

# LEAD AND LANDLORDS

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## INTRODUCTION

Lead is a toxin that humans cannot safely consume.<sup>1</sup> As has been known for decades, people suffer exposure to lead because of its use in paint and gasoline. In recent decades, water has been added to the list of delivery systems. Often, lead enters water when pipes containing lead are used to transport water from a public water system (“PWS”) to the tap in a home or

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\* Professor Emerita, University of Maryland Carey School of Law. Many thanks are due to the three people whose commitment to eliminating environmental injustice inspired me and my students to study how to eliminate lead service lines in the District of Columbia: Tom Neltner of the Environmental Defense Fund and Professors Karen Baehler and Marquise McGraw of the American University School of Public Affairs. I was fortunate to be joined in this endeavor by the students in MLAW 358B during the spring of 2022 at the University of Maryland College Park, whose hard work and enthusiasm sweetened my last semester of teaching before my retirement. Thanks as well to the *Belmont Law Review* and the students who put together the Symposium and this issue.

1. National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, 86 Fed. Reg. 4198, 4238 (Jan. 15, 2021) (“Exposure to lead can cause serious health effects in all age groups. Infants and children who drink water containing lead could have decreases in IQ and attention span and increases in learning and behavior problems. Lead exposure among women who are pregnant increases prenatal risks. Lead exposure among women who later become pregnant has similar risks if lead stored in the mother’s bones is released during pregnancy. Recent science suggests that adults who drink water containing lead have increased risks of heart disease, high blood pressure, kidney or nervous system problems.”).

a business—as many as 10 million homes in the United States.<sup>2</sup> In Flint, Michigan, for example, the buffering material inside the pipes was disturbed when the PWS started using a more acidic source of water and, at the same time, failed to add buffering chemicals to the mix. When lead leached from the service lines into the taps in people’s homes, thousands of residents—many of them particularly vulnerable infants and children—drank water from lead-contaminated pipes and were poisoned.<sup>3</sup>

Many PWSs and local, regional and state governments have been working to eliminate lead contamination from water pipes. Significant new funding for these efforts was included in the infrastructure bill signed by President Biden in November 2021.<sup>4</sup> Unfortunately, some of the people who historically have borne the greatest burden of lead exposure from all sources are less likely than others to see the benefits. One important reason for the differential is that people of color and people with little income and wealth are more likely to live in rental housing. In most jurisdictions, landlords are viewed as having exclusive power to decide whether and when to replace the portion of the water service line which is called “private”—the lateral portion of the service line that connects the main service line to the building. Getting the consent from a landlord to replace a lateral service line, as it turns out, is not always easy. When a landlord does not replace a line or consent to its replacement by the PWS, tenants continue to be exposed to significant levels of lead contamination from the pipes.

In this article, I argue that the accepted practice of requiring the consent of the landlord before replacing the lateral service line is, at least, questionable law. In making this claim, I’m asserting that property rights are properly subject to limits that affect a landlord’s autonomy around the question of whether a lead service line should be replaced on their property. While this assertion is contrary to the usual approach, it is anything but alien to property law. Unless judges and legislators are urged to consider more deeply the costs of landlord authority and opportunities to limit it, assumptions will continue to prevail over a more considered analysis.<sup>5</sup>

The assumption that the authority of the landlord is total rests on two common claims, both of which are questionable. The first claim is that a property owner, such as a landlord, has the right to exclude everyone from their property in all circumstances, throughout the property and regardless of who occupies the property. The second is that a property owner such as a

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2. See generally Review of the National Primary Drinking Water Regulation: Lead and Copper Rule Revisions (LCRR), 86 Fed. Reg. 71574, 71575 (Dec. 17, 2021).

3. See generally MONA HANNA-ATTISHA, WHAT THE EYES DON’T SEE (2018); Karen Syma Czapanskiy, *Preschool and Lead Exposed Kids*, 35 *TOURO L. REV.* 171 (2019).

4. Sophia Campbell and David Wessel, *What Would It Cost to Replace All the Nation’s Lead Water Pipes?*, BROOKINGS INST. (last updated Apr. 14, 2022), <https://www.brookings.edu/blog/up-front/2021/05/13/what-would-it-cost-to-replace-all-the-nations-lead-water-pipes/> [https://perma.cc/VZ4B-ATXP].

5. Nadav Shoked, *The Duty to Maintain*, 64 *DUKE L.J.* 437, 509 (2014).

landlord has no affirmative duties relating to the property. Together, assumptions such as these preclude appropriate consideration of practical solutions to problems around replacing private side water lines in rental housing.

### I. WHAT'S THE PROBLEM?

Using lead for plumbing is an ancient practice, so old that the chemical name for lead, Pb, is short for *plumbum*, the Latin word for plumbing.<sup>6</sup> What was not understood until more recently is that even small amounts of lead in drinking water can result in dangerously elevated blood lead levels in humans, causing special risks for infants and children. About a decade after that connection was documented in the District of Columbia, the Flint water crisis cemented in public consciousness the connection between childhood lead poisoning and municipal PWS.

Reducing the risk of lead poisoning from drinking water requires replacing service lines which contain lead because that lead can leach out of the pipes or fittings and enter the water. Unless and until the lines are replaced, the risk remains, at least if the PWS does not protect pipes effectively against corrosion.

Lead service lines include two segments. The first segment is the main, also called the “public” side, which includes the pipes which convey the water from the PWS source to the street. The second segment is the “private” side, the lateral branch which conveys the water from the main or public side to the fitting which connects to pipes in the building.

