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

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opposed Miller's motion.² Judge Fickling, in accordance with the long-standing refusal of courts to allow tenants to raise defenses in eviction cases, then barred introduction of the evidence, entered judgments for possession as a matter of law and dismissed the jury.³

These events formed the beginning of what turned out to be a very long saga. Eventually, in *Javins v. First National Realty Corporation*,⁴ the United States Circuit 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.

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³ 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.

⁴ 428 F.2d 1071, 138 U.S. App. D.C. 369 (D.C. Cir. 1970), rev'g *Saunders v. First National Realty Corp.*, 245 A.2d 836 (D.C.App. 1968). The proceeding in the Landlord and Tenant Division of the D.C. Court of General Sessions resulted in no published opinion.

Richard H. Chused*

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

Introduction

The clerk for Judge Austin Fickling called *First National Realty Corporation v. Saunders* for trial on June 17, 1966.¹ It must have been quite a scene. As Gene Fleming, the tenants' lawyer, tells the story, the tenants living in the 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 one thousand 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

* A longer, fully documented version of this article will be published in volume 11, issue 2 of the *Georgetown Journal on Poverty Law and Policy* (Winter 2004). At the editors' insistence, the full documentation and citations were removed to accommodate the book's format.

¹ 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.

opposed Miller's motion.² Judge Fickling, in accordance with the long-standing refusal of courts to allow tenants to raise defenses in eviction cases, then barred introduction of the evidence, entered judgments for possession as a matter of law and dismissed the jury.³

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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,⁵ 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, 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. And these same tenants lost their appeal before the District of Columbia Court of Appeals on September 23, 1968,⁶ 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

⁵ 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.

⁶ 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 course. 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. 91-358, 84 Stat. 473 (1970)

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."⁷ 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 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.⁸

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.⁹ Like many other planners of his time, Howard

⁷ National Park Service, Department of the Interior, National Register of Historic Places Registration Form, Sec. 8, p. 9 (Nov. 7, 2001). [Hereinafter cited as 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*, Washington Post (Sep. 5, 2002) at H1.

⁸ Id. at Section 8, p. 4.

⁹ For more on these movements, see Peter Hall, *Cities of Tomorrow* 86–135, 174–202 (Blackwell, 1988).

believed that the moral and civic fiber of urban society could be improved by altering the physical settings of city life.¹⁰ While many contemporary planners view the Garden City Movement as a bit romantic and naïve, residents of Washington found developments like Wardman Courts quite attractive. Through the 1950s the buildings were almost always full of middle class tenants.

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.¹¹ 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.¹² 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.¹³ 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 posses-

¹⁰ 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*, at 220–283 (Harvard Univ. Press, 1978).

¹¹ 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.

¹² 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 (Sup. Ct. 1873).

¹³ This was the rule in the District of Columbia. In *Howell v. Schneider*, 24 App. D.C. 532 (1905), the landlord was not responsible for personal injuries to a tenant resulting from a toilet flush tank falling off the bathroom wall.

sion 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 counter-claims were not nearly as extensive as today.¹⁴ Thus, when a 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 from each other and from suits for breaches of other contracts or tort duties of care.¹⁵ 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 covenants construct governed not only the law of leases but also much of nineteenth century contract law. 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

¹⁴ Today, a plaintiff suing in a standard civil forum may join all his or her claims against the defendant in the same case, including all 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. Fed. R. Civ. P. 13. In most cases, all the parties involved in the claims may be joined in the same case. Fed. R. Civ. P. 20.

¹⁵ 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.App. 1967), reversed by *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968).

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 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. 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. 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,¹⁶ and that a written demand for the rent was served on the

¹⁶ 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.

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.¹⁷

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. But by the 1960s, Sidney Brown's First National Realty Corporation owned the complex, the occupants were largely black and the buildings had fallen into disrepair. These legal, demographic and structural shifts laid part of the groundwork for major 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. Its demise actually began in the late eighteenth century with an opinion by Lord Mansfield in *Kingston v. Preston*.¹⁸ Justice Cardozo put the lid on the coffin in the United States in the early twentieth century.¹⁹ 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. 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

¹⁷ Many states adopted summary eviction remedies prior to 1850.

¹⁸ 2 Doug. 689 (1773).

¹⁹ *Jacob & Youngs v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921).

