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## An Invisible Crisis in Plain Sight: The Emergence of the "Eviction Economy," Its Causes, and the Possibilities for Reform in Legal Regulation and Education

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**AN INVISIBLE CRISIS IN PLAIN SIGHT:  
THE EMERGENCE OF THE “EVICTION ECONOMY,”  
ITS CAUSES, AND THE POSSIBILITIES FOR REFORM  
IN LEGAL REGULATION AND EDUCATION**

*David A. Dana\**

EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY. By *Matthew Desmond*. New York: Crown Publishers. 2016. Pp. xi, 341. \$28.

INTRODUCTION

In *Evicted: Poverty and Profit in the American City*, Matthew Desmond<sup>1</sup> explores the lives of landlords who evict and tenants who are evicted in poor neighborhoods of Milwaukee. While the book could be understood as simply an ethnography of a handful of landlords and their low-income tenants in one mid-sized American city, it is much more. *Evicted*, read in conjunction with Desmond’s prior scholarship, illustrates the emergence of what I call an “Eviction Economy” in our cities—an economy in which eviction of the poor is not exceptional, but rather the norm, part of landlords’ business models and poor people’s way of life. The greatest achievement of *Evicted* is that it makes this Eviction Economy, and the terrible human and societal toll it takes, visible to a broad audience. However, as much as it provides a compelling descriptive account of the Eviction Economy, *Evicted* is not fully persuasive in its explanation of the rise of the Eviction Economy. In particular, Desmond’s argument that the Eviction Economy is caused by landlords’ charging exploitative rents is conceptually and empirically problematic. As a response to the Eviction Economy, Desmond primarily calls for a robust universal voucher program, which would indeed address the lack of supply of affordable housing. But the political feasibility of such a program is questionable. *Evicted* does not address less sweeping reforms that could be both politically feasible and effective in limiting the scope and harmful effects of the Eviction Economy.

Part I of this Review summarizes *Evicted* and discusses what makes it such a remarkable achievement. Part II addresses the question of why the Eviction Economy has arisen and the problems in Desmond’s causal explanation. Part III addresses Desmond’s universal voucher reform proposal and outlines three reforms that Desmond does not explicitly advocate but that might be both politically feasible and effective in empowering low-income tenants.

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## I. MAKING THE EVICTION ECONOMY VISIBLE

Foreclosure—and not eviction—has been the housing crisis that has dominated public discourse in recent years. When the housing market and the accompanying securitization market collapsed beginning in 2007, everyone took note. The waves of foreclosures that resulted from the dramatic drop in home values drew the attention of national and local media, courts and lawyers, legal scholars and (to an extent) legislatures.<sup>2</sup> At a minimum, the foreclosure crisis was visible to everyone.

And yet, as *Evicted* teaches us, there is another phenomenon in the housing market worthy of the label “crisis” that (to date) has attracted almost no attention from media, courts, lawyers, legal scholars, or legislatures. Unlike the foreclosure crisis, the crisis Desmond describes, using both survey research and an ethnographic account, involves low-income, urban individuals who lose possession of their rental premises, rather than losing possession of homes they owned in fee simple.<sup>3</sup> These low-income tenants are disproportionately African American women with children (p. 98). And unlike the foreclosure crisis, the crisis Desmond describes does not seem to be a transitory or transitional phenomenon but rather a new, permanent part of the urban economy. While there was always reason to think the foreclosure crisis would abate as prices stabilized and lenders adopted stricter underwriting, nothing in *Evicted* suggests that the eviction crisis will necessarily diminish in due course.

The part of the housing economy Desmond describes, which I call the Eviction Economy (Desmond does not use that label), is a private market economy: the tenants in the Eviction Economy do not live in public housing and have not been able to access housing subsidies in the form of Section 8 vouchers, for which there are very long waiting lists in most areas (pp. 59–60, 223–24). As Desmond explains, most people who qualify for public housing or housing vouchers due to poverty do not in fact receive public housing or housing vouchers (pp. 59, 302–03). Quite the contrary, “[t]hree in four families who qualified for [housing] assistance receive[ ] nothing” (p. 59). These tenants face a private rental market in which even low-quality housing rents can consume as much as 80 to 90 percent of their monthly income,<sup>4</sup> and that is in months in which they do not face some unusual interruption in their flow of income. These tenants are one relative’s funeral expense or lost shift at work away from falling behind on their rent; in fact, they are often unable to make their rent, and thus are regularly subject to the

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2. See, e.g., Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 Hous. L. Rev. 683 (2008); David A. Dana, *Why Mortgage “Formalities” Matter*, 24 Loy. Consumer L. Rev. 505 (2012); Craig E. Pollack & Julia F. Lynch, Opinion, *Foreclosures Are Killing Us*, N.Y. TIMES (Oct. 2, 2011), <http://www.nytimes.com/2011/10/03/opinion/foreclosures-are-killing-us.html> (on file with the *Michigan Law Review*); Editorial, *Will Foreclosure Abuses Ever End?*, N.Y. TIMES (Oct. 22, 2012), <http://www.nytimes.com/2012/10/23/opinion/will-foreclosure-abuses-ever-end.html> (on file with the *Michigan Law Review*).

3. E.g., pp. 282–92.

4. See pp. 3, 112.

threat of eviction for non-payment. These tenants know that a formal eviction on an individual's record makes finding decent new housing much, much more difficult. They understand that an eviction record is like a criminal conviction record—a stain that marks an individual as undesirable for a range of purposes. Landlords of course also understand this and know that they can often compel tenants in arrears to leave the premises simply by threatening to bring a formal eviction for nonpayment of rent. Landlords build informal and formal eviction into their business model, into the rents they charge, and into the way they maintain (or do not maintain) their properties. In the Eviction Economy, informal and formal eviction is not unusual; it is not the result of some extraordinary happening. Eviction is entirely the norm.