Replacing service lines on the public side is typically done by the PWS. Replacing pipes on the private side can be done several ways. The first way, also the least expensive and safest method of replacement, occurs where a PWS replaces the main and the lateral branches at the same time. Some systems or jurisdictions require the owner of a building to pay the PWS or a private plumber to pay for the simultaneous private side replacement. The second way is for a property owner to spur the PWS to do a public side replacement by undertaking the private side replacement. The last way is for the PWS to replace only the public side lines without arrangements to replace the private side lines simultaneously. This results in a partial replacement which can leave the inhabitants of the building subject to risks to their health from unpredictable exposure to lead emanating from remaining lead service lines.<sup>7</sup> Experts agree that a partial replacement is risky, although the degree of risk is disputed.<sup>8</sup>

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6. See David A. Dana & Nadav Shoked, *Property Edges*, 60 B.C. L. REV. 753, 792–93 (2019).

7. National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, 86 Fed. Reg. 4198, 4218 (Jan. 15, 2021).

8. During its recent reconsideration of the Lead and Copper Rule (“LCR”), the Environmental Protection Agency (“EPA”) discouraged PWSs from doing partial

Among the many challenges inherent in lead service line replacement is the cost, which is massive. The Bipartisan Infrastructure Law passed in 2021 provides \$15 billion over five years.<sup>9</sup> The money generally can be spent only on replacing public service lines, leaving most private-side lines uncovered. Even with that limitation, the money is probably only enough to cover between half and a third of the total cost.<sup>10</sup>

Given the cost issue, priorities will be established. Because people of color have historically borne the greatest burden of exposure to lead, fairness and public health considerations counsel that communities of color deserve priority.<sup>11</sup> Historically, however, that has not happened on either the public side or the private side. A case study of lead service line replacements in the District of Columbia from 2010 through 2018, for example, showed that many more full replacements were done in the highest income neighborhoods.<sup>12</sup> Partial replacements were more common in the lowest income neighborhoods, leaving many children of color at risk.<sup>13</sup> Research that I did with students in a seminar at the University of Maryland College of Law in the spring of 2022 established that, even during the last several years after the District of Columbia and its PWS announced their commitment to greater fairness in communities of color, relatively less work was done in the neighborhoods with the highest concentrations of people in poverty and people of color.<sup>14</sup>

One reason that full lead service line replacements are more common in higher income neighborhoods is that many jurisdictions require private property owners to pay for private-side work. The cost can exceed two thousand dollars. Homeowners in low-income neighborhoods are less likely to be able to afford a private-side replacement. Low-income neighborhoods are also more likely to have a large number of rental properties, and landlords may be less willing to pay to replace service lines serving a building where

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replacements but did not prohibit them. *See id.* at 4214. According to the EPA, “partial LSLR [lead service line replacements] can cause lead levels to be temporarily elevated,” and that risk should be mitigated by providing residents with temporary water filtration where possible. *Id.* at 4218.

9. U.S. Env’t Prot. Agency, Bipartisan infrastructure law: A Historic Investment in Water, <https://www.epa.gov/system/files/documents/2021-11/e-ow-bid-fact-sheet-final.508.pdf> [<https://perma.cc/6SN9-5R6K>].

10. *See* Campbell & Wessel, *supra* note 4.

11. National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, 86 Fed. Reg. at 4215 (“Data ... suggest that non-Hispanic black individuals are more than twice as likely as non-Hispanic whites to live in moderately or severely substandard housing [which] ... is more likely to present risks from deteriorating lead-based paint ... minority and low-income children are more likely to live in proximity to lead-emitting industries and to live in urban areas, which are more likely to have contaminated soils”).

12. Karen J. Baehler et. al, *Full Lead Service Line Replacement: A Case Study of Equity in Environmental Remediation*, 14 SUSTAINABILITY 352, 362 (2022).

13. *Id.*

14. MLAW Briefing (5/16/2022) (on file with author).

they do not live.<sup>15</sup> While some jurisdictions fund full replacements,<sup>16</sup> and others provide subsidies for low-income homeowners and to landlords who rent to low-income tenants,<sup>17</sup> cost remains a significant barrier.

Even when the cost is not borne wholly or partially by landlords, private-side replacements remain a problem for the many people of color who occupy rental properties in low-income communities. The reason is that the usual practice is not to perform any work on the private side without the consent of the landlord, and the landlord may fail to provide or affirmatively deny consent.<sup>18</sup> The result is that tenants are left at risk of lead poisoning and have no way to get the pipe replaced.

States and local jurisdictions can make it less likely that a landlord will refuse consent by requiring landlords to replace the service line and imposing negative consequences when the landlord fails to hire a plumber or provide a PWS with consent so the PWS can do the job. Examining such laws demonstrates how difficult it is to solve the problem so long as the underlying assumption is that a landlord has an inviolable right to say no to replacing the service line and that the PWS must defer to the landlord.

Illinois provides a good example of a recent statute under which the property owner is empowered to deny access to the PWS.<sup>19</sup> In 2021, Illinois enacted the Lead Service Line Replacement and Notification Act<sup>20</sup> based on the findings of the General Assembly that “there is no safe level of exposure to heavy metal lead” and that lead service lines must be replaced because they transport lead and thereby jeopardize the general health, safety and welfare of residents.<sup>21</sup> The Act requires most of the state’s PWSs to replace lead service lines over the coming decades. In the interim, whenever a lead service line is identified, the PWS must notify the owner and occupants of the building.<sup>22</sup>

The Act acknowledges the dangers of partial replacements, and prohibits PWSs from doing them in most circumstances.<sup>23</sup> Nonetheless, the Act allows for a partial replacement whenever a landlord fails to provide a

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15. Review of the National Primary Drinking Water Regulation: Lead and Copper Rule Revisions (LCRR), 86 Fed. Reg. 71574, 71575 (Dec. 17, 2021) (“a higher incidence of rental housing in [low-income and of color] communities creates an additional barrier to lead service line replacement (LSLR) where the property owner does not consent to full replacement.”)

