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Against the ‘Safety Net’

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ESSAY

AGAINST THE ‘SAFETY NET’

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ABSTRACT

Jack Kemp and Ronald Reagan originated the ‘safety net’ conception of United States health and welfare laws in the late 1970s and early 1980s, defending proposed cuts to New Deal and Great Society programs by asserting that such cuts would not take away the “social safety net of programs” for those with “true need.” Legal scholars have adopted their metaphor widely and uncritically. This Essay deconstructs the ‘safety net’ metaphor and counsels against its use in understanding health and welfare laws. The metaphor is descriptively confusing because it means different things to different audiences. Some understand the ‘safety net’ as comprising morality-tested subsistence programs (as did Kemp and Reagan) but others understand it as comprising all subsistence programs (whether reserved for those with “true need” or not), or both subsistence programs and poverty-prevention programs, or even the full panoply of laws that affect in any way the human ecosystem in which people live, die, sometimes get sick, and sometimes get help. Moreover, the vision the metaphor conjures of laws springing to action to rescue an independent individual should she fall contradicts feminist and communitarian conceptions of the subject of regulation. Relatedly, this vision of law as net reifies laws involved in rescue but not those involved in preventing harm, building resilience, or promoting equality, thereby hiding social and structural determinants of health and inequality and taking sides on difficult prioritization questions raised by acknowledging such determinants. In light of these arguments against the ‘safety net,’ the Essay endorses the ‘ecosystem’ and other alternative terms that highlight rather than elide unresolved questions about the means and ends of health and welfare laws.

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AGAINST THE ‘SAFETY NET’

“Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they often end by enslaving it.”¹

INTRODUCTION

It is difficult to overstate the prevalence of the ‘safety net’ metaphor for United States health and welfare laws. Since being originated by Jack Kemp and Ronald Reagan as a way to reimagine and defend cutting New Deal and Great Society programs,² the metaphor has been adopted by scholars and policymakers *en masse*. The ‘safety net’ features in 5,047 law review articles, hundreds of reported cases, and numerous statutory provisions.³ As the ‘balance of powers’ metaphor is to structural constitutional law and the ‘bundle of sticks’ metaphor is to property law, the ‘safety net’ has become to health and welfare law. Yet unlike the ‘balance of powers’ or ‘bundle of sticks’ the usefulness of the ‘safety net’ has not been examined in legal scholarship.⁴ This Essay deconstructs the ‘safety net’ metaphor, which it finds to be descriptively confusing and both normatively and empirically problematic. It therefore encourages scholars to abandon the metaphor and identifies potential replacements.

Part I explains that the ‘safety net’ is unhelpful as a shorthand for health and welfare laws because it means vastly different things to different people. It acts as a Rorschach test, capturing differing laws, programs, and subjects depending, perhaps, on one’s underlying perspective on the need for and role of government-provided support. Indeed, that was the original function of the metaphor as employed during the first term of the Reagan administration.⁵ The ‘safety net’ today variously means morality-tested subsistence programs, means-tested such programs, poverty-prevention programs, laws impacting the social determinants of health whether

¹ *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (1926) (Cardozo, J.).

² See *infra* Part I (describing origination of metaphor).

³ Westlaw searches of the JLR, and ALLFEDS databases performed March 5, 2019. *E.g.*, 42 U.S.C. § 2295; 22 U.S.C. § 2620-2; 22 U.S.C. § 2212; 42 U.S.C. § 2291a; Robin Fretwell Wilson, *Moving Beyond Marriage: Healthcare and the Social Safety Net for Families*, 46 J. L. MED. & ETHICS 636 (2018); Brietta Clark, *A Journey Through the Health Care Safety Net*, 61 ST. L. L. J. 437 (2017); Marianne Bitler, *The EITC and the Social Safety Net in the Great Recession*, 70 TAX L. REV. 533 (2016-2017); Brian Galle & Jonathan Klick, *Recessions and the Social Safety Net: the Alternative Minimum Tax as a Countercyclical Fiscal Stabilizer*, 63 STAN. L. REV. 187 (2010-2011). Part II, *infra*, differentiates five ways contemporary legal scholarship uses the term ‘safety net.’