Desmond explains that this Eviction Economy is terrible not just for the tenants who are part of it but also for the neighborhoods and cities in which these tenants live. Eviction translates into insecurity, feelings of powerlessness, and depression for poor people who desperately need stability in their lives. Desmond explains, “Even after years pass, evicted mothers are less happy, energetic, and optimistic than their peers” (p. 298). Eviction deprives people of an ability to develop and maintain attachments to a residence, to neighbors, even to personal belongings (which are often lost in eviction); it perpetuates severely substandard housing conditions and intensifies the concentration of poverty and racial segregation and all its attendant ills; and it undermines poor people's efforts to gain and maintain employment, and to provide their children something like a stable education and a sense of agency.<sup>5</sup> Recurrent displacement through eviction “contribute[s] directly to what [Jane] Jacobs called ‘perpetual slums,’ churning environments with high rates of turnover and even higher rates of resentment and disinvestment” (p. 70). Eviction, Desmond argues, reflects poverty, but it is also, at least in our urban neighborhoods, a cause of poverty in its own right (p. 295). “Our cities have become unaffordable to our poorest families, and this problem is leaving a deep and jagged scar on the next generation” (p. 299).

Desmond argues that this Eviction Economy in our cities is a relatively new phenomenon. He argues that “evictions used to be rare” (p. 3) and were heavily resisted by tenants, even to the point of sparking riots (pp. 3–4). On this score, however, Desmond seems to lack quantitative data, and perhaps it would be impossible to develop such data.<sup>6</sup> As discussed below, however, there are good reasons to suppose that recurrent eviction of the poor is a product of relatively recent phenomena.

In documenting the current magnitude of the Eviction Economy, Desmond begins with court records from his test city, Milwaukee, to derive a rate of formal eviction and the demographics of those who are formally

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5. See p. 252.

6. In theory, one could look to court records to construct historical eviction rates that could be studied and compared to current rates. It seems implausible, however, that historical practices of informal eviction could be quantified.

evicted.<sup>7</sup> Drawing on an in-person survey of renter households throughout Milwaukee, Desmond finds that the rate of informal plus formal evictions is much higher than the rate of formal evictions (pp. 330–31, 344–45). As Desmond writes, one in eight Milwaukee renters experienced at least one forced move in the two years prior to being surveyed, with 48 percent of those forced moves being informal evictions and 24 percent being formal evictions (pp. 4–5, 330–31). Thus, about 8 percent or about 1 in 12 tenants were formally or informally evicted within a two-year period. Scholars have not yet sought to assess informal eviction rates in other cities, but Desmond points out that “Milwaukee is a fairly typical midsize metropolitan area with a fairly typical socioeconomic profile and housing market and fairly typical renter protections” (p. 333). And nationwide survey evidence that Desmond cites supports the view that “1 in 8 poor renting families . . . were unable to pay all of their rent, and a similar number thought it was likely they would be evicted soon” (p. 5).

Desmond also documents that African American mothers with children suffer the most in the Eviction Economy. The most harrowing, and maddening, account in *Evicted* is that of an African American mother named Arleen and her two sons who are repeatedly displaced, with no cheerful ending suggested at the end of their travails (pp. 282–92). Desmond’s quantitative evidence suggests that Arleen’s story is commonplace. As Desmond explains, women from black neighborhoods made up 9 percent of Milwaukee’s population but 30 percent of its formally evicted tenants (p. 98). Poor African American men are not being evicted as frequently as African American women (p. 99), perhaps because they are caught up in a crisis of their own—mass incarceration. As Desmond writes, “[i]f incarceration had come to define the lives of men from impoverished black neighborhoods, eviction was shaping the lives of women” (p. 98).

One question *Evicted* immediately raises is, how it is possible that the emergence of the Eviction Economy has escaped media and scholarly and political attention? How has it remained in effect invisible to people outside poor, urban neighborhoods? How can it be that there is no television or print coverage of the fact that many poor, urban tenants are facing eviction after eviction? Why did the foreclosure crisis, by contrast, quickly attain a prominent place in the national consciousness?

Part of the answer may be that data on eviction, and especially informal eviction, is not readily available (pp. 295–96). Desmond and his colleagues had to do a great deal of work to quantify the informal eviction rate in a single city (pp. 328–33). But almost certainly part of the answer has to do with class, race, and class- and race-based, physical segregation. The foreclosure crisis disproportionately hit lower-income and minority neighborhoods, but it also very substantially affected working class, middle-class, and

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7. See pp. 328–29. Desmond’s methodology is described in detail in Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 *Am. J. Soc.* 88 (2012) [hereinafter Desmond, *Eviction*].

indeed even upper-middle-class households. Even a prominent former presidential candidate, Marco Rubio, faced foreclosure.<sup>8</sup> Foreclosure crossed racial and class lines; it impacted inner-city neighborhoods but also suburbs and exurbs. By contrast, the Eviction Economy, at least as depicted by Desmond, is the domain of the very poor, and in particular very poor African Americans in highly segregated urban neighborhoods (pp. 4–5, 125).

In our history, there is a long tradition of treating as invisible problems and suffering that is limited to poor, minority neighborhoods. Eminent domain for private redevelopment was uncontroversial when it was aimed at low-income, heavily minority urban areas, but it sparked nationwide debate and legal reforms when the *Kelo v. City of New London*<sup>9</sup> decision in 2005 highlighted that middle-class, nonminority homeowners also could be affected by the use of eminent domain for redevelopment.<sup>10</sup> The ravages of heroin addiction did not prompt calls for legal reform and addiction treatment until addiction moved from the inner city to largely white, middle-class suburbs and small towns.<sup>11</sup> The rise of the Eviction Economy, perhaps, remained invisible as long as it did because it did not (and has not yet) moved out of poor, urban neighborhoods. It has remained largely bounded by race and class.

