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Welfare as Wrecking Ball: Constructing Public Responsibility in Legal Encounters Over Public Housing Demolition

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Scholarship on welfare privatization illustrates how the process often curtails and undermines public responsibility for the poor. In this article, I examine how recipients, policy makers, and judges participate in the legal process as a means of challenging and defending privatization. I look at cases of litigation initiated by public housing tenants between 1985 and 2012 to fight the demolition of their homes to explore the changing meaning of public responsibility within a shrinking public sector. My findings show that as legislative and administrative reforms steered courts toward a more flexible understanding of public responsibility, courts gave increasing attention to the economic hardships experienced by the state itself, while downplaying the plight of low-income tenants.

INTRODUCTION

In a 1932 campaign address, Franklin D. Roosevelt shared his vision of the modern state. "Modern society, acting through its government," he asserted, "owes the definite obligation to prevent the starvation or the dire want of any of its fellowmen and women who try to maintain themselves but cannot . . . not as a matter of charity but as a matter of social duty." For Roosevelt, this vision necessarily entailed addressing the problem of "housing accommodations for the poor in our great cities." Thus, later he signed into law the Housing Act of 1937, creating for the first time a national system "for the provision of decent, safe, and sanitary dwellings for families of low income."

The public housing program embodied the ideal that public mechanisms of ownership and coordination should provide homes for citizens excluded from the mainstream housing market. While Esping-Andersen (1990) argued that the project of de-commodifying vital social goods and services lies at the core of modern welfare states, US social policy has always fallen short of this ideal (Manza 2000). Yet,

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beyond its comparatively small size, the emergence of the US welfare state did establish within federal government what Daniel Bell (1976, 226) called an often "faltering," and yet "largely irreversible" sense of "normative commitment" to managing the needs of society. This *public responsibility* to moderate or reduce market speculation around housing and other vital goods and services underlay much of the New Deal legislation.

Today's policy climate departs in a number of ways from the activist welfare state that Roosevelt envisioned and helped build. In particular, the rise of neoliberalism—with its core ideological message about the superiority of markets as vehicles for societal problem solving (Block and Somers 2014)—has meant that private actors exert growing control over the economy (Harvey 2005). Likewise, reformers in education, social services, housing, and other policy arenas increasingly seek to privatize formerly public responsibilities.

Existing social policies matter to their constituents, however, and privatization efforts generate intense conflict over the limits of the state's responsibility to provide for citizens (Goldberg 2007). Law plays a special role in such ideological struggles as a rule-making framework that is both "central to a movement's framing strategies . . . [and] also an endpoint in a political contest that uses frames in ways that can foster progressive social change more generally" (Pedriana 2006, 1729). In this article, I focus on the contentious politics of welfare privatization in cases of litigation around public housing demolition, using judicial opinions as well as other legal and nonlegal sources.

Comprised of publicly built and owned units, where residents live inside of the benefit they receive, public housing is subsidized almost entirely by the federal government, which allots development capital and monthly operating subsidies to local public housing authorities (PHAs). Using these resources combined with below-market rent payments collected from tenants, PHAs build and maintain units for low-income families.[1] The demolition of public housing stock by implosion or wrecking ball represents an exceptionally clear refutation of public responsibility for housing the poor.[2] Since the 1950s, the so-called federal bulldozer has remained a controversial and widely despised icon of state coercion (Anderson 1964), and tenants and advocates have consistently mobilized against it. Yet, over the 1990s, demolition became the centerpiece of the broader privatization of low-income housing policy (Goetz 2013).

Litigation and the filing of formal complaints represent by far the most common forms of resident opposition against demolition (Hackworth 2005). I examine litigation filed in federal trial and appellate courts by public housing tenants to fight demolition from 1985 to 2012. In analyzing these cases, I ask how tenants translate policy grievances into legal claims, as well as how PHAs defend against these claims and courts decide on their legal merits. These differently positioned

1. Thus, PHAs exercise a great deal of authority in deciding what, when, where, and how public housing is built.

2. For tenants already occupying public housing properties—a "lucky" subset of assisted households who have often endured remarkably long waiting lists just to get into these units—demolition almost certainly portends less secure housing options in risky private markets in the future. For poor families outside of public housing, the consequences of demolition are more ambiguous.

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parties within the court system together defined the limits and parameters of public responsibility in a policy context characterized by welfare privatization. As statutory reforms steered courts toward more acceptance of demolition, courts grew to adopt a more flexible notion of the state's lawful responsibilities to the poor. Consequently, I show that courts came to view the welfare state itself, more than its recipients, as vulnerable, needy, and deserving of sympathy.

LAW AND WELFARE PRIVATIZATION

Recent scholarship emphasizes how the legal system constitutes meaning and identity in social life (McCann 1994; Ewick and Silbey 1998; Phillips and Grattet 2000; Richman 2002). A smaller literature extends these concerns to social policy, illustrating the role of legal rules and courts in reinforcing moral stereotypes attached to the welfare poor (Gans 1995; Bussiere 1997; Handler and Hasenfeld 1997; Munger 1998), subordinating recipients to regimes of discipline and surveillance (Minow 1991; Gilliom 2001; Katz 2008), and aiding privatization advocates in making welfare policies even less generous than before (Mink 1998; Munger 2003). On the other hand, legal venues also offer a "possibility of justice" (Lens 2009, 563) for marginalized groups seeking to challenge policy reform (Sarat 1990; Harris 2004; Hackworth 2005).

This article examines how courts participate in welfare privatization, defined as the "political pressure to limit public responsibility for protection of social citizenship" (Munger 2006, 391). A staple of neoliberal reform, welfare privatization's impact reaches across policy arenas such as education, health care, and housing. Despite the popularity of neoliberal reform ideas, however, policy makers are often wary of openly pursuing large-scale policy reform due to the risk of upsetting interest groups organized around specific policies (Pierson 1994). Likewise, Reese (2011, 1–2) shows that in the 1996 welfare reform debate, advocacy groups "were largely unable to block new national welfare reform policies . . . [but were] sometimes successful in reshaping them, altering or moderating the ways in which they were implemented, and challenging the terms of policy debates."

To avoid alienating interest groups, privatization advocates often seek to spin old values in new ways to generate institutional change (Béland 2007). As Stryker and Wald (2009, 522–23) argue, these reformers overcome opposition by redefining "general values . . . previously institutionalized in a policy arena, so these values can be converted from constraints to promoters of change." In doing so, privatization advocates rhetorically seek to limit the scope of the claims that the poor can make on the state.

Existing social policies embody values of public responsibility that advocates of privatization must confront and possibly redefine to create change. Varying institutional conditions mean that reformers frame and justify privatization in different ways (Béland 2007; Morgan and Campbell 2011) and, in doing so, they also tell different stories about the meaning and status of public responsibility. One common narrative, for example, holds that minimizing governmental involvement and maximizing the role of the market is the most effective basis for social well-being.

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Ronald Reagan in an early speech, for example, insisted that PHAs "cannot overcome the fundamental weakness of most public housing: namely it fails to give a man a chance to own his home" (Kiewe and Houck 1991, 45). Some scholars liken this narrative to a call for a "surrender of public responsibility" (Gilbert 2002, 4), which justifies tightened eligibility standards, deregulation, increased public-private contracting, and other measures that "tend to correspond with a reduced public sphere" (Aman 2004, 9; see also Kamerman and Kahn 1989).[3]

Another narrative mirroring the "surrender" story is specific to courts and the distinctions they draw between rights and privileges. This narrative emphasizes the fact that welfare recipients and tenants are entitled to fewer and weaker legal rights than private property owners. Bussiere (1997, 128) chronicles how the Warren Court refused to recognize a constitutional right to welfare benefits, including housing, thus preserving the key distinction separating "fundamental rights from economic policy and subsistence needs, civil and political equality from economic equality, and procedural from substantive justice" (see also Abraham 1996; Bussiere 1997; Steensland 2008).

While the foregoing narratives question the basic purpose of the welfare state, another posits the state as essential to the project of disciplining poor citizens into suitable market actors. As Soss, Fording, and Schram (2011, 38) argue, neoliberal reformers "did not dismantle the activist state; they reorganized it and turned it to new purposes." The new purpose, however, no longer involves insulating certain goods and services from market speculation, but instead transforming social policy recipients into market consumers. Since the poor allegedly lack the sense of private responsibility and initiative that markets require, the activist state is there to perform the needed disciplinary work. This so-called neoliberal paternalism is often couched in a rhetoric of compassion about reformers liberating recipients from welfare dependence (Stryker and Wald 2009).

