

Homelessness in the COVID Era: Utilizing the Bankruptcy Solution

*Geoffrey K. McDonald**

Homelessness is a national crisis in the United States. In the wake of the COVID-19 pandemic, there is no doubt that the nation will face a crisis of evictions and foreclosures, similar to what was seen as a result of the 2008 financial collapse. This, in turn, will lead to an increase in homelessness, which disproportionately impacts communities of color. While moratoria on evictions and foreclosures are good and necessary, they cannot go on indefinitely, and they cannot solve the underlying crisis, which may result in tens of millions of people facing homelessness.

This Article addresses the ongoing epidemic of homelessness in the United States, with a particular focus on the country's two largest cities: Los Angeles and New York City. Special attention is paid to the ways in which the COVID-19 pandemic will likely impact the homelessness crisis. The Article also demonstrates how filing for bankruptcy protection can be beneficial to tenants and homeowners who are facing eviction or foreclosure.

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Homelessness in the COVID Era

While there are many causes for the epidemic of homelessness and various potential solutions, the bankruptcy process has been underutilized as a tool for preventing homelessness. This Article addresses the ways in which bankruptcy can be better employed in this regard. Specifically, the Article addresses how bankruptcy can be used to stop an eviction or foreclosure and how the procedures available under the Bankruptcy Code can help distressed debtors discharge certain debts, restructure other debts, and obtain a “fresh start” in order to better afford their housing costs going forward.

In addition, the Article suggests ways in which the Bankruptcy Code may be amended to better serve as a tool for preventing homelessness in cases of eviction and foreclosure, as well as other potential solutions to the homelessness crisis, outside of bankruptcy. The Article concludes with reflections on the moral bankruptcy of a public policy that fails to adequately address extreme poverty, suffering, and homelessness in society.

I am hungry! Don't kill me! Have compassion for me! – cries out the miserable.

ENRIQUE DUSSEL¹

When you're homeless in this country, it's easy to have the sense that all the world is passing you by on its way to the important work of society but is pausing to gawk for a second. To take in the absurdity of the situation. To watch you as you rise from the ashes of the places they thought they had long burned down with indifference and hatred.

THE REV. LENNY DUNCAN²

I have lived in tents and happily kept rain and mosquitoes out. I have observed the sufferings of human beings, done little to alleviate them, and left them behind. My sensations in doing so are sometimes as smelly as San Francisco's rainy uriney Tenderloin streets, where in a sunken subway plaza homeless ones are reading, snoring or snarling in sodden sleep bags; infected by misery, I look

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1. ENRIQUE DUSSEL, *THE UNDERSIDE OF MODERNITY: APEL, RICOEUR, RORTY, TAYLOR, & THE PHILOSOPHY OF LIBERATION* 80 (Eduardo Mendieta ed. & trans, Humanity Books 1998).
 2. LENNY DUNCAN, *UNITED STATES OF GRACE: A MEMOIR OF HOMELESSNESS, ADDICTION, INCARCERATION, AND HOPE* 76 (2021).

away, but my eyes meet a man’s red-eyed glare on those rainy steps in the dark; I could remember him or I could remember the woman sitting on those steps, singing; her pants and her jacket are soaking wet in that night rain and water runs out of her hair into her eyes; her titanic thighs are blotched with eczema and she keeps scratching them; she reeks, but she is smiling as she sings; of course the only honest thing to do is remember them both – in my tent. I am a rich man. I’m one with the man in Bogotá who said: I’m scared about the poor people coming to take everything from me.

WILLIAM T. VOLLMANN³

Ten years ago, I walked this street my dreams were riding tall
 Tonight I would be thankful Lord, for any dream at all
 There’s some satisfaction in the San Francisco rain
 No matter what comes down the Mission always looks the same.

JERRY GARCIA⁴

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3. WILLIAM T. VOLLMANN, POOR PEOPLE 286 (2007).

4. JERRY GARCIA BAND, *Mission in the Rain*, on GARCIALIVE, VOL. 11 (Jerry Garcia Family LLC 2019) (1976).

INTRODUCTION

Homelessness is a national crisis in the United States.⁵ While the epidemic of homelessness has many causes and various potential solutions, the bankruptcy process has been underutilized as a tool for preventing homelessness. This Article illuminates the ways in which bankruptcy can be better employed in this regard. Specifically, the Article addresses how bankruptcy can be used to stop an eviction or foreclosure and how procedures available under the Bankruptcy Code can help distressed debtors discharge certain debts, restructure other debts, and obtain a “fresh start” to better afford their housing costs going forward.

In the wake of the COVID-19 pandemic, a crisis of evictions and foreclosures looms, similar to what was seen as a result of the 2008 financial collapse. This, in turn, will lead to an increase in homelessness, which disproportionately impacts communities of color.⁶ The federal and state moratoria on evictions and foreclosures enacted during the pandemic were good and necessary responses to extraordinary upheaval. But these policies cannot continue indefinitely,⁷ and they cannot solve the underlying crisis, which may result in millions of people facing homelessness.⁸ At the time of

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5. Homelessness is a crisis in many countries, but the focus of this Article is the crisis of homelessness in the United States. *See generally* LINDA GIBBS, JAY BAINBRIDGE, MUZZY ROSENBLATT & TAMIRU MAMMO, HOW TEN GLOBAL CITIES TAKE ON HOMELESSNESS: INNOVATIONS THAT WORK (2021).
 6. *See generally* Emily A. Benfer et al., *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL’Y L. & ETHICS 122 (2020).
 7. *See, e.g.*, James Gordon, *Hundreds of Thousands of NYC Tenants Face Eviction as State’s Pandemic-era Moratorium Ends Saturday: Housing Court Has 200,000 Pending Cases That Can Begin Tuesday*, DAILYMAIL.COM (January 15, 2022, 9:23 PM), <https://www.dailymail.co.uk/news/article-10405189/Hundreds-thousands-NYC-tenants-face-eviction-states-pandemic-era-moratorium-ends-Saturday.html> [<https://perma.cc/7GLT-5W3B>] (“New York instituted the eviction moratorium in March 2020 by then governor Andrew Cuomo and has been regularly extended since then, but current governor Kathy Hochul has declined to do. When it was first instituted, New York was the epicenter of the COVID-19 crisis in the United States. Extensions occurred even as a federal eviction ban and moratoriums in other states lapsed.”).
 8. *See* Geoffrey K. McDonald, *COVID and the Homelessness Crisis*, HUMAN RIGHTS AT HOME BLOG (April 12, 2021), <https://lawprofessors.typepad.com>

writing, the constitutionality and future existence of the current moratoria on evictions and foreclosures is uncertain. The Centers for Disease Control and Prevention (“CDC”) eviction moratorium order already has suffered defeat in court, and the Supreme Court has stated that any future moratorium would require explicit congressional authorization, which seems unlikely in this moment.⁹

Homelessness, like so many other social crises in the country, was not caused by the pandemic, but has been tragically amplified by it.¹⁰ This Article proposes bankruptcy as a way to mitigate homelessness, both in the pandemic-precipitated crisis and as a policy tool to address this endemic and enduring problem. Part I addresses the ongoing epidemic of homelessness in the United States, with reference to the country’s two largest cities: Los Angeles and New York City. Special attention will be paid to the ways in which the COVID-19 pandemic will likely impact the homelessness crisis. Part II reviews the judicial foreclosure process, the non-judicial foreclosure process, and the eviction proceedings that often precipitate homelessness. Part III shows how filing for bankruptcy protection can be beneficial to tenants and homeowners who are facing eviction or foreclosure.¹¹ This Part also suggests ways in which the Bankruptcy Code may be amended to better serve as a tool for preventing

/human_rights/2021/04/covid-and-the-homelessness-crisis-.html
[<https://perma.cc/WEJ5-HUYE>].

9. Order Granting Application to Vacate Stay, 141 S. Ct. 2485 (2021) (per curiam) (“Congress was on notice that a further extension would almost surely require new legislation, yet it failed to act in the several weeks leading up to the moratorium’s expiration. It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends. It is up to Congress, not the CDC, to decide whether the public interest merits further action here. If a federally imposed eviction moratorium is to continue, Congress must specifically authorize it. The application to vacate stay presented to THE CHIEF JUSTICE and by him referred to the Court is granted.”) (citation omitted).
10. *See, e.g.*, SLAVOJ ŽIŽEK, HEAVEN IN DISORDER 2 (2021) (“In recent months, the often alarming ways in which the crisis of the Covid-19 pandemic is intertwined with ongoing social, political, ecological, and economic crises are increasingly apparent.”).
11. In certain states (e.g., New York), which require judicial foreclosure, homeowners may face an eviction proceeding after their foreclosure case has been concluded. Also, tenants may face eviction after a foreclosure sale of the landlord’s property.

homelessness. Part IV looks at other potential solutions to the homelessness crisis, outside of bankruptcy.

I have adopted an optimistic outlook with respect to the hoped-for end of the COVID-19 pandemic. At the time of writing this Article, the end of the COVID-19 pandemic is far from assured. Nevertheless, the basic claims of this Article that this pandemic will undoubtedly contribute to the homelessness crisis, in this country and around the world, and that the bankruptcy process can be better utilized to prevent some individuals and families from falling into homelessness, should not be controversial.

The history of the COVID-19 pandemic has yet to be written, and this pandemic is, in fact, a world-historical event. A full understanding of what has happened, and is happening, requires not only the analysis of scientists and medical doctors, but also philosophers, theologians, psychoanalysts, lawyers, political scientists, and ethicists, among others.¹² This event is not only a public health crisis: it is also a crisis with ethical, political, philosophical, and religious dimensions which must not be overlooked, even if such an inquiry is outside the scope of the present Article.¹³

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12. *See also* BEN GOLDACRE, *BAD PHARMA: HOW DRUG COMPANIES MISLEAD DOCTORS AND HARM PATIENTS* ix (Rev. ed., Faber & Faber, Inc. 2014) (“We like to imagine that regulators let only effective drugs onto the market, when in reality they approve hopeless drugs, with data on side effects casually withheld from doctors and patients.”). *See generally* JEAN-LUC NANCY, *AN ALL-TOO-HUMAN VIRUS* (Cory Stockwell, Sarah Clift & David Fernbach trans., Polity 2022) (2020); GIORGIO AGAMBEN, *WHERE ARE WE NOW? THE EPIDEMIC AS POLITICS* (Valeria Dani trans., Rowman & Littlefield 2021); SLAVOJ ŽIŽEK, *PANDEMIC! COVID-19 SHAKES THE WORLD* (2020); SLAVOJ ŽIŽEK, *PANDEMIC! 2 CHRONICLES OF A TIME LOST* (2021); MARTIN STEFFENS & PIERRE DULAU, *FAIRE FACE: LE VISAGE ET LA CRISE SANITAIRE* (2021); MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978-1979* (Michel Senellart ed. & Graham Burchell trans., Palgrave Macmillan 2008).
 13. The question of the meaning or the truth of the pandemic is, moreover, a question involving, what Michel Foucault called, “biopolitics.” *See* FOUCAULT, *supra* note 12, at 317 (“The theme was to have been ‘biopolitics,’ by which I meant the attempt, starting from the eighteenth century, to rationalize the problems posed to governmental practice by phenomena characteristic of a set of living beings forming a population: health, hygiene, birthrate, life expectancy, race . . .”) (ellipsis in original); *see also* GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 119 (Daniel Heller-Roazen trans., Stanford Univ. Press 1998) (“In the last years of his life, while he was working on the history of sexuality and unmasking the deployments of power at work within it, Michel Foucault began to direct his inquiries with increasing

In personal terms, on March 16, 2020, I appeared in a case in the New York State Appellate Division of the Supreme Court First Judicial Department in the Borough of Manhattan, New York City, in an attempt to save a client's home from foreclosure. The case was adjourned. I have not appeared in a court case in person since, as my office closed the following day, along with many courthouses and countless places of business. Indeed, like many others, I worked from home for the next sixteen months. I am among the fortunate ones, as I was afforded the opportunities to continue to work, albeit remotely, and to earn an income, first as a lawyer and now as a law professor. Many are not so fortunate, and some of these less fortunate ones are facing homelessness today.

I. HOMELESSNESS IN THE U.S.: LOS ANGELES & NEW YORK CITY

This Part of the Article addresses the ongoing crisis of homelessness in the United States with a particular focus on the two largest cities: Los Angeles and New York City.¹⁴

There is no universally accepted definition of homelessness.¹⁵ Usually, three categories of homeless people, or potentially homeless people, are

insistence toward the study of what he defined as *biopolitics*, that is, the growing inclusion of man's natural life in the mechanisms and calculations of power.") (italics in original); Eduardo Mendieta, *Biopolitics*, in *THE CAMBRIDGE FOUCAULT LEXICON* 37, 37 (Leonard Lawlor & John Nale eds., 2014) ("Foucault first used the term [*biopolitics*] in the context of analysis of the transformation of social medicine as it took place during the eighteenth century. He characterized this process in terms of [*inter alia*] the appearance of medical authority, not simply in terms of scientific and technical knowledge but the authority bestowed on doctors to attend to the health of individuals and entire social groups. Doctors were now allowed and expected to wield power over the body politic.").

