

## THE CAPABILITIES APPROACH AS A SOLUTION TO THE NEED FOR A MORE ENCOMPASSING DEFINITION OF POVERTY

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*[T]he [assertion] that poverty is a value judgment. . . . suffers from difficulties rather similar to those that apply to ethical measurement of inequality. Poverty description—like any description—involves selection. Furthermore, even if prescription were the only reason for which people take an interest in poverty . . . poverty description will then reflect socially held value judgements rather than be value judgements themselves.<sup>1</sup>*

The passage above reflects the proposition that the poverty measurement employed by the federal government is imbued with society's values and what values are in fact represented are rather shallow. Since the "poverty line" is simply a measure of income,<sup>2</sup> the value is clear—our society values monetary status as a reflection of well-being. There is a distinction to be made between society's values as *reflected* in the prescriptive functions of a measure of poverty, and society's values as judgment imposed against those poor who are *described* by the federal poverty measure.<sup>3</sup> The former is seen in the determination of eligibility for federal welfare programs,<sup>4</sup> and invokes the values reflected in the age old distinction between the deserving and the non-deserving poor, whereby the "aged, infirm, orphans, [and] widows with young children" are distinguished from the "able-bodied paupers."<sup>5</sup> The descriptive aspect of the poverty measure

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<sup>1</sup> AMARTYA SEN, CHOICE WELFARE AND MEASUREMENT 373 (Harv. Univ. Press 1982).

<sup>2</sup> See 46 Fed. Reg. 62674, 62674 (Dec. 28, 1981) (stating that "[p]overty for statistical purposes is defined as the series of income cutoffs").

<sup>3</sup> See SEN, CHOICE WELFARE AND MEASUREMENT, *supra* note 1, at 373.

<sup>4</sup> 70 Fed. Reg. 8373, 8374 (Feb. 18, 2005).

<sup>5</sup> Hanson, F. Allan Hanson, *How Poverty Lost Its Meaning*, 17 CATO J. 189, 192 (1997), available at <http://www.cato.org/pubs/journal/cj17n2-5.html> (noting that the distinction between the deserving and the non-deserving poor has existed since the sixteenth century). This distinction has also been incorporated in very recent legislation such as the "voluntary quit" provision of the Food Stamp Act, under which a household is disqualified from receiving food stamps for a period . . . if the 'head of the household' voluntarily quits his or her employment without good cause." *LePage v. Yeutter*, 917 F.2d 741, 742 (2d Cir. 1990); 7 U.S.C. § 2015(d)(1)(A)(v). The court in *LePage* recognized that, "[i]n its own way, the enactment of the voluntary quit provision of the Food Stamp Act is a small part of the twentieth century's struggle with what the nineteenth century referred to as '[t]he mischievous

is reflected in the government's "selection" of income to define and categorize the members of society as either "poor" or "non-poor."<sup>6</sup> By selecting income as the defining characteristic of the poor, the government has disregarded many other elements of life's "beings and doings" that affect an individual's overall well-being, such as nourishment, health, avoiding premature mortality, and other more involved aspects, such as education and community involvement.<sup>7</sup> Since the "description" of poverty is a value judgment in and of itself, it *should* reflect the values and experiences that affect the poor.<sup>8</sup> This is especially true since lack of income is not the only element which might cause someone to find themselves in an impoverished circumstance.<sup>9</sup> The poor may find themselves afflicted with other debilitating accidents of life, such as disease, or inaccessibility to education or employment due to discrimination.<sup>10</sup> These additional burdens may cause the poor to be unable to convert the monetary resources they *do* have as efficiently as their neighbor.<sup>11</sup> Then there are those individuals who are not categorized as "poor"; the judgment reflected in this *failure* to categorize is that these individuals are not in need of help or aid of others simply because they make one dollar more than their neighbor.<sup>12</sup> This is why a measure of inequality, as compared to poverty is a more encompassing description.<sup>13</sup> Not only

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ambiguity of the word *poor*." *LePage*, 917 F.2d at 746, n. 8 (quoting GERTRUDE HIMMELFARB, *THE IDEA OF POVERTY: ENGLAND IN THE EARLY INDUSTRIAL AGE* (Knopf 1983)).

<sup>6</sup> U.S. Census Bureau, *How the Census Bureau Measures Poverty (Official Measure)*, <http://www.census.gov/hhes/www/poverty/povdef.html> (last visited Feb. 13, 2006).

<sup>7</sup> AMARTYA SEN, *INEQUALITY REEXAMINED* 33 (Harvard Univ. Press 1995); Martha Nussbaum, *Women's Capabilities and Social Justice*, 1 J. HUM. DEV. 219, 228 (2000).

<sup>8</sup> Amartya Sen, *From Income Inequality to Economic Inequality*, 64 S. ECON. J. 384, 385–86 (1997).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See CONG. RESEARCH SERV., *CASH AND NONCASH BENEFITS FOR PEOPLE WITH LIMITED INCOME: ELIGIBILITY RULES, RECIPIENT AND EXPENDITURE DATA, FY2000-FY2001*, 15–23 (Vee Burke ed., 2003), *available at* [http://www.opencrs.com/rpts/RL32233\\_20031125.pdf](http://www.opencrs.com/rpts/RL32233_20031125.pdf) (setting forth the income eligibility requirements of federal welfare programs, including those that set an income ceiling at the federal poverty line).

<sup>13</sup> See *infra* notes 45–51 and accompanying text.

does it help erase the dichotomy that arises between the poor and the non-poor by focusing instead on the diversity of circumstances that individuals encounter and the social forces and power structures that create such inequalities,<sup>14</sup> but it also eliminates the arbitrariness of an absolute measure of income cut-off point, below which individuals are labeled as poor.<sup>15</sup> To this end, philosopher and economist Amartya Sen has set forth an approach to egalitarian philosophy called the capabilities approach.<sup>16</sup> This approach looks further than simply the means to equality, and instead focuses on the ends, that is achieving “(1) well-being, and (2) the freedom to pursue well-being.”<sup>17</sup> In order to pursue these ends, the capabilities approach postulates that certain basic needs and wants are required, such as resources, health, and education.<sup>18</sup> These basic needs are the elements which should be included in a reformed poverty measure.<sup>19</sup>

Initially, it should be noted that this analysis assumes that achieving some sort of equality between people and improving the condition of those least-well off is an important goal on both an ethical and social level.<sup>20</sup> Another assumption is that comparison measures of equality will lead to a better understanding of the underlying minimums that are required in order to achieve enhanced quality of life and heightened social awareness of the existence of poverty and its causes.<sup>21</sup>

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<sup>14</sup> See *infra* Part V(A).

<sup>15</sup> See *infra* notes 45–51 and accompanying text.

<sup>16</sup> See generally SEN, *INEQUALITY REEXAMINED*, *supra* note 7.

<sup>17</sup> *Id.* at 39.

<sup>18</sup> *Id.* at 33.

<sup>19</sup> Sen, *From Income Inequality to Economic Inequality*, *supra* note 8, at 396–97.

<sup>20</sup> *But see id.* (addressing the question of “Why Equality?”; *id.* at 62–64 (discussing of how enhanced freedoms can actually diminishes overall well-being).

<sup>21</sup> See, e.g., Nussbaum, *supra* note 7, at 223 (arguing that the space of comparison chosen is critical to this end); United Nations Development Programme, *Human Development Report 2005: International Cooperation at a Crossroads: Aid to Trade and Security in an Unequal World* 52 (2005) [hereinafter HDR 2005], (stating that it is important “to ensure that inequality and the measures to overcome disparities in life chances figure more prominently in the design of poverty reduction strategies.”).

The scope of this Comment encompasses the substantive definitions of poverty that may be implied via the measurements employed by the government and the alternatives thereof. The methodological issues of measurement will be left to the statisticians and economists.<sup>22</sup> Part I of this Comment addresses the historical and present manifestations that result from the lack of values reflected in the poverty line. Part II considers the foundation of measures of poverty and inequality, including a brief description of the capabilities approach of egalitarian social theory, as relevant to the issue of defining poverty, and a description of the federal poverty line. Finally, this section will include a clarification of the distinction between prescriptive and descriptive functions of measuring poverty and the implications that might follow from a change in the current measure. Part III discusses the weaknesses of the federal poverty line as they have already been identified by different branches of government. Part IV sets forth the details of an effort to operationalize the capabilities approach by the United National Development Programme. Part V considers the capabilities approach as it might be applied to reform the U.S. poverty line, and considers its appropriateness in this context as a consequence of the immense diversity that exists in the United States and because of the wealth of data that has already been compiled by researchers in this country. Finally, this section proposes that renewed attention be focused on reforming the federal poverty line in light of the philosophical groundwork laid by the capabilities approach.

### **I. Redefining Values and Refocusing Society's Viewpoint**

The values inherent in the poverty measure must be seen in a context of evolving

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<sup>22</sup> But for an interesting discussion of such issues, see generally SEN, CHOICE WELFARE AND MEASUREMENT, *supra* note 1, at 373–385.

perceptions of poverty. The poverty line came about in the latter nineteenth century,<sup>23</sup> in an era that writer F. Allan Hanson describes as the “State Welfare” era, of which one of the characteristics was a systemic view of poverty that focused on the monetary inequality of the poor.<sup>24</sup> As one of President Johnson’s officials stated, “The way to eliminate poverty is to give poor people enough money so they won’t be poor anymore.”<sup>25</sup> Hanson hypothesizes that society has recently adopted a new attitude toward the poor, called the era of “Contemporary Individualism.”<sup>26</sup> The key feature of this era is that society has come to view poverty as an unfortunate, yet inevitable, consequence of civilized society.<sup>27</sup> Poverty then becomes less “the existence of poor as the prevailing *discourse* about them.”<sup>28</sup> This veil of ignorance was blatant after Hurricane Katrina when the reality of poverty in New Orleans, as presented through extensive media coverage, came as a surprise to a large part of the country.<sup>29</sup> The trend is also apparent in President Bush’s 2001 Executive Order, which called for religious organizations to

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<sup>23</sup> See Gordon M. Fisher, *Setting American Standards of Poverty: A Look Back*, 19 FOCUS 47, 50 (1998), available at <http://www.irp.wisc.edu/publications/focus/pdfs/foc192.pdf>, (describing the adoption of the poverty thresholds in May of 1965).

<sup>24</sup> Hanson, *supra* note 5, at 193. Hanson’s essay is an excellent historical survey of society’s changing attitudes towards poverty. He has analyzed the issue in terms of four distinct trends, which differ most notably in terms of whether or not society has found poverty to be a consequence of a divine plan (“Medieval Piety”), a social pathology (“Rugged Individualism”), a learned behavior that could be curbed through education (“State Welfare”), or a persistent condition that has no larger significance or ultimate solution (“Contemporary Individualism”). *Id.* at 189–202.

<sup>25</sup> *Id.* at 196.

<sup>26</sup> *Id.* at 196–198.

<sup>27</sup> *Id.* at 202.

<sup>28</sup> *Id.* at 207 (emphasis added). See also Ben H. Bagdikian, *A Secret in the News: The Country’s Permanent Poor*, ZNET DAILY COMMENTARIES, Apr. 3, 2001, <http://www.zmag.org/ZSustainers/ZDaily/2001-04/03bagdikian.htm> (observing that “[w]hen confronted with persistent poverty in the world’s richest country, the American mainstream print and electronic media seem to take as their mandate the biblical words from Matthew, ‘The poor ye will have always.’”).