In this article, I advance the scholarship on law and welfare privatization by filling a void in our understanding of the claims-making process involving social policy recipients and the state. Existing studies tend to emphasize how stereotypes about the allegedly undeserving poor are embedded into legal rules and policy measures. I instead examine how litigation redefines the terms of the reform debate, as recipients become legal protagonists, and state agencies pursuing privatizing reforms must defend and justify their actions. As PHAs enter these cases as defendants, the state becomes not only a force projecting meanings about *private* responsibility onto recipients, but also an object onto which recipients project meanings about *public* responsibility.

I situate these contentious processes within a context of collaborative governance between various independent governmental agencies (Barnes 2007). Goldberg (2007, 16) remarks that social policy struggles "are … fought not only *against* the state but also *within* the state … [and] create opportunities for dominated groups to contest their classification." Tenant-initiated legal actions draw various

3. Some scholars avoid equating privatization with a reduced welfare state. Instead, they argue that the state increasingly expands its authority and outsources its responsibilities to various private sector agents (see Morgan and Campbell's [2011] work on the delegated welfare state, Howard's [1999] work on the hidden welfare state, and Mettler's [2011] work on the submerged state). In this article, I address only the more established view that equates privatization with reduced social provision.

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domains of the state, all with their own perspectives and priorities, into policy disputes. I focus on how these divergent stances among governing elites critically shaped the limits of claims making for poor tenants in their fight against demolition.

OVERVIEW OF PUBLIC HOUSING REFORM

In the findings below, I situate disputes around public housing demolition from the 1980s through 2012 in their legal and policy context. In this section, I give a brief historical overview of public housing reform. Like welfare reform, public housing reform culminated in a piece of landmark legislation—the Quality Housing and Work Responsibility (QHWR) Act of 1998—but began decades earlier.

After its inception in 1937, the public housing program started slowly, hampered by powerful opposing interests in the real estate industry and the social upheaval of World War II. Reflecting the conventional view that public housing's successes should be measured in terms of production targets, the Truman Administration, in signing the Housing Act of 1949, committed the nation to build over 800,000 units by 1955; however, PHAs had only succeeded by 1959 in building 422,451 units total since the program's creation (Schwartz 2010). From the mid-1960s through the 1970s, public housing experienced its most productive stint, as the number of total units produced had by 1979 shot up to 1,192,000.

The program, however, simultaneously began to attract negative attention. Henderson (1995), studying popular press coverage of public housing, finds mostly enthusiastic coverage and only two negative pieces before 1965. After 1965, however, with the rise of black majorities in large cities and civil rights steadily gaining steam, public housing became "one of the most visible targets on which a growing white backlash could project its general concerns over race, sexuality, and state assistance" (Henderson 1995, 42).

With growing disapproval over public housing's architecture, financing, maintenance, and tenant composition, policy officials—even while they ramped up production—began searching for more privatized alternatives. This limited public housing's horizon for growth and set the gears of privatization into motion. Despite these pressures, however, policy makers throughout the 1980s remained unwilling to implement reform policies that would drastically reduce the housing stock through demolition, as large cities like Chicago, Boston, and New York began to initiate broad revitalization projects.

In a key turning point, legislators in 1991 began to piece together comprehensive reform legislation, the beginnings of what would become the HOPE VI program. For legislators, public housing was no longer an ignorable problem, but a crisis calling for active reform, yet they still avoided demolition (Cisneros and Engdahl 2009). The next key turning point came in 1998, when Congress passed the QHWR Act, thereby codifying emergent reform innovations. As I explain further below, public housing had by then become a thoroughly discredited policy

approach, and reformers embraced demolition as an acceptable way of dealing with the program's notorious problems. Ultimately, demolition has amounted to a net loss of more than 200,000 public housing units since the early 1990s, in what some have called the new urban renewal (Hyra 2008; see also Pattillo 2007; Goetz 2013).

REDEFINING RESPONSIBILITY FROM *OBLIGATED* TO *OBLIGED*

The analysis below examines public housing demolition as a clear example of struggle over the public responsibility of housing the poor. I highlight the key difference between public housing reform and the movement to reform cash support. In the latter, privatization advocates focused on curing recipients' pathological dependence on welfare by means of openly pushing to clear the public rolls. By contrast, demolition is a highly controversial change, visible not only to recipients, but also to other local people and organizations. It typically inspires tenants to mobilize, thereby creating unique political costs for policy makers. Thus, privatization advocates never openly pushed to reduce the public housing stock; instead, they opted for subtle reforms, or framed reform as a means of transforming poor communities using public housing as a vehicle. However, the reforms that eventually passed ultimately fueled privatization and reduced the public housing stock dramatically.

The article's central focus is the role of courts vis-à-vis officials in other governmental agencies in undermining as well as supporting demolition activities of reformist PHAs. My analysis demonstrates that in the years preceding HOPE VI and into the early years of the program, courts tended to penalize PHAs for demolishing properties. As legislative and administrative reforms gained momentum, and courts gradually came to accept demolition as lawful, however, courts rarely questioned the state's responsibility to house poor families. Rather, courts adopted a more flexible notion of the state's relationship to the poor, which I characterize as a shift from *obligated* to *obliged* responsibility. Consequently, courts increasingly downplayed tenant concerns, treating PHAs instead as the real victims of economic vulnerability, and demolition as a sometimes necessary, practical survival tactic.

DATA AND METHODS

The task of examining legal narratives places a premium on close analyses of contentious political episodes and their entanglements with the legal system (Johnson 1987; Mercer 1998; Richman 2002; Smyth 2006). My goal is to illuminate how courts reasoned creatively within the legal constraints of housing reforms, and yet still ultimately endorsed and supported the overall thrust of these reforms in fostering mass demolition. I draw on the method of thematic analysis (Boyatzis 1998; Braun and Clarke 2006). As an inductive approach to analyzing qualitative case data, thematic analysis differs from grounded theory and other methods in allowing for an analysis more tailored to a specific theory framework (i.e., it is not as committed to ground-up theory building). My broader

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theoretical interests are about understanding the construction of public responsibility within the process of welfare privatization.

To explore this broader theoretical puzzle, I draw from a data set of sixty-nine cases gathered using the Westlaw and LEXIS software.[4] The data set includes the universe of published opinions and rulings around public housing demolition from 1985, the earliest recorded case, to 2012, and cases occur exclusively in federal trial and appellate courts.[5] I divide these cases along three distinct phases in the historical trajectory of public housing reform: the years preceding the enactment of HOPE VI (pre-1991); the period during which policy makers established and refined that policy (1992–1998); and the period after that policy's codification in the statutory code (post-1998).

I examine court decisions and rationales across this historical trajectory. The endpoint of thematic analysis is "the reporting of the content and meaning of themes in the data, where 'themes are abstract (and often fuzzy) constructs the investigators identify before, during and after analysis'" (Braun and Clarke 2006, 15; see also Ryan and Bernard 2000). The process entails multiple stages of coding and culminates in a close examination of themes. In my initial coding, I focused on whether courts affirmed, rejected, or questioned the state's responsibility to public housing tenants in deciding on the legal merits of demolition cases, in addition to recording information on the year, level of court, background, central issue, case outcome, and other key details. I found that courts rarely denied that public responsibility had a valid legal basis. Instead, courts attended heavily to the question of what PHAs' responsibilities to tenants entailed.

I then focused on the rationales that courts used in deciding for or against PHAs in demolition cases, even as they generally accepted the legal basis for public responsibility. For example, sometimes the case hinged on whether evidence proved that a housing development was obsolete prior to, and therefore eligible for, demolition. I grouped these codes into two broader patterns encapsulating how courts characterized PHA responsibilities: (1) as a "technical" matter, in which decisions focused technically on the "facts" of whether PHAs had actually demolished a property, or (2) as a matter of "context," in which decisions were more attentive to the intentions and circumstances that influence PHAs' demolition activities.[6]

As Figure 1 shows, courts mostly decided cases on the basis of technical rather than contextual factors between 1985 and 1998, but that pattern reverses by 1999

4. The keywords "public housing," "demolition," "redevelopment," and "HOPE VI" (a leading demolition-oriented policy) turned up over 500 results, but I excluded cases in which public housing demolition was not at issue (e.g., disputes involving private housing, other federal programs, and provider contracts).

5. The resulting data set generally contains three types of cases: attempts by tenants to forestall or nullify demolition plans and therefore preclude demolition, including tenant attempts to block already submitted applications (41 percent); disputes over what should happen during demolition, including tenant complaints equating daily slumlord practices with demolition (37 percent); and postdemolition disputes about what should happen after the housing comes down, including issues of replacement housing options (22 percent).

