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Saunders (a.k.a. Javins) v. First National Realty Corporation 10th Anniversary Symposium Issue: Empowering the Poor and Disenfranchised: Making a Difference through Community, Advocacy, and Policy

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ARTICLES

*Saunders (a.k.a. Javins) v. First National Realty Corporation**

Richard H. Chused**

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**Professor of Law, Georgetown University Law Center. A number of people gave of their time and knowledge to help me write this history. Katherine Emig, Georgetown University Law Center '04, did stellar work as a research assistant. Gene Fleming, Esq., Professor Florence Wagman Roisman, Professor Monroe Freedman, Professor Myron Moskowitz, The Honorable Patricia Wald, Charles Duncan, Esq. and Richard Cotton, Esq., all provided me with information about their roles in the *Javins* drama. Florence Roisman and Gene Fleming, as well as my colleagues Dan Ernst, Sheryll Cashin, Lisa Heinzerling and Bill Vukowich, were gracious enough to read and comment upon an earlier draft. Many of my colleagues also made remarks about the paper when I presented it in November 2002 at one of the weekly lunch sessions my faculty devotes to discussion of scholarly projects. Finally, Georgetown University Law Center provided me with a summer writer's grant in 2002 as well as funds to gather a large collection of legal documents in the *Javins* case. Thanks to all.

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INTRODUCTION

The clerk for Judge Austin Fickling¹ of the District of Columbia Court of General Sessions called *First National Realty Corporation v. Saunders* for trial on June 17, 1966.² It must have been quite a scene. As Gene Fleming, the tenants' lawyer, tells the story,³ the tenants living in Washington, D.C.'s Clifton Terrace Apartments, who had refused to pay their rent because of the terrible conditions in the three-building complex, were asked to collect evidence of housing code violations and bring their exhibits to court. They brought bags of mouse feces, dead mice, roaches and pictures of their apartments to the courtroom, which was filled with tenants from the buildings. A housing inspector was also there, carrying a pile of paper that, according to Fleming, "stood at least one and one-half feet high," memorializing well over 1,000 citations for code violations. Herman Miller, the lawyer for Sidney Brown's First National Realty Corporation, which owned Clifton Terrace, moved to bar the introduction of any evidence of code violations on the ground that it would inflame the jury. Fleming, of course, vehemently opposed Miller's motion.⁴ Judge Fickling, in accordance with the long-standing refusal of courts to allow tenants to raise defenses in eviction cases,⁵ then barred introduction of the evidence, entered judgments granting First National Realty possession as a matter of law and dismissed the jury.⁶

These events formed the beginning of what turned out to be a very long judicial

1. Fickling, a graduate of Howard Law School and a Republican, was appointed to what was then the Municipal Court in 1956 by President Eisenhower and promoted to the District of Columbia Court of Appeals by President Johnson in 1968 over the objections of some Democrats. Obituary, *Judge Austin L. Fickling, Appointed by Eisenhower*, WASH. POST, Mar. 8, 1977, at C3.

2. Actions for possession for non-payment of rent are typically called for their first hearing about ten days after the complaint is served. In these cases, Fleming filed answers and requested jury trials. This later became routine in cases with tenants represented by counsel.

3. Telephone Interview with Edmund "Gene" Fleming, Attorney (May 29, 2002).

4. In addition to arguing that he should be able to introduce evidence of 1,500 housing code violations at Clifton Terrace, Fleming also wanted to use the testimony of Robert Gold, Chief of Research for the National Capital Planning Commission, to show that low-income families—especially black families—in the District of Columbia had great difficulty finding housing that met code standards. A summary of Fleming's offer of proof may be found in Settled Statement of Proceedings and Evidence, *First Nat'l Realty Corp. v. Saunders*, which was filed in the District of Columbia Court of Appeals on Aug. 18, 1966.

5. For the history of these old rules, see *infra* Section I.B.

6. Since no facts were left to be determined—everyone agreed that rent had not been paid—there was nothing for the jury to do. Traditionally, the court decides legal issues and the jury resolves factual disputes.

saga. Eventually, in *Javins v. First National Realty Corporation*,⁷ the United States Court of Appeals for the District of Columbia Circuit became the first tribunal to unequivocally hold that a warranty of habitability was implied in all residential leases and that tenants could set off damages for violation of that warranty defensively in eviction cases. But the propriety of Judge Fickling's decision took four years to resolve. During that time, Clifton Terrace became the object of enormous coverage in the press; City Hall politicians took center stage in the controversy for a time; plans to sell the building to a non-profit corporation for remodeling emerged, collapsed and reemerged; Sidney Brown was sent to jail for a brief period; the city erupted in major civil disturbances; and the tenants continued to suffer under terrible living conditions.

The acrimonious quality of the trial between Brown and his tenants typified many of the events surrounding the litigation of *Javins*, arguably the most influential landlord-tenant case of the twentieth century. The tenants were largely poor and black residents of Washington, D.C., a city rife with racial unrest and protest. The efforts of some tenants living in Clifton Terrace to alleviate hundreds of housing code violations in their apartments included sit-ins at the offices of Corporation Counsel of the city and of the Secretary of the Department of Housing and Urban Development, as well as a rent strike. It was the rent strike, and the resulting actions brought by the landlord to obtain possession of the apartments from the non-paying tenants, that eventually led to the *Javins* decision.

Protest and unrest in this epoch went far beyond sit-ins and rent strikes. June 17, 1966, the date the striking tenants' efforts to avoid eviction from the Clifton Terrace Apartments were first frustrated in Landlord and Tenant Court, was only ten months after the Watts area of Los Angeles went up in flames in an outburst of black anger;⁸ ten days after civil rights worker James Meredith was shot by a sniper in a failed assassination attempt while on a "March Against Fear" from Memphis to Jackson;⁹ five days after the start of the first of two civil disturbances that summer in Chicago; and the same day Stokely Carmichael, chairman of the Student Non-Violent Coordinating Committee, made his famous "Black Power" speech in Greenwood, Mississippi.¹⁰ These same tenants lost their appeal before

7. 428 F.2d 1071 (D.C. Cir. 1970) (reversing *Saunders v. First Nat'l Realty Corp.*, 245 A.2d 836 (D.C. 1968)). The proceeding in the Landlord and Tenant Division of the D.C. Court of General Sessions resulted in no published opinion.

8. The civil unrest in Watts, the first of what became a series of disturbances that affected many major American cities, began on August 11, 1965.

9. James K. Cazales, *Sniper Fells Meredith on March*, WASH. POST, June 7, 1966, at A1. After Meredith was hospitalized, Martin Luther King, Jr., Floyd McKissick, director of the Congress of Racial Equality (CORE), and Stokely Carmichael continued the walk in his honor. Meredith rejoined them on June 25 in Jackson at the end of the march.

10. He made the speech while on Meredith's March Against Fear crusade. Carmichael took over the leadership of SNCC in 1965 amid growing dissatisfaction among its black leaders about the role of whites in the organization. He asked all of the whites to leave and began to use the phrase "Black Power" as a statement about the need for blacks to take control of their own destiny. During the March Against

the District of Columbia Court of Appeals on September 23, 1968,¹¹ only a few months after Dr. Martin Luther King, Jr. was assassinated and parts of Washington, D.C., including areas on 14th Street north and south of Clifton Terrace, went up in flames. By the time the United States Circuit Court of Appeals issued its now famous decision in 1970, old downtown Washington had begun a steady decline from which it is only now recovering.

The *Javins* story, therefore, is full of the raw passion of actors convinced of the righteousness of their positions. Reconstructing the tale requires more than a review of the changes *Javins* made in landlord-tenant law, though that material will be covered. The meaning and impact of the case can be grasped only if some of the emotions of its actors and the passions of their historical moment can be recaptured in these pages.

I. IN THE BEGINNING

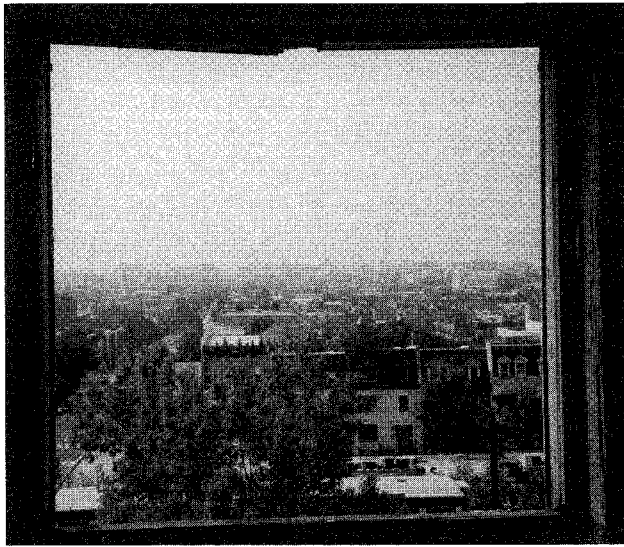
A. *The Apartment Buildings*

Harry Wardman, with the help of his architects Frank Russell White and A. M. Schneider, constructed the three Clifton Terrace Apartments at 1308, 1312 and 1350 Clifton Street, NW, originally called Wardman Courts, between 1914 and 1915. Wardman, "who often appears to have built Washington single-handedly, is known to have developed over 200 apartment buildings as well as hundreds of houses, 'flat' units, commercial spaces and office buildings."¹² Wardman Courts was one of many middle-class apartment complexes constructed in Washington between 1910 and the Great Depression. Located on the crest of a hill adjacent to a major streetcar line running up and down 14th Street, many of the apartments had spectacular views of downtown Washington. They were the largest buildings

Fear, he sometimes led "Black Power" chants. A brief summary of the rise of the "Black Power" slogan during the March Against Fear may be found at http://www.africana.com/research/encarta/tt_462.asp (last visited Feb. 9, 2004). See also Black Power in the United States (Feb. 22, 2004), at http://www.african.com/Articles/research/encarta/tt_462.htm.

11. At the time of this litigation, Washington, D.C. had a two level local court system. The trial level court was the Court of General Sessions and the appellate court was the District of Columbia Court of Appeals. For the most part citizens of the city did not control or elect those who governed them. The lack of self-governance was manifested in the court system by the existence of a right to apply for review of a local appellate decision by the United States Court of Appeals for the District of Columbia Circuit. Ironically, that right of review is what led to the *Javins* opinion read in most first-year property courses. Legislation ending the system of federal review of local court decisions was adopted in 1970, the same year *Javins* was decided by the federal circuit court. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970).

12. NAT'L PARK SERV., DEP'T OF THE INTERIOR, NATIONAL REGISTER OF HISTORIC PLACES REGISTRATION FORM, Sec. 8, p. 9 (Nov. 7, 2001) [hereinafter HISTORIC REGISTRATION]. A long feature article published in the *Washington Post* also headlined Wardman's impact on the city. Deborah K. Dietsch, *The Man Who Built Washington*, WASH. POST, Sept. 5, 2002, at H1.



View of Downtown Washington on Smoggy Day Through Window of Clifton Terrace During Remodeling in August 2002

in the area and, therefore, took on enormous importance as the symbolic center of the neighborhood.

The buildings were part of a major shift in urban planning and architectural design. As noted in the narrative supporting the 2001 certification of Clifton Terrace for listing in the National Register of Historic Places:

The use of modern styles for Washington apartment buildings between the 1920s and the 1930s stands out as the single most significant change during those years. As visually striking as was the contrast of the light stone of the classically derived styles of the early twentieth century against the dark red brick of the Victorian era, so was the impact of the styles associated with the Modern Movement. Clifton Terrace is a significant example of apartment building design influenced by the Garden City Movement in the 1920s[.] . . . [E]ncouraged by a desire for healthful living and suburban interest, [architects integrated] . . . more green space into urban living and apartment design, dispensing with many of the stigmas associated with urban living. The new “garden” apartments offered superior air circulation, more pleasing views, the inclusion of balconies, and enhanced light in each apartment—all at a moderate price.¹³

13. HISTORIC REGISTRATION, *supra* note 12, at Sec. 8, p. 4.



One of three buildings in the Clifton Terrace complex.

The Garden City Movement and the related City Beautiful Movement probably began with publication in 1898 of a thin volume entitled, *To-morrow: A Peaceful Path to Real Reform*, by Ebenezer Howard. Reissued under the more propitious title *Garden Cities of To-morrow* in 1902, the book advocated a combined use of modern urban architecture and countryside landscaping to create a wholesome and healthy environment for city dwellers.¹⁴ Like many other planners of his time, Howard believed that the moral and civic fiber of urban society could be improved by altering the physical settings of city life.¹⁵ While many contemporary planners view the Garden City Movement as a bit romantic and naïve,¹⁶ residents of Washington found developments like Wardman Courts quite attractive. Through the 1950s the buildings were almost always full of middle-class tenants.

14. For more on these movements, see PETER HALL, *CITIES OF TOMORROW* 86-135, 174-202 (1988).

15. The positive environmentalists—believers in the ability of architecture and design to enhance civic responsibility—are discussed in PAUL BOYER, *URBAN MASSES AND MORAL ORDER IN AMERICA: 1820-1920*, 220-83 (1978).

16. Many public housing projects, now razed, were designed as City Beautiful structures—apartment buildings scattered amid green surroundings and gardens. Their demise has led to many negative comments about early twentieth century planning theories. On the other hand, there is widespread recognition that the design of urban structures—with or without artificially romantic, bucolic settings—has a significant impact on the quality of city life. See JEAN JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961); Neal Kumar Katyal, *Architecture as Crime Control*, 111 *YALE L.J.* 1039 (2002).

B. Pre-Reform Eviction Law

At the time Wardman Courts was constructed, landlord-tenant law in Washington, D.C. and most of the rest of the country was based on a fairly simple and already old-fashioned set of property norms. The norms rested upon an English tenurial notion that in return for a grant of permission to use land, a tenant agreed to pay rent, maintain the land and return the land when the lease expired. It was a simple contract exchanging some form of payment in cash, service or kind for the right to possess land. Granting the tenant the right to take possession fulfilled all of the responsibilities of the landlord. After gaining the right to take possession, the tenant was obligated to pay the rent and return the land to the landlord at the termination of the lease. The customary view was that a lease gave the tenant virtually complete control over the use of the rented property for the lease term.¹⁷ If, therefore, the tenant vacated the land before the end of the lease, the obligation to pay rent did not end. Since, the reasoning went, the landlord had transferred the entire rental term by granting possession to the tenant, there was no obligation to take it back before the end of the lease.¹⁸ For similar reasons, a tenant injured because of some flaw on the leased property was unable to obtain compensation from the landlord. The obligation to keep the land safe for use and occupancy fell upon tenants.¹⁹ And, of course, the landlord could reclaim possession if the tenant did not pay rent.

Nineteenth century civil procedure in the United States reemphasized the notion that leases were straightforward exchanges of possession for payment. American judicial procedures, also based in many ways on English precedents, were often as narrow in their vision as a standard lease. Litigation began by the filing of a writ, usually limited to the statement of a single legal theory. There were certain defenses to each kind of writ, but merger of claims and parties, and the use of counterclaims, were not nearly as extensive as today.²⁰ Thus, when a

17. In many ways this vision was false. If, for example, rent was paid in-kind, the landlord might take large portions of the tenant's crops as payment. The terms of the lease could easily leave a tenant as a serf—a servant of the landlord.

18. The common law rules went so far as to hold a tenant responsible for rent even after the building was destroyed by fire, storm, or other natural cause. That result was altered by statute throughout the United States in the nineteenth century. For a case on this issue in Washington, D.C., see *Schmidt v. Pettit*, 8 D.C. 179 (D.C. 1873).

19. This was the rule in the District of Columbia. In *Howell v. Schneider*, 24 App. D.C. 532 (D.C. 1905), the landlord was not responsible for personal injuries to a tenant resulting from a toilet flush tank falling off the bathroom wall.

20. Today, plaintiffs suing in a standard civil forum may join all of his or her claims against the defendant in the same case and must join those arising out of the same facts. FED. R. CIV. P. 18. Defendants may respond to a plaintiff's case by asserting all available claims against the plaintiff. FED. R. CIV. P. 13. Claims arising out of the facts giving rise to the plaintiff's case must be asserted. In most cases, all the parties involved in the claims may be joined in the same case. FED. R. CIV. P. 20. This sort of wide-open litigation process was unknown for most of the nineteenth century. Serious reforms did not arise until the Federal Rules of Civil Procedure were adopted in 1938. Most states adopted court procedural norms similar to the federal rules by the 1950s.

landlord sought to evict a tenant for non-payment of rent, the tenant could not respond by asserting that the leased property was unusable for agriculture, even if the landlord had warranted that the land was a farmer's delight. To raise the warranty issue, the tenant had to file a new breach of contract case. Similarly, if a landlord sued a tenant for unpaid rent after the lessee abandoned the property, the tenant could not assert that her departure was partially or totally excused because of personal injuries suffered as a result of the landlord's negligent behavior. Again, the tenants had to file a separate tort claim.

Combining the law of leases with the limitations of nineteenth century procedural systems established a regime in which suits against tenants for either possession or unpaid rent were treated as independent both from each other and from suits for breaches of other contracts or tort duties of care.²¹ The basic lease—the exchange of possession for rent—was both substantively and procedurally independent from other contractual terms. Since each covenant in a lease was said to be independent, breach of one covenant by the landlord—such as a warranty of fitness—could not be used to defend a claim that the tenant breached a different covenant—like the obligation to pay rent for possession. Indeed, the independence of construct governed covenants not only the law of leases but also much of nineteenth century contract law.²² As a result, a suit for unpaid rent was defensible only by a claim of accord and satisfaction (payment), constructive eviction (an action by the landlord so disturbing to the tenant's right to possess the property that the rent for land exchange was deemed void for failure of consideration), or perhaps fraud in the inducement (fraud that induced the tenant to agree to a contract he would otherwise have eschewed).

For American residential tenants, the most serious consequence of this vision of landlord-tenant law was the ability of landlords to speedily evict non-paying tenants. Indeed, American practice "purified" the early English law by getting rid of some impediments to the use of ejectment law to evict non-paying tenants. Early ejectment law often contained a number of technical constraints on the ability of landlords to remove tenants quickly. For example, common law

21. A related body of rules was used to limit the ability of tenants to defend eviction actions brought when they held over beyond the end of their terms. At common law, a landlord, without stating any reasons, could terminate a periodic tenancy upon the giving of appropriately timed notice, even if he breached another standard of care by seeking the tenant's eviction. Landlords, therefore, could retaliate and seek the eviction of tenants who complained about housing code violations to public authorities. That was the rule in Washington, D.C. until 1968. *Edwards v. Habib*, 227 A.2d 388 (D.C. 1967), *rev'd*, 397 F.2d 687 (D.C. Cir. 1968).

22. For material on the nineteenth-century history of American residential landlord-tenant law, see generally Richard Chused, *Contemporary Dilemmas of the Javins Defense: A Note on the Need for Procedural Reform in Landlord-Tenant Law*, 67 GEO. L.J. 1385 (1979); Many Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982); John Humbach, *The Common-Law Conception of Leasing: Mitigation, Habitability, and Dependence of Covenants*, 60 WASH. U. L.Q. 1213 (1983); Sarajane Love, *Landlord's Remedies When the Tenant Abandons: Property, Contract, and Leases*, 30 KAN. L. REV. 533 (1982); Stephen Siegel, *Is the Modern Lease a Contract or a Conveyance?—A Historical Inquiry*, 52 J. URB. L. 649 (1978).

ejectment rules required a property owner to prove that a right to reenter the premises in case of the tenant's breach of a covenant was reserved in the lease. Some statutes, including those in Washington, D.C. and New York, also limited the eviction of tenants to cases where rent was more than six months in arrears.²³ These sorts of constraints on eviction made some sense in pre-industrial England where leasehold arrangements formed the backbone of much of early English property law and embodied a large set of cultural norms and interlocking chains of human relationships. In such a world it was rational to provide for some limits on ejectment. Removal of a tenant could cause a drastic change in social status and class. It served to protect not only the lower classes, but also those in the upper ranks of society who fell upon hard times.