14. I focus on Los Angeles and New York City because these are the nation's two largest cities and constitute two areas where the crisis of homelessness is particularly pronounced due to the extremely large number of homeless people living in these cities. I also focus on these two cities because, as is discussed in what follows, these cities have taken very different approaches to the crisis of homelessness as New York City has a "right to shelter" and Los Angeles does not. I do not suggest that the crisis of homelessness is limited to these cities or to cities in general. Instead, I mention these two cities as a way to focus the discussion of a crisis that is national and, indeed, international in scope.

15. GIBBS ET AL., *supra* note 5, at 18.

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recognized as follows: “precariously housed or at risk of homelessness, sheltered homeless, and street homeless.”¹⁶ Those who are precariously housed are those who are at risk of becoming homeless because, for example, they may have received an eviction notice.¹⁷ In this category, I also include those who are at risk of foreclosure. The sheltered homeless are those who do not have a home but are receiving some form of shelter (e.g., those individuals involved in the shelter system of New York City), and the street homeless are those who do not have a home and are literally sleeping on the streets or in other public places.¹⁸ When one speaks of the “homeless,” all three of these categories are sometimes combined.¹⁹ Also, there is an important distinction made, with respect to the research and available services, between homeless “individuals” and homeless “families.”²⁰

Homeless people are part of our communities and, as such, must be treated with dignity, compassion, and fairness. There are also other members of our communities, some of whom are deeply distressed and concerned about the presence of homeless individuals and families in the streets, parks, and other public places.²¹ Specifically, researchers have

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. MARYBETH SHINN & JILL KHADDURI, IN THE MIDST OF PLENTY: HOMELESSNESS AND WHAT TO DO ABOUT IT 13 (2020) (“The starting point for classifying people who experience homelessness is to distinguish adults and children who experience homelessness together (‘families’) from people who experience homelessness without an accompanying child (‘individuals’). This distinction is made by the U.S. Department of HUD [Housing and Urban Development] in its annual reports to Congress, by the U.S. Interagency Council on Homelessness in federal strategic plans to end homelessness, and by community-level planners who are responsible for allocating federal and local resources to address homelessness.”).

21. *See, e.g.,* Sandra Clark, *EXCLUSIVE: ‘We’re in a State of Emergency!’ Furious Venice Beach Residents Say Enough Is Enough as the Homeless Continue to Swarm the Boardwalk Less Than a Week After the City Conducted Massive Clean-up to Clear Out Encampments*, DAILYMAIL.COM (July 21, 2021, 12:22 PM), <https://www.dailymail.co.uk/news/article-9806941/Venice-Beach-residents-say-homeless-continue-swarm-boardwalk.html> [<https://perma.cc/9M3W-HVRG>] (“And while tourists and locals still visit the iconic boardwalk – a place they have long shared with the weird and the

found, with respect to some community members: “The[] [housed individuals] don’t want to navigate their children around people sleeping in the street, avoid parks that have become de facto open-air shelters, or fear for their safety in passing large street encampments known for drug trade.”²² The justified concerns of these “stakeholders” must also be taken into account when creating public policy to end the crisis of homelessness in the country.²³ In addition, many landlords, particularly “small” landlords, can experience deep financial problems themselves when non-payment of rent passes over an extended time.²⁴ All interests must be addressed with compassion and empathy to reach a universally acceptable solution.

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- wacky – visitors’ numbers have decreased as they must contend with an ever-growing army of homeless and the crime that accompanies them. DailyMail.com found syringes — one with a needle still attached — nestling in the sand in a children’s play area on the beach, emblematic of how the people for whom the area was designed are now being pushed out. Residents in the area are considering moving — but property prices have dropped by anything between 10 and 30 percent, so a move may not be economically viable.”).
22. GIBBS ET AL., *supra* note 5, at 137-138 (“The same people who want to help the homeless may also have an aversion to the actual homeless person asleep on a bench and to the location of a new shelter next door.”).
 23. *See, e.g.*, Rob Taub & Melissa Koenig, *Homeless Man Is Arrested Over Ten-Day Spree of Attacks on Women in Chicago Including Doctoral Student, 31, Who Was Stabbed to Death in Broad Daylight As Crime Continues to Surge Across America*, DAILY MAIL (June 25, 2021, 12:31 PM), <https://www.dailymail.co.uk/news/article-9725421/Homeless-man-arrested-spree-attacks-Chicago-including-student-stabbed-death.html> [<https://perma.cc/88P2-SLEX>] (“A homeless man has been arrested in connection with a spree of attacks on women over ten days in Chicago including a doctoral student who was stabbed to death in broad daylight, as crime surges across the city and the country. Police believe the man is responsible for three separate attacks on women who were all grabbed from behind as they walked in the Loop area of downtown Chicago.”).
 24. *See, e.g.*, Katy O’Donnell, *Suffering Landlords are Washington’s New Eviction Problem*, POLITICO (Aug. 14, 2021, 7:00 AM) (“Washington’s pandemic response is battering the finances of independent landlords, most of whom haven’t received federal rental aid designed to keep them whole during a nearly year-long eviction ban that has forced some property owners to house tenants for free. The distress is acute for so-called mom-and-pop landlords — those who own fewer than 10 properties, which typically have between one and four units. They supply about half the housing stock in the country, and they’re more likely than corporate property managers to have lower-income tenants who’ve fallen behind on their rent as a result of Covid-19.”).

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In the literature, one sometimes finds a reference to people “experiencing homelessness.”²⁵ While I understand the purpose of this locution is to emphasize the fact that homeless individuals are people first and that homelessness is a (hopefully) temporary state that they are experiencing, I have not adopted this convention entirely. It is true that most people who experience homelessness will return to permanent housing.²⁶ Nor have I opted to refer to homeless individuals as the “un-housed,” as lack of housing is typically only one of many issues that homeless individuals and families face. Other issues may include poverty, substance abuse, and mental illness as well as physical illness and disabilities.²⁷ A large proportion of homeless people are suffering from chronic health conditions.²⁸ In addition, surveys of homeless families have identified the following precipitating causes of homelessness: “eviction; doubled-up or severely overcrowded housing; domestic violence; job loss; and hazardous housing conditions.”²⁹

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25. See, e.g., GIBBS ET AL., *supra* note 5, at 37 (“While, for many, experiencing homelessness is a short-term crisis soon resolved (and, thus, often not seen by others), in many cities a significant and perceptible number of people are living unsheltered who have been doing so for some time, often for several years.”).
 26. SHINN & KHADDURI, *supra* note 20, at 16 (“Homelessness is not a permanent trait, but a temporary state that most people pass through before returning to housing.”) (citation omitted).
 27. *New York City Homelessness: The Basic Facts*, COAL. FOR HOMELESS 1 (Oct. 2022), https://www.coalitionforthehomeless.org/wp-content/uploads/2022/10/NYC-Homelessness-Fact-Sheet-8-2022_citations.pdf [<https://perma.cc/6E68-M46H>].
 28. Kerry Jackson, *Postcards From the Epicenter: Just How Bad is Homelessness in California?*, in *NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY* 3, 5 (Kerry Jackson ed., 2021) (“One study has determined that 85 percent of homeless individuals have chronic health conditions. Disorders include cardiorespiratory diseases, tuberculosis, skin problems and infections, HIV/AIDS, bronchitis, pneumonia, nutritional deficiencies, and drug dependency. The homeless are also vulnerable to physical and sexual assault, experience sleep deprivation, and have higher mortality rates than the non-homeless.”) (footnote omitted).
 29. *New York City Homelessness: The Basic Facts*, *supra* note 27, at 1; see also GIBBS ET AL., *supra* note 5, at 105 (“In the United States and Europe, factors that increase risk [of becoming homeless] include being poor, having been homeless before, lacking full-time work, living alone or in a single-parent

While bankruptcy may not be able to address all of the precipitating causes of homelessness, with respect to eviction, filing a bankruptcy petition creates an automatic stay that can stop an eviction, at least for a short time, to allow the tenant an opportunity to catch up on the rental arrears.³⁰ Filing for bankruptcy protection will also afford a tenant more time to obtain funds from a rental relief agency or to otherwise reach a settlement with the landlord. This Article argues that the bankruptcy process is an underutilized tool for attorneys to delay evictions and foreclosures and to use the additional time to save their clients' homes.

The National Law Center on Homelessness & Poverty has found that between 2.5 to 3.5 million people in America sleep in shelters or in public places not intended for those purposes each year.³¹ In addition, approximately 7.4 million people have lost their homes and are living with friends or relatives or are otherwise "doubled-up."³² This means that there are approximately 11 million people experiencing some form of homelessness in the U.S. each year. It is expected that the homeless population may increase substantially, as an additional 11 million households are facing homelessness due to evictions and foreclosures, in the wake of the COVID-19 pandemic.³³ In a related and overlapping tragedy, the United States suffered over 93,000 drug overdose deaths in 2020 (the

family, and being in a minority group or an immigrant, having been a victim of domestic violence or eviction, and having been discharged from an institution – a hospital, jail or prison, or a substance-abuse program – without an identified home.") (footnote omitted).

30. 11 U.S.C. § 362(l)(1).

31. *Homelessness in America: Overview of Data and Causes*, NAT'L L. CTR. ON HOMELESSNESS AND POVERTY 1 (Jan. 2015), https://homelesslaw.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_Sheet.pdf [<https://perma.cc/CB8N-Q54Y>].

32. *Id.*

33. Sylvan Lane, *More Than 11 Million Households Face Homelessness When COVID-19 Protections Expire: Report*, HILL (Mar. 1, 2021, 3:42 PM), <https://thehill.com/policy/finance/541058-more-than-11-million-households-face-homelessness-when-covid-19-protections> [<https://perma.cc/Z9UF-GNRQ>] ("More than 11 million families are at risk of losing housing when federal coronavirus eviction and foreclosure protections expire later this year, according to a report released Monday by the Consumer Financial Protection Bureau (CFPB).... The CFPB report also found that housing insecurity — like countless other dangers of the pandemic — afflicted Black, Hispanic and low-income households at far greater rates.").

highest rate in U.S. history), which has been tied to homelessness and the COVID-19 pandemic as well.³⁴

Vulnerable communities, sometimes called “marginalized” people, are disproportionately represented in the homeless population.³⁵ Specifically, “African-Americans make up an estimated 45% of the homeless population despite only being 12% of the national population. LGBTQ youth are 40% of the homeless youth population (only 7% of [the] general youth [population]), and persons with disabilities are 40% of those who are homeless (16% of [the] general population).”³⁶ It should also be noted that young people often become homeless for reasons different from their adult counterparts.³⁷ Also noteworthy is that homelessness has a disparate

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34. Betsy McKay, *U.S. Drug-Overdose Deaths Soared Nearly 30% in 2020, Driven by Synthetic Opioids*, WALL ST. J. (July 14, 2021, 3:56 PM), <https://www.wsj.com/articles/u-s-drug-overdose-deaths-soared-nearly-30-in-2020-11626271200> [<https://perma.cc/2SN9-Z4FX>] (“Drug-overdose deaths in the U.S. surged nearly 30% in 2020, the tragic result of a deadlier supply and the destabilizing effects of the Covid-19 pandemic, according to preliminary federal data and public health officials. The estimated 93,331 deaths from drug overdoses last year, a record high, represent the sharpest annual increase in at least three decades, and compare with an estimated toll of 72,151 deaths in 2019, according to provisional overdose-drug data released Wednesday by the Centers for Disease Control and Prevention . . . Many people who were receiving treatment for drug addictions or wanted it were unable to get it in the early weeks or months of the pandemic, or faced disruptions or changes in service, treatment providers say. Job losses or deaths of family and friends created stress and trauma, while office and business closures reduced social interaction, depriving some of coping mechanisms they rely on. Some people ended up homeless, on the street, where they have had trouble accessing treatment . . .”) (citation omitted).
35. *But see* DUNCAN, *supra* note 2, at 54 (“People treat the ‘margins’ as joyless places bereft of anything of value. In fact, talk about the ‘margins’ is one of the most racist narratives among progressives. I, for one, have grown to loathe the term, even though I use it from time to time to code switch. It’s not the ‘margins’ to me . . . it’s my world, it’s my moral center, it’s where I reside.”).
36. *Violations of the Human Rights of Persons Experiencing Homelessness in the United States*, NAT’L L. CTR. ON HOMELESSNESS AND POVERTY 2 (Oct. 16, 2017), <https://homelesslaw.org/wp-content/uploads/2018/10/sr-ep-2017.pdf> [<https://perma.cc/83WV-5979>].
37. SHINN & KHADDURI, *supra* note 20, at 18 (“The reasons that children leave home, including family conflict over sexual orientation, step-parent relationships,

impact on racial and other vulnerable minority populations,³⁸ although the United States is not unique in this regard.³⁹ Finally, it is notable that domestic violence is a significant cause of homelessness for women and children.⁴⁰

Importantly, homelessness has substantially increased since the beginning of the foreclosure crisis in 2008.⁴¹ State and local homeless groups have reported a sixty-one percent rise in homelessness since the start of the foreclosure crisis.⁴² Eviction is also a significant cause of homelessness.⁴³ As the National Law Center on Homelessness & Poverty has noted: “Evictions can cause homelessness. Evictions, whether through formal court proceedings or other methods of involuntary displacement from housing, are a direct cause of homelessness—either immediately or

and children’s behavior, are largely different than the reasons that adults become homeless, and the solutions are also quite different.”) (citation omitted).