<sup>29</sup> See, e.g., 151 CONG. REC. E1877 (daily ed. Sept. 15, 2005) (statement of Hon. Elijah E. Cummings), (imploping that “[t]he televised images of hardship, death and despair from New Orleans may have opened the doors to this nation’s reservoir of compassion—but something more than a momentary outpouring of conscience will be required to keep those doors from slamming shut again once the spotlights dim.”).

undertake a role in the anti-poverty objectives of the country.<sup>30</sup> The order exemplifies a renouncing of government responsibility for the poor to some degree, and also elicits concern about the values that will be imposed by faith-based organizations as a consequence of charities' tendency to "pick and choose who to serve. No one is entitled to anything from a charity, rather one must be designated a 'deserving' case."<sup>31</sup> If the value inherent in these observations of and reactions to the poor is the value of invisibility, then something must be done to counteract the inevitable consequences that will occur if society turns such a blind eye to the problems associated with poverty.<sup>32</sup> Although the "poverty line" as defined during the era of "State Welfare" represented a then prevailing value, its persistence in this newly hypothesized era will allow society to accept monetary inequality with a pessimistic acceptance of the inevitability of such.<sup>33</sup> On the other hand, if the poverty line were to be reworked, as suggested here, to reflect more inclusive values and current realities, the defeatist consequences of "Contemporary Individualism" could be avoided.<sup>34</sup> A more inclusive definition of poverty is needed to redefine

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<sup>30</sup> Exec. Order No. 13199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

<sup>31</sup> Martha Russell, *What's Wrong with "Charitable Choice"?* *A Plenty*, ZNET DAILY COMMENTARIES, Mar. 28, 2001, <http://www.zmag.org/ZSustainers/ZDaily/2001-03/28russell.htm>; *supra* note 5 and accompanying text (describing the distinction between the deserving and the non-deserving poor).

<sup>32</sup> *See, e.g.*, Hanson, *supra* note 5, at 207 (cautioning that "the loss of a larger meaning for [poverty], and the resulting indifference among an increasing proportion of the non-poor, is what, more than anything else, enables legislators to end welfare as we have known it").

<sup>33</sup> *See id.* at 202 (observing that "[p]ast failures seed [the non-poor's] doubt that poverty can be eradicated, and present values do not provide them with any great incentive for continuing to try").

<sup>34</sup> *See, e.g.*, Paul Vallely, *UN Hits Back at US in Report Saying Parts of America are as Poor as Third World*, THE INDEPENDENT, Sept. 8, 2005, <http://news.independent.co.uk/world/politics/article311066.ece> (stating that in order to deal with poverty in the U.S., policy-makers need to stop focusing on general economic growth, and instead need to "tackl[e] inequality - a message towards which John Bolton [U.S. ambassador to the U.N.] and his fellow US neocons [neo-conservatives] are deeply hostile").

the values of well-being and to refocus society's attention on the underlying inequalities that give rise to poverty. Such a result will give a larger meaning to poverty that is now lacking.<sup>35</sup>

First, it has to be recognized that there are different types of inequality that contribute to poverty.<sup>36</sup> The most basic and obvious equality that is lacking for the poor is monetary equality.<sup>37</sup> The federal poverty guidelines define the poor in this sense.<sup>38</sup> However, this measurement is, in the end, arbitrary,<sup>39</sup> and it ignores other factors that contribute to the status of the impoverished.<sup>40</sup> The poor that are excluded from these measurements are affected not only in the sense that they are disqualified from federal welfare programs because their incomes are too high,<sup>41</sup> but they are also disqualified from the realm of society's perception—that is, if they are not included in the census measurements of the poor, their plight is invisible to society's eye.<sup>42</sup> They are then deprived of the help and aid that the egalitarians envision.<sup>43</sup> Furthermore, even for the poor who

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<sup>35</sup> See Hanson, *supra* note 5, at 207-08 (imagining that if by chance renewed attention and aid to the poor occurred, such a result would be as a consequence of “some fresh set of meanings . . . to motivate the new volunteers in the war against poverty”).

<sup>36</sup> SEN, *INEQUALITY REEXAMINED*, *supra* note 7, at x–xi, 1 (attributing the different sources of equality to the diversity of mankind).

<sup>37</sup> See, e.g., HDR 2005, *supra* note 21, at 52 (stating that “[i]ncome inequality is an inevitable product of any functioning market economy, though there are questions about the justifiable extent of income inequality”).

<sup>38</sup> See 46 Fed. Reg. 62674, 62674 (Dec. 28, 1981) (stating that “[p]overty for statistical purposes is defined as the series of income cutoffs”).

<sup>39</sup> Gordon M. Fisher, Address at the 22nd Meeting of the Soc. Sci. History Ass’n: Poverty Lines and Measures of Income Inadequacy in the United States Since 1870: Collecting and Using a Little-Known Body of Historical Material (October 17, 1997), <http://aspe.hhs.gov/poverty/papers/since1870.htm> Author Gordon Fisher presents a provoking challenge to interested researchers regarding the question of arbitrariness: “Someone interested in the interaction between ideas and social institutions could do a study of the social context of the origin and social consequences of the belief or axiom . . . that ‘Poverty lines are arbitrary, it doesn’t matter at what level you set them.’” *Id.*

<sup>40</sup> See SEN, *INEQUALITY REEXAMINED*, *supra* note 7, at 20 (emphasizing that “[t]he relative advantages and disadvantages that people have, compared with each other, can be judged in terms of many different variables, e.g. their respective incomes, wealths, utilities, resources, liberties, rights, quality of life, and so on”).

<sup>41</sup> See 70 Fed. Reg. 8373, 8374 (Feb. 18, 2005) (explaining that “[i]n certain cases, as noted in the relevant authorizing legislation or program regulations, a program uses the poverty guidelines as only one of several eligibility criteria, or uses a percentage multiple of the guidelines”).

<sup>42</sup> See, e.g., Sen, *From Income Inequality to Economic Inequality*, *supra* note 8, at 398 (stating that “[s]ome assumptions [regarding valuations of equality, such as income] that give the appearance of working very well operate through hiding the choice of values and weights in some constructed opaqueness”).

<sup>43</sup> See, e.g., Hanson, *supra* note 5, at 194 (noting that egalitarian philosophies inspired the “State Welfare” era, which

are included in the current poverty measure, society will still ignore their plights if larger and more central values, such as health and education, are not considered in the official definition of poverty; for as Hanson argues, the lack of a larger meaning in the discourse about poverty allows the population to become indifferent, and for legislators to end the system of welfare as it has existed.<sup>44</sup>

## II. Measures of Poverty as Compared to Measures of Inequality

Although measurements of poverty and inequality are similar in concept, they are not necessarily identical.<sup>45</sup> One author distinguishes the two concepts based on their absolute versus relative definitions, whereas, “poverty is about *absolute levels of living*—how many people cannot attain certain pre-determined consumption needs,” and “inequality is about the *disparities in levels of living*—for example, how much more is held by rich people than poor people.”<sup>46</sup> However, poverty has also often been measured in relative terms, most notably in European countries.<sup>47</sup> Furthermore, although “[a]bsolute poverty and inequality may be different concepts, . . . they are intimately related. Disparities in life chances define prospects for escaping poverty.”<sup>48</sup> For example, poverty varies based on such indicators as income inequalities, gender

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embraced the idea that poverty “is a problem to be solved”).

<sup>44</sup> *Id.* at 207.

<sup>45</sup> See HDR 2005, *supra* note 21, at 54.

<sup>46</sup> Martin Ravallion, *The Debate on Globalization, Poverty, and Inequality: Why Measurement Works* 3 (World Bank Development Research Group, Working Paper No. 3038, 2003), available at <http://econ.worldbank.org>. Ravallion then goes on to emphasize the distinctions between “relative poverty” and “absolute poverty,” as well as between “relative inequality” and “absolute inequality.” *Id.* at 4–5. These distinctions and the distinction between poverty and inequality tend to collapse into one another, and are largely academic. They will be considered, for the purposes of this essay, to be interchangeable.

<sup>47</sup> See *id.* at 4 (“At one extreme, if the poverty line is proportional to the mean income then it behaves a lot like a measure of inequality; this has actually been popular in poverty measurement in Western Europe.”).

<sup>48</sup> HDR 2005, *supra* note 21, at 54.



and racial inequalities, inequalities in access to programs aimed at reducing inequalities, as well as on inequalities related to region, including urban-rural disparities.<sup>49</sup>

The capabilities approach calls for a renewed conceptualization of the measurement of poverty based on relative considerations that take into account a multitude of inequalities.<sup>50</sup> To whatever extent “poverty” and “inequality” are deemed severable concepts, the latter concept is the superior approach for reflecting the societal values that underlie a definition of overall well-being.<sup>51</sup>

### **A. The Capabilities Approach**

In the context of egalitarian theory, the capabilities approach set forth by economist and theorist Amartya Sen frames an alternative approach to the current definition of poverty and well-being.<sup>52</sup> The approach may be understood by what it is not. Different strains of egalitarian theory diverge most prominently on how they define equality.<sup>53</sup>

Not only do income-egalitarians . . . demand equal incomes, and welfare-egalitarians ask for equal welfare levels, but also classical utilitarians insist on equal weights on the utilities of all, and pure libertarians demand equality with respect to an entire class of rights and liberties. They are all ‘egalitarians’ in some

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<sup>49</sup> *See id.* at 53 (citing deprivation of public goods, as well as “inequalities based on wealth, gender or region” as contributors to poverty); NAT’L RESEARCH COUNCIL, MEASURING POVERTY: A NEW APPROACH 1 (Constance F. Citro and Robert T. Michael eds., 1995) (citing “differences in the extent of economic poverty among populations groups or geographic areas of the country” as reasons that the current poverty line is insufficient).

<sup>50</sup> *See, e.g.*, SEN, CHOICE WELFARE AND MEASUREMENT, *supra* note 1, at 380 (stating that “if we shift our attention to the measurement of inequality, we would like to consider the income gaps of people above the poverty line as well. . . Variations in these lines will transform an absolute poverty measure into a relative measure of inequality”).

<sup>51</sup> *But see*, Ravallion, *supra* note 46, at 4 (noting that a relative measure of poverty will cause economic growth to have little effect on the value of the measure, which can then reflect “rising poverty even when the levels of living of the poor have in fact risen”).

<sup>52</sup> Sen has contributed numerous works on the topic, most notably for the purposes of this discussion, SEN, INEQUALITY REEXAMINED, *supra* note 7.

<sup>53</sup>*Id.* at 3, 12-13.

essential way—arguing resolutely for equality of something which everyone should have and which is quite crucial to their own particular approach.<sup>54</sup>

The capabilities approach focuses on the equality of freedom in pursuit of basic functionings: that is, the capability to achieve certain basic needs and desires that constitute well-being.<sup>55</sup> The theory is inspired by the diversity of equalities that exist in society and thus considers what kind of approach would be most inclusive of this diversity.<sup>56</sup> Even though it shifts attention away from the means to achieving equality, and instead begins to look at the ends of this pursuit,<sup>57</sup> Sen does not ignore the fact that the means to achievement are crucial to the pursuit of equality.<sup>58</sup> In response to Rawlsian and Dworkinian concerns with distribution of “primary goods” and distribution of “resources,”<sup>59</sup> Sen states that “it is not unreasonable to think of these moves as taking us *towards* freedom—away from attention being confined exclusively to

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<sup>54</sup> *Id.* at ix.

