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Up from Javins: A 50-Year Retrospective on the Implied Warranty of Habitability

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UP FROM *JAVINS*: A 50-YEAR RETROSPECTIVE ON THE IMPLIED WARRANTY OF HABITABILITY

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INTRODUCTION

Come hell or high water. Although its origin has been lost to time,[1] this phrase describes with remarkable precision the common law governing the tenant's obligation to pay rent in full on the first of the month, regardless of the circumstances.[2] A long-standing principle of Anglo-American land law, this rule persisted for centuries until recognition of an implied warranty of habitability fifty years ago in the groundbreaking case of *Javins v. First National Realty Corporation*.[3]

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1. PETER BENGELSDORF, IDIOMS IN THE NEWS - 1,000 PHRASES REAL EXAMPLES (2012).

2. For centuries, under a variety of hardship circumstances, courts consistently declined to excuse tenants from paying rent. *See, e.g.*, Paradine v. Jane, (1647) 82 Eng. Rep. 897 (King's Bench) (tenant's obligation to pay rent not excused by invasion of the realm by Prince Rupert and a hostile band of men). One rationale offered by way of explanation is that the landlord bargains for a fixed return, regardless of tenant's success. ("[A]s the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burden of them upon his lessor . . .") *Paradine*, 82 Eng. Rep. at 898. In fairness, the tenant should therefore bear the risk of adverse conditions beyond the control of either party. A more likely explanation is that the interests of creditors are protected by this rule: the certainty of timely rent receipts enables landlords to make their mortgage payments.

3. 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied* 400 U.S. 925 (1970). *Javins* is widely regarded as the first case to recognize an implied warranty of habitability, perhaps because the D.C. Circuit's reputation as arguably the most important inferior appellate court helped spur acceptance of the concept by other courts. CALVIN MASSEY, PROPERTY LAW PRINCIPLES, PROBLEMS AND CASES 367 (2012); DAVID CRUMP, ET AL., PROPERTY CASES, DOCUMENTS, AND LAWYERING STRATEGIES 847 (2d ed. 2008). The New Jersey Supreme Court had recognized an implied warranty in a commercial landlord-tenant case a year earlier. Reste Realty Corporation v. Cooper, 251 A.2d 268 (N.J. 1969). The Hawaii Supreme Court held that an implied warranty of habitability was implied in residential leases the year before *Javins.* Lemle v. Breeden, 462 P.2d 470 (Haw. 1969). Both of the 1969 decisions arose in the context of constructive evictions. *Javins* was the first case to unequivocally hold that tenants could raise an implied warranty of habitability as a defense to eviction. Richard H. Chused, *Saunders (a.k.a Javins) v. First National Realty Corporation 10th Anniversary Symposium Issue: Empowering the Poor and Disenfranchised: Making a Difference through Community, Advocacy, and Policy*, 11 GEO. J. ON POVERTY L. & POL'Y 191, 193 (2004). Almost all Property casebooks either include *Javins* as a principal case or cite the decision in notes

It is impossible to over-emphasize the scope of the law reform triggered by *Javins*.[4] The decision radically altered the relationship of landlords and tenants. *Javins* is credited with setting the tone for later decisions substituting contract law principles for the feudal rules of property law that governed the landlord-tenant relationship for the previous eight centuries.[5] Subsequent court decisions constrained the rights of landlords, increased the obligations of landlords, and expanded the legal rights and remedies available to residential tenants.[6]

Long understood as involving the conveyance of an estate in land, leasing had been governed exclusively by principles of Property law.[7] From this common law tradition emerged the doctrine of *caveat* lessee, in which the tenant accepted possession of the premises "as is" and the lessor owed no further duty thereafter.[8] Landlords were only obligated to provide tenants with the legal right

and comments. A Westlaw Key Cite search performed on June 21, 2019 for all law review articles citing *Javins* returned 404 results. A LEXIS search on the same date found 377 articles.

4. It has been described as "arguably the most influential landlord-tenant case of the twentieth century." Chused, *supra* note 3. *See also*, Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503 (1982); Gerald Korngold, *Whatever Happened to Landlord-Tenant Law*, 77 NEB. L. REV. 703 (1998) (recognizing that in this era, "no area of the law was more vibrant than landlord-tenant."). Two years after *Javins*, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Residential Landlord and Tenant Act. UNIF. LAWS ANNOTATED 7B 289, 326 (2006). Section 2.104(a) codifies landlords' duty to make all repairs necessary to put and keep the premises in a fit and habitable condition, some version of which has now been adopted by statute in almost half the states. *State Adoptions of URLTA Landlord Duties*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/environment-and-natural-resources/state-adoptions-of-urlta-landlord-duties.aspx [https://perma.cc/R35S-3PUE]. *See generally* Anthony J. Fejfar, *Permissive Waste and the Warranty of Habitability in Residential Tenancies*, 31 CUMB. L. REV. 1 (2001). The implied warranty of habitability is now recognized by statute or judicial decision in 49 states, Arkansas being the only exception. Ginny Monk, *'Habitable' not in rules for state landlords*, ARK. DEMOCRAT GAZETTE (Jul. 8, 2018), https://www.arkansasonline.com/news/2018/jul/08/habitable-not-in-rules-for-state-landlo/ [https://perma.cc/Z9AM-AFCQ]. According to an annual study by the National Low-Income Housing Coalition, Arkansas has the lowest market rent for a two-bedroom apartment in the country at $720 per month. *Id.*

5. David Vance Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 NW. U. L. REV. 204, 210 (1976). *See generally*, Robert H. Kelley, *Any Reports of the Death of the Property Law Paradigm for Leases Have Been Greatly Exaggerated*, 41 WAYNE L. REV. 1563 (1995).

6. The implied warranty of habitability, prohibitions against self-help and retaliatory eviction, requirement of mitigation of damages, limits on landlords' ability to refuse to lease to certain tenants or to approve transfers of leasehold interests, are examples of the transformation in landlord-tenant law that took place within the last 50 years.

7. Korngold, *supra* note 4, at 705; ROBERT S. SCHOSHINSKY, AMERICAN LAW OF LANDLORD AND TENANT 1–2 (1980).

8. Stephen J. Maddex, *Propst v. McNeil*: *Arkansas Landlord-Tenant Law, A Time for Change*, 51 ARK. L. REV. 575, 576 (1998). The common law property principles that applied to the landlord-tenant relationship imposed very few obligations on landlord for the condition of the

to possession and quiet enjoyment of the premises.[9] Unless the parties expressly agreed, landlords were not required to deliver or maintain premises fit for the contracted use.[10]

These rules made sense in the rural agrarian society in which they originated, but created harsh results in cases where a tenant was more interested in the improvements than the land on which they were situated.[11] By the early nineteenth century, as a judicially created response to this problem,[12] the remedy of constructive eviction had become available to tenants willing to vacate unsafe or defective premises in order to assert defenses to rent based on the condition of the property.[13] Constructive eviction, however, did nothing to improve the living conditions of the urban poor. Landlords simply replaced vacating tenants with new occupants with a higher threshold for slum living conditions. What it would take to get a landlord's attention was a more effective remedy by which a tenant could withhold rent and remain in possession.

As rural populations shifted to urban centers, courts came to accept that a lease was a contract of mutual rights and obligations between the parties.[14] By

premises during the leasehold. Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 167 (2000).

9. *See* Daniel E. Wenner, *Renting in Collegetown*, 84 CORNELL L. REV. 543, 548 (1998–99).

10. *Id.* Furthermore, Property law long held that each party's obligations were independent of the other; therefore, tenant's obligation to pay rent was not dependent on landlord providing habitable premises. *See, e.g.*, Royce v. Guggenheim, 106 Mass. 201 (1870) ("It is now well settled, both here and in England, that in a lease of a building for a dwelling-house or store no covenant is implied that it should be fit for occupation. [Citations omitted.] And the English authorities, ancient and modern, are conclusive, that even where the landlord is bound by custom or express covenant to repair, and by his failure to do so the premises become uninhabitable, or unfit for the purpose for which they were leased, the tenant has no right to quit the premises, or to refuse to pay rent according to his covenant, but his only remedy is by action for damages."). *Id.* at 202–203. *See generally* Andrew Goldstein Fleissig, *Unconscionability: A New Helping Hand to Residential Tenants*, 1979 WASH. U. L. Q. 993, 994 (1979).

11. Boston Housing Authority v. Hemingway, 293 N.E. 2d 831, 837 (Mass. 1973).

12. *See, e.g.*, Dyett v. Pendleton, 8 Cow. 727, 731–32 (N.Y. 1826).

