemic. The subjugation of a targeted class of people—and the dismissal of their fundamental rights, their health, and their wellbeing—lies at the heart of the lead paint problem. As the law stands now, however, every widely-used solution fails to acknowledge this fact explicitly and directly, as part of the substance of its claim.

It is important to note at the outset that bringing civil rights and constitutional litigation to the legal repertoire of solutions will not wholly solve the lead paint problem. In fact, these alternatives may cover only a limited number of situations involving lead hazards. However, legal recognition of the structural racism and classism that are central to the crisis could serve to legitimize the experiences of hundreds of thousands of Americans, and garner greater public attention to the issue. In turn, heightened public focus on these issues could push the government to take action, and serve to frame the epidemic more clearly as the denial of children's fundamental rights.

There are many possible angles a civil rights or constitutional approach could take in this field. This includes action and advocacy under the Equal Protection Clause of the U.S. Constitution,[163] Section 504 of the Rehabilitation Act, the Americans with Disabilities Act,[164] Executive Order 12,898 (addressing environmental justice

163. U.S. CONST. amend. XIV; U.S. CONST. amend. V.

164. 29 U.S.C. § 794 (2018) (prohibiting discrimination against persons with disabilities in programs receiving federal financial assistance); 42 U.S.C. § 12101 (2018) (prohibiting discrimination against individuals with disabilities). One successful lead paint action brought under an ADA theory involved children who suffered from lead poisoning in a Chicago Housing Authority ("CHA") apartment. After learning about her children's elevated blood lead levels, their mother asked the CHA to move them into a different apartment, but the authority refused. The family successfully brought suit, arguing that the CHA's failure to act amounted to discrimination against individuals with disabilities. Benfer, *supra* note 118; Dina Roth Port, *Legal Freedom Fighter Series: Emily Benfer*, ROCKET MATTER: LEGAL PRODUCTIVITY (April 20, 2017), https://www.rocketmatter.com/general/legal-freedom-fighter-series-emily-benfer [https://perma.cc/CZ5H-5S7J].

concerns),[165] and various theories under state constitutions and state nondiscrimination statutes. Part III focuses on a few of the most promising strategies at the federal level: litigation using procedural and substantive due process arguments supplied by the Fourteenth Amendment, as well as claims under the Fair Housing Act and Title VI of the Civil Rights Act of 1964.[166] Although these methods do not represent the exclusive ways to address lead poisoning in the civil rights and constitutional context, they may yield the strongest chances of success in litigation.[167]

This Part first analyzes possible causes of action against local public housing authorities under a Fourteenth Amendment procedural due process theory. It then examines the viability of claims alleging that local housing authorities have violated tenants' substantive due process rights under the Fourteenth Amendment by failing to prevent children from becoming lead poisoned while living in public housing. Next, this Part argues that plaintiffs can

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165. Exec. Order No. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 11, 1994) (directing attention to the environmental and public health effects of federal action). This Executive Order provides persuasive support for an argument that the federal government should act to reduce environmental discrimination by requiring total lead paint abatement. However, the order does not provide for any right of action and thus lacks a meaningful mechanism of private enforcement. As a result, citizens are left to the whims and priorities of the enforcing agencies.

166. 42 U.S.C. § 2000d (2018).

167. This Part's discussion is also restricted to viable legal actions against entities receiving the provision of federal funds, and thus will only apply to public housing, not to the private housing market. The reason for this choice is partly for the sake of simplicity, but also due to the fact that federal lead poisoning laws generally do not regulate the private housing market (with one notable exception, the Residential Lead-Based Paint Hazard Reduction Act, *see supra* Section II.A.1.b). As a result, options for federal challenge to practices in the private market are limited. The most notable exception to this characterization is that private landlords can be held liable for discrimination under the Fair Housing Act.

For an interesting argument that a Massachusetts Law violates the FHA because it requires private landlords to perform lead inspections on units only when a child is expected to reside there, *see generally Civil Rights/Anti-Discrimination—How the Massachusetts Lead Poisoning Prevention and Control Act Codifies Systemic Housing Discrimination Against Families with Children in Violation of the Federal Fair Housing Act*, 40 WEST. NEW ENG. L. REV. 1 (2018) (claiming that this law results in landlords' refusal to rent to—and discrimination against—families with children).

successfully claim that a local authority's general failure to remove lead paint from homes constitutes a violation of its obligations under the Fair Housing Act ("FHA"), the Affirmatively Furthering Fair Housing Rule ("AFFHR"), and Title VI of the Civil Rights Act of 1964 ("Title VI"), because this practice results in a disproportionate harm to protected classes. Finally, this Part concludes with a discussion of possible claims under the FHA, AFFHR, and Title VI in the more specific case where a public housing authority has discriminated in its use of federal funds. In the lead paint context, this would mean that local public housing officials used federal funds to remediate lead hazards for some public housing tenants, while simultaneously neglecting to do the same for tenants belonging to a protected class.

A. Possible Causes of Action

1. Due Process Claims

The Fourteenth Amendment to the U.S. Constitution declares that no state shall "deprive any person of life, liberty, or property, without due process of law."[168] 42 U.S.C. § 1983 additionally states that an individual may bring a federal lawsuit against a state actor or local government for the violation of his or her federal constitutional rights.[169] With the combination of these two sources of law, the due process clause opens up a potentially promising cause of action for lead poisoned plaintiffs against local public housing authorities.