<sup>55</sup> *Id.* at 5 (explaining that “[a] person’s capability to achieve functionings that he or she has reason to value provides a general approach to the evaluation of social arrangements, and this yields a particular way of viewing the assessment of equality and inequality”).

<sup>56</sup> *Id.* at 20.

<sup>57</sup> *Id.* at 8–9, 26–27. Sen compares his approach to that of John Rawls. *Id.* at 8–9, 26–27. Sen states that “T[t]o judge equality—or for that matter efficiency—in the space of primary goods amounts to giving priority to the *means* of freedom over any assessment of the *extents* of freedom, and this can be a drawback in many contexts. The practical importance of divergence can be very great indeed in dealing with inequalities related to gender, location, and class, and also to general variations in inherited characteristics.” *Id.* at 8–9. He also contrasts utilitarianism with its focus on freedom to achieve as merely instrumental to the actual achievement. *Id.* at 32–33, 53–55. Utilitarianism does focus on an end in terms of individual utility and the achievement of some mental state “such as pleasure, happiness, or desire.” *Id.* at 6. Sen states that this is restrictive, however, in that it “(1) ignores freedom and concentrates only on achievements, and (2) it ignores achievements other than those reflected in one of these mental metrics.” *Id.*

<sup>58</sup> *Id.* at 33.

<sup>59</sup> John Rawls, *The Basic Liberties and Their Priorities*, in EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES 105, 123–24 (Stephen Darwall ed., Univ. of Mich. Press 1995) (discussing his concept of “primary goods” as things that are needed as means to undetermined ends, and emphasizing that the “characterization of such primary goods does not rest” on clear definition of the final ends); Ronald Dworkin, *Foundations of Liberal Equality*, in EQUAL FREEDOM: SELECTED TANNER LECTURES ON HUMAN VALUES 190, 223 (Stephen Darwall ed., Univ. of Mich. Press 1995) (arguing that “ideal distribution is achieved only when the resources different people control are equal in the *opportunity costs* of those resources, that is, the value they would have in the hands of other people”).

evaluation achievement”—that is, the evaluation of the level of achievement, as opposed to the freedom to achieve in the first place.<sup>60</sup>

The problem with focusing on the means, however, is that even if every person had the same resources, that does not necessarily translate into equal substantive freedoms.<sup>61</sup> The variation lies in the conversion of those resources.<sup>62</sup> Sen articulates this concept with an example:

[A] poor person’s freedom from undernourishment would depend not only on her resources and primary goods (e.g. through the influence of income on the ability to buy food), but also on her metabolic rates, gender, pregnancy, climatic environment, exposure to parasitic diseases, and so on. Of two persons with identical incomes and other primary goods and resources . . ., one may be entirely free to avoid undernourishment and the other not at all free to achieve this.<sup>63</sup>

The basic functionings that Sen refers to consist of those “beings and doings” that contribute to quality of life.<sup>64</sup> As examples of such functionings, Sen lists adequate nourishment, bodily health, avoiding premature mortality, as well as “more complex achievements such as being happy, having self-respect, taking part in the life of the community, and so on.”<sup>65</sup> Author and capabilities theorist, Martha Nussbaum, actually compiles a list of “central human functional capabilities,” which she admits is open to revision.<sup>66</sup> Her list includes life (avoiding premature death); bodily health; bodily integrity; senses, imagination, and thought; emotions; practical

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<sup>60</sup> SEN, *INEQUALITY REEXAMINED*, *supra* note 7, at 33.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*; Nussbaum, *supra* note 7, at 228.

<sup>63</sup> SEN, *INEQUALITY REEXAMINED*, *supra* note 7, at 33; Nussbaum, *supra* note 7, at 228. Nussbaum further articulates some of the more cultural variations, as opposed to physical variations, in individuals’ ability to convert resources into functionings. *Id.* For example, “[i]f we wish to bring all citizens of a nation to the same level of educational attainment, we will need to devote more resources to those who encounter obstacles from traditional hierarchy or prejudice.” *Id.*

<sup>64</sup> SEN, *INEQUALITY REEXAMINED*, *supra* note 7, at 39.

<sup>65</sup> *Id.*

<sup>66</sup> Nussbaum, *supra* note 7, at 231.

reason; affiliation; other species (being able to live with other animals and plants); play; and control over one's environment.<sup>67</sup>

The capabilities that a person has depends upon those functionings that the individual has chosen.<sup>68</sup> The capability to choose from the available functionings is also a function in and of itself, in that freedom of choice may contribute to quality of life.<sup>69</sup> It is the functionings that will constitute the indices for measuring well-being and poverty.<sup>70</sup> These indices of functionings, which will contribute to a thorough perspective on equality, will necessarily vary depending on the relative development of the society.<sup>71</sup> For example, in a developing country adequate nourishment and health might be factored prominently in a measure, whereas in a rich country, such as the United States, the list would be more complex.<sup>72</sup>

In terms of operationalizing this approach, Sen recognizes that too precise of a measure may in fact compete with the very essence of the ideas that he postulates—that is, a description that claims to be straightforward and unambiguous would deny the diversity of the human experience.<sup>73</sup> However, he states that “[t]he ‘pragmatic reason for incompleteness’ is to use

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<sup>67</sup> *Id.* at 231–33.

<sup>68</sup> SEN, *INEQUALITY REEXAMINED*, *supra* note 7, at 39–40. *See also*, Nussbaum, *supra* note 7, at 230 (noting that the capability to achieve the basic functions “in a truly human way, not merely an animal way” is also crucial to achieving quality of life.)

<sup>69</sup> SEN, *INEQUALITY REEXAMINED*, *supra* note 7, at 50.

<sup>70</sup> Sen, *From Income Inequality to Economic Inequality*, *supra* note 8, at 396–97. For a discussion on the methodological issues, including a discussion of measurement based on functioning vectors (variables based on those things a person values doing or being, such as being healthy or educated) and capability sets (the set of available functioning vectors that an individual may choose from), see *id.* at 394–97.

<sup>71</sup> *See, e.g.*, SEN, *INEQUALITY REEXAMINED*, *supra* note 7, at 44–45 (“In the context of some types of welfare analysis, e.g. in dealing with extreme poverty in developing economies, we may be able to go a fairly long distance in terms of a relatively small number of centrally important functionings . . . . In other contexts, including more general problems of economic development, the list may have to be much longer and much more diverse.”) (footnote omitted).

<sup>72</sup> *Id.*; *see also*, *infra* notes 150–53 and accompanying text (discussing the different indices of the Human Development Reports).

<sup>73</sup> SEN, *INEQUALITY REEXAMINED*, *supra* note 7, at 48.

whatever parts of the ranking we manage to sort out unambiguously, rather than maintaining complete silence until everything has been sorted out and the world shines in dazzling clarity.”<sup>74</sup>

## B. The Poverty Line

The potential complexity of a measure inspired by the capabilities approach is in stark contrast to the scarce composition of the federal poverty line.<sup>75</sup> The federal government has taken on the task of defining the poor through the federal poverty threshold and guidelines.<sup>76</sup> Not only do these measurements determine eligibility for many federal aid programs, but they also serve as the basis for the census reports on the prevalence of poverty.<sup>77</sup> Furthermore, “[t]he U.S. measure of poverty is an important social indicator that affects . . . public perceptions of well-being in America.”<sup>78</sup> Federal agencies have gone out of their way to ensure that these thresholds remain low, despite changing conditions that counsel otherwise, in order to maintain a perception by society that the problem of poverty is not as persistent as it really is.<sup>79</sup>

The official poverty measure sets a threshold level of income or resources and then compares the income or resources of families against that threshold to determine whether or not a

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<sup>74</sup> *Id.* The incompleteness Sen refers to is the “ambiguity and fuzziness” of well-being and inequality that is inevitable, and which it is the purpose of his theories to draw attention to. *Id.* at 39, 47–49, 133.

<sup>75</sup> See 70 Fed. Reg. 8373, 8374 (Feb. 18, 2005). As will be elaborated upon, the federal poverty guidelines considers the only indices for the measurement of poverty to be income and family size. *Id.*

<sup>76</sup> 42 U.S.C. § 9902 (2), (4) (2000) (originally enacted as Omnibus Reconciliation Act of 1981 tit. VI, § 673, 95 Stat. 511 (1981)). The Omnibus Budget Reconciliation Act (OBRA) of 1981 transferred the responsibility of annually updating the Federal Government’s poverty guidelines from the Community Services of Administration (OSCA)—formerly the Office of Economic Opportunity (OEO) until 1975—to the Department of Health and Human Services (HHS). *Id.*; Gordon M. Fisher, *Poverty Guidelines for 1992*, 55 SOC. SEC. BULL. 43, 43 (1992).

<sup>77</sup> 70 Fed. Reg. at 8374

<sup>78</sup> NAT’L RESEARCH COUNCIL, *supra* note 49, at 1.

<sup>79</sup> See Fisher, *A Look Back*, *supra* note 23, at 50 (describing the insistence of the federal government to maintain the current poverty measure in order to sustain public perceptions of a less persistent problem of poverty); *infra* notes 97–98 and accompanying text.

family is impoverished.<sup>80</sup> The threshold is calculated by estimating the average household's consumption level and normalizing for differences in household size.<sup>81</sup> The 2005 updated poverty guidelines set the income cutoff at \$19,350 for a family of four.<sup>82</sup> On its face, this income is grossly inadequate to maintain an acceptable standard of living.<sup>83</sup>

The poverty guidelines should initially be distinguished from the poverty thresholds in that the thresholds are used by the Census Bureau for statistical purposes, whereas the guidelines are a simplified version of the thresholds and are utilized in a more administrative context.<sup>84</sup> The Department of Health and Human Services updates the guidelines annually by multiplying the official poverty line by the percentage change in the Consumer Price Index (CPI), and this is the only alteration to which the measure is regularly subjected.<sup>85</sup> The guidelines are used to determine eligibility for a number of federal programs.<sup>86</sup>

The poverty line was originally calculated in response to the Johnson administration's declaration of "a war on poverty."<sup>87</sup> Mollie Orshansky, an economist working for the Department of Social Services, created the poverty thresholds, and these measures were adopted by the Office of Economic Opportunity (OEO).<sup>88</sup> "In effect, [Orshansky] took a hypothetical average family spending one-third of its income on food, and assumed that it had to cut back

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<sup>80</sup> U.S. Census Bureau, *supra* note 6.

<sup>81</sup> *Id.*

<sup>82</sup> 70 Fed. Reg. at 8374.

<sup>83</sup> See NAT'L RESEARCH COUNCIL, *supra* note 49, at 3 (noting that "[b]ecause of rising standards [of living] in the United States, most approaches for developing poverty thresholds (including the original one) would produce higher thresholds today than the current ones").

<sup>84</sup> 70 Fed. Reg. at 8374. From here on out the guidelines and thresholds will be referred to interchangeably as the "poverty line."

<sup>85</sup> 42 U.S.C. § 9902(2). This section authorizes and requires HHS to update the guidelines. *See supra* note 76.

<sup>86</sup> 70 Fed. Reg. at 8374. Many of the programs use the guidelines as only one factor for determining eligibility, or they use a percentage multiple of the guidelines. *Id.* For a comprehensive list of programs that utilize the guidelines see generally, CONG. RESEARCH SERV., *supra* note 12.

