

Legal Responses to the Crisis of Forced Moves Illustrated in *Evicted*

A Book Review of MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (Crown Publishers, New York, 2016)

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INTRODUCTION

Matthew Desmond's *Evicted: Poverty and Profit in the American City*¹ combines compelling narratives that illustrate many of the barriers to housing for individuals in poverty with quantitative data that speaks to the scope of the housing crisis in urban America. This Essay addresses what may be a lawyer's most natural question upon finishing Desmond's book: what can lawyers and the law do to reduce evictions and forced moves² among tenants in poverty?

The Essay begins by discussing legislative protections that can reduce unjust evictions and forced moves and analyzing lawyers' roles in ensuring that tenants realize those statutory protections. It then considers legal provisions

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1. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).
 2. I adopt Desmond's term "forced moves" in this Essay to capture both court-ordered evictions and other involuntary moves, defined as "moves . . . initiated by landlords or city officials (e.g. building inspectors) and involv[ing] situations in which tenants have no choice other than to relocate (or think as much). These include formal and informal evictions, foreclosures, and housing being condemned." Matthew Desmond & Tracey Schollenberger, *Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences*, 52 DEMOGRAPHY 1751-58 (2015).

that might reduce initial barriers to housing for tenants in poverty who want or need to move. Although the law and lawyers can be part of the solution to forced moves for individuals in poverty, a true remedy for the cycles of exploitation in low-income housing cannot be solely legal in nature. Thus, this Essay concludes by situating the immediate legal remedies described in Parts II and III in the context of some broader debates regarding the housing crisis among those living in poverty.

I. HOW CAN LAWYERS AND THE LAW REDUCE FORCED MOVES?

A. Legislative Protections To Prevent Unjust Forced Moves

On the very first page of *Evicted*, Arleen and her two sons face eviction because a stranger jumped out of a car and damaged their door.³ There is no indication that Arleen or her sons caused this damage or that they knew this stranger or invited him onto their rental property. Indeed, there was no indication that this was anything other than a random crime *against* Arleen. Surely, being a victim of crime was not a violation of her lease agreement (or a violation of any conscionable provision of her lease agreement, at any rate). And yet, Arleen still faced the threat of eviction. In Wisconsin, once a tenant's lease term expires, that tenant can be evicted with no other cause or allegation of wrongdoing by the tenant.⁴ It would appear Arlene either was in such a month-to-month tenancy or was unable, without advice or resources, to protect herself from eviction under local law. This Part examines a few potential legal solutions for tenants like Arleen who find themselves especially vulnerable and who face unjust and inhumane evictions.

To begin with, a simple-sounding protection can make a significant difference to a tenant in Arleen's situation: limiting evictions to "for-cause" evictions based on violations of the lease agreement or the obligations of tenancy and excluding overstaying the lease term from recognized "good cause" for eviction.⁵

3. DESMOND, *supra* note 1, at 1.

4. See WIS. STAT. § 704.23 (2017); see also *Tenants Rights and Responsibilities*, CITY MILWAUKEE, http://city.milwaukee.gov/ImageLibrary/User/jkamme/EAP/Info-Library/InfoLibrary_WiscLandlordTenant.pdf [<http://perma.cc/2MZN-24PP>] (laying out the obligations that landlords owe tenants in Wisconsin).

5. Many jurisdictions have some variation of "for-cause" eviction limitations. One particularly strong version of for-cause limitations exists in the District of Columbia, where even expiration of the lease term is not cause for eviction See D.C. CODE § 42-3505.01(a) (2017). Apart from violations of the lease or obligations of tenancy, tenants can face eviction if the landlord, upon proper notice, seeks possession of the property for the landlord's personal use or for personal use by a purchaser due to a finding of illegal activity within the rental unit by

As a first step, tenants need to be protected from eviction in circumstances where they have not violated their obligations. Had Arlene been protected by a robust for-cause eviction statute, made aware of her rights, and given access to counsel or a *pro se*-friendly forum in which to raise those rights, perhaps the forced move examined in the early pages of *Evicted* could have been avoided.

Of course, there is a significant difference between for-cause evictions in the abstract and for-cause evictions as they actually take place. For-cause evictions fail to provide meaningful relief to tenants in at least two kinds of situations described in *Evicted*: first, limited protections for victims of crime when the crime's perpetrator has a relationship with the victim, and second, retaliatory convictions disguised as for-cause evictions. But legal remedies can also help to mitigate these problems.