6. While courts considered context in both kinds of decisions, I show that courts sometimes explicitly deemed those contextual details irrelevant to the legality of demolition, while at other times they did not.

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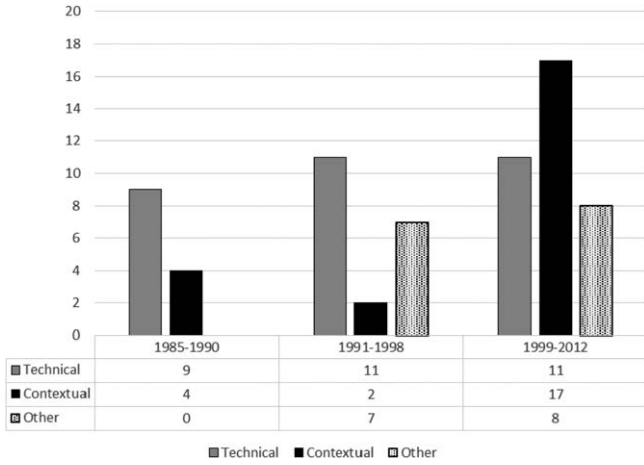

FIGURE 1.
Federal Court Decisions: Technical versus Contextual Rationales, 1985–2012

and beyond. I explain further below that this trend reflects how courts were steered by broader reforms that introduced more flexibility into statutory law surrounding demolition. I also coded decisions in terms of favoring tenants or PHAs.[7] As Figure 2 shows, courts predominantly ruled in favor of tenants between 1991 and 1998, but shifted to favor PHAs in a lopsided fashion by 1999 and beyond.[8] These trends support the empirical claim that as reforms steered courts toward embracing a less technical, more flexible notion of responsibility, courts became more accepting of demolition. In the qualitative analysis below, I describe this shift as one from *obligated* to *obliged* public responsibility, and elaborate on the specific ways that courts reasoned within this new legal paradigm.

While court decisions were important in shaping the fate of housing projects with up to several thousands of tenants, the analysis avoids focusing exclusively on the outcomes themselves. Rather, I use court decisions as one among many windows of information into the role of courts in reform disputes. In this vein, I also draw on other legal and nonlegal materials, including newspaper articles, Department of Housing and Urban Development (HUD) policy memos, official reports, congressional hearing transcripts, legal briefs, and published studies of tenant litigation. For each selected case, I used these materials to gather details about the events precipitating and motivations behind specific legal claims, as well as insights into the positions of federal governmental agencies and bodies that influence and are influenced by the courts.

7. I define a range of rulings as favorable to tenants in their efforts to prevent demolition or minimize its effects, including when courts grant tenants preliminary injunction, summary judgment, or court order; affirm tenants' counts after full trial; or deny defendant summary judgment, motion for court order, and motions for case dismissal. The category of other refers to cases decided on the basis of factors wholly unrelated to the substantive issue of demolition.

8. The cases betray a liberal bias, with 62 percent being decided by Democratic judges and only 22 percent being decided by Republicans (16 percent were mixed courts).

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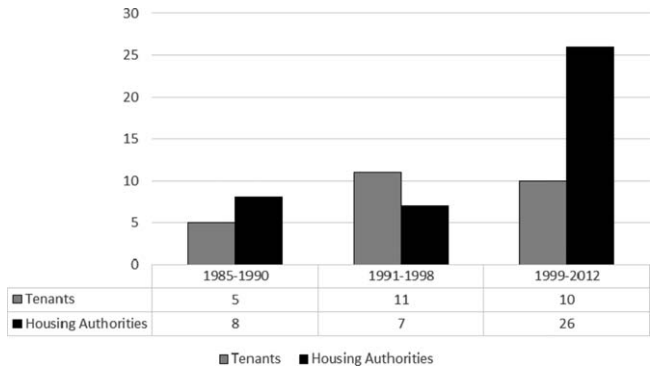

FIGURE 2.
Federal Court Decisions Favoring Tenants versus Housing Authorities, 1985–2012.

EXPOSING THE IRRESPONSIBLE LANDLORD (1985–1990)

Housing Reform in the Reagan Era

Political scientists argue that few policy arenas show clear evidence of welfare state retreat during the 1980s, but public housing is the exception (Pierson 1994). Reagan's Commission on Housing in 1982 issued a final report calling for greater reliance on private markets in the allocation of low-cost housing. Following these prescriptions, Reagan succeeded in cutting budget authority levels for public housing by 75 percent, and construction starts by 88 percent after they had reached an annual high of 20,400 in 1980 (Stegman 1991). In addition to slicing the housing budget, the administration also shifted resources away from the maintenance of existing public housing properties toward more privatized alternatives, such as the Section 8 Voucher program.

The retreat from public housing under Reagan, however, was nevertheless an incomplete one. Shifting budgetary priorities left public housing with fewer resources and unable to expand, but failed to eliminate or dramatically restructure the program.[9] In particular, budget cuts left open the question of what should be done with existing public housing projects and their tenants.

Despite staunchly opposing the public housing program, Reagan never once openly proposed mass public housing demolition. One reason was the widespread perception among policy makers throughout the 1980s that the political costs of demolition were simply too high. In the aftermath of urban renewal, demolition had become a widely despised practice as "by the early 1970s . . . [it] had become synonymous in the popular mind with bulldozers and heartless displacement of the

9. In the case of public housing, tenant screening practices were still relatively lenient (e.g., no criminal background checks or employment requirements), and subsidy contracts still required housing authorities receiving federal funds to operate public housing for a minimum of forty years. Additionally, while budget authority levels (i.e., proposed spending limits) fell dramatically, spending outlays (i.e., actual spending) actually increased due to the rising costs of maintaining already existing properties.

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poor and powerless" (Teaford 2000, 459). Even as late as the early 1990s, HUD Secretary under Clinton, Henry Cisneros, recalled that his team of reformers encountered "a widely shared belief that massive demolition was simply too charged an issue to contemplate" (Cisneros and Engdahl 2009, 23).

Even more importantly during the Reagan era was that, despite public housing's deep unpopularity among the general public, a group of progressive legislators consistently mobilized against Reagan to defend the program. Led by subcommittee chair Henry B. Gonzalez, from San Antonio, Texas, the House Committee on Banking, Finance, and Urban Affairs frequently clashed with Reagan and his appointees in what Gonzalez (1984, 441) mockingly called "the Department of *Anti*-Housing and *Un*development." Under Gonzalez, the House Committee consistently drew sharp contrast with the Reagan Administration and HUD by pushing to raise modernization funds (i.e., funds to cover the costs of maintaining and upgrading existing public housing properties) and thus preserve the public housing system.[10]

The legislative stance of avoiding mass demolition would take on new meaning as cities during the mid-1980s began to see the return of capital investment and gentrification (Berry 1985). This rising economic tide could prove a boon for public housing residents, as it could justify renewed federal provision to cities and poor communities, and thereby curtail the ongoing period of austerity and belt-tightening. However, policy makers could also decide to follow the trend of neglecting PHAs and allocating housing funds to for-profit developers. Competing possibilities of what urban revitalization could mean for the poor set the stage for an increasingly polarized debate about the future of public housing.

The Politics of Disrepair

In addition to contestation over the size and scope of the federal housing budget, the House Committee and the Reagan Administration clashed over the rules governing the local PHAs tasked with developing and maintaining public housing using federal funds. In particular, the subcommittee and the administration disagreed as to the lawful responsibilities of PHAs as public welfare agencies, as well as what constituted unlawful practice. The issue of demolition frequently sat at the center of this ongoing contention.

Reagan's budget cuts created so much financial turmoil for PHAs that many increasingly were accumulating vacancies and allowing their properties to fall into abject decay. Such practices rendered a project obsolete, which provided the pretext necessary for the central HUD office to approve a PHA's application to demolish it fully. When HUD refused to approve the demolition, the PHA could still reduce operating costs by allowing units to deteriorate. In 1990, a tenant advocacy group called the National Housing Law Project published a report showing that PHAs

10. For example, in a report on the committee's 1983 housing bill, it lamented the "cruelties inflicted" by Reagan's budget cuts—which had been passed without the committee's input—and rejected Reagan's proposal to eliminate public housing modernization funds. The committee described its own action as a "resounding rejection" of "the Administration's philosophy that government has no role in providing housing to those who do not have the resources to respond to market forces" (US Congress 1983).

had sold or demolished nearly 15,000 public housing units over the previous decade, including several thousand a year by the late 1980s.