16. *Id.* at 71578–79.

17. *Id.* at 71580.

18. *Id.* at 71575.

19. 415 ILL. COMP. STAT. 5 /17.12(c) (2022) (defining “service line” as the “piping, tubing, and necessary appurtenances acting as a conduit from the water main or source of potable water supply to the building plumbing at the first shut-off valve or 18 inches inside the building, whichever is shorter”).

20. Lead Service Line Replacement and Notification Act, Pub. Act 102-0613, 2021 Ill. Laws 3739.

21. 415 ILL. COMP. STAT. 5 /17.12(b).

22. 415 ILL. COMP. STAT. 5 /17.12(j).

23. 415 ILL. COMP. STAT. 5/17.12(ff).

PWS with consent to access to the private side of the service line. Regardless of whether the replacement is planned or results from an emergency, the PWS must contact the owner of the building to request access and permission to replace the service line on the private side.<sup>24</sup> In the absence of the owner's consent, the water company has to follow up on the partial replacement by providing warnings to the building's owner and residents about the dangers they now face because of the partial replacement.<sup>25</sup> The sole consequence for a property owner who fails to consent is that, between the time a partial replacement occurs and the time when the private service line is replaced, if that ever occurs, the property owner may be required to provide at least one certified filter on a source of potable water.<sup>26</sup>

A bill introduced in 2022 in the District of Columbia requires all property owners to remove lead water service lines by 2030.<sup>27</sup> Owners can comply by registering to have the PWS replace the line or by hiring a plumber to do the job.<sup>28</sup> Unlike in Illinois, owners who fail to comply face significant consequences. Non-compliant property owners are subject to fines and losing eligibility for business licenses, occupancy permits and construction permits for the offending property.<sup>29</sup> Importantly, under the bill, the landlord has no inviolable right to deny access to the property, although overruling the landlord's decision requires invoking the judicial process. A tenant on the property or the City's Attorney General can bring an action for abatement against a non-complying landlord. If successful, a tenant can also be awarded attorneys' fees and a portion of the fine paid by the landlord.<sup>30</sup>

The contrast between the laws of Illinois and the District of Columbia proposal is telling. Under the former, a tenant in a building where the landlord fails to consent may get a water filter. Under the latter, leaving the tenant unprotected can result in the landlord losing the right to decide whether the PSW can enter the building to replace the private-side service line. The District of Columbia's proposal is preferable, because it advances the desired outcome of reducing lead exposure. That said, as this article explores, not only is the deference shown to private property rights by the State of Illinois not legally required, even the District of Columbia bill would

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24. 415 ILL. COMP. STAT. 5/17.12(ff) (emergency replacement); *see also* 415 ILL. COMP. STAT. 5/17.12(gg)(3) (planned replacement).

25. 415 ILL. COMP. STAT. 5/17.12(jj).

26. 415 ILL. COMP. STAT. 5/17.12(ff)(1)(D).

27. Green New Deal for a Lead-Free DC Amendment Act of 2022, H.R. 24-802 (D.C. 2022). Advocates have proposed an alternative bill which, among other things, authorizes the occupant of the property to consent to the removal of the lead service line if the owner fails to respond to a request for access from the water company. *See id.* The proposed bill also requires the water company to provide residents with filters for potable water until the danger of leaded water has been abated.

28. § 6015(b).

29. §§ 6015(b)(d)(1)-(2).

30. § 6015(d)(3)(A).

fail to take advantage of property doctrines which could allow a PWS to gain access to all or part of rental properties.

## II. PRACTICAL SOLUTIONS RECONSIDERED

The accepted rationale underlying the Illinois statute is that entering a privately owned building without the consent of the property owner always constitutes an actionable trespass. In this article, I am not contesting that proposition when the building is both owned and occupied by the property owner. What I am contesting is the salience of that proposition when the property owner has rented all or part of the building to a tenant. In that case, as I explain below, other practical solutions are justifiable under various property law approaches.

### A. Some Tenants Have Property Right to Replace or Consent to Replacement of the Private-Side Service Line

At common law, the landlord-tenant relationship can be described as a transfer by the landlord to the tenant of the present possessory interest in the property.<sup>31</sup> When the tenancy ends, the landlord's future possessory interest begins. Except as limited by the lease or by the doctrine of waste, the present possessory interests of a tenant are coextensive with the future possessory rights of the landlord. During the tenancy, therefore, a tenant owns the right to decide who can and cannot access the property. If a tenant who has possessory rights to a building agrees to allow the PWS to replace the private-side line, the owner of the building has no right to claim that a trespass occurred when the PWS entered the property to replace the private-side line.

Theoretically, a landlord may have a claim against a tenant for consenting to a change in the premises under the doctrine of waste. The risk of being liable for waste could persuade a tenant not to give consent to the PWS. In most situations, however, the likelihood of a tenant being held liable for waste approaches zero.