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.²⁰

The contracts and torts textbooks used by first year law students are littered with famous opinions exemplifying the shifts described by Gilmore.²¹ 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 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. 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 Court was constructed, the Court of Appeals for the District of Columbia followed a national trend in holding a landlord responsible for

²⁰ Grant Gilmore, *Law, Logic and Experience*, 3 How. L.J. 40-41 (1957).

²¹ Among the best known are Justice Cardozo writing on products liability in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), Justice Francis limiting the validity of form contracts disclaiming warranties in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), Judge Traynor opining on products liability in *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436 (1944) and on strict liability in *Greenman v. Yuba Power Products, Inc.*, 59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr. 697 (1963), and Judge Wright 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).

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.²² The same result was reached a short time after *Wardman Courts* was completed in a case against *Wardman* himself.²³

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. 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*²⁴ that a landlord was responsible for injuries caused to a tenant when a bedroom ceiling collapsed. 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. Jess Fisher Management Company*²⁵ 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 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 dispossess 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

²² *Iowa Apartment House Co. v. Herschel*, 36 App.D.C. 457 (Ct. App. D.C. 1911).

²³ *Wardman v. Hanlon*, 280 F. 988, 52 App. D.C. 14 (Ct. App. D.C. 1922).

²⁴ 233 N.Y. 16, 134 N.E. 703 (1922).

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

purpose for which they were rented.”²⁶ This standard, worded much like an implied warranty of fitness for use, was more lenient than the common law rule.²⁷ 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. 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 looking activists of the day. They could not get beyond the notion that the payment of rent was an unchallengeable obligation.

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,

²⁶ *Ackerhalt v. Smith*, 141 A.2d 187 (Mun. Ct. App. D.C. 1958).

²⁷ 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 Development Corporation*, 77 F.2d 550, 64 App. D.C. 292 (1935).

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. Tenement house reforms, housing codes, creation of parks, improving sanitation systems and zoning fit naturally into the progressive mix, even for many conservatives. 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 anathema.

Many of the same basic trends continued to dominate urban reforms after World War II. As those perceiving themselves as artificially suppressed members of the 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 resources as public antipathy to those left behind in the cities grew. Summary dispossession court did not become a focus of public attention until black Americans began to claim their full citizenship rights and to 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 cause him legal troubles when he purchased Clifton Terrace in 1963. It was easy to remove non-paying residents and the city's code enforcement system was largely ineffectual. By the early 1960s the landlord-tenant court was processing tens of thousands of cases per year. 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,²⁸ the proceedings went something like this:

²⁸ 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.

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.²⁹

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. 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 funds from a federal grant from the Office of Economic Opportunity—opened an office in the basement of the Clifton Terrace Apartments.

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, Columbia Heights was an exception to the general trend. "[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."³⁰ 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.

²⁹ 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 I of the three part series *Justice in America* moderated by Eric Sevareid and televised by CBS News Reports in 1971.

³⁰ *Housing in the Seventies: A Report of the National Housing Policy Review 165-182* (1974) at 165.

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. Overcrowding also declined, though not as fast as the national rate. 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. 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.

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 legal system were "cheated most of the time."³¹ He saw an announcement about the establishment of the neighborhood legal services program in Washington, called Julian Riley Dugas, the director, and was hired. 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 workers³² and a secretary named Ruth Bradley.³³

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.³⁴ 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."

³¹ Email from Gene Fleming to the author (Aug. 19, 2002).

³² These workers were hired from the community with funds from the Office of Economic Opportunity.

³³ Gene Fleming says she 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." Email from Gene Fleming to the author (Nov. 17, 2002).

³⁴ 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.

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.³⁵ Each sent the landlord a letter drafted by Fleming stating that rent would be withheld until repairs listed in each letter were made.³⁶ 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 actions. Brown also visited the United States Marshal and alleged that Fleming had stolen money from the tenants. 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 Garris and Fleming of wrong-doing 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. 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. Rent

³⁵ 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).

³⁶ 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.

withholding began in April, 1966. Almost immediately after those still willing to strike followed through by refusing to pay rent, actions were filed seeking to evict them from their apartments.³⁷ 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. 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.

