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"Wealth is evidently not the good we are seeking; for it is merely useful and for the sake of something else."[1]

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I. Introduction

The debt burdens of Americans have grown tremendously in recent decades. For most Americans, income in real dollars has stagnated since the 1970s, but both unsecured and secured debt has marched sharply upward.[2] About 15% of families spend more

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1. ARISTOTLE, NICOMACHEAN ETHICS bk. I, at 9 (Martin Ostwald trans., Bobbs-Merrill Publ'g Co. 1962) (c. 384 B.C.E.).

2. KEVIN T. LEICHT & SCOTT T. FITZGERALD, POSTINDUSTRIAL PEASANTS: THE ILLUSION OF MIDDLE-CLASS PROSPERITY 48 fig.3.1, 59 fig.3.6 (2007) (showing that while middle-class income has remained, on average, stagnant, household

than 40% of their after-tax income on debt payments.[3] With inflation-adjusted borrowing at a current level more than ten times greater than it was fifty years ago,[4] debt permeates the lives of American families.

A significant proportion of households struggle to manage their debts. In the last decade, on average, more than one million consumer bankruptcy cases were filed annually.[5] To put that number in context, one million bankruptcy cases means that, in 2012, more women will go bankrupt than will divorce, and the annual number of freshly minted bankruptcy debtors will exceed the number of new college graduates.[6] And the bankrupt are only a small subset of those struggling with debts.[7] In 2006, one in seven families was contacted by a debt collector.[8] The foreclosure crisis and the recession have only expanded the number of people struggling with debts. In 2010, more than one in eight Americans

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debt has increased dramatically).

3. *See* Brian K. Bucks et al., *Changes in U.S. Family Finances from 2004 to 2007: Evidence from the Survey of Consumer Finances*, FED. RES. BULL., Feb. 2009, at A1, A50 fig.18, A50–51 (noting that the number of families with debt "payments exceeding 40% of their incomes" rose to approximately "14.7 percent" in 2007).

4. *See* FED. RESERVE BD. S.F., U.S. HOUSEHOLD DELEVERAGING AND FUTURE CONSUMPTION GROWTH 1 fig.1 (2009), *available at* http://www.frbsf.org/publications/economics/letter/2009/el2009-16.pdf (reporting that "the ratio of debt to personal disposable income" increased from "55% in 1960" to "133% in 2007").

5. In the twelve-month period ending September 2011, there were 1,417,316 million nonbusiness filings. *See* Admin. Office of the U.S. Courts, *Bankruptcy Statistics*, www.uscourts.gov/bnkrpctystats/bankruptcystats.htm (last visited Feb. 26, 2012) (on file with the Washington and Lee Law Review). In 2005 and 2006, the number of bankruptcies shows considerable variation from typical annual filings because of the anticipation and aftermath of new consumer bankruptcy legislation, the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act. *See* Pub. L. No. 109-8, 119 Stat. 23 (2005) (amending consumer bankruptcy law).

6. *Cf.* Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 HARV. WOMEN'S L.J. 19, 21 (2002) (stating this same proposition in relation to projected 2003 filings).

7. *See* Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289, 290 (2009) ("[O]nly a fraction of those in serious financial distress will ever file for bankruptcy.").

8. *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, 8, 10 (Summer 2007), *available at* http://dajoi.org/pdf/5/Warren.pdf ("Today about one in every seven families in America is dealing with a debt collector.").

was behind in their mortgage payments or in foreclosure.[9] Millions more have negative equity in their homes, with mortgage debts overwhelming their homes' values.[10] The exploding debt loads of American families have increased the phenomenon of unmanageable debt.

Most efforts to study the financial distress of debt burdens focus on the bankrupt population.[11] People who file for bankruptcy admit financial collapse, making a public declaration that they cannot pay their debts and that they need relief. Researchers and policymakers have decried the balance sheets of these bankrupt households. In 2007, the median bankrupt household owed nearly $34,000 in unsecured debt,[12] an amount equal to nearly fifteen months of its income.[13] Although debts have increased in the last two decades, an enduring characteristic of bankrupt families is that their debts dwarf their income and assets.[14] Policy debates about consumer credit have seized on the

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9. *See 12% of Homeowners Behind on Mortgages*, CBS NEWS (Oct. 25, 2010), http://www.cbsnews.com/stories/2009/03/05/business/main4844773.shtml (last visited Dec. 27, 2011) ("Twelve percent of all U.S. homeowners are behind in their mortgage payments [or] in foreclosure . . . .") (on file with the Washington and Lee Law Review).

10. Sarah Bloom, Bd. of Governors of the Fed. Res. Sys., Legal Opportunities and Challenges in Crafting a Foreclosure Response (Oct. 4, 2011), *available at* http://www.federalreserve.gov/newsevents/speech/raskin20111004a.htm.

11. Although many who struggle with debts will not file for bankruptcy, bankruptcy cases are particularly useful to researchers for several reasons. Borrowing is a private act, and debt is infrequently measured in surveys, particularly compared with the ubiquity of income. Bankruptcy filings are, however, public and permit one to identify the population with excessive debts. *See* Mann & Porter, *supra* note 7, at 296 (noting the difficulty of identifying debt-distressed households).

12. *See* Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349 app. III at 404 (2008) (noting that the median amount of unsecured debt owed by households in 2007 was $33,882). I am a co-author of this paper and an investigator in the Consumer Bankruptcy Project. More information on the other team members, methodology, and findings of the Consumer Bankruptcy Project is available in the prefatory footnote to the above article and in Appendix I: Detailed Methodology. *Id.* at 349 n.*, app. I at 387–98.

13. *See id.* at 373 ("By 2007, the median household owed nearly 15 months of income to unsecured creditors . . . .").

14. *See id.* at 365, 366 fig.5 ("[F]or households in bankruptcy . . . [a]s total assets rise, so do total debts, increasing from about $47,400 in 1981 to $87,300 in 2007.").

bankruptcy data as evidence of the high levels of indebtedness in America.

The debt metric pervades bankruptcy lawmaking. The means test added to bankruptcy law in 2005 calculates whether a household could repay a certain fraction of its debts to determine whether a household deserves a Chapter 7 bankruptcy discharge.[15] The cost of bankruptcy to creditors is measured by dollars of debt discharged.[16] Bankruptcy's success or failure is measured by the fraction of debtors that achieve a discharge of debt,[17] and generosity of the system is quantified by the types of debt deemed ineligible for discharge.[18] In the bankruptcy and consumer protection context, the conceptual space of financial distress has been defined along a single dimension: debt, or its kissing cousin, wealth. The problem of overindebtedness occurs when consumers' debts exceed certain financial benchmarks. Negative net worth, high debt-to-income ratios, or heavy debt service burdens all capture when debts overwhelm assets or when debt is unlikely to be serviceable on current and expected

15. *See* 11 U.S.C. § 707(b)(2)(A)(i)(I) (2006) (stating that courts will "presume abuse" if a debtor's current monthly income, after it is reduced by certain calculations and multiplied by sixty, "is not less than the lesser of . . . 25 percent of the debtor's nonpriority unsecured claims in the case").

16. *See* 152 CONG. REC. S10647 (daily ed. Sept. 29, 2006), *available at* http://www.gpo.gov/fdsys/pkg/CREC-2006-09-29/pdf/CREC-2006-09-29-pt1-PgS 10647.pdf (statement of Sen. Charles Grassley) (calculating bankruptcy losses saved through the 2005 bankruptcy reform by multiplying an average figure of $41,000 debt discharged by the number of filings in 2005 versus 2006). Such calculations frequently fail to consider what portion of the debt would be uncollectible even in the absence of bankruptcy and, thus, overstate the harm to creditors from bankruptcy relief.

17. *See* Gordon Bermant, *Bankruptcy by the Numbers: What Is "Success" in Chapter 13? Why Should We Care?*, AM. BANKR. INST. J., Sept. 2004, at 20, 67 (noting that discharge after completion of a repayment plan is the dominant debtor-oriented measure of the success of Chapter 13). For an example of this approach, see Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 504–05 (2006) (measuring "debtor fresh start in Chapter 13 based on discharge and refiling rates").

18. *See* Charles Jordan Tabb, *The Death of Consumer Bankruptcy in the United States?*, 18 BANKR. DEV. J. 1, 35–38 (2001) (discussing the then proposed reforms in availability of discharges in what became the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2006)).

income.[19] Although these measures are more likely to capture situations when debt is imposing harms than simply tallying dollars of debt, all financial metrics are limited in their usefulness to measure the cognate harms of overindebtedness. Financial measures may not reveal when debt becomes harmful, and they certainly do not illuminate the nonfinancial harms of overindebtedness.

The singular focus on dollars of debt has obscured the full purpose of legal intervention in consumer credit markets. For example, the point of bankruptcy is not to erase debt for the sake of the act itself. Debt is merely a proxy of the harms of financial distress, just as income and assets are proxies of financial success. Similarly, when the law regulates credit on consumer-protection grounds, the intent is not to prevent borrowing itself, but rather to reduce or to eliminate the harms that can result from unmanageable debt. The problem to be solved is not overindebtedness, but rather the serious and real harms that accompany overindebtedness. But what are the harms of excessive debt? How are they manifested? How severe or enduring are they? How can those harms be measured?

This Article is a first step in the larger endeavor of answering those questions. I articulate two challenges to the current research on excessive debt. The first critique accepts debt as an appropriate measure of welfare but highlights the lack of empirical work on the consequences of excessive debt on individuals and society. The principal shortcoming is a failure to assess the actual problem to be solved—the externalities and costs of debt. Both legal and other social science scholarship has paid little attention to this issue, even as the debt burdens of Americans have ballooned. The second critique posits that debt itself is an impoverished measure of diminished well-being. Drawing on poverty economics and its concern with human capabilities, I make a parallel between the limitations of income to measure poverty and the limitations of debt to measure financial distress. I identify ways in which debt may alter

19. *See* Edward Wolff & Ajit Zacharias, *The Impact of Wealth Inequality on Economic Well-Being*, CHALLENGE, July–Aug. 2007, at 65, 66 (noting that "negative net worth" is synonymous with indebtedness, and that "carrying substantial amounts of debt implies a diversion of household income toward debt service").

individuals' endowments and preferences and how society may condition opportunity for those mired in debt. I suggest a multidimensional framework for studying debt that incorporates study of how debt may affect elements of welfare, such as education, health, work, housing, and the ability to participate in social life. These harms of overindebtedness, which can limit what individuals can do and be, are obscured when researchers solely measure the problem of debt using a dollar metric. I conclude the Article with examples of how empirical research might assess how overindebtedness limits peoples' capabilities to achieve and sustain well-being.

Before turning to these two concerns with the existing work on overindebtedness, I pause to articulate how documenting the harms of debt could inform theory and policy in the consumer credit area. The initial goal is to describe the damage of unmanageable debt, either measured as externalities of debt itself or within a multidimensional space of well-being. These empirical findings would have implications for both *ex ante* and *ex post* policies on consumer credit, including bankruptcy. Regardless of their orientation, all existing theories of bankruptcy that attempt to justify a discharge of debt for individuals rest, to some degree, on eliminating the harms of financial distress.[20] For example, utilitarian theories justify a discharge on the basis that debt-burdened individuals are discouraged from socially productive activity such as maximizing earnings.[21] Yet, there is no evidence that excessive debt actually produces such effects. Similarly, the rehabilitationist view posits that the purpose of debt relief is to rectify the harms to

20. *See generally* HEIDI M. HURD & RALPH BRUBAKER, DEBTS AND THE DEMANDS OF CONSCIENCE: THE VIRTUE OF BANKRUPTCY (forthcoming 2012) (collecting and critiquing existing theories of bankruptcy). Hurd and Brubaker develop a new theory for discharge based on "aretaic duties." *Id.* at 122. Even in this paradigm, however, the aretaic duty arises because it is not virtuous to extract suffering from those who are in a "thoroughly miserable and pitiful state." *Id.* at 126. Such a determination requires empirical knowledge of whether excessive debt brings about such harms.