Supreme Court precedents have separated Fourteenth Amendment due process rights into two distinct categories: procedural due process and substantive due process rights. Procedural due process refers to a person's right to certain technical protections before the government can take a benefit away from them.[170] Substantive due process, on the other hand, protects fundamental rights.[171] Cases dealing with substantive due process claims ask "whether the government has an adequate reason for taking away a person's life, liberty or property."[172] This Section

168. U.S. CONST. amend. XIV, § 1.
169. 42 U.S.C. § 1983; *see* SCHWARTZ & URBONYA, *supra* note 89.
170. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 7.1 (2006).
171. *Id.*
172. *Id.*

argues that citizens in public housing facing lead hazards can make a strong case for the violation of both procedural and substantive due process rights.

i. Procedural Due Process

The Supreme Court has repeatedly held that the opportunity to be heard "at a meaningful time and in a meaningful manner" represents a central requirement of due process.[173] A plaintiff alleging a violation of her procedural due process rights must address two separate questions: first, "whether there exists a liberty or property interest which has been interfered with by the State,"[174] and second, "whether the procedures attendant upon that deprivation were constitutionally sufficient."[175]

As a result, an initial obstacle to a procedural due process claim in the public housing context is whether or not federal housing assistance can be construed as a "property interest." Significantly, the Supreme Court held in *Goldberg v. Kelly* that procedural due process constraints apply to the termination of welfare benefits, stating that a constitutional challenge under a due process theory in the welfare arena could not be "answered by an argument that public assistance benefits are a 'privilege' and not a 'right.'"[176] Lead poisoning scholar Emily A. Benfer likewise notes that "[i]t is widely recognized that recipients of Housing Choice Vouchers and other forms of federal housing assistance have a property interest in the benefit, as well as a property right to continued participation in the program."[177] As a

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173. City of Los Angeles v. David, 538 U.S. 715, 717 (2003).

174. Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 460 (1989); *see also* Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972) ("We must look to see if the interest is within the Fourteenth Amendment's protection of liberty and property.").

175. *Thompson*, 490 U.S. at 460 (citation omitted).

176. Goldberg v. Kelly, 397 U.S. 254, 262 (1970).

177. Benfer, *supra* note 8, at 544–45; *see also* Junior v. City of New York, No. 12 Civ. 3846 (PAC), 2013 WL 646464, at *6 (S.D.N.Y. Jan. 18, 2013) ("It is well established that Section 8 tenants have a property interest in continuing to receive assistance payments."); McCall v. Montgomery Hous. Auth., 809 F. Supp. 2d 1314, 1324 (M.D. Al. 2011) ("No party to this action has disputed that recipients of public assistance, such as Section 8 assistance, have a protected property interest in continuing to receive such assistance."); Swift v. McKeesport Hous. Auth., 726 F. Supp. 2d 559, 574 (W.D. Pa. 2010) (holding plaintiff's Section 8 voucher constituted "a property interest for purposes of due process"); Chesir v. Hous. Auth. of Milwaukee, 801 F. Supp. 244, 248 (E.D. Wis. 1992) ("[T]he right to

result, as long as plaintiffs can show that the procedures involved in the termination of their benefits were constitutionally insufficient, individuals participating in public housing programs should be able to bring a procedural due process claim in two different contexts dealing with lead paint.

First, if a tenant lives in a lead-contaminated unit that receives federal financial assistance, and his or her child becomes lead poisoned, the tenant may be able to successfully argue that the existence of lead paint in the home amounted to a denial of his or her property interest in housing benefits. Plaintiffs can argue that they were deprived of these benefits from the beginning, because access to *hazardous* housing is effectively access to no housing at all. Here, litigants should emphasize that if a home contains deteriorating lead paint, it is relatively certain that a child living there will become poisoned just by ingesting trace amounts of lead dust—even if the child is never left unsupervised, and even if the child never actually ingests any paint chips.[178]

In these cases, plaintiffs may also benefit from drawing an analogy to the state law doctrine of constructive eviction. Under this doctrine, a tenant is ordinarily permitted to argue that a landlord's wrongful acts materially deprived him or her of the beneficial use and enjoyment of the premises, and that this amounted to a "constructive eviction," even if no actual, physical eviction has occurred.[179]

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participate in the rent assistance program . . . creates a property interest."); Simmons v. Drew, 716 F.2d 1160, 1162 (7th Cir. 1983) ("[J]ust as job tenure is a species of property protected by the Fourteenth Amendment . . . so too is . . . the right of certificate holders to participate in a rent assistance program."). *But see* discussion *infra* regarding Paige v. New York City Hous. Auth., No. 17cv7481, 2018 WL 3863451, at *1, *9 (S.D.N.Y. Aug. 14, 2018) (Southern District of New York rejecting public housing tenants' property interest claims in the lead paint context).

178. This fact can help combat the common argument from opponents that kids only become poisoned when their parents are irresponsible, leaving their children unattended or allowing them to eat paint off the walls. If the parents had simply supervised their child, the argument goes, the housing would not have been hazardous. *Beyond Flint*, *supra* note 8; *see also* Benfer, *supra* note 8, at 516 (describing how legislators questioned the parenting abilities of parents of lead poisoned children while deciding whether or not to pass the LPPPA).

179. *See, e.g.*, Tracy Bateman et al., *Constructive Eviction*, *in* 74 N.Y. JUR. LANDLORD AND TENANT § 313 (2d ed. 2019) ("Constructive eviction occurs where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the defendant of the beneficial use and enjoyment of the premises."); Stephanie A. Giggetts et al.,

Similarly, individuals injured by lead paint in federal housing can argue that the existence of lead paint hazards in their apartment rendered the unit unsafe, and deprived them of the use and beneficial enjoyment of their home from the beginning. As Benfer emphasizes, however, "in the case of federally assisted housing, this is more than a lease violation; it is a termination without due process of law."[180] Additionally, if a family is forced to move out of their unit due to the presence of lead paint, and they are not provided with alternative housing or relocation services, the claim that their benefits have been revoked without due process becomes even stronger.