13. *Boston Housing Authority*, 293 N.E. 2d at 837–38. ("The constructive eviction doctrine created the legal fiction that the tenant had been 'evicted' to show that the tenant's possessory interest in the property itself was destroyed by the landlord's failure to provide adequate maintenance services. It was the loss of the tenant's possessory interest which excused him from paying rent. The constructive eviction defense gave the tenant the option of abandoning the demised premises in order to extinguish his rental obligation if the court shared the tenant's view as to what acts or omissions on the landlord's part constituted a breach of his duty to assure quiet possession."). In addition to taking the risk that a judge might not agree about the seriousness of the deficiency in the condition of the premises, a tenant would need the first-month's rent and security deposit in liquid funds necessary to secure new housing. Finally, the remedy of constructive eviction was cold comfort for tenants in times of housing shortages.

14. Maddex, *supra* note 8, at 582–83. "[I]n an urban society where the vast majority of tenants do not reap the rent directly from the land but bargain primarily. . . for living purposes . . . common law conceptions of a lease . . . are no longer viable." Lemle v. Breeden, 462 P.2d 470, 473 (Haw.

the late 1960's, *caveat* lessee eroded as courts recognized the modern residential tenant's interest in acquiring a package of services consisting of habitable premises, and not merely the conveyance of a leasehold estate.[15] In a series of decisions,[16] Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit played a leadership role in these developments. Judge Wright analogized residential tenants to consumers buying a product; if the tenant was obligated to pay the same amount of rent throughout the entire lease term, then the premises should stay in the same condition throughout.[17] From this analogy arose a duty on the landlord's part to deliver and maintain leased premises, and essential common areas, in a fit, safe, and habitable condition.[18]

Context is critical to a full understanding of most legal disputes,[19] and *Javins* is no exception. Perhaps more than the facts and legal doctrine involved, *Javins* is a product of the circumstances and the historical moment when the case arose.[20] It is not coincidental that *Javins* was decided at about the apogee of legal

1969). The recognition of a lease as a contract resulted in the application of rules of law founded on intent and expectations and have freed parties from archaic doctrines. *See* Korngold, *supra* note 4 at 709–10.

15. Arthur R. Gaudio, *Wyoming's Residential Rental Property Act – A Critical Review*, 35 LAND & WATER L. REV. 455, 463 (2000). It became obvious that urban residential tenants had different expectations than their agricultural predecessors. SCHOSHINSKY, *supra* note 7, at 3. Tenants in feudal England were more capable of inspecting and repairing the premises than tenants of today. *See* Maddex, *supra* note 8, at 581–82. Furthermore, the improvements were incidental to the transaction, the essence of which was obtaining access to land for agricultural purposes. *Id.* at 581. Modern tenants seek a package of services, not a bare possessory interest in land. SCHOSHINSKY, *supra* note 7, at 3. *See also* Spector, *supra* note 8, at 137 (noting that the modern residential tenancy shares few characteristics with common law tenancies of feudal England).

16. Edwards v. Habib, 397 F.2d 687, 690 (D.C. Cir. 1968) (landlord may not evict tenant in retaliation for reporting housing code violations); Javins v. First National Realty Corporation, 428 F.2d 1071, 1072–73 (D.C. Cir. 1970); Robinson v. Diamond Housing Corp., 463 F.2d 853, 857 (D.C. Cir. 1970) (landlord may not take premises off the market in retaliation for tenant reporting housing code violations).

17. Wenner, *supra* note 9, at 550.

18. The implied warranty of habitability was soon joined by a growing list of duties imposed on landlords. For example, at common law, a landlord was not liable for personal or physical injuries caused by defects in the leased premises; today, most courts reject this theory of landlord tort immunity and impose a duty of reasonable care on the landlord. *See* Edward H. Rabin, *The Revolution in Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 529–30 (1984). In addition, "landlords have been held liable for rapes, burglaries and assaults committed by criminal intruders" and, more recently, fellow tenants, when tenant can show that landlord did not take due care to protect against such occurrences. *Id.* at 529–30.

19. *See, e.g.*, RICHARD H. CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY vii (3d ed. 2010) ("Rarely do we admit that the official factual account contained in an appellate opinion may have only the most tenuous relationship to the events that actually lead the parties to court."). Paul A. Lombardo, *Legal Archaeology: Recovering the Stories Behind the Cases*, 36 J. L. MED. & ETHICS 589, 589 (2008).

20. *See infra* notes 136–38 and accompanying text.

services funding.[21] As part of the War on Poverty,[22] a component of the Great Society envisioned by President Lyndon B. Johnson, battalions of lawyers were deployed nationwide to provide legal representation to low-income Americans facing issues including housing.[23] One of these lawyers was Edmund E. ("Gene") Fleming,[24] a staff attorney for the Neighborhood Legal Services Program, which was located on the first floor of the Clifton Terrace Apartments in Washington, D.C.[25] The complex would become ground zero in the effort by legal services attorneys to forge a relationship between a tenant's duty to pay rent, and a landlord's obligation to provide premises that were clean, safe, and fit for habitation, in the context of tenants remaining in possession.[26] Fleming would represent the Clifton Terrace tenants throughout the trial and appellate stages of the *Javins* litigation.

"Every lawsuit is a potential drama: a story of conflict, often with victims and villains, leading to justice done or denied."[27] As a tale of the power of courts

21. David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CAL. L. REV. 389, 415 (2011).

22. Johnson declared unconditional war on poverty in his 1964 State of the Union address. President Lyndon Baines Johnson, *Annual Message to the Congress on the State of the Union* (Jan. 8, 1964), www.lbjlibrary.net/collections/selected-speeches/November-1963-1964/01-08-1964.html [https://perma.cc/QSX7-LXN7] ("This administration today, here and now, declares unconditional war on poverty in America. I urge this Congress and all Americans to join with me in that effort.").

23. Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L. J. 1383, 1385 (2014).

24. Clifton Terrace was home to Journalist Molly McCardle from the age of 15. Molly McCardle, *Amenities: Four Stories of Clifton Terrace (Preface)* (2008) https://mollymcardle.com/amenities/preface [https://perma.cc/E8FA-MSWJ]. Her chapbook, entitled *Amenities: Four Stories of Clifton Terrace*, is the closest thing available to a first-person account of life at Clifton Terrace at the time of the *Javins* case. *Id.* McCardle provides a description of Gene Fleming as seen through the eyes of her tenant protagonist, Doris. ("Gene is a thick, square man with ruddy skin . . . and a full head of fine yellow hair. He looks more like a quarterback than a lawyer, but he owns a pair of thick black framed glasses that he wears in court and it sure makes Doris feel better to look at him. . . . When Gene Fleming, a nice young man from George Washington law school and the only white man she's seen round here in years, started getting together folks from the building to file suit, Doris signed up. Even if they kick her out eventually, good riddance. Clifton Terrace would be no great loss on her mind.") *Id.* at 3–5 (A Slum Is a Slum).

25. Brian Gilmore, *Love You Madly: The Life and Times of the Neighborhood Legal Services Program of the District of Columbia*, 10 D.C. L. REV. 69, 95, 100 (2007).

26. Achieving reform in the nation's housing laws through litigation was an intentional strategy on the part of legal services attorneys. "It was planned in staff meetings, memos, conferences . . . . There was a conscious strategy to re-write property law, to alter the playing field." *Id.* at 91 (quoting Willie Cook, Jr., managing attorney at Neighborhood Legal Services Program and a colleague of Fleming).

27. Lombardo, *supra* note 19, at 589. Although once a subject of controversy, the value of narrative in legal scholarship and education is no longer a matter of dispute. *See, e.g.*, Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2414–15 (1989). ("Stories and counter-stories, to be effective, must be or must appear to be

to reverse centuries-old doctrine and to make a difference in peoples' lives, *Javins* is a very good story. Following the Introduction, Part I explores the backstory of events that led to the litigation. Part II analyzes the proceedings at the trial and appellate court levels.

Javins is also a cautionary tale about the limits of judicial intervention to achieve social reform. The tenants' rights revolution triggered by *Javins* has not produced meaningful improvement in the living conditions of the urban poor.[28] Notwithstanding the transformation in the law over the past half-century, landlords have managed to preserve the dominant position in the landlord-tenant relationship. The disconnect between landlord-tenant law as taught in the Property course, and as practiced in the courtrooms and corridors of the housing courts, is the subject of Part III.