The law of waste limits the possessory rights of a tenant. A tenant's present right of possession traditionally did not include the right to do certain things that affect the future possessory interest of the landlord, including a tenant's opportunity to make permanent changes to the property.<sup>32</sup> A tenant, therefore, traditionally would have lacked the right to consent to changes such as replacing the lead service line. Under the modern understanding of the law of waste, however, a change which increases the value of the land is "ameliorating waste" and is not actionable. Replacing the private-side lead service line should be seen as ameliorating because it improves the value of the property in at least two ways. First, replacement brings the property into

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31. DALE A. WHITMAN ET AL., *THE LAW OF PROPERTY* 216–17 (4th ed. 2019).

32. *Id.* at 217–18.

compliance with the law in those states that require lead service lines to be replaced.<sup>33</sup> Second, replacement protects the landlord from getting sued by occupants of the house who would otherwise risk being poisoned by the lead that contaminates drinking water coming from the private side of the service line.<sup>34</sup>

While a court should agree that replacing a lead water line does not constitute waste, a tenant may want assurance that their landlord cannot undertake eviction anyway. Theoretically, the proposed D.C. statute addresses that problem by explicitly holding the tenant harmless for agreeing to a lead service line replacement.<sup>35</sup> Even a court which is hostile to limiting the rights of a property owner is unlikely to give a landlord a remedy against a tenant who enjoys the protection of a statutory immunity to liability.

What the proposed D.C. statute does not address, however, is the assumption that only a property owner controls access to the property. Because of that assumption, neither the proposed D.C. statute nor the Illinois statute empowers a tenant to give the PWS permission to replace the service line, despite the control that some tenants have under standard landlord-tenant law. The D.C. proposed statute at least allows a court to overrule the landlord at the behest of a tenant who seeks an abatement order, but all tenants are treated the same, regardless of whether a particular tenant owns the necessary possessory interest.<sup>36</sup> Under the Illinois statute, the tenant would have to live with the leaded pipe because the PWS is authorized to do a partial replacement when the property owner does not consent to the private-side replacement.<sup>37</sup> Further, the EPA does not ban the partial replacement, although it does not allow Illinois to count the partial replacement toward its replacement numbers.<sup>38</sup>

### **B. Landlord's Duty to Maintain Includes Duty to Replace or Consent to Replacement of Private Side Lead Service Line**

A lease for an apartment in a multi-unit building, unlike a lease for the entire premises, conveys to each tenant a possessory interest in the leased apartment and access to any common area necessary for the use of the apartment, such as hallways, shared laundry space and the like.<sup>39</sup> These

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33. §§ 6015(b)(d)(1)-(2).

34. See Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 534-36 (1992) (discussing tenants' legal knowledge).

35. Green New Deal for a Lead-Free DC Amendment Act of 2022, H.R. 24-802 (D.C. 2022).

36. See 415 ILL. COMP. STAT. 5/17.12 (2019).

37. See 40 C.F.R. § 141.84 (2021).

38. See National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, 86 Fed. Reg. 4198-01, 4219 (Jan. 15, 2021).

39. Wynn ex rel. Wynn v. T.R.I.P. Redevelopment Assocs., 296 A.D.2d 176, 178-79 (N.Y. App. Div. 2002).



common areas usually do not include areas where common utilities are located, such as the hook-up to the water line. Without a right of possession, none of the tenants would have a right to consent to a third-party such as the PWS to enter the building to replace the service line. That right remains with the landlord. The duty to maintain common areas also rests with the landlord.<sup>40</sup> As understood under modern landlord-tenant law, then, the question is whether the duty to maintain includes the duty to replace or, at minimum, consent to the replacement of, a private-side lead water line that serves multiple tenants in a single building.

The answer to the question seems clear. According to the Restatement, “[t]he landlord . . . is obligated to the tenant to keep the leased property in a condition that meets the requirements of governing health, safety, and housing codes . . . the landlord is obligated to the tenant to keep safe and in repair the areas remaining under his control that are maintained for the use and benefit of his tenants.”<sup>41</sup>

Wherever lead service lines are prohibited, as in the Illinois statute and the D.C. proposal, a landlord probably violates a housing code relating to safety by not allowing the replacement of a lead service line. The landlord’s violation is also plain in jurisdictions where the obligation to maintain the premises is described as including “all cases where the leased premises are unfit for human habitation because of health or safety hazards, whether or not there is a housing code violation.”<sup>42</sup> In either case, the landlord’s conduct results in the health hazard of lead in the drinking water when that hazard would be eliminated if the landlord consented to the replacement of the lead service line. Tenants are entitled to the abatement of such health hazards once the existence of the hazard is known.<sup>43</sup>

The question remains as to whether the landlord’s breach of the duty to maintain with respect to the lead service line gives rise to a remedy that

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40. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 5.5 cmt. d (AM. L. INST. 1977). (“*d. Obligation to keep safe and in repair other areas in the control of the landlord and maintained for the use and benefit of the occupants.* The landlord is also under an obligation to keep in repair certain areas in multiple housing units and in commercial buildings which provide services to the tenants but which are in the landlord’s control and to which access is denied to the tenants. Examples of these areas are furnace rooms, ventilator shafts, elevator shafts and spaces where pipes and electrical wiring are placed. Other examples are closets for the storage of cleaning implements and tools used to clean and repair the building. The rule of this section imposes an obligation on the landlord to keep in repair these areas under his control so that the tenants will not be deprived of services they are entitled to receive.”).

41. RESTATEMENT (SECOND) OF PROPERTY: LANDLORD AND TENANT § 5.5(1-2) (AM. L. INST. 1977).

42. DALE A. WHITMAN ET AL., THE LAW OF PROPERTY 242 (4th ed. 2019).

43. See Shoked, *supra* note 5, 508–09 (various theories of property rights support imposing the duty to maintain on landlords, even when satisfying the duty deprives the landlord of freedom to manage her property as she wants and is costly, because landlord chooses to enter the market and voluntarily enters into a contract with the tenant that includes the warranty of habitability, and the tenant is dependent on the landlord to provide a safe living space in which the tenant can thrive).

modifies the usual rule that the landlord has control over the PWS's right to replace the line. The warranty of habitability offers an indirect method to achieve the result, and it may prove helpful in the right circumstances.