This system came under enormous strain in the United States as towns and cities blossomed during the nineteenth century. The strain arose not out of a perceived need to safeguard the well-being of an increasingly large number of poor urban tenants, but from a desire to protect the financial security of property owners. Early nineteenth century New York City, for example, had a large number of residential tenants. Many of them were immigrants occupying apartments and houses under oral, periodic leases that could be terminated on a month's notice. Use of the ejectment process made it difficult to evict those tenants not paying their rent. Landlords using oral leases could not always prove to the satisfaction of ejectment court judges that they had reserved a right to reenter the premises.

But, most importantly, landlords viewed the six-month waiting period as a major hardship. In 1820, the New York General Assembly rewrote the eviction statute, allowing a tenant to be summarily removed after holding over past the end of the lease term or defaulting in the payment of rent.²⁴ This statute did away with some of the traditional limitations on ejectment and, more significantly, shifted the proceedings to a different court for speedier action. In case of a rent default after the legislative changes, the landlord had to show that the rent was due, that a right to reenter the property was reserved,²⁵ and that a written demand for the rent was served on the tenant at least three days before the judicial proceeding was filed. Statutes similar to New York's appeared all across the United States, including in Washington, D.C., during the nineteenth century.²⁶

23. This was from a British statute, 4 Geo. 2 c. 28 (1731) (Eng.). New York got rid of the six-month waiting period in 1820. Laws of the State of New York, ch. 194, at 176 (Apr. 13, 1820). The D.C. provisions following the old English practice may be found in § 55 Code of Laws for the District of Columbia Prepared Under the Authority of the Act of Congress of the 29th of April, 1816, at 56 (1819).

24. *Id.*

25. Once the eviction cases were shifted to a specialized, speedy court handling a large volume of cases, this requirement became a formality fulfilled by appropriate statements from the landlord that the re-entry right had been reserved in oral undertakings.

26. Many states adopted summary eviction remedies prior to 1850. Ohio enacted a statute in 1831, followed by Georgia in 1833, Massachusetts in 1841, Tennessee in 1842, Indiana in 1843, Illinois in 1845, Michigan in 1846, Texas in 1848, and California in 1850. The best summary of the

II. AS WARDMAN COURTS AGED . . .

A. *Precursors to Reform*

Though there were a few changes in landlord-tenant law during the first half of the twentieth century, they had virtually no impact on the procedures used to evict non-paying tenants. The most significant shifts relevant to our story actually occurred in other areas of consumer law and in civil procedure. By the time the myriad “movements” of the late 1960s and early 1970s arose, it was palpably obvious that change in eviction law was long overdue. Cultural shifts also began to have an impact on Wardman Courts. Through the 1950s, Wardman Courts, by then called Clifton Terrace, was occupied by mostly white, middle-class tenants.²⁷ But by the 1960s when Sidney Brown’s First National Realty Corporation owned the complex, the occupants were largely black and the buildings had fallen into disrepair.²⁸ These legal, demographic and structural shifts laid part of the groundwork for what became the *Javins* controversy.

Contract and consumer law underwent a major transformation between 1900 and 1970. The independent covenant notion, to whatever degree it controlled the contours of nineteenth century law and judicial procedure, disappeared from standard contract law by the early twentieth century.²⁹ Its demise actually began in England in the late eighteenth century with Lord Mansfield’s opinion in *Kingston v. Preston*.³⁰ Justice Cardozo put the lid on the coffin in the United States in the early twentieth century.³¹ In addition, nineteenth century rules favoring freedom of contract and *caveat emptor* gave way either to judicially enforced limitations on bargains or to legislatively imposed regulatory regimes.

twentieth-century statutes may be found in RESTATEMENT (SECOND) OF PROPERTY: STATUTORY NOTE § 12.1 at 399-406 (1977). Washington, D.C. followed the old British ejectment practice in the early nineteenth-century. Code of Laws for the District of Columbia § 55, at 56-59 (1819). By the time a new code was issued in 1857, a summary dispossession act removing the six month waiting period had been adopted. Revised Code of the District of Columbia §§ 110-119, at 478-79 (1857). An 1862 proposal to allow landlords to remove non-paying tenants without the use of court proceedings was not adopted. Ferdinand Hassler, Revision of the Laws of Landlord and Tenant for the District of Columbia (1862).

27. HISTORIC REGISTRATION, Sec. 8, p. 2, reports: “A sampling of Boyd’s *City Directory* listings for Clifton Terrace between 1917 and 1954 identifies the residents as solidly middle-class according to their occupations, which included a number of nurses, salesmen, clerks, a physicist, physicians, teachers, contractors, and managers.”

28. *Id.* at Sec. 8, p. 2; Bart Barnes, *Sidney J. Brown Dies; Developer Battled D.C. Over Code Violations*, WASH. POST, Dec. 13, 2000, at B6 [hereinafter Barnes, *Sidney J. Brown Dies*].

29. The pace at which contract law abandoned independent covenants is subject to some debate. See William H. McGovern, Jr., *Dependent Promises in the History of Leases and Other Contracts*, 52 TUL. L. REV. 659 (1978).

30. 2 Doug. 689 (1773). For additional commentary, see JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 656-57 (4th ed. 2001); E. ALLEN FARNSWORTH, CONTRACTS 555-57 (3d ed. 1999). Farnsworth notes that leases still are an exception. He is in error on this point, as we will see later in the discussion of *Javins*. I guess that paragraph in the hornbook hasn’t been revised since the first edition came out in the 1970s.

31. *Jacob & Youngs v. Kent*, 129 N.E. 889 (N.Y. 1921).

Grant Gilmore, one of the most trenchant chroniclers of twentieth century contract law, nicely described the contours of the transformation in 1957:

It has been a commonplace of legal scholarship that one of the great ground-swells of movement in the nineteenth century was from status to contract—from the protection of rights of property and ownership to the protection of rights of contract. It is easy to see how this should have happened as wealth multiplied and an aristocratic society gave way to its pushing, aggressive, dynamic successor. I suggest that the ground-swell carried an undercurrent with it and that, as the great wave recedes, we are being caught in the undertow. The next half century may well record a reverse movement.

In the crucial business of allocating commercial and social risks we have already gone a long way toward reversing the nineteenth century. In tort we follow a banner which bears the strange device: liability without fault—though we soften the impact on the innocent tortfeasor by various schemes of insurance and compensation. In contract we have broken decisively with the nineteenth century theory that breach of contract was not very serious and not very reprehensible—as Justice Holmes once put it: every man is “free to break his contract if he chooses”—from which it followed that damages for breach should be held to a minimum. Today we look on breach of contract as a very serious and immoral thing indeed: never, I dare say, in our history have the remedies for breach been so easily available to the victim, or the sanctions for breach so heavy against the violator The continuing increase in seller’s warranty liability is merely one illustration of what has been going on all along the contract front.³²

The contracts and torts textbooks used by first year law students are littered with famous opinions exemplifying the shifts described by Gilmore.³³ But these at times dramatic shifts in consumer law had quite limited effects on landlord-tenant law. The notion of independent covenants continued to govern suits by

32. Grant Gilmore, *Law, Logic and Experience*, 3 How. L.J. 40-41 (1957).

33. Among the best known are Justice Cardozo’s writing on products liability in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916); Justice Francis’ limiting the validity of form contracts disclaiming warranties in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); Judge Traynor’s opining on products liability in *Escola v. Coca-Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) and on strict liability in *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963); and Judge Wright’s exploring unconscionable sales contracts under Uniform Commercial Code § 2-302 in *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). The critique of form contracts in KARL LLEWELLYN, *THE COMMON LAW TRADITION* 362-70 (1960) is also well known to many legal educators. A similar shift appeared in the rules governing sales of new houses, with warranty and products liability law protecting many buyers of new or substantially remodeled housing units by the 1960s. This history, along with a list of cases, is laid out in Justice Norvell’s opinion in *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968), also commonly used in textbooks. See also E. F. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967). The movement continued with a series of legislative actions in the 1960s and 1970s. Two of the most prominent federal enactments were the Truth in Lending Act, 15 U.S.C. § 1601, adopted in 1968, and the Magnuson-Moss Act, 15 U.S.C. § 2301, passed in 1975. Both acts require disclosures to consumers—on the terms of loans in the case of Truth in Lending and warranties in the case of Magnuson-Moss.

landlords for rent or possession. Only the rules on the liability of owners for tenant injuries were swept along with the general tide of reform.

Recall that at common law, landlords were not responsible for any injuries suffered by tenants on rented property.³⁴ Once landlords transferred possession to tenants, they were relieved of further responsibility. Two developments caused the common law rule to erode. First, the growth of apartment living led to a number of cases in which injuries occurred in building areas left in the control of landlords. Just before Wardman Courts was constructed, the Court of Appeals for the District of Columbia followed the national trend in holding a landlord responsible for property damage caused by steam escaping from a heating pipe. Recognizing that apartment living was "a class of tenancy of comparatively recent origin" and that it was not reasonable "to suppose that the [landlord] . . . intended to permit the plaintiff to exercise any control over the main steam pipes in his apartment," the court placed a duty on landlords to properly maintain stairways, common areas and other facilities under their control.³⁵ The same result was reached a short time after Wardman Courts was completed in a case against Wardman himself.³⁶

The other major impetus for changes in landlord liability was the adoption of housing and building codes, beginning in New York around the turn of the twentieth century.³⁷ Eventually, courts looked to the codes to establish duties of care in tort cases. Justice Benjamin Cardozo was among the first to take this step, holding in the famous case of *Altz v. Leiberson* that a landlord was responsible for injuries caused to a tenant when a bedroom ceiling collapsed.³⁸ Reform of this sort was much slower in coming to Washington, D.C. The city did not adopt a comprehensive housing code until 1955. A few years after the code went into effect, Judge Bazelon, explicitly relying in *Whetzel v. Fisher Management Company*³⁹ on the ground broken by Justice Cardozo in *Altz*, used the newly adopted regulations to impose a duty on landlords to safely maintain their premises.

At the same time that consumer and tort law reforms were altering the obligations of product manufacturers and vendors, civil procedure reforms were

34. For a summary of the operation of this rule and its reform in the District of Columbia, see JULIAN KARPOFF, *LANDLORD AND TENANT LAW IN THE DISTRICT OF COLUMBIA* 45-57 (1977).

35. *Iowa Apartment House Co. v. Herschel*, 36 App. D.C. 457 (D.C. Cir. 1911).

36. *Wardman v. Hanlon*, 280 F. 988, 52 App. D.C. 14 (D.C. Cir. 1922).

37. New York adopted Tenement House Laws in 1894 and 1901 and more comprehensive codes during the following decades. For more on the history of landlord-tenant law in New York, see Richard Chused, *Landlord-Tenant Courts in New York City at the Turn of the Twentieth Century*, in *PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE* 411 (Willibald Steinmetz ed., 2000).

38. 233 N.Y. 16, 134 N.E. 703 (N.Y. 1922).

39. 282 F.2d 943, 108 U.S. App. D.C. 385 (D.C. Cir. 1960). Judge Bazelon's efforts to impose a duty of care on landlords to maintain their properties in a safe and sanitary manner in two earlier cases, decided before the adoption of the housing code, failed to muster court majorities. *Hanna v. Fletcher*, 231 F.2d 469, 97 U.S. App. D.C. 310 (D.C. Cir. 1956); *Bowles v. Mahoney*, 202 F.2d 320, 91 U.S. App. D.C. 155 (D.C. Cir. 1953).

altering the face of American litigation. The Federal Rules of Civil Procedure were promulgated in 1938, enhancing the ability to litigate all issues arising out of the same situation at one time. Party joinder, counterclaims and cross-claims became routine. Within a fairly short time, most states emulated the federal system in their own procedural rules.

Despite these reforms in both law and procedure, the day-to-day relationships between landlords and tenants in Washington, D.C. and elsewhere did not change very much. The parties most commonly met in summary dispossession court when the landlord sued for possession of an apartment. In this setting, the old common law regimes continued to operate largely unchanged and unchallenged. A tenant could still move out and claim constructive eviction if the premises were “unfit for the purpose for which they were rented.”⁴⁰ This standard, worded much like an implied warranty of fitness for use, was more lenient than the common law rule.⁴¹ But residential tenants rarely took advantage of the opening. It was risky for tenants to move out and claim constructive eviction. If tenants lost their claim they were still responsible for paying rent. Most judicial proceedings, then and now, were simple actions brought by landlords for possession, either because rent was due or because tenants stayed over beyond the end of their terms. In these actions, courts still routinely applied the old common law rules—covenants were independent; no warranties were implied; and, save for accord and satisfaction, no defenses were available to an action for possession for non-payment.

The lack of lawyers willing to represent tenants exacerbated the problem. Tort lawyers sometimes were willing to take on the personal injury cases of poor injured tenants in the hopes of obtaining a contingent fee, but virtually no lawyers were willing to take on the eviction problems of a poor non-paying tenant. Until legal services programs arrived in the late 1960s, lawyers rarely challenged the operation of summary dispossession proceedings in residential lease disputes.

The real historical mystery in all of this is why the treatment of eviction cases in landlord-tenant court remained in this nineteenth century mode until the late 1960s and early 1970s. Progressives spent enormous amounts of time and energy during the late nineteenth and early twentieth centuries on tenement house reforms, City Beautiful buildings and parks, sanitation systems, and zoning.⁴² The social work and settlement house movements knew well the plight of immigrant and black tenants. Yet the most common assistance given to poor tenants about to be evicted was to urge summary dispossession court judges to delay the eviction of “good” tenants a few days so they could find another place to live. Blaming the poor for their plight was endemic even among the most forward

40. *Ackerhalt v. Smith*, 141 A.2d 187, 189 (D.C. 1958).

41. The earlier standard was that the “landlord must have done, or be responsible for, some act of a permanent character with the intention and effect of depriving the tenant of the enjoyment of the demised premises.” *Hughes v. Westchester Dev. Corp.*, 77 F.2d 550, 64 App. D.C. 292 (D.C. Cir. 1935).

42. See ROY LUBOVE, *THE PROGRESSIVES AND THE SLUM: TENEMENT HOUSE REFORM IN NEW YORK CITY, 1890-1917* (1962).

looking activists of the day. They could not get beyond the notion that the payment of rent was an unchallengeable obligation.⁴³

Perhaps the explanation can be found in the hearts and souls of those in the middle and upper classes who drove the Progressive Movement. For the most part, they were reacting to the chaos and disorganization of urban life at the turn of the twentieth century. The various crusades to clean up cities focused on the ways urbanization lowered the virtue and health of the impoverished and tempted children of all classes to misbehave. Structural reforms thought likely to make city life safer, poor people more virtuous and urban cacophony less threatening to the better off dominated the agenda. Many accepted the notion that improving the physical surroundings of the poor strengthened their moral backbone.⁴⁴ Tenement house reforms, housing codes, creation of parks, improvement of sanitation systems and zoning fit naturally into the progressive mix, even for many conservatives.⁴⁵ Each focused on the physical surroundings in which the poor lived and promised to protect those living in nearby middle and upper class neighborhoods. Reconstructing summary dispossession court, however, met few if any of the progressives' goals. Indeed, providing tenants with the ability to remain in unhealthy tenement house apartments only exacerbated the problem. And for those—progressive and otherwise—motivated by nativism and racism, the very idea of helping the immigrant and black residents of the slums was an anathema.

Many of the same basic trends continued to dominate urban reforms after World War II. As the white middle-class left the slums during the post-war recovery from the Great Depression, the poor population of urban America became largely black. During the late 1940s and early 1950s, vast resources were focused on assisting veterans, meeting pent up demand for middle-class housing, constructing the interstate highway system and opening suburbs for development. Blacks were systematically excluded from most of these resources⁴⁶ as public antipathy to those left behind in the cities grew.⁴⁷ Summary dispossession court did not become a focus of public attention until black Americans began to claim their full citizenship rights and gain access to legal services.

Regardless of the reasons for the long delay in eviction court reforms, Sidney Brown hardly could have anticipated that either the tenants or the city would

43. Chused, *supra* note 37, at 424-33.

44. BOYER, *supra* note 15, at 174-283.

45. Elsewhere, I developed a similar theory to suggest why Chief Justice Sutherland, the leader of a quite conservative Supreme Court, found zoning constitutional in the face of a strong challenge. Richard Chused, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597 (2001).

46. The classic study is KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985).

47. Lawrence Friedman's brilliant essay, *Public Housing and the Poor: An Overview*, 54 CAL. L. REV. 642 (1966), provides a telling description of how the reputation and esteem of public housing plummeted once it became occupied largely by black citizens.

cause him legal troubles when he purchased Clifton Terrace in 1963.⁴⁸ It was easy to remove non-paying residents and the city's code enforcement system was largely ineffectual.⁴⁹ By the early 1960s, the landlord-tenant court was processing tens of thousands of cases per year.⁵⁰ Handling this enormous load was relatively simple. Landlords quickly obtained judgments for possession from a court that refused to allow non-paying tenants to raise any warranty or other consumer defenses. Most cases took only moments to hear. For those tenants who bothered to show up,⁵¹ the proceedings went something like this:

The Clerk calls the parties to stand before the judge:

Landlord's Lawyer: (After introducing his rent payment records into evidence.) My records show that Tom and Teresa Tenant have not paid the rent for the past month. I rest.

Court (speaking to the unrepresented tenant): Have you paid the rent?

Tenant: No, but . . .

Court: Judgment for landlord. Call the next case.⁵²

48. Carl Bernstein & Robert G. Kaiser, *Brown Says: Compromise or Evictions*, WASH. POST, Nov. 12, 1967, at A1; Carl Bernstein, *Clifton Terrace Faces Fight on Permit*, WASH. POST, Nov. 16, 1967, at B1. In checking the deeds of record, I found that they do not show Brown and First National Realty as the owners of Clifton Terrace. There was, however, never a dispute about this. Apparently the deeds were never recorded. That is what showed up in other litigation involving Brown and First National Realty. *Brown v. Collins*, 402 F.2d 209 (D.C. Cir. 1968).

49. This became clear during the controversy over Clifton Terrace, as calls for enforcement of the housing code led to highly publicized raids on Clifton Street while other properties largely were ignored. Washington, D.C. was not the only city with lax enforcement of housing codes. NAT'L COMM'N ON URB. PROBLEMS, *BUILDING THE AMERICAN CITY* 282-95 (1968) [hereinafter *THE DOUGLAS COMMISSION REPORT*].

50. As far as I know, reports on judicial statistics don't exist for the early 1960s before the courts of the District of Columbia were reorganized into their present structure. But in 1977, an astounding 110,461 cases were filed in the Landlord and Tenant Branch of the Superior Court of the District of Columbia. JOINT COMM. ON JUDICIAL ADMIN. IN THE DISTRICT OF COLUMBIA, 1978 ANNUAL REPORT OF THE DISTRICT OF COLUMBIA COURTS 30 (1979) [hereinafter 1978 ANNUAL REPORT]. Even if only half that many were filed in 1960, it is clear that the single judge hearing eviction cases was faced with a massive caseload.

51. Even today, a large proportion of the tenant-defendants in urban dispossession courts do not show up for their hearings. This occurs for a variety of reasons. Some move out after receiving a complaint and summons and never bother to go to court. Others never receive notice or ignore it. And some pay their rent after receiving legal papers and assume they don't have to go. If a tenant fails to appear, a default judgment is entered for the landlord, who can then seek to have the tenant's possessions removed from the apartment.

52. This is my version of what these "trials" were like based on my own visits to landlord-tenant courts in Chicago while in law school between 1965 and 1968 and in Newark while teaching at Rutgers Law School between 1968 and 1973. A very similar version was given by Gene Fleming, the legal services attorney who represented the Clifton Terrace tenants in court, when he was interviewed for *Some Are More Equal Than Others*, part one of the three part series *Justice in America* moderated by Eric Sevareid and televised by CBS News Reports in 1971. In that show Fleming noted that some tenants, when asked if they had paid the rent, would attempt to complain about housing conditions. After being cut off, some judges, Fleming reported, asked the landlords' lawyers if they would be willing to allow the tenant to stay a few more days before being evicted. Similar reports about the processing of tenants in urban landlord-tenant courts may be found in a terrific article by Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voice in Legal Process*, 20 HOFSTRA L. REV. 533 (1992).