38. *Violations of the Human Rights of Persons Experiencing Homelessness in the United States*, *supra* note 36, at 2.
39. SHINN & KHADDURI, *supra* note 20, at 53 (“[S]ome racial and ethnic minorities are more likely than others to experience homelessness. The United States is not alone here. Minority groups are at heightened risk of homelessness throughout the industrialized world but the particular groups at risk vary from one country to the next.”) (citation omitted).
40. ACLU, DOMESTIC VIOLENCE AND HOMELESSNESS 1 (2008) (“When women flee domestic abuse, they are often forced to leave their homes, with nowhere else to turn. Landlords also sometimes turn victims of domestic violence out of their homes because of the violence against them. For years, advocates have known that domestic violence is a primary cause of homelessness for women and families. Studies from across the country confirm the connection between domestic violence and homelessness and suggest ways to end the cycle in which violence against women leads to life on the streets.”).
41. *Homelessness in America: Overview of Data and Causes*, *supra* note 31, at 3.
42. *Id.*
43. Wayne Winegarden, *Priced Out of Shelter and Onto the Streets: How California’s Housing Crisis Has Pushed Thousands into Homelessness and Has Many More on the Brink*, in NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY, *supra* note 28, at 46, 58 (“According to [a 2017 survey in San Francisco], more than a third – 34 percent – of the homeless are on the streets in San Francisco due to direct economic reasons. Twenty-two percent became homeless because of job loss, while 12 percent were evicted.”) (footnote omitted).

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after social safety networks are exhausted.”⁴⁴ Specifically, researchers have found as follows: “In 2012, the Boston Bar Association Task Force on the Civil Right to Counsel cited a 2011 report that 45 percent of households that enter the Massachusetts shelters gave eviction as the reason they were homeless or at risk of homelessness.”⁴⁵ Moreover, “[a]pproximately 40% of families facing eviction due to foreclosure are renters.”⁴⁶ A family may face eviction after the foreclosure sale of their home has been concluded. Therefore, eviction and foreclosure are often overlapping causes of dispossession, which are not easily disaggregated. A review of international data has revealed the following: “[E]viction prevention, landlord mediation, and housing advice programs are associated with a significant reduction of homelessness.”⁴⁷

As of 2018, one quarter of the nation’s homeless population lived in California.⁴⁸ Now it is estimated that up to 30 percent of the nation’s homeless population lives in California.⁴⁹ Homelessness is particularly pronounced in Los Angeles, where homeless people are much more visible, compared to the many homeless people who are hidden in the shelter system of New York City.⁵⁰ As of 2018, there were more than 57,000 people in Los Angeles County who lacked a “fixed, regular, or adequate place to sleep,” on any given night.⁵¹ In 2019, there were 44,214 homeless people

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44. *Protect Tenants, Prevent Homelessness*, NAT’L L. CTR. ON HOMELESSNESS AND POVERTY 7 (2018), <https://homelesslaw.org/wp-content/uploads/2018/10/ProtectTenants2018.pdf> [<https://perma.cc/M8RN-7L54>]; see also GIBBS ET AL., *supra* note 5, at 121 (“[E]viction is one of the most common reasons that families enter the homeless system in New York City. Although a small percentage of those evicted from apartments become homeless, at over 18,000 evictions a year, that feeds a significant proportion of the shelter system.”) (footnote omitted).
45. *Protect Tenants, Prevent Homelessness*, *supra* note 44, at 7.
46. *Homelessness in America: Overview of Data and Causes*, *supra* note 31, at 3.
47. Gibbs et al., *supra* note 5, at 30 (footnote omitted).
48. THE LOS ANGELES TIMES EDITORIAL BOARD, OUR NATIONAL DISGRACE: HOMELESSNESS IN THE CITY OF ANGELS 2 (2018).
49. Kerry Jackson, *Incentivizing Homelessness: How Local and State Policies Encourage Homelessness*, in NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY, *supra* note 28, at 29 (“California makes up only 12 percent of the US population, yet the state is ‘home’ to between 25 and 30 percent of the country’s homeless population.”).
50. THE LOS ANGELES TIMES EDITORIAL BOARD, *supra* note 48, at 2.
51. *Id.* at 12.

sleeping rough (i.e., on the streets), with more than 27,000 within the city limits of Los Angeles.⁵² In 2020, the total number of homeless people increased to 66,436 in Los Angeles County (from 58,936 in the previous year).⁵³ The homeless population within the city limits of Los Angeles increased as well in 2020 to a total of 41,290 (from 36,300 in the previous year).⁵⁴ In terms of disparate impact: “In Los Angeles County, Black people constituted 40 percent of the homelessness population in 2017, [and] 19 percent of the population in poverty, but only 9 percent of the general population.”⁵⁵

Approximately 10 percent of homeless people in Los Angeles County live on Skid Row, which has been described as follows:

Here, men and women sleep in rows, lined up one after another for block after block in makeshift tents or on cardboard mats on the sidewalks—the mad, the afflicted, and the disabled alongside those who are merely down on their luck. Criminals prey on them, drugs such as heroin and crystal meth are easily available, sexual assault and physical violence are common, and infectious diseases like tuberculosis, hepatitis, and AIDS are constant threats.⁵⁶

In 2017, more than 800 homeless people died on the streets of Los Angeles County.⁵⁷ Sadly, this number has only increased in recent years. In 2019, the number of homeless people who died in Los Angeles County was over 1,000.⁵⁸ Unsheltered homeless people generally perish 20 years earlier than their sheltered counterparts.⁵⁹ On average, three homeless people die each day in Los Angeles County.⁶⁰

52. Gibbs, et al., *supra* note 5, at 124-25.

53. Jackson, *supra* note 28, at 3-4.

54. *Id.* at 4.

55. Gibbs, et al., *supra* note 5, at 12.

56. THE LOS ANGELES TIMES EDITORIAL BOARD, *supra* note 48, at 11.

57. *Id.* at 89.

58. Jackson, *supra* note 28, at 4.

59. Wayne Winegarden, *Squandered Opportunities: How Homelessness Hurts the Economy*, in NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY, *supra* note 28, at 9, 13.

60. Joseph Tartakovsky, *Lawsuits Without End: How Courtroom Entanglement Limits Political Solutions*, in NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY, *supra* note 28, at 88, 95 (“[A] person

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In New York City, there were over 60,000 homeless people sleeping in the New York City municipal shelter system in 2019.⁶¹ This number decreased slightly to 53,199 during the height of the COVID-19 pandemic, as thousands of homeless people from the shelter system were moved to hotels in order to facilitate social distancing.⁶² As these individuals are now being returned to the shelter system, the total number of homeless people sleeping in the New York City municipal shelter system will rise again.⁶³ This represents the highest level of homelessness in New York City since the Great Depression.⁶⁴

There are thousands more unsheltered homeless people in New York City, who sleep on the streets, in the subways, and in other public places, of whom there is no accurate count.⁶⁵ In early 2022, approximately 350 homeless people were found living in the subway system alone.⁶⁶ A 2019

living on the streets doesn't just *sleep* there. If that person grapples with addiction, she will abuse psychoactive drugs there. If she suffers from psychosis or schizophrenia, she will have episodes there. The same sidewalks that serve as beds will double as repositories for human waste. Street camping, day after day, can produce mountains of rotting trash that breed disease-bearing rats, which in turn nourish disease-bearing fleas These are the reasons, and by no means the only ones, that on average three homeless people die each day in Los Angeles County.” (italics in original) (footnote omitted).

61. *State of the Homeless 2019*, COAL. FOR HOMELESS 1 (2019), <https://www.coalitionforthehomeless.org/state-of-the-homeless-2019/>
62. *New York City Homelessness: The Basic Facts*, *supra* note 27, at 1.
63. Rachel Holliday Smith, *City Starts Kicking Thousands of Homeless People From Hotels Back to Shelters*, THE CITY (Jun. 28, 2021, 9:24 PM), <https://www.thecity.nyc/housing/2021/6/28/22555011/city-starts-kicking-thousands-of-homeless-people-from-hotels-back-to-shelters> [<https://perma.cc/H7ZS-R5TF>].
64. *New York City Homelessness: The Basic Facts*, *supra* note 27, at 1.
65. *Id.*
66. Alyssa Guzman, *True Scale of Homeless Crisis on NYC's Subway Revealed: Transit Officials Found 350 People Living in Encampments in 29 Tunnels and 89 Stations*, DAILYMAIL.COM (February 25, 2022, 3:46 PM), <https://www.dailymail.co.uk/news/article-10552293/NYC-transit-officials-say-350-homeless-people-living-89-subway-stations-tunnels.html> [<https://perma.cc/33MD-Y8NR>] (“The Metropolitan Transportation Agency (MTA) said there are nearly 350 homeless people living in almost 90 subway stations - as New York City Mayor Eric Adams promises to tackle the ongoing

one-night point-in-time street count found 3,588 people “sleeping rough,” i.e., sleeping on the streets or in other public places.⁶⁷ This number is considered to be significantly below the actual number of unsheltered homeless people in New York City.⁶⁸ It is very difficult to obtain an accurate count of homeless people.⁶⁹ Some individuals perceive the shelter system as more dangerous than unsheltered homelessness and thus prefer to take their chances on the streets.⁷⁰ This is the case even though there is a legal right to shelter in New York City for anyone who requests it.⁷¹ Nevertheless, a legal right to shelter is not the same as a legal right to housing. The shelters are often dorm style, in which many people sleep in the same room.⁷² In Europe, states recognize that every individual has a right to housing.⁷³ I believe that adopting the maxim that housing, and not merely shelter, is a human right will be important as we grapple with the difficult issue of ending homelessness in the United States.⁷⁴ Unfortunately, we are a long way from this understanding in the United States, as New York City is currently one of the only cities that has recognized even a right to shelter,

crisis as part of his new subway safety plan. Hundreds of homeless people were found camping out in New York City’s subway tunnels and stations earlier this month, MTA officials said on Thursday. Transit workers and outreach employees found almost 30 ‘homeless encampments’ in the tunnels and another 89 camps in stations. Encampment can be defined as ‘lying down in a sleeping bag or stretch out,’ officials said. All the encampments were removed among discovery.”).

67. Gibbs et al., *supra* note 5, at 35.

68. *New York City Homelessness: The Basic Facts*, *supra* note 27, at 1.

69. Gibbs et al., *supra* note 5, at 148–49 (“To begin with, the homeless population is hard to reach. They are transient and often have no address; they may resist being counted and hide from surveyors; and use of volunteers and safety concerns prohibit access to certain areas, such as abandoned buildings or subway tunnels. Also, the number of homeless people on a given night is vastly different from the number over the course of a year.”).

70. *Id.* at 38.

71. THOMAS J. MAIN, HOMELESSNESS IN NEW YORK CITY: POLICYMAKING FROM KOCH TO DE BLASIO 3 (2016).

72. Rachel Holliday Smith, *supra* note 63.

73. Gibbs et al., *supra* note 5, at 8.

74. *See, e.g.*, SHINN & KHADDURI, *supra* note 20, at 3 (“The United Nations included a right to housing in the Universal Declaration of Human Rights 70 years ago. Not all countries are wealthy enough to make that right a reality. In the United States, it is within our power to realize that right today.”) (citation omitted).

i.e., a right to be shielded from the elements.⁷⁵ A similar “right to shelter” is recognized in Washington, D.C. and in Massachusetts.⁷⁶

Marginalized people are disproportionately represented in the homeless population in New York City as well.⁷⁷ Specifically, “[a]pproximately 58 percent of New York City homeless shelter residents are African-American, 31 percent are Latinx, 7 percent are white, less than 1 percent are Asian-American, and 3 percent are of unknown race/ethnicity.”⁷⁸ According to the corresponding census data, 26 percent of New York City residents are Black, 26 percent are Hispanic, 33 percent are White, and 13 percent are Asian.⁷⁹

Evictions and foreclosures are causes of homelessness because they are procedures whereby human beings lose their homes. The bankruptcy process has been underutilized as a tool for averting evictions and foreclosures. By stopping evictions and foreclosures, we can prevent many people from falling into homelessness. We turn to a review of eviction and foreclosure in the next section.⁸⁰

II. A STEP BEFORE HOMELESSNESS: FORECLOSURE & EVICTION

This Part of the Article reviews the judicial foreclosure process, the non-judicial foreclosure process, and eviction.

75. Gibbs et al., *supra* note 5, at 8.

76. MARYBETH SHINN & JILL KHADDURI, IN THE MIDST OF PLENTY: HOMELESSNESS AND WHAT TO DO ABOUT IT 103 (2020) (“Few jurisdictions in the country – Washington, DC, New York City, and the State of Massachusetts – have a ‘right to shelter,’ meaning that people who can prove they are homeless cannot be turned away, and in Massachusetts, people who leave shelters cannot come back for the next 12 months.”).

77. *But see* LENNY DUNCAN, UNITED STATES OF GRACE: A MEMOIR OF HOMELESSNESS, ADDICTION, INCARCERATION, AND HOPE 54 (2021) (“People treat the ‘margins’ as joyless places bereft of anything of value. In fact, talk about the ‘margins’ is one of the most racist narratives among progressives. I, for one, have grown to loathe the term, even though I use it from time to time to code switch. It’s not the ‘margins’ to me, . . . it’s my world, it’s my moral center, it’s where I reside.”).