<sup>87</sup> Fisher, *A Look Back*, *supra* note 23, at 49. For a look at how poverty was measured before this, see *id.* at 47–49.

<sup>88</sup> *Id.* at 49.

sharply on its expenditures and that expenditures for food and nonfood would be cut back at the same rate.”<sup>89</sup> The multiplier of three was based on a normative assumption about consumption patterns of the population as a whole, and not of the poor specifically.<sup>90</sup>

Orshansky’s purpose in creating the thresholds was, in fact, “not to introduce a new general measure of poverty, but to develop a measure to assess the relative risks of low economic status (or, more broadly, the differentials in opportunity) among different demographic groups of families with children.”<sup>91</sup> In this sense, her mission seems to have comported with a Rawlsian approach to equality, which focuses extensively on equality of opportunity.<sup>92</sup> It will be seen, however, that her good intentions were thwarted when the government adopted the measures.<sup>93</sup> The consequence of this adoption was an oversimplification and underestimate of the many contributing inequalities, aside from absolute income, that result in the problems associated with poverty.<sup>94</sup>

The poverty line is defined in absolute terms, or in terms of an inability to meet absolute basic needs.<sup>95</sup> This is compared to relative terms, or the distance of quality of life of the poor

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; see also Gordon M. Fisher, *The Development and History of the Poverty Thresholds*, 55 SOC. SEC. BULL. 3, 5 (1992).

<sup>91</sup> Fisher, *The Development and History of the Poverty Thresholds*, *supra* note 90, at 3.

<sup>92</sup> See, e.g., THOMAS W. POGGE, *REALIZING RAWLS* 161–73 (Cornell Univ. Press 1989) (describing Rawl’s principle of equality and fair opportunity, which states generally that any individuals in society with the same native talent and ambition should have the same prospects of success in competition for positions that confer special benefits and advantages).

<sup>93</sup> See generally Fisher, *The Development and History of the Poverty Thresholds*, *supra* note 90, at 3. Rather than be used as a descriptive measure of a narrow and specific social phenomenon as Orshansky originally intended, *id.*, the poverty line has rather been used as a prescriptive measure by virtue of its use in determining eligibility for federal welfare programs, and as a more generalized descriptive measure by its use by the census bureau, 70 Fed. Reg. 83 73, 8374 (Feb. 18, 2005). For a discussion of the virtues of descriptive versus prescriptive measures, see *infra* notes 86–9 and accompanying text.

<sup>94</sup> *Supra* notes 35–44 and accompanying text.

<sup>95</sup> ORG. FOR ECON. CO-OPERATION & DEV., *OECD EMPLOYMENT OUTLOOK 2001: RECONCILING SOCIAL AND EMPLOYMENT GOALS* 41 (2001).

from the community norm (e.g., the poverty threshold might be set below “an income value equal to half the national median value”).<sup>96</sup> It could be argued that the measure has a relative component in the sense that the cut off point at which a person is considered “below the poverty line” reflects a value judgment about how wide a gap should exist between the poor and the non-poor.<sup>97</sup> This argument is rendered moot, however, when one considers the *lack* of judgment that has been incorporated into the threshold.<sup>98</sup> For example, the line has never been adjusted to take into account the rising cost of housing.<sup>99</sup> Nor has the measure been sensitive to the fact that while high paying executives are typically compensated in ways that are not counted as salary, higher paying jobs for the lower to middle classes are being replaced by service industry jobs.<sup>100</sup> In other words, capital gains are not counted as income, so the extent of wealth is not reflected in the Census data for the upper classes, and as the lower classes are forced into lower paying jobs, the income gap becomes even more exaggerated.<sup>101</sup> The poverty line, in its absolute nature, misses this distribution by not taking into account the relative equality of the poor as compared to

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<sup>96</sup> *Id.*; see also *supra* notes 46–50 and accompanying text.

<sup>97</sup> See Fisher, *The Development and History of the Poverty Thresholds*, *supra* note 90, at 6 (stating that “Orshansky accurately described her poverty thresholds as a ‘relatively absolute’ measure of poverty, inasmuch as they were developed from calculations that made use of the consumption patterns (at a particular point in time) of the U.S. population as a whole”).

<sup>98</sup> See *supra* notes 83, 85 and accompanying text.

<sup>99</sup> See 150 CONG. REC. S3463, 3484 (daily ed. Mar. 31, 2004) (describing recommendations of a 1995 Council that included cost of living adjustments in the poverty measure).

<sup>100</sup> Celine-Marie Pascale, *Normalizing Poverty*, Z MAGAZINE, Jun. 1995, <http://www.zmag.org/ZMag/articles/june95pascale.htm>.

<sup>101</sup> *Id.*; see also Daniel H. Weinberg, *A Brief Look at Postwar U.S. Income Inequality*, CURRENT POPULATION REPORTS: HOUSEHOLD ECONOMIC STUDIES 3 (U.S. Census Bureau 2000), *available at* <http://www.census.gov/hhes/www/img/p60-191.pdf> (noting that “[o]ne factor is the shift in employment from those goods-producing industries that have disproportionately provided high-wage opportunities for low-skilled workers, towards services that disproportionately employ college graduates, and toward low-wage sectors such as retail trade.”).



the rich.<sup>102</sup> The *only* attempt to adjust the poverty line is the annual increase based on inflation.<sup>103</sup>

In this way, the poverty line *is* absolute, in that it sets an absolute budget that is apparently designed to represent the income necessary to meet basic needs.<sup>104</sup> Even more revealing of its absolute nature, the poverty line functions like a “head count ratio” and consists of “simply . . . count[ing] the number of the poor and check[ing] the percentage of the total population belonging to this category.”<sup>105</sup> Thus, “[a]n unchanged number of people below the ‘poverty line’ may go with a sharp rise in the extent of the short-fall of income from the poverty line.”<sup>106</sup> This type of measure does not take into account the distance between the income of the poor as compared to other members of the community.<sup>107</sup>

### C. Descriptive versus Prescriptive Functions of a Poverty Measure

The federal government’s hesitance in reworking the poverty measure results in a picture of poverty that is inaccurate and unrepresentative.<sup>108</sup> The purpose of the federal poverty measure is both descriptive, for census purposes, and prescriptive, to help determine eligibility for various welfare programs.<sup>109</sup> Philosophical approaches have tended to avoid the descriptive functions of

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<sup>102</sup> Weinberg, *supra* note 101, at 2 (reporting that the medium income of the richest households grew 44% from 1968 to 1994, whereas the income of the poorest households grew only 8%).

<sup>103</sup> 70 Fed. Reg. 8373, 8374 (Feb. 18, 2005).

<sup>104</sup> ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 95, at 41.

<sup>105</sup> SEN, CHOICE WELFARE AND MEASUREMENT, *supra* note 1, at 373.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*; see also *Capacchione v. Charlotte-Mecklenburg Schcl.*, 57 F.Supp. 2d 228, 276 (W.D.N.C. 1999) (stating that the use of free lunch status to measure poverty of students reflects “nothing more than a single gross measure that distinguishes the poor from the non-poor according to a federal definition of poverty[; i]t does not account for the severity of a family’s poverty, and it does not differentiate between children of highly affluent parents and children of middle or working class parents.”)

<sup>108</sup> See *supra* notes 35–44 and accompanying text.

<sup>109</sup> 70 Fed. Reg. at 8374.

such measures.<sup>110</sup> However, such descriptions are often very important where, as in this country, reliance on a reported figure of an administrative agency shapes and defines society's perception regarding a pervasive social problem.<sup>111</sup>

While the poverty measure is undoubtedly inaccurate, changing the measure may have consequences, such as:

[(a)] Changing the measure alters the relative vulnerability of various groups. Claims on resources or public attention, in part may depend on the perceived vulnerability of the group, whether children, or the elderly, or the working poor, or single mothers. . . .

[(b)] . . . Changing the measure can alter the geographical distribution of the poor. Under some scenarios, poverty increases on both coasts, whereas the midsection of the country does relatively well. This can be seen as good or bad news, depending on whether the relative change is viewed as a reflection of exant policies or as a predictor of future federal resources.

[(c)] . . . A new measure may well reshape our understanding of the record of U.S. poverty. The conventional wisdom holds that the economic position of children has been worsening and that of the elderly has been improving. What if a new measure modifies those assumptions? . . .

[(d)] . . . There is nothing that necessarily ties a new statistical measure of poverty to the allocation of public resources. Still, many would reasonably worry that a change in the measure would eventually have real consequences for who is helped and who isn't.

[(e)] . . . The political consequences of a new poverty measure might be large; they are certainly unpredictable. For example, suppose the poverty rate changes as a result of a new measure. A rise might be viewed as a transparent attempt to increase spending on the poor or, conversely, to demonstrate that prior spending has been ineffective. . . .<sup>112</sup>

For these reasons, the advisability of a more accurate measure of poverty must be questioned and examined. The political consequences of a new measure are probably the most

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<sup>110</sup> SEN, CHOICE WELFARE AND MEASUREMENT, *supra* note 1, at 432.

<sup>111</sup> *See id.* at 437 (“There is nothing exceptional to economics in making stylized facts a possible and potentially efficient method of understanding reality. Fiction is a general method of coming to grip with facts.”).

<sup>112</sup> Thomas Corbett, *Poverty: Improving the Measure after Thirty Years: A Conference*, 20 FOCUS 51, 52-53 (1999), available at <http://www.irp.wisc.edu/publications/focus/pdfs/foc202.pdf#page=51>.

stifling consequence; however, to the extent possible “the task of measuring poverty should be insulated from political influences.”<sup>113</sup>

There is no reason why descriptive statements in economics have to aspire after mechanical accuracy even when it conflicts with comprehension and absorption. There is, of course, an obvious objection to presenting non-facts dressed up as facts, but there is no need to do this once non-facts are accepted as legitimate descriptive instruments themselves. Such a description of something will be good in the sense of being useful, but . . . must not be confused with its being a good—or realistic—description of that thing.<sup>114</sup>

On the contrary, however, the poverty measure is confused as “being a good [and realistic description]”<sup>115</sup> of the prevalence of poverty in society. For example, Robert Rector, poverty specialist for the Heritage Foundation, a conservative think tank, who supports cutting government funds for the poor, utilizes some misleading statistics based upon poverty line data to support his conflicting claims that “30 years of welfare spending had not reduced poverty, [and that] poverty has fallen so steeply since the War on Poverty that virtually no one in American today is really poor.”<sup>116</sup> Data based on the poverty line is often quoted as an unquestionable pillar of accuracy.<sup>117</sup> The consequences of “presenting non-facts dressed up as facts,” in this context is clear—serious policy decisions in Congress about funding and initiation or continuation of programs aimed at assisting the poor could be compromised or abandoned completely.<sup>118</sup>

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<sup>113</sup> Alan B. Krueger, *The U.N. Aims to Cut Poverty in Half, Even as the Experts Wonder How to Measure It*, N.Y. TIMES, Feb. 3, 2005, at C2.

<sup>114</sup> SEN, CHOICE WELFARE AND MEASUREMENT, *supra* note 1, at 432.

<sup>115</sup> *Id.*

<sup>116</sup> Seth Ackerman, *The Ever-Present Yet Nonexistent Poor*, EXTRA!, Jan./Feb. 1999, at 9–10, available at <http://www.fair.org/index.php?page=1446> (setting forth multiples examples of Rector’s misstatement of data, and explaining the actual realities of the data asserted).