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.³⁸ 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.³⁹ Law review literature on tenant defenses was barely extant. The Clearinghouse Review, a newsletter published by the National Clearinghouse for Legal Services which became a major resource for poverty lawyers, and the CCH Poverty Law Reporter 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

³⁷ The eviction actions were filed on April 8, 1966.

³⁸ Recall the "transcript" of a typical hearing *supra* at pp. 18-19.

³⁹ *Pines v. Persson*, 14 Wis.2d 590, 111 N.W.2d 409 (1961).

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.⁴⁰

As noted at the beginning of this essay, Judge Austin Fickling heard the cases—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.

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, 30’ish, slender, quiet and determined.” When the appeal was filed, Fleming made sure to have him listed first so the case would be named after him. That worked in the District of Columbia Court of Appeals,⁴¹ 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 Saunder’s honor as will be done in the rest of this essay.⁴²

The dispute was ready for argument in the District of Columbia Court of Appeals fairly quickly. Some minor delays in the submission of briefs were occasioned by one “curious” event. 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.”⁴³ He asked for a continuance and finally filed his brief for the

⁴⁰ Answer in *First National Realty Corporation v. Saunders*, Civil Action No. LT 28968-66 (April 22, 1966). 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. It also according to Fleming, was designed to make it easier to stay evictions during the appeal he assumed would be necessary. Email from Gene Fleming to the author (Nov. 17, 2002).

⁴¹ The decision in that forum is *Saunders v. First National Realty Corp.*, 245 A.2d 836 (D.C.App. 1968)

⁴² Except when citing to the official case report, I will refer to the case by Saunders’ name in the rest of this tale.

⁴³ Interview with Gene Fleming (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.

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.⁴⁴ Written by Professor Robert Schoshinski of Georgetown and full of information about District of Columbia case law and regulations, it was published just before the trial. He and Fleming drew upon recent changes in consumer law, especially tort cases like *Whetzel v. Jess Fisher Management Co.*⁴⁵ finding that housing code regulations created a duty of care for landlords.⁴⁶ Their argument also relied upon constructive eviction cases, trying to make the claim that the underlying rule had long ago undermined the notion of independent covenants⁴⁷ 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," 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.⁴⁸

Miller's brief for the landlord responded that enforcement of the housing regulations was strictly a matter between the city and the

⁴⁴ Robert Schoshinski, *Remedies of the Indigent Tenant: Proposal for Change*, 54 *Geo. L.J.* 519 (1966). 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. Emails from Gene Fleming to the author (Nov. 5 and 19, 2002). The similarities between Schshinski's and Fleming's arguments suggest it was used for both briefs.

⁴⁵ *Supra* note 25.

⁴⁶ Brief for Appellants (November 4, 1966), *Saunders v. First National Realty Corp.*, 245 A.2d 836 (D.C.App. 1968).

⁴⁷ 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.

⁴⁸ 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, DC, and the need for judicial remedies.

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.⁴⁹ The brief also contained quite a bit of language that some tenants and many legal services lawyers viewed as gratuitously nasty.⁵⁰ 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?⁵¹

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 unupportable 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.⁵²

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

⁴⁹ Brief of Appellee (Nov. 16, 1966), *Saunders v. First National Realty Corp.*, 245 A.2d 836 (D.C.App. 1968).

⁵⁰ 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.

⁵¹ *Id.* at 2. Pardon the bad English, but a quote is a quote.

⁵² Reply Brief 2 (Nov.23, 1966), *Saunders v. First National Realty Corp.*, 245 A.2d 836 (D.C.App. 1968).

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"⁵³ he asked that the case be heard at "the earliest practicable time." The motion didn't seem to make a lot of difference; arguments were not held until March, 1968.

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. By October, the plans were in jeopardy. 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 dollars HDC wanted for the proposed project. 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."⁵⁴ 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 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 the difficulties of bring 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.

⁵³ Motion to Calendar for Argument (Dec. 19, 1967), Saunders v. First National Realty Corp., 245 A.2d 836 (D.C.App. 1968).

⁵⁴ Carol Honsa, *Slum Fighters are Stymied*, Washington Post, (Oct. 2, 1967) at B1.

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 * * *.⁵⁵

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, 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. 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. 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.

A few days later "a delegation of angry tenants visited Corporation Counsel Charles T. Duncan" demanding that heat be provided at Clifton Terrace immediately. 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. Despite the order, heat did not percolate through the old, broken down steam pipes. The next day Brown was brought into court, forced to go to trial immediately, 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:

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.