As Hacker (2004) argues, state actors employ such hidden reforms to curtail welfare provision silently in a context in which doing so openly would incur substantial political costs. Despite the absence of an open demolition policy, advocates and progressive lawmakers frequently spoke out against "the administration's demolition goal for the public housing program," and reminded that "in no case . . . ought HUD [to] promote demolition . . . as a means of reducing the nation's low-income stock. Our joint roles and mandate are to supply shelter, not destroy it" (Simon 1985, 771; Nicholson 1985, 950). The House Committee set out to stop PHAs from demolishing properties, an issue that Gonzalez had taken up as a personal cause. The committee's 1983 housing bill imposed key restrictions on PHAs, mandating that they consult with tenants before demolition and replace units on a one-for-one basis, in addition to the routine approval process.

This regulation, however, ultimately failed to resolve the demolition problem. The key issue was that HUD's approval process was not triggered until the PHA decided to submit a formal application, which was typically after it had allowed the property to deteriorate for some time. This left the project uninhabitable by the time HUD decided on whether a PHA should be allowed to destroy it. The approval process therefore amounted to a legal formality. Although antidemolition regulations left PHAs little room to justify their actions if found in violation, PHAs could simply avoid legal review by abstaining from filing an application to demolish a property. In this way, tenants could not rely on the approval procedure as an effective mechanism for regulating demolition. This gap between the approval process and the steadily worsening problem of deteriorating properties kept tenants out of court, and thus helped the Reagan Administration keep its unofficial demolition policy hidden from the public eye.

Additionally, in response to the 1983 housing bill, HUD had published its own set of rules, stressing that tenants could file grievances against PHAs only for actions those agencies had taken—for example, razing a building without approval—and not for the agencies' failures to act in fulfilling their operational duties. According to the House Committee, in ignoring legislators' intention to allow tenants to file grievances against PHA "failures to act, such as failure to maintain housing in decent condition," HUD had "created an artificial distinction between actions and omissions" (US Congress 1987, H9657).

Thus, the key point of contention during the Reagan years concerned the question of which aspects of PHAs' operational practices could be defined as action at all, and which were to be defined as nonactions, and thus given less scrutiny. The position of the Reagan Administration—and by extension, HUD—was that de facto demolition did not count as action for the purposes of law and litigation. Thus, courts should allow a PHA to neglect its responsibilities of maintaining units in decent condition, which included the possibility of allowing a housing project to die a slow death.

Redefining Ruin: De Facto Demolition

The fight over public housing demolition between housing advocates and their allies in Gonzalez's House Committee and the Reagan Administration came to a

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head in the federal court system. As administration officials continued to pursue de facto demolition to avoid the political costs of an open policy, the Gonzalez House Committee could not simply rely on legislative mandates to regulate PHAs. Instead, the committee channeled its influence through the federal court system by establishing legal rights for tenants to expose PHAs engaging in these hidden Reagan-era reforms as irresponsible landlords.

The most significant legal confrontation over the Reagan doctrine on housing demolition happened in 1985 when Brenda Edwards and other tenants of the Fort DuPont housing project took to federal district court seeking to prevent District of Columbia Housing Authority (DCHA) from allowing its project to deteriorate to a point of becoming unlivable (*Edwards v. District of Columbia* 1985). The issue was that DCHA wanted to revitalize the area and had applied to demolish the project, but for years HUD had declined to approve this application.

Taking matters into its own hands, the PHA ceased maintaining the project while its latest application was still being considered by HUD, allowing vacancies to pile up despite the more than 12,000 prospective tenants remaining on the waiting list. Tenants expressed outrage, however, when DCHA relocated them to other substandard housing instead of the newly renovated units. The court had refused to hear the tenants' earlier complaint, having decided that the tenants lacked legal standing until the PHA officially filed an application. Thus, in the period before the application was filed, the tenants had been forced to build a legal case focusing on the relocation units. Said Brenda Edwards, who became the lead plaintiff: "You wouldn't send a dog in there . . . there was feces dripping on my head from the ceiling. I cried and refused to move" (Carter 1985, C4)

To encapsulate their allegations against the PHA, the tenants coined the term "de facto demolition," which meant that allowing a project to deteriorate to a point of becoming unlivable was the same as razing it. At issue in the case was the question of whether existing legislation "obligated" PHAs to "maintain the project in a decent, safe, and sanitary condition" (*Edwards* 1985, 23). The court decided that DCHA had no such obligation to Fort DuPont tenants. As merely a "statement of policy," legislation forbidding PHAs from "razing" housing projects without approval failed to create rights for public housing tenants that would prevent "the District from seeking such demolition in the allegedly insensitive way it has chosen" (*Edwards* 1985, 25). In the eyes of the court, tenants were merely recipients of a public benefit. Outside of actual razing, PHAs were not liable for any actions that ultimately destroyed the housing projects in which poor families lived, a decision upheld by the DC Circuit Appeals Court in 1987 (*Edwards v. District of Columbia* 1987).

Coining the term of de facto demolition allowed tenants to identify PHAs as irresponsible actors, and name the human costs of neglect and inaction, which in the public housing arena had not yet become identifiable as a social problem. As Senior District Judge Hubert Louis Will warned in his dissenting opinion, *Edwards* was "not a run-of-the-mill landlord-tenant dispute," but would instead

> open the door to PHAs across the country embarking on similar programs to eliminate public housing projects by failing to maintain them . . . and,

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> after the projects are clearly uninhabitable, applying to HUD for formal permission to knock them down … and no private person, only HUD, could prevent them. … If Congress wants to repeal the Housing Act, it can do so. Until it does, I believe judges and the courts have a duty to uphold it and not permit it to be scuttled by maneuvers such as those allegedly taking place here. (*Edwards* 1987, 58)

The *Edwards* ruling reinforced the notion that PHAs' destructive practices did not actually count as action, and were therefore perfectly lawful. It seemingly would only further pave the way for Reagan Administration officials to continue silently eliminating public housing.

In 1987, however, Congress—led by the Gonzalez House Committee—amended the statutory language directly in response to the *Edwards* court ruling. The amendment forbade PHAs from engaging in *any action* to demolish a property before getting HUD approval, and allowed tenants to file private suit if they did (Powell 1995, 902; 42 USC § 1437p[b]). The Reagan Administration's hidden reform plan was to frame demolition as formal razing and implosion, thereby excluding PHAs' less formal practices of neglect. This allowed PHAs to engage in de facto demolition and to scale back provision to poor tenants. By mandating that PHA neglect counted as potentially unlawful action, the House Committee changed the standard for which kinds of legal facts could signal that a PHA had abandoned its responsibilities. Courts in the decade following *Edwards* frequently reaffirmed tenant rights against de facto demolition.

While the amendment made it easier for tenants to initiate legal cases against PHAs for unlawful demolition, the law still left PHAs no room for justifying their decisions to demolish a property. PHAs could only try to counter the charge that they had actually demolished the property without proper approval, which amounted to a rigid and technical exercise centered more on factually substantiating that PHAs had acted in a certain way rather than justifying or explaining why they did. In other words, the amendment meant that PHAs could no longer rely on the approval process to evade liability, and therefore exposed PHAs to the rigid and abstract "hard law" provisions in the statutes that regulate demolition (Tollefson, Zito, and Gale 2012, 6).

The House Committee's amendment therefore established a legal framework for understanding public responsibility as a hard obligation. By defining public responsibility as *obligated*, the committee constructed PHAs' responsibilities to tenants in black-and-white terms, in which what is lawful is always both doable and the only justifiable course of action. Thus, whereas the Reagan Administration relied on hard law provisions (i.e., the rigidity and abstractness of the approval process) for shielding PHAs from legal contention and suppressing tenant opposition to its hidden reforms, the House Committee repurposed hard law toward more strictly regulating PHAs and making them more accountable for their responsibilities as welfare-providing agencies. This new judicial paradigm took off just as legislators were beginning to mount a broad-based push to reform the public housing system.

REGULATING THE UNINTENTIONAL SLUMLORD (1991–1998)

The Cranston/D'Amato Reform Plan

The late 1980s saw the debate over public housing shift toward the political center. Legislators, executive rule makers, and local administrators in the housing arena now openly advocated for major changes, which contrasted sharply with Reagan's hidden reforms. The key post-Reagan reform effort was a bipartisan initiative spearheaded by Senate Subcommittee on Housing and Urban Affairs Chairman Alan Cranston (D) and ranking member Alfonse D'Amato (R).[11] While the Cranston/D'Amato approach called for Congress to allot more modernization funds and other resources to public housing, it differed from the Gonzalez House Committee's stance in focusing not so much on counteracting budget cuts as on developing a strategy to rehabilitate the relatively small percentage of severely distressed public housing projects that gave the program a bad name.