Tension was the result. Such hearings were out of sync with the widely publicized arrival of consumer remedies in other judicial settings. Racial friction and urban unrest were exacerbated as thousands of tenants—mostly black by the 1960s—were dragged through urban landlord tenant courts.⁵³ Housing conditions, thought by many to be on the decline in black urban neighborhoods, created additional disaffection. It was inevitable that, at some point, eviction courts would become the focus of public attention. For Washington, D.C., that point arrived not too long after 1965 when a program offering legal services for the poor—created with federal grant funds from the Office of Economic Opportunity—opened an office in the basement of the Clifton Terrace Apartments.⁵⁴

B. Rent Strike

Columbia Heights, the neighborhood in which Clifton Terrace is located, was a logical spot to place a legal services office. Though housing quality may well have been improving across income and racial lines nationally and in the District of Columbia,⁵⁵ Columbia Heights was an exception to the general trend.

53. Surveys revealed that dissatisfaction about housing—poor code enforcement, discrimination and overcrowding—was a major concern in cities that witnessed disturbances in the mid 1960s. NAT'L ADVISORY COMM'N, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 80-83 (1968).

54. Some form of legal services for the poor had been around for quite a while, usually in the form of offices supported by donations from local bar associations. But these offices were usually small and unable to handle very much work. Some experimental offices also received funding from the Ford Foundation in the early 1960s. A major aspect of President Lyndon Johnson's War on Poverty, launched in 1964, was the creation of the Office of Economic Opportunity (OEO), designed to give grants for community organizing and other local projects to help the poor. Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508. It was a remarkable program. The government actually gave out grants to groups of people pursuing complaints against local, state and federal agencies. One of the first, most important and (other than Head Start) only long-lasting effort of OEO was the funding of legal services programs. In 1964 Jean and Edgar Cahn published what became a famous law review article advocating the establishment of a nationally funded legal services program. Edgar S. Cahn & Jean Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964). The Cahns were also friends of Sargent Shriver, who was appointed by President Johnson to run the OEO, and had enormous influence on his decision to begin funding legal services offices. The OEO initiated a large-scale grant program in 1965. This infusion of funds allowed new legal services offices to open all over the country in the late 1960s. For more on the early history of legal services, see EARL JOHNSON, JR., *JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM* (1973); Alan W. Houseman, *Civil Legal Assistance for Low-Income Persons: Looking Back and Looking Forward*, 29 FORDHAM URB. L.J. 1213 (2002); John Mahoney, *Green Forms and Legal Aid Offices: A History of Publicly Funded Legal Services in Britain and the United States*, 17 ST. LOUIS U. PUB. L. REV. 223 (1998). Taking inflation into account, federal funds available for legal services programs in 2001 amounted to about half of the amount available in 1980 when Ronald Reagan was elected President. Houseman, *supra* at 1222.

55. For a review of national housing trends in the 1960s and 1970s, see Edward Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequence*, 69 CORNELL L. REV. 517, 542 (1984). Rabin claimed that housing conditions were at their highest levels ever during the era in which landlord-tenant law was dramatically changed and that the reforms of the 1960s and 1970s, therefore, had to arise from other cases. I suspect that is erroneous, given the condition of housing in certain areas of American cities. Though the federal government data used by Rabin suggests that the general

“[B]etween 1950 and 1970, the proportion of the nation’s housing stock characterized as ‘dilapidated’ decreased by more than 50 percent; the proportion not having complete plumbing facilities decreased by more than 80 percent; the proportion that was overcrowded fell almost 50 percent.”⁵⁶ Housing even improved for those in the lowest third of the income distribution. The number of units without complete plumbing facilities fell by more than 80 percent and the percentage of overcrowded units dropped by more than half.⁵⁷ Some of the same general trends appear in the data for Washington, D.C. By 1970, only 2.3 percent of all the housing units in the city lacked some basic plumbing facilities.⁵⁸ Overcrowding also declined, though not as fast as the national rate.⁵⁹ But in the census tract containing Clifton Terrace, some major trends were flowing in the opposite direction. While plumbing became more ubiquitous, serious overcrowding almost doubled and the number of owner occupied units fell dramatically. And, not surprisingly, the census tract flipped from an almost completely white to an almost completely black neighborhood between 1950 and 1970.⁶⁰ Similar trends existed in other impoverished urban neighborhoods as the number of non-whites living in substandard housing increased from 1.4 to 1.8 million during the 1950s alone.⁶¹

Edmund “Gene” Fleming, a 1961 law school graduate of George Washington University Law School, was among the first lawyers hired by the Neighborhood Legal Services Program in Washington. He sought out the job after part-time work with a firm while in school and a couple years of practice after graduation convinced him that people “without funds or sophistication” caught up in the

characteristics of the housing stock were improving during the 1960s and 1970s, U.S. DEPT. OF HOUS. & URB. DEV., *HOUSING IN THE SEVENTIES: A REPORT OF THE NATIONAL HOUSING POLICY REVIEW* 165-82 (1974) [hereinafter *HOUSING IN THE SEVENTIES*], other federal studies confirm that conditions in many urban areas were worsening. THE DOUGLAS COMMISSION REPORT, *supra* note 49, at 40-55.

56. *HOUSING IN THE SEVENTIES*, *supra* note 55, at 165.

57. *Id.* at 169. Overcrowding in this study is defined as more than one person per room in the housing unit.

58. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, *CENSUS TRACTS: WASHINGTON, D.C.-MD.-VA. STANDARD METROPOLITAN STATISTICAL AREA* (1970), at Table H-101.

59. Housing units with 1.51 or more persons per room fell from 5.2 percent of the occupied units to 4.5 percent. *Id.*

60. The data here was gathered from the Census Tract reports of the Bureau of the Census for 1950, 1960 and 1970. By 1970, slightly more units in the Clifton Terrace Census Tract (#36) lacked all plumbing facilities than in the city as a whole, but the number was still quite low at 4.4 percent. The crowding data, however, was noticeably different. The rate of serious overcrowding rose from only 6.0 percent of housing units containing 1.5 or more persons per room in 1950 to 11.6 percent in 1970. 20.1 percent of the units contained 1 or more person per room in 1970, compared to only 16.8 percent ten years earlier. Units in the tract occupied by their owners fell from 14.3 percent of the housing stock in 1950 to 8.5 percent in 1970. There was also a significant rise in the number of unoccupied units in the tract, reaching 15.6 percent in 1970. Clearly the national housing trends were not reflected in the conditions in and around Clifton Terrace.

61. The “Kerner Commission,” assembled by President Johnson to investigate the urban racial disturbances of the 1960s, gathered quite a bit of information on this problem, concluding that housing problems were a significant contributing cause to the unrest. NAT’L ADVISORY COMM’N, *supra* note 53, at 257-63.

legal system were “cheated most of the time.”⁶² He saw an announcement about the establishment of the neighborhood legal services program in Washington, called Julian Riley Dugas, the director, and was hired.⁶³ Shortly after Fleming joined the organization, Dugas asked him to run the Clifton Terrace office. When he arrived, Fleming had two other lawyers on the staff, along with two neighborhood workers⁶⁴ and a secretary named Ruth Bradley.⁶⁵

In January 1966, not too long after Fleming arrived at the Clifton Terrace office, Pat Garris walked in, asked to speak with a lawyer and was taken to see Fleming.⁶⁶ Garris was a neighborhood organizer for the War on Poverty and a resident, along with her two children, of the apartment complex. She told Fleming that Clifton Terrace was a mess—no heat in the buildings for the past six weeks together with a host of other maintenance and vermin problems. “Something,” Garris said, “had to be done.”

Fleming visited her apartment. He found a washtub in the middle of the living room floor collecting water dripping from the light fixture and discovered that she was trying to heat her apartment with the kitchen stove. After some discussion, Garris and Fleming agreed that a rent strike was the best strategy. Fleming promised to provide legal assistance—though he confided in a recent interview that “I was dreaming up the legal solutions as I went along.” Garris agreed to help organize the strike.

Garris found twenty-nine tenants willing to withhold rent.⁶⁷ Each sent the landlord a letter drafted by Fleming stating that rent would be withheld until repairs listed in each letter were made.⁶⁸ Sidney Brown, according to Fleming, responded to the letters with a series of steps designed to reduce the impact of the planned strike. First, he complained to the Director of the Legal Services Program about Fleming’s support for the Clifton Terrace tenants. A little “hearing” was held in the program offices on the matter. Though he was allowed to continue his work, Fleming is still miffed about being called in to explain his

62. E-mail from Gene Fleming, Attorney, to the author (Aug. 19, 2002) (on file with author).

63. E-mail from Gene Fleming, Attorney, to the author (Aug. 26, 2002) (on file with author).

64. These workers were hired from the community with funds from the Office of Economic Opportunity. For more on OEO, *see supra* note 54 and accompanying text.

65. Gene Fleming says Pat Garris played an “essential” role in the case, “keeping track of everything, keeping things in order amid the chaos, talking to the tenants, answering their questions.” She did “everything you would hope a very good secretary would do, including taking the initiative when needed.” E-mail from Gene Fleming, Attorney, to the author (Nov. 17, 2002) (on file with author).

66. The narrative that follows in the text, unless otherwise noted, comes from a telephone interview of Gene Fleming by the author on May 29, 2002.

67. Rent strikes occurred in many cities across the country during the late 1960s and early 1970s. For a description of one of the largest, *see* Frances Fox Piven & Richard A. Cloward, *Rent Strike: Disrupting the System*, NEW REPUBLIC, Dec. 2, 1967.

68. The wisdom of this strategy was revealed later. Virtually all implied warranty cases, including *Saunders*, require the tenant to give notice of housing defects to the landlord in order to defend any later action for rent or possession based on housing code violations. Fleming made the logical assumption that this sort of rule would emerge if he ever managed to alter then-extant legal norms.



Narrow Hallway in Unremodeled Section of The Clifton Terrace Apartments
(August 2002)

actions.⁶⁹ Brown also visited the United States Marshal and alleged that Fleming had stolen money from the tenants.⁷⁰ Nothing came of it. In addition, tenants told Fleming that Brown went around Clifton Terrace “talking” with the rent-striking tenants and “threatening” them with eviction and other acts of reprisal. The pressure led some of the strikers to back out and pay their rent.

Finally, one of the tenants in the group of strikers, who was behind in rent before the letters announcing the rent strike were distributed, was approached by the landlord and agreed to submit an affidavit accusing Garriss⁷¹ and Fleming of

69. Fleming had the understanding that the issue was whether he should be fired. In his view, the leaders of the legal services program had accepted “outrageous accusations” and passed judgment on whether his lawyering was “politically ok.” The review of his status was also triggered because Fleming had drafted a complaint seeking affirmative relief against First National Realty and sought permission to file it before eviction actions were filed. Review of that proposal was delayed by the “hearing.” When the eviction actions were filed, he decided not to proceed with it. E-mail from Gene Fleming, Attorney, to the author (Nov. 17, 2002) (on file with author).

70. Fleming found this very odd. The Marshal’s Office, created to work for and protect the courts, has no prosecutorial authority. As far as Fleming knows, Brown never approached the local United States Attorney.

71. Pat Garriss did not end up participating in the appellate parts of the litigation. She moved out of the complex. No one associated with the case now knows of her whereabouts.

wrongdoing in the hope of getting a break on his overdue rent. But Brown went ahead and sued for possession of his apartment anyway. The tenant—thinking no help would be provided after he agreed to cooperate with the owner—never brought his court papers to Fleming’s attention. As a result, no answer or other pleading was filed to protect him from eviction. Brown proceeded with this case as quickly as he could. A judgment for possession was obtained and the tenant’s belongings were put on the street.⁷² These events were the subject of widespread discussion among the tenants and caused some of those who had initially agreed to strike to fold their tents. Those still willing to strike began withholding rent in April 1966. Almost immediately thereafter, actions were filed seeking to evict them from their apartments.⁷³ By the time the trial rolled around, only six tenants remained as defendants. And so the stage finally was set for the legal drama that would alter the contours of landlord-tenant law.

III. THE LOCAL APPEAL: FROM RENT STRIKE TO CIVIL DISORDER

A. *The “Trial”*

The attorney for the First National Realty Corporation was Herman Miller. He was a courthouse fixture who represented numerous landlords for many years in eviction actions.⁷⁴ During the early part of his career, he represented tenants seeking relief under the rent control statutes adopted during World War II. He also helped train legal services lawyers in landlord-tenant law. But by the late 1960s, the bulk of his clients were landlords. Miller, it is said, used to announce: “God bless the person who sues my clients!” He also was “very proud of the fact that he had represented tenants” during the war.⁷⁵

In preparation for trial, Fleming took the then unusual step of filing answers to the complaints for possession filed by First National Realty Corporation. Normally tenants were told to show up about ten days after being served with the complaint and summons. The cases then went forward in quick succession without further procedural ado.⁷⁶ The format for raising defenses in eviction cases was far from well-established. Only one fairly obscure case suggested the availability of an implied warranty defense in eviction actions.⁷⁷ Law review

72. E-mail from Gene Fleming, Attorney, to the author (Sept. 11, 2002) (on file with author).

73. The eviction actions were filed on April 8, 1966.

74. Westlaw lists Miller as an attorney of record in a remarkably high 172 reported cases involving landlord-tenant issues decided in the District of Columbia between 1942 and 1978. He took part in uncounted thousands of unreported actions at the trial court level. His office at 421 Fourth Street, NW was right across the street from the courthouse complex.

75. E-mail from Florence Wagman Roisman, to the author (Oct. 18, 2002) (on file with author).

76. Recall the “transcript” of a typical hearing, *supra* text accompanying footnote 52.

77. *Pines v. Persson*, 111 N.W.2d 409 (Wis. 1961). *Pines* involved the rental of a furnished house, a long-time exception to the no-warranty rule at common law. The litigation also took the form of using constructive eviction as a defense to an action for rent rather than trying to create a defense to eviction for

literature on tenant defenses barely existed.⁷⁸ The *Clearinghouse Review*, a newsletter published by the National Clearinghouse for Legal Services that became a major resource for poverty lawyers, and the *CCH Poverty Law Reporter*⁷⁹ did not appear until 1967 and 1968, respectively. So when Fleming said he was making up things as he went along, there is every reason to believe him. Under the circumstances, he did very well indeed, anticipating exactly the sort of remedy that was put into effect when *Javins* was finally resolved. In each answer he claimed:

That as and from April the 1st, 1966, the premises occupied by the Defendant have been in an uninhabitable condition and in violation of the Housing Regulations of the District of Columbia. Plaintiff has failed and/or refused to maintain a habitable dwelling for Defendant and others according to their agreement. This failure and/or refusal has occurred in spite of repeated complaints by and/or on behalf of the Defendant and others of these conditions to the proper authorities of the District of Columbia. All to the damage of the Defendant in an amount equal to that otherwise due as rent payment for the month of April had the premises been in a habitable condition under the Housing Regulations of the District of Columbia.⁸⁰

As noted at the beginning of this essay, Judge Austin Fickling heard the cases—including evidence of bags of mouse feces, dead mice, roaches and all—on June 17, 1966. Notices of appeal were filed immediately after judgment was entered for the landlord.

non-payment of rent. But the language of the opinion approving of the existence of an implied warranty was potentially far reaching.

78. There were really only three articles on eviction law out by 1966. Hiram Lesar, *Landlord and Tenant Reform*, 35 N.Y.U. L. REV. 1279 (1960); Hiram Lesar, *The Landlord-Tenant Relation in Perspective: From Status to Contract and Back in 900 Years?*, 9 U. KAN. L. REV. 369 (1961); and Robert S. Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 GEO. L.J. 519 (1966). There was also one article urging reform of tort law. Joseph Sax & Fred J. Hiestand, *Slumlordism as a Tort*, 65 MICH. L. REV. 869 (1965). The Schoshinski piece was the most important of the lot. It appeared in the Winter 1966 edition, which, according to Chris Knott at the Georgetown Law Library, was received by subscribers in early February. Telephone Interview with Chris Knott, E.B. Williams Law Library, Georgetown University Law Center (Nov. 12, 2002). That was a bit over two months before the answers were filed in the eviction cases. Fleming says he was unaware of the article at the time. E-mail from Gene Fleming, Attorney, to the author (Nov. 5, 2002) (on file with author).

79. This is no longer published. The demise of this publication, as well as the sinking into obscurity of a host of other work on poverty published in the late 1960s and 1970s reflects a major downward shift in the level of attention paid by legal institutions and law schools to poverty questions during the 1980s and 1990s. There is some evidence that interest in these sorts of subjects is returning. Georgetown University Law Center, for example, began publishing the *Georgetown Journal on Poverty Law and Policy* in 1993.

80. Defendant's Answer, *First Nat'l Realty Corp. v. Saunders*, (Ct. Gen. Sess. 1966) (No. LT 28968-66). Fleming also included a paragraph asking the court to hold rent payments pending the outcome of the action. This was probably a wise strategic step, for it insured that if the tenant defenses were found wanting, the landlord would still get his rent money. According to Fleming, it was also designed to make it easier to stay evictions during the appeal he assumed would be necessary. E-mail from Gene Fleming, Attorney, to the author (Nov. 17, 2002) (on file with author).

B. Appellate Briefs

Of the six tenants involved in the landlord-tenant court hearing, four participated in the appeal to the District of Columbia Court of Appeals—Rudolph Saunders, Ethel Javins, Gladys Grant, and Stanley Gross. Saunders, according to Fleming, was the central figure among the rent strikers—“staunch, 30ish, slender, quiet and determined.”⁸¹ When the appeal was filed, Fleming made sure to list him first so the case would be named after him. That worked in the District of Columbia Court of Appeals,⁸² but not in the federal Court of Appeals, which listed Ethel Javins first in the opinion, even though the first round of briefs filed in the case styled it in the name of Saunders. To this day, Fleming does not know why the name switch occurred. Perhaps authors of first-year property textbooks should rename the case in Saunders’ honor, as will be done in the rest of this essay.⁸³

The dispute was ready for argument in the District of Columbia Court of Appeals fairly quickly. One “curious” event occasioned some minor delays in the submission of briefs. Fleming arrived at his legal services office in Clifton Terrace one morning to find that “shit had fallen on my desk during the night and ruined the papers I was working on.”⁸⁴ He asked for a continuance and finally filed his brief for the tenants on November 4, 1966. The landlord’s brief was filed only twelve days later and the tenants’ reply a week after that. By Thanksgiving the case was ready to be heard. Oral arguments, however, did not occur until March 11, 1968, almost one and one-half years after the briefs were all submitted. The appellate decision was not rendered until September 23, 1968, well over two years after Judge Fickling’s original order was entered.

The arguments in the briefs were fairly straightforward. Much of Fleming’s argument was similar to the contents of the first major law review article on the implied warranty of habitability.⁸⁵ Written by Professor Robert Schoshinski of Georgetown and full of information about District of Columbia case law and regulations, the article was published just before the trial. He and Fleming drew upon recent changes in consumer law, especially tort cases like *Whetzel v. Jess Fisher Realty*,⁸⁶ finding that housing code regulations created a duty of care for

81. Telephone Interview with Edmund “Gene” Fleming, Attorney (May 29, 2002).

82. The decision in that forum is *Saunders v. First Nat’l Realty Corp.*, 245 A.2d 836 (D.C. 1968).

83. Except when citing to the official case report, I will refer to the case by Saunders’ name in the rest of this tale.

84. Telephone Interview with Edmund “Gene” Fleming, Attorney (May 29, 2002). Remember that this occurred in pre-computer days. Typed documents with errors, or in this case stains, had to be re-typed.

85. Schoshinski, *supra* note 78, at 523. Though quite familiar with the article by the time he composed his arguments for the United States Court of Appeals, Fleming isn’t sure if he read it for the District of Columbia Court of Appeals brief. E-mails from Gene Fleming, Attorney, to the author (Nov. 5 and 19, 2002) (on file with author). The similarities between Schoshinski’s and Fleming’s arguments suggest it was used for both briefs.