1. *Special Protections for Victims of Crime, Especially Domestic Violence*

Tenants often face eviction for being victims of crime when the crime's perpetrator is another tenant, occupant, or someone deemed a "guest" present at the invitation of the tenant.⁶ In many cities, including Desmond's Milwaukee, police send landlords notices alleging nuisances on their properties after police calls. Landlords in turn often rely on the nuisance allegations to evict tenants. Such "criminal activity" or nuisance evictions can be especially problematic when the tenant is the victim, as is often the case in domestic violence matters. In *Evicted*, one landlord initially responded to a police "nuisance" notice by indicating that she would give a victim of domestic violence one more chance to stop the abuse before proceeding with eviction. The police responded that this was inadequate, so instead the landlord issued the victim an eviction notice.⁷

Survivors of domestic violence, especially those with limited financial resources, already face too many obstacles when it comes to calling for police protection and escaping abusive relationships. When landlords can evict tenants for their own victimization, it becomes difficult to imagine how tenant-

the tenant or another occupant; for demolition or substantial repairs under certain circumstances; or for condominium or cooperative conversion, among other reasons. See § 42-3505.01(c)-(j). For a summary of "just-cause" protections in other jurisdictions (focused on tenant protections after foreclosure, but not exclusively so), see *State and Local Tenant Protections*, NAT'L HOUSING L. PROJECT (Jan. 23, 2015), <http://nhlp.org/node/1341> [<http://perma.cc/6AAA-NR2X>].

6. It is beyond the scope of this Essay to critique the federal policy permitting tenants to be evicted from federally-subsidized housing for certain types of criminal activity by any household member or guest, but this federal one-strike policy has been amply critiqued elsewhere. See, e.g., Wendy J. Kaplan & David Rossman, *Called Out at Home: The One Strike Eviction Policy and Juvenile Court*, 3 DUKE F. FOR L. & SOC. CHANGE 109 (2011).

7. DESMOND, *supra* note 1, at 188.

victims can realistically avail themselves of police protection. There are, however, various avenues available to protect tenants from such “nuisance” evictions. First, jurisdictions can simply decline to enact nuisance legislation that makes calls to the police grounds for eviction. Second, when faced with eviction based on the alleged criminal activity of their “guests”/abusers, tenants can argue that abusers are not “guests” in any meaningful sense of the word and therefore avoid eviction, at least where for-cause eviction statutes are in place.⁸

Third, and perhaps most meaningfully, jurisdictions can categorically exempt domestic violence victims from eviction when the “cause” of the would-be eviction can be traced to related abuse. Residents of most types of federally-subsidized housing are already protected from evictions or subsidy termination due to domestic violence.⁹ It is not difficult to write similar protections into local law to ensure that survivors are not evicted from private housing due to domestic violence either.¹⁰

2. *Protections Against Retaliatory Evictions*

A second weakness of for-cause eviction protections concerns retaliatory evictions. Consider the following scenario: a landlord can knowingly accept that a tenant has a cat in violation of the lease without taking any action against the tenant, and may even inform the tenant that the cat is welcome. But if the tenant upsets the landlord by exercising her rights—for instance, calling a building inspector to report safety or sanitation concerns—the landlord can evict her for having the cat, even though the real reason lies elsewhere and is unlawful. Far from being a hypothetical, the aforementioned scenario takes place quite frequently. In *Evicted*, we see a landlord issuing eviction notices to tenants for calling the building inspector under the guise of for-cause rea-

8. In the context of criminal activity protections, the Supreme Court has opined that “[i]mplicit in the terms ‘household member’ or ‘guest’ is that access to the premises has been granted by the tenant.” See *Dep’t of Hous. v. Rucker*, 535 U.S. 125, 131 (2002). Similar arguments have been made, for example, in the unemployment insurance context. One applicant argued that she was not allowing unauthorized persons access to the work site because the unauthorized person was the applicant’s abuser. See *E.C. v. RCM of Wash., Inc.*, 92 A.3d 305, 312-13 (D.C. 2014) (noting that the administrative law judge had determined that the unauthorized person had not specifically threatened violence on the occasions of unauthorized presence, but holding that the termination was still “due to” domestic violence).