A second scenario in which participants in the public housing system may claim a violation of procedural due process rights is where a participant declines to live in a specific apartment that appears to be contaminated by lead, and is neither offered alternative housing nor able to find any available, affordable unit in the area that is reliably lead-free, and he or she is forced to find housing elsewhere as a result—the participant may have a due process claim, even if they never actually lived in a lead-contaminated apartment.

The existence of these circumstances is not implausible. In 2016, HUD estimated that 2.5 million units in the federal housing assistance program contained lead hazards.[181] In 2018, a report by the Office of the Inspector General ("OIG") stated that HUD "lacked adequate oversight of lead-based paint reporting and remediation in its public housing and Housing Choice Voucher programs," and that HUD did not "ensure that public housing agencies completed required lead-based paint inspections."[182] Potential tenants looking for federally assisted housing could argue that the actual failure of states and public housing authorities to abate lead hazards has resulted in the termination of their benefit without due process of law—regardless of whether or not laws exist on the books requiring abatement.

Constructive Eviction—Particular Acts or Conditions of Constructive Eviction, *in* 34 FLA. JUR. LANDLORD AND TENANT § 291 (2d ed. 2018) ("[A]ny disturbance of the possession of a tenant by the landlord . . . that renders the premises unfit for occupancy . . . or that deprives the tenant of the beneficial enjoyment of the premises, amounts to constructive eviction.").

180. Benfer, *supra* note 8, at 545.

181. Reynolds, *supra* note 107.

182. OFFICE OF THE INSPECTOR GEN., HUD'S OVERSIGHT OF LEAD-BASED PAINT IN PUBLIC HOUSING AND HOUSING CHOICE VOUCHER PROGRAMS 1 (2018).

One obstacle in this type of scenario, however, is that much of the case law in this area deals with the termination of federal financial assistance that beneficiaries were *already* receiving, such as the eviction of a tenant who was already living in public housing. However, at least one circuit has explicitly held that citizens have a "constitutionally protected 'property' interest in Section 8 benefits," solely by virtue of their "membership in a class of individuals whom the Section 8 program was intended to benefit."[183] Courts have accorded procedural due process protections to mere applicants for public benefits in similar contexts, such as where an individual applied for a driver's license.[184] As a result, citizens may still be able to bring a due process claim even if they decide not to live in a lead-riddled apartment in the first place.

Finally, it should not be difficult to prove the second prong of the procedural due process analysis in any of these scenarios (i.e., showing that the procedures associated with the deprivation of property were constitutionally deficient). Although the Supreme Court has held that a full evidentiary hearing is not necessarily required in order to afford constitutional protection of property interests, it seems clear that a lack of *any* process at all is insufficient.[185] At the very least, public housing authorities should be required to perform sufficient, effective inspections in their units, and tenants should have the right to request such inspections, to dispute their findings, to challenge the sufficiency of abatement, and to have their claims reviewed by a court.

The procedural due process claim is far from airtight, however. Many advocates appear reluctant to raise procedural due process claims in the lead paint context because of an adverse Supreme Court case, which held that there is no constitutional

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183. Ressler v. Pierce, 692 F.2d 1212, 1215 (9th Cir. 1982) (holding that Section 8 applicants are entitled to due process protections even in the application and selection process).

184. Raper v. Lucey, 488 F.2d 748, 752 (1st Cir. 1973) (applicant for driver's license); *see also* Baldwin v. Hous. Auth. of Camden, 278 F. Supp. 2d 365, 378 (D.N.J. 2003) (citing Kelly v. R.R. Ret. Bd., 625 F.2d 486 (3d Cir. 1980)) (applicant for disabled child's annuity under the Railroad Retirement Act).

185. Mathews v. Eldridge, 424 U.S. 319 (1976) (finding that an individual did have a property interest in the continued receipt of social security benefits, protected by the due process clause; holding that the procedural protections in place, including notice of termination of benefits, right to an evidentiary hearing before an administrative law judge, review by the SSA Appeals Council, and judicial review, were adequate).

guarantee to housing "of a particular quality."[186] This precedent was noted with particular force in *Paige v. New York City Housing Authority*, one of the only recent opinions to address a procedural due process claim in the lead paint and public housing context.[187] There, tenants living in NYCHA units whose children tested positive for lead exposure argued that their procedural due process rights were violated by NYCHA's failure to inspect units and abate lead paint. They claimed a property interest in the leases themselves, as well as in "a habitable residence . . . free from dangerous and unsafe conditions."[188] The court ultimately dismissed the plaintiffs' due process arguments, holding that there was "no constitutional right of access to a certain quality of housing."[189] Although this case raises a pertinent issue lurking behind due process claims, it seems possible for future plaintiffs to avoid this result by tailoring their arguments carefully. For example, the plaintiffs in *Paige* did not appear to raise any argument under *Goldberg* that their property interest inhered in the welfare benefits themselves—an argument that is supported by a fair number of cases.[190] Additionally, the court's holding in *Paige* turned, in large part, on the fact that the plaintiffs "were not evicted from their apartments and continue[d] to live there."[191]

Although the procedural due process argument has faced some negative treatment in U.S. courts, as evidenced by the court's holding in *Paige*, litigators should continue to push the limits of the doctrine to expand it to the lead poisoning context. At first glance, the procedural angle may appear relatively inconsequential, but correcting the lack of recourse for tenants could have a wide impact. It may be true that states and public housing authorities could simply respond to lawsuits by putting slight procedural protections in place. However, even the existence of minimal grievance procedures could ensure tenants' safe relocation and continued receipt of benefits, draw

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186. Lindsey v. Normet, 405 U.S. 56, 74 (1972).