Since the failure to replace or allow replacement of the lead service line means that the water delivered to the leased premises is unsafe, a tenant can sue the landlord for the violation under the warranty of habitability. If the court agrees that the warranty has been violated, the court can, among other things, relieve the tenant of the duty to pay rent until the unsafe condition is abated. The same doctrine allows a tenant to defend against an action by the landlord for rent until the unsafe condition is abated. The order for abatement might not reduce the rent to zero, but having access to safe drinkable water is so important that the reduction should be substantial enough to give the landlord an incentive to act.<sup>44</sup>

The warranty of habitability, however, is not an obvious source of law for solving the problem of a landlord failing to consent to the replacement of a lead service line. First, the warranty is usually invoked in cases where the tenant learns about the problem because of conditions experienced within the leased premises or the common areas of a multi-unit building. Typical examples include a broken toilet or a leaky roof, both of which are obvious to anyone inhabiting the premises. The tenant informs the landlord of the problem, which gives rise to the landlord's duty to repair. Alternatively, the condition may be revealed by a government inspector who is checking for housing code problems. The landlord's duty to repair arises once the landlord is informed of violations uncovered during the inspection. Finally, the landlord's knowledge of the hazard may depend on whether the hazard is something the landlord knew or should have known about even in the absence of a specific complaint from a tenant or an inspector. A good example is the liability of a landlord for the lead poisoning of a child once the landlord is made aware that there is deteriorating paint in an older building in a place where lead paint is a common problem.<sup>45</sup>

Private side lead service lines are not usually identified by either a tenant or a housing inspector. In fact, identifying lead service lines can be a challenge even for a local PWS.<sup>46</sup> The PWS may have historical or other

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44. Another way to give landlords incentives to protect tenants from leaded water could be found in cases imposing liability on landlords for harm to tenants exposed to lead. *See* 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). This strategy was probably successful in helping to reduce the number of rental premises containing lead paint. Whether it will prove successful in the case of landlords allowing leaded water to continue to flow into rental premises is as yet unknown.

45. *See* *Brown v. Dermer*, 744 A.2d 47, 60–61 (Md. 2000).

46. Under the Revised Lead and Copper rules (LCRR), larger PWSs have a duty to inventory and make public information about lead service lines. *See* 40 C.F.R. § 141.84 (2021); National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, 86 Fed. Reg. 4198-01, 4291 (Jan. 15, 2021). To assist with compliance, the EPA has issued guidance about how to conduct an inventory. *See* U.S. ENV'T PROT. AGENCY, GUIDANCE FOR

information about where lead service lines exist and may publish a map or otherwise provide information about the issue to owners or residents.<sup>47</sup> In a few places, the local government may attempt to inspect properties specifically for the purpose of disclosing lead service lines. Under the Revised Lead and Copper Rules, most PWSs will have a duty to provide information to help residents identify whether the property has a lead service line.<sup>48</sup> For at least the next few years, however, lead service lines may exist for a long time before the problem is found or made known to landlords or tenants.

No matter how the lead service line is identified, the duty to maintain should arise once the landlord knew or reasonably could have known that the service line contains lead, including when the landlord could have identified the line by undertaking an inspection. At the same moment, however, a second problem becomes visible. Usually, when the warranty of habitability is violated, the landlord can immediately undertake repairs. In the case of lead service lines, that situation is more complicated. If the PWS has replaced the public side of the water service line, the landlord can hire a plumber immediately to replace the water service line on the private side. Remedying the “partial” eliminates lead from the entire line. The same is not true, however, when the PWS has not yet replaced the public side of the water service line. In that case, replacing the private side may reduce some of the risk, but the replacement is still partial: water being delivered to the home comes through contaminated public side service lines. The landlord may have no way to change that immediately.<sup>49</sup>

Until the public side service line is replaced, then, the question is whether the duty to maintain might include an obligation for the landlord to mitigate the risk in the interim. The District of Columbia bill correctly suggests that, from the moment when the private side service lines are identified as conveying lead until the moment when the service line is replaced, the landlord bears a duty to mitigate risks, which must be satisfied by ameliorative means, such as the provision of appropriate filters. Appropriate filtration can be a complex mix of selecting filters that do the job, paying for the filters, and properly replacing them as needed. Complying with the warranty of habitability should mean that the costs of acquiring and

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DEVELOPING AND MAINTAINING A SERVICE LINE INVENTORY, EPA 816-B-22-001 (2022) [hereinafter EPA 816-B-22-001].

47. Identifying which properties have LSLs is so difficult that the EPA has committed itself to “pursue research to use data analytics and other methods to accelerate and improve the process of identifying LSLs” and to publish inventory development guidance. *See* Review of the National Primary Drinking Water Regulation: Lead and Copper Rule Revisions (LCRR), 86 Fed. Reg. 71574, 71582 (Dec. 17, 2021).

48. *See* 40 C.F.R. § 141.84 (2021).

49. Review of the National Primary Drinking Water Regulation: Lead and Copper Rule Revisions (LCRR), 86 Fed. Reg. 71574, 71574 (Dec. 17, 2021).

maintaining appropriate filtration<sup>50</sup> should fall on the landlord, just like the cost of appropriate filtration in a building's HVAC system.