By making the Eviction Economy visible, or at least more visible than otherwise, Desmond's *Evicted* performs a great service. This service is almost certainly a reflection of the powerful way in which Desmond communicates the story of the Eviction Economy. In 2003, Chester Hartman and David Robinson published "Evictions: The Hidden Housing Problem," in which they decried that "[e]ach year, an untold number of Americans are evicted or otherwise forced to leave their homes,"<sup>12</sup> but their article did not appear to generate much attention. Several years before publishing *Evicted*, Desmond published an academic article that summarized the quantitative and ethnographic findings from Milwaukee that support his views about eviction and that are elaborated upon in *Evicted*.<sup>13</sup> As far as I can tell, this academic article, which very much reads like an academic article, did not

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8. Sean Sullivan, *Does Rubio Have a Spending Problem?*, WASH. POST (May 20, 2015), [https://www.washingtonpost.com/politics/marco-rubios-struggles-with-money-are-back-under-the-campaign-spotlight/2015/05/20/4dec1732-fd89-11e4-8b6c-0dcce21e223d\\_story.htm](https://www.washingtonpost.com/politics/marco-rubios-struggles-with-money-are-back-under-the-campaign-spotlight/2015/05/20/4dec1732-fd89-11e4-8b6c-0dcce21e223d_story.htm) [https://perma.cc/7H5R-M6RZ].

9. 545 U.S. 469 (2005).

10. See David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 Nw. U. L. REV. 365, 365–66 (2007) (arguing that the fact "reform" efforts in the law of eminent domain have largely focused on economic development condemnations in middle-class areas, and not blight condemnations in poor areas, "is fully consistent with the fact that the two cases that have spawned the greatest public outrage both involved middle-class areas").

11. Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, N.Y. TIMES (Oct. 30, 2015), <http://www.nytimes.com/2015/10/31/us/heroin-war-on-drugs-parents.html> (on file with the *Michigan Law Review*).

12. Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 HOUSING POL'Y DEBATE 461, 461 (2003).

13. Desmond, *Eviction*, *supra* note 7.

generate any media attention about eviction as a pressing problem. It took Desmond's book *Evicted* and his exceptional gifts as a narrator to make visible what the cloak of race and class generally renders invisible.

In *Evicted*, the stories of real human beings are told in vivid, flowing prose. The footnotes in *Evicted* are extensive and scholarly but the main text gives individual tenants and landlords distinctive voices, making them feel like well-written characters in a novel. Desmond himself remains in the background of the narrative: as he notes, *Evicted* breaks with the recent practice of ethnography in not having the ethnography narrated by a first-person "I" (p. 334). The reader comes to care about what will happen to the tenants whose stories Desmond tells, and finishes the book hoping they will find a way out of the morass of problems they face in their daily lives. Because of its communicative power, *Evicted* has reached many Americans who otherwise might never be motivated to read about—and feel for those caught up in—eviction in inner-city Milwaukee.

*Evicted* shows that race divides the Eviction Economy as it divides so much else in the United States. Specifically, Desmond follows one white landlord—a trailer park owner—who largely rents to poor whites, all of whom seem to share the overwhelming goal of not being forced into the poor African American neighborhoods of Milwaukee (p. 37). He also follows an African American couple that rents to only low-income African Americans in poor African American neighborhoods (p. 13). He chronicles the eviction of eight families, "some black, some white; some with children, some without" (p. 5).

Powerlessness is Desmond's overriding theme. The powerlessness of the tenants in their dealing with what might be called the power players of the Eviction Economy (the landlords, the storage companies, the courts) resonates throughout the account. One tenant hands over to her landlord what for her is a huge check to be applied to back rent, but then the landlord tells her he will keep the check she just gave him but evict her immediately anyway (pp. 46, 50). A tenant is tossed out after—and really only because—her mother complains to a building inspector that her daughter's apartment is so cold her grandson has fallen ill (pp. 16–18). Because she has an eviction record, another tenant is forced to rent an apartment that has no working bathroom or sink or proper locks and is unable to convince her landlord to fix anything, yet she is too scared to call a building inspector (pp. 69, 74–75, 256). A landlord fails to install required fire alarms and a tenant's baby dies in a fire, and yet the landlord is not held accountable and proceeds to collect the property's insurance money (pp. 201–03). A tenant who has lost his legs manages to do work fixing up a unit for his landlord in exchange for rent owed, but the landlord dismisses his work as unsatisfactory and refuses to credit him for any work done (pp. 26–31). A tenant falls behind in rent because she must cover family funeral expenses, is docked benefits for missing an appointment with her case worker (pp. 62–63), and is then evicted along with her children (p. 94). One of her sons grows ever more enraged and explosive as he is shuffled from one unsafe place to live to another (pp. 54–55, 162–63, 212–13, 287–88). And after a seemingly endless struggle to

find a place for herself and her children, she finds an apartment with a \$600 rent that takes up virtually all of her monthly income. Unable to afford to keep the lights on after paying her rent, that same tenant has no choice but to send her children to live away from her (pp. 290–91).

One of the most notable aspects of *Evicted* is how it illuminates the strength of these tenants. Arleen, the repeatedly evicted tenant whose children are sent off to live with others after the utility company turned the lights off, is quoted near the end of the book as reflecting:

I wish that when I be an old lady, I can sit back and look at my kids. And they be grown. And they, you know, become something. Something more than me. And we'll all be together, and be laughing. We be remembering stuff like this and be laughing at it. (p. 292)

Crystal, an evicted tenant contending with a history of sexual abuse and mental illness (pp. 213–14, 252), buys dinner for a hungry boy at McDonald's and says, "I wish I had me a house. I would take him in" (pp. 253–54).

Although the landlords complain about pro-tenant courts (p. 107 n.18) and irresponsible tenant behavior (the tenants do in fact engage in a range of self-destructive behaviors)<sup>14</sup> and the landlords (to Desmond's credit) come off as multi-dimensional human beings and not monsters, they seem to have all the power. They choose which of their tenants in arrears to evict and which to allow to stay; the landlords know what they are doing in housing courts whereas their tenants almost never show up; and even when tenants do appear in court, they are unrepresented and unable to press a case. Whereas evicted tenants bear a stain that makes finding new housing exceedingly difficult, landlords have no problem filling units right after an eviction. As Desmond notes, "[t]he high demand for the cheapest housing told landlords that for every family in a unit there were scores behind them ready to take their place" (p. 47).