86. *Whetzel v. Jess Fisher Realty*, 282 F.2d 943 (D.C. Cir. 1960).

landlords.⁸⁷ Their argument also relied upon constructive eviction cases, trying to establish a claim that the structure of the rule had long ago undermined the notion of independent covenants⁸⁸ and to convince the court to modify constructive eviction theory for use in eviction cases. Finally, relying upon a court rule that allowed tenants in eviction cases to “set up an equitable defense or claim by way of recoupment or set-off in an amount equal to the rent claim,”⁸⁹ Fleming argued that Judge Fickling’s refusal to hear any evidence of housing code violations or to allow recoupment of rent as damages for housing code violations was erroneous.⁹⁰

Miller’s brief for the landlord responded that enforcement of the housing regulations was strictly a matter between the city and the building owner. The landlord, he argued, was not an insurer of his tenants’ well-being. Nor, he claimed, did constructive eviction rules provide any basis for granting the tenants relief. Rescission of a lease because of constructive eviction required the tenants to return to the pre-contract situation by relinquishing possession back to the landlord.⁹¹ The brief also contained quite a bit of language that some tenants and many legal services lawyers viewed as gratuitously nasty.⁹² At one point, for example, Miller wrote:

There are many instances where landlords expend large sums of money to come into compliance [with housing codes], and just as soon as he is finished, the tenant’s use, his carelessness, the ignoring of his obligations, and his lack of care creates the same violations and in addition to others. Is it fair to require the landlord to keep an armed guard present to prevent the tenants’ continued abuse of the property, and constantly damage the premises, over and over again, and then complain that the landlord is in violation and although the tenant continues to occupy, assert that no rent is due or payable?⁹³

87. Brief for Appellants, *Saunders v. First Nat’l Realty Corp.*, 245 A.2d 836 (D.C.C.A. 1968).

88. This was a pretty dubious claim. Constructive eviction traditionally was limited to those cases in which the entire possession of the tenant was unavailable due to actions of the landlord. In such settings, the basic rent for possession exchange—the single most central covenant of a lease—was rendered null. In most cases, no other covenant was involved; dependency, therefore, usually was irrelevant.

89. Not all states had language that so clearly allowed certain sorts of tenant defenses to be raised in eviction actions. *See, e.g., Marini v. Ireland*, 265 A.2d 526 (N.J. 1970).

90. The fairly long brief also contained quite a bit of material on the difficulties confronting poor urban tenants, the deteriorating condition of housing in much of Washington, D.C., and the need for judicial remedies.

91. Brief of Appellee (Nov. 16, 1966), *Saunders v. First Nat’l Realty Corp.*, 245 A.2d 836 (D.C. 1968).

92. From my own experience handling landlord-tenant issues in the late 1960s and early 1970s, it was a common landlord litany that the tenants caused most or all of the problems. Tenants, when confronted with such talk, uniformly castigated their landlord’s indifference to their plight. The differences in perception, accentuated by racial and other tensions of the day, sometimes were remarkably stark.

93. Brief of Appellee, *supra* note 91, at 2. Pardon the bad English, but a quote is a quote.

The written arguments were closed with a very short Reply Brief in which Fleming made an emotional plea for the application of contract law to eviction law.

It is patently unsupportable that a person renting an apartment in this city does so in disregard of his dependence on the landlord to provide . . . [basic services], or that he would knowingly and willingly agree to do without or get them only at the landlord's whim. The principle of Contract law which provides for dependency, mutuality and consideration, and provides remedies for aggrieved parties to the contract, are much more appropriate than ancient doctrines which purport to recognize no relationship between the obligations of the parties.⁹⁴

C. *Waiting Amid Major Public Controversy*

The somewhat muted fervor of the briefs gave way to outbursts of passion long before the District of Columbia Court of Appeals actually heard oral arguments in the case. Indeed, the court waited so long to calendar the case for oral argument that Fleming took the unusual step of filing a motion requesting the court to do so. Claiming that "the time which has elapsed since the filing of the briefs . . . is well beyond the normal lapse of time within which this case would ordinarily have been scheduled for oral argument," he asked that the case be heard at "the earliest practicable time."⁹⁵ The motion didn't seem to make a lot of difference; arguments were not held until March 1968.⁹⁶

During the wait, the tenants and their advocates were not idle. In June of 1967, the Housing Development Corporation (HDC), a non-profit group set up with a grant from the Office of Economic Opportunity to develop low-cost housing, revealed plans to purchase the notorious buildings at Clifton Terrace.⁹⁷ By October the plans were in jeopardy.⁹⁸ The Federal Housing Administration, claiming that it would be cheaper to tear the buildings down and start from scratch and that the rent levels proposed by HDC would support only a \$3.8 million dollar project, refused to provide a loan for the \$4.8 million HDC wanted for the proposed project.⁹⁹ HDC and city officials responded that the FHA "is shunning the central city ghettos and appears unable and unwilling to do the low-cost housing job Congress assigned."¹⁰⁰ This was the first volley in a continuing stream of criticism of the city and the federal government over the course of the next thirty-five years as Clifton Terrace repeatedly roller-coasted

94. Reply Brief at 2, *Saunders v. First Nat'l Realty Corp.*, 245 A.2d 836 (D.C. 1968).

95. Motion to Calendar for Argument, *Saunders v. First Nat'l Realty Corp.*, 245 A.2d 836 (D.C. 1968).

96. It is unlikely that the court was doing anything nefarious by delaying the arguments so long. Long waits have been common for a long time in this tribunal.

97. *Housing Unit Plans to Buy Apartments*, WASH. POST, June 6, 1967, at B2.

98. Carol Honsa, *Slum Fighters are Stymied*, WASH. POST, Oct. 2, 1967, at B1.

99. *Id.* The plan called for a purchase price of \$1.8 million. The rest of the budget was the projected cost of rehabilitation.

100. *Id.*

from acceptable to unacceptable housing. The prominence of the complex in the Columbia Heights neighborhood of Washington made it a symbol of both the possibilities for developing housing for the less well-off and of the difficulties of bringing those possibilities to fruition.

The *Washington Post* starkly described conditions in the building during the controversy over HDC's plans:

Broken glass and trash litter the walks, alleys, grounds and the large patch of sand and dirt out back called the play area.

Boarded windows deface the spacious entrance lobbies, which hark back to their better days with well-worn marble stairs, carved pillars and high ceiling with elaborate moldings. All upper story apartments have their own balconies, many of them festooned with drying laundry, airing rugs and junk.

....

Rain damage and leaking pipes have buckled the floors and collapsed water-logged ceilings in at least 18 apartments.

The central heating system, a coal burning furnace that consumes 13 tons of fuel a day, breaks down from five to ten times a month during the winter.¹⁰¹

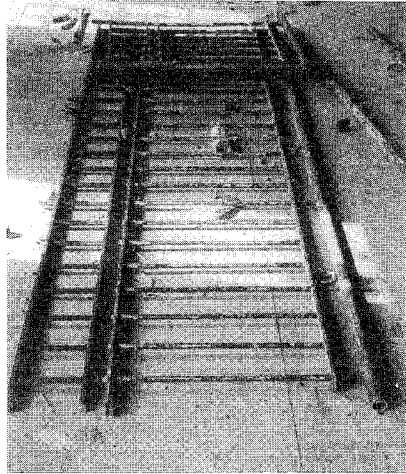
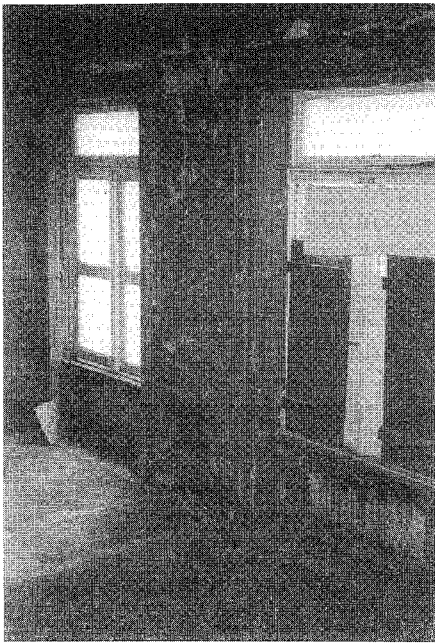
Even a local community organization with its offices in the basement of the complex was forced to move out because the conditions were unacceptable.

While the various parties to the proposed transaction dickered over the terms of the proposed sale and rehabilitation of the apartments,¹⁰² the city began to respond to tenant pressure and pressed Brown to reduce his asking price for the building to enhance the project's feasibility. The story unfolded in a series of *Washington Post* articles by Carl Bernstein—later to become famous as part of the Woodward and Bernstein investigative reporting team during the Watergate Era. Although housing code violations at Clifton Terrace going back at least three years had been filed with the city's Department of Licenses and Inspection, no enforcement actions had been taken.¹⁰³ Late in October 1967, shortly after another blast of criticism from officials at HDC, Robert Campbell, an Assistant Corporation Counsel for the city, announced he was going to haul Sidney Brown into court to enforce the code violations and Robert Weaver, Secretary of the Department of Housing and Urban Development, announced he had reopened negotiations for FHA support of the Clifton Terrace redevelopment project.

101. *Id.*

102. Carol Honsa, *FHA Turns Down Proposal to Purchase Clifton Terrace*, WASH. POST, Oct. 10, 1967, at B2; Carol Honsa, *NW Housing Complex Is Approved by FHA*, WASH. POST, Oct. 21, 1967, at B1; Carol Honsa, *Rehabilitation of Apartment Held Feasible by U.S. Unit*, WASH. POST, Oct. 7 1967, at B3; *Housing Unit Shelves Clifton Terrace Plan*, WASH. POST, Oct. 11, 1967, at B2. By late October, Brown had reduced his asking price by \$150,000 to \$1.65 million. HDC officials were saying that a further reduction of at least \$350,000 was needed to make the project feasible. Carl Bernstein, *Clifton Terrace Code Cases Pushed as Sale Talks Resume*, WASH. POST, Oct. 26, 1967, at D20 [hereinafter Bernstein, *Clifton Terrace Code*].

103. Bernstein, *Clifton Terrace Code*, *supra* note 102.



Old Moldings in Entrance Lobby and Balcony Railing Undergoing Repair in Building at 1308 Clifton Terrace (July 2002)

Campbell claimed he could not understand why the case had never been turned over to the Corporation Counsel for enforcement action, though at least some of the charges against Brown had been held in abeyance at the city's request during negotiations over sale of the buildings.¹⁰⁴

A few days later, "a delegation of angry tenants visited Corporation Counsel Charles T. Duncan,"¹⁰⁵ demanding that heat be immediately provided at Clifton Terrace. Duncan dispatched a member of his staff and a housing inspector to the apartments, documented the continuing violations and directed that Brown be ordered to provide heat by the following day.¹⁰⁶ Despite the order, heat did not percolate through the old, broken down steam pipes. The next day Brown was brought into court, immediately forced to go to trial, found guilty by Judge Milton Kronheim for heating system code violations and sentenced on the spot to a sixty-day term in jail. Clifton Terrace made the front page for the first time:

104. *Id.*

105. Charles Duncan, now retired, had a distinguished legal career. In addition to serving as Corporation Counsel for Washington, D.C., he has been a professor and Dean at Howard University Law School, the first General Counsel of the Equal Employment Opportunity Commission, the first African-American President of the D.C. Bar, Chair of the D.C. Judicial Nomination Commission, and a member of the Iran-U.S. Claims Tribunal in The Hague.

106. *City Tells Clifton Terrace to Furnish Heat to Tenants by Noon Today*, WASH. POST, Nov. 7, 1967, at B1.

As the judge pronounced the sentence, which court officials said represented the first time in their memory that a landlord has been ordered jailed on housing code violation charges, a cheer went up from more than 50 Clifton Terrace tenants in the room.

Brown, who is yet to be tried for another 1200 violations at Clifton Terrace cited by housing inspectors, was visibly stunned by the sentence.

As he was led away to the court's basement cellblock, the landlord, his hands visibly shaking, did not appear to be the defendant who moments before had told the Judge from the witness box that the District government was responsible for the lack of heat at Clifton Terrace.

After remaining in the cell block for about 45 minutes, Brown's attorney, George E. C. Hayes, filed notice of appeal in the case and the landlord was released after posting \$2000 bond.¹⁰⁷

Though heat apparently returned to the apartments for a time,¹⁰⁸ the situation did not cool off. Tenants, along with some legal services attorneys, Paul Fred Cohen and Florence Wagman Roisman,¹⁰⁹ visited Mayor Walter Washington's office demanding that the city make basic repairs and bill the costs to the owner.¹¹⁰ Roisman made several visits with tenants to the District Building (Washington's city hall) demanding action on Clifton Terrace. Charles Duncan witnessed one such call to action. Duncan's main assistant was a gentleman named Hubert Pair, "a very proper and old school lawyer."¹¹¹ Duncan recalls walking into Pair's office one day to find Florence Roisman speaking to a group of tenants from Clifton Terrace while standing behind the desk of a perplexed Mr. Pair. Roisman had pulled a copy of the D.C. Code off the shelf and "was reading to the tenants the sections from the code saying the city had the authority to help out." His relationship with Roisman, Duncan says, was a bit "stormy" in those days, but "we later became good friends."¹¹²

Sidney Brown responded to the swelling controversy by threatening to close

107. Carl Bernstein, *Landlord Is Given Jail Term*, WASH. POST, Nov. 8, 1967, at A1 [hereinafter Bernstein, *Landlord Given Jail Term*].

108. *Heat's on at Clifton*, WASH. POST, Nov. 11, 1967, at B4. Six days later, 60 percent of the units lacked heat. Carl Bernstein, *Slum Project Upsets Mayor*, WASH. POST, Nov. 17, 1967, at A1 [hereinafter Bernstein, *Slum Project*].

109. Roisman worked in the Law Reform Unit of the DC Neighborhood Legal Services Project from 1967 to 1970. Attorneys in that unit took on some of the appellate work on the Clifton Terrace litigation beginning in 1967.

110. *Heat Apartments, Tenants Ask City*, WASH. POST, Nov. 9, 1967, at B2.

111. This little story comes from an interview with Charles Duncan, former Corporation Counsel for Washington, D.C. (May 27, 2002) (on file with author). The exact timing is not clear. Roisman thinks it might have occurred before the city criminally prosecuted Brown and that the prosecution was, in part, a result of this event. Duncan recalled the event, but not its exact historical moment. Roisman also insists she was never behind Pair's desk. Duncan's recollection is different.

112. E-mail from Florence Wagman Roisman, to the author (Oct. 18, 2002) (on file with author). Roisman agrees. When she learned I had tracked Duncan down, she wanted his phone number so she could call and catch up on old times.

down the entire complex and evict everyone.¹¹³ This may have been a reaction not only to pressure from city authorities, but also to his failure to obtain an occupancy permit for Clifton Terrace after he purchased the buildings. Reporter Carl Bernstein revealed the lack of a permit after an unnamed reporter for the *Washington Post* made inquiries about it with city authorities.¹¹⁴ Perhaps Bernstein was in training for his later Watergate exploits.

This chapter of the conflict came to a head just before Thanksgiving. On the morning of November 16, Corporation Counsel Charles Duncan visited Clifton Terrace. "I've never seen," he said, "a more appalling place where people lived." The conditions, he added, were "subhuman."¹¹⁵ Later that day he took Mayor Washington for a look—a step that led to a story on the front page of the *Washington Post* with a large photo and a large headline.¹¹⁶ On the day of the Mayor's visit, tenants of Clifton Terrace filed suit in federal court seeking to require the city and Sidney Brown to make repairs.¹¹⁷ On Thanksgiving Day, it was reported that "60 percent of the units were without heat."¹¹⁸ In early December, amid talk of landlords and tenants being "at war,"¹¹⁹ legal services lawyers partly reconstructed their litigation by filing an amended complaint seeking to bar Brown from evicting the tenants from Clifton Terrace.¹²⁰

The entire ruckus, which also included sit-ins by tenants in the offices of Robert Weaver, Secretary of the Department of Housing and Urban Development, designed to convince him to fund the Clifton Terrace project,¹²¹ finally led to the signing of agreements calling for the sale of the buildings to HDC. Sidney Brown obtained \$1.4 million dollars for the complex, \$400,000 less than his initial demand. Brown later claimed that the price was \$200,000 below what he paid for the buildings and \$250,000 less than the mortgage encumbering the complex.¹²²

113. Robert G. Kaiser & Carl Bernstein, *Brown Says: Compromise or Evictions*, WASH. POST, Nov. 12, 1967, at A1. Most tenants were on month-to-month leases. At common law, landlords could evict such tenants on one month's notice. In some areas now, a good cause must be posited in order to terminate month-to-month tenancies.

114. Carl Bernstein, *Clifton Terrace Faces Fight on Permit*, WASH. POST, Nov. 16, 1967, at B1.

115. Telephone Interview with Charles Duncan, former Corporation Counsel for Washington, D.C. (May 27, 2002) (on file with author).

116. Bernstein, *Slum Project*, *supra* note 108. The Post also wrote a strongly worded editorial that day castigating the city for lax enforcement of housing codes. Editorial, *Neglected Housing Code*, WASH. POST, Nov. 17, 1967, at A24.

117. Clifton Terrace Ass'n v. Brown, (D.C. Super. Ct. 1967) (No. 2958-67); Carl Bernstein & Robert G. Kaiser, *City Sued by Tenants of Clifton Terrace*, WASH. POST, Nov. 18, 1967, at B1.

118. Paul W. Valentine, *Most Dined Well, Some Didn't; Turkey Was Free for Hundreds*, WASH. POST, Nov. 24, 1967, at A23.

119. Jack White, Jr., *Landlords, Tenants at War*, WASH. POST, Nov. 25, 1967, at B1.

120. The amended complaint in Clifton Terrace Tenants Ass'n v. Brown was filed on December 6, 1967. Carl Bernstein, *Court Asked to Forbid Clifton Terrace Ousters*, WASH. POST, Dec. 8, 1967, at B1.

121. E-mail from Florence Wagman Roisman, to the author (Oct. 18, 2002) (on file with author) [hereinafter Roisman Oct. 18, 2002 e-mail].

122. Stuart Auerbach, *Clifton Case Settled By No-Contest Plea*, WASH. POST, Jan. 16, 1968, at D1.

The second criminal trial of Sidney Brown and his First National Realty Corporation for violating the housing code began on December 15, 1967,¹²³ almost immediately after Brown turned over operation of Clifton Terrace to HDC. Like the first trial, this proceeding must have been quite a scene. In addition to Brown, tenants and all the regular lawyers, *Washington Post* reporter Carl Bernstein showed up. Though author of many of the stories most damaging to his cause, Brown subpoenaed him.¹²⁴ The *Washington Post*, of course, sent along lawyers to protect the paper's interests. Adding to the theatrics, Brown's lawyer moved for a change of venue, claiming that a fair trial was impossible in the District of Columbia.¹²⁵ Drama aside, the case was continued.

The next week Fleming filed his motion to calendar the *Saunders* case for oral argument in the District of Columbia Court of Appeals. Early in 1968, all the remaining criminal charges for housing code violations were settled. First National Realty Corporation pled no-contest in return for the dismissal of all charges leveled personally against Sidney Brown.¹²⁶ The corporation was sentenced to pay a fine of \$5,000, "one of the largest imposed in a local housing case."¹²⁷ Judge Tim Murphy, when announcing his sentence, said that the corporation's misconduct "reaches incredible proportions." But he also castigated the city, saying that "the delay and neglect by District officials" helped cause the problems the code was designed to prevent. Brown's sentence to serve sixty days in jail in the earlier trial was still on appeal. Brown did not pay the \$5,000 fine until May 1971.¹²⁸ The affirmative litigation against Brown and the city brought by the tenants of Clifton Terrace was dismissed after HDC took over the complex. And the oral arguments in *Saunders* finally occurred on March 11, 1968.

D. Oral Arguments and . . . Assassination

As the attorneys gathered to argue *Saunders*, each side had some developments to ponder. Three of the four tenants appealing their eviction from Clifton Terrace no longer lived in the complex. The fourth—Gladys Grant—had paid her rent to HDC after the buildings were sold. The case, perhaps, was moot. In addition, the District of Columbia Court of Appeals had rendered a decision just five weeks

123. The first trial was the "hurry-up" proceeding during the public controversy about heating Clifton Terrace. See Bernstein, *Landlord Given Jail Term*, *supra* note 107.

124. It is not clear why he did. Maybe he thought it would help delay things. Or maybe his lawyer hoped to impeach his articles and reduce their impact on the judicial proceedings.