Even where a tenant is empowered to require a landlord to replace or consent to the replacement of a lead water line, tenants are not entitled to use self-help. A judicial order is required, something most tenants are not likely to have the resources to invoke.<sup>51</sup> During the litigation, further, tenants and their families may lack protection from drinking water delivered through lead-contaminated pipes. Finally, eviction is not impossible, depending on the duration of the lease. It is still preferable, therefore, for the PWS to be able to bypass the landlord altogether. The proposed D.C. statute addresses this concern by allowing the Attorney General to get involved in the judicial process to seek an order of abatement.<sup>52</sup> The Illinois statute, by contrast, leaves the job to tenants.<sup>53</sup>

**C. Interpret the ownership interest in a rental property as not including the right to refuse access for the purpose of replacing the private side lead service line.**

While tenants have certain rights to demand that their landlord not impede the replacement of the lead service line, nothing would work better than to simply empower the PWS to access and replace the service line. The extent of a landlord's property-based right to exclude the PWS from replacing a lead service line is less than plain.<sup>54</sup> The right to exclude has been described as being at the heart of the rights that define property ownership.<sup>55</sup> At the same time, no property right is absolute.<sup>56</sup> A court may be tempted to cabin the right to exclude in cases where the landlord's exercise of a right to

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50. Not every filter does the job. *See* National Primary Drinking Water Regulations: Lead and Copper Rule Revisions, 86 Fed. Reg. 4198, 4241 (Jan. 15, 2021) ("EPA agreed with some of the commenters' concerns and has included in the definition that a pitcher filter must be certified by an American National Standards Institute (ANSI) certifying body to reduce lead."); David D. Mitchell, *Preventing Toxic Lead Exposure Through Drinking Water Using Point-of-Use Filtration*, 48 ENV'T. L. REP. NEWS & ANALYSIS 11074, 11076 (2018) (discussing different filters).

51. Bezdek, *supra* note 34.

52. Green New Deal for a Lead-Free DC Amendment Act of 2022, H.R. 24-802 (D.C. 2022).

53. 415 ILL. COMP. STAT. 5/17.12 (2022); 765 ILL. COMP. STAT. 742/1 (2022).

54. The EPA, however, assumes that service lines are owned by the customer rather than the water system in many instances and that the customer has the legal authority to exclude the PWS unless the PWS owns the lateral line. *See, e.g.*, Review of the National Primary Drinking Water Regulation: Lead and Copper Rule Revisions (LCRR), 86 Fed. Reg. 71574, 71574 (Dec. 17, 2021) ("Because lead in drinking water primarily results from leaching of lead from plumbing in homes and from lead service lines (lead pipes connecting homes to the water distribution system), and portions of lead service lines may be owned by the water system or homeowner, the drinking water rules intended to reduce the amount of lead in tap water have been complex and controversial.")

55. Cedar Point Nursery v. Hassid, 141 S.Ct. 2063, 2072 (2021).

56. *Id.* at 2068.

exclude the PWS places burdens on tenants more than on landlords, and tenants are exposed to serious health issues affecting infants, children, and adults. Distinguishing between the clear points and the ambiguities, therefore, is important.

It seems likely that courts would rule that the landlord's property rights include the right to exclude the PWS from entering an apartment building to replace a lead service line.<sup>57</sup> The question is less clear about the right to exclude the PWS from the portion of the line that extends from the exterior wall of the building to the boundary of the property.<sup>58</sup> Further, the portion of the line which extends from the water main under a public street to the border of the property usually includes public property, such as part of the street, a sidewalk, or a treebox. The landlord may have maintenance duties over that area, such as removing snow, but the area is outside the deed description of the property which the landlord owns, which means the landlord has no property rights to exercise.<sup>59</sup>

Professors Dana and Shoked aptly describe places similar to lateral service lines as "edges," property where private and public interests "inevitably interact and where both must somehow be accommodated."<sup>60</sup> For example, despite having formal title to a portion of the land under which the lateral service line runs, the property owner has no say in where the PWS places the line, nor may the property owner block the PWS from connecting the building to the water line.<sup>61</sup> The line may even be subject to an express or implied easement for public utilities, such as water, sewage, electricity, communication cables and telephone lines.<sup>62</sup>

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57. *Id.* at 2072; see Julia D. Mahoney, *Cedar Point Nursery and the End of the New Deal Settlement*, 11 BRIGHAM-KANNER PROP. RTS. J. 1, 13 (2022). It is possible, however, that *Cedar Point* is limited to "recurring physical invasions imposed or authorized by the government – at least as to property closed to the public – are per se takings, however minimal the impact on the use and value of the property." Cynthia Estlund, *Showdown at Cedar Point: "Sole and Despotism" Gains Ground*, 2021 SUP. CT. REV. 125, 137 (2021). Since the PWS has to enter the building only once to replace the water line, and not on multiple occasions as contemplated under the regulation considered in *Cedar Point*, the entry might not be classified as a taking. At the same time, unlike the water line replacement, the entry considered in *Cedar Point* did not include any ongoing physical change to the property. The physical change, even though it only affects a pipe which is already in place in the building, appears to cross the line established in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982).

58. See EPA 816-B-22-001, *supra* note 46, at 2–4 (graphic representation of underground plumbing leading from a water main to the premise plumbing).

59. See Dana & Shoked, *supra* note 6, 797–98.

60. *Id.* at 754.

61. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 5.5(1-2) (AM. L. INST. 2000); see also *District of Columbia v. Brooke*, 214 U.S. 138, 148–49 (1909).