## II. WHY THE EVICTION ECONOMY NOW?

If (as Desmond argues) the Eviction Economy is a relatively new phenomenon, then a key question is, why has it arisen now? Desmond points to many forces that no doubt have helped to give rise to the Eviction Economy. But Desmond also identifies "exploitation"—overcharging by landlords—as one cause of the lack of reasonable rents for low-income households and the cycle of missed rent payments and eviction (pp. 305–07). If Desmond is wrong, and housing for the very poor is not now unusually profitable, then the cost of incentivizing the private market to create and maintain more such housing may be greater than Desmond suggests. And, as a political matter, that may make effective reform even more difficult to attain than Desmond recognizes.

Desmond's argument as to why the Eviction Economy has arisen relies not only on reduction in public housing and housing assistance,<sup>15</sup> but also

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14. See, e.g., p. 107.

15. See pp. 303, 396 n.28; see also Desmond, *Eviction*, *supra* note 7, at 106–07 .



on the growing gap between private-market housing prices and income for low-income households.<sup>16</sup> Housing prices continue to rise, as does the price of electricity and other basic household costs, whereas welfare stipends and minimum wage–based incomes have stagnated. As he explains:

Welfare stipends have remained completely stagnant over the past decade, while the cost of housing has increased by historic proportions. . . . [T]he fair market rent for a . . . two-bedroom apartment [in Milwaukee] jumped from \$585 in 1997 to \$795 in 2008 . . . . During this 10-year span, welfare stipends did not change. The result is that the average cost of rent, even in high poverty neighborhoods, is quickly approaching the total income of welfare recipients . . . . Women resigned to low-wage work fare slightly better but not by a wide margin. . . . The[ ] . . . increases [in minimum wage earnings for a 35-hour week] are far outpaced by the climbing cost of housing . . . .<sup>17</sup>

Desmond's account suggests other possible causes for the growth of the Eviction Economy, such as a suspicion of African American children (and especially boys) on the part of landlords who may believe such children bring the unwanted attention of the police.<sup>18</sup> Desmond tells how one landlord was willing to rent to Arleen and her two boys even though they were living in a shelter following an eviction, but then when police came to the apartment to check up on one of the boys who had had a scuffle with a teacher in school, the landlord demanded that Arleen and her boys leave (pp. 287–88). In an era marked by less conflict between police and young African American men, Arleen might have more easily been able to find and then keep decent housing. But as Desmond writes, “Children didn't shield families from eviction; they exposed them to it” (p. 287).

Desmond also tracks the story of a former nurse who fell into an eviction cycle after becoming addicted to opioids (pp. 80–87), and this tenant's story could be read as suggesting that the recent rise in opioid addiction has contributed to the rise of the Eviction Economy. In addition, Desmond addresses the effects of the local “nuisance” ordinances that have been adopted throughout the country in recent years and heavily enforced in poor, African American neighborhoods. These laws encourage landlords to evict tenants who are the subject of domestic abuse by fining landlords for 911 calls to their buildings (Chapter Fifteen).<sup>19</sup>

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16. See p. 303. One question is whether the reduction in public housing has led to an increase in the costs of private, low-income housing, by reducing available supply relative at least to the population in need. Desmond does not delve into that issue in *Evicted*.

17. Desmond, *Eviction*, *supra* note 7, at 106. Desmond also explains that “[t]o make matters worse for the very poor, the shortfall of federal housing assistance has coincided with the emergence of an employment-based safety net” that reserves any available public housing for parents with low-wage jobs. P. 305.

18. See, e.g., p. 287.

19. For a discussion of the harms caused by these ordinances, see Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181 (2008).

Desmond's least persuasive causal story relates to the economics of renting to low-income households that are part of the Eviction Economy. In Desmond's view, landlords in the Eviction Economy are exploiting low-income tenants by charging them rents higher than they need to in order to reap reasonable profits (pp. 305–06). This exploitation is one component in the rise of the Eviction Economy. Desmond makes a similar claim regarding the rents paid to private landlords pursuant to Section 8 voucher programs; according to Desmond, these rents are set at levels that reflect prevailing rents in much more desirable neighborhoods, such that Section 8 landlords are overcharging taxpayers and using up program resources that would allow the government to help more of those in need (pp. 148–49).

Desmond's exploitation argument is problematic on two scores. First, it is not clear that rental rates have been rising any faster in poor neighborhoods than in other ones; indeed, Desmond himself points out that prevailing nominal rents in poor urban neighborhoods have never been that much lower than prevailing, nominal rents in safer urban neighborhoods and suburbs (pp. 74–75). “The poor did not crowd into slums because of cheap housing. They were there—and this was especially true of the black poor—simply because they were allowed to be” (p. 75). Thus, if landlords have always overcharged poor tenants in poor neighborhoods, it is not clear that that overcharging now itself accounts for the new prevalence of informal and formal and informal evictions.

But the more fundamental issue is this: What does it mean to say that the landlords in the Eviction Economy are overcharging tenants? If it means that the status quo is intolerable, in that tenants are being asked to pay rents they really cannot afford for (often) poorly maintained premises, there is no question Desmond is correct. But if Desmond is arguing that private landlords could provide decent, safe housing to the kinds of tenants who now inhabit the Eviction Economy at rents substantially lower than the rents they now charge, then that seems highly doubtful, and the quantitative or ethnographic evidence in *Evicted* certainly does not prove that.

From *Evicted*, it seems that the landlords in the Eviction Economy—mostly individuals or small, family businesses, in Desmond's account—have adopted a model of charging higher rents than they know some or many of their tenants can consistently pay in full,<sup>20</sup> presumably because they think doing so is more profitable than charging lower rents. These landlords rent to some individuals with real vulnerabilities and problems and complications in their lives, ranging from addiction to mental illness to medical problems to highly insecure sources of monthly income, and some of these tenants would presumably fail to make rent or otherwise pose problems for continuing their tenancies even if the nominal rents were lower. Although exactly what motivates the landlords in Desmond's account is not always clear, it seems that they charge high nominal rents and collect them when they can to cover the risk that other tenants will miss payments in due course; more now covers the risk of getting much less or nothing later. In

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20. See p. 75.

this way, these landlords seem to act like many lenders who charge higher interest rates to borrowers perceived as having a higher risk of default. Of course, Desmond's landlords also "skimp on maintenance" (p. 75), sometimes horrendously and inexcusably,<sup>21</sup> but by itself that still does not establish that they are making a level of profit or return on capital that is exceptional in the economy as a whole or even in the broader rental housing market. Nothing in Desmond's account shows these landlords are quickly, dramatically getting rich.