<sup>117</sup> See, e.g., *Would an Increase in the Federal Minimum Wage Help or Hinder Small Business?: Hearing Before the Subcomm. on Workforce, Empowerment & Government Programs of the H. Comm. on Small Business*, 108th Cong. (2004) (statement of Paul Kersey, Bradley Visiting Fellow in Labor Policy, Heritage Foundation) (citing conclusions reached by the Heritage Foundation based on Census data to assert that “the average poor American has a car, air conditioning, at least one color television along with cable or satellite TV, a home that is in decent condition and enough food in the refrigerator”).

<sup>118</sup> *Id.* The statements of Kersey before the House were in opposition to a proposed increase in the minimum wage.

And, alas, the predictions of Allan Hanson, could be realized, as the poor could become yet more invisible to the non-poor and the government could, as a result, feel justified in withdrawing federal aid.<sup>119</sup> However, some have taken note of the measure's inherent problems and inaccuracies, and called for a change in the federal poverty line.<sup>120</sup>

### III. A Call for Change Has Already Been Made

The poverty lines have engendered much criticism over the years. The need for reform of the poverty measure has been articulated by all branches of government, and several federal agencies have called for interagency committees to conduct reviews of the poverty line.<sup>121</sup> Yet, no substantial change has been made in the measures since their adoption.<sup>122</sup> Upon reporting on the progress of a Congressionally appointed committee in 1990, it was concluded that:

Current methods of measuring poverty are based on outdated assumptions. . . .

The present method of measuring domestic poverty . . . is updated annually to reflect only inflation, not changes in consumption patterns, family structures, or perceptions of minimal standards of living.

Recent research shows that if these changes are considered, the poverty line would be 50 percent higher than it presently is. Other research suggests that

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*Id.*

<sup>119</sup> Hanson, *supra* note 5, at 207; *supra* notes 32, 44 and accompanying text.

<sup>120</sup> *Infra* Part II.

<sup>121</sup> In 1968, the Social Security Administration convened such a committee. For a result of their efforts see *infra* notes 126–27 and accompanying text. In 1971 and 1973, the Office of Management and Budget (OMB) established committees; however, again no changes were made in the poverty definitions. Fisher, *The Development and History of the Poverty Thresholds*, *supra* note 90, at 9. In 1979, the Justice Department's Task Force on Sex Discrimination found that the thresholds were discriminatory against women because of the disparate thresholds for male headed families as compared to female headed families. *Id.* at 10. Thus, the distinction was eliminated, as was the farm versus nonfarm distinction of the original measures. 46 Fed. Reg. 62674 (Dec. 28, 1981). These changes were largely technical, and the definition of poverty remained constant. Several other committees have been convened since then, notably in 1992 when Congress requested the study that was compiled by the National Research Council in 1995. NAT'L RESEARCH COUNCIL, *supra* note 49, at 1.

<sup>122</sup> See NAT'L RESEARCH COUNCIL, *supra* note 49, at 1 (stating that “[t]he current measure has remained virtually unchanged over the past 30 years”); 150 CONG. REC. S3463, 3484 (daily ed. Mar. 31, 2004) (stating that “the current measure . . . has remained virtually unchanged over the past 40 years, yet during that time, there have been marked changes in the nation's economy and society and in public policies”).

nearly 13 million more people would be classified as poor, if present-day assumptions were applied.<sup>123</sup>

The Office of Management and Budget (OMB), in the 1995 study commissioned by Congress, also recognized that the current measurement is lacking:

[I]t no longer provides an accurate picture of the differences in the extent of economic poverty among population groups or geographic areas of the country, nor an accurate picture of trends over times. The current measure has remained virtually unchanged over the past 30 years. Yet during that time, there have been marked changes in the nation's economy and society and in public policies that have affected families' economic well-being, which are not reflected in the measure.<sup>124</sup>

Even more recently, the Senate adopted the findings of the 1995 study, and concluded that “the improvement of the current measure of income poverty is an important goal,” but that “before taking action to implement a new poverty measure, the [OMB] should consider the impact of alternative measures on federally funded programs.”<sup>125</sup> The latter part of the sentence is reminiscent of the shutting down of attempted reforms in 1968, at which time the Census Bureau was instructed to make no changes to the criteria used to determine the poverty thresholds on the grounds that such changes would “seriously affect[] budgets and regulations” relating to federal aid programs and “result[] in a higher count of the poor.”<sup>126</sup> It was deemed “politically unacceptable in such a context to report a 2.8 million ‘increase’ in the poverty population.”<sup>127</sup>

The reforms that were suggested by the 1995 Council, and thereafter supported by the legislature, call for a measure based upon a family's budget that includes food, clothing, shelter,

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<sup>123</sup> H.R. Rep. No. 101-1002 at (II)(A)(21).

<sup>124</sup> NAT'L RESEARCH COUNCIL, *supra* note 49, at 1.

<sup>125</sup> 150 CONG. REC. at S3463, 3484 (daily ed. Mar. 31, 2004).

<sup>126</sup> Fisher, *A Look Back*, *supra* note 23, at 50.

<sup>127</sup> *Id.*

utilities, and additional amounts for other needs,<sup>128</sup> as opposed to the current measure that only takes into account food consumption as increased by a multiplier of three.<sup>129</sup> Another recommended change based the measure on after-tax income, “including in-kind benefits and deducting expenses such as child care and out-of-pocket medical costs,” instead of the before-tax measure currently employed.<sup>130</sup> Geographic variations in costs of living were also recognized and suggested as an additional consideration.<sup>131</sup> These suggestions are positive recommendations and their implementation, although unlikely, would help aid the underinclusive and absolute nature of the current measure; however, the recommended measures still do not address the lack of values inherent in the definition of the poor.<sup>132</sup> Instead, they reflect a philosophy of resource distribution that is in line with the philosophical “basic needs approach” that has been “reduced to a commodity approach with an emphasis on bringing individuals up to a certain minimal level of needs satisfaction.”<sup>133</sup>

Not only have the executive and legislative branches of our government already recognized the inadequacy of the current measure, but the judicial branch has taken note as well. Chief Judge Posner of the Seventh Circuit articulated an applied example of how the poverty line is lacking and impliedly that the capability measure would address the cited problem.<sup>134</sup> In the context of a school desegregation case, where a specific provision of a remedial decree required

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<sup>128</sup> 150 CONG. REC. at S3484.

<sup>129</sup> Fisher, *A Look Back*, *supra* note 23, at 49; *supra* notes 89–90.

<sup>130</sup> 150 CONG. REC. at S3484.

<sup>131</sup> *Id.*

<sup>132</sup> *See generally* NAT’L RESEARCH COUNCIL, *supra* note 49, at 1 (stating that “[i]mproved data, methods, and research knowledge make it possible to improve the current poverty measure”).

<sup>133</sup> John Schischka, *The Capabilities as a Metric for Economic Development* 4 (N.Z. Ass’n of Economists, Conference Paper No. 57, 2000), available at <http://nzae.org.nz/conferences/2002/2002-Conference-Paper-57-SCHISCHKA.PDF>.

<sup>134</sup> *People Who Care v. Rockford Bd. of Educ.*, Sch. Dist. No. 205, 111 F.3d 528, 537 (7th Cir. 1997).

that the school close the gap in test scores between white and minority students, and in response to a study attributing the gap in scores to poverty, the opinion stated that:

The study did not even measure poverty. It merely identified students who were below a poverty line. Even if the line was correctly chosen, the black students eligible for free lunches could be on average significantly poorer than the white students eligible for them; they could be further below the poverty line, and this could make a difference in their educational achievement. And poverty is not the only family or demographic characteristic affecting scholastic performance. If it were, the well-documented scholastic achievements of the children of poor immigrants would have to be ascribed to discrimination in favor of immigrants! The social scientific literature on educational achievement identifies a number of other variables besides poverty and discrimination that explain differences in scholastic achievement, such as the educational attainments of the student's parents and the extent of their involvement in their children's schooling. These variables cannot be assumed to be either randomly distributed across the different racial and ethnic groups in Rockford or perfectly correlated with poverty.<sup>135</sup>

This excerpt sums up the influence of an absolute poverty measure when it ignores variations in *degrees* of poverty.<sup>136</sup> It further recognizes the multitude of inequalities that may contribute to a status of poverty aside from income, such as race, genetics, and parental influences.<sup>137</sup> And most detrimentally, as Judge Posner's comments reflect, an index of poverty that focuses solely on income will have the outcome of reinforcing inequalities that are highly relevant to well-being.<sup>138</sup>

#### **IV. The Capability Approach Operationalized: The United Nations Development Programme**

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<sup>135</sup> *Id.*

<sup>136</sup> *See, supra* notes 106–07 and accompanying text.

<sup>137</sup> *People Who Care*, 111 F.3d at 537; *supra* notes 61–63 and accompanying text.

<sup>138</sup> *People Who Care*, 111 F.3d at 537.

As a solution to the inadequacies of the poverty line, Sen's theories, at first glance, seem important, but non-functional.<sup>139</sup> However, many other theorists have taken Sen's work and operationalized them—most notably in the context of development economics.<sup>140</sup> The United Nations Development Programme sets forth the Millennium Development Goals, the achievement of which are considered in depth in the annual Human Development Reports.<sup>141</sup> The Reports present analyses of features that contribute to inequality.<sup>142</sup> They then provide a measurement tool called the Human Development Index (HDI) that quantifies some of the major contributors to human development, and lists and compares countries based on the index.<sup>143</sup> Other indices have come about through the Reports, including the gender-related development index (GDI), the gender empowerment measure (GEM), two different human poverty indices (HPI-1 and HPI-2), and the technological achievement index (TAI).<sup>144</sup> The HDI serves as “an alternative focal point to the traditional concentration on the Gross National Product (GNP),

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<sup>139</sup> See JOHN RAWLS, *THE LAW OF PEOPLES* 13 & n. 3 (Harv. Univ. Press 1999) (describing Sen's approach as unworkable, but important).

<sup>140</sup> See e.g., Manu V. Mathai, *Case Studies: Observations on Operationalizing Sen's Capability Approach 1* (July 2003) (unpublished manuscript), available at [http://www.fas.harvard.edu/%7Efreedoms/resources/941mathai\\_case\\_studies\\_070103.pdf](http://www.fas.harvard.edu/%7Efreedoms/resources/941mathai_case_studies_070103.pdf) (presenting case studies of the operation of Sen's approach in India); Schischka, *supra* note 133, at 1 (presenting a case study of the approach as applied to the Association of Craft Producers in Kathmandu, Nepal).

<sup>141</sup> United Nations Development Programme, *Who We Are and What We Do*, <http://www.undp.org/about/> (last visited Feb. 13, 2006).

<sup>142</sup> See e.g., HDR 2005, *supra* note 21, at 51.

<sup>143</sup> United Nations Development Programme, *Human Development Report 2004: Cultural Liberty in Today's Diverse World* 138 (2004) [hereinafter HDR 2004].

<sup>144</sup> HDR 2004, *supra* note 143, at 259–62; United Nations Development Programme, *Human Development Report 2001: Making New Technologies Work for Human Development* 246 (2001).