21. *See id.* at 30–31 (noting that utilitarians believe that "the goal of personal discharge law must be to improve debtors' future economic functioning so as to minimize the economic impact of debt on society as a whole").

individuals from excessive debt.[22] Yet, without knowing the nature of the damage of debt, such theories lack imperative.

Understanding the harms of excessive debt also aids in assessing whether existing systems for debt relief are adequate. A robust definition of the problem the law seeks to solve is a precursor to evaluating the efficacy of legal solutions. Shifting the definitional space from the narrow financial measure of dollars of debt to a multidimensional space for debt that embodies an expansive definition of well-being may reveal limitations of the bankruptcy discharge as a remedy. For example, I hypothesize that an episode of severe debt-induced financial distress, such as those experienced by bankrupt households, may make it difficult for individuals to seek new employment or may result in lasting health consequences. These harms to productivity and well-being continue after individuals discharge their debts in bankruptcy. Thus, when the harm is measured as too many dollars of debt, the discharge is a resounding success. But when the harm is measured along multiple dimensions, the discharge may be an incomplete or inadequate solution. Moreover, it is difficult to make accurate calculi about the costs and benefits of credit regulation without understanding the individual and collective harms of unmanageable debt.

To be sure, the harms of credit restrictions may outweigh the harms of excessive debt, and the appropriate balance may elude regulators. Such determinations should be informed by evidence, however, and not by conjecture or anecdote. By developing a theoretical frame to measure the harms of overindebtedness, I hope to guide empirical research that is sensitive to the economic and social consequences of unmanageable debt.

II. Traditional Constructs of Debt Problems

Since the enactment of the Bankruptcy Code in 1978, bankruptcy policy has been racked with allegations that consumer bankruptcy relief is too generous.[23] Such concerns could

22. *See id.* at 92 (noting that rehabilitationists seek to ensure "that debtors are restored to a position of legal, moral, and psychological equality that allows them to rewrite their lives anew").

23. *See, e.g.*, Lawrence Shepard, *Personal Failures and the Bankruptcy*

have motivated studies of excessive debt harms. As I posit above, it is difficult to assess whether bankruptcy is an adequate solution to unmanageable debt without a grasp on the problems that may accompany unmanageable debt. Yet, there is scant research, particularly on American families, that assesses the consequences of overindebtedness.

The debates on bankruptcy, often ferocious in the years leading up to the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act,[24] took a very different approach. Rather than gauging the generosity of debt relief against the harms of debt, the debate focused on fears of abuse. This drove researchers toward debating the causes of bankruptcy and trying to assess whether people who filed for bankruptcy had the means to repay their debts. For example, the groundbreaking empirical work of Teresa Sullivan, Elizabeth Warren, and Jay Westbrook identified job problems, medical problems, and family break up as the principal causes of bankruptcy.[25] They documented the high debts and low incomes of bankrupt people and the fact that the financial profiles of bankrupt households were more dismal with successive iterations of their research, despite conjectures that the stigma of bankruptcy was declining.[26] Advocates of constricting bankruptcy relief countered with anecdotes of high-income debtors, concerns about the moral hazards of debt relief, and narrower approaches to determining the causality of bankruptcy.[27]

Reform Act of 1978, 27 J.L. & ECON. 419, 423–24 (1984) (describing certain provisions of the Bankruptcy Code of 1978 as "generous," thus "mak[ing] bankruptcy a more attractive option for many debtors").

24. *See* 2005 Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2006) (amending consumer bankruptcy law).

25. *See* TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT 25 (2000) [hereinafter FRAGILE MIDDLE CLASS] (finding that as "medical costs" increase, "job security" becomes more fragile, and the divorce rate "remains at historic highs," the bankruptcy filing rate of middle-class consumers has increased as well).

26. *See* Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 233–39 (2006) [hereinafter *Less Stigma*] (noting that, from 1981 to 2001, the "total debt-to-income ratio rose from 30% of [annual] income to 63%").

27. *See, e.g.*, *Bankruptcy Reform Act of 1999: Hearing on H.R. 833 Before*

Both sides of the debate largely ignored the consequences of financial distress in favor of contesting causality. Embedded in arguments about the deservingness of people for debt relief was an assumption that financial metrics adequately captured the problem of financial distress. In this view, the central question became whether households had enough dollars of income to pay off their dollars of debt.[28] Such a calculation might screen particular people for bankruptcy eligibility, but it cannot itself justify debt relief even for those with the gravest inability to repay their debts. Relief from unmanageable debt must be motivated by the harms attendant to the debt, not merely by the fact that that debt exceeds a dollar benchmark.

In the last few decades, there have been virtually no empirical studies of the consequences of excessive debt. Given the changes in family structure, labor markets, and access to credit since the 1970s, the conclusions of older studies may not describe the current environment. When harms of debt have been recognized, the scholarly treatment of them has been limited. Even accepting debt as an appropriate measure for the harm of financial distress, scholars have barely begun to measure the costs of debt. Conjectures that debt could create externalities

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the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary, 106th Cong. 58 (1999) (statement of Rep. Steven Rothman) (espousing the need to "reinstill a sense of personal responsibility"); Edith H. Jones & James I. Shepard, *Additional Dissent to Recommendations for Reform of Consumer Bankruptcy Law*, *in* NATIONAL BANKRUPTCY REVIEW COMMISSION FINAL REPORT, BANKRUPTCY: THE NEXT TWENTY YEARS 1123, 1134 (2000) (quoting Congressman Pete Sessions in stating that "bankruptcy is 'for some people . . . just another tool of financial management'"); Gail L. Heriot, *Misdiagnosis: A Comment on* Illness and Injury as Contributors to Bankruptcy *and the Media Publicity Surrounding It*, 10 TEX. REV. L. & POL. 229, 234 (2005) (criticizing a study for its construction of "medically related" bankruptcy).

28. *See, e.g.*, U.S. GEN. ACCT. OFFICE, PERSONAL BANKRUPTCY: ANALYSIS OF FOUR REPORTS ON CHAPTER 7 DEBTORS' ABILITY TO PAY 3 (1999), *available at* http://www.gao.gov/archive/1999/gg99103.pdf (analyzing reports that "address a major public policy issue—the amount of income that those who file for personal bankruptcy have available to pay their debts"); Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13 AM. BANKR. INST. L. REV. 665, 671–74 (2005) (describing the means test as measuring whether a debtor has "enough disposable income . . . to fund a workable Chapter 13 plan"); Edith H. Jones & Todd J. Zywicki, *It's Time for Means-Testing*, 1999 BYU L. REV. 177, 178 ("Means-testing . . . embodies the concept that well-off, income-earning debtors should be required to repay what they can to their unsecured, nonpriority creditors.").

have not translated to momentum for empirical study. I describe the existing research largely to glean areas for future empirical investigation rather than to document significant existing knowledge.

To at least some degree, scholars addressing the purpose of consumer bankruptcy have had to confront the consequences of financial distress.[29] Several authors have hypothesized that financial distress from debt imposes social losses and have posited that bankruptcy relief may curb those externalities.[30] Writing thirty years ago, John Weistart noted a possible economic justification for liberalized access to bankruptcy discharge:

> The point to be investigated is whether excessive debt, with its attendant pressure on family and emotional stability and job security, does not so inhibit productivity that there would be a net social gain from terminating costly collection actions, excusing the debts, and giving the poorer-but-wiser debtor a second chance.[31]

Thomas Jackson echoed this utilitarian approach, hypothesizing that debtors who cannot pay off their debts from their anticipated income would revert to leisure rather than work.[32] The externality arises because "the social cost of lost productivity exceeds the debtor's personal loss in shifting to leisure."[33] This is perhaps the most commonly theorized harm of debt, often

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29. This confrontation results in efforts to justify a discharge of debt as a crucial element of bankruptcy. A consumer bankruptcy system has other purposes, including maximizing recovery to creditors, reducing inefficiencies in individual collection activity, and ensuring a particular order of distribution to creditors. These purposes may be justified on bases other than individual or social harms of debt.

30. *See, e.g.*, THE GRIFFITHS COMM'N ON PERS. DEBT, WHAT PRICE CREDIT? 13 (2005), *available at* http://centreforsocialjustice.org.uk/client/downloads/WhatPriceCredit.pdf (describing how "personal household debt has become a major issue of public concern"); Mann & Porter, *supra* note 7, at 296 (describing the "social losses" experienced by "households in distress" from debt).

31. John C. Weistart, *The Costs of Bankruptcy*, 41 LAW & CONTEMP. PROBS. 107, 111 (1977).

32. *See* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1421 (1985) (predicting that, in some cases, debtors "may shift from work to leisure" if they will never be able to repay their debts with personal income).

33. *Id.*

expressed as a problem of human capital.[34] The normative goal of a bankruptcy discharge is to "redeploy" such capital by changing a debtor's incentives to work.[35] Put more colorfully, "[S]ociety as a whole also loses when moping bankrupt debtors are distracted from working at their highest and best use level of productivity because they are instead coping with financial ruin."[36] These scholars may be correct that excessive debt alters a debtor's productivity and labor efforts, but they have not calculated such harms. I am disposed to agree with the utilitarian insight that debt probably alters economic incentives and creates social loss. Indeed, the hypothesis of this Article is that such damage occurs. But to date, there is little evidence of how overindebtedness may affect labor processes and productivity.[37]

Perhaps more importantly, theories framed on utilitarian terms such as "redeployment of human capital" and "externalities" may mask the complex harms of financial distress.[38] I discern two problems. First, defining debt as the agent of harm does not illuminate the causal pathway of debt's negative effects. Debt may operate on incentives, but it is the incentives themselves that alter an individual's behavior.

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34. *See* RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS 50 (2006) [hereinafter CHARGING AHEAD] ("Another category commonly noted is the loss to the economy of the diminished productivity of people in financial distress."); Richard M. Hynes, *Non-Procrustean Bankruptcy*, 2004 U. ILL. L. REV. 301, 340–43 (describing the "serious" possibility that debtors may forgo "productive labor" and become "a drain on the public fisc" or cease "to contribute to such fisc through taxation").

35. *See* Ronald J. Mann, *Making Sense of Nation-Level Bankruptcy Filing Rates, in* CONSUMER CREDIT, DEBT AND BANKRUPTCY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES 225, 242 (Johanna Niemi, Iain Ramsay & William Whitford eds., 2009) [hereinafter *Making Sense*] ("[S]ociety gains considerably from the discharge [of debt], because it is central to the redeployment of the debtor's human capital.").

36. John A.E. Pottow, *Private Liability for Reckless Consumer Lending*, 2007 U. ILL. L. REV. 405, 412.

37. One example of such work is Jinhee Kim & E. Thomas Garman, *Financial Stress and Absenteeism: An Empirically Derived Model*, 14 J. FIN. COUNSELING & PLAN., no. 1, 2003 at 31 (finding that financial stress, which includes concerns regarding money owed, is positively associated with absenteeism from work).

38. *See Making Sense*, *supra* note 35, at 242–43 (discussing how debt discharge allows a debtor to redeploy its human capital); Hynes, *supra* note 34, at 340–43 (discussing externalities that may stem from debt discharge).