78. *New York City Homelessness: The Basic Facts*, *supra* note 27, at 1.

79. THE FURMAN CENTER FOR REAL ESTATE & URBAN POLICY, THE CHANGING RACIAL AND ETHNIC MAKEUP OF NEW YORK CITY NEIGHBORHOODS 30 (2012).

80. *See infra* Part II.

A good beginning definition of “foreclosure” is as follows: “A legal proceeding to terminate a mortgagor’s interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property.”⁸¹ It should be noted that other entities can also initiate a foreclosure proceeding, including, *inter alia*, the taxing authority (for non-payment of property taxes) and the homeowner association (for non-payment of common charges, where applicable). Nevertheless, the most common foreclosure is the one in which the mortgagee seeks to sell the property due to non-payment on the part of the mortgagor.

A judicial foreclosure is one in which a court is involved, and the foreclosing party is not permitted to conduct a foreclosure sale until it receives the court’s permission to do so.⁸² In contrast, the non-judicial foreclosure does not require a court’s involvement. The non-judicial foreclosure is also known as a “power-of-sale foreclosure” in which “the mortgaged property is sold at a non-judicial public sale by a public official, the mortgagee, or a trustee, without the stringent notice requirements, procedural burdens, or delays of a judicial foreclosure.”⁸³ This method is used in more than half of the states.⁸⁴ The automatic stay, which goes into effect upon the filing of a bankruptcy petition, can temporarily stop the sale of a person’s home.⁸⁵ This will give the homeowner an opportunity to attempt to save his or her home through the bankruptcy process.⁸⁶

Eviction is defined as the “act or process of legally dispossessing a person of land or rental property.”⁸⁷ Specifically, it is the process by which a landlord regains possession of its property from a tenant either for non-payment of rent or for some other reason (e.g., the tenant remains in the

81. *Foreclosure*, BLACK’S LAW DICTIONARY (11th ed. 2019).

82. NATIONAL CONSUMER LAW CENTER, HOME FORECLOSURES § 1.2.2.1 (2019).

83. *Power-of-Sale Foreclosure*, BLACK’S LAW DICTIONARY (11th ed. 2019).

84. *Id.*

85. 11 U.S.C. § 362(a).

86. *See, e.g.*, Hon. Cecelia G. Morris & Mary K. Guccion, *The Loss Mitigation Program Procedures for the United States Bankruptcy Court for the Southern District of New York*, 19 AM. BANKR. INST. L. REV. 1, 28 (2011) (“The automatic stay provides a ‘breathing spell’ that benefits the creditors as much as it does the debtor, because it stops all actions to collect a debt, including situations in which the debtor does not have enough resources to satisfy all debts.”).

87. *Eviction*, BLACK’S LAW DICTIONARY (11th ed. 2019).

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property after the lease expires (a “holdover”), or the tenant is hoarding).⁸⁸ Eviction is often accomplished in a “summary,” or expedited, proceeding.⁸⁹ The automatic stay, which goes into effect with the filing of a bankruptcy petition, can stop an eviction for a short time to allow the tenant an opportunity to catch up on the rental arrears.⁹⁰

III. HOW BANKRUPTCY CAN PREVENT HOMELESSNESS⁹¹

Bankruptcy is a gloomy and depressing subject.

CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935)⁹²

This Part of the Article reviews the basic purpose of bankruptcy, the process of seeking bankruptcy protection, and how the bankruptcy process can be better utilized to prevent homelessness by stopping evictions and foreclosures. This Part also suggests ways in which the Bankruptcy Code may be amended to better serve as a tool for preventing homelessness.

A. *The Purpose of Bankruptcy*

The legal definition of bankruptcy is as follows: “A statutory procedure by which a (usu[ally] insolvent) debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor’s assets for the benefit of creditors; a case under the Bankruptcy

88. See, e.g., IAIN DE JONG, *THE BOOK ON ENDING HOMELESSNESS* 29 (2019) (“Obviously, understanding landlord and tenant legislation is important, in addition to the mechanics of how one goes about renting in your community and what types of documentation and background checks may be necessary. But there is also a need to understand how to support people who engage in hoarding or collecting behavior that may put their tenancy at risk.”).

89. See Frank J. Martin, *Eviction: How Expedited Process and Underfunded Legal Aid Contribute to Our Housing Crisis*, 9 CALIF. L. REV. 35, 36-37 (2018).

90. 11 U.S.C. § 362(a).

91. Some of what follows in this section of the Article has been adapted from Geoffrey K. McDonald, *Radical Forgiveness as a Regulative Ideal in the Bankruptcy Context: Toward a Genuine Fresh Start for Individual Debtors*, in 2012 NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 237.

92. CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 3 (photo. reprint 1994) (1935).

Code (Title 11 of the United States Code).⁹³ Legal requirements of bankruptcy aside, the purpose of bankruptcy is to provide relief for both creditors and debtors. The Supreme Court has also referred to the idea of providing a debtor with a “fresh start” in the context of a discussion of the purpose of bankruptcy law.

One of the primary purposes of the Bankruptcy Act is to “relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.” This purpose of the act has been again and again emphasized by the courts as being of public as well as private interest, in that it gives to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.⁹⁴

The discharge of debts in bankruptcy is enforced forgiveness because the debtor is no longer legally obligated to repay the debts that are discharged and it is intended to provide the debtor with a “fresh start.”⁹⁵ Discharged debts typically include those from credit cards, medical bills, some (older) taxes, auto loans, utility arrears, rental arrears, and government benefit overpayments.⁹⁶ The bankruptcy discharge of certain debts may make it possible for distressed tenants and homeowners to afford their housing costs going forward, and thereby avoid eviction and foreclosure and, potentially, homelessness as well.⁹⁷

93. *Bankruptcy*, BLACK’S LAW DICTIONARY (11th ed. 2019).

94. *Loc. Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (Sutherland, J.) (citations omitted) (quoting *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549, 554-55 (1915)).

95. *See generally* Geoffrey K. McDonald, *Radical Forgiveness as a Regulative Ideal in the Bankruptcy Context: Toward a Genuine Fresh Start for Individual Debtors*, in 2012 NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 237.

96. *See generally* ANDREW BALBUS, *FRESH START: WHY BANKRUPTCY IS FASTER, EASIER AND BETTER THAN YOU THINK* (2021).

97. *See, e.g.*, Alan M. White, *Does Bankruptcy Save Homes? A Further Look*, 92 AM. BANKR. L.J. 363, 381 (2018) (“Filing bankruptcy to discharge large unsecured debts helps homeowner debtors to save their homes, by freeing up much needed cash flow to pay the mortgage debt.”).

B. Filing for Bankruptcy Protection

In most cases, an individual has the option of filing for bankruptcy relief under Chapter 7 or Chapter 13. As a result of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA”) amendments, there is now a “means test,” which mandates that individuals who earn over a certain amount are ineligible to file under Chapter 7 and must file under Chapter 13.⁹⁸ If the debtor has a more substantial amount of debt, however, he or she may be ineligible to file under Chapter 13 and would instead need to consider filing under Chapter 11.⁹⁹

Chapter 7 involves liquidation, in which the debtor provides all non-exempt assets to the trustee, who then sells the assets and distributes the proceeds to the creditors on a *pro rata* basis.¹⁰⁰ However, most Chapter 7 cases are “no asset” cases in which there is nothing to be sold and distributed for the benefit of the creditors.¹⁰¹ If an individual debtor opts to file under Chapter 13, they would keep all assets and pay off debts through the trustee from future income. This alternative has the advantages of allowing the debtor to keep his or her assets and may result in a greater return for the creditors. Nevertheless, creditors must fare at least as well under the Chapter 13 plan as they would have in a Chapter 7 liquidation.¹⁰²

98. 11 U.S.C. § 707(b)(2).

99. 11 U.S.C. § 109(e) (Chapter 13 debt limits effective from April 1, 2022 to April 1, 2025 are \$465,275 for unsecured debt and \$1,395,875 for secured debt).

100. *See, e.g.*, ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS PARENTS ARE GOING BROKE 76-77 (2003) (“The first option, Chapter 7, permits a debtor to wipe out his debts in just a few months. In Chapter 13, the debtor files for bankruptcy in order to buy some time to pay what he owes, rather than to get rid of his debts altogether. The family works out a repayment plan, under which it commits to living on a sharply restricted budget for the next three to five years, handing over the remainder of each paycheck to a trustee who distributes it among the creditors. Only after the payments are complete can the family discharge any debts that remain unpaid.”) (footnotes omitted).

101. The discharge in bankruptcy only extends to the legal obligation to pay those debts that have been discharged. That legal obligation to pay certain debts is extinguished, with the bankruptcy discharge, but this does not reach the moral obligation to pay one’s debts. The Bankruptcy Code implicitly recognizes this distinction in Section 524(f), with respect to the bankruptcy discharge, where we find the following: “Nothing . . . prevents a debtor from voluntarily repaying any debt.” 11 U.S.C. § 524(f).

102. 11 U.S.C. § 1325(a)(4).

As a result of the BAPCPA amendments to the Bankruptcy Code, in order to qualify for bankruptcy protection, an individual must have had credit counseling in advance of filing the bankruptcy petition.¹⁰³ In addition, they must provide the court with a certificate in connection with the credit counseling.¹⁰⁴ Most courts are strict with this requirement and cases in which the debtor did not meet the requirement have been dismissed.¹⁰⁵

When a debtor's case is dismissed for failure to meet the credit counseling requirement, the debtor has lost the protection of the automatic stay, which temporarily stops most collection efforts by creditors.¹⁰⁶ If the debtor re-files for bankruptcy protection, the automatic stay is limited to thirty days for the second case commenced within the same one-year period.¹⁰⁷ The debtor also has the option to move for an extension of the stay.¹⁰⁸ The request for an extension should be liberally granted, absent bad faith.¹⁰⁹ Importantly, the debtor will have difficulty if they had more than one case dismissed within the previous year. If two or more cases were pending within one year, then the automatic stay would not go into effect upon the filing of the next petition.¹¹⁰

If the purpose of the credit counseling requirement were truly to benefit the debtor, then, presumably, the debtor would be allowed to complete the counseling while the case remained on the bankruptcy court's calendar. The

103. 11 U.S.C. § 109(h)(1).

104. 11 U.S.C. § 521(b)(1).

105. *See, e.g., In re Wallert*, 332 B.R. 884, 888 (Bankr. D. Minn. 2005) ("Because the Debtor has not evidenced her pre-petition compliance with 11 U.S.C. § 109(h)(1), and because the Debtor has admitted to the court that in fact she did not comply with the requirement of pre-petition credit counseling, she 'may not be a debtor under' the Bankruptcy Code, 11 U.S.C. § 109(h)(1). The Debtor therefore is not eligible for relief under Chapter 13 under color of the petition that she filed to commence this case. This lack of eligibility is an incurable defect in the Debtor's petition, arising from facts presented by the Debtor herself. Thus, there is cause to dismiss this case without further delay.") (internal numbering omitted).

106. 11 U.S.C. § 362(a).

107. 11 U.S.C. § 362(c)(3)(A).

108. 11 U.S.C. § 362(c)(3)(B).

109. *In re Warneck*, 336 B.R. 181, 182 (Bankr. S.D.N.Y. 2006) ("Where no presumption of bad faith arises, and where no party objects, a request to extend the automatic stay should be liberally granted.").

110. 11 U.S.C. § 362(c)(4)(A)(i).

pre-petition credit counseling requirement may be waived in certain instances if three conditions are met.¹¹¹ The first is “exigent circumstances.”¹¹² This often involves an imminent foreclosure on the debtor’s residence. The second condition is that the debtor requested credit counseling from an approved agency, but was unable to receive it within seven days of the request.¹¹³ The third condition is that the request is satisfactory to the court.¹¹⁴ If a debtor is granted a waiver of the pre-petition filing requirement, then the debtor must file a credit counseling certificate post-petition.¹¹⁵

Cases that are dismissed because a debtor did not comply with the pre-petition credit counseling requirement result in making bankruptcy protection more difficult to obtain for the individual debtor who may be struggling to hold on to their home, and who may not have had the opportunity to obtain credit counseling prior to filing the petition or who misunderstood its procedural significance. This is especially problematic for those debtors who file their bankruptcy petitions on the eve of a foreclosure or an eviction, even more so for those without counsel.

*C. Filing Bankruptcy to Stop an Eviction*¹¹⁶

The automatic stay, which goes into effect at the time of filing a bankruptcy petition, can stop an eviction, at least for a short time (usually only thirty days if judgment of eviction has been entered), to allow the debtor an opportunity to catch up on the rental arrears.¹¹⁷ The landlord has the option of making a motion to lift the automatic stay. When a judgment of eviction has already been entered in a housing court, the debtor must deposit the future rent with the bankruptcy court.¹¹⁸ A debtor with higher

111. 11 U.S.C. § 109(h)(3)(A).

112. 11 U.S.C. § 109(h)(3)(A)(i).

113. 11 U.S.C. § 109(h)(3)(A)(ii).

114. 11 U.S.C. § 109(h)(3)(A)(iii).

115. 11 U.S.C. § 109(h)(3)(B).