In defending the claim of exploitation, Desmond argues, that "[t]he annual income of the landlord of perhaps the worst trailer park in the fourth-poorest city in America is 30 times that of his tenants working full-time for minimum wage and 55 times the annual income of his tenants receiving welfare or SSI" (p. 308). But that fact, which I agree is a troubling fact among so many others about inequality in the United States, does not tell us whether Desmond's landlords are making more relative to reference groups they would argue are the relevant ones, namely other investors and business-people. Given how our economy operates, one might ask, why should these landlords' return on capital be assessed by reference to the economic situation of their tenants? We do not generally assume that health care providers that serve low-income populations or food vendors with low-income purchasers should—as a normative matter—receive lower rates of return on their investments than entities catering to the wealthy.

Moreover, there is an empirical problem with Desmond's argument: we do not see capital rushing in to the Eviction Economy. If the housing market were even close to an efficient market, one might assume that if Desmond's landlords were reaping something like super profits in the Eviction Economy, if they were making a premium beyond normal returns that cannot be justified in terms of risk, other actors would enter the market to also reap unusually high rewards, with the result that supply would increase and even tenants identified as highly risky would have more choices. There are of course reasons for outside investors to hesitate to enter these markets: as Desmond himself notes, it takes a lot of local knowledge to understand which properties in distressed areas are better for rentals than others and how to collect rents from a distressed population in a safe and effective way.<sup>22</sup> The landlord Sherrera, for example, "knew the ghetto's value and how money could be made from a property that looked worthless to people who didn't know any better" (p. 10). Some outside investors may feel that the learning curve is too high, or the whole endeavor too unsavory, but by the same token, these investors could hire people like Desmond's landlords as their agents to help them. Indeed, Sherrera herself expresses a willingness to partner with established investors and/or to act as their agent for a fee.<sup>23</sup> Certainly, large investors did and still seek to make money selling mortgages

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21. See p. 76 (describing the pervasiveness of neglected repairs).

22. See p. 10.

23. See pp. 28–29.

to low-income buyers and, if they saw high profits as a realistic possibility, it seems that they would also invest in renting to very poor tenants.<sup>24</sup>

There really is no *a priori* reason to believe the investors would be willing and able to offer the kinds of very poor tenants Desmond follows decent housing at rents lower to or even equal to what the landlords in Desmond's account charge. If the government removed part of the risk for landlords—by guaranteeing the payment or rent, by indemnifying landlords against other risks posed by tenants—lower rents could be charged. But that would entail substantial public investment. The current regime is socially unproductive—indeed untenable. It does not follow, though, that decrying exploitation will help attract and engage private investors in the project of doing away with the Eviction Economy.

### III. RECOMMENDED REFORMS

Desmond quite rightly believes the core of the eviction problem—the grounding for the Eviction Economy—is the lack of decent (or even not that decent) housing that is genuinely affordable for poor households: “[A]ffordable rental housing stock has been allowed to deteriorate and eventually disappear . . . . The high demand for the cheapest housing told landlords that for every family in a unit there were scores behind them ready to take their place” (p. 47). More supply is absolutely needed. Accordingly, Desmond's reform proposals focus on a universal voucher system in which all landlords would be required to participate; this would in effect guarantee that all individuals would be able to attain decent housing in any neighborhood for a maximum of something like 30 percent of their income (pp. 308–13). A universal voucher system, such as the one he supports, would greatly increase supply. But as Desmond recognizes, this proposal presupposes political acceptance of decent, non-location-segregated housing as a basic human right (p. 305). And there is no evidence that there is broad political support for recognition of such a right in the United States or, for that matter, for any major public investments to address affordable housing. Indeed, Desmond himself recognizes that one reason for the rise of the Eviction Economy is that there has been a reduction in support on the part of the federal and state governments for poor people in the form of both housing and nonhousing assistance (pp. 302–03).

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24. A similar question could be raised regarding Desmond's argument that Section 8 landlords are overcharging. *See* pp. 148–49. If Section 8 rent levels are far too high, then what accounts for the reluctance of many landlords to accept Section 8 tenants? Presumably, the answer is that the landlords perceive there to be ancillary costs associated with accepting Section 8 tenants. Given these perceived ancillary costs, it is not clear Section 8 overpays landlords but rather perhaps pays what is needed to garner their participation. That said, under a universal voucher system with mandatory participation, a good part of these perceived ancillary costs might disappear, inasmuch as such a system would address landlords' concerns that renting to Section 8 tenants will drive away other tenants.

Desmond's *Evicted* thus raises the question: Are there reforms that make sense even assuming we do not see universal vouchers with mandated participation or a major government push to vastly expand supply of housing for low-income households, and instead at best we see some modest efforts to reverse the decline in public investment in affordable housing? There are a range of possible reforms that would empower low-income tenants in their dealings with their landlords but that would not by themselves add to the supply of affordable housing. Standard economics would suggest that reforms that empower tenants without adding to supply would have the effect of raising the costs to landlords of renting to low-income households. Such a rise in costs could result in a reduction in the supply of affordable low-income housing by inducing landlords to raise rents, withdraw units from the low-income rental market, or reduce their investments in new units for that market. Hence the question: Are there any particular legal reforms (and if so, which ones) that would be on net desirable because they might empower tenants and assist them in avoiding or escaping the Eviction Economy even though the reforms might reduce the availability of affordable rental units? Framed in this light, the questions of which reforms warrant active pursuit—which warrant the biggest expenditure of limited political capital—is one of cost-benefit or risk-benefit analysis.