I. MURDER CAPITAL[29]

Sidney J. Brown had been editor-in-chief of the *New York University Law Review* and a prosecutor in the Nuremberg war crime trials.[30] But when he died in 2000 at age 86, the lead sentence of his obituary identified Brown as the

noncoercive. They invite the reader to suspend judgment, listen for their point or message, and then decide what measure of truth they contain. . . . [T]hey offer a respite from the linear, coercive discourse that characterizes much legal writing.") *Id.* at 2415. Jean C. Love, *Commentary, The Value of Narrative in Legal Scholarship and Teaching*, 2 J. GENDER RACE & JUST. 87, 88, 92 (1998) (arguing that students learn from narratives in ways they cannot learn from objective analyses and traditional scholarly presentations).

28. Fearful of the pervasive threat of eviction, tenants fail to exercise their legal rights and remedies. The erosion of public support for legal services in recent decades limits the availability of attorneys willing to enforce the rights of residential tenants. *See generally,* Super, *supra* note 21, at 435–36.

29. In any drama, the place in which events unfold can profoundly influence the outcome. Clifton Terrace Apartments functions as a principal character in the *Javins* case. According to classic Aristotelian theory, place is one of the three unities (together with time and action) of dramatic construction. Max Dana, *Classical Dramatic Structure*, BROWN U. http://www.math.brown.edu/~banchoff/Yale/project04/th-class.html [https://perma.cc/V44D-ERHD].

30. Bart Barnes, *Sidney J. Brown Dies*, WASH. POST (Dec. 13, 2000), https://www.washingtonpost.com/archive/local/2000/12/13/sidney-j-brown-dies/226e7ccc-99ef-4619-960d-beb683c01d5e/?utm_term=.33958af0cedf [https://perma.cc/EU52-ZNNU].

slumlord who owned the Clifton Terrace Apartments,[31] notorious as the murder capital of northwest Washington, D.C.[32]

Built as Wardman Court by architect Harry Wardman between 1916 and 1918, Clifton Terrace was part of an explosive growth of residential construction to accommodate the burgeoning federal government during the World War I era.[33] Located in the Cardozo neighborhood at 1308, 1312, and 1350 Clifton Street, N.W. between 13th and 14th Streets, N.W.,[34] Clifton Terrace was the largest luxury apartment complex in Washington, consisting of 284 units and

31. *Id.* Brown was convicted of multiple housing code violations, including failure to provide heat, ordered to pay a $5,000 fine, and sentenced to 60 days in prison. *Id.* The sentencing of Sidney Brown was reported by Carl Bernstein in a front-page story in *The Washington Post.* Carl Bernstein, *Landlord Given Jail Term*, WASH. POST (Nov. 8, 1967), at A1, cited in *The Three-Front War for URLTA (1964-1972)*, https://rentconfident.com/blog/1165/the-three-front-war-for-urlta-1964-1972 [https://perma.cc/ADC4-WMD7]. The jail sentence was reversed on appeal. Barnes, *supra* note 30. Brown's legacy has not improved with the passage of time. A recent retrospective described him as "a notoriously rapacious slumlord—the kind of owner who drove down values all over the area." Marisa M. Kashino, *The Reinvention of 14th Street: A History*, WASHINGTONIAN (Apr. 4, 2018), https://www.washingtonian.com/2018/04/04/how-14th-street-came-back-reinvention-a-history/ [https://perma.cc/7CUJ-XWE5].

32. Beginning in the 1960s and continuing into the 1990s, Clifton Terrace was considered one of the city's deadliest neighborhoods, home to an active open-air drug market, and the scene of turf wars between hit squads representing organized drug gangs from out of town and local dealers. Drew Hansen, *Then and now: D.C.'s Riot-Ravaged Block 50 Years Later*, WASH. BUS. J. (Mar. 30, 2018), https://www.bizjournals.com/washington/news/2018/03/30/dc-riots-1968-then-and-now.html [https://perma.cc/95F2-WWK2]. One gang adopted the nickname "Clifton Terrace University." On their Facebook page, "alumni" of CTU, as they call themselves, reminisce about old times and marvel how Clifton Terrace has since been transformed. *See* Clifton Terrace Univ., FACEBOOK https://www.facebook.com/pages/category/Organization/Clifton-Terrace-University-168066489943323/ [https://perma.cc/HN23-72NN].

33. *Clifton Terrace*, D.C. HIST. SITES, https://historicsites.dcpreservation.org/items/show/103 [https://perma.cc/K7S6-E9ZC]. Wardman was one of the most prolific real estate developers in the history of the District of Columbia. Donna Evers, *It's a Wardman*, WASH. LIFE (June 1, 2006), http://washingtonlife.com/2006/06/01/its-a-wardman/ [https://perma.cc/2A49-VBB8]. Born in England in 1872, Wardman came to this country by accident. At the age of 17, he stowed away on a ship bound from London to Australia. *Id.* When discovered, he was put off the ship at the first port, which turned out to be New York City. *Id.* Wardman is credited with building 400 apartment buildings containing 80,000 housing units, a dozen office buildings, two embassies, and eight hotels, including the iconic Wardman Park Hotel, considered the largest and grandest hotel in the capital up to that time. *Id.* Wardman lost his entire fortune, estimated at $30 million, during the Depression. *Id.* By the time of his death in 1938, it was estimated that 10 percent of Washingtonians lived in a residence designed by Harry Wardman. *Id.*

34. The neighborhood is named for Francis Cardozo, African American educator and politician. Born a free man in Charleston, South Carolina in 1836, Cardozo was elected Secretary of State in South Carolina, the first African American elected to statewide office. He moved to Washington, D.C. and became principal of an African American high school now named after him. He was a cousin of Supreme Court Justice Benjamin Cardozo. *Francis Lewis Cardozo*, NAT'L PARK SERV. (Jan. 25, 2018), https://www.nps.gov/people/reverendfranciscardozo.htm [https://perma.cc/BNE2-CHRZ].

complete with uniformed doormen.[35] Clifton Terrace was built in the Colonial Revival style, and inspired by the ideals of the garden apartment movement.[36] Situated on a hilltop with a panoramic view of the capital,[37] the complex consists of three identical buildings, evocatively described by journalist Molly McCardle:

> Clifton Terrace was beautiful. Harry Wardman poured more than a million dollars into the three sand colored brick buildings that stretched up five stories high on Washington's possibly third highest hill. The buildings, each shaped like the letter E, had their three prongs facing Clifton Street and their connecting spine facing the slope of the hill down towards the river. They were arranged in a row, with the far left and right building sitting right up on the road. The middle building was pushed back so that it began just when the other two ended, sitting comfortably on the crest of the hill with a long narrow courtyard stretching out in front of it, which bridged the two neighboring buildings in a long swath of green. The doormen had matching uniforms and there was a swimming pool. Each of the three lobbies had marble floors and crystal chandeliers. The newspapers would add exclamation points after these facts if their style guide allowed it. Marble floors! Crystal chandeliers! Really! Here![38]

When Sidney Brown purchased Clifton Terrace for $1,475,000 in 1963,[39] the buildings remained home to middle to upper-middle class families.[40] Through the eyes of her tenant protagonist named Doris, McCardle paints a vivid word picture of the decline in living conditions under Brown:

35. Manny Fern, *Longtime Residents Welcome Clifton Terrace Transformation*, WASH. POST (June 30, 2004), https://www.washingtonpost.com/archive/local/2004/06/30/longtime-residents-welcome-clifton-terrace-transformation/a2cdbcd3-edbf-4fe4-b35f-baa90b067900/?utm_term=.8602493773fc [https://perma.cc/8V3S-DZRB].

36. The garden apartment movement encouraged the integration of green space into multifamily urban design. *National Register of Historic Places Registration Form* (Nov. 7, 2001), http://www.historicwashington.org/docs/Historic%20Landmark%20Application/Clifton%20Terrace.pdf [https://perma.cc/8EAL-W3DR]. Clifton Terrace featured superior air circulation, maximization of light, and apartments with balconies offering pleasing views of the landscaped courtyard. *Id.* Clifton Terrace was placed on the National Register of Historic Places in 2001. *Clifton Terrace*, D.C. HIST. SITES, https://historicsites.dcpreservation.org/items/show/103 [https://perma.cc/GPP9-4ZDA].

37. McCardle, *supra* note 24 ("It is the most dramatic thrust of an inevitable rise from the Potomac, where the land heaves itself upward and away from the politicians and lobbyists and lawyers, men who want nothing to do with Clifton Terrace and its history. The corner of 13th and Clifton is its peak, where residential DC definitively tears itself from the marble knot of Washington.").