⁵⁵ *Id.*

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.⁵⁶

Though heat apparently returned to the apartments for a time, the situation did not cool off. Tenants, along with some legal services attorneys, Paul Fred Cohen and Florence Wagman Roisman, visited Mayor Walter Washington's office demanding that the city make basic repairs and bill the costs to the owner. Roisman made several visits with tenants to the District Building (Washington's city hall) demanding action on Clifton Terrace. Charles Duncan witnessed one. His main assistant was a gentleman named Hubert Pair. "Pair," Duncan reports, "was a very proper and old school lawyer."⁵⁷ 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."

Sidney Brown responded to the swelling controversy by threatening to close down the entire complex and evict everyone.⁵⁸ 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. Carl Bernstein revealed the lack of a permit after an unnamed reporter for the Washington Post made inquiries

⁵⁶ Carl Bernstein, *Landlord is Given Jail Term*, Washington Post (Nov. 8, 1967) at A1.

⁵⁷ This little story comes from an Interview with Charles Duncan by the Author (May 27, 2002). 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.

⁵⁸ 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.

about it with city authorities. 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 has said, "a more appalling place where people lived." The conditions were "subhuman." 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. 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. On Thanksgiving Day, it was reported that "60 percent of the units were without heat." In early December, amid talk of landlords and tenants being "at war,"⁵⁹ legal services lawyers partly reconstructed their litigation by filing an amended complaint seeking to bar Brown from evicting the tenants from Clifton Terrace.

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, 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. The second criminal trial of Sidney Brown and his First National Realty Corporation for violating the housing code began on December 15,⁶⁰ 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.⁶¹ 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. Drama aside, the case was continued.

Fleming filed his motion to calendar the *Saunders* case for oral argument in the District of Columbia Court of Appeals the following week. Early in 1968 all the remaining criminal charges for housing code

⁵⁹ Jack White, Jr., *Landlords, Tenants at War*, Washington Post (Nov. 25, 1967) at B1.

⁶⁰ The first trial was the "hurry up" proceeding during the public controversy about heating Clifton Terrace. See *supra* pp. 32–33.

⁶¹ 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.

violations were settled. First National Realty Corporation pled no-contest in return for the dismissal of all charges leveled personally against Sidney Brown. The corporation was sentenced to pay a fine of \$5000, "one of the largest imposed in a local housing case."⁶² 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 60 days in jail in the earlier trial was still on appeal. Brown did not pay the \$5,000 fine until May, 1971.⁶³ 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 earlier invalidating a residential lease entered into in contravention of the housing code.⁶⁴ 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 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.

Fleming opened the arguments, returning to Washington, DC for the occasion from Des Moines, Iowa, his hometown, where he had moved in 1967 to direct a newly funded OEO funded legal services program.

⁶² William Schumann, *Ex-Landlord of Clifton Fined \$5000*, Washington Post (Jan. 27, 1968) at A1.

⁶³ *Landlord Finally Pays Fine*, Washington 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 Roisman to the author (Oct. 18, 2002).

⁶⁴ *Brown v. Southall Realty Company*, 237 A.2d 834 (D.C.App. 1968). The opinion in this case, argued by Florence Roisman, came down on February 7, 1968.

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.⁶⁵ 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.

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. 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. Similarly, the new owners were forced to take steps to control vandalism by tenants and outsiders. Brown constantly complained about misbehaving tenants. On the other hand, HDC's rehabilitation plan began under an unusual arrangement giving the tenants' association the legal authority to patrol the buildings, collect rents and seek the eviction of any people misbehaving or failing to pay. 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. 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. 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 western most structure. After a few snags, the project formally began on August 13, 1968.⁶⁶

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,

⁶⁵ If you read the pleadings carefully, it had been raised below. But not much attention had been paid to it 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 National Realty*, 245 A.2d 836, 837 (D.C.App. 1968).

⁶⁶ *Rehabilitation Begins (Photo and Caption Only)*, Washington Post (Aug. 14, 1968) at B1.