The idea to focus reform efforts on a subset of problem projects came out of an influential report prepared by a Cranston/D'Amato-appointed taskforce chaired by famed real estate developer James Rouse and Fannie Mae chairman David Maxwell.[12] The taskforce in turn recommended the creation of a National Commission on Severely Distressed Public Housing (NCSDPH) to examine the challenges of "problem projects" across the nation more closely (National Housing Task Force 1998, ii). The NCSDPH found that as many as 86,000 public housing units were in need of extensive physical rehabilitation, requiring demolition and replacement of units. Here, demolition would serve as a step toward rehabilitating existing public housing projects, and was neither a policy in and of itself, a means of reducing units, nor part of an entirely new housing paradigm.

Reformers were cautious, however, given the legal crackdown on irresponsible PHAs after *Edwards*. The commission's final report and action plan warned that "the legal services and civil rights communities have taken an active interest in the demolition and replacement of public housing. They have gone to court several times to stop HUD-approved PHA's plans relating to the demotion of public housing developments, and they have been successful" (NCSDPH 1992, 96). Thus, the NCSDPH worried that even an initiative designed to fix and save the existing public housing system was still in danger of violating antidemolition regulations.

The HOPE VI program—which eventually became HUD's main demolition policy—emerged directly out of the NCSDPH action plan. The NCSDPH action

11. Another important reform effort—this one spearheaded mostly by Republicans—met with little success. HUD Secretary under the Bush Administration, Jack Kemp, pushed the idea of selling off public housing properties to tenants. The secretary claimed to favor this approach because, as one top HUD official confided, "he does not want to be known as the secretary of demolition for public housing" (Polikoff 2006, 284).

12. Another important point of difference between the Gonzalez House Committee and the Cranston/D'Amato Senate Subcommittee involved their coalitional bases: the former allied mainly with advocacy and community groups, while the latter worked with the for-profit housing industry. Public housing was therefore not as central to the Cranston/D'Amato coalition's agenda and housing industry groups wielded great influence in shaping its reform proposals.

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plan was not initially envisioned as the radical break from the past that it eventually became. As a federal policy memo readily admits, it "started as an embellished modernization program" (General Accounting Office 2002, 7). Reformers altered the scope of the NCSDPH plan significantly, however, as they ran against widespread sentiment that the program was a fundamentally broken one that did not deserve to be fixed. HUD secretary under Clinton, Henry Cisneros, for example, presented Congress with a series of reform proposals, each of them designed to limit demolition and total reduction of units, but the proposals met with a chilly reception. The so-called Republican Revolution of 1994 in Congress strengthened the hand of reformers, as fifty-seven House Representatives signed a bill to eliminate HUD entirely (Zhang 2004).

His back against the wall, Cisneros pledged to reinvent HUD and move the department beyond its image as a housing production agency toward a vision of housing as a vehicle for social transformation. In particular, he insisted that public housing reform could anchor a broader initiative to turn around troubled urban neighborhoods and de-concentrate inner-city poverty, especially by transforming densely-built housing projects into smaller-scaled, mixed-income housing communities.[13] Cisneros's twist on the NCSDPH action plan thus altered public housing's most fundamental objective as stated in the 1937 Housing Act: "the provision of "decent, safe, and sanitary dwellings for families of low income" (42 USC § 1401-30). Specifically, it proposed reducing the public housing stock via demolition as a means of making inner-city spaces less dense and more attractive to higher-income families.

Simply approving more demolitions would not help move this reform agenda forward, since allowing properties to deteriorate enough to gain demolition approval only increased PHAs' liability to the threat of tenant litigation. HUD's new social mission therefore required weakening tenant rights by overhauling of the legal code. Cisneros lobbied Congress to set PHAs "free from statutes and rules governing one-for-one replacement . . . [and other] measures that limited the program's flexibility to serve higher-income residents" (Zhang and Weismann 2006, 48). Congress would take several years to rewrite the statute, however, so HUD was forced in the meantime to find some other way to lessen PHAs' liability to legal action.

To that end, HUD published a rule in the *Federal Register* in November 1993 reinterpreting the restrictions imposed by the Gonzalez House Committee to include an intent requirement. HUD reasoned that under the antidemolition law,

> the "action" of failing to maintain units, standing alone, would not be prohibited . . . unless the "action" was connected with the eventual planned demolition, that is, the razing of a project, which . . . requires HUD approval. . . . HUD's interpretation of [the statute] thus contains an intent provision. . . . Of course, unlike the Edwards case . . . a PHA may

13. Thanks in large part to social science ideas about urban restructuring (Wilson 1987) and residential segregation (Massey and Denton 1993), the social consequences of urban poverty had again become a major public issue, which lent more political cache to Cisneros's approach.

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> not always announce that it has formed an intention to demolish units that it administers. In such instances, the task of determining the requisite "intent" to demolish or dispose is similar to determining "intent" to discriminate; i.e., whether, from the totality of the facts, the eventual demolition was a "motivating factor" behind the PHA's failure to maintain units. (HUD 1993, 58785)

Thus, in attempting to qualify the House Committee's rule that inaction counts as unlawful action, HUD suggested that demolition should be scrutinized like a case of discrimination under the equal protection clause: that is, the scrutiny should focus on evaluating whether or not the PHA had acted intentionally. The proposed rule sparked immediate opposition from tenant advocacy groups (Powell 1995). The move made it clear that the legal battle lines had shifted from questions of responsible versus irresponsible PHAs to questions of PHAs as intentional versus unintentional slumlords.

Horner and the Problem of Intent

As policy makers cautiously tip-toed into the legal minefield of experimenting with demolition as a policy measure, courts continued to affirm the tenants' stance that PHAs were bound by a hard obligation to adequately maintain and to avoid destroying public housing projects. Between 1988 and 1994, for example, six separate courts cited and followed the House Committee's amendment in ruling that tenants had rights and could file legal claims against de facto demolition.[14] Yet, most of these courts presumed that tenants needed to show evidence of intent in order to make a persuasive case, an interpretation also adopted by HUD. Thus, as Figure 2 shows, despite consistently affirming tenant rights, courts ruled in favor of tenants in only 38 percent of cases between 1985 and 1990.

Tenants would later find the judicial soil more fertile, however, as courts ruled in their favor in 61 percent cases from 1991 to 1998. During this period, courts strengthened and extended the legal rights afforded to tenants by the House Committee, thereby enlarging legal and economic risks for PHAs looking to demolish properties as a means of carrying out HUD's new plan for urban transformation. In particular, the courts increasingly rejected the Reagan Administration portrayal of PHAs as *unintentional slumlords*, ruling that PHAs should be defined by what they did and not what they intended to do. In doing so, courts both innovated beyond the House Committee's antidemolition provisions, and also provided a counterpoint to HUD's emerging position that demonstrating intent should be a key evidentiary hurdle in tenant legal cases against PHAs.

14. These included *Concerned Tenants Association v. Pierce* (1988), *Project B.A.S.I.C. v. O'Rourke* (1989), *Tinsley v. Jack L. Kemp* (1990), *Gomez v. Housing Authority of El Paso* (1992), *Velez v. Cisneros* (1994), and *Henry Horner Mothers Guild v. Chicago Housing Authority* (1991). Only the *Dessin v. Housing Authority of the City of Fort Myers* (1990) decision sought to defy this move toward recognizing a tenant cause of action against constructive demolition, and by the early 1990s it was no longer considered good law (Powell 1995).

The turning point in the legal battle over intent occurred in a 1991 case in Chicago. The subject of Alex Kotlowitz's famous exposé, *There Are No Children Here*, the Henry Horner Homes projects exhibited some of the worst urban living conditions in the country. As one advocate recalled,

> there would be a whole building with hundreds of units in it, with maybe 20 people living in that building. . . . Everything was stripped down, and you'd walk through the hallways and it would be pitch dark and it felt like you were in an abandoned building, yet CHA is actually running this building. . . . Even I was shocked at how awful [the conditions] were. Just the filth, the dirt, the sense of danger, the sense of doom. (Gerber 1995b, 8)

The Henry Horner Mother's Guild, like other tenant groups across the United States, had for years protested to no avail that CHA should use its modernization funds to improve the housing project for families living there.

As the most distressed housing project in Chicago at the time, however, Horner instead ended up on the list of projects slated for demolition as Chicago emerged as an early laboratory for the public housing reforms being proposed in Washington. Following the 1992 shooting death of seven-year-old Dantrell Davis in the Cabrini-Green Housing project, Chicago Housing Authority CEO, Vincent Lane, announced plans for demolishing several notorious housing projects, including Henry Horner Homes. At the press conference, Lane promised that "this is just the beginning. If there's anything whose time has come, it's the demolition of these God-awful places. We can no longer isolate the poor in those high-rise prisons." Unbeknownst to the general public, the announcement had emerged out of a plan to revitalize inner-city Chicago that had already been a year in the making (Pattillo 2007, 239, 241).