116. *Cf.* Geoffrey K. McDonald, *Why “Litigation Tactic” is Not Cause for Dismissal of a Bankruptcy Case under Section 1112(b)*, 20 NORTON J. BANKR. L. & PRAC. 857, 871-75 (2011) (explaining the use of bankruptcy as a tool to stop evictions and foreclosures in the business bankruptcy context).

117. 11 U.S.C. § 362(l)(1).

118. *Id.*

income may not be eligible to file for Chapter 7, due to the aforementioned “means test,”¹¹⁹ and may instead file a Chapter 13 petition and plan, under which the debtor may have up to five years to repay the rental arrears, in cases in which no judgment of eviction has been entered. At a minimum, filing for bankruptcy protection will afford the tenant more time to obtain funds from a rental relief agency or to otherwise reach a settlement with the landlord. Indeed, bankruptcy is an underutilized tool for housing attorneys to delay evictions and use that additional time to save their clients’ homes.

*D. Filing Bankruptcy to Stop a Foreclosure*¹²⁰

As mentioned above, there is an exception to the requirement to file a pre-petition credit counseling certificate in the case of exigent circumstances, such as an impending foreclosure sale.¹²¹ The powerful automatic stay,¹²² which goes into effect upon the filing of a bankruptcy petition, can stop the sale of a debtor’s home, even when the petition is filed on the same day that the foreclosure sale has been scheduled, if the bankruptcy petition is filed prior to the sale.¹²³ The automatic stay would give the debtor an opportunity to attempt to save his or her home through the bankruptcy process.¹²⁴

119. *See supra* Section III.B.

120. *Cf. McDonald, supra* note 116, at 871-75.

121. *See supra* Section III.B.

122. 11 U.S.C. § 362.

123. *See, e.g.,* Cecelia G. Morris & Mary K. Guccion, *The Loss Mitigation Program Procedures for the United States Bankruptcy Court for the Southern District of New York*, 19 AM. BANKR. INST. L. REV. 1, 11 (2011) (“Also upon commencing the bankruptcy case, the automatic stay arises. The automatic stay is a phenomenon in law, a broad injunction that takes effect without notice to creditors, and stops efforts to collect pre-petition debts For most debtors, the practical effect of the automatic stay is that the collection calls and wage garnishments stop, and the foreclosure proceeding or sale is put on hold.”) (footnotes omitted); *see also* Alan M. White, *supra* note 97, at 365 (“The bankruptcy stay can give homeowners a chance to complete a workout with their lender by preventing the lender from completing a foreclosure sale, even if the debtor does not ultimately receive a discharge.”).

124. *See, e.g.,* Morris & Guccion, *supra* note 123, at 28 (“The automatic stay provides a ‘breathing spell’ that benefits the creditors as much as it does the debtor, because it stops all actions to collect a debt, including situations in which the debtor does not have enough resources to satisfy all debts.”).

While many potential bankruptcy filers labor under the misapprehension that only a Chapter 13 case can save their home from foreclosure, this is not the case in districts such as the Southern District of New York that offer a loss mitigation procedure.¹²⁵ The procedure, in the Southern District of New York, is described as follows: “The Loss Mitigation Program is designed to function as a forum for debtors and lenders to reach consensual resolution whenever a debtor’s residential property is at risk of foreclosure. The Loss Mitigation Program aims to facilitate resolution by opening the lines of communication between the debtors’ and lenders’ decision-makers.”¹²⁶ This is important because it is not always clear whether the entity that is servicing the loan (i.e., the entity that has been accepting the debtor’s mortgage payments) also has authority to modify the loan and thereby offer the debtor a home-saving option. The bankruptcy court requires the lender’s representative to have full settlement authority in the loss mitigation process.¹²⁷

“Loss mitigation” itself is defined as follows: “[T]he full range of solutions that may avert either the loss of a debtor’s property to foreclosure, increased costs to the lender, or both.”¹²⁸ Loss mitigation generally consists of the following types of agreements: “loan modification, loan refinance, forbearance, short sale, or surrender of the property in full satisfaction.”¹²⁹ The last two types of agreements (short sale or surrender of the property in full satisfaction) are not home-saving solutions. A “short sale” involves selling the property for less than the debt, but the lender accepts the proceeds of the sale in full satisfaction of the debt. A “surrender of the property in full satisfaction” involves the homeowner signing the property over to the lender to satisfy the debt. The first three types of agreements

125. *See id.* at 4 (“The purpose of the Loss Mitigation Program is to function as a forum for debtors and lenders to reach consensual resolution whenever a debtor’s residential property is at risk of foreclosure by opening the lines of communication between the debtors’ and lenders’ decision makers. The Loss Mitigation Program is a procedural mechanism that provides the debtor and the creditor the opportunity to get a decision regarding the home loan, so that the debtor can take the next step in the bankruptcy, whether it is confirming a chapter 13, three to five year, plan, or seeking an immediate discharge in chapter 7.”) (footnotes omitted).

126. *LOSS MITIGATION PROGRAM PROCEDURES*, U.S. BANKR. CT. S. DIST. OF N.Y. 1 (2013); *see generally* Morris & Guccion, *supra* note 123.

127. U.S. BANKR. CT. S. DIST. OF N.Y., *supra* note 126, at 5.

128. *Id.* at 1.

129. *Id.*

(loan modification, loan refinance, and forbearance) are potentially home-saving solutions. A loan modification involves changing the terms of the current loan to make it affordable for the homeowner (e.g., by reducing the interest rate and/or by extending the payment schedule), a refinance involves taking a new loan to pay off the old loan, and a forbearance allows the borrower to skip some payments (e.g., during a period of unemployment), though all payments are eventually made before the loan is deemed fully satisfied.

Nevertheless, the bankruptcy court cannot require the lender to offer a loan modification or other home-saving option.¹³⁰ In a Chapter 13 case, however, the lender must accept payments from the debtor to repay arrears under a plan approved by the bankruptcy court.¹³¹ A debtor typically will have five years to repay mortgage arrears under a Chapter 13 plan, while continuing to make the current mortgage payments.¹³² A secured creditor can object to confirmation of the plan, but if the plan is confirmed by the bankruptcy court over the secured creditor's objection, then the secured creditor must accept the payments and allow the debtor to retain their home.¹³³

The Loss Mitigation Program in the Southern District of New York does not always equalize the power imbalance between the individual debtor and the institutional lenders. Especially problematic, from the perspective of utilizing bankruptcy as a tool to prevent homelessness, is the protected status afforded to home mortgages.¹³⁴ Home mortgages are not subject to

130. *See, e.g.,* Morris & Guccion, *supra* note 123, at 4 (“The [Loss Mitigation] Program does not compel the parties to enter into a loan modification, only to engage in the loss mitigation process.”) (footnote omitted).

131. 11 U.S.C. § 1322(b)(3).

132. 11 U.S.C. § 1322(a)(4).

133. *See* Alan M. White, *supra* note 97, at 374 (“Curing defaults under the mortgage over the life of the plan is permitted. The other permitted modification is the ability to extend the term of the loan but this modification may only be used when the final mortgage payment is contractually due in less than five years.”).

134. *See* Morris & Guccion, *supra* note 123, at 18 (“Debtors struggling to save their homes from foreclosure can file for chapter 13 to bring their home loan back to normal by resuming a regular payment schedule and making up lost payments gradually over a three- or five-year term. However, the debtor cannot force the home lender to modify the loan to make it more affordable. In practice, this restriction means that the court may not compel a secured

“cramdown” (under which the amount owed beyond the value of the property is treated as any other unsecured debt); instead, the Bankruptcy Code prohibits modification of the rights of secured creditors when the claim is “secured only by a security interest in real property that is the debtor’s principal residence.”¹³⁵

In other words, an individual debtor in bankruptcy is still responsible for the full amount of his or her home mortgage without regard to the actual value of the property, which could be much lower than the amount remaining on the mortgage debt. An exception is made for second mortgages, which can be “stripped off” and treated as unsecured debt, in a Chapter 13 case, where the home is “under water” (i.e., where the debt on the first mortgage exceeds the value of the property).¹³⁶ This lien-stripping procedure is not available in a Chapter 7 case.¹³⁷ Nevertheless, bankruptcy,

creditor to accept a lower principal balance or reduced interest rate on a home loan, even if the home is worth less than what is owed.”) (footnotes omitted).

135. 11 U.S.C. § 1322(b)(2).

136. *In re Pond*, 252 F.3d 122, 127 (2d Cir. 2001) (“In the case at hand, both parties agree that the value of the residential property underlying defendants’ lien is insufficient to cover any portion of the lien; as a result, defendants’ lien is wholly unsecured under [Bankruptcy Code] Section 506(a). Because their lien is wholly unsecured, defendants are not ‘holders of . . . a claim secured only by a security interest in . . . the debtor’s principal residence,’ 11 U.S.C. § 1322(b)(2), and their rights in the lien are not protected under the antimodification exception of [Bankruptcy Code] Section 1322(b)(2). Accordingly, the District Court properly declared that plaintiffs’ Chapter 13 plan could void this lien.”); *see also* Alan M. White, *supra* note 97, at 367 (“Arguably the most powerful tool that bankruptcy offers homeowners is the ability to strip off unsecured junior mortgages. This is a tool that is only available in chapter 13. Every court of appeals to consider the issue has held that a chapter 13 debtor’s plan may strip off a wholly underwater lien on a debtor’s principal residence. In other words, if the first mortgage balance exceeds the value of the debtor’s home, any second or third mortgage may be voided and discharged, so that the debtor and her property are free of the junior debt.”) (footnote omitted).

137. *Dewsnup v. Timm*, 502 U.S. 410, 417 (1992) (holding Chapter 7 debtor may not “strip down” second mortgage lien); *see also* Cecelia G. Morris & Mary K. Guccion, *supra* note 123, at 22 (“Chapter 7 debtors may not strip off second mortgages, because, among other reasons, to do so would totally extinguish the mortgagee’s rights to recover some money on the debt – the mortgagee would have its lien erased, preventing foreclosure, and would not be able to pursue the debtor personally for the money, because of the discharge.”) (footnote omitted).

regardless of chapter selected, is a powerful tool for preventing foreclosure.¹³⁸

E. Limitations on Bankruptcy as a Tool to Prevent Homelessness

The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (“BAPCPA” or “2005 Act”) amendments to the Bankruptcy Code were not friendly to individual debtors in many ways and have made the goal of providing individuals with a “fresh start” more difficult.¹³⁹ The late Harvey Miller of Weil, Gotshal & Manges LLP, who was one of the nation’s most prominent bankruptcy attorneys, noted: “Perhaps the biggest special interest victory is the ill-conceived Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (‘BAPCPA’) which has effectively repealed the fresh start principle for individuals.”¹⁴⁰ The BAPCPA amendments, with respect to consumer debtors, include the means test, a waiting period between filings (i.e., between bankruptcy discharges), the credit-counseling requirement, and limitations on the automatic stay for repeat filers.¹⁴¹ The 2005 Act is hostile to individual consumers in other ways. While some provisions may be facially unrelated to homelessness prevention, limited ability to discharge other debts hinders tenants, and homeowners in meeting rent or mortgage arrears.¹⁴²

138. *See, e.g.*, Cecelia G. Morris & Mary K. Guccion, *supra* note 123, at 65-66 (“[T]he bankruptcy court provides the ideal forum for a debtor struggling with an unmanageable home loan to achieve a consensual loan modification Mortgage arrears can be cured over the years under a court-supervised plan. Judgement liens and junior mortgages may be removed, clearing title and reclassifying secured claims. Unsecured debt such as credit card debt can be eliminated, making money available over the long term to pay the home loan.”) (footnotes omitted).

139. *See, e.g.*, Angela Littwin, *Adapting to BAPCPA*, 90 AM. BANKR. L.J., 183, 234 (2016) (“All the evidence points to BAPCPA’s most important long-term affect being the creation of a more expensive and therefore less accessible consumer bankruptcy system.”).

140. Harvey R. Miller, *Chapter 11 in Transition – From Boom to Bust and Into the Future*, 81 AM. BANKR. L.J. 375, 388 (2007).

141. *See generally* Angela Littwin, *supra* note 139.

142. *See, e.g.*, Alan M. White, *supra* note 97, at 365-66 (“[D]ischarging substantial amounts of credit card, medical, and other unsecured debts in bankruptcy should make it easier for moderate-income homeowners to make their

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The policy on student loans is a very good example of how the limited ability to discharge certain debts makes it much harder for an individual debtor to realize the bankruptcy goal of a “fresh start.”¹⁴³ Section 523(a)(8) of the Bankruptcy Code excludes student loans from discharge unless “undue hardship” would be present without the discharge.¹⁴⁴ Factors considered in order to establish whether or not “undue hardship” exists include those found in *Brunner v. New York State Higher Education Services Corp.*¹⁴⁵

(1) that the debtor cannot maintain, based on current income and expenses, a “minimal” standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.¹⁴⁶

Here the presumption is that the loans are not to be discharged, which limits the possibility of a “fresh start,” and the conditions are so strict that almost no one will be able to meet them.¹⁴⁷

mortgage payments by freeing up cash flow. This benefit is particularly significant in states that allow wage garnishments by unsecured creditors because the automatic stay will produce an immediate increase in disposable income for any homeowner subject to wage garnishment.”) (footnotes omitted).