125. Roisman Oct. 18, 2002 e-mail, *supra* note 121.

126. *Id.*

127. The narration of the sentencing story may be found in William Schumann, *Ex-Landlord of Clifton Fined \$5000*, WASH. POST, Jan. 27, 1968, at A1.

128. *Landlord Finally Pays Fine*, WASH. POST, May 22, 1971, at B1. This occurred only after Monroe Freedman, who represented Florence Roisman in her tussle with the Committee on Admissions and Grievances, sought the appointment of a special prosecutor to complete the prosecution of Brown. Letter from Florence Wagman Roisman (Oct. 18, 2002) (on file with the author).

earlier in *Brown v. Southall Realty Company* invalidating a residential lease entered into in contravention of the housing code.¹²⁹ Section 2304 of the District of Columbia Housing Regulations provided that: "No persons shall rent or offer to rent any habitation . . . unless such habitation . . . [is] in a clean, safe and sanitary condition, in repair, and free from rodents or vermin." The court of appeals read this regulation to specifically bar the creation of leases in buildings violating the housing code and ruled that the presence of conditions violating the code at the inception of the tenancy made the lease illegal. As a result, a judgment of eviction was reversed.¹³⁰

Fleming opened the arguments, returning to Washington, D.C. for the occasion from Des Moines, Iowa, his hometown, where he had moved in 1967 to direct a legal services program newly funded by the Office of Economic Opportunity.¹³¹ Hopeful that the results of the *Brown* litigation would be useful in his cases, he made sure to raise illegality as an issue for the court to resolve.¹³² He, of course, also contended that the old independent covenant rules were no longer valid and that tenants should have a right to recoup damages for the existence of code violations by reducing their rents. Herman Miller responded with a strong attack on *Brown* and on the city for failing to enforce housing codes. *Brown*, he contended, allowed tenants to create violations and then refuse to pay their rent. And, he continued, the existence of a criminal penalty for code violations strongly suggested that only the city should be able to enforce housing regulations.¹³³

Both sides could claim some moral support for their positions from the difficulties encountered by HDC after it gained control of Clifton Terrace from Sidney Brown. After the sale of Clifton Terrace, Brown may have taken perverse delight in the heating problems that continued to plague the complex. It was impossible to replace the old system in a short time.¹³⁴ Similarly, the new owners were forced to take steps to control vandalism by tenants and outsiders. In the past, Brown had constantly complained about misbehaving tenants. On the other hand, HDC's rehabilitation plan began under an unusual arrangement giving the

129. 237 A.2d 834, 836-37 (D.C.C.A. 1968). The opinion in this case, argued by Florence Roisman, came down on February 7, 1968. *Id.* at 835.

130. In *Brown*, as in three of the four cases appealed in *Saunders*, the tenant had moved out. *Id.* The court went ahead and resolved the case on the theory that its resolution served to bind the parties on the question of whether the unpaid rent was actually owed to the landlord. *Id.* Later, the court also held that in cases of lease illegality, the landlord was still entitled to obtain payment for use of the premises, though at a level that took the condition of the dwelling into account. *William J. Davis, Inc. v. Slade*, 271 A.2d 412, 413-16 (D.C. 1970).

131. E-mail from Gene Fleming, Attorney (Oct. 2, 2002) (on file with the author).

132. If you read the pleadings carefully, the issue of illegality had been raised below. But not much attention had been paid to the issue at trial or in preparation of the briefs many months before. The court read his arguments about *Brown* as raising the issue for the first time. *Saunders v. First Nat'l Realty Corp.*, 245 A.2d 836, 839 (D.C. 1968).

133. See *Landlord's Lawyer Hits Housing Code*, WASH. POST, Mar. 12, 1968, at B1.

134. Paul W. Valentine, *Clifton is Heatless on Coldest Night*, WASH. POST, Jan. 3, 1968, at B1.

tenants' association the legal authority to patrol the buildings, collect rents, and seek the eviction of any people misbehaving or failing to pay.¹³⁵ In addition, HDC contracted with Pride, Inc., a non-profit community organization, to arrange to hire tenants and other nearby residents to clean and maintain the buildings.¹³⁶ Marion Barry, Jr., later to be Mayor of Washington, D.C., was a high official in Pride. These actions began the process of cleaning up the complex in ways that Fleming and some tenants might have found quite acceptable. Nonetheless, conditions in the buildings were so bad that a significant number of tenants moved out.¹³⁷ By the middle of 1968, only 121 of the 275 units were occupied. Those tenants remaining were moved into the east and south buildings to allow for reconstruction to begin first in the westernmost structure. After a few snags,¹³⁸ the rehabilitation project formally began on August 13, 1968.¹³⁹

The ground-breaking was one of the few bright moments for downtown Washington, D.C. during the summer of 1968. The black communities of Washington, D.C. and most other areas of the country were still trying to recover from the events that unfolded after the assassination of the Reverend Martin Luther King, Jr. in Memphis, Tennessee on the evening of Thursday, April 4—about three weeks after the oral arguments in *Saunders*. Within hours, a twenty-block stretch of 14th Street, NW, stretching north and south from Clifton Terrace, was engulfed in civil disturbances. Similarly, long stretches of 7th Street, NW, from E Street in downtown Washington on the south to W Street on the north, and of H Street, NE, running East from Union Station, were also involved, as were stretches of 8th Street, SE, through the heart of Capitol Hill and other areas in Southeast and Northeast Washington. According to one report, 7 people died, 1,166 were injured, 7,370 were arrested, and 711 fires were set.¹⁴⁰ Over 11,000 troops were called out to restore order. Calm began to descend on the smoky city by Monday, April 8.¹⁴¹ Like Los Angeles, Newark, Detroit and other cities hit by major disturbances between 1965 and 1967, Washington faced the grim task of making sense out of the racial tension that inflamed the city.

No one knows why Washington exploded after King's assassination while some other cities remained relatively calm.¹⁴² The final report of the Kerner

135. Carol Honsa, *Tenants Given Policing Role*, WASH. POST, Dec. 22, 1967, at A1.

136. *See Pride Inc. Gets Cleaning Job at Clifton Terrace*, WASH. POST, Jan. 7, 1968, at C2.

137. Paul W. Valentine, *Clifton Terrace Cleaner, But Tenants Leave*, WASH. POST, Apr. 3, 1968, at B1.

138. *Insurance Snag Delays Clifton Plan*, WASH. POST, Aug. 10, 1968, at B2.

139. Ken Fell, *Rehabilitation Begins*, WASH. POST, Aug. 14, 1968, at B1.

140. *Aftermath of Riots—What Next?*, U.S. NEWS & WORLD REPORT, Apr. 22, 1968, at 27, 28. The *Washington Post* reported on Monday, April 8, 1968, that six people had died, 961 had been injured, 851 fires had occurred and 4,352 people had been arrested. Willard Clopton Jr. & Robert G. Kaiser, *Fires Dying Out, Arrests Decline, Curfew Continues*, WASH. POST, Apr. 8, 1968, at A1.

141. Multiple stories were published on the front page of the *Washington Post* each day. These and other materials are discussed at length in BEN W. GILBERT, *TEN BLOCKS FROM THE WHITE HOUSE* (1970).

142. One survey of the literature suggests that those most likely to participate in the disturbances were part of an "ambitious, hard working, but intensely dissatisfied group of working class and lower middle class blacks who feel deprived and excluded from what they feel are justified expectations." John S.

Commission, assembled by President Johnson to investigate the causes of earlier racial disturbances, issued its famous explanation in 1968: "Our Nation is moving toward two societies, one black, one white—separate and unequal."¹⁴³ Perhaps the uproar surrounding Clifton Terrace—which sat right in the middle of an impoverished black neighborhood devastated by destruction after the death of Martin Luther King—exemplified the inequalities the Kerner Commission saw as a primary cause of the unrest.

E. Decision

Not quite six months after large areas of Washington went up in smoke, just over three months after the assassination of Robert F. Kennedy immediately following his declaration of victory in the 1968 California presidential primary election,¹⁴⁴ and just weeks after the tumultuous Democratic Party Convention in Chicago and the uprising now known as the Prague Spring,¹⁴⁵ the District of Columbia Court of Appeals rendered its decision in *Saunders*. Unmoved by its own decision in *Brown*,¹⁴⁶ the tumult surrounding the Clifton Terrace complex, and the disturbances following Martin Luther King's death, the court affirmed the eviction judgments. Though the court agreed to decide the merits of the case even though the appealing tenants had left Clifton Terrace or paid the back rent,¹⁴⁷ it held that the illegality holding of *Brown* was inapplicable because the tenants never claimed that violations of the housing code existed at the *inception* of their tenancies and brushed aside the broader claim that standard consumer oriented contract defenses should be available in eviction cases. Enforcement of housing code regulations was left solely with the government. "We cannot believe," the court wrote, "that the Commissioners intended that the single violation of any of the Regulations for any length of time would give ground for defending against payment of rent in whole or in part." In addition, the tort cases imposing a duty of care based upon the housing code were different, the court wrote opaquely, because those results "did not hold that the Housing Regulations enlarge the

Adams, *The Geography of Riots and Civil Disorders in the 1960s*, 48 ECON. GEOGRAPHY 24, 30 (1972). And the areas most likely to explode were black neighborhoods "midway between ancient, emptying ghetto cores, and youthful, prosperous, advancing ghetto margins Trapped in the middle zones were people with intense expectations who found the relative deprivation gap widening when it should have diminished." *Id.* at 35. The Clifton Terrace area may well have fallen within this description. Wealthier black areas of town were just to the northwest.

143. NAT'L ADVISORY COMM'N, *supra* note 53, at 1.

144. The killing took place on June 5, 1968.

145. For a list of major events during the turbulent year 1968, see DAVID CAUTE, *THE YEAR OF THE BARRICADES: A JOURNEY THROUGH 1968*, 465-69 (1988).

146. Two of the three judges in *Saunders* were the same as in *Brown*—Andrew Hood and Frank Myers.

147. The court's willingness to hear the cases was based on the same ground as in *Brown*—that resolution of the dispute would bind the parties on the question of how much rent was due for the months in question.

contractual duties of a landlord.”¹⁴⁸ The judges did not discuss the potential contradiction between allowing the illegality defense in *Brown* or the use of housing codes to establish duties of care in tort while refusing to allow use of similar contract defenses in *Saunders*.

The District of Columbia Court of Appeals might also have decided *Saunders* differently if it had paid attention to actions taken by the United States Court of Appeals for the D.C. Circuit. Between the oral argument and decision in *Saunders*, the federal court reversed the local judges in another famous landlord-tenant case, *Edwards v. Habib*.¹⁴⁹ Judges Wright and McGowan, both of whom would shortly sit on the panel deciding *Saunders*, issued a strongly worded rebuke of the District of Columbia Court of Appeals’ refusal to recognize a “retaliatory eviction” defense when a landlord attempted to terminate a periodic tenancy in response to tenant complaints about housing code violations to public authorities. With a sense of annoyance, Judge Wright noted:

[A]s a court of equity we have the responsibility to consider the social context in which our decisions will have operational effect. In light of the appalling condition and shortage of housing in Washington, the expense of moving, the inequality of bargaining power between tenant and landlord, and the social and economic importance of assuring at least minimum standards in housing conditions, we do not hesitate to declare that retaliatory eviction cannot be tolerated.¹⁵⁰

The refusal of the District of Columbia Court of Appeals to recognize a retaliatory eviction defense in *Edwards* was even more remarkable than the chiding language of the federal court suggests, for this same case had come before the circuit court previously. After the landlord-tenant court rejected the retaliatory eviction defense at trial, the District of Columbia Court of Appeals refused to stay the eviction pending review. A petition for a stay was then taken before the circuit court and granted¹⁵¹—surely a strong signal that future actions in the case were going to be watched. These two courts, however, were beating to different drummers.

Prior to the adoption by Congress in 1970 of legislation creating a local court system in the District of Columbia that looks much like those in the various states, the President appointed judges of the District of Columbia Court of Appeals, subject to confirmation in the Senate.¹⁵² As a practical matter, the Chair

148. *Saunders v. First Nat’l Realty Corp.*, 245 A.2d 836, 839 (D.C. 1968).

149. 397 F.2d 687 (D.C. Cir. 1968), *rev’g* 227 A.2d 388 (D.C. 1967). The D.C. Circuit issued its opinion on May 17, 1968, and declined an invitation to rehear the case *en banc* on July 11, 1968. *Id.* at 687.

150. *Id.* at 701.

151. *Edwards v. Habib*, 366 F.2d 628, 628 (D.C. Cir. 1965).

152. When first established, the old court was called the Municipal Court of Appeals for the District of Columbia and had only three judges. Act of Apr. 1, 1942, ch. 207, § 6, 56 Stat. 190, 194 (1942). The

of the Senate subcommittee overseeing the District of Columbia¹⁵³ had substantial input into the selection of local judges. In contrast to appointments to the federal courts in the District of Columbia, nominations to the city's tribunals usually raised few eyebrows and drew little attention from either the President or the Senate as a whole. The views of those appointed to the bench were sometimes out of sync with the population they served and an effective venue for reviewing their qualifications did not exist.

Chief Judge Andrew Hood, the author of the District of Columbia Court of Appeals' opinions in both *Edwards* and *Saunders*, was an interesting example of the problem. President Franklin Roosevelt originally appointed him for a ten-year term on the old Municipal Court of Appeals, a tribunal established by Congress in 1942 to handle minor criminal and juvenile cases. At that time, major civil and criminal matters were all handled by the federal district and circuit courts. Presidents Truman; Eisenhower; Kennedy, who named him Chief Judge; and Johnson, all reappointed him. Hood served on the court until his death at the age of seventy-eight in 1979.¹⁵⁴ His service, therefore, overlapped the transition of the court from a minor appellate tribunal to the court of last resort for the District of Columbia. In his obituary in the *Washington Post*, it was reported that he said his court was "more of a traditionalist than an activist" tribunal. Because of the review function of the federal courts, he thought, "we were never free to indulge in activism, although I don't say that we wanted to." Important matters, he believed, should be left to the legislature rather than be resolved by the courts. It is now much less likely that a person with such views would either be appointed to the court or retain a seat for multiple terms. But in the days of *Edwards* and *Saunders*, Hood spoke for the D.C. Court of Appeals. It should have surprised no one, including Judge Hood himself, that the *Saunders* case ended up on the circuit court's docket.

IV. THE FEDERAL APPEAL: THE WRIGHT STUFF

A. *The Briefs*

On October 1, 1968, the tenants filed a petition asking the United States Court of Appeals for the District of Columbia Circuit to review the *Saunders* case. On

President still appoints local judges, but now is limited to selecting from a panel of three candidates selected by a Judicial Nominations Commission. The President's selection is sent to the Senate for confirmation. The nominating commission contains representatives from the bar, Congress, the federal court and the local government.

153. The Senate Subcommittee on Oversight of Government Management and the District of Columbia.

154. This and other information in the text about Hood is reported in J. Y. Smith, *Andrew M. Hood*, 78, *Dies*, WASH. POST, July 18, 1979, at C4.

January 16, 1969, the circuit court agreed to allow the appeal.¹⁵⁵ In reality, this was all quite odd. In the normal course of events, federal appellate courts lack authority to review decisions of the highest courts of a state on matters of local law. The District of Columbia, however, has always been a legally strange place—neither fish nor fowl. The District was established by an act of Congress. Many of its executive, legislative, and judicial actions appear state-like; but its entire structure, including its courts, are creatures of federal law.¹⁵⁶ At the time *Saunders* was decided by the District of Columbia Court of Appeals, the court of last resort for matters of District of Columbia law was the United States Court of Appeals for the District of Columbia Circuit. On petition of a party, the circuit court had discretion to accept cases for appellate review. *Saunders* was among the last cases heard under this court structure. As part of a gradual extension of partial home rule to residents of Washington during the late 1960s and early 1970s—a somewhat muted response to local claims of disenfranchisement and racial insensitivity¹⁵⁷—Congress established a new court structure for the District and removed virtually all authority of the District of Columbia Circuit Court of Appeals to review local decisions.¹⁵⁸

Briefing in *Saunders* continued through much of 1969.¹⁵⁹ Though longer and a

155. Three of the four tenant petitions were granted. Gladys Grant's motion was denied quickly on the ground of lack of jurisdiction. Her motion was denied on October 1, 1968, only one month after it was filed, in an order signed by Judges Danaher, Burger (later Chief Justice) and Tamm. Though I don't know for sure, it is possible a Motions Clerk (the same sort of employee as a judge's law clerk only working for the judges routinely rotating through motions' panels) spotted a jurisdictional problem with this case and recommended that it be pulled out and immediately dismissed. Since Grant had paid all of her rent after the HDC took over Clifton Terrace, the landlord-tenant court had no authority to entertain an eviction case against her. The motions in the other three cases were held for further consideration and, on January 16, 1969, granted. Gene Fleming and Florence Roisman filed a brief on November 8, 1968, asking the court to hear these three cases. Herman Miller filed a response on behalf of First National Realty on December 2, 1968. Chief Judge Bazelon and Judge McGowan signed the order granting review. Further briefs on the merits of the case were then filed during 1969.

156. U.S. CONST. art. I, § 8, cl. 17. Grants to Congress have the authority "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." This power has been used to establish so-called "Article I" courts in the District of Columbia, subject to different rules than the regular federal courts established under Article III. District of Columbia judges, for example, do not have life tenure. The Senate must confirm their appointment. There are a large number of other ways in which the District of Columbia differs from a state. Congress, for example, has never seen fit to grant the District voting representation in Congress. The District's budget is subject to review and final passage in Congress. The United States Attorney, rather than the local Corporation Counsel, prosecutes most crime in the District.

157. The jurisdictional changes were hardly motivated only by a desire to provide D.C. residents with more control over their city government. Opposition by many to the liberal decisions of the federal court of appeals led many conservatives to support a shift they might not otherwise have endorsed.

158. District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473 (1970). The provision limiting appellate review by the federal courts is now codified at D.C. Code Ann. § 11-301 (2001). This provision took effect in early 1971. The D.C. Circuit was allowed to continue its review of any case decided by the District of Columbia Court of Appeals prior to that time. *Id.*

159. Fleming's brief for the tenants was filed in April, followed by Herman Miller's for First National Realty in early July and the tenants' reply in later July.

bit more polished than the prior filings, the tenants' brief ploughed the same basic legal ground.¹⁶⁰ After cataloguing the particular problems confronting black residents of inner city Washington seeking decent housing, Fleming argued that the housing code should be treated as a part of every residential lease and construed to invalidate the old rules imposing duties of repair on tenants. Tort cases like *Whetzel v. Fisher Management Co.*,¹⁶¹ imposing a duty of care based on the terms of housing codes, he argued, vitiated the idea that covenants in a lease were all independent from one another and supported the notion that diminution of rent was a perfectly acceptable form of relief. It was not a historical exegesis, but a well-crafted attempt to apply standard contract theory in landlord-tenant court.

Like Fleming, Herman Miller largely repeated—without many grammatical improvements—the same argument he made before the District of Columbia Court of Appeals. Enforcement of the housing regulations rests with the government, he contended. They “do not create any new contractual rights in the tenant.”¹⁶² But there were, however, two sets of new material. First, much of the first half of the brief was directed at convincing the court to ignore or discount the importance of the illegality holding in *Brown v. Southall Realty*.¹⁶³ Since that case came down after the briefs were filed at the District of Columbia Court of Appeals, this was the first opportunity Miller had to write about the holding in the case. He claimed that the result of the case removed housing regulation enforcement from the appropriate city authority and confused the granting of a license to operate an apartment with its regulation.

The other batch of new material—critiquing the impact of legal services attorneys and law students in clinical programs on the operation of landlord-tenant court—was much more interesting. While the case had been pending, the number of tenants represented by counsel in landlord-tenant court increased dramatically. In addition to the opening of legal services offices, law school clinical programs blossomed. The Prettyman Internship Program, funded by the Ford Foundation, began at Georgetown in the mid-1960s. Graduate law students took classes, practiced in civil and criminal courts, and obtained a Masters of Law in Trial Practice degree upon completion of the two-year program.