Tenants filed a lawsuit against CHA in 1991. Citing both the House Committee amendment and the *Edwards* dissenting opinion, the federal district court found—like numerous courts had before it—that tenants did enjoy the right to file a demolition claim; but the court failed to "reach the far more difficult problem of what would have to be proved to show de facto demolition" (*Henry Horner Mother's Guild v. Chicago Housing Authority* 1991, 1993, 1998). By 1993, tenants sought a summary judgment that would throw a wrench in the city's nascent revitalization plan.

Rather than focus on the revitalization plan itself, the litigation continued to build the de facto demolition case, emphasizing how the CHA had shirked its responsibilities as a public agency. As one tenant explained, the tenants turned to the legal system as a means to "make somebody take notice and say, 'these people shouldn't be living like this.' So that's when we did the big lawsuit; to make people stand up and take notice" (Gerber 1995a, 6). And take notice the people did, as numerous local television newscasts on the nights of May 31 and June 1 in 1991 led with the story of "mothers in Chicago, furious about their living conditions, fed up and fighting."[15]

15. In particular, CBS's WBBM-TV Chicago, May 31, 1991.

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Echoing HUD's broader position, CHA argued that tenants should be required to show intent in order to prove de facto demolition. Tenants implicitly downplayed intent by proposing to present evidence of a high number of vacancies and inhabitable units to demonstrate that CHA had actually destroyed or taken actions likely to result in destroying the project. Stressing the need for a full trial in considering a claim that "has never been proved" and that had been "judicially recognized for the first time only a few years ago," the court—during the summary judgment phase of the trial—rejected both the tenants' and the PHA's suggestions, though offering different reasons for each (*Horner* 1993, 30). The court argued that the tenants' proposed evidence would not provide good enough information: while vacancy rates and the other data presented by tenants shed some light on the situation, these data fell short of demonstrating conclusively that the PHA had "exercised [its] judgment in a manner that has, in effect, rendered Horner uninhabitable" (*Horner* 1993, 32).

On the other hand, the court rejected the CHA's fundamental interpretation of the statute, framing the issue of whether or not CHA had lawfully fulfilled its public responsibilities in noticeably stark terms: "if the statutory conditions for demolition are not satisfied and public housing is demolished, be it through design, neglect, incompetence or inadvertence, a violation of [the law] has occurred . . . [as] there is nothing in the language or legislative history that compels the conclusion that intent is a necessary element of a claim under that section" (*Horner* 1993, 34). Further, the court reasoned that since tenants did not need to demonstrate intent in order to make a credible de facto demolition case, HUD needed to pay more attention to what PHAs actually did, especially before submitting a demolition application. "Any other interpretation," the court argued, "would leave the section without a governmental mechanism of enforcement—a result contrary to Congress' intent to prevent the unapproved destruction of public housing" (*Horner* 1993, 35).

Thus, in the *Horner* case, the court adopted the tenants' understanding of the legal system and what it ought to accomplish: that it should concern itself with what PHAs actually did, and not as much with why they did it. Leaning on a view of *obligated* responsibility, the court rejected CHA attempts to qualify or justify its demolition activities. In other words, there was no such thing as an unintentional slumlord, as far as courts were concerned. The court's endorsement of tenants' view of intent—that it should not matter for evaluating evidence—set the stage for tenants later to obtain a ruling that mandated CHA to replace the units it had destroyed on a one-for-one basis, even as policy makers and HUD were beginning to rethink that restriction. Likewise, between 1991 and 1993, federal courts made similar rulings downplaying intent against PHAs in Chester, Pennsylvania, as well as in Houston and Dallas, Texas (*Resident Council of Allen Parkway Village et al v. United States Department of Housing & Urban Development* 1993; *Velez v. Cisneros* 1994).

Tenant Rights in the Shadow of the Law

The judicial turn toward expanding tenant rights, as embodied especially by the *Edwards* and *Horner* cases, left PHAs less confident about allowing courts the

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final say on the legality of urban revitalization plans. As I discuss below, much of the action increasingly happened outside of the courtroom, as tenants negotiated with PHAs "in the shadow of the law" (Mnookin and Kornhauser 1979, 1). Courts still played an important role in this negotiating process, both as a looming threat and by arbitrating the rules of engagement.

For example, tenants typically negotiated with PHAs via tenant councils with members elected by residents. Courts frequently saw cases involving disputes about the legitimacy of such organizational leadership. In the earliest example in 1993, a tenant group during Atlanta's Olympic revitalization eventually came to support the Atlanta Housing Authority's plan to demolish and rebuild the Techwood Homes project. This group emphasized how the community had been long starved for resources, and saw the growing pot of reform money as "the best opportunity we'll have to revitalize our neighborhood" (Anderson 1992).

However, a new, opposing faction of tenants—named Tenants United for Fairness—emerged, foreseeing broken promises and few tenants returning to the redeveloped complex. The district court mandated a reelection of tenant leadership at a crucial moment in the redevelopment process, allowing the antidemolition group to acquire formal organizational authority (Vale 2013, 104). The newly elected officers, "pleased that an independent authority has found that the [previous] officers are probably not legitimate and are not working in the best interest of the community" (Harris 1992a, C8), swiftly negotiated an ambitious plan for replacement housing, which previously had been "'the weakest section' of the [redevelopment] proposal" (Harris 1992b,A1).

Likewise, courts also created possibilities for ownership transfer where the private market was unlikely to facilitate it. In 1997 in Alexandria, Virginia, for example, the district court not only affirmed for the established tenant group exclusive rights of first refusal to purchase its own housing project, but also ordered the PHA to accept the tenant group's purchase offer (*Alexandria Resident Council v. Alexandria Revitalization and Housing Authority* 1997). Finally, court proceedings also encouraged PHAs to settle, often resulting in big concessions for tenants. For example, in a 1997 Chicago case, the district court ruled that the local tenant group had legal standing, prompting settlement negotiations in which tenants secured a partnership with private developers and a 51 percent share in new construction initiatives (*Cabrini-Green Local Advisory Council v. Chicago Housing Authority* 1997; see also Wilen and Stasell 2000).

Thus, following the House Committee's amendment, courts frequently adopted tenants' views of PHAs' responsibilities as public agencies, as well as their understanding of the legal system's role in ensuring those responsibilities were not neglected. In particular, courts expanded tenant rights by affirming tenants could file suit, removing intent as an evidentiary standard, and strengthening tenant leverage in out-of-court negotiations. These moves meant that the law-on-the-books created by the House Committee could translate into real action, in the form of forestalled or canceled demolition plans as well as remedies such as replacement housing. The new liabilities presented huge economic risks for PHAs looking to participate in the burgeoning moment of revitalization and reform.

ACCOMMODATING THE NEEDY STATE (1999–2012)

The Quality Housing and Work Responsibility Act

Cisneros's mantra of "more than bricks and mortar" and his mixed-income housing proposal proved popular among the Republican majority in Congress and saved HUD from being eliminated. By 1995, reformers had reached consensus on public housing's new mission of social transformation in poor neighborhoods, but not on how best to design policy to bring about this change. The reform community had experimented with a host of approaches, including full rehabilitation of housing projects, converting units into vouchers, tweaking guidelines for replacement housing, producing new metrics for determining physical obsolescence, and more. In passing the QHWRA in 1998, legislators finally codified what seemed like a winning formula.

The QHWRA evidenced how far reformers had drifted from their previous stance in 1989 of avoiding demolition. During the Clinton years, legislators and administrative rule makers not only continued to push their vision for socially transforming poor neighborhoods, they also directly revised legal rules to weaken—and in some cases delete—tenant rights provisions. For example, they eliminated the de facto demolition and one-for-one replacement provisions, loosened requirements for gaining demolition approval, and even mandated that PHAs demolish a share of their physically distressed stock.

PHAs could now redevelop projects into mixed-income housing with many fewer income-restricted units, or simply demolish projects without replacing them, confident that the new reforms insulated them from liability.[16] By deemphasizing bricks and mortar and rewriting the legal code, policy makers broadcasted their position. PHAs were to be less concerned with housing the poor, and more with transforming communities, even if the latter goal happened to undermine the former. Unlike in the welfare reform debate, public housing reformers never articulated reform as a project of lessening recipients' dependence on the state by reducing their access to public assistance. In theory, the goals of housing provision and community transformation could comfortably align. In QHWRA, however, reformers explicitly sought to make legal rules more amenable to mass demolition, and ultimately established demolition as the flagship policy and new face of the reinvented HUD agency.