Gross Domestic Product (GDP), and other standard measures of economic development.”<sup>145</sup> The HPI-2 is specifically targeted towards high-income countries, as an alternative to the HDI.<sup>146</sup>

The Human Development Reports are inspired by Sen’s theories, and thus they focus on the central functionings essential to achieving quality of life.<sup>147</sup>

While the coverage is necessarily restricted by data limitations, the ultimate object is to include all the crucial functionings that are central for quality of life, varying from such elementary ones as avoiding escapable morbidity and preventable mortality to being educated, having comfortable lives, achieving self-respect and respect from others, being socially integrated, and so on.<sup>148</sup>

Although Sen was initially skeptical about the development of a measure that boils down to a single number, he was “persuaded . . . that only a single number could shift the attention of policy-makers from material output to human well-being as a real measure of progress.”<sup>149</sup>

The HPI-2 specifically addresses inequality in countries that fall within the Organisation for Economic Co-Operation and Development (OECD),<sup>150</sup> which is a group of market economy, democratic countries that collaborate and function on a theory of peer review to improve policy and implement non-binding laws relating to economic and social issues.<sup>151</sup> Whereas “the HDI measures average achievement” in development, the HPI-2 measures *deprivation* in four areas of human development.<sup>152</sup> The reason for the separate measure is that by focusing on the most

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<sup>145</sup> Sudhir Anand and Amartya Sen, *The Income Component of the Human Development Index*, 1 J. HUM. DEV. 83, 85 (2000).

<sup>146</sup> HDR 2004, *supra* note 143, at 138.

<sup>147</sup> HDR 2005, *supra* note 21, at 52; Anand and Sen, *supra* note 145, at 84.

<sup>148</sup> Anand and Sen, *supra* note 145, at 84.

<sup>149</sup> Sakiko Fukuda-Parr, *The Human Development Paradigm: Operationalizing Sen’s Ideas on Capabilities*, 9 FEMINIST ECON. 301, 305 (2003)

<sup>150</sup> HDR 2004 *supra* note 143, at 260. The HPI-1 addresses deprivations in developing countries. *Id.*

<sup>151</sup> Organization for Economic Co-Operation and Development, Overview of the OECD: What is it? History? Who does what? Structure of the organisation?,

[http://www.oecd.org/document/18/0,2340,en\\_2649\\_201185\\_2068050\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html) (last visited Dec. 3, 2005).

<sup>152</sup> HDR 2004 *supra* note 143, at 260.

deprived people and deprivations in basic human capabilities in a high-income country, rather than on the average national achievement, a more accurate picture is presented which reflects the fact that high-income per person is no guarantee of a poverty-free country.<sup>153</sup>

The dimensions that are measured in the HPI-2 include: a long and healthy life, knowledge, a decent standard of living, and social exclusion.<sup>154</sup> “A long and healthy life” is defined as the “vulnerability to death at a relatively early age,” and is measured based on “the probability at birth of not surviving to age 60.”<sup>155</sup> “Knowledge” is defined as “exclusion from the world of reading and communications,” and is measured based on “the percentage of adults (aged 16-65) lacking functional literacy skills.”<sup>156</sup> “A decent standard of living” is measured “by the percentage of people living below the income poverty line (50% of the medium adjusted household disposable income).”<sup>157</sup> “Social exclusion” is measured “by the rate of long-term unemployment (12 months or more).”<sup>158</sup>

The “decent standard of living” measurement in the HPI-2 is the most comparable to the poverty line since it is a measure of income, yet the HPI-2 measures relative income as opposed to absolute income.<sup>159</sup> The index contemplates a “command over resources to enjoy a decent standard of living,” which is in contrast to the other measures:

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<sup>153</sup> See *supra* notes 71–72 and accompanying text.

<sup>154</sup> HDR 2004 *supra* note 143, at 260.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* This measure is in contrast to the HPI-1, which is applicable to developing countries. In the HPI-1, “a decent standard of living” is defined as “lack of access to overall economic provisioning, as measured by the unweighted average of two indicators, the percentage of the population without sustainable access to an improved water source and the percentage of children under weight for age.” *Id.* Also, it should be noted that the poverty line utilized here is *not* the U.S. federal poverty line, but rather it is a relative measure based on a percentage of medium income. *Id.*

<sup>158</sup> *Id.* Note that this measure is not factored into the HPI-1.

<sup>159</sup> *Id.*

Both longevity and education [as well as social exclusion] are clearly valuable as aspects of a good life, and also valued as constituents of the capability to do other things. In contrast, ‘command over resources’ is only an instrument for other ends –indeed, income is just one way of seeing this command. The purpose of including this in the HDI was to note the fact that there are many important capabilities which are critically dependent on one’s economic circumstances. The income level enjoyed, especially close to poverty lines, can be very crucial information on the casual antecedents of basic human capabilities.<sup>160</sup>

Therefore, use of income measurement is not wholly without merit in defining poverty, especially when concrete quantitative data on other elementary capabilities is unavailable.<sup>161</sup>

A measurement is undermined, however, if variables tend to “move with each other.”<sup>162</sup> That is, if life expectancy is predicted by income, the inclusion of both indices is difficult to justify.<sup>163</sup> The ideas set forth by Sen and Nussbaum regarding the variations among individuals in the conversion of resources are especially relevant for the purpose of pinpointing the necessity of the additional indices.<sup>164</sup> Sen sets forth five parameters that cause diversity in conversion: “personal heterogenics,” or physical characteristics such as age, disability, gender or disease; “environmental diversities,” for example, living in an area with frequent hurricanes requires more income to repair damage caused by such disasters; “variations in social climate,” such as availability of health care, education and law enforcement; “differences in rational perspectives,” for example, being poor in a rich neighborhood requires additional spending if one is to feel accepted in his community; and “distribution within the family,” which relates to the family

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<sup>160</sup> Anand and Sen, *supra* note 145, at 86. The article by Anand and Sen discusses the usefulness of the income measurement in the HDI which is measured by the GDP per capita. *Id.* Although we are here concerned most prominently with the HPI-2 (which measures income based on the poverty line), the analysis of income measurement in general is useful for our purposes. *See also supra* notes 57–60 and accompanying text (discussing the advantage of considering ends over means).

<sup>161</sup> Anand and Sen, *supra* note 145, at 86.

<sup>162</sup> *Id.* at 100.

<sup>163</sup> *Id.*

<sup>164</sup> *Supra* notes 61–63.

income and its distribution among family members.<sup>165</sup> The inadequacy of the income measure alone, and thus the need for varying indices that incorporate the diverse parameters listed above, is apparent in yet another lucid example from Sen.<sup>166</sup> His research has revealed that blacks in the United States have much lower life expectancy than do citizens of China or the state of Kerala in India, despite having much higher absolute incomes.<sup>167</sup> Therefore, income does not absolutely predict life expectancy, but rather, many of the parameters identified by Sen necessarily contribute to the prediction as well.<sup>168</sup> The recognition of this type of variation in conversion is an overwhelming aspect of what is lacking in the federal poverty line.

## **V. How Does the Federal Poverty Line Compare to this Framework**

### **A. Diversity in the United States Requires More Encompassing**

#### **Definition of Poverty**

The capabilities approach is worthwhile in its emphasis on the diversity of influences that it takes into account in explaining variations in individual's ability to convert resources.<sup>169</sup> One can imagine a domestic example of the phenomenon Sen articulates regarding the life expectancy of blacks domestically as compared to abroad.<sup>170</sup> “[A] person’s difficulties— naturally or socially generated—in converting ‘primary goods’ into actual freedoms to achieve” must be taken into

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<sup>165</sup> Sen, *From Income Inequality to Economic Inequality*, *supra* note 8, at 385–86. These variables may be seen in the United Nation’s HPI indirectly. That is, physical, environmental, social and relational factors, as well as economic composition of the family, certainly affect morbidity, literacy and long-term unemployment rates. *See* HDR 2004, *supra* note 143, at 260. There is an argument to be made that the HPI is underinclusive with respects to some of these variables, however, it is a starting point for seeing the different indices that could be considered.

<sup>166</sup> Sen, *From Income Inequality to Economic Inequality*, *supra* note 8, at 387-88.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Supra* notes 164–165 and accompanying text.

<sup>170</sup> *Supra* note 167 and accompanying text.

account in “a theory of justice,”<sup>171</sup> as well as in an inclusive descriptive measurement of poverty. The parameters which Sen sets forth as examples of diversity that affect the conversion of resources<sup>172</sup> are visible in the many benefit programs that the federal government has created to address the varying challenges of the diverse population of the poor.<sup>173</sup> It is thus apparent that the government has recognized the diversity; however, this recognition is expressed only through the prescriptive functions of the government’s policies and not in the descriptive uses of the poverty measure.<sup>174</sup> Some examples of how these variations can effect the experience of the poor are instructive.

Sen lists “personal heterogenics,” or physical characteristics, such as disease, as a parameter that contributes to this diversity.<sup>175</sup> Consider, for example, the plight of those afflicted with HIV or AIDS who “suffer from a fatal, currently incurable disease, [and of whom many] suffer from the tremendous limitations of poverty as well.”<sup>176</sup> The Department of Social Security Administration follows specific standards by which individuals applying for benefits are considered disabled.<sup>177</sup> “[A]ll of the symptoms (including pain), signs, and laboratory findings, as well as the effects of medication on the ability to function, are evaluated on a case-by-case basis to determine if an HIV-positive adult is able to engage in substantial gainful activity . . . .”<sup>178</sup> This reflects not only that individuals with AIDS or HIV have more difficulty converting

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<sup>171</sup> SEN, *INEQUALITY REEXAMINED*, *supra* note 7, at 148.

<sup>172</sup> Sen, *From Income Inequality to Economic Inequality*, *supra* note 8, at 385–86.

<sup>173</sup> See, e.g., 42 U.S.C. § 301(2000) (old age and survivors benefits); 42 U.S.C. § 423 (disability insurance); 42 U.S.C. § 601 (temporary assistance to needy families); 42 U.S.C. § 701 (maternal and child health services);

<sup>174</sup> *Supra* notes 6–13 and accompanying text.

<sup>175</sup> Sen, *From Income Inequality to Economic Inequality*, *supra* note 8, at 385–86.

<sup>176</sup> *Rosetti v. Sullivan*, 788 F.Supp. 1380, 1387 (E.D. Pa. 1992), *vacated*, 12 F.3d 1216 (3d Cir. 1993).

<sup>177</sup> 42 U.S.C. §§ 423(d), 1382c(a)(3) (2004).

<sup>178</sup> *Determining Disability and Blindness*, 56 Fed. Reg. 65702, 65704 (proposed Dec. 18, 1991) (summarizing the already enacted standards set forth in 20 C.F.R. § 416.905(a) (2005)).

resources because of increased costs of medical care,<sup>179</sup> but also that the patients may lack the basic capability to engage in gainful employment.<sup>180</sup>

The individuals affected by the disaster of Hurricane Katrina reflect Sen's second parameter, "environmental diversities."<sup>181</sup> Not only are people who live in hurricane prone areas of the country forced to convert their resources for insurance or repair for damage caused by such disasters,<sup>182</sup> in this specific instance, so many of those affected by the storm were already living in poverty.<sup>183</sup> "[O]f the 5.8 million individuals who lived in those states struck hardest by Katrina, over one million lived in poverty prior to the storm. In New Orleans, 28% of the city's residents were living in poverty prior to Katrina . . . ."<sup>184</sup> The poor who were affected had already lacked some of the basic capabilities, such as the ability to escape, as "those who were poor commonly lacked their own means of transport."<sup>185</sup> As so much attention has been placed on the government's lack of preparedness prior to the storm,<sup>186</sup> it begs the question whether or not a

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<sup>179</sup> See, e.g., Kathleen Short, et al., *Defining and Redefining Poverty* 8 (U.S. Census Bureau, Working Paper Series, Aug. 16–19, 2002), available at <http://www.census.gov/hhes/www/povmeas/papers/define.pdf>, (stating that "medical care needs differ from the need for food or housing in that not every family requires medical care in a given year, but when they do, the associated costs may be extraordinary large"); Sondra G. Beverly, *Using Measures of Material Hardship to Assess Well-Being*, 21 FOCUS 65, 68 (2000), available at <http://www.irp.wisc.edu/publications/focus/pdfs/foc212.pdf#page=65>, (noting that even if an individual has health insurance, he may be still find it difficult to access care because of coverage restrictions of the insurance carriers and physicians, or geographic obstacles of individuals in rural areas).