9. See 42 U.S.C.A. § 14043e-11 (2016).

10. For examples of such protections, see D.C. CODE § 42-3505.01(c-1) (2017), which provides tenants who are survivors of intrafamily offenses with a defense to eviction actions for lease violations or criminal activity on the premises related to the domestic violence, and. § 2-1402.21.

sons.¹¹ As Desmond explains, “The law forbade landlords from retaliating against tenants who contacted [the city inspection agency]. But landlords could at any time evict tenants for being behind on rent or for other violations.”¹²

As *Evicted* illustrates, a law merely prohibiting retaliation is inadequate in for-cause jurisdictions. To be effective, the law must prohibit retaliatory evictions *even if* the landlord might otherwise have a legal basis to evict the tenant.¹³ In addition, a statutory scheme that presumes evictions to be retaliatory if brought within a certain time of the tenant’s exercise of her rights relieves the tenant of the often-insurmountable burden of proving the landlord’s (often easily concealed) subjective intent. Such statutes shift the burden to the landlord to show that, where eviction is sought within the specified time of the tenant exercising her rights, the action is not retaliatory.¹⁴ By shifting the burden of proof in these kinds of eviction proceedings and establishing that even otherwise lawful evictions cannot proceed if the action is retaliatory, lawmakers can attempt to avoid the scenario Desmond describes, in which, as soon as the landlord can articulate some other claim for eviction, the tenants’ protections against retaliatory eviction disappear.¹⁵

The statutory protections described here are but a sampling of protections that jurisdictions can reasonably implement to protect tenants living in poverty. However critical these laws may be, such provisions mean little if tenants are unaware of them or unable to avail themselves of their protections. As with any of the legal protections discussed in this Part, landlords can evict tenants through informal means if the protection is on the books but unenforced. Often, having a lawyer is the difference between a real protection and an illusory one.

11. DESMOND, *supra* note 1, at 18.

12. *Id.*

13. The District’s retaliation protection, for example, prohibits retaliation and includes a statutory presumption of retaliation if the landlord takes certain actions against the tenant, including seeking eviction, within six months of the tenant exercising protected rights. See D.C. CODE § 42-3505.02(a)-(b) (2017). The D.C. Court of Appeals has applied this protection even in cases involving nonpayment of rent, where the landlord would otherwise lawfully be able to evict the tenant but for the retaliatory nature of the eviction. See *Bridges v. Clark*, 59 A.3d 978, 983-84 (D.C. 2013).

14. For an example of such a burden-shifting scheme, see D.C. CODE § 42-3505.02(b) (2017).

15. DESMOND, *supra* note 1, at 18.

B. Access to Counsel for Low-Income Tenants

As Desmond notes—and as a trip to almost any eviction court in the country would make clear—there is a dramatic disparity in legal representation for parties in eviction court: “[I]n many housing courts around the country, 90 percent of landlords are represented by attorneys, and 90 percent of tenants are not. Low-income families on the edge of eviction have no right to counsel. But when tenants have lawyers, their chances of keeping their homes increase dramatically.”¹⁶

Even if local housing law includes the protections described in the previous section or other protections, tenants are often ill-equipped to avail themselves of these laws when proceeding alone, especially if the landlord has counsel. Some jurisdictions have attempted to answer this by establishing and funding programs providing legal representation to tenants.¹⁷ Such programs tend to focus on providing representation to tenants in eviction court, either with or without a merits screen establishing the tenants’ defenses prior to representation. According to various studies, these programs successfully reduce evictions for tenants assigned a lawyer compared to tenants without any representation.¹⁸

However, focusing exclusively on funds to provide representation for tenants already in eviction court can risk neglecting other critical housing issues—including efforts essential to reducing forced moves other than lawful evictions.¹⁹ As Desmond describes:

16. *Id.* at 303.

17. Government funding for such programs is under consideration in many jurisdictions. *See, e.g.*, Bill 22-0024, “Expanding Access to Justice Act of 2017” (D.C. 2017), <http://lims.dccouncil.us/Legislation/B22-0024> [<http://perma.cc/FYH8-SSJG>]; Proposed Int. 0214-2014, Version A, “A Local Law to amend the administrative code of the city of New York, in relation to providing legal counsel for low-income eligible tenants who are subject to eviction, ejection or foreclosure proceedings” (N.Y.C., 2014), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1687978&GUID=29A4594B-9E8A-4C5E-A797-96BDC4F64F80&Options=ID%7cText%7c&Search=%22covered+proceeding%22> [<http://perma.cc/ZY3D-MS5H>]; Gloria Pazmino, *De Blasio, Mark-Viverito Announce Right to Counsel Initiative* (Feb. 12, 2017, 2:24PM), <http://www.politico.com/states/new-york/city-hall/story/2017/02/de-blasio-mark-viverito-announce-landmark-right-to-counsel-initiative-109542> [<http://perma.cc/PQ24-PLHH>].