38. *Id.*

39. U.S. Government Accountability Office (GAO), Housing: Rehabilitation of Clifton Terrace Apartments in Washington, B-168191 U.S. DEP'T HOUS. & URB. DEV. 16 (Comp. Gen. Sept. 23, 1970) (addressing Mr. Broyhill's complaint).

40. *Clifton Terrace*, D.C. HIST. SITES, https://historicsites.dcpreservation.org/items/show/103 [https://perma.cc/GPP9-4ZDA].

> [E]ver since that rat of a man bought the place in '63 there is no doubt that he has turned it into a slum. It makes Doris sick to think about. There was a swimming pool once, but he filled it up with dirt. After a time, her brass chandelier in the sitting room started to weep a thin stream of water and she began to eat her suppers in front of the open stove on cold nights. When the men came to board up her balcony on account of safety regulations, all she could do was sit on her bed and cry.[41]

By the mid-1960's, the capital was a majority-black city.[42] Clifton Terrace became a symbol of the frustration of inner-city blacks living in substandard housing owned by whites.[43] By 1970 the Government Accountability Office (GAO) would report to Congress that the appraised value of Clifton Terrace had declined to $1 million, "a substantial drop in the fair market value of the property . . . attributable to deterioration of the buildings from an apparent lack of maintenance which had resulted in over 1,000 violations of the D.C. building code."[44]

Clifton Terrace tenants consulted Gene Fleming for advice in 1966. Fleming assisted them in organizing a rent strike.[45] Brown responded by a public shaming of the striking tenants:

> Mr. Brown sent men marching into each of Clifton Terrace's three buildings and posted up a sign on the rental office doors. It was a list of everyone in the whole complex who had not paid their rent, those on strike as well as those flat-out broke. It listed their names, their apartment number and the amount of rent they owed right down to the last penny in neat columns.[46]

41. McCardle, *supra* note 24, at 3.

42. Barnes, *supra* note 30, at 2.

43. *Id.* In 1967, the Washington Post described Clifton Terrace as a place where "the lobbies are dim and damp . . . ceiling light fixtures are missing, paint on the walls peels, plaster crumbles . . . the stench of urine and garbage is diluted by the brisk draft in the hallway—a draft that whips through the broken window panes and open doors of the lobby . . . electrical panels have no covers leaving the wiring exposed . . . the elevator in this five story building doesn't work." *Id.*

44. GAO, *supra* note 39, at 16. The GAO report of living conditions at Clifton Terrace is an example of bureaucratic understatement. More graphic accounts are provided by other sources. *See, e.g.*, Les Shaver, *Making it Work*, www.multifamilyexecutive.com (June 2, 2005) ("With shootings in the laundry rooms, crack dealers in its hallways, and prostitutes in the stairwells, resident security and safety was nothing more than an afterthought."). *See also The Three-Front War for URLTA (1964-1972)*, *supra* note 31, at 4. ("Broken glass covered the sidewalks, grounds and hallways. Lobby windows were boarded up. 18 apartments had collapsed ceilings and buckled floors from water damage. The faulty furnace was going through 13 tons of coal every day and broke at least once a month in the winter. On Thanksgiving Day in 1967, 60% of the apartments had no heat.")

45. "In 1965, [tenant] Pat Garris walked into the law clinic office to say she'd had enough of the conditions in the building. She encountered attorney Gene Fleming and took him upstairs for a look around. He took one look at the mess and agreed to support her and her neighbors in a rent strike." *The Three-Front War for URLTA*, *supra* note 31, at 4.

46. McCardle, *supra* note 24.

Brown's intimidation tactics were successful. Of the twenty-nine Clifton Terrace tenants who began the rent strike, only four would remain on strike throughout the trial and appellate proceedings, which are the subject of Part II, below.

II. TRIAL AND ERROR

On April 8, 1966, Sidney Brown filed suit seeking possession of apartments occupied by six striking Clifton Terrace tenants who were still in arrears in the payment of rent.[47] As a yet unproven litigation strategy, Gene Fleming intended to rely on the existence of more than 1,000 violations of the D.C. housing regulations at Clifton Terrace as a defense to eviction.

A jury trial was scheduled to commence on June 17, 1966 in the courtroom of Judge Austin Fickling of the District of Columbia Court of General Sessions. Fleming's litigation strategy, apparent from the scene in the courtroom on the day set for trial, was to introduce graphic evidence of living conditions at Clifton Terrace, consisting of bags containing mouse feces, dead mice and roaches, and images of tenants' apartments. Herman Miller, counsel for First National Realty Corporation, moved to bar the admission of evidence of housing code violations, claiming it would exacerbate the jury. Fleming opposed Miller's motion.[48] Judge Fickling ruled the evidence inadmissible, based on the long-standing refusal of courts to allow tenants to raise the physical condition of the premises as a defense in eviction cases.[49] Each tenant having stipulated that rent was in arrears, and with no other relevant facts remaining to be determined, Judge Fickling entered judgments of possession as a matter of law, and dismissed the jury by the end of the day.[50]

Notices of appeal were filed in the District of Columbia Court of Appeals on behalf of four of the original six tenants—Rudolph Saunders,[51] Ethel Javins, Gladys Grant, and Stanley Gross. Both parties' briefs having been filed by

47. Chused, *supra* note 4, at 210.

48. *Id.* at 192. Fleming argued he should be able to introduce evidence of more than 1,500 housing code violations, as well as testimony by Robert Gold, Chief of Research for the National Capital Planning Commission, to prove that low-income families, especially African Americans, had trouble finding housing that met codes. Chused, *supra* note 4, at 192 n.4.

49. *Id.* Brown's complaint sought only possession and not a monetary judgment for unpaid rent. Accordingly, under Rule 4(c) of the Landlord and Tenant Branch of the Court of General Sessions, no equitable defense by way of recoupment or set-off was available, nor could tenants counterclaim for money damages.

50. McCardle described the scene in the courtroom following Judge Fickling's decision. "Gene patted the backs of the men and hugged the women. 'This isn't over,' he said. 'We were prepared for this outcome. I've already got our appeal together and we're going to keep going with this. You *won't* be evicted.'" McCardle, *supra* note 24, at 4.

51. Fleming wanted Saunders to serve as the central figure because he was "staunch, 30ish, slender, quiet and determined." Chused, *supra* note 4, at 212 (citing a telephone interview with Fleming on May 29, 2002).

November 16, 1966, the case was ready to be heard by Thanksgiving. However, oral argument did not occur until March 11, 1968. Meanwhile, the District of Columbia Court of Appeals rendered its decision in *Brown v. Southall Realty Co.*,[52] invalidating a residential lease that had been executed with the landlord aware of housing code violations at the time of lease commencement.[53]

Fleming expected to rely heavily on *Brown*. He began his oral argument pleading the similarities between the two cases. Fleming next advanced the argument that, merely by their promulgation, the housing regulations were intended to significantly alter the common law tenant-landlord relationship by creating a contractual duty on the landlord's part to comply.[54] Miller responded by attacking *Brown*, claiming the decision allowed tenants to create violations and then refuse to pay rent.[55] Miller also argued that the existence of criminal penalties for code violations meant only the city should be entitled to enforce the regulations.[56]

On September 23, 1968, Chief Judge Andrew Hood rendered the court's decision.[57] Judge Hood distinguished *Brown* as pertaining only to leases executed with the landlord aware of housing code violations existing *prior* to lease commencement.[58] "[W]e did not hold and we now refuse to hold, that violations occurring after the tenancy is created void the lease," Judge Hood wrote.[59]

Turning to Fleming's principal argument, Judge Hood cited the long-established common law rule: "[I]n the absence of express covenant in the lease, a landlord does not impliedly covenant or warrant that the leased premises are in habitable condition and the landlord is not obligated to make ordinary repairs to the leased premises in the exclusive control of the tenant."[60] Although violations of the housing code expose landlords to legal liability, nothing express or implied in the housing regulations created a contractual duty owed by landlords to comply with the regulations.[61] Judge Hood concluded a landlord's violation of housing regulations is not a defense to an action for possession for nonpayment of rent.[62]

52. 237 A.2d 834 (D.C. 1968).

53. *Id.* at 836–37.

54. *See generally* Brief for Appellant at 20–47, Saunders v. First Nat'l Realty Corp., 245 A.2d 836 (D.C. 1968).

55. Chused, *supra* note 4, at 220.

56. *Id.*

57. Saunders v. First Nat'l Realty Corp., 245 A.2d 836 (D.C. 1968).

58. *Id.* at 837–38.