62. See Susan F. French, *Highlights of The New Restatement (Third) Of Property: Servitudes*, 35 REAL PROP. PROB. & TR. J. 225, 235 (2000); RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 2.12 (AM. L. INST. 2000); *Nichols v. City of Evansdale*, 687 N.W.2d 562, 569 (Iowa 2004); *Devon-Aires Villas Homeowners Ass'n, No. 4., Inc. v. Americable Assocs., Ltd.*, 490 So.2d 60, 66 (Fla. Dist. Ct. App. 1985).

Dana and Shoked argue that a sharing approach should govern this “edge” property, in the sense that the cost of replacing the private side line is properly placed on both the property owner and the PWS.<sup>63</sup> If that’s true, it may also be true that the PWS should not be required to accede to a property owner’s denial of access to replace a lead pipe that traverses the edge property that is the responsibility of both the PWS and the property owner.

Modulated rules of exclusion should govern in cases of edge properties, particularly in situations where the property owner has no reasonable expectation that they could exclude third parties.<sup>64</sup> In the case of an apartment building where the landlord does not reside, numerous third parties such as tenants and their guests have the right to make use of the building. Landlords can even be denied access to leased premises without permission of the tenants under local law and common lease terms. Further, utilities commonly enter both leased and owner-occupied properties for the purpose of repairing and replacing materials that deliver utilities to the building. The only common area about which property owners are likely to have an expectation of privacy is inside the building in those areas under their control and not the control of a tenant.

A modulation in the power to exclude is also appropriate where a property owner’s decision directly affects the health of occupants and the public health of the community. Denying access to the PWS, at least if no mitigation methods are used, means that tenants and their guests unnecessarily continue to risk lead poisoning. Denying access also means that the community will have to provide resources to care for people whose disability arises from lead poisoning that could have been averted by replacing lead service lines.<sup>65</sup>

The Environmental Protection Agency (EPA) has complicated the issue about who has the right to make decisions about replacing the portions of the lateral service line between the water main and the interior of the building. Beginning with the 2000 revisions of the Lead and Copper Rules,<sup>66</sup> the EPA has distinguished between the water main, which the EPA says is “owned” by the PWS, and the rest of the lateral line, which the EPA says is “owned” by the customer.<sup>67</sup> The EPA adopted this bilateral distinction for a reason that has nothing to do with a landlord’s authority to preclude a PWS from accessing a lateral service line. Instead, the distinction is used to allocate the responsibility to pay for the replacement of lead pipes. The EPA’s goal is to ensure that PWSs bear financial responsibility only as to the

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63. See Dana & Shoked, *supra* note 6, 800–01.

64. *Id.* at 785; see *Parnotff v. Aquarion Water Co. of Conn.*, 204 A.3d 717, 731 (Conn. App. Ct. 2018).

65. *Can I Receive Social Security Benefits for Lead Poisoning?* DAYES L. FIRM (Dec. 9, 2019), <https://www.dayeslawfirm.com/blog/ssd-for-lead-poisoning.html> [<https://perma.cc/D46B-NTBX>].

66. Letter from Jennifer C. Chavez, Attorney, Earthjustice, to EPA (Nov. 11, 2014) (on file with author).

67. See 40 C.F.R. § 141.85 (2021).

portions of the system over which PWS have uncontested control: the mains. The EPA takes no position on whether a particular PWS also has property rights over some or all of the lateral service line. That is a question left to local law, and different jurisdictions take different positions. In those jurisdictions where “ownership” extends to the building, the PWS is charged under EPA rules with replacing the pipes up to the building. In those jurisdictions where “ownership” ends at the junction between the main and the lateral service line, the PWS is charged with replacing the pipes only of the main.<sup>68</sup>

If the lateral service line is “edge” property, then the property owner may share with the PWS some responsibility for paying for replacing the lateral service line. Since replacement costs can be substantial, some property owners have opposed identifying themselves as owners. At the same time, property owners have not generally disclaimed the right as owners to preclude entry onto the land to replace the lines. If the area is seen as “edge” property, both claims can be accommodated. Replacement costs can be shared, which is what many jurisdictions have decided to do in recent years. At the same time, permission to enter the property can be assumed, at least where the PWS respects the needs of property owners in terms of restoring the property as necessary after a replacement.

As a policy matter, this approach to the right of exclusion makes sense if the PWS effectively employs all reasonable means to remove barriers placed by a property owner, even under an edge theory, against access to the interior space in those buildings where the service line connection is inside the building. The problem is far from unsolvable, because a landlord’s right to exclude from the interior space can be eliminated with relative ease. First, the landlord can consent to the entry. This is what usually happens for a variety of reasons, including regulatory pressure, but only when the PWS reaches out to landlords to seek their consent.<sup>69</sup> Alternatively, if the PWS is prepared to enter without consent, a landlord might seek an injunction or compensation as the result of the PWS entering without the landlord’s consent.<sup>70</sup> Landlords have little incentive to do this, however, because the

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68. See 40 C.F.R. § 141.84 (2021).

69. You’d think that would happen, but not so much from DCWater! DC WATER, DC WATER’S LEAD SERVICE LINE REPLACEMENT PLAN 3 (June 2021), [https://www.dewater.com/sites/default/files/documents/lfdc\\_summary\\_6\\_7\\_21x.pdf](https://www.dewater.com/sites/default/files/documents/lfdc_summary_6_7_21x.pdf) [<https://perma.cc/B26B-9EEF>].