Anthony Kronman perhaps has come closest to recognizing such effects:

> One reason for giving the debtor a fresh start is to counteract the self-hatred he may feel, having mortgaged his entire future in a series of past decisions he now regrets. Whatever its macroeconomic function, the bankruptcy discharge has a moral purpose as well—to restore to the debtor some measure of confidence in his capacity to arrange his future as he wishes, free from the dead hand of the past. Without such confidence, the debtor may lose even that minimum of self-respect that is a condition for his taking an interest in himself and his own life.[39]

Similarly, Teresa Sullivan, Elizabeth Warren, and Jay Westbrook have noted that bankrupt people experience "self-loathing and humiliation in recognition of what their spending habits have brought them to."[40] Although couched in rehabilitationist terms, there is a behavioralist-utilitarian perspective in the observations: excessive debt could alter a debtor's decision making in ways that lower utility. For example, debtors could assess financial risk differently in the aftermath of overindebtedness. Such perceptions could lead to enduring changes in a debtor's labor market participation and allocation of their human capital. The bankruptcy literature, which takes debt itself as the operative harm, obscures such effects. The immediacy of discharge as a legal remedy leads to a conclusion that debt relief produces instant improvement in productivity. However, excessive debt may create complex and enduring harms that do not abate in direct proportion to a reduction in debt.

The second shortcoming of the utilitarian lens is that it may impose unduly narrow and abstract limitations on the types of harm it "sees." The rational actor is also a person with a psyche—a spouse, a parent, or a social actor. Focusing on the amount of an individual's debt seems to have reinforced an atomistic view that identifies a single person—the borrower—as the locus of harm. But the harms of debt may reverberate from the indebted individual to that person's family, workplace, and larger community. An individualistic approach focused on dollars of debt

39. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 785–86 (1983).

40. FRAGILE MIDDLE CLASS, *supra* note 25, at 139.

makes it difficult to discern the full range of social loss associated with excessive debt, including harms suffered by those who do not have any debt themselves. Scholars have noted that more intimate externalities could arise from overindebtedness, as when family members or friends depend on the debtor for support.[41] Implicit here is the idea that financial distress alters a debtor's willingness or ability to support such dependents, harming these dependents' "financial or psychological well-being."[42] Ronald Mann has written that "children and spouses suffer substantially in the event of financial distress of a wage-earning spouse."[43] Yet, the work he cites to support that statement is thin.[44] Professors Sullivan, Warren, and Westbrook hypothesized that economic difficulties—in particular, the uncertainty and reversal that can accompany unmanageable debt—may lead to marital strain and divorce.[45] Ten years and several studies of bankrupt families have elapsed, but the causal pathway between divorce and debt remains murky.[46]

Sociological literature offers a modest amount of empirical research on families who struggle to make ends meet. These studies are often concerned with people with low socioeconomic status, who may also be in financial distress. The work rarely focuses on debt or financial metrics, but instead, is usually

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41. *See* Jackson, *supra* note 32, at 1419 (arguing that "[f]amily members and . . . close friends who depend on another individual for support need [debt] discharge to safeguard" their own interests).

42. *Id.*; *see also* Pottow, *supra* note 36, at 411 ("The debtor's family and others in her circle of intimates suffer too, experiencing the very tangible psychological and monetizable costs when a debtor endures general default.").

43. CHARGING AHEAD, *supra* note 34, at 49.

44. *Id.* at 49–50 n.18 (citing Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985) and Richard M. Hynes, *Non-Procrustean Bankruptcy*, 2004 U. ILL. L. REV. 301).

45. *See* Deborah Thorne, *Women's Work, Women's Worry? Debt Management in Financially Stressed Families*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 136, 136–53 (Katherine Porter ed., 2012) [hereinafter BROKE]; FRAGILE MIDDLE CLASS, *supra* note 25, at 195 ("A steady state of little money may not contribute to marital disruptions so much as sharp drops, uncertainties, and sudden reversals.").

46. *See* Jonathan D. Fisher & Angela C. Lyons, *Till Debt Do Us Part: A Model of Divorce and Personal Bankruptcy*, 4 REV. ECON. HOUSEHOLD 35, 48 (2006) ("[F]uture research on marital disruption needs to more carefully model the role that financial distress plays within a marriage . . . .").

anchored in the traditional sociological construct of class. Although class may have a powerful connection to debt, the existing literature does not explore such relationships.[47] Thus, the social science literature is primarily useful to prompt consideration of whether the harms of excessive debt may mimic or diverge from the harms of poverty, working-class membership, or downward socioeconomic mobility. While many people accumulate debts after an income or job loss, the experience of debt carries with it a set of experiences that are distinct from the financial distress of poverty.[48] For example, debt collectors and garnishment are uniquely a function of debt.[49] They have no direct association with income, poverty, or working-class status. Borrowing, even for necessary consumption like food, has a voluntary aspect to it. This may result in different stigmatization or internalized blame of debt-induced financial distress compared to poverty. Similarly, what I have termed the "off-label" use of credit scores for employment and rental housing may lead to lasting labor market and educational constraints (via public school access tied to housing) from excessive debt.[50] Such harms originate differently than the consequences of low income or a

47. A few scholars have focused on wealth—*see* LISA A. KEISTER, WEALTH IN AMERICA: TRENDS IN WEALTH INEQUALITY 259–62 (2000) (describing the distribution, ownership, and accumulation of wealth for middle- and upper-class households); DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 43–44, 53 (1999) (describing "possible conditions that foster black-white differences in wealth accumulation")—but this work has primarily been concerned with asset accumulation and not debt.

48. I use the term "poverty" here to refer to a sustained condition of financial hardship resulting from low or nonexistent income.

49. In fact, some types of debt collection are relatively uncommon experiences for the lowest-income households because of asset and income exemptions from coercive collection.

50. *See* Katherine Porter, *More Supreme Court Action on Credit Issues*, CREDIT SLIPS (Sept. 28, 2006, 12:39 PM), http://www.creditslips.org/creditslips/2006/09/more_supreme_co.html (last visited Jan. 7, 2012) (describing "off-label" uses of credit reports as "those not concerning a decision to grant credit—such as a decision to insure someone") (on file with the Washington and Lee Law Review); Deborah Thorne, *Personal Bankruptcy and the Credit Report: Conflicting Mechanisms of Social Mobility*, J. POVERTY, Dec. 1, 2007, at 23, 28 ("Given the breadth of information that credit reports provide . . . potential employers, owners of rental housing, utility companies, and insurance agents typically request copies of applicants' credit reports.").

loss of socioeconomic status and may differ in magnitude and duration.

Notwithstanding this uncertainty about the similarity of different types of financial hardship, the externalities of debt almost certainly have at least some parallels to poverty, downward mobility, and low socioeconomic status. The social science work on those problems points to an array of harms that extends beyond the productivity and familial harms mentioned in the legal literature.[51] The most pointed work on the negative consequences of debt is a chapter in David Caplovitz's study of debtors sued for delinquent consumer debts in 1967.[52] He finds that many debtors report experiencing job loss, health problems, or marital strain because of their "debt troubles."[53] This research provides support for the idea that debt may lead to a variety of harms, although both the legal landscape and the structure of the credit markets have changed dramatically since 1967. Additionally, the sample of defendants in debt-collection lawsuits may not be representative of those with unmanageable debts. Creditors ostensibly choose to sue debtors who they believe have income or assets and do not sue those who are judgment proof.[54] But most of those who file for bankruptcy—a group overwhelmingly mired in debt—have not been sued, garnished, or had property taken.[55] The population of people with unmanageable debt is likely both different and much larger than the population of debt-collection defendants.

David Caplovitz extended his work on financial distress in a comprehensive study, *Making Ends Meet: How Families Cope*

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51. *See supra* notes 28–46 and accompanying text (critiquing works that describe the effects of debt on family and productivity).

52. *See* DAVID CAPLOVITZ, CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT 273–89 (1974) (describing the "impact of the debt problem" on various aspects of a debtor's life).

53. *See id.* at 274–89 (finding that "debt troubles" can be "extremely costly and debilitating" due to their effects on a debtor's employment, health, and marriage).

54. *See* Mann & Porter, *supra* note 7, at 309–10 (describing various difficulties that creditors encounter when trying to collect from debtors with no assets).

55. *See id.* at 308–10 (describing how, under Chapters 7 and 13, debtors escape litigation, garnishment, and foreclosure).

with Inflation and Recession.[56] Using interview data from four urban areas, he offers a detailed portrait of how households were affected by, and responded to, inflation and recession in the late 1970s.[57] The study examined a cross-section of households, including those who reported few, if any, actual negative effects.[58] Nonetheless, his insights on how households respond to a generalized economic downturn are intriguing and suggest consequences that might accompany debt-induced financial distress.[59] In particular, his identified association between financial well-being and mental health could be replicated in the context of studying the harms of debt.[60]

Other researchers have used the traditional sociological lens of class to study financial hardship. Lillian Rubin's interview-based studies examine working-class families, defined by occupation.[61] She focuses on how the low incomes and other outcomes (such as limited control of one's job prospects) that accompany working-class occupations strain the happiness and stability of family life.[62] She describes the ways that financial

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56. *See* DAVID CAPLOVITZ, MAKING ENDS MEET: HOW FAMILIES COPE WITH INFLATION AND RECESSION 253 (1979) (finding that "inflation and recession did hurt many families" throughout the 1970s, but that "there was no wholesale breakdown of social or psychological life because of these economic setbacks").

57. *See id.* at 11 (studying "four major urban areas" to determine how families were "affected by and have responded to the twin calamities of inflation and recession").

58. *See id.* at 22–36 (finding that mostly "minority groups and the poor" reported being affected by the negative aspects of the recession, such as "reduced income and fear of job loss").

59. *See id.* at 91–157 (describing the consequences of inflation and the recession for various classes of families and the strategies that they used to cope with these problems, including "trying to maintain [their] standard of living by going into debt").

60. *See id.* at 155 (finding that "[t]hose whose incomes had fallen behind rising prices were much more likely to show mental stress . . . than those whose incomes kept up with rising prices").

61. *See, e.g.*, LILLIAN B. RUBIN, FAMILIES ON THE FAULT LINE: AMERICA'S WORKING-CLASS SPEAKS ABOUT THE FAMILY, THE ECONOMY, RACE, AND ETHNICITY 30–31 (1994) [hereinafter FAULT LINE] (defining the "working-class" as individuals "who work at the lower levels of the manufacturing and service sectors of the economy"); LILLIAN B. RUBIN, WORLDS OF PAIN: LIFE IN THE WORKING-CLASS FAMILY 10 (2d ed. 1992) [hereinafter WORLDS OF PAIN] (describing use of "intensive interviews" to conduct her research on working-class families).

62. *See* WORLDS OF PAIN, *supra* note 61, at xxiv–xxv, 204–07, 210

pressures harm parenting and spousal relationships, for example, by damaging ideas of self-worth.[63] In a later work, she emphasized the goal of documenting the "economic and social realities that make family life so difficult today and that so often destroy it."[64]

A decade later, Katherine Newman made a similar exploration of the middle class. Her ethnography, *Falling from Grace*, documented the reactions of middle-class Americans who were experiencing downward economic mobility.[65] Newman focuses on four types of middle-class households that experience income loss, including unemployed managers and executives and divorced mothers.[66] She identifies the cultural frames that these groups of people use to understand their economic dislocation.[67] Her work offers a rich description of how individuals understand financial distress, but it does not attempt to measure the harms of such distress beyond individuals' own struggles to make sense of their downward mobility.[68] As a result, her work largely fails to articulate any normative or consequentialist explanation of why society should mitigate or prevent financial distress.

The existing work provides little knowledge about the contemporary harms of excessive debt. Sociologists have largely overlooked debt as a peculiar source of harm, eschewing it in

(describing both the economic realities of working-class life and their effects on the quality of life for working-class families).

63. *See id.* at 55 (stating that society's "acceptance and transmission of definitions of self-worth that are tied to material accomplishments and acquisitions" have inflicted significant injuries "upon the working-class").

64. FAULT LINE, *supra* note 61, at 234.

65. *See* KATHERINE S. NEWMAN, FALLING FROM GRACE: THE EXPERIENCE OF DOWNWARD MOBILITY IN THE AMERICAN MIDDLE CLASS ix–x (1988) (studying the "experience of downward mobility" for middle-class families and the "cultural forms" that emerge from that experience).