187. Paige v. New York City Housing Authority, No. 17cv7481, 2018 WL 3863451, at *8–9 (S.D.N.Y. Aug. 14, 2018).

188. *Id.*

189. *Id.* at 8 (citing Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065, 1068 (2d Cir. 1974)); *Normet*, 405 U.S. at 74).

190. *See* cases cited *supra* note 177.

191. *Paige*, 2018 WL 3863451, at *9. The claimants did not appear to raise a defense to this objection by analogizing to the doctrine of constructive eviction, as suggested in the prior discussion of procedural due process, *supra* Section III.A.1.i.

more attention to the issue, encourage record-keeping, and enable citizens the option to seek judicial review of administrative decisions.

ii. Substantive Due Process

Individuals may also be able to assert a novel argument that the authorities' failure to ensure the safety of children in public housing constitutes a violation of substantive due process. Plaintiffs should make this argument based on an analogy to the doctrine in *Youngberg v. Romeo*.[192] In that case, a mentally impaired man was involuntarily committed to a psychiatric institution, where he suffered numerous injuries while in confinement. These injuries were caused both by his own violence and the violence of others. The man's mother, participating as next friend, argued that her son had a constitutional right to safety and personal security, and that the institution knew or should have known about his injuries but failed to provide him with care. The Supreme Court ultimately held that the man *did* have substantive rights to reasonably safe conditions of confinement under the due process clause of the Fourteenth Amendment.[193] The Court, citing *Ingraham v. Wright*, stated that the "right to personal security constitutes a 'historic liberty interest' protected substantively by the Due Process Clause."[194]

In addition, the man claimed that he was entitled to minimal training services that would enable him to reduce his aggressive behavior, thus allowing him to secure his own bodily safety. In response, the Court emphasized the "constitutionally protected liberty interest in safety and freedom from restraint," and noted that while a state is generally "under no constitutional duty to provide substantive services" for its citizens, "[w]hen a person is institutionalized—*and wholly dependent on the State* . . . a duty to provide certain services and care does exist."[195]

In the case of persons seeking federal financial assistance in housing, litigators may succeed in analogizing to *Youngberg* by arguing that these groups are wholly dependent on the State as well. Without the means to secure housing in the private market, individuals are, de facto, entirely dependent on the financial

192. 457 U.S. 307 (1982).
193. *Id.* at 307.
194. *Id.* at 315–16 (citing Ingraham v. Wright, 430 U.S. 651, 673 (1977)).
195. *Id.* at 316–18 (emphasis added).

assistance afforded through public housing programs. Moreover, the government knows that they are dependent; benefits would not be available if individuals had other means of financing housing. Since the government has elected to provide these benefits, its knowledge that individuals are wholly dependent on governmental support arguably creates a duty in government agencies to offer housing that will not cause permanent neurological damage to its beneficiaries.

This argument is undoubtedly vulnerable to multiple fronts of attack, however. There may be fear that this kind of substantive right to personal safety could be extended into any area of welfare, and that this would become too costly for the state. It could also work to chill government undertakings to provide assistance. The most prominent obstacle, however, is the Supreme Court's decision in *Lindsey v. Normet*, in which the Court stated that there is no constitutional guarantee to housing "of a particular quality."[196] However, by focusing on the fact that lead poisoning only causes serious neurological damage to *children*, litigators may effectively defeat these barriers.

In *Paige v. New York City Housing Authority*, one of the only cases to raise a theory of dependence on the state in the lead paint context, the Southern District of New York stated that the fact that housing authority tenants had low incomes did not sufficiently restrain their freedom such that they fell within the "involuntary custody" exception envisioned by *Youngberg*.[197] However, in *Paige*, the plaintiffs' argument focused on the freedom of the *parents* to live elsewhere. To make a successful claim under this theory, litigants should instead emphasize that *children* have no part in the decision whether or not to live in public housing. Advocates should argue that this situation is similar to the *Youngberg* plaintiff's lack of choice as to whether or not he would live in a mental health institution. In both cases, the injured subject's complete dependence on the state is entirely "involuntary."[198]

Plaintiffs can additionally support this argument by relying on language from *DeShaney v. Winnebago County Department of*

196. Lindsey v. Normet, 405 U.S. 56, 74 (1972).

197. Paige v. New York City Housing Authority, No. 17cv7481, 2018 WL 3863451, at *11 (S.D.N.Y. Aug. 14, 2018).

198. *See generally Youngberg*, 457 U.S. at 314–19 (considering the substantive due process rights of involuntarily committed persons).

Social Services.[199] There, the Supreme Court declined to hold that state social workers had an affirmative duty to protect a child who was being abused by his father.[200] The Court stated, however, that if the state had removed the child and placed him in a foster home, this may have been sufficient to give rise to an affirmative duty to protect.[201] The Court distinguished the two scenarios, saying that while officials in *DeShaney* "may have been aware of the dangers that [the child] faced [due to abuse by his father], [the state] played no part in their creation, nor did it do anything to render him more vulnerable to them."[202] In contrast, children who face lead hazards in public housing can argue that public housing authorities that fail to inspect and abate their units do, in fact, render children more vulnerable to harm. Other courts have shown a similar willingness to place an affirmative duty on the state where children are placed in foster care.[203] Litigants should push courts to extend this right to cover children who, through no fault of their own, are forced to reside in public housing.

2. Fair Housing Act and Title VI Claims

Building on the due process violations discussed in the previous Section, this Section argues that citizens should allege that these same problems—a general lack of lead-free public housing in certain localities and a failure to complete required inspections and abatement—constitute a violation of housing authorities' obligations under the FHA, the AFFHR, and Title VI. In addition, this Section discusses the more specific claims that individuals can raise under these statutes when a public housing authority has clearly used its federal funds to abate lead hazards in a discriminatory manner.