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, N.E. running East from Union Station were also involved, as were stretches of 8th Street, S.E. through the heart of Capitol Hill and other areas in Southeast and Northeast Washington. According to one report, seven people died, 1,166 were injured, 7,370 people were arrested, and 711 fires were set. Over eleven thousand troops were called out to restore order. Calm began to descend on the smoky city by Monday, April 8. 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.⁶⁷ The final report of the Kerner 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."⁶⁸ 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 Robert F. Kennedy was assassinated immediately after declaring victory in the 1968 California presidential primary election⁶⁹ and just weeks after both the tumultuous Democratic Party Convention in Chicago and the Prague Spring ended the District

⁶⁷ 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. Adams, *The Geography of Riots and Civil Disorders in the 1960s*, 48 *Ec. 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 these 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.

⁶⁸ Report of the National Advisory Commission on Civil Disorders 1 (1968).

⁶⁹ The killing took place on June 5, 1968.

of Columbia Court of Appeals rendered its decision in *Saunders*. Unmoved by either its own decision in *Brown*,⁷⁰ the tumult surrounding the Clifton Terrace complex or the disturbances following Martin Luther King's death, the court affirmed the eviction judgments. The court agreed to decide the merits of the case even though the appealing tenants had left Clifton Terrace or paid the back rent.⁷¹ But the illegality holding of *Brown* was said to be inapplicable because the tenants never claimed that violations of the housing code existed at the *inception* of their tenancies—the moment the contracts were created. And the broader claim of the tenants that standard consumer oriented contract defenses should be available in eviction cases was brushed aside on the ground that enforcement of the housing code regulations rested 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 contractual duties of a landlord."⁷² 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 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. Between the oral argument and decision in *Saunders*, the federal court reversed the local judges in another famous landlord-tenant case, *Edwards v. Habib*.⁷³ 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:

⁷⁰ Two of the three judges in *Saunders* were the same as in *Brown*—Andrew Hood and Frank Myers.

⁷¹ 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.

⁷² *Saunders v. First National Realty Corp.*, 245 A.2d at 839.

⁷³ 397 F.2d 687 (D.C. Cir. 1968), rev'g *Edwards v. Habib*, 227 A.2d 388 (D.C.App. 1967). The Circuit Court issued its opinion on May 17, 1968 and declined an invitation to rehear the case en banc on July 11, 1968.

[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.⁷⁴

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 refused to allow the 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 granted⁷⁵—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. As a practical matter, the Chair of the Senate subcommittee overseeing the District of Columbia 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. Chief Judge Andrew Hood, the author of the District of Columbia Court of Appeals' opinions in both *Edwards v. Habib* 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 78 in 1979. 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

⁷⁴ 397 F.2d at 701.

⁷⁵ *Edwards v. Habib*, 366 F.2d 628 (D.C. Cir. 1965).

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 court. It should have surprised no one, including Judge Hood himself, that the *Saunders* case ended up on the Circuit Court of Appeal'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 Appeal for the District of Columbia Circuit to review the *Saunders* case. On January 16, 1969, the Circuit Court agreed to allow the appeal.⁷⁶ In reality, this was all quite odd. In the normal course of events, the 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. It was established by 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. 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 insensitivity⁷⁷—Congress established a new court structure for the

⁷⁶ 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 she 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 Nov. 8, 1968 asking the court to hear these three cases. Herman Miller filed a response on behalf of First National Realty on Dec. 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.

⁷⁷ 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

District and removed virtually all authority of the District of Columbia Circuit of Appeals to review local decisions.

Briefing in *Saunders* continued through much of 1969. Though longer and a bit more polished than the prior filings, the tenants' brief ploughed the same basic legal ground. 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. Jess Fisher Management Company*⁷⁸ 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 an historical exegesis, but a well-crafted attempt to apply standard contract theory in landlord-tenant court.

Like the tenants, 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.”⁷⁹ But there also were 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*.⁸⁰ Since that case came down after the briefs were filed before the District of Columbia Court of Appeals, this was the first opportunity Miller had to write about the result in the case. He claimed that the result of the case removed enforcement of the housing regulations from the appropriate 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

decisions of the federal Court of Appeals led many conservatives to support a shift they might not otherwise have endorsed.

⁷⁸ See *supra* note 25.

⁷⁹ Brief for Appellee at 11, *Javins v. First National Realty*, 428 F.2d 1071, 138 U.S.App.D.C. 369 (D.C. Cir. 1970).