66. *See id.* at 16–18 (examining four different groups of downwardly mobile, middle-class Americans, including former managers and executives and divorced mothers).

67. *See id.* at 11 ("The absence of socially validated pathways for dealing with economic decline has important consequences for the downwardly mobile. They often mourn in isolation and fail to reach any sense of closure . . . . Their disorientation suggests how critical culture is in 'explaining' to individuals the meaning of their fate.").

68. *See id.* at 231 ("When economic displacement strikes, it not only jars the victim's own sense of position, it disrupts a family trajectory, weakening its sense of forward motion or upward mobility.").

favor of income- or class-based approaches.[69] The legal scholarship on bankruptcy examines debt but largely focuses on debating the causes of overindebtedness.[70] It has not made an intense or sustained effort to explore the consequences of debt, or even to explore how the consequences of overindebtedness may vary depending on the causality of the debt problems.[71] As John Pottow has recently observed, "To be sure, the case for negative bankruptcy externalities is more intuitive than empirical at this juncture."[72] Because we have only a shallow understanding of the harms of excessive debt (and how they may converge or diverge with other forms of financial hardship), it is difficult to develop a crisp plan for empirical investigation.[73] The existing legal and

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69. *See supra* notes 52–68 and accompanying text (critiquing the studies of several sociologists who identify class and income as sources of harm rather than debt).

70. *See supra* notes 25–28 and accompanying text (critiquing legal works that focus on the causes of overindebtedness).

71. Stephen Lubben observed to me that the effects of unmanageable debt may vary depending on whether the debt is incurred following an exogenous financial shock, such as an unanticipated job layoff, or is incurred as part of a pattern of compulsive overconsumption. I agree with this perspective but keep the focus of this Article firmly on the consequences of unmanageable debt, rather than its causes, to advance the theoretical framework for examining the impact of overindebtedness on human welfare. The causation literature on bankruptcy is rich, and future empirical work on the harms of debt should certainly engage it. I do note, however, that American bankruptcy law does not require debtors to have "good cause" for their debt problems to qualify for a bankruptcy discharge. Indeed, the bankruptcy process usually does not inquire at all into the reasons that consumer debts were incurred. This supports my assertion that much of the normative justification for bankruptcy and credit regulation is to reduce the harms of overindebtedness to *all* debtors, not to selectively relieve the deserving debtors of those harms.

72. Pottow, *supra* note 36, at 412. From the context of the article, which articulates an argument for a tort of reckless lending, I take Professor Pottow to mean externalities incurred in the period of debt-induced financial distress that typically precedes bankruptcy, rather than externalities that result from the bankruptcy filing itself.

73. Professor John Pottow has compared the legal scholarship on the harms of debt with the research on the harms of smoking and concluded as much. "The sophistication of Hanson and Logue's analysis (and that of the studies they critique) demonstrates that their field is light years ahead of bankruptcy scholarship with respect to the depth of its empirical research into the scope and costs of externalities in one product market." *Id.* at 412 n.33 (referring to analysis in Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163 (1998)).

sociological literature offers a starting point for identifying possible harms of overindebtedness.

III. The Multidimensional Space of Poverty

The prior Part noted the lack of empirical work on the harms of having unmanageable debt burdens. In so doing, it did not challenge measuring the problem of overindebtedness using dollar metrics, such as debt-to-income ratios, absolute dollars of debt, or negative wealth. It accepted that, at least when the debt burden crosses a threshold into being unmanageable, that debt is inversely proportional to individuals' welfare and that the magnitude of overindebtedness is roughly proximate to the degree of harms from overindebtedness.

In this Part, I critique the validity of using financial metrics as the exclusive proxy to measure the problems of unmanageable debt. I draw a parallel between using the singular measure of income to assess the harms of poverty and using the singular measure of debt to assess the harms of overindebtedness, and argue that such approaches are plagued with similar weaknesses. I describe the alternative multidimensional framework for measuring poverty harms that assesses people's capabilities to achieve aspects of welfare such as health and access to markets. In subsequent Parts, I analyze how such a multidimensional measure of welfare might be applied to study the harms of debt-induced financial distress.

Traditional measures of poverty focus on income.[74] Aggregate economic indicators such as Gross Domestic Product (GDP) are used to compare the problem of poverty between countries. Another measurement technique is counting all people whose incomes were below a determined income threshold.[75] These

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74. *See* Amartya Sen, *Conceptualizing and Measuring Poverty, in* POVERTY AND INEQUALITY 30, 32 (David B. Grusky & Ravi Kanbur eds., 2006) ("The 'space' of incomes has been the principal—often the unique—focus of attention of those who have to examine the trend of inequality and poverty in the world . . . ."); Amartya Sen, *Issues in the Measurement of Poverty*, 81 SCANDINAVIAN J. OF ECON. 285, 293–96 (1979).

75. *See* François Bourguignon, *From Income to Endowments: The Difficult Task of Expanding the Income Poverty Paradigm*, *in* POVERTY AND INEQUALITY, *supra* note 74, at 76 (describing the "income poverty paradigm" that dominates

approaches have been criticized on several grounds, fundamentally, as Martha Nussbaum has expressed, for being "obtuse in human terms."[76] I see two propositions in the critiques of income/wealth measures of poverty: first, that aggregate measures fail to recognize individual level effects;[77] and second, that income and wealth are only instruments to human welfare, not ends themselves.

David Grusky and Ravi Kanbur conclude there is a "consensus" among both sociologists and economists that poverty has negative individual-level effects on "health, political participation, and a host of other life conditions."[78] Concern with individual-level effects can derive from normative or consequentialist perspectives.[79] Poverty may offend the public because it denies people fundamental human rights.[80] Alternatively, we may wish to reduce poverty to halt its negative externalities.[81] Poverty may produce harms that extend beyond the individual or even the individual's household to include collective effects. Within the space of income, it can be difficult to identify such harms. Counting the number of poor, for example, only indirectly incorporates the distributional harms of poverty because the distribution may be relevant in determining the income threshold for "poor." Yet the effects of inequality (relative deprivation) may be different from poverty of income (absolute

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the economic research on poverty).

76. Martha C. Nussbaum, *Poverty and Human Functioning: Capabilities as Fundamental Entitlements*, *in* POVERTY AND INEQUALITY, *supra* note 74, at 47.

77. A parallel critique might apply to sociologists who have relied on a few big categories, such as social class or occupational prestige codes, to measure social stratification. *See* David B. Grusky & Kim A. Weeden, *Does the Sociological Approach to Studying Social Mobility Have a Future?*, *in* MOBILITY AND INEQUALITY: FRONTIERS OF RESEARCH IN SOCIOLOGY AND ECONOMICS 85, 100–03 (Stephen L. Morgan, David B. Grusky & Gary S. Fields eds., 2006) (advocating a multidimensional approach to the study of sociology and economics).

78. David B. Grusky & Ravi Kanbur, *The Conceptional Foundations of Poverty and Inequality Measurement*, *in* POVERTY AND INEQUALITY, *supra* note 74, at 1.

79. *Id.*

80. *Id.*

81. *Id.*

deprivation) and equally troubling for those concerned with human welfare and economic development.[82]

Amartya Sen, Martha Nussbaum, and others have exposed the conceptual shortcoming of relying principally on income to measure human welfare. In numerous works, Sen has questioned "whether the space of incomes, despite its relevance, can really be the appropriate informational basis for assessing *equity and social justice in general*, and if it is inadequate, why it is so?"[83] In his view, income is merely a means to achieving quality of life.[84] He has argued that a rich appreciation of the problem of poverty requires looking directly at potential and achieved welfare.[85] In his words, "If life consists of various things that people are able to do or be (such as being able to live long, to be in good health, to be able to read and write, and so on), then it is the capability to function that has to be put at the center state of assessment."[86] This "capabilities approach" permits comparisons between individuals along several dimensions of human functioning.[87]

While there is disagreement about the key capabilities, most scholars identify the following elements: bodily health, adequate shelter, education, the right to employment, social bases of self-respect that permit social participation, and the right to be free from anxiety and fear.[88] In this multidimensional framework, a lack of income may correlate with poverty but is not poverty per se. Rather, the problem with poverty is the way in which it constrains individuals from pursuing or achieving fundamental

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82. The failure to take inequality of distribution into account is a principal critique of the space of incomes for poverty studies. Amartya Sen, *Poverty: An Ordinal Approach to Measurement*, 44 ECONOMETRICA 219, 219–22 (1976); *see also* Sen, *Conceptualizing and Measuring Poverty, supra* note 74, at 36–37. The classic example of this problem is South Africa, which fares well under a Gross National Product (GNP) per capita approach because of its relatively high GNP, despite harboring some of the sharpest inequalities between rich and poor (along racial lines) in the world.

83. Sen, *Conceptualizing and Measuring Poverty*, *supra* note 74, at 34.

84. *Id.*

85. *Id.*

86. *Id.*

87. *See* Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 279–85 (1998) (detailing the advantages of a capabilities approach).

88. *See id.* at 287–88.

capabilities. This different conception of human welfare recognizes income as an instrument of good living, not as a good life itself. Financial metrics may powerfully correlate with capability achievement, particularly in some societies. Conceptually, however, they are incomplete tools to assess people's well-being.

A multidimensional approach that incorporates financial measures as one element of welfare assessment is gaining acceptance in research and public policy. The United Nations has recognized the benefits of a multidimensional approach, cautioning that the pursuit of financial wealth has often obscured the "simple but powerful truth" that the "people are the real wealth of a nation."[89] *Science* magazine featured research on the negative correlation in the United States between average wages and reports of subjective well-being. It concluded that science is developed enough to support using broad measures of quality of life in place of income to measure the well-being of a population.[90] In September 2009, French President Nicolas Sarkozy announced his commitment to have France develop and use alternate measures to assess prosperity instead of GDP, average income, or poverty counts.[91] While some condemned the maneuver as a political tactic to deflect criticism about France's lagging economic growth,[92] Sarkozy created a commission, which included five Nobel laureates, to make recommendations for measuring the nation's welfare, including a component part for individual citizens' welfare.[93] The commission struggled to produce tractable metrics but suggested indicators such as educational attainment, opportunity for leisure, personal freedom, health, and inequality

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89. *Human Dev. Report 1990*, UNITED NATIONS DEV. PROGRAMME ch.1 at 9, http://hdr.undp.org/en/media/hdr_1990_en_chap1.pdf..

90. Richard Layard, *Measuring Subjective Well-Being*, 327 SCIENCE 534, 534 (2010).

91. David Gauthier-Villars, *For France, a Joie de Vivre Index*, WALL ST. J., Sept. 15, 2009, at A11.

92. *See* Brian Domitrovic, *Gross Domestic Happiness?*, WALL ST. J., Sept. 28, 2009, at A25 (citing possible political motivations behind the shift away from GDP-based assessment, which include "laggard" economic growth).

93. Roger Bate, *Measuring the Good*, WALL ST. J. (Oct. 13, 2009), *available at* http://online.wsj.com/article/SB10001424052748703746604574462941885608188.

indices.[94] Notably, the commission did not articulate how to weight these components in assessing individual welfare or how to aggregate individual-level measures with societal-level measures of well-being.

Indeed, the major challenge to a multidimensional approach to welfare may be practical rather than conceptual. It is difficult to elaborate on the relevant dimensions and perhaps even more difficult to design adequate measures for those dimensions.[95] Francois Bourguignon has attempted to impose some order on the multidimensional approach by delineating three broad categories of concern.[96] He sees welfare as the result of the interaction between an individual's endowments, an individual's preferences, and a set of parameters imposed by society that condition an individual's choices.[97] The first element, endowments, includes measures of an individual's assets at a given moment, such as health and education.[98] The second element, preferences, refers to an individual's choices and desires to achieve welfare.[99] The third element, conditions, are limitations on the deployment of an individual's endowments such as the price of goods, access to credit and labor markets, and public goods, such as the social institutions available to an individual.[100] Harms to welfare occur in the form of unequal endowments, societal constraints to individual achievements, and the prevalence of maladaptive preferences.[101]

Even within the constructs of endowments, conditions, and preferences, challenges abound for theorists and empiricists alike. A multidimensional approach to welfare arguably gives weight (although almost certainly not equal weight) to each of these elements, and so each element must be assessed in some

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94. *Id.*; *see also* Gauthier-Villars, *supra* note 91 (discussing the Sarkozy commission).