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199. 489 U.S. 189 (1989).

200. *Id.*

201. *Id.* at 201 n.9.

202. *Id.* at 190.

203. *See, e.g.*, Cohen v. District of Columbia, 744 F. Supp. 2d 236, 242 (D.D.C. 2010) ("A child in foster care is in custody for substantive Due Process purposes and a State (or the District) owes the child a constitutional duty of care.") (citing Smith v. District of Columbia, 413 F.3d 86, 95 (D.C. Cir. 2005)); Carrero v. N.Y.C. Hous. Auth., 744 N.Y.S.2d 371, 372 (N.Y. App. Div. 2002) (finding an issue of fact as to whether county had a special duty to protect an infant from lead paint poisoning, where county inspector advised county health authorities that child could return to foster parents from hospital, without first confirming that lead contamination in the foster home had been remedied).

The FHA, as amended in 1988, prohibits discrimination on the basis of race, color, religion, sex, disability, familial status, or national origin in both public and private housing.[204] In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the Supreme Court upheld a broad interpretation of the FHA, enabling plaintiffs to challenge practices that had a discriminatory effect without requiring evidence of intentional discrimination.[205] The AFFHR, promulgated in 2015, additionally requires government agencies receiving federal funding to take affirmative action to "overcome historic patterns of segregation."[206]

Title VI similarly prohibits discrimination on the basis of race, color, and national origin in programs receiving federal assistance.[207] The Supreme Court has also held that a violation of Title VI does not necessarily require proof of discriminatory intent.[208]

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204. Fair Housing Act, 42 U.S.C. § 3604 (2012); *see also File a Complaint*, U.S. DEP'T OF HOUSING & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/online-complaint [https://perma.cc/GKN3-AHHK] [hereinafter *File a Complaint*] (providing an online platform where individuals can file housing discrimination complaints).

205. Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, 135 S. Ct. 2507 (2015).

206. Affirmatively Furthering Fair Housing Rule, 80 Fed. Reg. 42,272 (July 16, 2015). At the time of publication, the Department of Housing and Urban Development had begun the process of instituting a new Affirmatively Furthering Fair Housing Rule that would significantly roll back the protections provided by the 2015 AFFHR, but no final rule was yet in place. *See* Tracy Jan, *HUD Releases Proposal, Further Weakening Enforcement of Housing Laws*, WASH. POST (Jan. 7, 2020), https://www.washingtonpost.com/business/2020/01/03/ben-carsons-latest-plan-weaken-fair-housing-enforcement/ (on file with the *Columbia Human Rights Law Review*). However, as discussed *infra*, the 2015 AFFHR does not appear to include a private right of action, regardless. As a result, a change to the rule should not significantly impact the arguments set forth in this Section. However, the implementation of a new rule could generally weaken a lead poisoned plaintiff's argument—set forth in conjunction with an FHA claim—that a government agency failed to act affirmatively to reduce segregation, and thus violated its obligations under the AFFHR. For further discussion, *see infra* note 213.

207. 42 U.S.C. § 2000d (2012).

208. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE VI LEGAL MANUAL, SECTION VII: PROVING DISCRIMINATION—DISPARATE IMPACT 6, https://www.justice.gov/crt/case-document/file/923556/download [https://perma.cc/62H5-AR2R] [hereinafter TITLE VI LEGAL MANUAL] (citing Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 643 (1983) (Stevens, J., dissenting) (internal citations omitted) and Alexander v. Choate, 469 U.S. 287,

However, the Court held in *Alexander v. Sandoval* that, although private individuals may sue to enforce Title VI where there is intentional discrimination, there is no private right of action to combat regulations that have a disparate impact on protected groups.[209] Still, this does not preclude citizens from filing complaints with HUD and petitioning for writs of mandamus as a means of addressing these violations.[210]

Ultimately, this means there is an important distinction when it comes to a private citizen's ability to bring a lawsuit for a violation of the FHA as opposed to a lawsuit under Title VI. For violations where citizens cannot prove intentional discrimination, but can only prove disparate impact, private citizens may bring *lawsuits* under the FHA.[211] In these same circumstances under Title VI, however, citizens may only file a complaint with a government agency (i.e., HUD), or petition for a writ of mandamus.[212]

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293 (1985)); *see also id.* at 4 (stating that the Title VI "disparate impact regulations seek to ensure that programs accepting federal money are not administered in a way that perpetuates the repercussions of past discrimination," and noting the Supreme Court's recognition that "even benignly-motivated policies that appear neutral on their face may be traceable to the nation's long history of invidious race discrimination.") (citing Griggs v. Duke Power Co., 401 U.S. 424, 430–31 (1971)) (other citations omitted).

209. Alexander v. Sandoval, 532 U.S. 275, 279–80 (2001). Note that the Department of Justice has explicitly stated that the ruling in *Sandoval* does not "affect the disparate impact provisions of other laws, such as . . . the Fair Housing Act." TITLE VI LEGAL MANUAL, *supra* note 208, at 7. As a result, and in light of the FHA's private enforcement provision, individual citizens may still bring lawsuits under the FHA in cases of discrimination, even where there is only proof of disparate impact. 42 U.S.C. § 3613; *see, e.g.*, Reyes v. Waples Mobile Home Park Ltd. P'ship, 903 F.3d 415 (4th Cir. 2018) (mobile home park residents brought FHA action against owners and operators of mobile home park under a disparate impact theory).

210. *See, e.g.*, Complaint, O'Berry et al. v. East Chi. Hous. Auth., HUD No. 16-167 (Aug. 29, 2016) (complaint filed with HUD by residents of West Calumet housing complex, alleging violations of Title VI, FHA, and AFFHR); *see also File a Complaint*, *supra* note 204 (providing a platform where individuals can file complaints).