59. *Id.* at 838.

60. *Id*.

61. *Id.*

62. *Id.* at 839.

Tenants filed a petition for review by the U.S. Court of Appeals for the District of Columbia Circuit.[63] On January 16, 1969, the tenants' appeal was granted.[64] In his brief, Fleming sought to incorporate principles of contract law into the landlord-tenant relationship. Citing the challenges black residents of inner-city Washington encounter in seeking housing, Fleming urged that compliance with housing regulations be implied as an obligation of landlord in residential leases. Fleming cited *Whetzel v. Jess Fisher Management Co.*[65] as precedent for courts imposing a duty on landlords to correct housing code violations, with nonpayment of rent as a remedy for noncompliance.

Miller's brief reiterated the same argument made successfully in the D.C. courts that housing regulations do not create contractual rights for tenants because enforcement rests solely with the government. He criticized the decision in *Brown*, claiming it usurped enforcement of housing regulations from the appropriate authority. In a novel argument, Miller accused legal services attorneys and law students of interference in the administration of justice by informing tenants not to pay rent and to demand a jury trial, perniciously clogging dockets in housing courts. Landlords inevitably would be coerced into settlement to avoid long delays, during which rent would be uncollectable.[66]

The case was assigned to a three-judge panel consisting of J. Skelly Wright, Carl McGowan, and Roger Robb. Skelly Wright has been described as "the most courageous and influential lower court judge of his generation,"[67] and the

63. At the time of *Javins*, the federal government controlled every aspect of life in the District of Columbia, which explains why the U.S. Court of Appeals for the D.C. Circuit had discretionary jurisdiction to hear appeals of cases decided by the D.C. Court of Appeals. Chused, *supra* note 4, at 225. The District of Columbia was granted home rule, subject to federal oversight, effective December 24, 1973, pursuant to the D.C. Home Rule Act, Pub. L. No. 93–198, 87 Stat. 774 (1973); D.C. CODE ANN. §§1–201 to 1–1405 (2001).

64. Only three of the four tenant petitions were granted. Gladys Grant's motion was denied for lack of jurisdiction. Because Grant had paid her rent arrearages after Clifton Terrace changed hands, the landlord-tenant court lacked jurisdiction to entertain an eviction action against her. *See* Chused, *supra* note 4, at 225 n.155.

65. 282 F.2d 943 (D.C. Cir. 1960).

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

67. Louis Michael Seidman, *J. Skelly Wright and The Limits of Liberalism* 1, GEO. LAW FAC. PUBL'N & OTHER WORKS 1387 (2014), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2399&context=facpub [https://perma.cc/FXW4-PGSS]. As a United States District Court Judge prior to his nomination by President Kennedy to the D.C. Circuit Court of Appeals in 1962, Wright became known as the "integration judge" for his role in the controversial desegregation of New Orleans' public schools in 1960, invalidating a state statute that gave the governor authority to take over the city's schools and continue segregation. *See* Michael S. Bernick, *The Unusual Odyssey of J. Skelly Wright*, 7 HASTINGS CONST. L.Q. 971 (1979–1980). "By the end of 1960, Skelly Wright had become the most hated man in New Orleans. Pairs of federal marshals alternated in eight-hour shifts at his home to ensure his physical safety, and they escorted him to and from work. With few exceptions, old friends would step across the street to avoid speaking to him." Rabin, *supra* note 18, at 548 n.175.

foremost judicial activist of modern times.[68] As Fleming approached the podium, Judge Wright told him that he could take as much time as he needed for oral argument.[69] Fleming argued for an hour and forty-five minutes on behalf of the appellant. As counsel for the appellee, Miller's argument lasted ten minutes.[70]

Oral argument had gone well for Fleming, but reversal on appeal would require the court to discard, as a matter of common law interpretation rather than legislative action, three classical rules, acceptance of any one of which would result in affirmance: the landlord's lack of any duties with respect to the physical condition of the premises not expressly provided in the lease; the independence of tenant's duty to pay rent from the landlord's obligations (if any) with respect to the premises; and the adequacy and exclusivity of the long-standing remedy of constructive eviction that required tenants to vacate before asserting a defense to nonpayment of rent based on condition of the premises.

On May 7, 1970, Judge Wright issued the court's decision. His opinion acknowledged a duty to "reappraise old doctrines in the light of the facts and values of contemporary life—particularly old common law doctrines which the courts themselves created and developed."[71] Based on factual and contextual changes in the landlord-tenant relationship, Judge Wright concluded that a warranty of habitability should be implied in all leases for space in urban dwellings, imposing an obligation on the landlord to ensure that the premises, and essential common areas, are in habitable condition on the lease commencement date, and remain habitable throughout the term.[72]

Judge Wright began by addressing the dichotomy of whether residential leases should be governed by centuries-old principles of Property law or modern contract law. The traditional view of leases as being nothing more than the conveyance of a non-freehold estate in land may have been appropriate in a rural environment, where the land itself was the subject matter of the lease. With the passage of time, and the evolution from an agrarian to urban society, this understanding no longer reflected the expectation of the parties, especially tenants.[73] According to Judge Wright, the purpose of the modern apartment lease is to provide "shelter," defined as not merely the walls and ceilings, but also

68. ARTHUR SELWYN MILLER, A "CAPACITY FOR OUTRAGE": THE JUDICIAL ODYSSEY OF J. SKELLY WRIGHT 4 (1984). "Activism is the propensity of judges to substitute their views . . . for those of legislative and executive officers." *Id.* at 5.

69. *See* Chused, *supra* note 4, at 233 (citing a telephone interview with Gene Fleming on May 29, 2002). Minutes of oral argument time in the U.S. Circuit Courts of Appeal are a precious commodity tightly rationed by the clerk of the court after reviewing the briefs submitted by appellate counsel, fifteen minutes per side being typical.

70. *Id.*

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

72. *Id.* at 1080.

73. R. WILSON FREYERMUTH, et al., PROPERTY AND LAWYERING 393 (3d ed. 2010).

"adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance."[74] To accomplish this purpose it would be necessary to introduce principles of contract law in the construction and interpretation of leases.[75]

Judge Wright believed that residential leases resembled the typical contract involving consumer products.[76] As with any such contract, the court should seek to protect the legitimate expectations of the consumer, and hold the provider accountable for the quality of services through implied warranties.[77] The inflexible doctrine that lessor was under no obligation to make repairs, unless it had expressly covenanted to do so, was outmoded.[78] According to Judge Wright, "the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned in favor of an implied warranty of habitability."[79]

The old rule of *caveat emptor* was based upon factual assumptions that no longer apply.[80] Unlike the "jack-of-all-trades" farmer, the contemporary urban tenant is likely to possess a single, specialized skill, that is likely unrelated to maintenance.[81] In an increasingly mobile society, the time and effort required for tenants to repair dwellings of growing complexity cannot be justified.[82] In times of housing shortages, tenants have no alternative but to accept premises "as is," with the expectation that landlord will make necessary repairs.[83]

Judge Wright found support in prior court decisions holding vendors and developers of real property accountable on consumer protection principles for the quality of their products. He invoked the inequality in bargaining power between landlords and tenants, a rationale he had used two years earlier to

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

75. *Id.* at 1074–75.

76. *Id.* at 1075. Wright elaborated on the implied warranties of fitness and merchantability, and how each has not been limited to cases involving sales. *Id.*

77. *Id.*

78. *Id.* at 1076.

79. *Javins*, 428 F.2d at 1076–77.

80. At common law, when land was leased to a tenant, the lease was essentially a sale of the premises for a term, and the lessee became the owner and the occupier subject to the doctrine of *caveat emptor*. Jonathan M. Purver, Annotation, *Modern Status of Rules as to Existence of Implied Warranty of Habitability or Fitness for Use of Leased Premises*, 40 A.L.R. 3d (1971). The lessee had the opportunity to inspect the premises prior to execution of the lease, but must accept the premises "as is" if execution followed. Javins, 428 F.2d at 1077 n.32. Under this doctrine, once an estate was leased, there were no further acts to be performed by the landlord, unless expressly covenanted in the lease. Purver, *supra* at § 2.

81. *Javins*, 428 F.2d. at 1078.