70. Even when compensation for taking is likely to be trivial because there’s no interference with the use or value of the property, some owners will exercise their due process right to a hearing, at considerable cost to the government. See Estlund, *supra* note 57, at 144–45. That scenario seems more likely when the owner’s use of a property is affected by the government action rather than, as in the case of replacing a lead service line in an apartment house, the direct impact in on tenants who can use the warranty of habitability to impose the cost of replacement, if any, on the landlord regardless of other government regulation.

damage award is likely to be significantly smaller than the cost of litigation.<sup>71</sup> The award will be small because the trespass is minimal.<sup>72</sup> The PWS's entry lasts for a brief time—usually less than a day.<sup>73</sup> The work is not likely to cause much disruption to the building or leave a permanent scar. Further, replacing the line yields a benefit to the landlord because it reduces exposure to suits for harms suffered by residents and guests from ingesting lead in the water.<sup>74</sup>

When a landlord's resistance can be met only with condemnation of the right to exclude, the PWS should similarly prevail.<sup>75</sup> Replacing lead service lines in rental properties serves the public health by reducing the risk that ingestion of water with lead will poison residents and guests.<sup>76</sup> The risk is particularly great to infants and young children. As in the case of Flint, once infants and children are exposed to lead—even in small doses—they are likely to require special education and other public resources because of their injuries. The costs to the public can be substantial.

The Illinois statute does not appear to contemplate condemnation when a landlord fails to consent; instead, it permits a partial replacement to be undertaken. In the proposed D.C. statute, on the other hand, the tenant or the Attorney General can seek an order of abatement. Although it is not explicit in the proposed statute, an order of abatement could be conditioned on the payment to the landlord for the condemnation of the landlord's right to exclude for the limited time needed to enter the building as part of replacing the service line.

Where a PWS adopts a policy of replacing private side water lines only with the consent of the property owner, the question remains about what kinds of incentives exist to maximize landlord cooperation. Reducing or eliminating the costs of replacement is probably the most effective carrot. Among the sticks is encouraging tenants to sue over the violation of the warranty of habitability, as described earlier. The proposed statute in the

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71. The litigation may be for an injunction before the PWS commits a trespass, for damages for the trespass after it occurs, or for compensation for the taking of the right to exclude. If the landlord is awarded an injunction, the PWS can foreclose on it by paying compensation. See *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063, 2089 (2021) (Breyer, J., dissenting) (citing *Knick v. Township of Scott*, 139 S. Ct. 2162, 2179 (2019)).

72. See Estlund, *supra* note 57, at n. 102 (explaining that, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 446 N.E.2d 428 (N.Y. 1983), “[O]ne dollar was found to be ‘just compensation’ for any who challenged the mandatory cable installation.”); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 157 (Wis. 1997) (nominal damages awarded for trespass by truck which crossed plaintiff's land without permission to deliver mobile home to another property).

73. U.S. ENV'T. PROT.AGENCY, STRATEGIES TO ACHIEVE FULL LEAD SERVICE LINE REPLACEMENT 34 (2019).

74. See Shoked, *supra* note 5.

75. See TaQuira Thompson, *Restoring Control: Get Those Lead Pipes Out of Here*, 8 LSU J. OF ENERGY L. & RESOURCES 703, 726 (2020) (discussing condemnation of property).

76. Review of the National Primary Drinking Water Regulation: Lead and Copper Rule Revisions (LCRR), 86 Fed. Reg. 71574, 71574–75 (Dec. 17, 2021).



District of Columbia amplifies the landlord's incentive to consent by empowering the attorney general to participate in aid of the tenant's action. Another stick is to impose regulatory consequences where a landlord fails to consent. For example, a landlord could be denied a license to rent the premises or do construction on the property, as in the proposed District of Columbia statute.

### CONCLUSION

With enhanced funding from sources such as the Infrastructure Investment and Jobs Act and the renewed focus of the Lead and Copper Rules, the stage is set for a national attack on lead service lines. There are situations, however, when the last mile can prove as problematic as the first. Leaving landlords in undisputed control of private side lead service lines means that some tenants will continue to risk lead poisoning from ingesting water provided by the local PWS. Given that older housing in poorer neighborhoods are the places most likely to have lead service lines, the most likely group of tenants harmed by a landlord's control are the same people who have historically borne the greatest burden of exposure to lead and other environmental toxins: people of color who have low incomes and little wealth.<sup>77</sup>

Recognizing the nature of the problem and finding effective and practical solutions is a matter of environmental justice. What I've tried to do in this article is explore how existing property law doctrines can and should be employed to make progress for tenants, many of whom will be people of color in low-income communities. Even more people can be protected from lead poisoning if these practical solutions are coupled with incentives and disincentives similar to those found in the statute which has been proposed in the District of Columbia. Further, PWAs need solutions such as these if they are to meet the requirements placed on larger systems by the EPA. Together, then, these approaches are likely to improve the lives of tenants, reduce delays for PWAs and impose costs which will be too great for most landlords to resist.

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77. Letter from Laura Brion, Exec. Dir., Childhood Lead Action Project, Dwayne Keys, President, South Providence Neighborhood Association, Christopher Samih-Rotondo, Interim Dir., Direct Action for Rights and Equality, Amanda L. Reddy, Exec. Dir., National Center for Healthy Housing, and Tom Neltner, Senior Dir., Environmental Defense Fund to Michael S. Regan, Administrator, Environmental Protection Agency, Lilian Dorca, Dir., External Civil Rights Compliance Office, United States Environmental Protection Agency (Jan. 5, 2022) (on file with author); *see* Review of the National Primary Drinking Water Regulation: Lead and Copper Rule Revisions (LCRR), 86 Fed. Reg. 71574, 71575 (Dec. 17, 2021).