95. *See* Bourguignon, *supra* note 75, at 89–93 (discussing various approaches of measuring poverty).

96. *Id.* at 83–85.

97. *See id.* at 80–93 (describing different approaches to comparing individuals in multidimensional model).

98. *Id.* at 83–84.

99. *Id.*

100. *Id.*

101. *Id.* at 78.

replicable and ostensibly quantifiable way. Some dimensions, such as level of education, are susceptible to concrete measure with well-worn metrics. In general, many endowments have existing measures, whereas conditions and parameters are much harder to observe. An illustrative example is the constraints on access to labor markets. One perhaps cannot accurately rely on the number of people who got jobs to measure how many people did not get jobs. Indeed, the only way to estimate rationing in at least some markets may well be survey research, which is expensive and raises its own set of measurement concerns.

Preferences pose particular challenges for a capabilities approach over a multidimensional space of bare outcomes. Accepting the validity of individuals' preferences transforms the goal from the production of a certain level of well-being to equalization of endowments and constraints. For example, if we respect an individual's greater preference for leisure, then we should not condemn that person's failure to achieve a particular outcome (such as working full time to earn a high income) as an actual failure. In this view, the goal is to ensure that all people are capable of achievement—not to produce identical outcomes. On the other hand, many sociologists accept the idea of maladaptive preferences; they reject a conception of preferences as fixed and unaffected by changes in personal circumstances.[102] To the extent that people's preferences are malleable and may be altered by societal conditions and constraints, measuring preferences is another dimension to see reductions in well-being. Lack of income or overindebtedness may change people's preferences for risk, lengthen or shorten people's time horizons, or force people to develop different self-control habits.

While scholars still wrestle with how to apply a multidimensional framework to empirical research, the approach has expanded poverty and inequality research.[103] The idea of a multidimensional space for poverty has continued to erode the primacy of income as a sufficient measure of well-being and inspired debate about whether the move from income to social

102. *See* Grusky & Kanbur, *supra* note 78, at 9–10 (arguing that the assumption of fixed preferences is "no longer tenable").

103. *See id.* at 2 (arguing that "conceptual ground clearing" is necessary to make progress with poverty).

class merely replicates the disadvantages of a unitary measure. It has pushed utilitarian theorists to examine whether the assumption of a rational actor model is wholly accurate for understanding the effects of poverty and how preferences may be altered by financial hardship. The thrust of these arguments is that either class or income can be excessively abstract and insensitive to human welfare.[104] As Martha Nussbaum has written, the capabilities approach supplies "a moral and humanly rich set of goals for development "in place of 'the wealth and poverty of the economists,' as Marx so nicely put it."[105]

IV. An Expanded Framework for Understanding the Harms of Overindebtedness

I now turn to the task of developing a multidimensional space for excessive debt, building on the poverty framework described above. In so doing, I consider places where the multidimensional approach articulated for studying poverty and inequality may be an imperfect fit for assessing the connection between overindebtedness and welfare. My primary goal is to articulate dimensions for empirical investigation and to identify some of the obstacles to such work.

At the outset, I acknowledge that amount of debt, especially as measured against available assets and income, is surely *one* appropriate basis for assessing the harms experienced by bankrupt families. Indeed, in many ways, it must be so. Unmanageable debt is the unique feature of the type of financial distress that characterizes bankrupt households, and the elimination of debt can free up income and return families to positive wealth. And, as Sen has conceded in the context of thinking about income deprivation as a measure of poverty, wealth is clearly a powerful general tool for ensuring a household's well-being and preventing deprivation.[106] Debt and

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104. *See* Sabina Alkire, *Choosing Dimensions: the Capability Approach and Multidimensional Poverty* 2 (Oxford Poverty & Human Dev. Initiative, Working Paper No. 88), *available at* http://www.chronicpoverty.org/uploads/publication_files/WP88_Alkire.pdf ("[I]ncome data alone are perhaps the crudest form of measurement.").

105. Nussbaum, *supra* note 76, at 52.

106. Sen, *Conceptualizing and Measuring Poverty*, *supra* note 74, at 33.

income are both useful proxies of a household's welfare. And, because these financial characteristics are relatively easy to measure and incorporate into models, they should remain useful tools for assessing quality of life.

This Article does not seek to displace financial metrics but, instead, suggests their limitations by considering the actual effects of debt-induced financial distress—how overindebted individuals live, work, parent, plan, learn, participate in society, etc. To understand the myriad ways that overindebtedness may result in reduced welfare, we need more than a diagnostic tool that a problem exists. We need instruments to measure the symptoms of the problem. It is in this way that the capabilities approach used in poverty research may expand our understanding of overindebtedness.

The problem of excessive debt is not that it reduces wealth per se but that it harms people's capacity for well-being. To construct a multidimensional space for studying the problem of overindebtedness, I build off the three components in François Bourguignon's model for welfare: an individual's endowments or assets, an individual's ability to use those endowments through social or economic conditions, and an individual's preferences to use his or her endowments.[107] The relevant dimensions are sometimes at the individual level, such as endowments or preferences, and sometimes at the societal level, such as parameters that inhibit individuals' capacities to achieve well-being. Drawing on the small body of prior research, I identify specific endowments, conditions, and preferences that seem like promising areas for investigating the harms of overindebtedness.

Endowments are qualities of an individual that are available to improve one's welfare.[108] The classic example, of course, is wealth.[109] The capabilities frame recognizes wealth as only one

107. Bourguignon, *supra* note 75, at 83–84. Bourguignon excludes preferences from his later model, saying that because these determinants are in the control of an individual, they should not be ingredients in measuring poverty. *See id.* at 101. I disagree. I take at least some subset of preferences to be malleable and responsive to the experience of poverty or debt, and thus I believe that measurement of preferences is an important component to assessing how poverty or debt shapes welfare.

108. *Id.*

109. *Id.*

measure of welfare.[110] It takes wealth largely to be a *means* of good living, and conversely, negative wealth, which occurs because of debt, as a reduction in the *means* of good living.[111] Wealth is a better endowment measure than consumption, particularly in the United States where consumption is often financed by debt. Because consumption will rise in tandem with debt but may have opposite effects of well-being, it is an unreliable marker of well-being for indebted individuals.[112] Wealth nets out such effects, taking into account the debt burdens that accompany consumption or asset accumulation.

Debt can cause people to diminish their wealth, either voluntarily, by selling assets to pay debts, or involuntarily, when creditors resort to coercive processes for debt collection. Although this relationship is straightforward, the empirical research on the connection between asset-building and borrowing is incomplete. Research suggests that debtors in the United States are relatively infrequently subjected to coercive processes and, perhaps, that such processes have not grown in proportion to the rising debt loads of households.[113] Longitudinal research on households in debt could monitor how asset levels vary with debt burdens, but no appropriate data set currently exists.[114] We know

110. Sen*, Conceptualizing and Measuring Poverty*, *supra* note 74, at 34.

111. *Id.*

112. A similar problem with consumption arises with smoking. In a consumption model, spending on cigarettes counts as an increase in well-being, although it is clearly counter to good health. *See* Grusky & Kanbar, *supra* note 78, at 9 (discussing two World Bank reports, one documenting the social costs of smoking in developing countries and the other counting increased spending on cigarettes as a decrease in poverty).

113. *See, e.g.*, TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA 331–33 (1989) [hereinafter AS WE FORGIVE OUR DEBTORS] ("Creditors have not organized their information systems to detect and halt credit abuse."); Richard M. Hynes, *Credit Markets, Exemptions, and Households with Nothing to Exempt*, 7 THEORETICAL INQUIRIES L. 493, 498 (2006) (noting that "many creditors may abandon collection efforts without seeking a judgment").

114. The Federal Reserve Board's Survey of Consumer Finance and the 2007 Consumer Bankruptcy Project, a collaboration of academic researchers (including the Author), collect data from about 2,000 households. The difficulty is that the Survey of Consumer Finance, designed to be representative of the U.S. population, has in absolute numbers only a relatively small number of individuals who have unmanageable debt, for example as measured along

very little about how debt burdens alter asset accumulation or, alternatively, affect individuals' earnings trajectories.[115] Even for assets, the dimension that most closely relates to debt, the consequences of excessive debt are not extensively documented.

Other important endowments that may be altered as a result of overindebtedness are education, job training, and health. In the context of studying intragenerational mobility of adults, I would add family resources as an important endowment. An individual with extended family resources or a spouse/partner may ask those people to make financial contributions or enter the labor market to cope with overindebtedness. In examining the harms of debt-induced financial distress, these endowments may vary over the life course. While a middle-aged adult may have a fixed endowment of education (given the small likelihood of returning to school), the health status of an adult may fluctuate in the future. For younger adults, education and job training may be immediately subject to the effects of debt, such as when an individual drops out of college or is denied a promotion at work because of his poor credit.

The most extensive research on the relationship of overindebtedness to an endowment explores whether there is a negative relationship between health and debt problems. While

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criteria such as credit denials, late payments, or bankruptcy filings. The Consumer Bankruptcy Project is by design only a sample of people in bankruptcy and is not representative of all households, such as those with relatively modest debt burdens. Neither survey is longitudinal, although the Consumer Bankruptcy Project has had a modest panel component in the past. *See* Brian K. Bucks, *Out of Balance?: Financial Distress in U.S. Households*, *in* BROKE, *supra* note 45, at 41–42 (discussing measurement and comparison problems between the Survey of Consumer Finance and the Consumer Bankruptcy Project). The Federal Reserve Board conducted a supplemental panel study in late 2009 with its respondent households from the 2007 Survey. *See* Press Release, Fed. Reserve Bd., Federal Reserve Will Soon Begin a Statistical Study of Household Finances to Update Data Collected at the Outset of the Economic Downturn that Began in Late 2007 (July 27, 2009), http://www.federalreserve.gov/newsevents/press/other/20090727a.htm (last visited Jan. 12, 2012) (on file with the Washington and Lee Law Review).

115. There is some recent work in this regard using bankrupt households. *See* Jay L. Zagorsky & Lois R. Lupica, *A Study of Consumers' Post-Discharge Finances: Struggle, Stasis, or Fresh-Start?*, 16 AM BANKR. INST. L. REV. 283, 283–84 (2008) (analyzing postdischarge finances of debtors); Katherine Porter & Deborah Thorne, *The Failure of Bankruptcy's Fresh Start*, 92 CORNELL L. REV. 67, 94–97 (2006) (emphasizing the importance of income to a successful financial situation postbankruptcy).

not nearly as sizeable as the empirical work establishing that poverty has health-damaging consequences,[116] the research suggests several pathways of association between unmanageable debt and health harms.[117] Excessive debt may be associated with underutilization of medical treatment.[118] In the extended period of financial distress before bankruptcy, one's health may be worsened, say by the amputation of a limb from inadequate treatment of diabetes. This is a permanent change to an individual's health endowment that clearly harms her welfare in human terms, as well as economic terms of inhibiting labor opportunity. Unmanageable debt may condition one's access to health care or may itself worsen health by creating or aggravating mental or physical conditions. For example, a study of Germans found an increased probability of obesity among overindebted individuals, even when controlling for other socioeconomic factors. The researchers concluded this relationship may reflect ways in which debt limits leisure activities and participation in social life, as well as constrains the purchase of healthy food.[119] Other research has suggested

116. *See* Peggy McDonough et al., *Time on My Side? Life Course Trajectories of Poverty and Health*, 61 SOC. SCI. & MED. 1795, 1797 (2005) (collecting prior research on poverty and health dynamics). McDonough et al. conclude that while permanently nonpoor respondents generally always had better health, exiting poverty did not always improve health because the poverty experience created a residual poverty-health gap. *Id.* at 1806.