<sup>180</sup> See 56 Fed. Reg. at 65704. Evaluating the applicant's ability to engage in "gainful employment," *id.*, also reflects the long-standing notion of the "deserving" and "undeserving poor." *Supra* notes 5, 31 and accompanying text.

<sup>181</sup> Sen, *From Income Inequality to Economic Inequality*, *supra* note 8, at 386.

<sup>182</sup> See, e.g., U.S. DEP'T HOMELAND SEC., SURVIVING THE STORM: A GUIDE TO HURRICANE PREPAREDNESS 6, available at <http://www.fema.gov/pdf/hazards/hurricanes/survivingthestormhurricane.pdf> (last visited Feb. 19, 2006), (advising that, because home owner insurance policies do not cover flood damages, flood insurance should be purchased in order to avoid repaying loans with interest).

<sup>183</sup> *McWaters v. Fed. Emergency Mgmt. Agency*, No. Civ.A.05-5488, 2005 WL 3642730 (E.D. La. Dec. 12, 2005), available at <http://www.nlchp.org/Katrina/OrderTRODec12.pdf>, at 3.

<sup>184</sup> *Id.* (footnotes omitted).

<sup>185</sup> *Id.*

<sup>186</sup> See, e.g., *Challenges in a Catastrophe: Evacuating New Orleans in Advance of Hurricane Katrina: Hearing Before the S. Comm. on Homeland Security and Governmental Affairs*, 109th Cong. (2006) (statement of Walter S. Maestri, Director, Jefferson Parish Department of Emergency Management), (emphasizing that: "from 1992 forward, all agencies of the local, state and federal governments knew that actual physical evacuation was necessary to guarantee the safety of the New Orleans Metropolitan area, . . . that a significant portion of the

more inclusive definition of equality and well-being could have helped identify the need for further resources, and substantially mitigated the impact of the disaster on those individuals.<sup>187</sup>

One pervasive example of Sen’s parameter describing “variations in social climate,”<sup>188</sup> is access to quality education as it varies based on wealth and minority status.<sup>189</sup> The Supreme Court has held that education is not a fundamental right, and that indigency does not qualify that class of persons as a suspect class.<sup>190</sup> New York addressed an issue somewhat unique<sup>191</sup> as compared to the issues regarding disparities in state funding addressed by many courts, including the Supreme Court in *San Antonio Independent School District v. Rodriguez*.<sup>192</sup> In *Paynter v. State*, the petitioners, African-American schoolchildren, alleged that due to high levels of poverty concentration and racial isolation, their schools could not deliver sound basic education.<sup>193</sup>

Specifically, Chief Judge Kaye described the conflict as such:

Whereas *C[ampaign for] F[iscal] E[quality v. State]* premised its action on the State’s failure to fund the New York City education system, plaintiffs here claim no inadequacy of teaching, facilities or instrumentalities of learning. Rather, they charge that the State’s fault lies in practices and policies[, such as school residency requirements and nonresident tuition requirements,] that have resulted

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population of the area did not have adequate means of transportation which would allow them to evacuate the area. . . . [and that] it would take a minimum of 60 hours to have a real chance of evacuating this population”)

<sup>187</sup> See, e.g., *Experiences and Challenges of Hurricane Katrina Evacuees, Hearing Before the Comm. on House Select Katrina Response Investigation*, 109th Cong. (2005) (statement of Tom Davis, Chairman, U.S. Rep.) (observing that “issues of race and class were central to evacuation experiences[, which f]or many [were] complicated by age, mental or physical disability, the need to care for dependants, or material possessions they were trying to take with them”).

<sup>188</sup> Sen, *From Income Inequality to Economic Inequality*, *supra* note 8, at 386.

<sup>189</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 1 (1973) (addressing the claims of poor children who complained of inadequate spending on the schools in their districts as compared to more affluent districts as a result of the state’s reliance on property tax bases to fund the schools).

<sup>190</sup> See *id.* at 24, 35 (finding that children are not denied Equal Protection when the government provides greater educational opportunities for children who can afford to pay for access to the best state operated schools).

<sup>191</sup> *Paynter v. State*, 797 N.E.2d 1225, 1226 (N.Y. 2003).

<sup>192</sup> *San Antonio Indep. Sch. Dist.*, 411 U.S. at XX; *Campaign for Fiscal Equality v. State*, 801 N.E.2d 326 (N.Y. 2003).

<sup>193</sup> *Paynter*, 797 N.E.2d at 1226.

in high concentrations of racial minorities and poverty in the school district, leading to abysmal student performance.<sup>194</sup>

The majority of the court held that this theory could not state a cause of action under the Education Article of the New York State Constitution.<sup>195</sup> In a lengthy dissent, however, Judge Smith set forth the historical fact of separate but equal school policies in the state that persisted in time well beyond the Supreme Court's decision in *Brown v. Board of Education*, which held that the practice violated the Equal Protection clause of the Fourteenth Amendment.<sup>196</sup> Judge Smith further asserted that it is within the powers of the State to address the problems complained of:

A child who lives in a high crime neighborhood with one parent struggling to make ends meet is capable of learning. It is plaintiffs' contention that when a school population is made up almost entirely of such children, the opportunity to learn vanishes. . . . The alleged cause of the problem, the high concentration of poor and minority students, is not one that is beyond the powers of the State to remedy.<sup>197</sup>

Thus, the "capability" for these children to learn is stunted by circumstances beyond their control, and they are unable to convert that capability into resources that are available to those with better access to quality education.<sup>198</sup>

"Differences in rational perspectives"<sup>199</sup> is a parameter that is most exemplified by Adam Smith's quote:

By necessities I understand not only the commodities necessary for the support of life, but whatever the custom of the country renders it necessary for creditable people, even of the lowest order to be without. A linen shirt, for example, is strictly speaking not a necessity of life. . . . But in present times, through the

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<sup>194</sup> *Id.* at 1226–27.

<sup>195</sup> *Id.* at 1231; N.Y. CONST. art. 11, § 1.

<sup>196</sup> *Paynter* at 1232–33 (Smith, J., dissenting); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)

<sup>197</sup> *Paynter* at 1248 (Smith, J., dissenting).

<sup>198</sup> *Id.*

<sup>199</sup> Sen, *From Income Inequality to Economic Inequality*, *supra* note 8, at 386.



greater part of Europe, a creditable day labourer would be ashamed to appear in public without a linen shirt.<sup>200</sup>

With recent welfare reform, the need for access to amenities like proper work attire is even more crucial as the welfare program, Temporary Assistance to Needy Families (TANF), emphasizes personal responsibility and work incentives.<sup>201</sup> Getting non-service employment is difficult for many, especially when taking into account the impact of discrimination.<sup>202</sup>

The welfare system appears to think poorly of the way that Native American and African American women choose to dress. Fifty-three percent of Native women and 47% of Black women who received job training were sent to ‘Dress for Success’ classes, compared with only 26% of white women. By comparison, Whites, African Americans and Latinos were all more likely than Native Americans to be allowed what is arguably a more valuable opportunity—computer training.<sup>203</sup>

So again, impoverished persons, although possibly possessing valuable skills, may not be able to convert those capabilities in the mainstream job market without access to the equivalent of Adam’s “linen shirt.”<sup>204</sup>

The parameter which contemplates “distribution within the family” can be considered by looking at cross-cultural variation in social safety nets.<sup>205</sup> As a byproduct of the immense diversity in the United States, various sub-cultures may have differing ways of dealing with the lack of resources of members within their specific communities, thus affecting an individual

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<sup>200</sup> HDR 2005 *supra* note 21, at 54-55, quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Oxford Univ. Press 1996) (1776).

<sup>201</sup> See 42 U.S.C. § 601 (stating that “[t]her purpose of this program is to increase the flexibility of States in operating a program designed to . . . end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage”).

<sup>202</sup> Lisa E. Oliphant, *Four Years of Welfare Reform: A Progress Report* 12 (Cato Inst., Policy Analysis No. 378, 2000), available at <http://www.cato.org/pubs/pas/pa378.pdf>, (“Studies show the majority of TANF leavers entering full-time jobs in food service, retail trade, sales, manufacturing, recreational services, hotels, and clerical duties. Those jobs are usually entry level positions with few educational experience or skill requirements.”)

<sup>203</sup> REBECCA GORDON, APPLIED RESEARCH CENTER, CRUEL AND USUAL: HOW WELFARE “REFORM” PUNISHES POOR PEOPLE 34 (2001).

<sup>204</sup> HDR 2005 *supra* note 21, at 54-55

<sup>205</sup> See *In re Holocaust Victim Assets Litigation*, 314 F.Supp. 2d 169, 172 (E.D.N.Y. 2004).

member's ability to convert those resources.<sup>206</sup> A look at the anecdotal stories of these groups may “reveal[] factors not included in the definition of poverty that nevertheless impact how [members of the groups] live.”<sup>207</sup> Thus, “even if . . . 25% of [Holocaust] survivors in America live below the poverty line, private and public social safety nets generally prevent them from facing the same level of need as those in the F[ormer] S[oviet] U[nion]. While the number of survivors below the poverty level is a quantitative figure, it is only the beginning of the story.”<sup>208</sup> This example represents the proposition that although the members of the specific sub-group may fall below the poverty line, their ability to convert their available resources is enhanced by the social safety nets that exist within their specific community.<sup>209</sup>

It is clear based on these examples that the poverty line fails to take into account a number of factors that contribute to and exacerbate the plight of the impoverished.<sup>210</sup> The task of incorporating indices in the poverty line that might reflect these phenomena is not, however, outside the reach of the government.<sup>211</sup> The HPI-2 establishes that this goal could be attained,<sup>212</sup> and the data that might be incorporated in to a domestic version of the HPI is already available from a number of authentic government agency sources.<sup>213</sup>

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<sup>206</sup> See, e.g., KELSO, POVERTY AND THE UNDERCLASS: CHANGING PERCEPTIONS OF THE POOR IN AMERICA 162 (N.Y. Univ. Press 1994) (“When we ask why the incidence of the underclass is so much higher among one minority than another, the answer may lie in the breakdown of mediating institutions in the inner city. For instance, the black family has become more fragile than ever, the black church has lost its pivotal role in holding together its poor constituents, and middle-class blacks have fled the often inhospitable atmosphere of the ghetto.”)

<sup>207</sup> *In re Holocaust Victim Assets Litigation*, 314 F.Supp. 2d at 171.

<sup>208</sup> *Id.* at 172.

<sup>209</sup> See *id.* at 171–72.

<sup>210</sup> See *supra* notes 6–13 and accompanying text.

<sup>211</sup> *Infra* Part V(B).