⁸⁰ 237 A.2d 834 (D.C.App. 1968).

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 Washington, 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 in the Washington area to respond to racial unrest and to demands for action made by a variety of community groups during the late 1960s. A court rule was adopted in the fall of 1968 allowing students to appear under the supervision of a member of the District of Columbia Bar. 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. A director was hired, offices were rented, and the program began operation in the fall of 1969, just after Miller's brief was filed with the federal Circuit Court in *Saunders*.⁸¹ The program, one of the largest clinical programs in the nation, is still running. Each participating law school contributes funds to operate the clinic.

As indicated by the fairly sophisticated pleadings filed by Gene 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 also must have been 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, wherein third year law students under supervision of a member of

⁸¹ *McCormick Picked to Head LSIC Program in District*, 3 Georgetown Law Weekly 1 (Mar. 14, 1969); *Students in Court Applications Set for 1969-1970 Year*, 3 Georgetown Law Weekly 1 (Mar. 27, 1969).

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.⁸²

The pace of the action in landlord-tenant court, of course, has 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. Miller's brief inarticulately 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 reply made any efforts to deal with these issues. The court, as we will see, eventually did.

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, 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 60-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 black construction workers from the neighborhood getting union cards. 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* in February, 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

⁸² Brief for Appellee at 14, *Javins v. First National Realty*, 428 F.2d 1071, 138 U.S.App.D.C. 369 (D.C. Cir. 1970).

air conditioning ducts this week.”⁸³ Henderson and other long time residents of Clifton Terrace finally moved into refurbished apartments in the fall of 1970, two years behind schedule.

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. "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." Recall that the case was heard in haste amid efforts by the city to get heat turned back on at Clifton Terrace. 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 the attorney protested that he was unprepared for trial and showed up only because he was told there was an emergency.

Perhaps emboldened by his appellate victory, Brown filed ethics charges against Florence Roisman on July 14. He complained to the Committee on Admissions and Grievances at the United States Courthouse in Washington, D.C. that Roisman brought the federal action seeking to enjoin Brown from violating local housing codes without the knowledge of the parties named in the complaint as plaintiffs and that she urged the Office of Corporation Counsel in Washington, D.C. 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 without any foundation Roisman labeled him a "criminal" and accused him of taking "money from the poor at Clifton Terrace." Her interest in the matter, Brown wrote, 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."⁸⁴

⁸³ Carl Bernstein, *Black Builders Get a Big Job*, Washington Post (Feb. 27, 1969) at B1.

⁸⁴ "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

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.⁸⁵

The ethics complaint, which lacked any serious basis for disciplining Roisman, lingered unresolved for almost ten months. 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 previously collected a fraudulent judgment against Brown for \$14,000.⁸⁶ 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. In any case, the failure of the Committee to dismiss the ethics proceedings it initiated against Roisman, even after all procedural and evidentiary issues were resolved, led Roisman to file an action in federal district court on March 4, 1970 seeking to enjoin any further ethics proceedings. The Committee met nine days after the federal complaint was filed, dismissed the ethics proceeding against Roisman, and sent out a letter attempting to justify the Committee's slow response by blaming the parties for the delay.⁸⁷ The federal action was dismissed a short time later.

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, it held up a number of rehabilitation projects in HDC's pipeline. A real estate entrepreneur

modify them to, at a minimum, require some sort of unsuitable motivation for supporting litigation of another.

⁸⁵ Letter from Sidney J. Brown to Mr. John Bodner (July 22, 1969). 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 Gene Fleming (May 29, 2002).

⁸⁶ *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 \$7,059.00 and punitive damages of \$7,500.00 was affirmed on appeal by the same court. *Brown v. Coates*, 253 F.2d 36 (D.C. Cir. 1958).

⁸⁷ 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. Complaint, *Roisman v. Jones, et al.*, Civil Action No. 638-70.

named George Kalavritinos filed suit in federal district court in early October claiming that the contractors rebuilding Clifton Terrace were cutting corners or that the Federal Housing Administration was failing to enforce various contract requirements. The suit led Senator Wallace Bennett (R-Utah) to request the Department of Housing and Urban Development 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 Winston A. Burnett Company met federal standards. In addition, Rep. Joel Broyhill (R-Va.) 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. Broyhill later asked George Romney, Secretary of the Department of Housing and Urban Development, 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.