Desmond's account implicitly suggests two reforms that would pass this cost-benefit test and that seem to be politically conceivable, even though both would represent a step beyond what any jurisdictions have considered or are considering. The first reform would be the automatic sealing of an individual's first (and perhaps second) eviction record by the courts. The second reform would alter retaliatory eviction statutes to bar evictions following the reporting of truly egregious conditions even when the complaining tenant was in arrears on her rent at the time of the report. Another—and by far the easiest—reform would be reform in legal education. Property casebooks basically tell a story of triumph for tenants, whereby landlord-tenant law was transformed from being pro-landlord to being pro-tenant, and especially protective of low-income, urban renters. There is some truth in this story, but only some, and the other side of the story, the story of the Eviction Economy, deserves a place in property classes (and, for that matter, property law scholarship). This Part briefly sketches these three possible reforms.

#### A. *Sealing Records*

As Desmond explains, “Both the mark of a criminal record and the stain of eviction can attenuate one's chances of securing decent, affordable housing. ‘I'll rent to you as long as you don't have a conviction or an eviction,’ landlords repeated to prospective tenants.”<sup>25</sup> In Desmond's account, sometimes tenants are able to lie about past eviction on rental applications but the days of that approach appear to be passing: “With the proliferation of

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25. Desmond, *Eviction*, *supra* note 7, at 120–21 (emphases and footnote omitted).

cheap tenant screening services, there is good reason to expect the mark of eviction (and of a criminal record) to become even more consequential in the coming years.<sup>26</sup>

If we want to limit the Eviction Economy, it would seem desirable to limit a landlord's ability to see the eviction records of applicants for rental housing. Once a tenant is marked with an eviction record, her possibility of becoming trapped in the Eviction Economy increases: she will have to spend time and energy she may not have to find housing, and is more likely to be forced to accept housing in worse condition, for more money, in a more dangerous location, and farther from employment opportunities than otherwise would have been the case.<sup>27</sup> All of that, in turn, increases the risk she will be informally or formally evicted again or feel compelled by the conditions to leave of her own accord.<sup>28</sup> Having an eviction record, in other words, reduces the evicted tenant's shot at staying out of the cycle of instability that characterizes the Eviction Economy. Because one societal goal should be to reduce the number of households trapped in the Eviction Economy, it would seem that sealing eviction records—and thus removing them from the tenant screening process—would represent good social policy.

There is a counterargument, of course. Landlords plausibly would argue that they need to know the risk of nonpayment associated with tenants, as well as other risks, to make informed decisions. Eviction records provide relevant information, albeit information that is routinely given far too much weight in a mechanical screening process. One possible reform that would promote the goal of minimizing the households in the Eviction Economy while recognizing landlords' interest in obtaining information about applicants would be to give every tenant one (or two) free pass(es) in the form of having her first and perhaps second evictions sealed, at least if the eviction(s) were for nonpayment of rent and not for destructive or dangerous behavior.

This limited sealing measure, which certainly should pass First Amendment scrutiny given the limited public interest in eviction records, also would provide tenants with the ability to risk fighting back against a threatened eviction they believe is wrongful. It would also eliminate a form of intimidation landlords use to drive them to leave informally. As long as a single eviction on one's record can deprive a tenant of future housing and other opportunities, even tenants who are not among the most economically vulnerable can be cowed from speaking up when their landlords act or fail to act in palpably unfair or abusive ways.

No jurisdiction has yet adopted, or even seriously considered, a reform measure of this sort. But there has been some limited legislative action regarding eviction records. In Illinois, there have been statutory reforms passed that require sealing eviction records where the eviction resulted from

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26. *Id.* at 120 n.21.

27. *See* pp. 296–97.

28. *See* p. 297.

a foreclosure of the landlord's property.<sup>29</sup> Illinois also allows for judicial sealing of eviction records upon motion by the tenant or her lawyer where there has been a judicial determination that the eviction action was not proper.<sup>30</sup> In Minnesota, a recent statute provides that the court, upon request of the defendant tenant, may seal the record where judgment was rendered in favor of the defendant.<sup>31</sup> These reform statutes, welcome as they are, do not go far enough when read in light of Desmond's *Evicted*. It is unrealistic to imagine that poor tenants will show up in court and move to have eviction records sealed, given their very limited resources and other demands in their lives. And sound social policy should provide for the sealing of at least the first eviction for nonpayment record even though the judgment is indeed in favor of the landlord.

### B. Broadening Retaliatory Eviction Protection

The second reform relates to the doctrine of the implied warranty of habitability and the related doctrine barring retaliatory evictions. The implied warranty of habitability ("IWH") has long been controversial among legal scholars and other commentators because requiring landlords to provide conditions that meet demanding housing codes has the potential to hurt those it is supposed to help by increasing rents and decreasing the supply of affordable housing.<sup>32</sup> And Desmond's account provides some support for this view. His ethnography begins with Arleen being forced to leave a dilapidated house the city has condemned but that Arleen loved and that, perhaps, was better than the drug-dealer-ridden building where she next finds housing (pp. 2–3). And the landlord, Sherrena, explains that she avoids participating in the Section 8 program because of the high administrative and other costs associated with that program's requirements that premises be fully up to code (p. 147).

At the same time, the IWH can be justified as a way to pressure the removal of premises from the market or the repair of premises that truly pose tremendous risks to the adults and children who inhabit them, not to

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29. 735 ILL. COMP. STAT. 5/9-121(c) (2014).

30. See *id.* § 5/9-121(b) ("The court may order that a court file in a forcible entry and detainer action be placed under seal if the court finds that the plaintiff's action is sufficiently without a basis in fact or law, which may include a lack of jurisdiction, that placing the court file under seal is clearly in the interests of justice, and that those interests are not outweighed by the public's interest in knowing about the record.").

31. MINN. STAT. ANN. § 504B.345(1)(c)(2) (West 2016) (allowing the court to expunge records relating to a housing eviction at the time judgment in favor of the defendant is entered, or any time thereafter upon motion of the defendant).

32. For a good summary of the debate over what the effects of the implied warranty of habitability actually are with regard to rent levels and the supply of affordable housing, see Michael A. Brower, Comment, *The "Backlash" of the Implied Warranty of Habitability: Theory vs. Analysis*, 60 DEPAUL L. REV. 849 (2011). See also Michael H. Schill, *Comment on Chester Hartman and David Robinson's "Evictions: The Hidden Housing Problem"—Protection or Protraction?*, 14 HOUSING POL'Y DEBATE 503 (2003) (exploring the connection between legal protections for tenants and affordable housing supply).

mention neighbors. Apartments that lack heat in a place like Milwaukee or that are fire traps or that are covered with mold pose health risks. Such conditions compromise the ability of tenants and their children to lead a decent life, and they are insults to the human spirit and dignity itself.