In addition, a consortium of law schools in the District of Columbia, including those at Georgetown, Catholic, George Washington, Howard, and American Universities, developed a proposal to allow third-year students to practice in the local courts. These new programs were part of a concerted effort by universities to respond to racial unrest and demands for action made by a variety of community groups during the late 1960s. A court rule was adopted in the fall of

160. The brief was written by Gene Fleming. By this time he had moved to Boston to help set up and run the Boston Legal Assistance Project, another OEO funded legal services program.

161. 282 F.2d 943, 108 U.S. App. D.C. 385 (1960).

162. Brief for Appellee at 11, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

163. 237 A.2d 834, 836-37 (D.C. 1968).

1968 allowing students to appear under the supervision of a member of the District of Columbia Bar.¹⁶⁴ Start-up funding was obtained from the Council on Legal Education and Professional Responsibility (CLEPR), an organization that was involved in establishing law school clinical programs all across the country.¹⁶⁵ After a director was hired and offices were rented, the program, known today as Law Students in Court, began operation in the fall of 1969, just after Miller's brief was filed with the federal circuit court in *Saunders*.¹⁶⁶

As indicated by the sophisticated pleadings filed by Fleming in the *Saunders* case, poverty lawyers and law school clinical teachers began to develop a coherent strategy for litigating eviction cases during the late 1960s, some years before they were actually vindicated in the courts. By the time Miller prepared his brief in *Saunders*, the strategy was beginning to have an effect. In his brief, Miller complained about the impact of legal services attorneys and Prettyman Interns on the operation of the court. He worried about the changes that would occur when the Law Students in Court program began operating shortly after he filed his brief:

Appellants complain that clogged dockets delay enforcement caused by many cases, appeal procedures and suspended sentences. But appellants fail to inform the court that these conditions militate also in favor the tenants, in that from many sources the tenants are encouraged not to pay and when action is brought in the Landlord and Tenant Court all of the judges sitting, zealously protect the tenants by referring the cases called to attorneys for the Neighborhood Legal Service (and by coincidence who, in every case, assert Housing Violations at the inception of the tenancy though no order had been issued regardless of the time when the tenancy commenced); or refer the case to the Georgetown Legal Intern Program,¹⁶⁷ wherein third year law students under supervision of a member of the bar takes over the case or reference is made to the Legal Aid Society. The familiar procedure then is to demand a jury trial during which no rent is collectable thus resulting in a very long delay before the matter is settled All of which results in favorable treatment for the tenants.¹⁶⁸

The pace of the action in landlord-tenant court, of course, had been an issue for a very long time. As noted earlier, speedy eviction procedures were established during the nineteenth century to provide landlords with some relief from the technical and frequently slow proceedings in ejectment cases.¹⁶⁹ Miller's brief

164. *Courts Approve Student Atty Plan*, GEO. LAW WKLY., Oct. 24, 1968, at 1.

165. Jean Just, *Student in Court Project Funded*, GEO. LAW WKLY. Feb. 14, 1969, at 1.

166. *McCormick Picked to Head LSIC Program in District*, GEO. LAW WKLY., Mar. 14, 1969, at 1; *Students in Court Applications Set for 1969-1970 Year*, GEO. LAW WKLY., Mar. 27, 1969, at 1.

167. This must refer to the Prettyman Internship Program, but the interns were graduate students who had already obtained their law degrees and passed the bar.

168. Brief for Appellee at 14, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

169. *Supra* notes 23-26 and accompanying text.

inarticulately¹⁷⁰ posed the very real concern that his clients would not receive rents during or after long eviction proceedings. Neither the tenants' main brief nor their reply¹⁷¹ made any efforts to deal with these issues. The court, as we will see, eventually did.¹⁷²

B. Another Wait and More Conflicts

While legal activity in the *Saunders* case quieted during the second half of 1969, it was an eventful year for Clifton Terrace and various people associated with its troubles. Though nothing could match the tumult of 1968,¹⁷³ major controversies arose over the remodeling of the complex by HDC. In addition, Sidney Brown, refusing to leave the limelight, gained a reversal of the conviction underlying his sixty-day jail sentence and initiated an ethics proceeding against Florence Roisman.

Reconstruction of Clifton Terrace proceeded apace during much of 1969. HDC hired the Winston A. Burnett Company, a black-owned company based in Harlem, as the general contractor. The deal required minority sub-contractors to be used, if at all possible. In addition, residents of Clifton Terrace and the surrounding Cardozo neighborhood were given a hiring preference to work on the project. The job was financed by a loan from the International Brotherhood of Electrical Workers, guaranteed by the Federal Housing Agency. The union connection meant that everyone working on the site had to be union members. This resulted in a dramatic increase in the number of union cards given to black

170. In addition to the grammatical problems in his brief, he did not pull together any thoughtful suggestions for dealing with the consequences of slow eviction proceedings.

171. The tenants' reply brief was filed by Margaret Farrell (nee Ewing), Florence Roisman and Patricia M. Wald. They all worked for the Law Reform Project of Neighborhood Legal Services.

172. Three amicus curiae briefs also were filed, all on the tenants' side. Myron Moskowitz, now a Professor of Law at Golden Gate School of Law, and Peter Honigsberg, now a Professor of Law and Director of Legal Research and Writing at the University of San Francisco Law School, wrote a brief for The National Housing Law Project, an OEO funded resource center for poverty lawyers across the country. The bulk of their brief focused on the history of and reasons for the abysmal record of housing code enforcement across urban America. Caryl Terry's (now Caryl Bernstein) brief for the Washington Planning and Housing Association concentrated on the impact of housing regulations. One of the major purposes of the Association was to support the use of intelligent planning schemes. In this case, that interest translated into a brief arguing that the codes should be used to establish boundary lines for landlords when they attempt to evict their tenants. Finally, the Law Reform Unit of the Washington Neighborhood Legal Services Program submitted a lengthy amicus brief that largely reiterated the contentions in Fleming's brief for the tenants. It was written by Florence Roisman, presently Professor of Law at Indiana University School of Law in Indianapolis, the Honorable Patricia Wald, later a judge on the United States Court of Appeals for the District of Columbia Circuit and Margaret Farrell (nee Ewing), now a member of the Washington, D.C. office of Cohen, Milstein, Hausfeld & Toll, P.L.L.C. working on health care issues and undertaking significant amounts of *pro bono* work on behalf of mentally ill and mentally disabled persons.

173. Indeed, 1968 was a major year on many fronts. The year has become the subject of major historical works. One of the most interesting, in part because it contains a very long catalog of major events occurring during the year, is DAVID CAUTE, 1968: THE YEAR OF THE BARRICADES (1988).

construction workers from the neighborhood. Over 250 black people worked on the project. One of the construction workers, Dickie Henderson, lived in Clifton Terrace and sat in the courtroom when Sidney Brown was sentenced to serve sixty days in jail. In reporting on the project for the *Washington Post*, Carl Bernstein quoted Henderson as saying, "No, I never thought then we'd be where we are now . . . We've not only got heat all the time; but we're putting in the air conditioning ducts this week."¹⁷⁴ Henderson and other long-time residents of Clifton Terrace finally moved into refurbished apartments in the fall of 1970, two years behind schedule.¹⁷⁵

Henderson must have been disappointed when, on April 25, a couple of months after he was interviewed by Carl Bernstein, the District of Columbia Court of Appeals reversed Brown's conviction and tossed out his sixty-day jail term.¹⁷⁶ "It was wrong," the court wrote, "to deny appellant a continuance in the circumstances of this case. While prompt trials and vigorous administration of the criminal laws are extremely desirable, a defendant is entitled to a reasonable opportunity to prepare his defense."¹⁷⁷ Recall that the case was heard in haste amid efforts by the city to get heat turned back on at Clifton Terrace.¹⁷⁸ Brown was summoned to court on one day's notice when his attorney was out of town. A request for a continuance of a couple of days, opposed by the government, was denied. Brown was then given a brief recess to call his attorney's office to see if another lawyer could come over to help him out. Someone did appear, but that attorney protested that he was unprepared for trial and showed up only because he was told there was an emergency.¹⁷⁹

Perhaps emboldened by his appellate victory, Brown filed ethics charges with the committee on Admissions and Grievances at the U.S. Courthouse in Washington, D.C. against Florence Roisman on July 14, 1969.¹⁸⁰ He complained that Roisman brought the federal action seeking to enjoin Brown from violating local housing codes¹⁸¹ without knowledge of the parties named in the complaint as plaintiffs and that she urged the Office of Corporation Counsel to continue pursuing criminal charges against Brown for housing code violations even after the District of Columbia Court of Appeals had reversed his conviction on such charges. He also claimed that Roisman labeled him a "criminal" and accused him

174. Carl Bernstein, *Black Builders Get a Big Job*, WASH. POST, Feb. 27, 1969, at B4.

175. Joseph D. Whitaker, *94 Clifton Units Almost Ready*, WASH. POST, Aug. 16, 1970, at B1; Joseph D. Whitaker, *Ex-Slum Housing Begins Life Anew*, WASH. POST, Oct. 15, 1970, at B1.

176. William N. Curry, *Jail Term Voided for D.C. Landlord*, WASH. POST, Apr. 27, 1969, at A3.

177. *Brown v. Dist. of Columbia*, 252 A.2d 513, 516 (D.C. Cir. 1969).

178. See *supra* text accompanying footnotes 105-108.

179. *Brown*, 252 A.2d at 516. The appellate court also noted that the sentence imposed on Brown was unlawful. The section used by Judge Kronheim, which allowed for a fine not to exceed \$300 and a jail term of up to 90 days, dealt only with license revocations. The penalty provision for housing code violations called for a fine of up to \$300, but a maximum jail term of only ten days.

180. Letter from Sidney J. Brown to Committee on Admissions and Grievances (July 14, 1969) (on file with the author).

181. See *supra* text accompanying footnotes 115-120.

of taking "money from the poor at Clifton Terrace" without any foundation. Her interest in the matter, Brown wrote in his ethics charge, went "far beyond that of a private citizen and far beyond that of any attorney practicing in this jurisdiction." Stating that "her attitude is engendered by pure malice, far beyond that of counsel for a litigant," he accused Roisman of "maintenance of litigation."¹⁸² Brown wrote a similar letter to John Bodner, Chairman of the Board of the Neighborhood Legal Services Program, in an effort to have the board review the propriety of Roisman's conduct.¹⁸³

The ethics complaint, which lacked any serious basis for disciplining Roisman, lingered unresolved for almost ten months.¹⁸⁴ This was not the first time Brown made apparently spurious charges against attorneys. Just the year before, he lost a defamation case to Dennis Collins, who had filed a mechanics lien on a building owned by First National Realty Corporation. Brown called the lawyer who had brought Collins into the case and claimed that Collins was not concerned with settling the claim, filed the mechanic's lien "solely because of a personal grudge against Brown," was anti-Semitic, and collected a fraudulent judgment against Brown for \$14,000.¹⁸⁵ The Committee on Admissions and Grievances probably knew about the case; it was litigated in the D.C. federal courts and resolved by the circuit court of appeals just a few months before Brown filed his charges against Roisman.

Roisman, aggravated by the failure of the Committee to dismiss the ethics proceedings brought against her, even after all procedural and evidentiary issues were resolved,¹⁸⁶ filed an action in federal district court on March 4, 1970

182. "Maintenance" of litigation usually is defined vaguely as supporting or promoting litigation by one person against another. But that includes virtually every case in which a lawyer is involved. Charges of maintenance or "champerty"—the contribution of funds to support a lawsuit in return for a share of any proceeds produced by the litigation—were commonly brought against legal services lawyers in the early years of the program. The definitional difficulties associated with these rules has led most states to significantly modify them, at a minimum, to require some sort of unsuitable motivation for supporting litigation of another.

183. Letter from Sidney J. Brown to John Bodner (July 22, 1969) (on file with the author). As far as I know nothing came of this letter. In at least one other setting, however, an attorney working with the tenants of Clifton Terrace was called before Legal Services authorities to personally justify his handling of their cases. Gene Fleming, who handled the landlord-tenant court cases, was told to appear before the board members after Brown mailed them a letter complaining of Fleming's activities. The board allowed Fleming to continue his work. Telephone Interview with Edmund "Gene" Fleming, Attorney (May 29, 2002).

184. The ethics complaint was not resolved until March of 1970, just a couple of months before the D.C. Circuit rendered its opinion in *Saunders*.

185. *Brown v. Collins*, 402 F.2d 209 (D.C. Cir. 1968). Brown also previously lost a real estate fraud case in which a judgment for compensatory damages of \$7,059 and punitive damages of \$7,500 was affirmed on appeal by the same court. *Brown v. Coates*, 253 F.2d 36 (D.C. Cir. 1958).

186. Brown's initial complaint was not notarized as required by court rule. It was later dismissed for lack of specificity, and reinstated when additional information was filed. In December 1969, Monroe Freedman, who handled the ethics case for Roisman, wrote the Committee reminding them that affidavits of the various tenants approving the filing of litigation against Brown had been filed with the court. This

seeking to enjoin the proceedings.¹⁸⁷ The Ethics Committee met nine days after the federal complaint was filed, dismissed the proceeding against Roisman, and sent out a letter attempting to justify the Committee's slow response by blaming the parties for the delay.¹⁸⁸ Roisman dismissed her federal action a short time later.¹⁸⁹

One more critical dispute enveloped Clifton Terrace before *Saunders* was finally resolved by the District of Columbia Court of Appeals. Though it had no impact on the litigation, this dispute held up a number of rehabilitation projects in HDC's pipeline. A real estate entrepreneur named George Kalavritinos filed suit in federal district court in early October claiming that the contractors rebuilding Clifton Terrace were cutting corners and that the Federal Housing Administration was failing to enforce various contract requirements.¹⁹⁰ The suit led Senator Wallace Bennett (R-Utah) to request the Department of Housing and Urban Development (HUD) to investigate whether HDC exerted undue pressure to win the federal contract to rebuild Clifton Terrace, whether costs were too high, and whether work on the apartments by the Winston A. Burnett Company met federal standards. In addition, Rep. Joel Broyhill (R-Virginia) asked the General Accounting Office to audit the HUD report after its issuance and to review the expenditure of federal funds by HDC on other projects.¹⁹¹ Broyhill later asked George Romney, Secretary of HUD, to hold up any additional funding of HDC projects while the Kalavritinos charges were investigated. Romney took that step in mid-December, despite preliminary reports from the FHA finding that the rehabilitation work met federal standards.¹⁹²

The scope of Kalavritinos' labor in opposition to HDC was staggering. He gathered and turned over to Broyhill's staff "hundreds of pages of personal reports," including copies of "HDC's correspondence, contracts and other papers concerning Clifton Terrace."¹⁹³ The *Washington Post* described his motivations:

Kalavritinos also sprinkles his observations liberally with references to "black power in action," "conspiracies," involving local and federal officials, and charges of "payoffs" and "conflicts of interest."

is all summarized in Letter from Committee on Admissions and Grievances to Sidney J. Brown (March 24, 1970) (on file with the author).

187. *Roisman v. Jones*, No. 638-70 (D.D.C. Mar. 4, 1970).

188. The federal litigation was filed several months after the last evidentiary issues in the ethics proceeding had been resolved. The Committee met on March 13 and dismissed Brown's complaint. *Id.*

189. Praecepte Dismissing the Complaint in Civ. Action No. 638-70 (Apr. 29, 1970) (on file with the author).

190. *Tuesday's Area News*, WASH. POST, Oct. 3, 1969, at B10. It is not at all clear he had standing to file the suit. As far as I can tell from the newspaper articles he was not a disappointed bidder on the Clifton Terrace project. His interests seem wholly based on a deep-seated opposition to government support for housing.

191. *Clifton Terrace Project Being Probed by HUD*, WASH. POST, Oct. 18, 1969, at B7.

192. Leonard Downie, Jr., *Complaint to Romney Halts Slum Projects*, WASH. POST, Dec. 14, 1969, at A1.

193. *Id.*

His papers offer no proof of illegal acts.

Kalavritinos makes clear in his booklet that he is opposed to the whole idea of nonprofit groups renovating slum housing.

He ties these efforts to what he characterizes as pressures by activist tenants, poverty lawyers and city officials to force landlords out of property ownership in the inner city.

....

A stocky, dark-haired man who smokes long cigars, Kalavritinos is described by Broyhill's staff as "a wealthy man who once owned slum property but sold it all, and has devoted himself to this crusade."

Kalavritinos once owned several tracts of inner city property, including some on which he built large apartment buildings.

But he lost most of his holdings through foreclosure during the collapse of Republic Savings and Loan Association, run by his brother, Pete Kalavritinos.¹⁹⁴

Two days after these comments about Kalavritinos appeared in the paper, Rep. Henry Reuss (D-Wisconsin), a member of the Subcommittee on Housing of the House Banking and Currency Committee, asked Romney to speedily complete his Clifton Terrace investigation and release the hold on other HDC projects.¹⁹⁵ The next day, HDC officials issued a blistering attack on HUD's willingness to pay so much attention to "irresponsible accusations."¹⁹⁶ In early February of 1970, shortly after the oral arguments in *Saunders*, HUD completed its investigation of Clifton Terrace, HDC, and Winston A. Burnett Construction Company, concluding that there was no evidence of wrongdoing or misconduct and releasing its hold on all pending HDC project applications.¹⁹⁷ Seven months later, the General Accounting Office, Congress' investigative arm, reached the same conclusion.¹⁹⁸

C. Oral Arguments

As the Kalavritinos dispute began to wind down, *Saunders* was argued before the circuit court of appeals. The case had been placed on the summary docket—a list of cases scheduled for brief hearings, with each side limited to fifteen minutes of oral argument. Fleming prepared a ten-minute presentation, planning to save

194. *Id.*

195. Leonard Downie, Jr., *HUD Asked to Resume 3 Projects*, WASH. POST, Dec. 16, 1969, at C6.

196. Leonard Downie, Jr., *HDC Scores Criticism of Slum Project*, WASH. POST, Dec. 17, 1969, at B1.

197. Leonard Downie, Jr., *HUD Clears Apartment Renovation*, WASH. POST, Feb. 5, 1970, at B1. Though HDC was given a clean bill of health, Broyhill and Kalavritinos continued their crusade. Rep. John Dowdy (D-TX), Chairman of the House District Select Subcommittee for Investigations brought in Kalavritinos as an unpaid consultant to lead further investigations. Broyhill continued to work with him. Leonard Downie, Jr., *Ex-Landlord Probing Clifton Terrace Project*, WASH. POST, Mar. 5, 1970, at A1; *Broyhill Terms Renovation of Housing Unit "Depressing,"* WASH. POST, Mar. 11, 1970, at C4.

198. Eugene Whitaker, *HDC Given Clean Bill on Clifton Job*, WASH. POST, Sept. 17, 1970, at D1.

five minutes for rebuttal.¹⁹⁹ He returned to Washington again to argue the case, this time from Massachusetts, where he was Deputy Director of the Boston Legal Assistance Project. When he arrived and learned that Judges J. Skelly Wright, Carl McGowan and Roger Robb would hear the case, he thought, “Hey, we’ve got a chance here!”²⁰⁰ Though he assumed Robb might be a problem, Wright was an extraordinarily well-known liberal and McGowan often agreed with him.

As the argument began, Judge Wright informed Fleming that all the other cases on the calendar had been resolved and that he could have as much time as he wanted. Fleming was caught completely by surprise. Though he realized he had been presented with a golden opportunity, it required a spur of the moment reconstruction of his argument. After pausing for what seemed to Fleming to be a very long time, he began to speak. The argument went on for one hour and forty-five minutes. Fleming spent part of the time responding to unsympathetic inquiries from Judge Robb. The questions from Wright and McGowan, however, were thoughtful, probing, and helpful. These judges allowed him a great deal of latitude to think through issues as they went along. It became an occasion to discuss rather than argue about the issues before the court.²⁰¹ Rick Cotton, Justice Wright’s law clerk at the time *Saunders* was before the circuit court of appeals, generally confirmed Fleming’s recollections about the atmosphere of the arguments. Extending the length of oral presentations was not unusual for Wright. If he wanted some help, oral arguments became “thinking time.”²⁰² When Fleming sat down at the conclusion of his argument, he was hopeful that a reversal was in the offing. In contrast, Herman Miller’s statement for the landlord lasted only about ten minutes and went largely uninterrupted by the court. Miller, Cotton opined, was “a caricature of a lawyer” who did not understand he was arguing an important case. To him, “it was just another collection action.”