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."⁸⁸ 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."

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.

⁸⁸ Leonard Downie, Jr., *Complaint to Romney Halts Slum Projects*, Washington Post (Dec. 14, 1969) at A1.

But he lost most of his holdings through foreclosure during the collapse of Republic Savings and Loan Association, run by his brother, Pete Kalavritinos.⁸⁹

Two days after these comments about Kalavritinos appeared in the paper, Rep. Henry Reuss (D.-Wis.), 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. The next day HDC officials issued a blistering attack on HUD's willingness to pay so much attention to "irresponsible accusations."⁹⁰ 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. Seven months later, the Government Accounting Office, Congress' investigative arm, reached the same conclusion.

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 five minutes for rebuttal.⁹¹ 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!" 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 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

⁸⁹ *Id.*

⁹⁰ Leonard Downie, Jr., *HDC Scores Criticism of Slum Project*, Washington Post (Dec. 17, 1969) at B1.

⁹¹ 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.

Robb. But the questions from Wright and McGowan were thoughtful, probing and helpful. They 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 them. 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." 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. But Judge Robb 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 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*⁹² began by staking out a major role for itself—the reappraisal "of old doctrines in the light of facts and values of contemporary life."⁹³ 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

⁹² *Javins v. First National Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

⁹³ *Id.* at 1074.

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 had only an eleven-day cushion. The New Jersey Supreme Court opinion in *Marini v. Ireland*⁹⁴ followed hard on the heels of *Saunders*. Indeed, *Marini* was a predictable result after *Reste Realty Corporation v. Cooper*⁹⁵ was decided on March 17, 1969. *Reste* was one of two important constructive eviction cases decided in other jurisdictions while *Saunders* was being briefed and argued. Both decisions 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 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. 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*.⁹⁶ 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

⁹⁴ 56 N.J. 130, 265 A.2d 526 (1970). The opinion was rendered by the New Jersey Supreme Court on May 18, 1970. The *Saunders* opinion was released on May 7.

⁹⁵ 53 N.J. 444, 251 A.2d 268 (1969).

⁹⁶ 51 Haw. 426, 462 P.2d 470 (1969).

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.⁹⁷

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.⁹⁸ 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."⁹⁹ 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 law review literature, there was an ongoing debate in academic circles about the applicability of contract law to leases. 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.¹⁰⁰ The exchange of rent for possession was said to be a

⁹⁷ See, e.g., *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972); *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 280 N.E.2d 208 (1972); *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 293 N.E.2d 831 (1973); *Foisy v. Wyman*, 83 Wash.2d 22, 515 P.2d 160 (1973); *Steele v. Latimer*, 214 Kan. 329, 521 P.2d 304 (1974); *Green v. Superior Court*, 10 Cal.3d 616, 111 Cal.Rptr. 704, 517 P.2d 1168 (1974). A number of states also adopted statutory versions of the implied warranty during the same time period.

⁹⁸ *Saunders*, *supra* note 92, at 1074.

⁹⁹ *Id.* at 1075.

¹⁰⁰ 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

“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,¹⁰¹ 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. But, 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 judgment,” Wright concluded, “the common law itself must recognize the landlord’s obligation to keep his premises in a habitable condition.”¹⁰² Judge Robb was unwilling to agree to such a broadly worded rationale.¹⁰³ He ended up concurring in the result, but he

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. 6 Williston on Contracts § 890 (1936).

¹⁰¹ *Supra* note 11 to 17 and accompanying text.

¹⁰² *Saunders, supra* note 92, at 1077.

¹⁰³ There is more than mere rhetoric in the different approaches of Wright and Robb. Another area of landlord-tenant law that led to rely 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

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.”¹⁰⁴ 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 place to 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.¹⁰⁵ “We think,” he went on, “this is an excellent protective procedure.”¹⁰⁶ Just two weeks before Wright released the opinion in *Saunders* containing this comment, he heard oral arguments in *Bell v. Tsintolas Realty Company*,¹⁰⁷ 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 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 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.¹⁰⁸

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. 533 (1982).

¹⁰⁴ *Saunders*, *supra* note 92, at 1080.

¹⁰⁵ The answers of the tenants volunteered this action. See *supra* note 40. 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* p. 22.