117. *See* Melissa B. Jacoby, *Does Indebtedness Influence Health? A Preliminary Inquiry*, 30 J. L. MED. & ETHICS 560, 560 (2002) ("In a recent study, nearly half of the sample of individual bankruptcy filers reported they also were dealing with illness, injury, or substantial medical debt.").

118. Note that the path to this underutilization may be somewhat different than for those who simply cannot pay for health care at all due to a lack of income. Excessive debt may result in collection pressure, guilt, or fear of property loss that could lead an individual to forgo health care in favor of using income to meet other obligations. That is, as paying off debt becomes more of a necessity in an individual's mind, an individual could come to view health care as less of a necessity. The result of these changes in priority prompt the individual to make different spending decisions. In the model, this is an altered preference for how to use the endowment of income. Yet the damage from the debt pressure to human welfare is a reduced endowment of health on a going forward basis.

119. *See Link Between Over-indebtedness and Obesity Identified*, MED. NEWS TODAY, (Aug. 12, 2009), *available at* http://www.medicalnewstoday.com/releases/160430.php.

correlations between mental illness and overindebtedness.[120] While reducing debt via a bankruptcy discharge can free up income from debt service that can be used to pay for health care, the pathway between debt and health may be much more complex. The discharge of debt may be an instantaneous remedy for balance sheets but not for human health. The stress and emotional harms of struggling with debt, for example, may be replaced after bankruptcy by shame and guilt at having sought bankruptcy relief.

Conditions are socially imposed limits on an individual's use of her endowments and preferences.[121] They are not individual qualities, although each individual will be subject to a particular set of conditions. In the American economy, access to markets is a crucial set of conditions. In the last thirty years, the development of credit scores has dramatically lowered the cost of decisions about imposing conditions. A wide range of jobs, including those at the middle to lower end of the occupational spectrum, requires applicants to pass a credit check.[122] This constraint is a serious, and largely unexamined, consequence of debt.[123] Many households will cope with a job loss by borrowing. If the period of unemployment is sustained and the debt accumulates to the point

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120. *See, e.g.*, H. Ruger et al., *Mental Illness and Over-indebtedness: Mental Illness, Social Networks, and Financial Strain in Over-indebted Persons*, 60 PSYCHOTHERAPY, PSYCHOSOMATICS & MED. PSYCH. 250 (2009) (discussing the potential link between debt and mental illness).

121. *See* Bourguignon, *supra* note 75, at 84 (describing conditions as "a set of parameters . . . conditioning the individual's choices and imposed upon him/her by society").

122. In 2004, about 43% of U.S. employers checked the credit reports of job applicants; that number has trended sharply upward in the last decade. *See* Thomas Frank, *Job Credit Checks Called Unfair*, USA TODAY, Feb. 13, 2009, at 1A (noting a 36% increase between 2004 and 2009 in the percentage of employers that check credit scores). Credit checks are used in many industries outside of financial services, including education and data entry. *See* Jonathan D. Glater, *Another Hurdle for the Jobless: Credit Inquiries*, N.Y. TIMES, Aug. 7, 2009, at A1 (discussing an individual who was denied a data-entry job); Christina Rexrode, *Job Hunting? Check Your Credit*, CHARLOTTE OBSERVER, Aug. 30, 2009 (reporting that Charlotte-Mecklenburg school district backed down on plans to run credit checks after teacher protest).

123. The only study of this kind uses 2001 Consumer Bankruptcy Project data. *See* Thorne, *supra* note 50, at 35–37 (reporting that among people who tried to find new employment after bankruptcy, 45% of respondents claimed that their bankruptcy was a reason for the denial of employment).

that it becomes unmanageable, then the individual will face barriers to reemployment because of a low credit score. Debt, and default on debt, may thus directly bear on labor market processes. Conceptualizing the problem as debt itself does not highlight this attenuated harm. It is perhaps unsurprising, then, that bankruptcy law does nothing to address this problem.[124]

Conditions on future borrowing are an important concern in the context of understanding the experience of excessive debt. Here, as I have noted in prior research, there is little consensus about what amount of borrowing opportunity is optimal for individuals who have or have had excessive debt.[125] Consumer advocates lament continued lending to those already mired in debt.[126] After bankruptcy, however, return to the credit economy may be a crucial element to maximizing a debtor's productivity.

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124. Section 525 of the Bankruptcy Code prohibits private employers from terminating the employment of, or discriminating with respect to employment against, a bankruptcy debtor. 11 U.S.C. § 525(b) (2006). A vast majority of bankruptcy courts interpret this provision to apply only to existing employment relationships. It appears legal for an employer to refuse to hire a person because the person has filed bankruptcy. *See* Fiorani v. CACI, 192 B.R. 401, 405–06 (E.D. Va. 1996) ("Congress' inclusion of an explicit reference to hiring in § 525(a), juxtaposed with its deliberate omission in § 525(b) six years later, makes unmistakably clear that subsection (b) does not reach hiring decisions."); Pastore v. Medford Sav. Bank, 186 B.R. 553, 554 (D. Mass. 1995) ("The fact that there is specific mention of discrimination in the termination of employment, but no corresponding mention of the inception of employment suggests an intentional omission."); Burnett v. Stewart Title, Inc., No. 06-34312-H4-13, 2008 WL 4609983, at *2 (Bankr. S.D. Tex. Oct. 14, 2008) ("A close reading and comparison of the language in subsections (a) and (b) leads to the [conclusion that] the private sector is prohibited only from discriminating against those persons who are *already* employees."). *But see* Leary v. Waranco, Inc., 251 B.R. 656, 658 (S.D.N.Y. 2000) (interpreting the language in § 525(b) to include hiring). And regardless of the scope of Section 525 of the Bankruptcy Code, an employer could refuse to hire a debtor on the basis of poor credit, rather than bankruptcy itself, and apparently circumvent the statute entirely.

125. *See* Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA L. REV. 1369, 1416 (2008) (discussing the differences between secured and unsecured credit opportunities for postbankruptcy debtors).

126. *See* Brad Stone, *Drawing a Bead on Debtors*, N.Y. TIMES, Oct. 22, 2008, at 1 (describing lenders' practice of culling credit agency information to market to particular demographics, including those who have fallen deeply into debt). Jim Campen, the Executive Director of the Americans for Fairness in Lending, stated that "[lenders] get people who they know are in trouble, they know are desperate, and they aggressively market a product to them which is not in their best interest." *Id.*

For example, an individual's capabilities suffer if prior debt problems inhibit credit extensions for sound ideas for new businesses. Similarly, a person who cannot borrow to purchase a new vehicle after repossession may be unable to work or attend school without access to transportation. Two very recent studies have largely confirmed the findings of my research on the widespread availability of postbankruptcy credit and debtors' reluctance to use such credit.[127] A multidimensional space for understanding excessive debt sharpens the theoretical implications of this work, situating it alongside other market constraints or rationing activity.

Another important market that is conditioned on debt is the housing market, both for homeownership (perhaps better examined under credit access) and for rental housing.[128] This is a question of great importance for the well-being of families in the United States because, as Douglas Massey has noted, "[H]ousing markets distribute education, insurance rates, wealth, safety, peer groups, and employment."[129] The multidimensional approach helps us recognize that foreclosure from unmanageable mortgage debt imposes harms beyond a loss of wealth. A recent work by Marianne Culhane examines what happens to bankrupt families who lose their homes due to financial pressures. She documents their next place of residence after foreclosure and their attitudes about homeownership.[130] Understanding how failed homeownership will affect future housing outcomes is an urgent policy issue for responding to the ongoing foreclosure crisis.[131]

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127. *See* Song Han & Geng Li, *Household Borrowing After Personal Bankruptcy*, 43 J. MONEY, CREDIT, AND BANKING 491, 507 (2011) (comparing the likelihood of obtaining credit for bankruptcy filers and nonfilers); Ethan Cohen-Cole, Burcu Duygan-Bump & Judit Montoriol-Garriga*, Forgive and Forget: Who Gets Credit After Bankruptcy and Why?*, 9, 18–22 (Fed. Reserve Bank of Bos., Working Paper No. QAU09-2, 2009*), available at* http://www.bos.frb.org/bank info/qau/wp/2009/qau0902.pdf (discussing postbankrupcy access to credit).

128. *See* Thorne, *supra* note 50, at 33–34, tbl.1 (reporting findings on credit score discrimination in rental housing from survey of bankruptcy debtors).

129. Douglas S. Massey, *Race, Class, and Markets: Social Policy in the 21st Century*, *in* POVERTY AND INEQUALITY, *supra* note 74, at 117, 129.

130. *See generally* Marianne B. Culhane, *No Forwarding Address: Losing Homes in Bankruptcy*, in BROKE, *supra* note 45, at 129–34.

131. I have been unable to locate research on how foreclosure affects the odds and success of future homeownership. One study of duration of homeownership status was conducted by the Department of Housing and Urban

Social exclusion may also be a consequence of overindebtedness. This can be characterized as a condition on an individual's choices. The bankruptcy literature has engaged this concept in terms of debates about whether the stigma of bankruptcy has increased or decreased.[132] But a focus on stigma as a check to the moral hazard of bankruptcy is distinct from understanding stigma as a consequence of debt. If participation in social institutions is conditioned on unmanageable debt, this is a real harm that limits human welfare. The poverty literature has explored the connection between income and social participation, noting that each society defines a set of commodities needed to take part in the life of the community.[133] A lack of goods may prohibit meaningful social interaction.

Social-exclusion dynamics may operate in another way: by stigmatizing those who seek or receive assistance. In this regard, François Bourguignon has noted that "[t]o some extent, income transfers may even worsen the situation as they may stigmatize their beneficiaries."[134] Seeking bankruptcy relief to address unmanageable debt could function similarly. Although it relieves debt, if a debtor suffers exclusions from markets and social life as a result, the harms of overindebtedness continue even after the discharge of the debt itself.

Debt burdens may inhibit social participation by lowering one's self-esteem or may inhibit the consumption that is often a

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Development using panel data ending in 2000, which predates the current crisis. *See* DONALD R. HAURIN & STUART S. ROSENTHAL, U.S. DEP'T OF HOUS. & URBAN DEV., THE SUSTAINABILITY OF HOMEOWNERSHIP: FACTORS AFFECTING THE DURATION OF HOMEOWNERSHIP AND RENTAL SPELLS 37–48 (2004) (documenting the factors that affect the duration of homeownership). The models developed in that study do not measure the association between debt burdens and homeownership duration or examine the future housing patterns of people who lost homes to foreclosure. *Id.*

132. *Compare Less Stigma*, *supra* note 26, at 233–46 (questioning the theory that declining stigma associated with bankruptcy, if it exists at all, is responsible for increased filings), *with* Jones & Zywicki, *supra* note 28, at 215–21 (citing studies supporting the proposition that bankruptcy's stigma has declined in recent decades).

133. *See, e.g.*, Sen, *Conceptualizing and Measuring Poverty*, *supra* note 74, at 37 (discussing the set of commodities required for a New Yorker to take part in the community).