143. See Alan M. Ahart, *How the Courts Have Gone Astray in Refusing to Discharge Student Loans: The Folly of Brunner, of Rewriting Repayment Terms, of Issuing Partial Discharges and of Considering Income-Based Repayment Plans*, 95 AM. BANKR. L.J. 53 (2021).

144. 11 U.S.C. § 523(a)(8).

145. *Brunner v. New York State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987).

146. *Id.* at 396.

147. *But see* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 525 (2012) (demonstrating that nearly 40% of debtors who seek a discharge of student loan debt are granted the discharge). Nevertheless, the vast majority of debtors who seek to have their student loans discharged are denied this request, and most debtors will not even attempt to have their student loans discharged.

F. *Discrimination Against Debtors*

Some debtors who may benefit from bankruptcy protection are reluctant to seek its relief out of fear of post-bankruptcy discrimination. The Bankruptcy Code addresses this issue in Section 525.¹⁴⁸ This nondiscrimination provision provides certain protections with respect to employment, student loans, licenses, and similar benefits. A government employer, for example, is prohibited from denying employment to an individual because he or she has filed for bankruptcy.¹⁴⁹ Nevertheless, the provision has been read by at least one court to merely prohibit a private employer from terminating employment because of bankruptcy.¹⁵⁰ For instance, the Fifth Circuit has held that a private employer did not violate the law by denying employment to a person because of her bankruptcy.¹⁵¹ With respect to the discrimination experienced by people who have filed for bankruptcy, Elizabeth Warren and Amelia Warren Tyagi note: “For ten years, their credit reports will document their bankruptcy, making everything from car insurance to house payments more expensive.”¹⁵² This discrimination also makes matters more difficult for those at risk of homelessness because it makes it harder for them to secure even rental housing.

G. *Recommendations for Change*

As noted above, the “means test” mandates that individuals who earn over a certain amount may not file for bankruptcy protection under Chapter

148. 11 U.S.C. § 525.

149. *Id.* § 525(a) (“[A] governmental unit may not...*deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under this title or a bankrupt or a debtor under the Bankruptcy Act . . .*”) (emphasis added).

150. *Id.* § 525(b) (“No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act . . .”).

151. *In re Burnett*, 635 F.3d 169, 174 (5th Cir. 2011) (“The bankruptcy court and district court below properly held that 11 U.S.C. § 525(b) does not prohibit private employers from denying employment to applicants based on their bankruptcy status.”).

152. ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS PARENTS ARE GOING BROKE* 77 (2003).

7 and must file under Chapter 13 instead.¹⁵³ This is problematic because Chapter 13 is more complicated, more expensive, and often unnecessary for the limited purpose of preventing an eviction or foreclosure. The first recommendation for change is that the “means test” be repealed and the decision to dismiss abusive bankruptcy filings be left in the sound discretion of the bankruptcy judges. The authority to dismiss a bankruptcy case for abuse of the bankruptcy process is squarely within the power of the bankruptcy court under the Bankruptcy Code.¹⁵⁴

Moreover, the bankruptcy process already requires debtors surrender all nonexempt assets to their Chapter 7 trustee, to be monetized to make payments to creditors. Therefore, the “means test” is unnecessary and only serves to discourage potential debtors from availing themselves of bankruptcy protection and a potential avenue for saving their homes. Repealing the “means test” may make the bankruptcy process more accessible for individuals facing eviction or foreclosure and, as a result, may prevent some individuals from losing their homes and becoming homeless.

Similarly, automatic dismissal based on the failure to obtain pre-petition credit counseling and a certification of pre-petition credit counseling should be rescinded, particularly because the next filing (within one year) provides only limited protection with respect to the automatic stay. The second recommendation for change is that the pre-petition credit counseling requirement be repealed. With respect to repeat filers, the bankruptcy court should be given absolute discretion to extend the automatic stay based on the particular facts of each case. At a minimum, the thirty-day protection might be in effect for repeat filers no matter how many times they file. This thirty-day period would allow the bankruptcy court to determine if there is cause for an extension of the automatic stay, or if the case should be dismissed. The third recommendation for change is that the limitations on the automatic stay for repeat filers be repealed. One might object that this would encourage abuse of the bankruptcy system. Nevertheless, bankruptcy judges are in the best position to police the bankruptcy process and should have full discretion to dismiss, or allow, cases in their courts that are squarely within the goals of bankruptcy.

153. *See supra* Part III.B.

154. 11 U.S.C. § 707(b)(1) (“After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor’s consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter.”).

In addition, the protected status for home mortgages and student loans should be lifted. These are the fourth and fifth recommendations for change, respectively. The home mortgages would then be subject to “cramdown,” thereby allowing the amount owed, beyond the value of the property, to be treated as any other unsecured debt. This would make the debt burden for some homeowners more manageable. There is no sound reason that the lenders should fare better in bankruptcy than they would outside of bankruptcy. Specifically, if a home is sold in a foreclosure sale, the lender receives no more than the value of the property, as reflected in the sale price. If the amount owed is less than the sale price, the borrower receives the remainder. If the amount owed exceeds the sale price, the lender has the right to a deficiency judgement, but these judgments are rarely sought, often uncollectable, and are dischargeable in bankruptcy as any other unsecured debt. Student loans should also be dischargeable as any other unsecured debt.¹⁵⁵ While discharging student loans in bankruptcy does not directly impact homelessness prevention, it would make available additional funds for tenants and homeowners, who are struggling to hold on to their homes, to pay their housing expenses.

The sixth recommendation for change is that discrimination in private employment, as experienced by individuals who have filed for bankruptcy protection, should be addressed by holding the private employers and the government employers to the same standard, thereby prohibiting denial of employment based on an individual’s bankruptcy status in all cases.

With respect to the credit-related discrimination experienced by individuals because of a bankruptcy being reported on their credit reports for ten years, this decade-long period might be reduced by at least half,

155. Cf. Alan M. Ahart, *How the Courts Have Gone Astray in Refusing to Discharge Student Loans: The Folly of Brunner, of Rewriting Repayment Terms, of Issuing Partial Discharges and of Considering Income-Based Repayment Plans*, 95 AM. BANKR. L.J. 53, 79 (2021) (“Based upon the plain meaning of [Bankruptcy Code] § 523(a)(8) and the purposes underlying it, a bankruptcy court must determine whether the debtor’s reasonable future financial resources would sufficiently cover payment of the student loan debt over the remaining term of the loan, while still allowing for a minimal standard of living If these resources would be sufficient, the court should not find ‘undue hardship,’ declare the loan is not discharged and ordinarily enter a money judgment in favor of the creditor. But if these resources will *not* allow for full repayment of the loan according to its payment schedule and interest rate, or in a lump sum if the loan has matured, been accelerated or reduced to a money judgment, ‘undue hardship’ is established and the court ought to simply order discharge of the *entire* balance of the loan.”) (italics in original) (footnotes omitted).

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which could mitigate discrimination in obtaining housing. This is the seventh recommendation for change. All of the above-mentioned recommendations for change can only be accomplished with amendments to the Bankruptcy Code.

As discussed more fully below, I propose a universal right to counsel in bankruptcy cases that impact rent or mortgage arrears as well as in all eviction and residential foreclosure cases. Congress must pass legislation to stem the tide of increasing homelessness due to COVID-19, including the seven recommendations for amendments to the Bankruptcy Code marshalled above, as well as solutions to homelessness more broadly, which are discussed in the next section.¹⁵⁶

IV. ENDING HOMELESSNESS IN THE U.S.¹⁵⁷

This section of the article suggests other potential solutions to the homelessness crisis, outside of bankruptcy.

The foregoing demonstrates how bankruptcy, as currently available, can be better utilized as a tool for the prevention of homelessness and how the Bankruptcy Code could be amended to better serve as a tool for preventing homelessness in the future.¹⁵⁸ Those who are facing homelessness, because they are at risk of eviction or foreclosure, usually need time to obtain the money necessary to pay off the arrears on their rent or mortgage.¹⁵⁹ Bankruptcy can be very effective in this regard. Nevertheless, bankruptcy and bankruptcy reforms alone are not enough to end homelessness in the United States. There is an old adage: the first step to getting out of a hole is to stop digging. In what follows, I propose solutions

156. *See infra* Part IV.

157. Some of what follows in this section of the Article has been adapted from Geoffrey K. McDonald, *COVID and the Homelessness Crisis*, HUM. RTS. AT HOME BLOG (Monday, April 12, 2021) https://lawprofessors.typepad.com/human_rights-/2021/04/covid-and-the-homelessness-crisis.html [<https://perma.cc/WL47-ECVA>].

158. *See supra* Part III.

159. *See, e.g.*, Alan M. White, *Does Bankruptcy Save Homes? A Further Look*, 92 AM. BANKR. L.J., 363, 365 (2018) (“[T]he automatic stay in bankruptcy and the chapter 13 plan process provides the space and time for homeowners to navigate the complex mortgage modification process. The bankruptcy stay can give homeowners a chance to complete a workout with their lender by preventing the lender from completing a foreclosure sale, even if the debtor does not ultimately receive a discharge.”).

to some of the root causes of homelessness, including mental illness, substance abuse, poverty, and a lack of adequate, affordable housing.

Individuals at risk of becoming homeless due to eviction or foreclosure should apply for legal assistance, in the form of representation in their housing or foreclosure cases, from Legal Aid, Legal Services, or similar organizations, which need to be funded now more than ever. The work of attorneys, paralegals, social workers, and others at these organizations is essential for addressing the needs of tenants and homeowners who will be facing homelessness in the wake of the COVID-19 pandemic.

Those seeking assistance from these organizations are often angry and scared as well as confused by the processes they are facing. In my role as a public interest attorney, I listened to thousands of individuals facing eviction or foreclosure and immediately provided relief by letting them vent their rage, fear, and despair. Next, I shared my knowledge of the eviction and foreclosure processes they were facing. This also provided incredible relief to many as they realized that they could not be put out of their homes overnight, that they had legal rights, and, for the clients we could take on, caring and competent counsel to see them through these difficult times, which, for my clients, resulted in home-saving solutions.

There has been a dramatic reduction in the number of evictions in New York City since the city adopted the “Right to Counsel” in eviction cases.¹⁶⁰ This “Right to Counsel” means that New Yorkers who qualify for legal assistance based on (low) income have a legal right to be represented by an attorney in housing court.¹⁶¹ This legal representation can make a decisive difference between a tenant being evicted and a tenant remaining in their home, as attorneys know how to navigate housing court, advocate for clients before judges, and negotiate for more time to pay off rental arrears with the landlords’ attorneys.¹⁶²

160. Allison Dikanovic, *Tenants’ ‘Right to Counsel’ Expands Citywide. Here’s Why That’s a Big Deal*, CITY (May 20, 2021, 5:44 PM EDT), <https://www.thecity.nyc/2021/5/20/22444023/right-to-counsel-expands-citywide-why-thats-a-big-deal-tenants-nyc> [<https://perma.cc/SK8P-2RRP>] (“In the first two years of implementing Right to Counsel, evictions dropped by nearly 20% in the neighborhoods where tenants qualified. And nearly 85% of tenants who got free lawyers through the program in its first two years were able to ward off eviction.”).

161. *Id.*

162. *See, e.g.*, MARYBETH SHINN & JILL KHADDURI, *IN THE MIDST OF PLENTY: HOMELESSNESS AND WHAT TO DO ABOUT IT* 139 (2020) (“[P]roviding legal counsel in housing court to tenants with incomes below poverty led to a reduction in eviction

In some cases, these same lawyers may assist their clients with the applications to obtain emergency grant funding in order to pay off the arrears and remain in their homes.¹⁶³ The right to counsel should be extended to bankruptcy cases that impact rent or mortgage arrears as well as to all residential foreclosure cases. Representation in housing court is, of course, critical to those who cannot afford counsel. If the goal is to prevent homelessness, then all actions that seek to keep people in their housing require a parallel right to counsel. Attorney representation is indispensable because foreclosure and bankruptcy cases can be incredibly complex.

At all levels of government, funds must be made available to assist tenants and homeowners in paying off rental and mortgage arrears to stay in their homes. Programs are needed urgently today for homeowners and renters facing eviction or foreclosure.¹⁶⁴ Courts also have a role to play in lessening the impact of this crisis by mandating settlement conferences in all cases where housing is at risk, including eviction, foreclosure, and bankruptcy cases.¹⁶⁵

A bankruptcy filing, which can be used to provide an individual with a “fresh start,” should be among the solutions considered to assist a homeless person in “getting back on their feet.”¹⁶⁶ Other, more pressing, issues may include medical care, including substance abuse counseling, mental health treatment, temporary shelter, job training and placement, permanent housing and a permanent housing subsidy. Permanent housing would naturally be at the top of this list, right after emergency medical care.¹⁶⁷

orders from 44% (for tenants without representation) to 10% in a randomized study in New York City – a reduction of 77%. Evidence that legal representation of poor tenants will reduce evictions is thus quite solid.”) (citation omitted).

163. *Id.* (“We classified financial assistance to prevent evictions as having solid evidence for preventing homelessness.”).

164. *See, e.g.,* McDonald, *supra* note 157 (“The Home Affordable Modification Program (HAMP) was very successful in making it possible for individuals to stay in their homes by modifying their mortgages. The New York State Mortgage Assistance Program (MAP) program provided 0% interest loans to homeowners at risk of foreclosure.”).