Because of resource constraints, and perhaps also political constraints, city inspectors do not routinely inspect premises. Thus, tenant reports to inspectors that premises have code violations and hence violate the IWH can, in theory, be a meaningful way to force action on the part of landlords. Once the doctrine of IWH was established, of course, there had to be a doctrine that prohibited retaliatory evictions; otherwise, tenants who reported violations would simply be evicted and tenants would soon learn to be quiet. And indeed court cases establishing a prohibition against retaliatory eviction accompanied or soon followed the adoption of the IWH.<sup>33</sup>

What Desmond's work teaches us, though, is that we have a retaliatory eviction doctrine as implemented that is close to meaningless as a way of promoting more habitable conditions and validating the IWH. As he explains, very poor tenants fear that they will be unable to keep up with their rent, and often they do fall behind in payments. These are precisely the tenants who live in premises that are likely to have the most most dangerous conditions. And yet these tenants are not protected by the retaliatory eviction doctrine, which is inapplicable to tenants who are behind in their rent at the time they complain about conditions.<sup>34</sup> Desmond explains:

Tenants able to pay their rent in full each month could take advantage of legal protections designed to keep their housing safe and decent. Not only could they summon a building inspector, . . . but they also had the right to withhold rent until certain repairs were made. But when tenants fell behind, these protections dissolved. Tenants in arrears were barred from withholding or escrowing rent; and they tempted eviction if they filed a report with a building inspector. It was not that low-income renters didn't know their rights. They just knew those rights would cost them.<sup>35</sup>

One possible solution to this problem would be to simply modify the state retaliatory eviction statutes to prohibit retaliatory eviction in all cases where a tenant complained about a code violation regardless of whether she was behind in her rent at the time of her complaint. But that might invite so

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33. See, e.g., *Schweiger v. Superior Court*, 476 P.2d 97 (Cal. 1970); *Jack Spring, Inc. v. Little*, 280 N.E.2d 208 (Ill. 1972); *Berzito v. Gambino*, 308 A.2d 17 (N.J. 1973); *Voyager Vill. Ltd. v. Williams*, 444 N.E.2d 1337 (Ohio Ct. App. 1982); *Pugh v. Holmes*, 405 A.2d 897 (Pa. 1979); *Dickhut v. Norton*, 173 N.W.2d 297 (Wis. 1970).

34. See also David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. L. REV. 389 (2011).

35. P. 75 (citation omitted). Technically, a renter who is not yet behind in her rent could complain about conditions and be protected from a retaliatory eviction but once the conditions were repaired and the tenant fell behind in her rent at some point in the future, the landlord would be free to evict her. See JOSEPH WILLIAM SINGER ET AL., *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 896–97 (6th ed. 2014). Knowing that, even tenants who are not yet in arrears have good reason to view themselves as subject to eviction for complaining. See *id.*



many complaints and so many delays in eviction that there would be a substantial, counterproductive decrease in available affordable housing. What is needed, then, are reforms that give the IWH some real meaning while also taking into account the realities of rental housing economics. One such reform would be statutory amendments (or court rulings) that broaden the retaliatory eviction doctrine to protect tenants from eviction in cases where they report not merely technical code violations, but rather conditions that pose imminent health and safety risks, regardless of whether they are in arrears on their rent at the time of reporting. Eviction would be blocked until conditions were remedied or perhaps, as an alternative, simply for a set period of time. Some reported premises might be condemned by local authorities and tenants forced to leave, but a statute could also require the landlord to refund some rent paid in order to facilitate the tenant's relocation where the relocation was due to condemnation.

Another possible approach to reforming retaliatory eviction statutes would place the burden on the landlord to show that the tenant being evicted after reporting substandard conditions was in arrears on her rent for a greater amount or for a longer time than other tenants the landlord has chosen not to evict. This would require, in effect, landlords to disclose schedules of their tenants and the balances on their rent accounts.<sup>36</sup>

These sorts of reforms have not been proposed or considered anywhere to my knowledge, and they would entail greater administrative costs for courts, local agencies, and legislative bodies. Notably, it would not be an easy task for public authorities to identify which kinds of code violations represent imminent risks to health and safety, as opposed to those violations that are simply undesirable or represent less than best practices. But if the IWH is to be a meaningful doctrine, some effort to give real power to the retaliatory eviction doctrine is necessary.

### C. *Changing the Property Curriculum*

Finally, at least to a professor of property, *Evicted* also suggests the need for reform in legal education. Law students become lawyers and sometimes judges and legislators; what law students are taught about the world thus can have a real impact on our legal and political systems, and hence, ultimately, on legal and political reform. Moreover, providing law students an accurate account of law and legal institutions is a good in itself. Nearly every law school treats property as a required class, and landlord-tenant law is a standard part of the class. In the property casebooks used in American law schools, the lessons of Desmond's *Evicted* about how legal doctrines work and do not work in reality are not taught to the extent they should be.

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36. However, one problem with this approach, in addition to requiring more judicial resources, is that it could encourage landlords to evict non-complaining tenants in arrears along with complaining ones so as to avoid appearing that they were retaliating against the complaining tenants.

Three leading property casebooks—Merrill and Smith,<sup>37</sup> Dukeminier,<sup>38</sup> and Singer<sup>39</sup>—address the transformation of landlord-tenant law from a pro-landlord regime to a pro-tenant one focused on urban, multifamily housing.<sup>40</sup> On the topic of eviction itself, all three casebooks address the change in the law in the United States whereby landlords were required to formally evict defaulting tenants rather than resorting to “self-help,” that is, throwing the tenants’ belongings on the street.<sup>41</sup> As the Dukeminier text explains, for example, landlords lost the legal right to self-help evictions but in return the formal eviction process was streamlined and made more summary, as compared to common law ejectment.<sup>42</sup> But what none of the casebooks address is the role landlord self-help still plays in the Eviction Economy: because landlords often can induce low-income tenants to “voluntarily” leave in order to avoid the stain of an eviction record, tenants in the Eviction Economy simply are locked out of their premises in a way that would seem to be indistinguishable from the uncivilized days of self-help evictions.