134. Bourguignon, *supra* note 75, at 77.

required component of taking part in everyday social activities.[135] Allison Pugh has coined the term "economy of dignity" to capture the way in which goods and experiences shape self-esteem and a sense of belonging to social life.[136] This economy of dignity can be seen not only as a process for self-evaluation but also as a market for commodifying others. A provocative example in this regard is the recent arrival of agencies that do credit checks on prospective spouses. Public advertisements for such services transmit the message that social exclusion from marriage is an appropriate reaction to debt problems.[137] Other social constraints from debt could be more even direct. For example, European countries may prohibit bankrupt individuals from holding elected political office or serving as directors of public companies.[138] Although the United States has few such laws, social stigmatization may operate to impose such barriers, even when formal law does not. The conditions imposed on overindebted people may also change over time; as debt problems become more common, society may develop a greater tolerance of those with debt problems.[139] Of

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135. *See, e.g.*, Telephone Interview with Respondent W3_0637D, 2007 Consumer Bankruptcy Project, Question CHLD07 ("It caused anger because they were unable to do athletics and school activities like their friends."). Nearly three-fourths (73%) of parents said their children did without clothes or shoes that they needed because they could not afford them. *See* 2007 Consumer Bankruptcy Project, Telephone Interview Question PRV02. The question allowed parents to define "need," which they almost certainly constructed in absolute, as well as relative terms, based on norms of social acceptance.

136. ALLISON J. PUGH, LONGING AND BELONGING: PARENTS, CHILDREN, AND CONSUMER CULTURE 6–8 (2009).

137. S*ee, e.g.*, Elizabeth Warren, *Wife Beaters and Bankrupts*, CREDIT SLIPS (Apr. 29, 2007, 2:35 PM), http://www.creditslips.org/creditslips/2007/04/wife_beaters_an_1.html (last visited Feb. 9, 2012) ("A quarter page advertisement in the New York Times shows a young man and woman laughing . . . under the headline 'Get the whole story on him, before it's too late.' The advertiser, Intelius, promises to check out two things: 1) Bankruptcy, and 2) Domestic Violence Convictions.") (on file with the Washington and Lee Law Review).

138. *See, e.g.*, Insolvency Act, 1986, c. 45, § 426A (Eng.) (stating that a person with a bankruptcy restrictions order or debt relief restrictions order shall be disqualified from Parliament); European Commission, *Best Project on Restructuring, Bankruptcy and a Fresh Start: Final Report of the Expert Group*, 19–20 (2003), *available at* http://www.eversjung.de/ceemes/webfile/show/581 (describing the restrictions and prohibitions of bankrupt individuals in countries of the European Union).

139. *See* Jean Braucher, *Theories of Overindebtedness: Interaction of*

course, the converse is also possible. As default rates escalate, sanctions against those with debt problems may increase as a means of deterring borrowing to the point of excess.

Preferences are the final element of a multidimensional framework for assessing the influence of debt on well-being.[140] The capabilities approach explicitly acknowledges that individuals will make choices that affect their welfare, focusing on capability rather than outcome as its central goal.[141] Preferences reflect individuals' different desires. In the economic framework that dominates the consumer credit and bankruptcy literature, the standard assumption is that such preferences are rational and fixed. Behavioral work has exposed how cognitive biases may undermine rational decision making.[142] In the poverty literature, the idea of an underclass, while contested, has facilitated recognition of the malleability of preferences and how some adaptive preferences may harm individuals' well-being.[143]

Structure and Culture, 7 THEORETICAL INQUIRIES L. 323, 336–42 (2006) (providing a historical examination of consumer tolerance to debt and indebtedness in Europe and the United States).

140. *See* Bourguignon, *supra* note 75, at 84 (listing preferences as the third and final element of his multidimensional approach).

141. *See id.* at 85 ("Outcome determinants beyond the control of individuals, rather than outcomes per se should be the basis for defining poverty or for measuring inequality.") (emphasis omitted).

142. *See, e.g.,* Paige Marta Skiba & Jeremy Tobacman, *Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default* 16 (Vanderbilt Univ. Law Sch. Law & Econ., Working Paper Number 08-33, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1319751 (finding that a "quasi hyperbolic" discounting model may better explain consumer payday borrowing, repayment, and default); *see also* Oren Bar-Gill, *Bundling and Consumer Misperception*, 73 U. CHI. L. REV. 33, 48–50 (2006) (using an example of how consumers underestimate future credit card borrowing to illustrate how card companies' "bundling" of transacting and financing services can harm consumers who build up debt); Michael S. Barr & Jane Dokko, *Paying to Save: Tax Withholding and Asset Allocation Among Low- and Moderate-Income Taxpayers* (Univ. of Mich. Law Sch., John M. Olin Ctr. for Law & Econ., Working Paper Series, Working Paper No. 79, 2007), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1080&context=umichlwps (concluding that low to moderate-income tax filers may have a preference for overwithholding because they "seek a pre-commitment device against the tendency to over-consume").

143. *See* William Julius Wilson, *Social Theory and the Concept "Underclass"*, *in* POVERTY AND INEQUALITY, *supra* note 74, at 103 (discussing poverty scholars' reaction to the idea of an "underclass" and examining the implications of such reactions).

These adaptive preferences are shaped over time in response to life experiences and then color individuals' assessments of their well-being.

Preferences may also change during one's lifetime based on the experience of indebtedness.[144] Most obviously, people may be fearful of credit and seek to avoid it, even when a rational choice framework would show a benefit to borrowing. My research on the financial habits of families in the aftermath of bankruptcy suggests distaste for credit and for credit cards in particular.[145] Years of anxiety about the possibility of garnishment or levy may also lead bankrupt families to eschew traditional banking or to hide assets. Alternatively, some families may choose a strict cash economy for their household as a budgeting device to prevent entanglement with debt through mechanisms such as overdraft fees or lines of credit. Michael Barr and others have illustrated the costs of being "unbanked."[146] These preferences to avoid mainstream financial institutions impose direct financial costs on individuals, who pay higher fees to use fringe banking services and generate externalities, such as difficulty in ensuring taxation of all income.

The experience of financial distress caused by debt may also change people's appetite for risk. The hardships of debt may change people's risk preferences, leading to myopic

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144. This is another justification for the capabilities approach rather than a strict utilitarian lens. If maladaptation can occur, people's own assessments of their well-being reflect the status quo, rather than their genuine desires. Martha Nussbaum explains that because "deprived people frequently exhibit 'adaptive preferences,' preferences that have adjusted to their second-class status . . . the utilitarian framework, which asks people what they currently prefer and how satisfied they are, proves inadequate to confront some pressing issues of justice." Nussbaum, *supra* note 76, at 48.

145. S*ee* Katherine Porter, *Life After Debt: Understanding the Credit Restraint of Bankruptcy Debtors*, 18 AM. BANKR. INST. L. REV. 1, 9 (2010) (finding that only one in four Chapter 7 debtors report any new credit one year after bankruptcy). The constraint in borrowing is not a result of strict credit rationing. Households who discharge debts in bankruptcy get offers for both secured and unsecured credit within the first months after bankruptcy. *See* Porter, *supra* note 125, at 1373 ("[C]reditors repeatedly solicit debtors to borrow after bankruptcy.").

146. *See* Michael S. Barr, *An Inclusive, Progressive National Savings and Financial Services Policy*, 1 HARV. L. & POL'Y REV. 161, 162–64 (2007) (describing "unbanked" families and detailing their difficulties, which include resorting to high cost check-cashing services).

miscalculations. As a hypothesis, people who have suffered from debt may then save excessively in the future to avoid another bout of distress. If this savings leads to underinvestment in themselves or their children, then this preference will produce social loss. In 1968, David Caplovitz hypothesized a similar effect of debt on occupational preferences. He posited that debt-burdened individuals might avoid entrepreneurial employment, preferring the stability of less lucrative, wage-earning positions.[147]

A panel study of Dutch households provides a useful model of how one could study the association between debt and preferences.[148] Paul Webley and Ellen Nyhus incorporated measures for attitudes to debt, time preferences, and self-control into a telephone survey of debt burdens.[149] Their focus is primarily on predicting debt, but they also consider the inverse effect—that short time horizons and a lack of self-control are a consequence of debt, and that accepting attitudes toward debt may be an adaptive preference of having been in debt.[150] In their words, "getting into debt makes debt seem not quite so bad."[151] Relying on cross-time correlation measures, they report that the association between debt burdens in Time Period 1 and psychological variables in Time Period 2 is stronger than the converse association of psychological variables in Time Period 1 and debt burdens in Time Period 2.[152] This suggests that indebtedness changes preferences, such as time horizons for satisfaction and self-control.[153] Replication of this approach with panel data on bankrupt households would help identify whether excessive debt alters preferences of American consumers.

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147. *See* David Caplovitz, *Consumer Credit in the Affluent Society*, 33 LAW & CONTEMP. PROBS. 641, 643 (1968), *available at* http://www.jstor.org/stable/1191015?seq=3 (noting the "emergence of the new middle class of salaried employees and the decline of the old middle class of entrepreneurs").

148. S*ee* Paul Webley & Ellen K. Nyhus, *Life-cycle and Dispositional Routes into Problem Debt*, 92 BRIT. J. PSYCHOL. 423, 423 (2001) (studying "the correlates of debt in a three-wave panel study of saving and other financial behaviour").

149. *See id.* at 428 (discussing the methodology of their survey).

150. *See id.* at 442 (discussing the "psychological variables" that are associated with debt).

151. *Id.* (internal citation omitted).

152. *Id.* at 439–40 & tbl.6.

153. *Id.*

In identifying those appropriate dimensions, one conceptual difficulty lies in the possible temporal differences in poverty and indebtedness. Social scientists have documented, as a general matter, the intractability of poverty in an individual's lifetime,[154] but have focused most of their energies on intergenerational mobility, rather than intragenerational mobility.[155] The paucity of research leads to a certain amount of conjecture on the trajectories of indebtedness, most of it building off a theory of debt as a consumption-smoothing model over the life cycle. Although we know very little about the duration of excessive debt as a phenomenon,[156] scholars in the last thirty years have firmly pinned down the demographic characteristics of bankrupt households.[157] One of the most enduring findings of this research is that bankrupt households have multiple indicia of middle-class status, excepting income.

Families have very low incomes when they file for bankruptcy. The median debtor has an income just above the poverty line; even the top income quintile of bankrupt households earns less than the median income of the general U.S.

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154. Conclusions about the duration of poverty vary, in part, because of different approaches to measuring time in poverty. For a discussion of the prior literature and estimates from a complex model that accounts for repeated episodes of poverty, see Ann Huff Stevens, *Climbing Out of Poverty, Falling Back In: Measuring the Persistence of Poverty over Multiple Spells*, 34 J. HUMAN RESOURCES 557, 558–62 (1999). Stevens concludes that time in poverty varies substantially with demographic characteristics but that, on average, a family in poverty will spend over four of the next ten years in poverty. *Id.* at 583.

155. *See generally* M. Corcoran, *Rags to Rags: Poverty and Mobility in the United States*, 21 ANN. REV. SOC 237 (1995) (evaluating recent models explaining intergenerational poverty).

156. *See* Webley & Nyhus, *supra* note 148, at 424–25 (noting the paucity of empirical evidence and developing a taxonomy of debtors' "careers").

157. S*ee* AS WE FORGIVE OUR DEBTORS, *supra* note 113, at 49–62 (providing stories of bankrupt families); FRAGILE MIDDLE CLASS, *supra* note 25, at 41 fig.2.1, 46 fig.2.2, 53 fig.2.3 (graphing age, racial–ethnic composition, and education (respectively) of bankrupt debtors); Teresa A. Sullivan, Deborah Thorne & Elizabeth Warren, *Young, Old, and In Between: Who Files for Bankruptcy?*, 9 NORTON BANKR. L. ADVISER, Sept. 2001, at 1 (presenting a longitudinal study containing demographic data on debtors in 1991 and 2001); Elizabeth Warren, *supra* note 6, at 24–30 (discussing women in bankruptcy and noting their increasing propensity to file); Elizabeth Warren, *Financial Collapse and Class Status: Who Goes Bankrupt?*, 41 OSGOODE HALL L.J. 115, 129–42 (2003) (measuring bankruptcy by categories such as education and occupation).

population.[158] The disparity between income and other class indicia suggests that bankrupt households have experienced substantial income loss in the period preceding their bankruptcy.[159] This suggests that overindebtedness, at least for families who seek bankruptcy relief, may be a transitional experience of downward mobility, rather than a persistent state.