211. 42 U.S.C. § 3613; *see also* TITLE VI LEGAL MANUAL, *supra* note 208, at 7 (stating that the ruling in *Sandoval* does not "affect the disparate impact provisions of other laws, such as . . . the Fair Housing Act.").

212. For an overview of the nature of writs of mandamus, *see generally* Howard W. Brill, *The Citizen's Relief Against Inactive Federal Officials: Case Studies in Mandamus, Actions 'In the Nature of Mandamus,' and Mandatory Injunctions*, 16 AKRON L. REV. 339 (1983) (exploring the history of the writ of mandamus and the requirements for issuance of the writ).

Given HUD's general reluctance to take sufficient action on the lead poisoning front on its own, it is clear that a private lawsuit would be the preferred mode of legal action here. Relying on non-judicial remedies once again places harmed individuals at the mercy of administrative procedures and priorities. Other government organizations have been criticized for their lack of response to civil rights complaints in the past. The EPA, in particular, has recently come under fire for their mishandling of Title VI complaints. As of 2013, the EPA's Office of Civil Rights had "failed to make a single final finding of noncompliance among the 247 complaints . . . filed since 1993." Olatunde C.A. Johnson, *Lawyering That Has No Name: Title VI and the Meaning of Private Enforcement*, 66 STAN. L. REV. 1293, 1329 (2014); *see also* Glenn, *supra* note 59, at 50 (describing extreme delays in the EPA's processing of complaints). However, this lack of response to civil rights complaints appears to be unique to the EPA—the report that exposed the EPA's inadequate procedures compared the EPA data to "benchmark" performances of other agencies, including HUD. DELOITTE CONSULTING LLP, EVALUATION OF THE EPA OFFICE OF CIVIL RIGHTS 27 (2011), https://archive.epa.gov/epahome/ocr-statement/web/pdf/epa-ocr_20110321_finalreport.pdf [https://perma.cc/5W7S-VL2S]. Furthermore, a report from the Office of Fair Housing and Equal Opportunity ("OFHEO"), a division of HUD, showed that in 2017, 155 new Title VI complaints were filed with the OFHEO, and 181 investigations into Title VI complaints were closed. Compared with the EPA's complaint response rate of 6% between 1997 and 2011, HUD appears to keep up a solid pace when it comes to Title VI cases. OFFICE OF FAIR HOUSING AND EQUAL OPPORTUNITY, ANNUAL REPORT TO CONGRESS: FY 2017, at 46 (2017); *see also* Glenn, *supra* note 59, at 50 ("Between 1997 and 2011, EPA responded to only six percent of Title VI complaints within the required timeframe.").

As a backstop to a potential unwillingness from HUD to respond to violations of Title VI, however, interested groups can follow the lead of the plaintiffs in Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency, 581 F.3d 1169 (9th Cir. 2009). In that case, nonprofit community groups filed suit against the EPA under the Administrative Procedure Act, seeking an injunction to compel the EPA to timely process all of the organization's complaints. *Id.*

Note also that the viability of a given FHA lawsuit against a public housing authority may depend on the extent to which the state or public housing authority has waived sovereign immunity. *See* McCardell v. U.S. Dep't of Hous. & Urban Dev., 794 F.3d 510, 522 (5th Cir. 2015) ("The language of the Fair Housing Act does not make 'unmistakably clear' that Congress intended to abrogate [states' sovereign immunity]."). The sheer number of FHA lawsuits that private individuals have filed against housing authorities, however, suggests that local authorities often waive sovereign immunity defenses in this context. *See, e.g.*, Tull v. N.Y.C. Hous. Auth., 16-3609-cv, 2018 WL 862298 (2d Cir. 2018) (tenant claim for failure to accommodate was violation of FHA); Hardaway v. D.C. Hous. Auth., 843 F.3d 973 (D.C. Cir. 2016) (tenant who was denied approval for live-in aid successfully demonstrated injury in fact under FHA).

For lawsuits alleging intentional discrimination under Title VI, however, Congress has unequivocally abrogated states' immunity from suit. *See* 42 U.S.C. § 2000d-7 (2018) ("A State shall not be immune under the Eleventh

Notwithstanding this distinction, however, overall the FHA[213] and Title VI can form the basis for lawsuits, complaints, and petitions for writs of mandamus alleging discrimination by local housing authorities in two different scenarios. On the one hand, tenants can make a general claim that a housing authority's failure to adequately inspect and abate lead paint has had a disparate impact on a protected group in a given community. On the other, plaintiffs can make out a more specific discrimination claim by showing that housing authority officials provided lead inspection and abatement services to certain tenants, while refusing to provide the same services to tenants belonging to a protected group. This Section will address each claim in turn.

i. General Failure to Inspect Units and Abate Lead Paint in Public Housing Inflicts a Disproportionate Harm on Communities of Color

The more general claim against public housing authorities under the FHA, AFFHR, and Title VI involves proving that the failure to inspect apartments and abate lead paint in public housing inflicts a disproportionate harm on communities of color. According to a recent national survey, over 65% of residents across all federal public housing are African-American, Hispanic, or Latino.[214] As a

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Amendment of the Constitution of the United States from suit in Federal court for a violation of . . . title VI of the Civil Rights Act of 1964.").