82. *Id.*

83. *Id.* at 1079 n.42.

establish the retaliatory eviction defense in *Edwards v. Habib*.[84] Judge Wright catalogued the factors that contribute to the inequality of bargaining power, including racial and class discrimination, standardized form leases presented to tenants on a "take it or leave it" basis, and the severe shortage of adequate housing.[85]

Judge Wright addressed the question of whether this was a matter better left for legislative development. He responded that the very existence of housing regulations in the District of Columbia reflects the legislative intention that a warranty of habitability be implied in leases of all housing that it covers.[86] He found precedential support in *Whetzel,* which held that housing regulations created legal rights and duties enforceable in tort against private parties.[87] An opinion by Judge Cardozo in *Altz v. Lieberson*[88] concluded the housing code imposed a duty of repair upon the landlord, and provided a remedy to a tenant injured by landlord's breach of duty. In dismissing the argument that government officials should have exclusive housing code enforcement power, Judge Cardozo wrote:

> We may be sure that the framers of this statute, when regulating tenement life, had uppermost in thought the care of those who are unable to care for themselves. The Legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by any one. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect.[89]

Judge Wright acknowledged the holding in *Brown* stated the "basic validity of every housing contract depends upon substantial compliance with the housing code at the beginning of the lease term."[90] But he interpreted Section 2501 of the housing regulations[91] to evidence the D.C. council's intention that this section cover defects arising after a lease has been signed.[92]

84. 397 F.2d 687, 699 (D.C. Cir. 1968) (tenant could defend eviction action on grounds that landlord terminated month-to-month tenancy in retaliation for tenant reporting housing code violations to governmental authorities.) (Miller had represented the landlord in *Edwards*).

85. *Javins*, 428 F.2d at 1079.

86. *Id.* at 1080.

87. *Id.*

88. 134 N.E. 703 (N.Y. 1922).

89. *Lieberson*, 134 N.E. at 704.

90. *Javins*, 428 F.2d at 1081.

91. Section 2501 of the Housing Regulations read: "Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of this Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe." *Id.*

92. *Id.*

The implied warranty is not absolute. The trier of fact must first determine whether the alleged violation existed during the period for which past rent was due, and what portion of the tenant's rent obligation may be withheld due to landlord's breach.[93] Not all housing code violations give tenant the right to withhold rent. One or two *de minimis* violations that do not affect habitability, or violations arising from tenant's own wrongful conduct, do not justify withholding rent.[94] If the fact-finder determines only a portion of withheld rent is appropriate, tenant must pay the remaining amount due to avoid judgment for possession. The full amount of rent once again becomes due after landlord makes the necessary repairs.

In the final footnote of his opinion, Judge Wright addressed Miller's argument about the pernicious impact of legal services attorneys in eviction cases and the negative consequences for the administration of justice. Judge Wright agreed that an "excellent protective procedure" would be to have tenants deposit the full amount of their rent into the court's registry during a pending action to assure the availability of funds to pay landlord if a tenant is found to have wrongfully withheld rent.[95]

III. UP FROM *JAVINS*

In a seminal 1965 article,[96] Yale Kamisar identified the disconnect between the Constitutional protections afforded criminal defendants in courts of law (mansions) compared with the treatment they receive in police station interrogation rooms (gatehouses). The Supreme Court cited Professor Kamisar's article and adopted its reasoning in *Miranda v. Arizona*,[97] holding that the Fifth Amendment requires police to advise suspects under arrest of their right to remain silent and to counsel before custodial interrogation.

An ethnographic study of low-income rental housing in Milwaukee by Matthew Desmond won the Pulitzer Prize for nonfiction in 2017.[98] Like

93. *Id.* at 1082.

94. *Id.* at 1082 nn.62–63.

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

96. *See generally*, Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, CRIMINAL JUSTICE IN OUR TIME (A. E. Dick Howard, ed. 1965).

97. 384 U.S. 436, 472 n.41 (1966).

98. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2017). Desmond, a professor of sociology at Princeton University, also received the 2017 American Bar Association Silver Gavel Award for fostering public understanding of law and the legal system, and a fellowship, commonly known as "Genius Award," from the MacArthur Foundation, which has a long-standing interest in the condition of rental housing in the U.S. Anthony Downs, *Introduction: Why Rental Housing is the Neglected Child of American Shelter*, REVISITING RENTAL HOUSING 1 (Nicolas P. Resinas & Eric S. Belsky, eds. 2008). Before the publication of *Evicted*, rental housing had become the "neglected child of American life." *Id.* The U.S. is an ownership society in which the detached single-family house has long represented the American dream, strongly encouraged through lavish tax subsidies. It is estimated the tax benefits of homeownership

Professor Kamisar, Desmond identified a similar disconnect between the theoretical legal rights available to tenants facing eviction in housing court, and the obstacles tenants encounter along the way. Desmond found that tenants who fell behind were unable to summon a building inspector for fear of eviction or withhold rent until repairs are made. A recent empirical study of 40,000 residential eviction actions filed in Essex County, New Jersey in one year similarly found only eighty cases of tenants asserting landlord's breach of the implied warranty of habitability as a defense to nonpayment of rent, notwithstanding significant reported instances of grossly substandard rental housing known to exist within the county.[99]

Crowded housing court dockets spawn an assembly-line process to resolve a high volume of cases as efficiently as possible.[100] The resulting system is a closed, static environment with patterns of behavior that have evolved over decades. The courthouse culture features repeat players who interact daily—judges, court clerks, landlords, landlords' lawyers, and unrepresented tenants.[101] "The process is a morass, the language is different, and the stakes are high. It is an intimidating experience to navigate, even for a lawyer."[102] The fast-moving

amount to $147 billion dollars per year. *Id.* at 7–8. *Evicted* placed rental housing quality at the top of America's housing policy agenda, a position previously occupied by affordability. DESMOND, *supra* at 355.

99. Paula A. Franzese, et al., *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS L. REV. 1 (2016). Asserting a defense based on the condition of the premises can be daunting. "Some courts require written answers, which *pro se* litigants may not know how to generate. Even those courts that allow tenants to respond orally in open courtroom on a particular day require a presence of mind and sense of timing that *pro se* litigants are likely to lack: the tenant may have only a few seconds to decide what to say, and the judge's cue (such as "is this the amount you owe?") may steer tenants into responding to the landlord's accounting rather than raising an affirmative defense that may seem unresponsive." Super, *supra* note 21, at 407.

100. *See* Todd C. Frankel & Dan Keating, *Eviction Filings, Code Complaints: What Happened When a Private Equity Firm Became One City's Biggest Homeowner*, WASH. POST (Dec. 25, 2018), https://www.washingtonpost.com/business/economy/eviction-filings-and-code-complaints-what-happened-when-a-private-equity-firm-became-one-citys-biggest-homeowner/2018/12/25/995678d4-02f3-11e9-b6a9-0aa5c2fcc9e4_story.html [https://perma.cc/WVV6-R2PS].

101. Super, *supra* note 21, at 415.

102. Zachary Best, *Landlord-Tenant Work is Empathy in Action*, WASH. LAW., Dec. 2018, at 43–44. A tenant facing eviction encounters a Byzantine web of rules and practices:

> Your landlord's lawyer finds you and suggests that you go with him to an office to talk about your case. You sit down across from him in the office, intimidated but resolute as he hands you documents and says that your landlord will drop the case against you if you agree to move out within 30 days . . . The lawyer says if you don't take the deal today, then you'll need to go through the court process and prove to a jury that you didn't do anything wrong. Your palms sweat and your head swims. You think to yourself that you don't know how to prove

housing court chaos forces parties to settle cases in crowded hallways, or makeshift offices crammed with old furniture and broken file cabinets.[103]

The overwhelming number of tenants either lose their cases in housing court or, more likely, agree to disadvantageous settlements. Either way, they are evicted, or they give up and vacate. Most tenants facing eviction never reach housing court.[104] They are removed by other, cheaper, and quicker ways than eviction. Landlords leverage the threat of eviction to incentivize tenants to forfeit their right to be heard.[105] Desmond found that half of forced moves were

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> something to jury. You don't have a lawyer, and you can't afford one. What do you do?

Id.

103. N.R. Kleinfield, *Unsheltered: Where Brooklyn Tenants Plead the Case for Keeping Their Homes*, N.Y. TIMES (May 20, 2018), https://www.nytimes.com/interactive/2018/05/20/nyregion/landlord-tenant-disputes-housing-court.html [https://perma.cc/7NKX-RMD4].