<sup>212</sup> *Supra* Part IV.

<sup>213</sup> See generally MARIANNE HILLEMEIER, ET AL., U.S. DEP'T HEALTH AND HUMAN SERV., DATA SET DIRECTORY OF SOCIAL DETERMINANTS OF HEALTH AT THE LOCAL LEVEL (2003) (modified from Marianne Hillemeier, et al., *Measuring Contextual Characteristics for Community Health*, 38 HEALTH SERV. RES. 1645 (2003), available at [http://www.cdc.gov/cvh/library/data\\_set\\_directory/pdfs/data\\_set\\_directory.pdf](http://www.cdc.gov/cvh/library/data_set_directory/pdfs/data_set_directory.pdf) (presenting a collection of sources for various data)).

## **B. Data Already Available for Incorporation as Indices in a Reformed Measure**

The HPI may not be *specifically* suited to measurements in the United States. “[T]he relative importance of capabilities can vary with social context—from one community or country to another, and from one point of time to another. Thus, ‘task of specification must relate to the underlying motivation of the exercise as well as dealing with the social values involved.’”<sup>214</sup> The fact that such a feat has been accomplished represents the methodological attainability of the new measure.<sup>215</sup> The international scope of the HDI and HPI counsels that they must be considered simplified versions of what could be achieved in a purely domestic setting, where normalization across nation boundaries is not necessary.<sup>216</sup>

The capabilities approach calls for a reform of the *absolute* nature of the poverty line:

The idea that poverty and human welfare can be defined solely in absolute terms to the exclusion of relative considerations flies in the face not just of attitude survey evidence, but of basic ideas elaborated in 1776 by Adam Smith. . . . that relative distribution is integral to any assessment of human welfare: “By necessities I understand not only the commodities necessary for the support of life, but whatever the custom of the country renders it necessary for creditable people, even of the lowest order to be without.”<sup>217</sup>

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<sup>214</sup> Fukuda-Parr, *supra* note 149, at 305, (quoting Amartya Sen, *Development as Capabilities Expansion*, 19 J. Development Planning 41–58 (1989)).

<sup>215</sup> See also *supra* note 140 and accompanying text (citing more examples of case studies that have operationalized the capabilities approach).

<sup>216</sup> See HDR 2005, *supra* note 21, at 347–48 (comparing methodologies used to obtain national and international data).

<sup>217</sup> HDR 2005, *supra* note 21, at 54-55 (second ellipses in the original), quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Oxford Univ. Press 1996) (1776).

Of all cultures observable, the United States must be the most susceptible to a relative measure as a consequence of its enormous diversity.<sup>218</sup> In such a culture, an absolute measure is impossible to justify.

To the end of measuring relative inequalities, the Gini coefficient, which was used in the HPI-2,<sup>219</sup> has also been utilized domestically by the Census Bureau<sup>220</sup> The coefficient is a measure of inequality, which ranges from zero when every household has the same income, to one-hundred when one household has all the income.<sup>221</sup> It is, therefore, one way to measure how far a given income distribution is from equality.”<sup>222</sup>

The wealth of statistical data collected by government bureaus and other entities shows the accessibility of a multitude of indices that the poverty thresholds could incorporate.<sup>223</sup> Looking at the indices of the HPI-1 alone, and the utilization of the Gini-coefficient, the comparable data for the U.S. is virtually already compiled.<sup>224</sup> Mortality rates are reported by the National Center for Health Statistics.<sup>225</sup> Literacy rates are reported by the National Center for Education Statistics.<sup>226</sup> Unemployment rates are reported by the U.S. Department of Labor,

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<sup>218</sup> See Sen, *From Income Inequality to Economic Inequality*, *supra* note 8, at 398 (stating that “[t]he case for such broadening of informational focus . . . entails the need to pay evaluative attention to heterogenous magnitudes”).

<sup>219</sup> HDR 2005, *supra* note 21, at 38.

<sup>220</sup> Carmen DeNavas-Walt, et al., U.S. Census Bureau, *Income, Poverty, and Health Insurance Coverage in the United States: 2004*, CENSUS POPULATION REPORTS: CONSUMER INCOME 3 (U.S. Gov’t Printing Office 2005), available at <http://www.census.gov/prod/2005pubs/p60-229.pdf>.

<sup>221</sup> HDR 2005, *supra* note 21, at 356.

<sup>222</sup> *Id.*

<sup>223</sup> See generally HILLEMEIER, *supra* note 213 (compiling a comprehensive list of sources of data that measure social environment).

<sup>224</sup> *Id.*

<sup>225</sup> Nat’l Ctr. for Health Statistics, Mortality Data from the National Vital Statistics System, <http://www.cdc.gov/nchs/deaths.htm> (last visited Mar. 1, 2006).

<sup>226</sup> Nat’l Ctr. for Educ. Statistics, National Assessment of Adult Literacy, <http://nces.ed.gov/naal/> (last visited Mar. 1, 2006).

Bureau of Labor Statistics.<sup>227</sup> And finally, relative income measures are compiled by the Current Population Survey (CPS) on a state by state basis.<sup>228</sup> The CPS measures are particularly relevant for a capabilities approach because they can “screen for households with particular characteristics—elderly Hispanics, for instance, or the disabled.”<sup>229</sup>

Particularly useful for pinpointing the availability of existing data is a report compiled by the Center for Disease Control and Prevention (CDC) based upon a workshop of experts from the United States and Europe, convened for the purpose of “review[ing] an initial list of dimensions important for understanding social determinants of health.”<sup>230</sup> The result of this endeavor was a compilation of sources, which have already collected and recorded data based on twelve dimensions: economy, employment, education, political, environmental, housing, medical, governmental, public health, psychosocial, behavioral, and transport.<sup>231</sup> This list is uncannily reminiscent of the suggestions of Sen and Nussbaum regarding possible inclusions in a list of basic functionings.<sup>232</sup> As a reminder, Sen lists adequate nourishment, bodily health, avoiding premature mortality, and more complex ends such as happiness, self-respect, and community involvement.<sup>233</sup>

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<sup>227</sup> Bureau of Labor Statistics, Local Area Unemployment Statistics, <http://stats.bls.gov/lau/> (last visited Mar. 1, 2006).

<sup>228</sup> Am. Cmty. Survey Home Page, <http://www.census.gov/acs/www/> (last visited Feb. 13, 2006). The ACS is viewed as an ultimate replacement for the census long form. Fisher, *A Look Back*, *supra* note 23, at 54.

<sup>229</sup> Fisher, *A Look Back*, *supra* note 23, at 54.

<sup>230</sup> HILLEMEIER, *supra* note 213, at 1.

<sup>231</sup> *Id.* at 3.

<sup>232</sup> *Supra* notes 64–67 and accompanying text.

<sup>233</sup> SEN, INEQUALITY REEXAMINED, *supra* note 7, at 39.

Within each dimension listed by the CDC report, sub-components were further identified.<sup>234</sup> For example, in the context of the economy dimension, the report describes the various components they found relevant:

[A] broadened perspective to more fully assess the economic status of communities[, o]n the one hand, . . . involved identifying a more diversified set of indicators for commonly studied components, such as considering various types of income (earnings, investments, and transfers) in addition to the overall mean or median income in an area. On the other hand, a number of additional components of economic well-being were also suggested . . . . For example, the opportunities for community residents to obtain financial resources would be influenced by characteristics of economic development in an area, including productivity, industrial mix, and amount of area business lending, as well as by the exchanges of goods and services through the informal economy. The availability of financial services such as banks and other sources of credit were considered important, as were local costs of living, patters of redistribution through taxes and transfers, and the fiscal capacity of the area. One other seldom-considered aspect of the economic milieu concerns the degree to which segments of the community are differentially exploited, and thereby constrained in their access to monetary resources. Indicators of exploitation include the ratio of wages to corporate profits, as well as issues related to location of jobs such as length of commute and commuter taxation.<sup>235</sup>

For all of these components, the source of already existing data was provided.<sup>236</sup>

### C. Conclusion

The lack of worthwhile information in the poverty line reflects a value system as the quote at the beginning of this article articulates.<sup>237</sup> The values that the measurement does reflect are disheartening. “This approach tries to weasel out of making any . . . claims about what has value –although, notice, it does assume the universal value of opulence.”<sup>238</sup>

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<sup>234</sup> HILLEMEIER, *supra* note 213, at 3.

<sup>235</sup> *Id.* at 4.

<sup>236</sup> *Id.* at 5–10.

<sup>237</sup> SEN, CHOICE WELFARE AND MEASUREMENT, *supra* note 1, at 373.

<sup>238</sup> Nussbaum, *supra* note 7, at 228. Although Nussbaum’s statement was in reference to a cross-cultural measurement of quality of life, *id.*, its applicability in this context is clear.

The philosophical reasoning upon which the capabilities approach is grounded is one positive aspect of its potential applicability that exacts attention.<sup>239</sup> “[P]hilosophical accounts are not at all useless: for once they are worked out, they can offer a great deal of guidance to public life—to judges, legislators, economists, [and] policy-makers of many kinds. . . . [T]hey will be able to use the results of philosophical inquiry to design social institutions better.”<sup>240</sup> Contrast this with the current poverty line measure, which is not only lacking a philosophical basis, but also lacks extensive economic justifications.<sup>241</sup>

Arguably, the most important aspect that might result from the adoption of a capabilities inspired measure directly relates to society’s perception of poverty, which has become one of ignorance. The incorporation of a multitude of inequalities in a perception of poverty, though important for the purposes of more accurate measurement and statistics, “is ultimately as much about the nature and importance of public discussion on social evaluation.”<sup>242</sup> The current measure avoids such discussion by making normative judgments about poverty, assumptions that have been criticized by the very lawmakers who maintain them.<sup>243</sup> Further recommendations for reform of the poverty line proceed to maintain this illusion of efficient operation of an income measure by continuing to “hid[e] the choice of values and weights in some constructed opaqueness.”<sup>244</sup>

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<sup>239</sup> See MARTHA NUSSBAUM, *THE THERAPY OF DESIRE: THEORY AND PRACTICE IN HELLENISTIC ETHICS* 138 (Princeton Univ. Press 1994) [hereinafter *THE THERAPY OF DESIRE*]; see also Fukuda-Parr, *supra* note 149, at 304, (emphasizing that “Sen has written extensively about the conceptual roots of capabilities in the longstanding intellectual traditions of philosophy, political economy, and economics, dating back to Aristotle and including the works of Adam Smith and Immanuel Kant, among others”).

<sup>240</sup> *THE THERAPY OF DESIRE*, *supra* note 239, at 138.

<sup>241</sup> See *supra* notes 128–33 and accompanying text.

<sup>242</sup> Sen, *From Income Inequality to Economic Inequality*, *supra* note 8, at 398.

<sup>243</sup> *Supra* Part III.

<sup>244</sup> Sen, *From Income Inequality to Economic Inequality*, *supra* note 8, at 398.

Additional discussion of the potential indexes that would be incorporated into this hypothetical, capabilities-based U.S. poverty measure is needed. The breadth of the discussion is enormous, but important. Before considering this discussion, the philosophical foundation must be laid. The capabilities approach affords such a foundation, and the potentialities of its application are inspiring: “Sen has drawn attention to the fact that economics as a social science has a ‘moral’ dimension as well as an ‘engineering’ one.”<sup>245</sup>

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<sup>245</sup> Schischka, *supra* note 133, at 14.