18. Stout Risius Ross, Inc., *The Financial Costs and Benefits of Establishing a Right to Counsel in Eviction Proceedings Under Intro 214-A*, STOUT RISIUS ROSS, INC. 4 (Mar. 16, 2016), http://www2.nycbar.org/pdf/report/uploads/SRR_Report_Financial_Cost_and_Benefits_of_Establishing_a_Right_to_Counsel_in_Eviction_Proceedings.pdf [<http://perma.cc/3F3U-838D>].

19. Projects focusing on eviction defense may also detract funding from other critical legal services for individuals in poverty, including but not limited to family law, consumer protec-

There are other ways, cheaper and quicker ways, for landlords to remove a family than through court order. Some landlords pay tenants a couple hundred dollars to leave by the end of the week. Some take off the front door. Nearly half of all forced moves experienced by renting families in Milwaukee are “informal evictions” that take place in the shadow of the law.²⁰

Lawyers have a critical role to play in preventing these shadowy “informal evictions” by representing tenants organizing to protect their rights, bringing affirmative actions to address harassment and retaliation by landlords, and advocating (where possible) for better tenant protections in local law. Lawyers can also demystify the court process through outreach initiatives and know-your-rights efforts with tenants before their court dates, in an effort to both reduce default rates²¹ and ensure that tenants who receive pre-court eviction notices know their options to defend against eviction and, potentially, to stay in the home. Pairing lawyering with other forms of advocacy—including community organizing, efforts at legislative change, and investments in high-poverty neighborhoods—can help lawyers address forced moves happening outside of eviction courts.

II. PROTECTIONS FOR PROSPECTIVE TENANTS SEARCHING FOR HOUSING

The legal protections and outreach efforts described above may be able to prevent some or even many forced moves, but they speak little to assisting low-income tenants who need or want to move elsewhere. Desmond’s book highlights many of the barriers tenants face when moving to safe, affordable housing, including discrimination against people of color, families with children, and those who use housing vouchers; denial of housing to people with poor rental histories like prior eviction suits (even without judgments entered); and limited, substandard housing options.

The law can at least attempt to address some of these barriers. For example, Desmond discusses how many tenants with housing vouchers are turned away by landlords unwilling to participate in the program. This bias against housing

tion, and public benefits. How resources among these practice areas should be allocated in beyond the scope of this Essay, but it is important to note that however severe the housing crisis is, it is not the only crisis facing those living in poverty.

20. DESMOND, *supra* note 1, at 4.

21. “Some tenants couldn’t miss work or couldn’t find child care or were confused by the whole process or couldn’t care less or would rather avoid the humiliation [than come to eviction court].” *Id.* at 96.

vouchers occurs even though many jurisdictions have outlawed source-of-income discrimination, including refusals to rent to voucher-holders.²² Jurisdictions have also prohibited family status discrimination by outlawing landlords' practices of declining to rent, for example, to families with children.²³ Although many jurisdictions have already passed the necessary laws, the next problem lies in enforcing these anti-discrimination protections, which, as Desmond notes,²⁴ has proven to be notoriously difficult. Lawyers and tenants can, however, make use of anti-discrimination protections in an effort to preserve housing options for tenants with low incomes, many of whom are parents of young children. For example, tenants can challenge redevelopment schemes that seek to eliminate housing for families by replacing family-size units with entirely one- and two-bedroom units, by arguing that such efforts constitute family status discrimination.²⁵

Though many landlords or management companies attempt to avoid discrimination by setting clear standards and criteria for tenant admission, Desmond describes how "equal treatment in an unequal society" can nonetheless create inequality: "Because black men were disproportionately incarcerated and black women disproportionately evicted, uniformly denying housing to applicants with recent criminal or eviction records still had an incommensurate impact on African Americans."²⁶

Additional protections in rental applications are imperative if we wish to address these inequalities and prevent supposedly neutral criteria from becoming insurmountable and disproportionate barriers to housing for tenants with low incomes and minority tenants. Promisingly, jurisdictions are increasingly restricting when and how an individual's criminal history can be considered in rental applications.²⁷

22. See, e.g., D.C. CODE § 2-1402.21(a) (2017) (prohibiting source of income discrimination); see also *Feemster v. BSA Ltd. P'ship*, 548 F.3d 1048, 1070-71 (D.C. Cir. 2008) ("Permitting [the landlord] to refuse to accept Section 8 vouchers on the ground that it does not wish to comply with Section 8's requirements would vitiate" the Human Right's Act's source-of-income protection).