On the other hand, I have reported that more than two-thirds of bankrupt households say that they seriously struggled for more than one year before filing bankruptcy.[160] The modal response, selected by more than 40% of bankruptcy debtors, was a serious struggle of more than two years before bankruptcy.[161] In other research, I have shown that bankruptcy does not ensure people avoid further financial problems. In a study of Chapter 7 bankruptcy, Deborah Thorne and I show that the fresh start of a bankruptcy discharge does not usually translate to a higher future income.[162] In a study of Chapter 13 bankruptcy, I report that less than half of those filing cases achieve either a discharge of debt or a significant nondischarge goal, such as saving a home.[163] This research leads me to suggest that we should think about excessive debt as being a sustained, if not chronic, experience. In this regard, excessive debt is perhaps more similar to poverty. Because the temporal nature of overindebtedness, even among the limited population of those whose debts drive them to bankruptcy, is unclear, any initial study might begin with the hypothesis that unmanageable debt has relatively

158. *See* Deborah Thorne & Elizabeth Warren, *A Vulnerable Middle Class: Bankruptcy and Class Status*, *in* BROKE, *supra* note 45, at 25 (reporting consistent findings in 1991, 2001, and 2007 surveys of bankrupt households' occupational prestige, homeownership, and educational attainment).

159. *See id.* (discussing Consumer Bankruptcy Project data, which show that "shortly before filing, many people lost their jobs or saw their work hours reduced").

160. Mann & Porter, *supra* note 7, at 313–14.

161. *Id.* This was the first time such a question had been posed to bankrupt households, and the responses suggest that the question design may have censored the top range of respondents' true experiences. We simply cannot discern how much beyond two years the 40% of respondents may have struggled.

162. *See* Porter & Thorne, *supra* note 115, at 94 fig.6 (depicting changes in income correlated to families' self-reported financial situation).

163. *See* Katherine Porter, *The Pretend Solution: An Empirical Study of Bankruptcy Outcomes*, 90 TEX. L. REV. 103, 153 (2011).

enduring effects. This uncertainty about the duration of overindebtedness, and the degree to which it may vary among households whose debt problems have different primary causes, leads me to err toward inclusion in suggesting dimensions worthy of empirical investigation.

V. Dimensions for Future Empirical Research

A multidimensional framework is unwieldy in practical application, and perhaps can never achieve the precision of unitary financial metrics for welfare such as income or debt. Applying the theoretical frame to concrete data, however, helps to expose its strengths and weaknesses, both as a theory and for practical application. I conclude this Article by exploring directions for future empirical studies on the consequences of overindebtedness.

In the prior Part, I identified some specific dimensions in which unmanageable debt may create harms to welfare. Empirical research within the multidimensional frame could begin by gathering data on the association between a single dimension and debt. Such measures of the interaction between increasing debt burdens and single capabilities can then be used as building blocks in a multidimensional assessment of the welfare harms of overindebtedness. For example, a labor economist could add measures of debt burdens to a panel study of occupational choices and wages. This would allow an estimation of the interaction between indebtedness, occupational rigidity, and labor market barriers. Such research tests a single dimension of the model, rather than the usefulness of a multidimensional approach itself. Nonetheless, it would help tease out whether income, poverty, and debt-induced financial distress have distinct consequences. This piece-wise approach also permits comparison of different scales or constructs for capturing the harms of overindebtedness, helping to determine whether existing models, such as mobility on socioeconomic prestige scales, capture the harms of overindebtedness or whether they are manifest in other ways, such as wage stagnation.

To take another example, the key effect of debt problems on health could either be physical or mental, perhaps with the latter effects then feeding back into physical outcomes. Separate projects on debt and health could test whether well-worn measures, such as the five-point self-assessment of overall health, are useful to capture the effects of debt.[164] If not, then researchers can debate whether such effects are of minimal magnitude or require alternative measures. For example, if its sample size were expanded to include a sufficient sample of heavily indebted households, the Panel Study of Income Dynamics (PSID) could add a set of health measures permitting analysis of whether the relationship between debt and psychological health that has been identified in British households is also present in American households.[165]

The 2007 Consumer Bankruptcy Project is the most comprehensive data set on heavily debt-burdened households.[166] Its sample consists of over 2,000 households that filed consumer bankruptcy in the first quarter of 2007.[167] The project asked debtors to complete written surveys at the time of bankruptcy, coded financial data drawn from each debtor's court records, and conducted in-depth telephone interviews of more than one hour with over 1,000 debtors. The data include several measures of the consequences of struggling with debt and bankruptcy. These measures can be organized into the three elements of the

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164. The National Health Interview Survey uses such a measure, which has been found to be a powerful predictor of mortality and to correlate with other measures such as hospitalization episodes. *See* Anne Case, Darren Lubotsky & Christina Paxson, *Economic Status and Health in Childhood: The Origins of the Gradient*, 92 AM. ECON. REV. 1308, 1310 (2002) (studying the relationship between household income and children's health).

165. *See* Sarah Brown, Karl Taylor & Stephen Wheatley Price, *Debt and Distress: Evaluating the Psychological Cost of Credit*, 26 J. ECON. PSYCHOL. 642, 656–58 (2005) (reporting results of ordered probit regression estimating association between psychological health and presence of unsecured debt, mortgage debt, and amount of debt burdens in British households).

166. Because the vast majority of people who file bankruptcy have very heavy debt burdens, the bankrupt population is of fairly limited utility for attempts to gauge how the harms of debt may vary with debt burdens and to identify the breakpoints at which debt produces reductions in endowments, alters preferences, or subjects people to limiting conditions.

167. For more information regarding the methodology of the 2007 Consumer Bankruptcy Project, see Lawless et al., *supra* note 12, at app. I.

multidimensional framework: endowments, conditions, and preferences. Such work would permit at least a partial application of that framework to the situations of real families.[168]

Measures in the 2007 Consumer Bankruptcy Project that could be used to assess the effects of high debt burdens on endowments are questions about mental and physical health, deprivations of health care, educational decisions (such as stopping an adult's education or changing schools for children), and how individuals drew down on assets (such as retirement accounts or savings) or terminated such asset building strategies. The conditions measured included a number of indirect inquiries about labor market effects of debt. For example, debtors were asked if they missed work or were distracted at work because of their debts.[169] Inquiries that might fit the criterion for preference measures include questions about savings habits, willingness to start a business, and willingness to file a future bankruptcy.

The 2007 Consumer Bankruptcy Project also collected data that could be used to assess effects of debt beyond harms to individuals. Such effects could be construed as externalities of debt or folded into the multidimensional approach to welfare as societal harms that then impact individual capabilities. For example, the 2007 Consumer Bankruptcy Project asked a series of questions about how struggles with debt affected marital relations and marital status.[170] Other inquiries could be used to probe intergenerational harms of debt, such as questions about whether children suffered privations from debt and how parental behaviors changed during the indebted period. The open-ended inquiries and debtors' spontaneous comments during the interviews also provide insights on the interpersonal consequences of debt and the exclusion effects of debt-induced financial distress. Several debtors

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168. *See supra* note 107 and accompanying text (discussing Francois Bourguignon's model for welfare).

169. *See, e.g.*, Telephone Interview with Respondent W4_0905R, 2007 Consumer Bankruptcy Project, Question EMP10 ("I only missed a few days for lawyer and court hearings, but I missed a lot of work because of the depression that was caused by the financial troubles and the bankruptcy.").

170. *See, e.g.*, Telephone Interview with Respondent W5_0891B, 2007 Consumer Bankruptcy Project, Question SR09 ("We didn't separate before the bankruptcy, but we did after we filed. It had really damaged our relationship and it could never be the same. I felt I had to move out and take my young son because it was effecting [sic] him so much too.").

did describe family relationships that were damaged by their difficulties in managing their debts.[171] Other parents talked about their children being unable to participate in school activities or athletics because of their financial distress.[172] These findings, invisible in a metric of dollars, reveal how social exclusion and stigmatization may result from debt.

Taken together, the 2007 Consumer Bankruptcy Project data are a starting point to examine how debt may reduce well-being across multiple dimensions, including inhibiting productivity and constraining other basic capabilities, such as good health and stable social relationships. The data are concededly preliminary and limited on these points. Future studies of bankrupt households should consider adding additional dimensions and should develop improved measures of endowments, conditions, and preferences. The framework developed in this Article could be applied usefully to households with debt problems that have not filed bankruptcy, such as those who seek debt counseling or lose homes to foreclosure. In particular, one wishes for longitudinal data that could illuminate the trajectory of harms from unmanageable debt. It would be useful to know how harms to human welfare deteriorate (if they do so at all) as a family's debt burdens exceed certain thresholds. The consequences of overindebtedness also may differ when an individual suffers an isolated bout of unmanageable debt versus a chronic situation, and when an individual rebounds from debt problems without intervention versus after intervention from bankruptcy or other formal processes.

171. *See, e.g.*, Telephone Interview with Respondent W3_0795B, 2007 Consumer Bankruptcy Project, Question ERD22 ("[My son] just discarded me. He won't communicate with me."); Respondent W2_0835C, Question ERD22, *supra* ("My kids lost total faith in me."); Respondent W5_0891B, Question ERD22, *supra* ("People close to me didn't know what to do to help and I lashed out at them from frustration and that was damaging.").

172. *See, e.g.*, Telephone Interview with Respondent W3_0637D, 2007 Consumer Bankruptcy Project, Question CHLD07 ("[The debt] caused anger because [the children] were unable to do athletics and school activities like their friends."); Telephone Interview with Respondent W2_0970L, 2007 Consumer Bankruptcy Project, Question PRV03 (reporting that children went without "things for school like band uniforms" because she could not afford them); Respondent W5_0891B, Question PRV03, *supra* (reporting that children went without "educational activities and arts and sports.").

VI. Conclusion

This Article's first goal is to highlight the paucity of empirical work measuring the harms of debt. Given the heavy debt burdens of families and the ferocity of policy debates about bankruptcy and credit regulation in the United States, this Article tries to motivate studies to assess whether the conjectured externalities of debt exist and to quantify those costs. This criticism accepts debt as a valid measure of welfare but notes the lack of recent or sophisticated efforts to measures the negative effects of unmanageable debt. The Article's second goal is to expose the limitations of using financial measures as the space for assessing how overindebtedness harms well-being. Examining debt in a multidimensional space based on a capabilities approach to welfare is a superior approach to measuring the consequences of debt. This theoretical frame would incorporate elements that examined how debt reduces an individual's endowments, produces undesirable preferences, and subjects individuals to societal conditions on achievement.

Understanding the consequences of unmanageable debt would provide meaningful contributions to both theory and policy on bankruptcy and credit regulation. Better knowledge of the harms from overindebtedness may suggest that the means test in bankruptcy law, which conditions access to bankruptcy on financial metrics, is a poor instrument for evaluating one's need to discharge debt.[173] Quantifying the externalities of excessive debt would provide input on the costs of borrowing that could be incorporated into cost-benefit calculations about restrictions on credit. More fundamentally, when the association between debt and individual welfare is recast beyond a debt metric and, instead, encompasses human capabilities such as good health, adequate shelter, access to education, the right to seek employment on an equal basis with others, and a life free from undue anxiety and fear, the connection between well-being and consumer credit policy comes into sharper focus. This may encourage a richer conversation about the risks of fueling the economy with debt-funded consumption.

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173. *See* U.S. Dep't of Justice, *Means Testing*, http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm (last visited Feb. 7, 2012) (explaining the calculations in a bankruptcy means test) (on file with the Washington and Lee Law Review).