¹⁰⁶ *Saunders*, *supra* note 92, at 1083, fn. 67.

¹⁰⁷ 430 F.2d 474 (D.C. Cir. 1970).

¹⁰⁸ *Id.* at 484.

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 Sevareid. 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 statements from a sitting judge. 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.*¹⁰⁹ 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. Wright ordered the desegregation of the city's schools effective the fall of 1960. When Governor Davis took over the New Orleans 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.

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

¹⁰⁹ *Supra* note 21.

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.¹¹⁰

After New Orleans, implying warranties in *Saunders* was a piece of cake.¹¹¹

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.

¹¹⁰ Arthur Selwyn Miller, A "Capacity for Outrage": The Judicial Odyssey of J. Skelly Wright 81-82 (Greenwood Press 1984).

¹¹¹ *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

I offer no apology for not following more closely the legal precedents which had cooperated in creating the conditions that I found unjust.¹¹²

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's 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.¹¹³ 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.

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 thirty-nine million dollars before giving up. Boise Cascade took over the Clifton Terrace job and completed it. By the end of 1972, HDC and Boise 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, 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, the Department of Housing and Urban Development (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

¹¹² The letter is reprinted in full in Edward Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell. L. Rev. 517, 549 (1984).

¹¹³ In August, 1970, First National Realty did seek review in the United States Supreme Court, but certiorari was denied. *First National Realty Corp. v. Javins*, 400 U.S. 925 (1970).

and daily operation of the buildings. Phillips' predictions of foreclosure came true early in 1973.

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. A short time later, P.I. Properties, the real estate arm of Pride, Inc., agreed to purchase the complex for \$1,286,000. 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.

But tragedy has never seemed far from the halls of Clifton Terrace. Complaints about operation of the buildings grew fierce. Mortgage payments were not made. Hundreds of citations were issued for housing code violations. In 1978, HUD foreclosed again and took over the complex, though not without a fight from Pride. 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. Treadwell, it turned out, was not only playing a role as one of the most politically powerful women in Washington, but 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,¹¹⁴ was mayor of Washington. He ordered a review of all city contracts with her organization. Treadwell and two of her colleagues, Joan Booth and Robert Lee were eventually indicted, tried and convicted in a highly publicized trial. She was sentenced to serve three years in prison.

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. 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

¹¹⁴ 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.

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. 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. With Mayor Anthony Williams and other dignitaries attending, groundbreaking ceremonies were held on October 17, 2001. Construction continues as this 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.

Sidney Brown died on November 26, 2000.

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."¹¹⁵ 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 for non-payment of rent, the process looks much as it did thirty-five years ago. Though it does not handle as many cases as in the 1970s,¹¹⁶ the court's docket remains massive.¹¹⁷ Poverty still is endemic in large sections of the city 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 thirty-four percent of the cases filed.¹¹⁸ Anyone who watches the court operate will hear countless requests for default 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—

¹¹⁵ 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.

¹¹⁶ Over 100,000 cases per year were filed in landlord-tenant court during the 1970s. See Joint Committee on Judicial Administration in the District of Columbia, 1978 Annual Report of the District of Columbia Courts 30 (1979).

¹¹⁷ Though the population of the District has fallen between 1970 and 2000, new filings in landlord-tenant court still averaged of 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. Joint Committee on Judicial Administration in the District of Columbia, 2001 Annual Report of the District of Columbia Courts 83 (2002); L-T Report at 25.

¹¹⁸ 55,289 cases were filed and 18,717 ended up with defaults. L-T Report at 25.

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.¹¹⁹

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. 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!¹²⁰ 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.¹²¹ Each settlement agreement reached is reviewed in a brief proceeding by an Interview and Judgment Clerk to determine if the tenant understands its terms. 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 speak with a legal services

¹¹⁹ 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.

¹²⁰ 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 Praeceptum, 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." The complete form is available for you to peruse online at http://www.dcbart.org/for_lawyers/courts/superior_court/pdf/dcsc107.pdf.

¹²¹ L-T Report at 26.

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.¹²² 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.¹²³ 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. This suggests that the desire of Judge Wright to provide lawyers to poor litigants must be significantly expanded beyond 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.

¹²² 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.

¹²³ *Supra* p. 61.