D. The Final Decision

At the first conference among the three judges after the oral argument, a vote was not taken. But there was general agreement among the judges that the law should be changed, that Wright should compose the opinion, and that the other two would sign on if he came up with a reasonable rationale for such a result. When all was said and done, Wright did get the votes of his two colleagues. Judge Robb, however, concurred only in the result and in the narrowest holding constructed by Wright’s opinion—that housing codes construct a baseline for creating tenant remedies in eviction cases. Ironically, the argument accepted by

199. Appellants present their arguments first. They are generally allowed to reserve a small amount of time to rebut any contentions made by appellees during their argument.

200. Telephone Interview with Edmund “Gene” Fleming, Attorney (May 29, 2002).

201. *Id.*

202. Telephone Interview with Richard Cotton, former law clerk for Judge Wright (June 27, 2002) (providing details on the oral argument and on the crafting of opinion as described in the next section).

Robb was very similar to those made by the tenants' attorneys. Wright, with significant help from his law clerk, attempted to reconstruct a broad swath of landlord-tenant law.

Judge Wright's opinion in *Saunders*²⁰³ began by staking out a major role for itself—the reappraisal “of old doctrines in the light of facts and values of contemporary life.”²⁰⁴ Though the various briefs submitted on behalf of, or as *amici* supporting the tenants certainly discussed the need to make some changes in the law, the language was not as bold as Wright's. Rather than calling for a reconstruction of basic rules, the brief authors argued that previously decided cases laid the groundwork for changing the operation of landlord-tenant court and that only small steps were required to provide tenants with the protections they needed. The housing codes, for example, had previously been used to establish baselines for tort duties of care. All that was needed now was to take the same step for eviction cases. This approach did not satisfy Rick Cotton, Judge Wright's law clerk. “Reliance on housing codes,” he thought, “was the least creative way” to deal with the issues. He urged Wright to change the structure of the underlying law. That, he thought would make the opinion “much more persuasive.” The opinion evolved in that direction, though Wright was frustrated a bit at how long it took Cotton to put a draft together.

It took almost five months to compose and issue the opinion. Though Judge Wright's opinion in *Saunders* was the first to unequivocally hold that tenants could raise defenses based on implied warranties in eviction actions, it gained that distinction by only eleven days. The New Jersey Supreme Court's implied warranty opinion in *Marini v. Ireland*²⁰⁵ followed hard on the heels of *Saunders*. Indeed, *Marini* was a predictable result after the same court decided *Reste Realty Corp. v. Cooper*²⁰⁶ on March 17, 1969, just over a year before *Saunders* was decided. *Reste* was one of two important constructive eviction cases decided in other jurisdictions while *Saunders* was being litigated, briefed, and argued. *Reste* and *Marini* made Wright's job a bit easier. *Reste* upended virtually all of the old common law rules, holding in a commercial case that lease covenants were dependent and that a common law implied warranty should be read into the lease. The court's willingness to imply landlord obligations in a commercial setting without reference to housing codes strongly suggested it would move in a similar direction if and when a residential case arose, and that it would be favorably inclined to allow defenses in eviction actions. The suggestion became reality in *Marini*. Though *Reste* was decided well before any of the briefs in *Saunders* were filed, neither the litigants nor the *amici* cited it. It is curious that *Reste* was ignored. Widespread knowledge of important new cases sometimes took months

203. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

204. *Id.* at 1074.

205. *Marini v. Ireland*, 265 A.2d 526 (N.J. 1970), was rendered by the New Jersey Supreme Court on May 18, 1970. The *Saunders* opinion was released on May 7.

206. 251 A.2d 268 (N.J. 1969).

to spread around the country while lawyers and teachers waited for the arrival of printed advance sheets, but gossip networks often sped up the process. *Reste* was the subject of much discussion by poverty lawyers and clinical law teachers in New Jersey as soon as it came down.²⁰⁷ The fairly tight poverty law grapevine should have reached legal services lawyers in Washington, D.C. before *Saunders* was argued. It didn't, but Cotton found the case and relied upon it in drafting Wright's opinion.

The other important case that came down while *Saunders* was being prepared for argument was *Lemle v. Breeden*.²⁰⁸ It was decided by the Hawaii Supreme Court on November 26, 1969, long after all the *Saunders* briefs were filed and about two months before it was argued. *Lemle* was also a constructive eviction case, this time residential. In a fashion similar to *Reste*, the court concluded that lease covenants were dependent, that an implied warranty of habitability was implied in residential leases, and that the tenants, who had quickly departed after discovering the house was infested with rats, could recover their security deposit and prepaid rent. *Reste*, *Lemle*, and *Saunders* were the first of a deluge of opinions on implied warranties rendered in the early 1970s. It was like a dam breaking.²⁰⁹

After Wright declared in his opinion that he wished to reappraise the "old doctrines," he structured the analysis as a contest between "the assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land," and the more modern view of the lease as a contract providing urban dwellers with a place to live.²¹⁰ Courts, he observed, "have been gradually introducing more modern precepts of contract law in interpreting leases. Proceeding piecemeal has, however, led to confusion." The best approach, Wright declared, was simply to treat "leases of urban dwelling units . . . like any other contract."²¹¹ The recognition of implied warranties in residential leases, like those in many other contracts for services and consumer products, ineluctably followed.

To modern readers, this must seem quite odd. The idea that "conveyances" were different from "contracts" and that the rules for conveyances of leases were dramatically different from those controlling transfers of interests in other things of value seems strange at best and inane at worst. But Wright's conveyance/contract dichotomy perfectly fit its historical moment. Though not yet reflected in

207. This is a personal observation. I was doing clinical teaching at Rutgers University School of Law at the time and knew a number of legal services attorneys. We all knew about it.

208. 462 P.2d 470 (Haw. 1960).

209. See, e.g., *Kline v. Burns*, A.2d 248 (N.H. 1971); *Mease v. Fox*, 200 N.W.2d 794 (Iowa 1972); *Jack Spring v. Little*, 280 N.E.2d (Ill. 1972); *Boston Hous. Auth. v. Hemingway*, 293 N.E.2d 831 (Mass. 1973); *Foisy v. Wyman*, 551 P.2d 160 (Wash. 1973); *Steele v. Latimer*, 521 P.2d 304 (Kan. 1974); *Green v. Superior Court*, 517 P.2d 1168 (Cal. 1974). A number of states also adopted statutory versions of the implied warranty during the same time period.

210. *Javins*, 428 F.2d at 1074.

211. *Id.* at 1075.

law review literature,²¹² there was an ongoing debate in academic circles about the applicability of contract law to leases.²¹³ As suggested by the terms of Wright's opinion, the discussion took the highly structured form of debating whether a lease represented a "property" conveyance or a "contractual" agreement. That form of debate emerged as a shorthand way of attempting to deal with the continuing vitality of the independent covenant rules in eviction law.²¹⁴ The exchange of rent for possession was said to be a "property" transaction. The reformers discussing the issue lamented the use of old property rules and argued that a shift to contractual analysis would force courts to recognize the various terms of leases as dependent upon one another and to provide defenses in eviction actions.

In hindsight, the use of property versus contract terminology "conveyed" an erroneous description of the history. As already noted,²¹⁵ the combination of old contract rules, the limitations of early procedural systems, the desire to protect the budding rental housing business during the nineteenth century, the lack of lawyers to represent poor tenants, the biases of progressive reformers against tenement house residents, and antipathy to the urban poor after World War II had more to do with the continued use of the independent covenant rules in eviction actions than any largely ephemeral distinction buried in the description of a lease as a contract or a conveyance. Though historically misguided, the rhetoric of the legal debate did allow those seeking reform to use the consumer remedies—often based on tort, contract or implied contract theories—as a starting point for their analysis. Their eagerness to do so is certainly not surprising. Most of the new legal services attorneys who handled the vast bulk of the eviction litigation across the country during the late 1960s and early 1970s received their legal educations not too long after the consumer reforms were adopted. Not surprisingly, they used what they knew well as a baseline for structuring their reformist arguments.

Wright, with Cotton's help, took this debate and used it to turn residential leases into deals about consumer products. This move allowed him not only to accept housing codes as norms for landlords' maintenance duties, but also to embrace the use of implied warranty theory in leasehold settings. "In our

212. Rick Cotton characterized the law review literature extant at the time he worked on *Saunders* as "not very good."

213. This was, for example, a prominent part of panel discussions at a conference on landlord-tenant law organized by students at the University of Chicago Law School in the late 1960s when I was attending the institution. The issue surfaced in the law reviews a short time later. See, e.g., Note, *Contract Principles and Leases of Realty*, 50 B.U. L. REV. 24 (1970); John Forrester Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443 (1972); Stephen A. Siegel, *Is the Modern Lease a Contract or a Conveyance?—A Historical Inquiry*, J. URB. L. 649 (1978).

214. By the early twentieth century, the idea that a lease was different from a contract was pretty firmly established, despite the fact that the distinction had little to do with the origins and maintenance of the independent covenant rules. Though the first two editions of Williston's treatise on contracts said nothing about this issue, the third edition, issued originally in 1920, laid it out in great detail. 3 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 890 (Samuel Williston et al. eds., rev. ed. 1936).

215. See *supra* notes 17-26 and accompanying text.

judgment,” Wright concluded, “the common law itself must recognize the landlord’s obligation to keep his premises in a habitable condition.”²¹⁶ Judge Robb was unwilling to agree to such a broadly worded rationale.²¹⁷ He ended up concurring in the result, but he aligned himself with only one substantive aspect of Wright’s opinion—a narrower rationale that the local housing code “requires that a warranty of habitability be implied in the leases of all housing units it covers.”²¹⁸ Gene Fleming’s skepticism about getting Robb’s vote turned out to be misplaced. Indeed, Robb basically adopted the argument made in the tenants’ brief. But it was the undermining of the conveyance/contract dichotomy in Wright’s opinion that caught the attention of academics and led them to place it in their first year property texts.

Wright’s last task was to grapple with the landlord’s claim that lengthy proceedings and tenant defenses endangered the ability of building owners to collect whatever rent was due. Though the briefs of the tenants did not discuss this problem directly, Judge Wright wrote that they had offered to pay rent into the registry of the court during the action.²¹⁹ “We think,” he went on, “this is an excellent protective procedure.”²²⁰ Just two weeks before Wright released the opinion in *Saunders* containing this comment, he heard oral arguments in *Bell v. Tsintolas Realty Co.*,²²¹ a case that directly raised questions about the propriety of requiring tenants to deposit money in court pending the outcome of eviction litigation. It was, therefore, predictable that Wright’s opinion in *Tsintolas* would allow landlords to protect their interests by seeking pre-judgment rent deposits. Though he noted that the use of protective orders was contrary to the general rule declining to guarantee plaintiffs the solvency of people they sue, Wright was also well aware of the impact of tenant demands for jury trials and defenses on the supposedly speedy eviction process. While declining to allow rent deposits in all cases, the court approved protective orders when tenants asked for jury trials or asserted a defense based on housing code violations, but only after notice and

216. *Javins*, 428 F.2d at 1077.

217. There is more than mere rhetoric in the different approaches of Wright and Robb. Another area of landlord-tenant law that led to reliance on the conveyance/contract dichotomy involved mitigation of damages. At common law, under a rule said to arise because a landlord simply conveyed possession to a tenant and had no further obligation until the lease ended, landlords did not have to mitigate damages when a tenant left before the lease expired. By the last third of the twentieth century that sort of rule had by and large disappeared in standard contract law, but it hung on longer in leaseholds. In any case, Wright’s theory could be used to end the special landlord mitigation rule. Robb’s would not. For more on the mitigation debate, see Sarajane Love, *Landlord’s Remedies When the Tenant Abandons: Property, Contract and Leases*, 30 U. KAN. L. REV. 552 (1982).

218. *Javins*, 428 F.2d at 1080.

219. The answers of the tenants volunteered this action. See *supra* note 80. Fleming refused to hold money himself for fear of being accused of stealing it. That was a well-founded concern. Given the number of complaints about lawyers Brown scattered around the landscape, caution was appropriate. And, of course, Brown did accuse Fleming of stealing the rent money. See *supra* text accompanying footnote 70.

220. *Javins*, 428 F.2d at 1083 n.67.

221. 430 F.2d 474 (D.C. Cir. 1970).

opportunity for oral argument was provided to both parties. The argument, Wright suggested, should focus on the likelihood of serious housing code violations existing in an apartment. The existence of such violations would be grounds for requiring a tenant to deposit only a portion of the contract rent with the court.²²²

For many first-year law students, reading the opinion in *Saunders* defines the extent of their knowledge of Judge Wright; but he is a major figure in twentieth century legal history. Shortly after he wrote the *Saunders* opinion, he was interviewed by CBS News about the case. Parts of his interview were broadcast in a 1971 program entitled "Some Are More Equal Than Others," the first of a three-part series on Justice in America narrated by Eric Sevaraid. During the show, Wright said that law is systematically "biased against the poor." The courts implement a "vast body of law slanted against" a poor person who is "helpless as a child" without a lawyer. Indeed, Wright opined, "equal justice under law is a farce" without lawyers for the poor. Any lay person, he contended, would find "completely reasonable" the idea that a lease for an apartment has a warranty requiring that the place be "livable." If the landlord doesn't fulfill "all of his bargain, then why should the tenant have to fulfill all of his?"

These are bold public statements from a sitting judge.²²³ They convey the sensibility of a man deeply conscious of the relationships between poverty and access to justice. His ruling in *Saunders* and the statements he made about it for CBS certainly were not the first time Wright took strong positions on behalf of the poor. He authored the opinion in the famous unconscionability case, *Williams v. Walker-Thomas Furniture Co.*²²⁴ And his actions ordering the desegregation of public schools in New Orleans during the 1960-1961 school year, while sitting there as a federal district court judge, are legendary indications of his courage and convictions. Indeed, President Kennedy is said to have promoted him to the federal circuit court in Washington rather than to a southern panel in order to satisfy the desires of Louisiana's senators to get him out of town.²²⁵

Wright ordered the desegregation of New Orleans' schools effective the fall of 1960. When Governor Davis took over the city's schools and ordered segregation to continue, Wright invalidated the state statute that gave the governor authority to take such steps. Governor Davis then asserted that the court had no authority over him and the state legislature enacted a series of segregation laws.

222. *Id.* at 484.

223. He expressed quite similar views in an address he gave at Duke University that was published the same year as his opinion in *Saunders*. J. Skelly Wright, *Poverty, Minorities, and Respect for Law*, 1970 DUKE L.J. 425 (1970).

224. See *supra* note 33.

225. ARTHUR SELWYN MILLER, A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT 83 (1984).

That led Wright to issue an injunction against the Governor, the Attorney General, the state police, the National Guard, the state superintendent of education, "and all those persons acting in concert with them," ordering them not to enforce the new laws. That was on November 10. On November 11, the state superintendent of education declared that November 14 was a state school holiday, which caused Wright to issue a decree against the holiday and to cite the superintendent for contempt. But the dragon of official segregation was not yet dead. The legislature declared November 14 to be a school holiday, whereupon Wright added all its members to the list of those ordered not to interfere with desegregation.

On November 14, four black children entered the first grade of two white schools. This caused the legislature to pass a resolution removing members of the New Orleans school board. Again Skelly Wright was up to the challenge to his, and the federal government's authority; he ordered that the resolution not be enforced. White anger exploded. Leander Perez addressed a mass rally in which he shouted, "Don't wait until the burr heads are forced into your schools. Do something about it now." Whites threatened to boycott the schools; the legislature threatened to cut off funding. But Skelly Wright prevailed. Jack Bass in his book, *Unlikely Heroes*, concludes: "With support by the full federal judiciary and ultimately the Justice Department and by his own personal resolve, Skelly Wright broke the back of the state's effort at massive resistance and prevented the closing of the New Orleans public schools. He upheld federal supremacy under the Constitution by facing down the full force and power of the entire state of Louisiana." Wright was alone, totally alone.²²⁶

After New Orleans, implying warranties in *Saunders* was a piece of cake.²²⁷

Judge Wright has candidly admitted that the civil rights movement had a significant impact on his decision in *Saunders*. In a letter to Professor Edward Rabin, he wrote:

I was indeed influenced by the fact that, during the nationwide racial turmoil of the sixties and the unrest caused by the injustice of racially selective service in Vietnam, most of the tenants in Washington, D.C. slums were poor and black and most of the landlords were rich and white. There is no doubt in my mind that these conditions played a subconscious role in influencing my landlord and tenant decisions. . . . It was my first exposure to landlord and tenant cases, the U.S. Court of Appeals here being a writ court to the local court system at the time. I didn't like what I saw, and I did what I could to ameliorate, if not eliminate, the injustice involved in the way many of the poor were required to live in the nation's capital. I offer no apology for not following more closely the

226. *Id.* at 81-82.

227. Wright also ordered the desegregation of the public schools in Washington, D.C. *Horson v. Hanson*, 269 F. Supp. 401 (D.C. 1967).

legal precedents which had cooperated in creating the conditions that I found unjust.²²⁸

V. EPILOGUE

A. *The Apartment Buildings Today*

And so the long, tortured journey of the *Saunders* litigation ended with the reversal of Judge Austin Fickling's²²⁹ refusal to allow the Clifton Terrace tenants to use mice feces, dead rodents and jars of bugs in defending against First National Realty Corporation's claim for possession of their apartments.²³⁰ Though the *Saunders* saga ended, the story of Clifton Terrace was just beginning. Many thought the complex was headed to recovery in the early 1970s. At the end of the 1971 CBS News television special "Some Are More Equal than Others," in which Wright spoke about his experiences with landlord-tenant law in the *Saunders* litigation, scenes of an almost rehabilitated apartment complex flashed upon the screen. In the background, Eric Sevaraid described the project as a rare success in the reconstruction of inner city apartment housing. For a short time that was an accurate picture. Those living in Clifton Terrace after HDC finished remodeling the complex agreed.²³¹

But signs of trouble quickly appeared. The prime contractor, Winston A. Burnett Construction Company, was disbanded by its parent company, Boise Cascade. The parent had started up Burnett with \$600,000 in seed money and claimed to have lost \$39,000,000 before giving up. Boise Cascade took over the Clifton Terrace job and completed it.²³² By the end of 1972, HDC and Boise

228. Letter from Judge J. Skelly Wright, former Chief Judge, U.S. Court of Appeals Judge for the D.C. Circuit, to Edward Rabin, Professor of Law, University of California at Davis (Oct. 14, 1982), *reprinted in* Edward Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 549 (1984).

229. This, by the way, was not the last time he was reversed by Wright. After hearing the *Saunders* case, Fickling was promoted to the District of Columbia Court of Appeals. On that court he wrote two opinions refusing to recognize a retaliatory eviction defense to attempts by landlords to remove tenants who complained about some aspect of their rental arrangements. *Wilson v. John R. Pinkett, Inc.*, 265 A.2d 778 (D.C. 1970); *Robinson v. Diamond Hous. Corp.*, 267 A.2d 833 (D.C. 1970). In one of those cases, *Robinson v. Diamond Housing Corporation*—a case almost as famous as *Saunders* and also worthy of an historical review—Wright reversed Fickling again. The often quoted opinion affirmed the importance of protecting tenants' right to seek the assistance of housing code enforcement authorities and to raise defenses in landlord-tenant court without fear of being evicted in retaliation for their actions. 463 F.2d 853, 150 U.S. App. D.C. 17 (1972). In doing so, Wright reaffirmed a position he had taken two years earlier in *Edwards v. Habib*, 397 F.2d 687, 701-03 (D.C. Cir. 1968), discussed *supra* text accompanying footnotes 149-51. *Diamond* was one of the last cases in which the federal circuit court entertained an appeal on a matter of local law from the courts of the District of Columbia.

230. In August 1970, First National Realty did seek review in the United States Supreme Court, but *certiorari* was denied. *First Nat'l Realty Corp. v. Javins*, 400 U.S. 925 (1970), *cert. denied*.