In doing so, policy makers also redefined public responsibility, in part by revising the legal code so that it merely *obliged* PHAs to maintain units in decent shape, allowing them to opt out of this responsibility with proper justification. This shift in the construction of PHA responsibilities from *obligated* to *obliged* introduced

16. The QHWRA reforms exposed poor tenants to a range of new market risks. Vouchers used to replace units left poor families vulnerable to an array of new risks in private rental markets: tenant screening practices and eviction rules grew more punitive, and PHAs were allowed to sell off public housing to private foundations, developers, and management firms. Despite the many new reform tools that QHWRA made available to PHAs, Goetz (2013, 14) insists that "the most common form of privatization is the demolition of public units, which are either not replaced in any form or are replaced by Housing Choice Voucher subsidies used by low-income families to rent private-sector housing."

a more flexible notion of the legality of demolition, mirroring a shift from hard law to soft law (Lobel 2004; Scott 2004). Additionally, the reforms steered courts toward adopting a more accepting position on demolition, as courts ruled in favor of PHAs in 72 percent of demolition cases between 1999 and 2012 (see Figure 2).

In reasoning within the legal constraints of QHRWA, however, courts still acted creatively: rather than focusing on tenants' weakened position in terms of legal rights, courts increasingly considered the practical limits and vulnerabilities of PHAs.[17] Faced with sympathetic plaintiffs attempting to hold off the wrecking ball from destroying their homes, courts rationalized their role in permitting demolition by highlighting the context surrounding it, especially PHAs' intentions and the circumstances within which they acted.

Occupancy Consolidation and Extenuating Circumstances

The 2004 example of the English Woods project in Cincinnati was the first case in which tenants filed a de facto demolition claim after QHWRA (*English Woods Civic Association v. Cincinnati Metropolitan Housing Authority* 2004). The PHA had declared the project unlivable and suggested that it would be more cost effective to demolish than to renovate. Residents disagreed that the project was beyond repair. Said the vice president of the local tenant council: "Let us have our homes, have the opportunity to even have a home. . . . I just need a roof over my children's heads, I don't need a big large room. . . . Fix what is broken. If you just put the bare basics in, it won't cost that much. I don't need central air" (Hadley 2003).

The PHA cited a new QHWRA provision, allowing what was called occupancy consolidation, where PHAs could demolish part of the project if it improved the quality of life for tenants (42 USC § 1437p[e]). In *English Woods*, the key issue was whether PHA's decision to vacate and neglect three of its five buildings constituted an occupancy consolidation or an unlawful demolition. One indicator of the shift in judicial reasoning was that evidence previously deployed by tenants to build cases against PHAs could now be used the other way around. In *English Woods*, the PHA presented the kind of evidence that tenants normally would: for example, data on the project's high vacancy rates and infrastructural problems. The PHA argued that because its property had deteriorated, it was justified in demolishing a large part of it. Thus, where before tenants could use poor living conditions to indict PHAs of unlawful demolition, now the same evidence helped PHAs to establish demolition as legal.

Given PHAs' increased discretion, courts now had to determine whether choosing to demolish made sense in context. However, the needs of PHAs rather than tenants dominated these considerations. A problem such as high vacancy rates, for instance, certainly reduced quality of life for tenants, but the *English Woods* court focused instead on how the PHA was financially strapped and had

17. There was only one case in which a court cited weakened tenant rights as a factor in its decision: *Anderson et al. v. Jackson et al.* (2009).

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tried and failed to attain a federal redevelopment grant. The court concluded that:

> CMHA had no feasible alternative to occupancy consolidation. No funds for revitalization or demolition had been granted by HUD, and CMHA did not possess sufficient capital money to cover the enormous cost of renovation. Maintaining the entire development, with large swaths of vacant units, was economic[ally] imprudent. . . . The only feasible option was to consolidate the tenants at English Woods into the better buildings and then keep those buildings maintained, while offering better housing choices to those affected by the consolidation. (*English Woods* 2004, 20)

Here, and throughout the opinion, the court sympathizes with a particular struggle: that of PHAs facing budgetary turmoil rather than of tenants trying to keep their homes. Courts grew more sensitive to practical contingencies that PHAs encountered, and more understanding of demolition as a sometimes necessary tactic. In this way, courts accommodated PHAs, which they now treated as the true victims of budget cuts rather than poor tenants.

PHA Hardships and Good Intentions

Another consequence of policy makers rewriting the legal code was that tenants increasingly found it necessary to avoid the specific statutory provisions related to public housing demolition and instead frame demolition as a form of discrimination. Tenants looked to a provision of the Fair Housing Act forbidding discrimination against protected classes in matters of housing.

The first and most significant fair housing case emerged in 2001 during the revitalization of the Near South area of St. Louis (*Darst-Webbe Tenant Association Board et al. v. St. Louis Housing Authority* 2001, 2004, 2005). Along with Chicago, Atlanta, and Boston, St. Louis had been one of the earliest sites of HOPE VI experimentation. The revitalization plan called for demolishing several public housing projects, including the Darst-Webbe and Clinton-Peabody projects. The St. Louis Housing Authority (SLHA) had been awarded two HOPE VI grants in 1994 and 1995—one for planning and another for revitalization—but had revised that plan multiple times in the years prior to the lawsuit.

In leading this effort, the SLHA partnered with a for-profit real estate development firm, McCormack Baron and Associates. Richard Baron, the firm's principal, had become one of the most influential private-sector advisees to HUD under the Clinton Administration.[18] In a public meeting over the revitalization plan, Baron had stressed to residents that the purpose of HOPE VI and the broader reform

18. Henry Cisneros, HUD secretary at that time, recalls in his memoir that "from the private sector we had the advice of people such as Richard Baron of the private firm that is now McCormack Baron Salazar. In late 1993, he wrote a memorandum outlining how HOPE VI could be reshaped to attract meaningful private investment to public housing neighborhoods in cities" (Cisneros and Engdahl 2009, 7). Thus, the fair housing case initiated by the Darst-Webbe Tenants Association held significant import as a key test of the QHWRA legislation, a vision influenced significantly by Richard Baron and private real estate industry.

process was to redevelop public housing so that its tenants would be less vulnerable to being stigmatized: "Right now, we see a neighborhood that looks more institutional in character than a real neighborhood. We think our job is to make it invisible—as to income" (Hasan 2001). The plan called for replacing a 758-unit housing project with a mixed-income complex including only eighty units affordable to the original tenants. The tenants wanted to add an additional 120 public housing units to the mix (Missouri Lawyers Media Staff 2003).

Tenants mobilized against the plan, and in the ensuing litigation accused the PHA of discrimination on the basis of race and familial status. According to tenants, the SLHA had denied them "the opportunity to occupy new[ly built] ... replacement units in their community." As one resident reflected as the lawsuit gathered momentum: "People love the projects; this is their home.... It was *they* choice to move to the county. Now, *they* like it here close to the city.... They can't just move us like that.... We pay taxes, too. We got rights, too. These are low-income houses.... This is ours. We were here when they was raggedy, falling apart. Now we gonna stay when they new" (Hassan 2001). On the grounds of the old housing project, the SLHA was creating an allegedly new community, and tenants charged SLHA with discrimination in deciding which types of tenants and families would be allowed to live there.

The SHLA argued that the limited number of affordable units within its proposed housing mix was necessary to make the community marketable enough to attract higher-income families. The tenants' key argument highlighted an earlier version of the revitalization plan that had included significantly more affordable units. Their point was that a plan uniting their interests with the broader marketability objective was indeed possible.

Yet, the federal district court prioritized the PHAs over the tenants' struggle to save and improve the community. The court focused, for example, on the hardships endured and effort put up over the years by SLHA in pushing the earlier plan favored by the tenants: "because of delays and a number of plan changes the SLHA failed to move forward on the grant and ... HUD notified the SLHA that [it] was in default ... that things had to change, and that ... the SLHA was required to submit a default resolution plan satisfactory to HUD" (*Darst-Webbe* 2004, 17). By 1998, as the court highlighted, the SLHA had worked with consultants to design a new proposal and resolve the default problem. In the eyes of the court, the SLHA with its consulting team—by revising the plan to garner HUD approval and cure the default—had finally prevailed, having figured out "the optimum density and mix of housing" (*Darst-Webbe* 2004, 27). Only by ignoring tenant concerns, however, could the court deem "optimum" a plan with far fewer affordable units than previous versions.