> Settlement discussions occur in the hallways, within earshot of everyone, because there is no other space for them. Since there is little seating, these conversations usually happen standing up. It's hard to think clearly when you can't even sit down. A report on the court years ago said it resembled a hospital waiting room, and that seems about right. The hallways, though, feel like a bustling bazaar. Negotiations deal not with textiles or pottery, but with homes. Litigants trade money for time, until there is no more money and therefore no more time. And therefore no more home . . . . Tenants wind up signing all sorts of dubious [stipulations]. Because they're scared. Or bewildered. Or ashamed. Or have children to pick up from school. Or can't skip another day of work. Or think they're speaking to an impartial court official when it's actually the landlord's lawyer.

Id.

104. DESMOND, *supra* note 98, at 4.

> [Courts] have come to depend on this because each day brings a pile of eviction cases, and the goal of every person working in housing court is just to get through the pile because the next day another pile will be waiting. The principle of due process has been replaced by mere process: pushing cases through. Tenant lawyers would change that. . . . Every housing court would need to be adequately funded so that it could function like a court, instead of an eviction assembly line: *stamp, stamp, stamp.*

Id. at 304.

105. Desmond described a poor black couple living in a house with exposed wires and water flowing inside when it rained. As the court date approached, landlord's lawyer offered tenants a stipulation agreeing to move, which tenants accepted so no eviction would appear on their record:

> If they signed a stipulation and agreed to leave, according to the housing court judge, "the eviction part [of the case] would dismiss. So on your record, which anyone can see, it wouldn't say you were evicted. . . . If you think you really have paid the rent or have some other reason that is a legal defense here, then

informal evictions that take place in the shadow of the law: off-the-books displacements not processed through the court, as when a landlord pays a tenant to leave, "or hires a couple of heavies to throw you out."[106] "[F]or every eviction executed through the judicial system, there are two others executed beyond the purview of the court, without any form of due process. Some landlords pay tenants a couple hundred dollars to leave by the end of the week. Some take off the front door."[107]

The absence of counsel for tenants facing eviction is well-documented. Between ninety and ninety-five percent of landlords have legal representation, compared with only five to ten percent of tenants.[108] When tenants have lawyers, their chances of keeping their homes increase dramatically.[109] Desmond concluded that extending the right to counsel in housing court "would be a major step on the path to a more fair and equitable society."[110]

Low-income tenants facing eviction have limited access to legal services. Rising for Justice (formerly known as D.C. Law Students in Court) is among the oldest and most successful programs that protect clients experiencing housing instability. Operated by a consortium of D.C.-area law schools, students are available to stay evictions and assist clients in seeking rental assistance from local social service agencies.[111]

Beginning in 2017, New York City became the first jurisdiction to guarantee legal representation to low-income tenants facing eviction.[112] All tenants sued for possession in housing court are entitled to individual consultation with

> you can tell me all about that. That's your one choice. Your other choice would be to go ahead with some agreement that you'll leave and save [the landlord] and ultimately yourself some headache."

Id. at 398–99.

106. *Id.* at 330. Formal eviction was less common—twenty-four percent of forced moves. Twenty-three percent of forced moves were due to landlord foreclosure, and five percent to condemnation. *Id.* at 330–31. Tenants also prefer informal evictions because an official record does not accompany them, whereas an eviction filing shows up on background checks. The advent of the internet encourages tenants to skip court and quietly move out of a home riddled with dangerous problems when their landlord threatens to evict. *Id.* at 398.

107. *Id.* at 4.

108. Best, *supra* note 102, at 44.

109. A 2016 report by the New York City Civil Justice Coordinator's office found that representation reduced evictions by twenty-four percent. Andrew Scherer, *The Right to Counsel for Tenants Who Face Eviction* (Feb. 20, 2018), https://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1345&context=fac_other_pubs [https://perma.cc/RPU9-V3JP].

110. DESMOND, *supra* note 98, at 305. "Good lawyers will raise defenses tenants often don't, because they are either unaware of them or . . . are too nervous and intimidated." *Id.* at 303.

111. *D.C. Law Students in Court Rebrands at 50*, D.C. BAR (Aug. 19, 2019), https://www.dcbar.org/about-the-bar/news/DC-Law-Students-in-Court-Rebrands-at-50.cfm [https://perma.cc/85DP-EM4S].

112. Scherer, *supra* note 109.

lawyers, and low-income tenants who face eviction proceedings are entitled to legal representation.[113] The city requires that the availability of access to legal assistance be publicized on public transportation.[114]

Legal aid to the poor decreased steadily since the Reagan era, and was decimated by the Great Recession.[115] The reality is that there is unlikely to be enough pro bono or affordable attorneys to satisfy demand.[116] It will be necessary to explore creative ways to level the landlord-tenant playing field by minimizing the cost of access to justice.[117]

Counseling residential tenants is an example of a type of "law practice" that could be performed by trained persons with less than a three-year J.D. degree and law license. Tenants facing eviction would benefit from assistance offered by trained and licensed legal service providers. Armed with basic legal advice, tenants can be empowered to navigate the system and exercise their legal rights without a lawyer.

Washington State was the first in the country to introduce an affordable legal services option for low- and moderate-income individuals with unmet legal needs. It represents the first time in the American legal profession that non-lawyers can openly, legally, and ethically engage in activities constituting the practice of law.[118] Admission and Practice Rule 28, created by order of the state supreme court in 2012,[119] requires limited license legal technicians to meet

113. The law requires the city to build up the capacity of its nonprofit legal services organizations so that, by July 31, 2022, the organizations will be able to provide free legal representation for every low-income individual (defined as households with a family of four earning below $49,200 per year) sued for eviction in housing court. *Id.*

114. *Id.* There is no reason why rental housing accommodations with more than a handful of units should not be required to make tenants aware of this service, in the same manner as casinos and racetracks are required to publicize the availability of assistance for problem gamblers.

115. DESMOND, *supra* note 98, at 303.

116. Legal services organizations suffer chronic underfunding and regularly combat political threats of extinction. *See* Deborah J. Merritt, *The Justice Chasm*, LAW SCH. CAFE (June 17, 2018), https://www.lawschoolcafe.org/2018/06/17/the-justice-chasm/ [https://perma.cc/LB68-ZZYW]. *See also* David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CAL. L. REV. 1051, 1093–94 (2005).

117. One such initiative is the result of a partnership consisting of attorneys with the Wilson Sonsini law firm and law students at the University of Arizona and Brigham Young University. "Hello Landlord" is an on-line program that generates correspondence designed to help tenants inform landlords of conditions that affect habitability. Bob Ambrogi, *In Unique Partnership, Two Law Schools and a Private Company Collaborate on Tool to Reduce Evictions*, LAWSITES (June 26, 2019), https://www.lawsitesblog.com/2019/06/in-unique-partnership-two-law-schools-and-a-private-company-collaborate-on-tool-to-reduce-evictions.html [https://perma.cc/3W9J-YRPM].

118. Rebecca M. Donaldson, *Law by Non-Lawyers: The Limit to Limited License Legal Technicians Increasing Access to Justice*, 42 SEATTLE L. REV. 1 (2018).

119. The Supreme Court stated, "[w]e have a duty to ensure that the public can access affordable legal and law related services, and that they are not left to fall prey to the perils of the unregulated marketplace." Order in the Matter of the Adoption of New APR 28—Limited Practice Rule for Limited License Legal Technicians, No. 25700-A-1005, at 5–6 (Wash. 2013).

educational requirements, pass three licensing exams, and complete 3,000 hours of supervised work experience, the equivalent of almost 18 months of full-time work.[120] Unlike attorneys, limited license legal technicians would not have significant student loan debt.[121] This model is a promising legal services option for those unable to afford a lawyer.[122] The court delegated the Washington State Bar Association to oversee the licensure process and identify practice areas. Landlord-tenant law is expected to be one of the first practice areas approved.[123]

CONCLUSION

Clifton Terrace Apartments have been given a new lease on life.[124] Fifty years later, it is hard to picture the "maze of drugs, gangs, and prostitution"[125] that was Clifton Terrace at the time of *Javins.* The entire Cardozo neighborhood is a different place with a different population.[126]

120. *A Unique Option for Affordable Legal Services*, WASH. ST. B. ASS'N (Jan. 2, 2020), https://www.wsba.org/for-legal-professionals/join-the-legal-profession-in-wa/limited-license-legal-technicians [https://perma.cc/86V3-P8L3].

121. According to the most recent data from the National Center for Education Statistics, law students graduate with an average student loan debt of $145,550, including undergraduate loans, for which the average monthly loan payment is $1,656. Ryan Lane, *Average Student Loan Debt for Law School Graduates*, NERDWALLET (Jul. 10, 2019), https://www.nerdwallet.com/blog/loans/student/loans/student-loans/average-student-loan-debt-law-school-graduates/ [https://perma.cc/K9YD-5E8W].