213. Note that the AFFHR does not appear to include a private right of action, and as a result this rule cannot form an independent basis for a lawsuit. However, advocates should still include AFFHR claims in their FHA complaints. As it is currently written, the rule has considerable force, given its requirement that government agencies act affirmatively to reduce segregation. Although litigants may not be able to bring an independent legal claim under the rule's provisions, plaintiffs can still successfully argue, in an FHA lawsuit, that a government agency has failed to fulfill its obligations under the AFFHR. *See* Affirmatively Furthering Fair Housing Rule, 80 Fed. Reg. 42,272 (July 16, 2015). As discussed *supra*, however, at the time of publication of this Note, HUD was in the process of attempting to replace the AFFHR and significantly roll back the rule's protections. The outcome of this process—and the contours of a potential new rule—will determine whether plaintiffs should continue to include AFFHR claims in their FHA complaints. *See supra* note 206.

214. NAT'L LOW INCOME HOUS. COAL., HOUSING SPOTLIGHT: WHO LIVES IN FEDERALLY ASSISTED HOUSING? 3 (2012), https://nlihc.org/sites/default/files/HousingSpotlight2-2.pdf [https://perma.cc/JD99-PF49].

result, litigators in many localities should be able to prove that the lack of lead paint abatement in public housing has resulted in a disparate impact on communities of color. This claim is further bolstered by the statistics explored in Part I, which demonstrate that the incidence of lead poisoning is significantly lower in white children than in children of other races.[215] By not addressing the lead paint hazards in public housing, the entities receiving federal assistance have violated their obligation not to inflict a disproportionate harm on protected classes under the FHA and Title VI.[216] Affected individuals can also argue that these entities have failed to fulfill their duty to affirmatively reverse historical patterns of segregation and discrimination under the AFFHR.

Despite the viability of these types of claims, however, several cases suggest that advocates are reluctant to address the lead paint crisis in this context. This may be due to disagreement among courts about the showing a plaintiff must make in order to demonstrate disparate impact. Some courts have held that a plaintiff must do more than just show that a certain policy adversely affects a protected group—the policy must also "lead[] to under-representation of [the group] in the housing relative to the general population,"[217] and "create[] a shortage of housing" for that group.[218] Some courts

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215. *See supra* Section I.C.

216. For one example of a case using a similar theory, *see* Nat'l Fair Hous. All. v. Travelers Indem. Co., 261 F. Supp. 3d 20, 33–34 (D.D.C. 2017). There, the district court held that the National Fair Housing Alliance ("NFHA") properly stated a claim under the FHA by showing that housing voucher recipients were significantly more likely to be members of a protected class than was true for the D.C. population as a whole. *Id.* The court stated that the NFHA had pleaded facts demonstrating that "because of the different composition of the affected population (voucher recipients) as compared to the District's population as a whole, members of a protected class are *more* likely to be harmed by Travelers' policy than are other individuals." *Id.* at 34. The court likewise found that the NFHA had pleaded facts that, "if true, would show that Travelers' policy will exacerbate racial . . . disparities by having a disproportionate impact on African-American residents . . . in the District." *Id.*

Note that the Supreme Court held in Tex. Dep't of Hous. & Cmty. v. Inclusive Cmtys. Project, 135 S. Ct. 2507, 2523 (2015) that a disparate impact claim relying on statistics will fail unless a plaintiff can point to a defendant's policy or policies causing that disparity. Plaintiffs should be able to meet this requirement by showing that there is actual widespread incidence of lead paint throughout a public housing complex or across public housing in a town or state.

217. Meyer v. Bear Road Assocs., 124 F. App'x 686, 688 (2d Cir. 2005).

218. Candlehouse, Inc. v. Town of Vestal, 2013 WL 1867114, at *13 (N.D.N.Y. May 3, 2013); *see also* Paige v. N.Y.C. Hous. Auth., No. 17cv7481, 2018

have also said that disparate impact can be measured only in relation to the "total group to which a policy or decision applies," not to the general population.[219] At the same time, however, other courts have accepted more favorable methods of demonstrating disparate impact. These include "showing that the proportion of the plaintiff's protected class adversely affected . . . is higher than their proportion of the general population," or "showing that the proportion of protected-class members adversely affected . . . is higher than the proportion of all persons in the general population adversely affected."[220]

Notwithstanding potential resistance to these disparate impact arguments, one complaint filed with HUD in 2016 has proven to be a successful template for alleging general violations of the FHA, AFFHR, and Title VI in the lead poisoning context. In that case, which has since been resolved on terms favorable to the complainants, a group of individuals claimed that the East Chicago Housing Authority ("ECHA") knowingly built a housing complex ("West Calumet") on a tract of land that had previously been used for a lead refinery.[221] At the time of construction, the housing authority's

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WL 3863451, at *3 (S.D.N.Y. Aug. 14, 2018) ("Plaintiffs did not offer evidence that [the protected group] . . . [was] dissuaded from renting because of the presence of lead paint.").

219. *See, e.g.*, Hallmark Developers, Inc. v. Fulton Cty., 466 F.3d 1276, 1286 (11th Cir. 2006) ("[T]he appropriate inquiry is into the impact on the *total group to which a policy or decision applies*.") (emphasis added).

220. Robert G. Schwemm, *Discriminatory Effect Cases: Violations Without a Prohibited Intent—Disparate-Impact Claims*, HOUSING DISCRIMINATION LAW AND LITIGATION § 10:6 (2018) (citing Gallagher v. Magner, 619 F.3d 823, 834 (8th Cir. 2010) (approximately 61% of the population seeking affordable housing was African-American, but African-Americans made up 11.7% of the city's total population); Smith v. Town of Clarkton, 682 F.2d 1055, 1060–61 (4th Cir. 1982) (prima facie case was made out where 56% of low-income families were African-American and 69% of all African-American families were eligible for low-income housing, but African-Americans only represented 40% of the population); Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 938 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (challenged zoning decision had a substantial impact where 24% of African-American families needed subsidized housing, compared to 7% of all families in Huntington) (other citations omitted)).