23. See, e.g., D.C. CODE § 2-1402.21(a) (2017) (prohibiting discrimination in housing based on familial status).

24. See DESMOND, *supra* note 1, at 252.

25. For a summary of one example of such litigation, see Andrew Giambrone, *Northeast Tenants Sue Owner for Alleged Discrimination*, WASH. CITY PAPER (Aug. 25, 2016, 8:00 AM), <http://www.washingtoncitypaper.com/news/housing-complex/blog/20831721/northeast-tenants-sue-owner-for-alleged-discrimination> [<http://perma.cc/B4N8-D335>] (describing a pending lawsuit alleging familial status discrimination by a housing developer).

26. DESMOND, *supra* note 1, at 252.

27. For example, San Francisco regulates how and when criminal history can be considered in housing (and employment) applications. See S.F. POLICE CODE art. 49, § 4906,

Another frequent barrier to housing for tenants with low incomes is that records of any eviction cases filed, regardless of result, are usually available online as public records.²⁸ In many jurisdictions, such as Milwaukee, this means that rental screening agencies or landlords can decline to rent to a tenant solely on the basis of a record that a prior landlord had sued that tenant for eviction—regardless of outcome. Restrictions on the use of court records with no resulting judgment (for example, an online record indicating that a case was dismissed on the day of the first hearing or before) in rental history reports could go a long way toward making legal protections for tenants a reality. Protections against retaliatory suit risk inadequacy if a prior landlord can torpedo the tenant’s future housing hopes just by filing an eviction action in court.

CONCLUSION

The legal solutions outlined in Parts II and III of this Essay can only be part of the picture. As Desmond’s sociological study makes clear, any solution to the housing crisis that those living in poverty face requires an interdisciplinary approach. Laws to protect tenants threatened with eviction and tenants seeking safe, affordable housing—and lawyers to ensure that tenants can realize those legal protections—are a critical part of the solution. But they are only part of the solution. Other important areas for further inquiry include the way “affordable” housing is defined for people with extremely low incomes,²⁹ the dearth of subsidized and/or genuinely affordable housing for individuals in poverty,³⁰

[http://library.amlegal.com/nxt/gateway.dll/California/police/article49proceduresforconsideringarrests?f=templates\\$fn=default.htm\\$3.o\\$vid=amlegal:sanfrancisco_ca\\$anc=JD_Article49](http://library.amlegal.com/nxt/gateway.dll/California/police/article49proceduresforconsideringarrests?f=templates$fn=default.htm$3.o$vid=amlegal:sanfrancisco_ca$anc=JD_Article49) [<http://perma.cc/WA7T-8LYB>]. The District of Columbia now has a law regulating how and when criminal histories may be considered in housing applications. See Law 21-0259, Fair Criminal Record for Housing Screening Act of 2016 (D.C. 2017). In addition, rental screening practices that rely on criminal history and have a disproportionate impact on the basis of race or other protected grounds can be challenged under the Fair Housing Act. See Helen R. Kanovsky, *Office of General Counsel Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions*, DEP’T HOUSING & URB. DEV. (Apr. 4, 2016), http://portal.hud.gov/hudportal/documents/huddoc?id=hud_ogcguidappfhastandcr.pdf [<http://perma.cc/URB3-EN5J>].

28. DESMOND, *supra* note 1, at 87.

29. Housing is typically considered “affordable” if the rent is roughly 30% of the household income. *Id.* at 295. However, for extremely low-income households, 30% is often an unmanageable percentage of monthly income to dedicate to housing. See *Rental Burdens: Rethinking Affordability Measures*, PD&R Edge, DEP’T HOUS. & URB. DEV. (Sept. 22, 2014), http://www.huduser.gov/portal/pdredge/pdr_edge_featd_article_092214.html [<http://perma.cc/6ZXT-5RP6>].

30. Waiting lists for subsidized housing in hot rental markets are often “counted in decades.” DESMOND. *supra* note 1, at 59.

the way rent is calculated in the voucher program, and the effects of that formula on both voucher tenants' mobility and on market rents for other tenants in high poverty neighborhoods.

Evicted began an important conversation by making the experiences of tenants living in poverty real to readers who may never have been inside the cycle of forced moves that households in poverty too often experience. By recognizing the harms of such forced moves and contemplating ways the laws can prevent them, hopefully lawyers can help to interrupt this cycle by advocating with, and enforcing legal protections for, tenants in poverty.

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