122. The program is similar to nurse practitioners who have reduced the cost and increased the availability of health care. *See* Kathy Lugo, *The Pro Bono Effect*, WASH. LAW., April 2019, at 46, 48.

123. Family law was the first practice area recognized. Donaldson, *supra* note 118, at 9.

124. Even the name is different. The current ownership group restored the original name, "Wardman Court Apartments." Marketing Brochure, WARDMAN COURT APARTMENTS: TURN-OF-THE-CENTURY ELEGANCE (on file with author). On the day the author visited in March 2019, there were no vacancies in the two buildings still operated as rental housing, and the waiting list was closed. 1308 Clifton Terrace was converted to condominium and is managed separately from the others.

125. Kashino, *supra* note 31. "[A]bout the only thing the development, now called Wardman Court, has in common with the old Clifton Terrace is that it still consists of three buildings." Shaver, *supra* note 44. Residents enjoy a variety of services including ESL and computer training, and classes in vegan cooking and Tae Kwon Do. Rob Brunner, *What Happens When You Discover Your House Was Designed by a Criminal*, WASHINGTONIAN, (Aug. 2, 2018), https://www.washingtonian.com/2018/08/02/what-happens-when-you-discover-your-house-was-designed-by-a-criminal-frank-russell-white/ [https://perma.cc/V4QN-65PW].

126. The gentrification of the thriving Cardozo neighborhood is largely attributable to the proximity of the U Street/Cardozo and Columbia Heights Metro Stations. The Green Line, which was designed on paper but not yet built, was rerouted to spur revitalization of the neighborhood in the aftermath of the riots following the assassination of Rev. Martin Luther King, Jr. Kashino, *supra* note 31.

The current ownership group acquired the complex from HUD for $1 in 1999,[127] and spent $16 million on restoration.[128] Its marketing literature describes the return of "turn-of-the-century elegance based on studies of other buildings in the area created by the same architect," buried behind decades of drywall renovations.[129] Tenants and visitors enter the buildings after passing through the newly landscaped courtyard, formerly an open-air drug market.[130] The well-appointed lobby features tall ceilings, chair-rail and ceiling molding, and chrome and glass chandeliers. On display in the lobby is a collection of vintage photographs and historical documents, including the original 1914 building permit and a 1915 newspaper story featuring an artist's rendering of Wardman Court before commencement of construction. Absent from the display is any reference to the tumultuous but transformative role of Clifton Terrace in the history of landlord-tenant law.

The tenants' rights revolution of the past half-century represents one of the most extraordinary reforms in modern Property law.[131] Reversing centuries-old doctrine, *Javins* radically altered the allocation of legal rights and responsibilities in the landlord-tenant relationship by shifting obligations and liability to landlords. *Javins* illustrates Judge Skelly Wright's willingness to create law when he thought the circumstances warranted, and his intentional use of judicial power as an engine to achieve social change.[132]

Article III judges typically prefer to remain anonymous or, at least, largely unknown.[133] It is uncommon for appellate judges to refute critiques, preferring to let their opinions speak for themselves as the voice of the court.[134] An

127. Shaver, *supra* note 44.

128. *Id*. HUD gained control of the project from the previous owner through foreclosure in 1996. *Id.*

129. Marketing Brochure, *supra* note 124. The current ownership is a partnership between the Community Preservation and Development Corporation, a non-profit organization dedicated to revitalizing housing complexes, and the Michaels Development Company, which claims to have developed more than 22,000 housing units in nineteen states. Shaver, *supra* note 44. To qualify for HUD financing, the partnership agreed to maintain the apartments as housing for low- and moderate-income families for at least twenty years, reduce density from 289 to 232 units, and provide childcare and job training services. *Id.* The combined family income of residents cannot exceed $56,280. Rent starts at $1,245 for a one-bedroom apartment, and increases to $1,713 for a three-bedroom unit. Marketing Brochure, *supra* note 124.

130. *Id.*

131. *See, e.g.*, Glendon, *supra* note 4, at 504; Korngold, *supra* note 4; Spector, *supra* note 8, at 166.

132. Seidman, *supra* note 67, at 2.

133. "The position is unelected, the appointment is for life, and judges generally avoid placing themselves in the public eye." Jill Lepore, *Misjudged*, NEW YORKER, Oct. 8, 2018, at 36.

134. William C. Vickrey, et al., *Opinions as the Voice of the Court: How State Supreme Courts Can Communicate Effectively and Promote Procedural Fairness*, CT. REV. J. AM. JUDGES ASS'N (2012) http://digitalcommons.unl.edu/ajacourtreview/396 [https://perma.cc/8DSM-A4V9]. Ethical considerations dictate the exercise of caution by judges in their public comments even when a case

uncommon judge, Skelly Wright was certainly more candid, and probably more intellectually honest than most in admitting that his opinions were result-oriented, visceral reactions to the context in which they arose, strong enough to overcome precedent which stood in the way.[135] In an extraordinary exchange of correspondence with a law professor in 1982, Judge Wright reflected on his landlord-tenant decisions. He acknowledged the influence of the nationwide racial turmoil of the sixties,[136] the injustice of racially selective service during the Vietnam War,[137] and his belief that legal doctrine had helped create and perpetuate systematic class bias. He acknowledged he "did what he could to ameliorate, if not eliminate, the injustice involved in the way many of the poor were required to live in the nation's capital . . . . I offer no apology for failing to follow more closely the legal precedents which had cooperated in creating the conditions that I found unjust."[138]

Skelly Wright was under no illusion that the systemic problems of the urban poor would be remedied by individual judicial decisions, no matter how significant. Judicial intervention would not "solve the housing crisis in the District of Columbia. That crisis is the product of a constellation of social and economic forces over which no court—and perhaps no legislature—can exercise full control . . . [T]he judicial process is not a *deus ex machina* which can magically solve problems where the legislature and the executive have failed."[139]

is no longer pending. For example, judges in New Jersey are cautioned not to "clarify, defend, or justify any of the judge's decisions or opinions, or reasoning therein." Cynthia Gray, *When Judges Speak Up*, AM. JUDICATURE SOC'Y (1998) (quoting *New Jersey Guidelines for Extrajudicial Activities*, III.A.2b), https://www.ncsc.org/~/media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Publications/When-Judges-Speak-Up-Study-Materials.ashx [https://perma.cc/7TP8-EBAN].

135. MILLER, *supra* note 68, at 211. "Unfortunately judges tend not to be candid about how they decide cases. They like to say they just apply the law—given to them, not created by them—to the facts. They do this to deflect criticism and hostility on the part of losing parties and others who will be displeased with the result, and to reassure the other branches of government that they are not competing with them—that they are not legislating and thus encroaching on legislators' prerogatives, or usurping executive-branch powers." Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts – One Judge's Views*, 51 DUQUESNE L. REV. 3 (2013).

136. Rabin, *supra* note 18, at 549. The context for the *Edwards* and *Javins* decisions included the 1963 March on Washington, urban rioting in summer 1967 and following the assassination of Dr. Martin Luther King Jr. in summer 1968, and passage of the Civil Rights Acts of 1964 and 1968. *Id.* at 548.

137. *Id.*

138. *Id.*

139. Robinson v. Diamond Housing Corp., 463 F.2d 853, 871 (D.C. Cir. 1972). Clifton Terrace's troubled history persisted following *Javins*. In 1978 HUD acquired the property after foreclosing on a loan to an ownership group led by Mayor Marion Barry's ex-wife, Mary Treadwell. Fern, *supra* note 35. Treadwell was convicted in 1984 of conspiracy charges for skimming off $600,000 in rental payments and other federal funds intended for the complex's

At its fiftieth anniversary, *Javins* illustrates a disconnect between the legal doctrine of the Property class and the assembly-line justice of landlord-tenant court. Of considerable influence and staying power among academics, the implied warranty of habitability has been rendered virtually irrelevant in practice.[140] Unaware of their legal rights and how to raise them, unrepresented tenants in housing court confront a daunting array of procedural obstacles. The legacy of *Javins* depends upon the ability to deliver basic and affordable legal services to tenants facing eviction.

upkeep, allegedly affording Treadwell an apartment in the Watergate and a Jaguar. Jonathan Berr, *Subsidized Nightmare*, CITYPAPER (Jul. 26, 1996), https://www.washingtoncitypaper.com/news/article/13011184/subsidized-nightmare [https://perma.cc/T7CQ-LYYB].

140. Super, *supra* note 21, at 423; Franzese, *supra* note 99, at 3.