221. Complaint at 6, O'Berry v. East Chi. Hous. Auth., HUD No. 16-167 (Aug. 29, 2016); Preliminary Voluntary Compliance Agreement and Title VIII Conciliation Agreement Between U.S. Department of Housing and Urban Development and Calumet Lives Matter and East Chicago Housing Authority, FHEO Nos. 05-16-5210-8/6, 05-16-5211-8/6, 05-16-5212-8/6, 05-16-5213-8/6, 05-16-5214-8/6/4, 05-16-5215-8/6/4, and 05-16-5216-6 (Nov. 2, 2016), https://www.

director stated that there were "limited siting options for public housing in East Chicago," and that "the majority of tenants would be African-American and Hispanic or Latino."[222] Years later, it was discovered that many children living on the site were suffering from elevated blood lead levels.[223] The complaint alleged that the ECHA practiced discrimination in failing to effectively relocate the families away from the housing complex.[224] The complaint specifically pointed to the fact that 87% of the West Calumet housing complex residents were Black or African-American, and that an additional 11% of residents were Hispanic or Latino.[225] It claimed that ECHA had taken "no steps to reduce the likelihood of poor, segregative, [*sic*] and unhealthy housing outcomes for these residents," and that many residents were not offered relocation assistance or were not relocated for extended periods of time.[226] In this case, the complainants made out a strong claim that the ECHA, a recipient of federal funds, had practiced discrimination in violation of its FHA, AFFHR, and Title VI obligations.[227]Although this scenario dealt with lead contamination caused by the remnants of a smelting plant, the case is a strong model for a successful action under these civil rights theories.

ii. Specific Patterns of Discrimination in Housing Authorities' Lead Inspection and Abatement Practices

Aggrieved plaintiffs may also be able to make more specific challenges to the discriminatory use of federal funds within local housing authorities. This will be possible where there is evidence that an authority's response to a lead paint problem varies according to the race of the tenant. In the lead paint context, this would mean that a housing authority was using federal funds to conduct risk assessments or otherwise protect against lead hazards in some federally assisted units, while not doing so in the units occupied by members of a protected class.

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hud.gov/sites/documents/ECHA_11032016.PDF [https://perma.cc/3JG4-46UK] [hereinafter Preliminary Voluntary Compliance Agreement].

222. Complaint at 6, *O'Berry*, HUD No. 16-167.
223. *Id.* at 2–5.
224. *Id.* at 9.
225. *Id.* at 10.
226. *Id.* at 11, 13.
227. Preliminary Voluntary Compliance Agreement, *supra* note 221.

Although this may appear to be a difficult burden to meet, one example of such a challenge was already brought in a 2017 lawsuit filed by a number of plaintiffs in Cairo, Illinois.[228] There, the plaintiffs alleged that the Alexander County Housing Authority ("ACHA") had discriminated on the basis of race and family status in violation of the FHA and Title VI.[229] As evidence of discrimination, the plaintiffs alleged that the ACHA had engaged in a pattern and practice of failing to maintain certain housing developments occupied almost exclusively by African-American tenants.[230] The complaint further alleged that ACHA had simultaneously maintained, in satisfactory condition, corresponding developments in which approximately half of the tenants were white.[231] Although the lawsuit did not directly discuss lead poisoning, some of the conditions complained of in the case included chipping and flaking paint—generally a strong sign of a lead paint hazard.[232] While the lawsuit has since settled in favor of the plaintiffs, with approximately $10,000 going to each individual, this case presents another template for lead poisoning actions that could allege discrimination in the use of federal funds.[233]

CONCLUSION

Attorneys will undoubtedly face unique and difficult challenges in their attempts to persuade courts that the lead paint epidemic is a crisis of constitutional dimensions. This should not stop lawyers from litigating these areas to the fullest extent. The lead poisoning problem has proven to be relentless—to the point that it has almost become an established part of everyday life. For many, a naïve refusal to accept that society has allowed this disaster to continue for decades has rendered the problem invisible.

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228. Third Amended Class Action Complaint, Lambert v. Alexander Cty. Hous. Auth., No. 3:16-cv-00513-MJR-RJD (S.D. Ill. Feb. 13, 2017).

229. *Id.* at 2. The plaintiffs also pursued a cause of action under the Illinois Civil Rights Act of 2003. *Id.* at 2, 23.

230. *Id.* at 2.

231. *Id.* at 2–3.

232. *Id.* at 4.

233. Molly Parker, *Cairo Residents Settle Lawsuit over Poor Housing Conditions with ACHA for $350,000*, S. ILLINOISAN (July 1, 2017), https://thesouthern.com/news/local/acha/cairo-residents-settle-lawsuit-over-poor-housing-conditions-with-acha/article_77589eff-5290-5ab3-b642-adf4b7ef0856.html [https://perma.cc/2UP7-XBRD].

With the changing makeup of today's U.S. Supreme Court, and the uncertain, volatile nature of current politics, attorneys may understandably feel reluctant to lean on theories that require a new vision of due process, or the application of civil rights laws. The ultimate truth, however, is that nothing else has worked. As the history of lead paint legislation has demonstrated, even seemingly positive developments in the law have not amounted to meaningful change. There is little reason to think that this pattern will change now.

Focusing on the racial and class-based aspects of lead poisoning and framing the issue as the denial of fundamental rights could finally provoke the outrage that has long been missing from discussions on the subject. Utilizing civil rights and constitutional claims in this context is an important step toward recognizing that lead paint in the United States is not just a public health crisis, or a products liability disaster. Lead poisoning is a clear manifestation of the racist and classist attitudes that continue to define the U.S. today. Until we address this aspect of the problem, hundreds of thousands of children will continue to suffer at the hands of a poison in their own homes—just as they have for the last 100 years.