By contrast, the court failed to acknowledge that tenants were also survivors of the adversities endemic to an underfunded public housing system, and had similarly earned a say in what happened to the project. In a submitted statement, tenants argued that adding 120 additional units would not undermine the marketability of SLHA's revitalization plan since the public "is not going to know they are public housing," as "the beauty of the HOPE VI project is that when you build public housing units as part of mixed income development, you don't know where those

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public housing units are" (*Darst-Webbe* 2004, 24). The court dismissed this statement as "simplistic," however, and contrasted it to HUD's "necessarily broader" vision of transforming communities, even though the sentiment about making public housing less visible only mirrored lead developer Richard Baron's original pitch to them. To the court, tenants were only passive critics.

The appeals court similarly dismissed tenant demands as impractical. The court supported the district court's ruling by also rejecting the earlier plan favored by tenants as evidence that the new plan could be more inclusive. In particular, the court emphasized that the earlier plan had created financial problems for SLHA:

> the district court properly declined to rely upon the original, 1995 redevelopment proposal as evidence that the [SLHA] could have included a greater number of low-income rental units and maintained marketability. Redevelopment stalled under that proposal, and HUD declared the [SLHA] to be in default . . . . While the 1995 redevelopment proposal demonstrates that, at an earlier date, the Housing Authority believed that a different housing mix would be marketable, we do not find it appropriate to declare the district court's findings infirm on the basis of an abandoned plan that was never implemented. (*Darst-Webbe* 2005, 19)

Here, the court focused on the PHA's story of financial hardship and eventual triumph in developing its revitalization plan. More importantly, the court found that tenants did not offer a viable alternative, as their demands had thwarted progress, creating yet another obstacle that SLHA would have to overcome.

Thus, in evaluating the legality of the revitalization plan, the court embraced a notion of responsibility as *obliged*, and attended heavily the intentions and circumstances of PHA actions. In particular, the court interpreted SLHA's history of struggling to attain a grant and its eventual triumph as evidence that the less inclusive plan made sense in context, and was therefore not indicative of discriminatory action. Meanwhile, the court discounted that the tenants' proposal offered any evidence that a more inclusive plan was possible, and saw tenant demands only as obstacles to SLHA's hard-won progress. Courts have similarly prioritized questions of intention and circumstance and found in favor of PHAs in cases in New Orleans, Miami, Orlando, San Antonio, and Lowell (Massachusetts) (*Benavides et al. v. Housing Authority of the City of San Antonio* 2001; *Mary Reese v. Miami-Dade County* 2002, 2009; *Anderson et al. v. Jackson et al.* 2007; *Rita Freeney et al. v. Sanford Housing Authority et al. Orlando* 2011).

Courts therefore rationalized their stance of authorizing mass demolition by emphasizing PHAs' intentions and the circumstances shaping their decisions to demolish properties. In adopting the legislators' view of public responsibility as *obliged*, courts neglected—without openly opposing—tenant rights. Reasoning within these legal constraints, courts focused on the challenges that PHAs encountered in creating revitalized communities, thereby marginalizing tenants' ideas of what community means. For the court, the community continues to exist even if few original tenants return. For tenants, however, the community disappears when original tenants can no longer afford to rent there. Thus, even as reforms steered

courts to permit mass demolition, courts rarely questioned the ideal that housing the poor remained a matter of public responsibility. Instead, courts grew more sensitive to the hardships and vulnerabilities of the welfare state itself, as above those of its recipients.

DISCUSSION AND CONCLUSION

This article has investigated legal cases against public housing demolition as an example of contestation over the limits of the state's responsibility to the poor. Public housing's founding legislation sets forth the responsibility to "[provide] decent, safe, and sanitary dwellings for families of low income" (42 USC § 1401-30). Tenants and advocates have consistently opposed reforms that encourage mass public housing demolition, arguing that such reforms amount to the state abandoning its responsibility. I show how legislators and courts redefined the state's responsibilities to public housing tenants, with the effect of institutionalizing the once controversial practice of demolition as a flagship reform policy.

This research speaks to the broader issue of how privatization transforms the activist welfare state. My findings add to perspectives that characterize welfare privatization as a "surrender" of public responsibility (Gilbert 2002, 1), and a project of "neoliberal paternalism" (Soss, Fording, and Schram 2011, 1). I emphasize that even as reformers implemented HOPE VI and enacted the QHWR Act, severely weakening—and in some cases deleting—tenant rights provisions, courts rarely questioned the assumption that PHAs were bound by responsibilities to tenants. Rather, as the QHWRA reforms took hold, courts adopted a view of PHAs' responsibilities as *obliged* rather than *obligated*: that is, as legally flexible rather than a matter of hard and fast rules. In reasoning within these flexible legal parameters, courts increasingly considered PHAs' intentions and the circumstances surrounding demolition, thereby reflecting greater awareness about the economic problems affecting PHAs than those experienced by public housing tenants.

These findings contribute to the literature on law and welfare privatization in three main ways. First, scholars typically and correctly identify the 1980s and 1990s as a time of conservative attack on the welfare state, especially in the legal realm (Bussiere 1997). The example of public housing reform complicates this familiar account, revealing a policy arena in which poor recipients succeeded in winning new protections—for example, de facto demolition and one-for-one replacement provisions—during the height of austerity. These victories were fleeting and incremental, but they reveal a different kind of welfare debate and reform trajectory.

Likewise, while scholars have thoroughly explored how the Reagan and Clinton eras undermined earlier moments of welfare state expansion (Handler 1996; Mink 1998), this article specifies and illuminates some of the forces and mechanisms that ran counter to welfare privatization. During the Reagan years, for example, the House Committee under Gonzalez used federal courts and the mechanism of legal rights to hold Reagan-era PHAs accountable as irresponsible landlords. As a result, courts drew on existing legal frameworks in a way that stood in opposition to the public housing reform movement in the early phases of the Clinton

Administration. In particular, tenant groups relied on rigid and inflexible statutory rules to limit PHAs' ability to justify practices of demolition. These findings suggest the importance of time lags as well as ideological clashes between governing institutions (e.g., the courts and Congress), in generating claims-making opportunities for marginalized groups.

Second, I find that courts played different roles in varying political circumstances. In the 1980s, PHAs engaged in what Hacker (2004, 243) calls a politics of "hidden retrenchment," as they silently allowed properties to die because the risks and costs of open reform were too high. Courts rendered this growing threat to tenant homes and communities legible as a social problem and an offense against tenant rights. Although courts were initially disinclined to side with tenants, the judicial debate took on a life of its own once the House Committee pushed through its amendment, establishing courts as a key political access point for tenants.

When policy makers later began to experiment openly with reforms, putting demolition officially on the agenda, courts provided a venue for directly challenging increasingly hegemonic policy reform narratives (Lens 2009). Courts empowered tenants by treating them as legal agents, and by strengthening and extending the legal rights created by the Gonzalez House Committee's amendment. By affirming that tenants could file suit against PHAs, removing intent as an evidentiary standard, and strengthening tenant leverage in out-of-court negotiations, courts enlarged the risks for PHAs of participating in the emerging moment of urban revitalization.

The question of how the role of law and courts has shifted in the most recent chapter of reform feeds into a third and final point about welfare privatization. My findings show that in the most recent reform period, courts overwhelmingly favored housing authorities in struggles over demolition. Although this judicial swing undoubtedly signals real material and symbolic losses experienced by public housing tenants, it also indicates a new angle on how courts think about and manage social policy reforms.

HUD's new mission encouraged courts to adopt the *obliged* view of PHAs' responsibilities to the poor as legally flexible, and PHAs to present themselves to the courts as well-intentioned but vulnerable. This finding adds to the literature theorizing the welfare state as a seemingly all-powerful source of paternalist authority and surveillance in the lives of the poor (Soss, Fording, and Schram 2011). I show that to justify and frame welfare privatization, the state sometimes opts to undermine its own all-powerful image by portraying itself as vulnerable and needy. The findings suggest that courts rationalized their participation in allowing the demolition of tenant homes by growing increasingly receptive to this narrative of the needy and vulnerable state.

Courts, for example, emphasized PHA struggles for grants and other development resources, seeing these as providing a context in which demolition made sense. Yet, in doing so, courts minimized the considerable hardships and adversities endured by tenants in what they claimed were unlivable housing projects. Thus, in a legal context where public responsibility is *obliged* rather than *obligated*, the so-called needy state can advance reform by out-paupering the very poor recipients for whom it is supposed to provide. These findings suggest the need for more research on how courts shape the direction of social policy reforms, how divisions among

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political elites shape claims-making opportunities for the poor, and also new or counterintuitive ways that states frame and justify welfare privatization.

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