165. *Id.*

166. *See generally* BALBUS, *supra* note 96.

167. GIBBS ET AL., *supra* note 5, at 33 (“Housing is *unquestionably* a critical factor in any discussion of strategies to end homelessness. There are many who argue that the only appropriate response to homelessness is to create affordable

Importantly, it is recommended that a household not spend more than thirty percent of its total income on housing.¹⁶⁸ This is the case because paying more than thirty percent of a household's income toward housing can quickly become unmanageable, when unexpected expenses arise (e.g., due to an emergency).¹⁶⁹ Therefore, any needed subsidy should cover the cost of housing beyond thirty percent of the household's income.¹⁷⁰

The current crisis reveals the urgent need for action to support those who are experiencing homelessness and those at risk for homelessness. Communities should consider two priorities in homelessness prevention. The first is giving homeless individuals free, accessible treatment for mental illness and substance abuse, should they choose to participate in treatment. Treatment is imperative as those forced to live without a permanent home experience high rates of mental health needs because of their precarious and often dangerous living circumstances. The second is immediate and adequate housing or permanent housing subsidies for every person who is experiencing homelessness.¹⁷¹ It is well established that permanent housing subsidies are the most effective way to keep shelter families from falling back into homelessness.¹⁷² In Paris, France, for example, a

housing and include appropriate support to assist people in maintaining their housing. Further, many argue that spending scarce dollars on shelter strategies such as those presented in this book perpetuates the institutionalization of homelessness but does not bring cities any closer to ending it.”) (*italics in original*).

168. *Id.* at 71.

169. *Id.* at 72.

170. SHINN & KHADDURI, *supra* note 162, at 29 (“Further, giving families offers of ongoing rental subsidies that held their housing costs to 30% of their income not only ended homelessness for many but also reduced their rates of psychological distress, substance use, and experiences of domestic violence compared to families who received the usual care available in their communities.”) (citation omitted).

171. *Id.* at 118 (“Research has shown what works to end homelessness for people who experience it. Supportive housing using a housing first approach works for people who have long histories of homelessness and serious mental illnesses and substance problems. Many people, including most families, become stable and indeed flourish with just an ongoing rental subsidy that makes housing affordable for people who are deeply poor.”).

172. THOMAS J. MAIN, HOMELESSNESS IN NEW YORK CITY: POLICYMAKING FROM KOCH TO DE BLASIO 156 (2016); *see also* GIBBS ET AL., *supra* note 5, at 107 (“[P]ublic housing rental vouchers in the United States have been shown to significantly reduce

combination of housing subsidies, eviction prevention and return to work programs, reduced evictions by thirty percent over a ten-year period.¹⁷³

Moreover, as noted by Thomas J. Main: “If mental illness and substance abuse are supposed to be underlying causes of homelessness, Housing First [i.e., providing immediate housing without preconditions] does a better job of addressing them than do treatment-first programs that paternalistically insist on the use of services that are supposed to address those underlying causes.”¹⁷⁴ Indeed, Housing First policies have been adopted internationally.¹⁷⁵ Nevertheless, the Housing First philosophy also has its critics, who claim that by providing housing without preconditions, the Housing First programs are enabling formerly homeless individuals to continue to suffer lives defined by untreated addiction and mental illness, which often end in early death.¹⁷⁶

The crisis of homelessness is one for the homeless individuals as well as it is one for the whole of society. It is unfortunate that some people, who are afforded an opportunity to obtain housing and treatment for mental illness and addiction, still perish prematurely. Premature death can have its origins in many concerns, not the least of which is prolonged deprivation of regular medical care. I argue that it is not ethical to keep these individuals on the streets, in the hopes that they will someday hit “rock bottom” and reform their lives.¹⁷⁷ The failure to act with dispatch in removing homeless people

homelessness among recipient households, compared with those not receiving this rental support.”) (footnote omitted).

173. GIBBS ET AL., *supra* note 5, at 30.

174. MAIN, *supra* note 172, at 208.

175. GIBBS ET AL., *supra* note 5, at 30.

176. *See, e.g.*, Christopher F. Rufo, *The Limits of Housing First: Los Angeles Makes a \$1.2 Billion Bet on a Solution to Homelessness That Is Bound to Fail*, in NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY 79, 83 (Kerry Jackson ed., 2021) (“A recent Housing First experiment in Ottawa, Canada, illustrates this paradoxical outcome in stark terms To the shock of the researchers, after 24 months, the non-intervention control group reported better results regarding substance abuse, mental health, quality of life, family relations, and mortality than the Housing First group. In other words, doing nothing resulted in superior human outcomes than providing Housing First with wraparound services.”) (footnote omitted).

177. *See* LENNY DUNCAN, UNITED STATES OF GRACE: A MEMOIR OF HOMELESSNESS, ADDICTION, INCARCERATION, AND HOPE 4-5 (2021) (“This is what rock bottom

from the streets may endanger other members of society by unnecessarily multiplying the number of homeless people on the streets.¹⁷⁸ Therefore, even though the “treatment first” model has been dominant,¹⁷⁹ the Housing First approach is preferable.

There is an important distinction between providing shelter, as is done in the New York City shelter system, and assisting an individual or a family back into permanent housing. While shelters are undoubtedly necessary, they should always be viewed as a temporary solution and not the end goal, which must always be permanent housing for formerly homeless individuals and families.¹⁸⁰ There are many hurdles that homeless people face when attempting to make the transition from homelessness to permanent housing, including convincing a landlord that they would be

looked like for me. I had eaten out of trash cans. Slept by the side of the road. Been sexually assaulted. Nearly died several times in different ways. But something about being in paradise and not being able to enjoy it even though I had the whole island at my disposal was soul crushing to me. It was like I was watching a series of still photos of the world having fun around me. I could touch the image, but I couldn’t engage or enter the picture myself. The world was flat and had no depth. It was like a fly passing in front of my nose I couldn’t grab onto or hold.”).

178. *See, e.g.*, Jack Newman & Andrea Cavallier, *UCLA Grad Student, 24, Is Stabbed to Death While Working in LA Furniture Store: Homeless Man Knifes Her in Random Attack Before Calmly Walking out of Back Door*, DAILYMAIL.COM (January 17, 2022, 4:13 PM), <https://www.dailymail.co.uk/news/article-10410375/UCLA-grad-student-24-stabbed-death-random-attack-worked-LA-furniture-store.html> [<https://perma.cc/2QQZ-SYBX>] (“A UCLA grad student was stabbed to death in a random attack in the middle of the afternoon last week while she was working in a luxury furniture store in Los Angeles Police said the male suspect is believed to be homeless and fled through the back door before calmly walking down an alley, adding that he did not know the victim and that there is no known motive at this time.”).
179. MARYBETH SHINN & JILL KHADDURI, *IN THE MIDST OF PLENTY: HOMELESSNESS AND WHAT TO DO ABOUT IT* 81 (2020) (“The idea [in the “treatment first” model] is that, in order to succeed in housing, individuals with mental illnesses and substance use problems need to be clean and sober and participate in psychiatric or substance abuse programs [before being placed in permanent housing].”).
180. IAIN DE JONG, *THE BOOK ON ENDING HOMELESSNESS* 56 (2019) (“Shelters must be seen as a process, not as a destination. They are the process by which people get housed again. If shelters are treated as a destination, a person/family experiencing homelessness is more likely to see and treat shelter as the answer to homelessness.”).

good tenants as well as paying the security deposit, first month's rent, and moving expenses.¹⁸¹

Homelessness prevention will work best if these initial expenses are paid by city, state and/or federal programs to assist as many people as possible to make the transition from homelessness to permanent housing. When we understand housing as a human right, then the need for these transitional expenses to be paid by society becomes unquestionable.¹⁸² Also, in the long run, it is less expensive for society to pay the initial housing costs for formerly homeless individuals and families, such as the security deposit, first month's rent, and moving expenses, and an ongoing subsidy as needed, than it is for society to pay to maintain homeless people in shelters indefinitely, with all of the concomitant services.¹⁸³

The federal Housing Choice Voucher Program, which is the current name for the Section 8 program, does provide housing vouchers for low income families as well as elderly and disabled individuals.¹⁸⁴ Under this program, a housing subsidy is paid directly to the landlord on behalf of the program participant, who then pays the difference between the full rent charged by the landlord and the amount of the subsidy.¹⁸⁵ This program is good as far as it goes, but it does not go nearly far enough, because the need for vouchers is much greater than the number of vouchers that are

181. GIBBS ET AL., *supra* note 5, at 74.

182. *See, e.g.*, JONG, *supra* note 180 at 12. ("People can move directly from living outdoors into housing. It doesn't matter if they are living deep in the woods, bunking down on a park bench, or living underneath a freeway overpass, a person can be successfully housed from any outdoor location. They can also be housed directly from living in cars, abandoned buildings, squats, barns and sheds, leantos, and tents.").

183. *But see* SHINN & KHADDURI, *supra* note 179, at 77 (2020) ("Advocates often argue that it would be cheaper to give a rental subsidy to everyone who becomes homeless rather than to maintain a costly shelter system. The cost data from [one] study suggests that they are not completely right, although if additional costs associated with foster care or psychological distress and domestic violence were factored in, the balance might tip.") (citation omitted). To which the response must be as follows: not everyone who becomes homeless will ultimately need a permanent rental subsidy and the cost comparison must be made between the total cost to society in either scenario.

184. *Housing Choice Vouchers Fact Sheet*, U.S. DEP'T HOUS. & URB. DEV., https://www.hud.gov/topics/housing_choice_voucher_program_section_8 [HTTPS://PERMA.CC/2PRY-G2HZ].

185. *Id.*

available.¹⁸⁶ As a result, many qualified applicants will likely never receive a voucher.¹⁸⁷

Homeless people are often suffering from mental illness and addiction, and as a result, they may be involved in the criminal justice system.¹⁸⁸ A data match in New York City revealed a “huge overlap” of individuals shuffling between jails and homeless shelters.¹⁸⁹ In San Francisco, homeless individuals constitute forty percent of the inmates in the San Francisco County Jail while also making up less than one percent of the overall population. This disparity exists despite the fact that San Francisco has taken the lead in “decriminalizing” homelessness by refusing to enforce so-called “quality-of-life” crimes, which are associated with homelessness.¹⁹⁰ These “quality-of-life” crimes include, *inter alia*, public urination, blocking the sidewalk, offering or soliciting sex, and public camping.¹⁹¹

It is axiomatic that the homeless population would be reduced by jailing the criminals and institutionalizing the mentally ill individuals within this population.¹⁹² Approximately seventy-five percent of unsheltered homeless

186. GIBBS ET AL., *supra* note 5, AT 77.

187. *Id.*

188. Christopher F. Rufo, *Compassionate Enforcement: Balancing Public Services and Public Order*, in *NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY* 130, 132 (Kerry Jackson ed., 2021) (“In order to formulate successful policies, it’s essential to understand the domain of unsheltered homelessness. The facts, which have become taboo in progressive cities, are simple: 75 percent of the unsheltered homeless have a serious addiction, 78 percent have a mental illness, and, as a group, they are nearly 100 times more likely to commit crimes and get booked into jail than the average citizen.”) (footnote omitted).

189. GIBBS ET AL., *supra* note 5, at 166.

190. Christopher F. Rufo, *Homeless, Addicted, and Insane: The “Perilous Trifecta” Puts San Francisco’s Policy Regime to the Test*, in *NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY* 35, 37 (Kerry Jackson ed., 2021).

191. Kerry Jackson, *Incentivizing Homelessness: How Local and State Policies Encourage Homelessness*, in *NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY* 29, 30 (Kerry Jackson ed., 2021).

192. Kerry Jackson & Wayne Winegarden, *Taking Action: Lessons Learned from Local Changemakers*, in *NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY* 103, 111 (Kerry Jackson ed., 2021) (“Involuntary institutional commitment might seem like a callous act, especially when it’s done in large numbers. But is it truly humane to allow

people suffer from some form of mental illness.¹⁹³ In 2022, California enacted a plan to remove some mentally ill homeless people from the streets through a process of involuntary commitment.¹⁹⁴ This process would only be ethically justifiable in cases where individuals pose a serious risk of harm to themselves or others. In the case where an individual has been so compromised—by mental illness, physical illness, or addiction—that they are unable to act in an autonomous manner, then this individual must be taken off the streets for their own protection and for the protection of the community, including other homeless individuals.¹⁹⁵ Any decision to deprive someone of their civil liberties must not be taken lightly and must depend on the facts of the individual case.¹⁹⁶

people to waste away and pose a threat to others? Policymakers would be more negligent than they already have been if they dismiss this option, which has more support than one might imagine, without thoughtful examination.”).

193. *Id.* at 110.

194. Emma Camp, *California’s “CARE Court” Won’t Help the Homeless*, REASON (Oct. 5, 2022, 3:00 PM), <https://reason.com/2022/10/05/californias-care-court-wont-help-the-homeless> [https://perma.cc/QA4N-SKXG] (“The Community Assistance, Recovery, and Empowerment (CARE) Act, was signed into law last month by Democratic Gov. Gavin Newsom. The law creates CARE Courts, a new form of civil mental-health court designed to usher untreated, severely mentally ill individuals into medical treatment and other forms of state support. While many have lauded the law as an important step toward getting treatment for the most severely mentally ill Californians—many of whom are homeless—civil liberties organizations have expressed concerns about the bill’s potential for abuse and the expansion of state power. While some severely mentally ill people certainly need treatment, the potential for coercion is cause for serious concern.”).