All three casebooks address the rise of the IWH, although Merrill and Smith do so only very briefly.<sup>43</sup> Still, even Merrill and Smith describe the IWH as a “runaway success story.”<sup>44</sup> The Dukeminier and Singer casebooks devote substantial time to the question of the adjudication of IWH claims, particularly in terms of the remedies available to the tenant.<sup>45</sup>

As already explained, a key point that emerges from Desmond’s account of the Eviction Economy is that the IWH has limited utility because most tenants living in poor conditions are or easily could become in arrears, and a tenant lawfully may be evicted for nonpayment (and threatened plausibly with eviction) even after she has complained about substandard conditions (p. 75). None of the casebooks address this point, but rather give the impression that the statutory prohibitions against retaliatory eviction meaningfully protect tenants who complain about substandard conditions. Thus, the Dukeminier casebook explains:

Conventional common law doctrine gave landlords virtually unlimited freedom to terminate periodic tenancies and tenancies at will upon proper notice and to refuse to renew expired terms of years. . . . Landlords could

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37. THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES & POLICIES* (2d ed. 2012).

38. JESSE DUKEMINIER ET AL., *PROPERTY* (8th ed. 2014).

39. SINGER ET AL., *supra* note 35.

40. *Id.* at 875–85; DUKEMINIER ET AL., *supra* note 38, at 443–540; MERRILL & SMITH, *supra* note 37, at 694–702.

41. DUKEMINIER ET AL., *supra* note 38, at 488–90; MERRILL & SMITH, *supra* note 37, at 387–94; SINGER ET AL., *supra* note 35, at 848–49.

42. DUKEMINIER ET AL., *supra* note 38, at 490–92.

43. *See id.* at 515–25; MERRILL & SMITH, *supra* note 37, at 694–702; SINGER ET AL., *supra* note 35, at 875–85.

44. MERRILL & SMITH, *supra* note 37, at 694.

45. DUKEMINIER, *supra* note 38, at 490, 515–25; SINGER ET AL., *supra* note 35, at 849–97.

cope with expanding tenant rights simply by getting rid of tenants who exercised them, at the same time giving a message to tenants who were thinking of doing so. So something had to change, and it did. Most jurisdictions today, whether by statute or judicial decision, forbid retaliatory action by landlords renting residential space . . . .<sup>46</sup>

For its part, the Singer casebook devotes more attention to issues surrounding retaliatory action than Dukeminier or Merrill and Smith. The Singer casebook quotes extensively from *Robinson v. Diamond Housing Corp.*,<sup>47</sup> an early D.C. Circuit case where an eviction for nonpayment of rent was deemed an impermissible retaliation for complaints about conditions.<sup>48</sup> At the same time, the Singer casebook also excerpts a model retaliatory eviction statute that on its face provides no protection from retaliatory eviction when the tenant is in arrears for rent at the time the tenant complains about code violations: Section 5.101(c)(2) of the Uniform Residential Landlord and Tenant Act provides that a landlord may not retaliate against a complaining tenant except the landlord “may recover possession if . . . ‘the tenant is in default in rent.’”<sup>49</sup> But the Singer casebook never makes explicit the point that the Uniform Act and specific state statutes that are consistent with it<sup>50</sup> deny any meaningful, actual protection to very poor tenants from retaliatory eviction.

Unlike changes in statutes regarding eviction records or retaliatory eviction statutes, changes in property casebooks and curriculums are straightforward to implement. These changes will not immediately change any tenant’s life, but they could help foster a more realistic debate among students and faculty about what landlord-tenant law has achieved and what it could achieve.

#### CONCLUSION

Desmond’s *Evicted* is an extraordinary accomplishment that enriches our understanding of poverty, urban life, housing, and the law in the United

46. DUKEMINIER, *supra* note 38, at 526.

47. 463 F.2d 853 (D.C. Cir. 1972).

48. SINGER, *supra* note 35, at 893–95.

49. *Id.* at 896–97 (quoting the Uniform Act). Similarly, Burke and Snoe’s text notes that the retaliatory eviction bar doctrine is applicable only when “the tenant at the time of the reporting of the code violation [was] not . . . otherwise in material default on the lease,” but does not address how this limit on applicability undermines the impact of the retaliatory eviction doctrine. BARLOW BURKE & JOSEPH SNOE, PROPERTY: EXAMPLES AND EXPLANATIONS 320 (5th ed. 2016).

50. The Wisconsin statute that governed the evictions in *Evicted* contains exactly this limit on the scope of the prohibition against retaliatory evictions. WIS. STAT. ANN. § 704.45 (West 2015). A tenants resource document published by a Wisconsin NGO, the Tenant Resource Center, makes the point even more emphatically than the statute itself: “Wis. Stat. 704.45 provides absolutely no protection against eviction if tenants are behind in their rent (except if the rent not paid is due to a retaliatory rent increase).” *Landlord Retaliation*, THE TENANT RES. CTR. FOR HOUS. JUSTICE IN WIS., [http://www.tenantresourcecenter.org/landlord\\_retaliation](http://www.tenantresourcecenter.org/landlord_retaliation) [https://perma.cc/FXQ7-HART] (last visited Dec. 23, 2016).

States. Its account of the lives of low-income tenants is so compelling that it has made visible and salient a crisis that racial and class divides had obscured. *Evicted* highlights the need for something to be done to address the powerlessness of low-income individuals and families who are hard-pressed to afford the housing that is available in the private market. While Desmond's universal voucher proposal would directly undermine the pernicious Eviction Economy, there are less sweeping, more politically feasible reforms, such as sealing eviction records and reforming retaliatory eviction doctrine, that would represent sensible first steps in addressing the plight of low-income, urban tenants. At a minimum, *Evicted* should change how we understand and teach landlord-tenant law.