231. Paul Hodge, *Housing Unit, in 5th Year, Is Praised*, WASH. POST, July 10, 1971, at E2; Bart Barnes, *Success Crowns Long Struggle to Rehabilitate Clifton Terrace*, WASH. POST, May 15, 1972, at A1 [hereinafter Barnes, *Success Crowns Long*].

232. Barnes, *Success Crowns Long*, *supra* note 231, at A1.

Cascade ended up in court feuding about how much the contractor was still owed for its work on the apartment complex. The dispute, according to the head of HDC, Reverend Channing Phillips,²³³ was likely to lead to foreclosure of the Clifton Terrace by the Electrical Workers' Benefit Association. Since the federal loan insurance and subsidy program used to rehabilitate the apartments required that rents be kept fixed and low, there was no way to raise funds to pay off the additional construction costs Boise Cascade claimed. Given the federal loan guarantee, HUD was expected to end up owning the buildings. Problems similar to these had cropped up in projects all over the country. The underlying structure of the federal program—the provision of subsidies and loan insurance while requiring low rents—did not provide enough money for both the payment of construction debt and daily operation of the buildings.²³⁴ Phillips' predictions of foreclosure came true early in 1973.²³⁵

Problems emerged almost immediately after HUD took over the buildings. Maintenance declined and vandalism rose. HUD eventually agreed to change building managers and signed on Pride, Inc., the same group that had helped clean up Clifton Terrace after HDC took over the buildings.²³⁶ A short time later, P.I. Properties, the real estate arm of Pride, Inc., agreed to purchase the complex for \$1,286,000.²³⁷ Initial impressions were quite good. The project seemed to right itself. Pride, Inc., was a well-known non-profit group devoted to working with youths with little education and criminal records. Pride seemed to be all business. Headed by Mary Treadwell Barry, it got lots of great publicity, including a visit full of praise from Mayor Walter Washington.²³⁸

But tragedy has never seemed far from the halls of Clifton Terrace. Complaints about operation of the buildings grew fierce.²³⁹ Mortgage payments were not made. Hundreds of citations were issued for housing code violations.²⁴⁰ In 1978, HUD foreclosed again²⁴¹ and took over the complex, though not without a fight

233. Phillips was an important player in District politics. Among other things, he was a member of the delegation from the city to the chaotic Democratic Convention of 1968. He was nominated for the Presidency as a favorite son to protest the lack of home rule in the District. Others dissatisfied with the general tenor of the convention also supported him on the first ballot, in which he received 67.5 votes. Robert L. Asher, *District Favorite Son Would Withdraw Early*, WASH. POST, Aug. 26, 1968, at A9; Robert L. Asher, *Phillips Bid Is Backed by Negroes*, WASH. POST, Aug. 28, 1968, at A1; Robert L. Asher, *Some D.C. Delegates Join Protest March, Leave Town*, WASH. POST, Aug. 31, 1968, at A5.

234. Eugene L. Meyer, *Bankruptcy Near for Clifton Terrace*, WASH. POST, Dec. 30, 1972, at A1.

235. *Firm Forecloses on D.C. Complex*, WASH. POST, Feb. 10, 1973, at A11.

236. Thomas W. Lippman, *Pride, Inc., to Manage Clifton Terrace Project*, WASH. POST, Apr. 1, 1974, at A1.

237. Megan Rosenfeld, *Pride Unit to Buy Clifton Terrace*, WASH. POST, May 17, 1974, at B8.

238. J.Y. Smith, *Clifton Terrace Hailed as Model*, WASH. POST, Nov. 13, 1975, at A21.

239. Courtland Milloy, *Clifton Terrace Tenants Cold, Manager Blames Late Rents*, WASH. POST, Jan. 24, 1977, at A1.

240. Patricia Camp, *Clifton Terrace Accused by D.C. on 300 Counts*, WASH. POST, Aug. 9, 1978, at A1.

241. Patricia Camp, *HUD to Reclaim Clifton Terrace from Pride, Inc.*, WASH. POST, June 24, 1978, at C1.

from Pride.²⁴² Things could hardly get worse, but they did. The real tragedy turned out to have very little to do with tenants not paying rent or vandalizing the buildings. In October 1979, the *Washington Post* published the first of a series of stories on Mary Treadwell Barry and some of her colleagues at Pride, Inc., accusing them of stealing \$600,000 from the government and tenants.²⁴³ Treadwell, it turned out, was not only playing a role as one of the most politically powerful women in Washington, but was also living the high life on other people's money. By this time Marion Barry, who got his political start by working with Pride and was at one time the husband of Mary Treadwell Barry,²⁴⁴ was mayor of Washington. He ordered a review of all city contracts with her organization.²⁴⁵ Treadwell and two of her colleagues, Joan Booth and Robert Lee, were eventually indicted, tried, and convicted in a highly publicized trial. Treadwell was sentenced to serve three years in prison.²⁴⁶

Some time after Pride lost the building, HUD sold it to Phoenix Management Services. The same pattern repeated itself one more time. Initial hope was followed by another round of decay, with the additional burdens of rampant drug use, neighborhood disarray, and lack of supervision over the funds dispersed in the heavily subsidized project. HUD finally foreclosed on the complex again in 1996.²⁴⁷ The government selected another new redevelopment team in 1999. Michaels Development Company of New Jersey and Community Preservation and Development Corporation of Bethesda, Maryland purchased the building for \$1. They also received a \$9.2 million grant from HUD to help pay the \$21 million dollar renovation cost, the third in a series of federal subsidy plans designed to help solve the "Clifton Terrace" problem.²⁴⁸ The plans included a reduction in the number of housing units from 289 to 232. Seventy-six of the apartments will be sold as condominiums; the rest will be rented at below market rates.²⁴⁹ With Mayor Anthony Williams and other dignitaries attending, groundbreaking

242. Patricia Camp, *Lawsuit Stops Clifton Terrace Auction by HUD*, WASH. POST, Aug. 1, 1978, at B7; Patricia Camp, *Clifton Terrace Acquired by HUD for \$1.1 Million*, WASH. POST, Aug. 24, 1978, at C2.

243. Lewis M. Simons & Ron Shaffer, *Pride Firm Tied to \$600,000 Theft*, WASH. POST, Oct. 21, 1979, at A1; Neil Henry & Loretta Tofani, *Five Years of Shadows at Clifton*, WASH. POST, Oct. 22, 1979, at A8; Timothy S. Robinson, *Prosecutor Probes Theft Allegations*, WASH. POST, Oct. 22, 1979, at A1; Lewis M. Simons & Ron Shaffer, *How HUD Gave Project to Pride*, WASH. POST, Oct. 23, 1979, at A1; Milton Coleman, *Maggots and Neglect: It's an Old Story at Clifton Terrace*, WASH. POST, Oct. 25, 1979, at C1.

244. They separated in 1976. Barry was never accused of any wrongdoing in the affair, but his association with Treadwell led to the spilling of a great deal of newspaper ink.

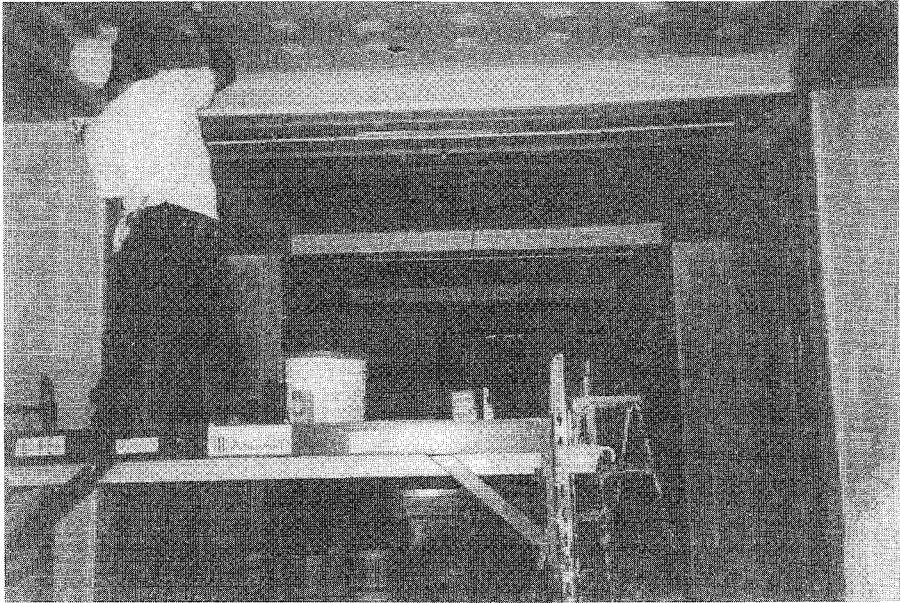
245. Milton Coleman & Timothy S. Robinson, *Barry Orders a Review of City's Pride Contracts*, WASH. POST, Oct. 23, 1979, at A1.

246. Kenneth Bredemeier, *Ex-Pride Chief Gets 3 Years in Clifton Terrace Scandal*, WASH. POST, June 20, 1984, at A1.

247. Phillip P. Pan, *HUD Set to Seize D.C. Housing Complex*, WASH. POST, Sept. 1, 1995, at B3; Katherine Boo, *Misery's New Landlord*, WASH. POST, Oct. 18, 1996, at A1; *HUD Takes Over Troubled D.C. Housing Project*, WASH. POST, Nov. 2, 1996, at B6.

248. Eric Lipton, *Starting Over, Again, at Clifton Terrace*, WASH. POST, May 13, 1999, at J1.

249. *Firms to Redevelop Clifton Terrace*, WASH. POST, Apr. 28, 1999, at B3; Sandra Fleishman, *Symbol of Decay to Get a Facelift*, WASH. POST, Jan. 13, 2001, at G1.



Lobby Area of 1315 Clifton Street Being Remodeled (August 2002)

ceremonies were held on October 17, 2001.²⁵⁰ Construction continues as this Article is written. Only time will tell whether the apartments, named Wardman Courts once again, will finally recover and maintain their original status as a worthy abode.²⁵¹

Sidney Brown died on November 26, 2000.²⁵²

B. The Landlord-Tenant Court Today

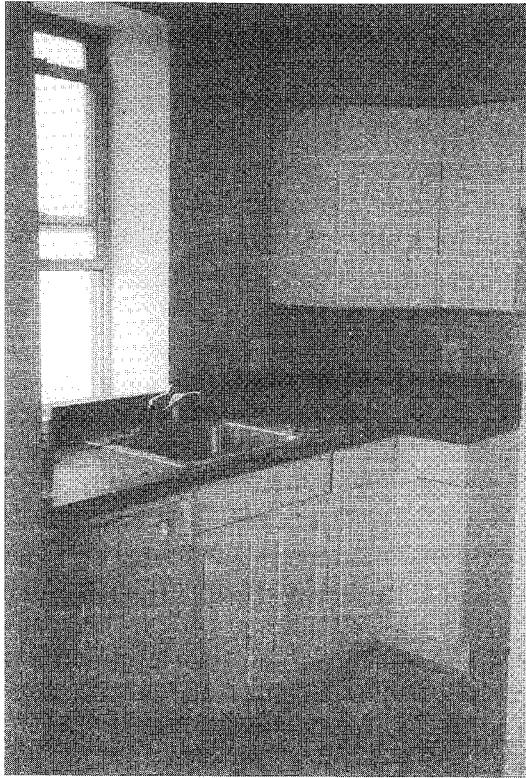
And what about the landlord-tenant court? Has it changed very much since *Saunders* was decided? In some ways, the answer is obviously “yes.”²⁵³ Defenses are available in eviction actions. Lawyers are available to help some tenants. The judges are not usually as hostile to tenant claims. Protective orders are routinely granted to landlords who move for them. The court often appears to operate fairly. But for a very large proportion of the tenants who are sued for possession

250. *Metro; In Brief*, WASH. POST, Oct. 18, 2001, at B3.

251. There is some optimism. See Fleishman, *supra* note 249, at G1.

252. Barnes, *Sidney J. Brown Dies*, *supra* note 28, at B6.

253. And in some ways, the answer also is obviously “no.” The court is still a forum of limited jurisdiction very much as it was in the nineteenth century. Procedures are rapid. Answers may be filed only upon motion of a tenant. Most actions are only about possession. Landlords suing for possession may serve process by door posting. Claims for back rent must be personally served. Counterclaims are still barred.



Kitchen in 1350 Clifton Street Ready for New Occupant (August 2002)

for non-payment of rent, the process looks much as it did thirty-five years ago.²⁵⁴ Though it does not handle as many cases as in the 1970s,²⁵⁵ the court's docket remains massive.²⁵⁶ Poverty still is endemic in large sections of the city²⁵⁷ and the tenants appearing in the court are still largely black. As Judge Wright noted in his comments to CBS News, many tenants don't show up in court. In 1997, default judgments against tenants were entered in 34% of the cases filed.²⁵⁸ Anyone who watches the court operate will hear countless requests for default

254. A recent study of the Landlord Tenant Court by the public services arm of the District of Columbia Bar confirms this. See D.C. BAR PUB. SERV. ACTIVITIES CORP. LANDLORD TENANT TASK FORCE, FINAL REPORT 5 (1998) [hereinafter L-T REPORT].

255. Over 100,000 cases per year were filed in landlord-tenant court during the 1970s. See 1978 ANNUAL REPORT, *supra* note 50.

256. Though the population of the District has fallen between 1970 and 2000, new filings in landlord-tenant court still averaged 55,977 each year from 1997-2001, with a high of 57,621 and a low of 53,970. That works out to about 225 cases per court day, all handled by a single judge. See JOINT COMM. ON JUDICIAL ADMIN. IN THE DIST. OF COLUMBIA, 2001 ANNUAL REPORT OF THE DISTRICT OF COLUMBIA COURTS 83 (2002); see also L-T REPORT, *supra* note 254, at 25.

257. *Poverty Deepens in District*, WASH. POST, Oct. 2, 2002, at A1.

258. 55,289 cases were filed and 18,717 ended up with defaults. L-T REPORT, *supra* note 254, at 25.

judgments from landlords' attorneys as the clerk calls the roll of cases each morning. Perhaps the no-shows have already moved and taken a "poor man's" eviction—not paying rent for a couple months and forfeiting a security deposit in order to have enough money to move into a different apartment. Or maybe they assume there is nothing they can do because they owe back rent. And, of course, some tenants never receive service of the court papers.²⁵⁹

After the clerk calls all the cases to see who is present and to enter default judgments against the non-appearing tenants, the tenants in attendance are encouraged to talk to their landlords' representative and work out a settlement. A formal court recess is called for that purpose. The various landlords or their attorneys sit behind tables set up by the court while their tenants line up to wait for a chat.²⁶⁰ The formulaic agreements reached during this period routinely require the tenants to pay each month's rent as it comes due in the future, along with a portion of their unpaid back rent. They also typically have clauses by which tenants waive their right to any further court proceedings if they fail to pay. In case of breach, the landlord need only apply to the clerk of the court to obtain authorization to evict the tenant. The settlement forms containing these terms are actually provided by the court!²⁶¹ Tenants signing such agreements routinely do so without the advice of counsel. In 1997, a startling 99.3% of the tenant defendants lacked counsel while 86% of the landlords retained attorneys.²⁶² Each settlement agreement reached is reviewed in a brief proceeding by an Interview and Judgment Clerk to determine if the tenant understands its terms.²⁶³ The thoroughness of this review varies a bit, but the vast bulk of the agreements are approved. A judge only hears the cases left open after the completion of this process.

When the judge finally takes the bench after the recess, the remaining cases are called. At this point, tenants may be asked why they haven't paid rent. Some judges are more willing to inquire about the existence of potential defenses than others. If the court thinks it appropriate, tenants are asked if they would like to

259. Service of process is commonly made by posting papers on doors. Default judgments obtained after tenants fail to show up are particularly difficult to reopen. While the law is clear that failure to receive notice is grounds for vacating the default, proof of service failure must be gathered, motions must be filed and hearings scheduled. Legal assistance is crucial and often not obtained.

260. This description is further confirmed by the descriptions of Julie Becker, a staff attorney with the Legal Aid Society of the District of Columbia, in an op-ed article, *Gimme Shelter: For Renters, a Trip to the District's Landlord and Tenant Court Can Be an Unjust and Degrading Experience*, WASH. POST, Oct. 27, 2002, at B8.

261. The court provides a number of forms for use by landlords pursuing eviction actions, but none for tenants seeking to raise defenses. One of the forms for landlords, a Consent Judgment Praecipe, contains blanks for completing a tenant payment schedule and for repairs to be made by the landlord. The repair portion of the form is rarely used and largely ignored during the hallway "negotiations." Consent Judgment Praecipe, available at http://www.dcbbar.org/for_lawyers/courts/superior_court/pdf/dcsc107.pdf (last visited Feb. 9, 2004).

262. L-T REPORT, *supra* note 254, at 26.

263. This system is formalized in the rules of the Landlord-Tenant court. D.C. SUP. CT. R. CIV. P. FOR L.T. BRANCH 11-1.

speak with a legal services lawyer or a third-year law student. Given the timing of such requests so late in the day's proceedings, only a very small segment of tenants actually obtain legal assistance. Once a lawyer or a student speaks with a tenant, it is routine practice to ask for a continuance in order to have time to file an answer and demand a jury trial.²⁶⁴ Only in these cases, together with a few more in which tenants seek out and obtain legal assistance before the date they are supposed to appear in court, do tenants have any chance of gaining the full benefits of the remedies provided by *Saunders*. One day, perhaps, judges and other persons of authority in Washington will recall Judge Wright's statement that "equal justice under law is a farce" without lawyers for the poor.²⁶⁵ And if they do, perhaps they will reconstruct the operation of the landlord-tenant court so that more tenants have a shot at obtaining the legal assistance they need to properly use the remedies made available in *Saunders*.

Provision of legal services to tenants in eviction courts by itself, of course, will not fulfill Wright's desire to help all those most in need of housing assistance. In the absence of government subsidies, strong enforcement of housing codes—whether in eviction cases or administrative proceedings—is unlikely to dramatically improve the quality of the housing stock occupied by the poor or make it more financially accessible.²⁶⁶ This suggests that the desire of Judge Wright to provide lawyers to poor litigants must be significantly expanded beyond

264. These statements about the operation of the court result from my own observations and those of my first year property students. All of my students are required to visit the court at least once and write a brief memo on their impressions of its operations. Their observations are confirmed by all extant literature on the operation of the court.

265. See *supra* text accompanying footnotes 222-23.

266. There is a lengthy academic debate about the relationship between housing code enforcement and the cost of housing. The most recent entry in the debate is Robin Powers Kinning. Kinning claims that a system of selective enforcement of the codes against repeat offenders and symbolically important buildings has a salutary impact without any significant increase in rents. Robin Powers Kinning, *Selective Housing Code Enforcement and Low-Income Housing Policy: Minneapolis Case Study*, 21 FORDHAM URB. L.J. 159, 160 (1993). This theory would have supported strong code enforcement in the Clifton Terrace setting. To the extent that strong enforcement of housing codes and implied warranties raise rent, some tenants may be negatively affected in the absence of government support for below market rate housing. But this outcome, too, supports the claims made by many people during the repetitive efforts to rehabilitate Clifton Terrace that federal housing subsidies must be a central feature of any systematic efforts to provide housing for the less well off. Kinning's work comments upon Bruce Ackerman, *Regulating Slum Housing on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971); Neil K. Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 YALE L.J. 1175 (1973); Bruce Ackerman, *More on Slum Housing and Redistribution Policy: A Reply to Professor Komesar*, 82 YALE L.J. 1194 (1973); Richard S. Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976); Charles J. Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975); Edward H. Rabin, *Symposium: The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984); Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485 (1987). For a study of the impact of warranties in the commercial world, see Anthony J. Vlatas, *An Economic Analysis of Implied Warranties of Fitness in Commercial Fitness*, 94 COLUM. L. REV. 658 (1994).

courtroom representation. In addition to providing assistance in eviction cases and other judicial disputes, lawyers are also needed to help tenants purchase, rehabilitate or build decent dwellings and to provide help developing a political constituency for a vast increase in public financial support for housing programs. The tenants' lawyers in *Saunders* were good role models for us all. Simultaneously working to change eviction law and to obtain subsidies for the reconstruction of Clifton Terrace, they understood well the limits of litigation and the importance of government assistance. We need many more like them if the true legacy of *Saunders* is to be fulfilled.