195. GIBBS ET AL., *supra* note 5, at 48 (“When it becomes apparent that the client’s illness is so debilitating that their chronic lack of self-care puts themselves and others in danger, more extreme actions may be warranted, and are usually permitted under the public health laws of many jurisdictions.”).

196. *Id.* at 49 (“Whether to act in a person’s interest, but against their stated desires, by compelling their involuntary removal and treatment requires case-by-case determination [W]hen a client is unable to make responsible decisions that affect their own safety, then the client’s survival and welfare – and that of the community – become the team’s primary concern, even if it means outreach workers must act against the client’s immediate wishes.”).

Unsheltered homeless people are nearly 100 times more likely to commit crimes than their housed counterparts.¹⁹⁷ Researchers have found the following: “Deinstitutionalization of the mentally ill in 1980 without adequate alternative accommodations resulted in thousands of vulnerable people on the streets across the United States. Even reform efforts to reduce jail and prison populations can, without adequate planning, put people at high risk of homelessness.”¹⁹⁸

Homeless people are part of the larger community (un-housed and housed), but no one has the right to endanger any other member of that community regardless of whether that other member is homeless or not.¹⁹⁹ I do not favor the so-called “criminalization of homelessness,” which refers to the criminal enforcement of minor offences against homeless people, such as having an open alcohol container.²⁰⁰ There was also a time in United States history when being homeless itself was a crime.²⁰¹ I argue that no one

197. Christopher F. Rufo, *Compassionate Enforcement: Balancing Public Services and Public Order*, in *NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY* 130, 132 (Kerry Jackson ed., 2021).

198. GIBBS ET AL., *supra* note 5, at 121.

199. See, e.g., James Gordon, Andrea Cavallier & James Gordon, *Advertising Creative, 35, Fatally Stabbed in Her Own Manhattan Apartment by Homeless Career Criminal, 25, Free on Bail who Sneaked in Behind Her: Landlord Blames DA Alvin Bragg’s Woke Policies for her Death*, DAILYMAIL (Feb. 14, 2022, 2:34 PM EDT), <https://www.dailymail.co.uk/news/article-10509019/Woman-followed-home-night-fatally-stabbed-inside-New-York-City-apartment.html> [<https://perma.cc/GDU2-APKP>] (reporting on a homeless man murdering an innocent civilian in New York City).

200. GIBBS ET AL., *supra* note 5, at 38.

201. Joseph Tartakovsky, *From Vagrancy to Homeless Rights: A Brief History of the “Law” of Homelessness*, in *NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY*, *supra* note 28, at 21, 22-23 (“At the founding [of the United States], the condition of living semipermanently on the streets was, on paper at least, outlawed. A Washington, D.C., law from 1804, typical of its kind, prescribed hard labor for anyone within an expansive list of undesirable categories, among them ‘vagrants,’ ‘idle or disorderly persons,’ persons who ‘have no visible means of support, or are likely to become chargeable to the City as paupers,’ people ‘who can show no reasonable cause of business or employment in the City,’ people ‘who have no fixed place of residence’ or ‘cannot give a good account of themselves,’ or ‘night walkers.’”) (footnote omitted).

should be “criminalized” based on their poverty and lack of housing.²⁰² Nevertheless, criminal laws pertaining to serious crimes, such as selling illicit drugs, theft, robbery, and assault (including sexual assault) must be enforced.²⁰³ Moreover, the justified concerns of all “stakeholders,” including the housed and un-housed, must be taken into account when creating public policy to end the crisis of homelessness in society.

CONCLUSION

Some researchers claim that people become homeless due to “bad luck,” which can include job loss, being asked to leave a home, or health problems,²⁰⁴ but there is also much that needs to be done in terms of creating conditions conducive to avoiding the threat of homelessness entirely by, for example, ensuring an adequate stock of affordable housing.²⁰⁵ I do not discount the necessity for action on a societal level, but

202. *But see* Joseph Tartakovsky, *Smarter Laws, Smarter Enforcement: Legal and Policy Reforms to Relieve Homelessness with Humanity and Fairness*, in *NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY*, *supra* note 28, at 127 (“But quality-of-life laws are not designed to get us ‘out’ of the crisis; they are designed to keep streets tolerable while cities attempt longer-term solutions—none of which, alone, will result in any permanent resolution.”) (footnote omitted).

203. *But see* LENNY DUNCAN, *UNITED STATES OF GRACE: A MEMOIR OF HOMELESSNESS, ADDICTION, INCARCERATION, AND HOPE* 107 (2021) (“This is what it was like to be sixteen in solitary [confinement]. This is the America I know. This is how you tried to save me. A ton of my friends were doing the things I was at that time in Boulder. But I was the only Black kid in a circle of a few hundred. I had dreads, an East Coast accent, and no one who cared about me with any power in the situation. I was exposed to this torture as a child for selling pot in a state where today it’s totally legal.”).

204. *See, e.g.*, SHINN & KHADDURI, *supra* note 20, at 69 (“Some kinds of bad luck are more likely than others to lead to homelessness But two types of events were more common among the group that experienced homelessness: job loss and being evicted or asked to leave a home Health problems were important largely when they restricted ability to work.”) (citation omitted).

205. *See, e.g., id.* at 34 (“Our central argument in this book is that homelessness arises primarily because poor people do not have access to housing they can afford. Housing affordability is a joint function of incomes and the cost of housing. Incomes below levels that cover basic needs put even the lowest-cost housing out of reach for many. Landlords cannot afford to operate housing that meets the minimum standard required by society at prices people at the

these policy questions arise from a different perspective.²⁰⁶ As researchers have noted:

Both efforts—focused on people at high risk and broader social changes—are likely to be necessary to end homelessness. The scope is different: in one case it is helping people who are at or close to the crisis that plunges them into homelessness; in the other it is keeping a larger number of people from approaching that point.²⁰⁷

This Article demonstrates that filing for bankruptcy protection can be beneficial to tenants and homeowners who are facing eviction or foreclosure. While there are many causes and potential solutions for the epidemic of homelessness, the bankruptcy process has been underutilized as a preventative tool. This Article shows the ways in which bankruptcy can be better employed in this regard. Specifically, the Article reveals how bankruptcy can be used to stop an eviction or foreclosure and how the procedures available under the Bankruptcy Code can help distressed debtors discharge certain debts, restructure other debts, and obtain a “fresh start” in order to better afford their housing costs going forward.

In addition, the Article suggests ways in which the Bankruptcy Code may be amended to better serve as a tool for preventing homelessness in cases of eviction or foreclosure, as well as other potential solutions to the homelessness crisis outside of bankruptcy. The Article further proposes that Congress stem the tide of increasing homelessness in the aftermath of COVID-19 by passing legislation, including the seven recommended amendments to the Bankruptcy Code marshalled above.²⁰⁸

The recommended amendments to the Bankruptcy Code are as follows: (i) repeal the “means test” and leave the decision to dismiss abusive bankruptcy filings to the sound discretion of the bankruptcy judges; (ii) repeal the pre-petition credit counseling requirement; (iii) repeal the limitations on the automatic stay for repeat filers; (iv) end protected status for home mortgages; (v) end protected status for student loans; (vi) prohibit

bottom can afford to pay without public income or rent subsidies, and public subsidies have not kept up with the need.”).

206. *See id.* at 70 (“Structural factors, including poverty, inequality, lack of affordable housing, and the lack of a strong social safety net—and in particular a safety net for housing—place many people in the United States at risk of homelessness.”).

207. *Id.* at 121 (footnote omitted).

208. *See supra* Section III.G.

the denial of employment based on an individual's bankruptcy status; and (vii) delete bankruptcy history from credit reports after five years.²⁰⁹

The most important policy recommendations to end the immediate homelessness crisis, apart from amendments to the Bankruptcy Code, are as follows: (i) create federal and state grant and loan programs to assist tenants and homeowners in paying off rent and mortgage arrears; (ii) provide funding to Legal Aid, Legal Services, and related organizations that represent individuals in eviction, foreclosure and bankruptcy cases; and (iii) establish a "right to counsel" for low-income individuals in all cases where their housing is at risk, including eviction, foreclosure, and bankruptcy cases.²¹⁰ The recommended long-term solutions to the homelessness crisis include the following: (i) provide free and accessible treatment for mental illness and substance abuse; (ii) provide immediate and adequate housing or permanent housing subsidies for every person experiencing homelessness; and (iii) recognize housing as a human right.²¹¹

Millions of people experience homelessness in this country every year and thousands of these people literally die in the streets. The Rev. Lenny Duncan writes:

Until the first time someone throws away Styrofoam leftovers in front of you, ignores you, and walks on as you wait for them to turn the corner to grab those leftovers out of the trash can. Then as you sit to have your meal, sharing it with the huddled masses of friends who are out there with you, only then do you see this country.²¹²

This state of affairs is wholly unacceptable and demands an immediate and comprehensive response. In addition to the legal definition of bankruptcy, there is also a colloquial sense of the term as follows: "[T]he state of being completely lacking in a particular quality or value: *the moral bankruptcy of turning away desperate people*."²¹³ This country is in a state of moral bankruptcy with respect to our treatment of homeless people as evinced by the fact that so many are permitted to suffer in such dire circumstances.

In the words of Michel Foucault: "Let's say very briefly that through studying madness and psychiatry, crime and punishment, I have tried to

209. *Id.*

210. *See supra* Part IV.

211. *Id.*

212. DUNCAN, *supra* note 2, at 80.

213. *Bankruptcy*, NEW OXFORD AM. DICTIONARY (3d ed. 2010) (italics in original).

show how we have indirectly constituted ourselves through the exclusion of some others: criminals, mad people, and so on.”²¹⁴ Homeless people surely fall into this category of those who are excluded as well, and according to Foucault, it is through this process of exclusion that we constitute ourselves.²¹⁵ Theologian Timothy P. Jackson expressed a similar idea as follows: “We seek to elevate ourselves by denigrating others, to convince ourselves of our dignity and sanctity by denying dignity and sanctity to others Even if we do not actively assault them, we take delight in their suffering and misfortune (*schadenfreude*).”²¹⁶ Other researchers have used the phrase “social exclusion” in this regard.²¹⁷ It sometimes appears as if the homeless among us are laboring under a kind of societal ban in the precise sense in which Giorgio Agamben uses that term: “He who has been banned is not, in fact, simply set outside the law and made indifferent to it but rather *abandoned* by it, that is, exposed and threatened on the threshold in which life and law, outside and inside, become indistinguishable.”²¹⁸

Foucault assessed the purpose of intellectual work as follows: “[T]o show people that they are much freer than they feel, that people accept as truth, as evidence, some themes which have been built up at a certain moment during history, and that this so-called evidence can be criticized and destroyed.”²¹⁹ And elsewhere:

It is one of my targets to show people that a lot of things that are a part of their landscape—that people think are universal—are the result of some very precise historical changes. All my analyses are

214. MICHEL FOUCAULT, TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT 146 (Luther H. Martin, Huck Gutman & Patrick H. Hutton eds., 1988).

215. *Id.*

216. TIMOTHY P. JACKSON, MORDECAI WOULD NOT BOW DOWN: ANTI-SEMITISM, THE HOLOCAUST, AND CHRISTIAN SUPERSESSIONISM 149 (2021) (emphasis added).

217. *See, e.g.*, SHINN & KHADDURI, *supra* note 20, at 65 (“We have suggested that discrimination in income, wealth, housing, and incarceration are central ways in which that social exclusion puts both racial minorities and people with disabilities such as mental illness at risk. Sexual orientation and gender identity are also sources of social exclusion that can lead to homelessness, particularly for youth, but the pathways are different. In addition to community-level discrimination, in some case[s] youths face rejection by their own families.”).

218. AGAMBEN, *supra* note 13, at 28 (italics in original).

219. FOUCAULT, *supra* note 214, at 10.

against the idea of universal necessities in human existence. They show the arbitrariness of institutions and show which space of freedom we can still enjoy and how many changes can still be made.²²⁰

With Foucault, I too believe in what he calls “the freedom of people.”²²¹ As he observes, “To the same situation, people react in very different ways.”²²² There is human freedom in terms of possibilities, which must remain unreservedly open so that we can create a better society in the future. There is also human freedom within every individual—including those temporally experiencing homelessness—which is the source of a possible better life in the present. Nevertheless, an individual’s human freedom may be obstructed by mental illness or addiction. As Heidegger observed: “If *Dasein* [“human existence”], as it were, sinks into an addiction then there is not merely an addiction present-at-hand, but the entire structure of care has been modified. *Dasein* has become blind, and puts all possibilities into the service of the addiction.”²²³ Indeed, *Dasein* is blinded by addiction, which also needs to be addressed to end the scourge of homelessness.

220. *Id.* at 11.

221. *Id.* at 14.

222. *Id.*

223. MARTIN HEIDEGGER, BEING AND TIME 240 (John Macquarrie & Edward Robinson trans., Harper & Row Publishers 1962) (1927) (emphasis added).