⁴ The ‘separation of powers’ metaphor and ‘bundle of sticks’ metaphor have been subject to extensive scholarly analysis and debate. See Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution, and the Problem of Executive Underenforcement*, 164 U. PENN. L. REV. 1677, 1677 (2016) (“Judges and scholars should abandon the balance-of-powers metaphor and instead address directly whether bureaucratic innovation is likely to improve policy outcomes.”); J.E. Penner, *The ‘Bundle of Rights’ Picture of Property*, 43 UCLA L. REV. 711, 714 (1996) (collecting sources discussing usefulness of ‘bundle of sticks’ metaphor).

⁵ See David Zarefsky, Carol Miller-Tutzauer, and Frank E. Tutzauer, *Reagan’s Safety Net for the Truly Needy: The Rhetorical Uses of Definition*, 35 COMM. STUDIES 113, 114–118 (1984) (identifying this function).

focused on health care or not, or health care providers willing to treat a person even if she lacks government-provided insurance coverage.

Part II explains that the 'safety net' metaphor itself contradicts feminist and communitarian theories on the nature and role of social programs and implicitly takes a position on disputed empirical questions central to such conceptions. The conception of an independent, autonomous height-defying subject affected by government influence only should she "fall" and only insofar as necessary to get her back "up" is at odds with both vulnerability theory (which emphasizes that dependence and subsidy are universal) and health justice (which emphasizes collective responsibility for and impacts of health outcomes). And the conception of laws as lying dormant, ready to spring to action to act as a "net" for any person in need of rescue obscures the important, ongoing role law plays in shaping the social determinants of health and structural determinants of inequality that put some people and not others in need of rescue in the first place.

Part III concludes that in light of its descriptive and normative failings, retiring the 'safety net' would reduce misunderstanding in dialogue about health and welfare laws, particularly between adherents of competing normative viewpoints. Accordingly, it endorses replacements terms used to describe health and welfare laws that are less normatively divisive than the 'safety net.' Specifically, as least-common denominator alternatives to the 'safety net' the Essay endorses four distinct terms, each capturing a different sense in which scholars use the term today: 'subsistence programs' (means- or morality-tested) to describe direct supports for those in poverty; 'poverty-prevention programs' to describe programs that try to reduce the number of people who become impoverished; 'last-resort providers' to describe health care providers willing to treat patients regardless whether they are insured; and the 'human ecosystem' to describe the laws, institutions, behaviors, and environmental factors that through their interaction affect human health, activity, and the propagation of society. Finally, a brief conclusion summarizes the Essay's contribution.

I. THE ORIGIN OF THE 'SAFETY NET'

The "safety net" metaphor for certain social programs was first popularized in international finance.⁶ Specifically, the World Bank required countries to accept structural adjustments reducing social components of their budgets as a loan condition but permitted them to insulate certain low-income groups from the impacts of these adjustments.⁷ Such insulating mechanisms became known as 'social safety nets.'⁸

⁶ See Srawoath Paitoonpoing & Shigeyuki Abe, *The Meaning of 'Social Safety Nets'*, 19 J. ASIAN ECON. 467, 468 (2008) (discussing use of term "social safety nets" in southeast asian development economics; "[t]he term 'social safety net' began to be used by Bretton Woods' institutions in connection with structural adjustment programs related to their lending programs"; "[d]eveloping countries introduced [social safety nets] to mitigate the social impact of structural adjustment measures on specific low-income groups").

⁷ Paitoonpoing & Abe, *supra* note 6, at 468.

⁸ *Id.*; WORLD BANK, PROSPERITY FOR ALL: ENDING EXTREME POVERTY AT 12 (Spring Meetings 2014), http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1327948020811/8401693-1397074077765/Prosperity_for_All_Final_2014.pdf (referring to "transfers via social protection programs" designed to "lift people out of poverty" as "safety nets"); Independent EVALUATION GROUP, WORK BANK, EVIDENCE AND LESSONS

Jude Wanniski, an editorial writer for the Wall Street Journal, learned the international finance term before being tasked in 1979 with helping Republican politician Jack Kemp write “An American Renaissance: A Strategy for the 1980s.”⁹ That book invoked the metaphor as a tool for understanding New Deal and Great Society programs in the United States, before going on to problematize this “safety net.”

Americans have two complementary desires. They want an open, promising ladder of opportunity. And they want a safety net of social services to catch and comfort those less fortunate than themselves and those unable to share in the productive processes when the economy goes sour.¹⁰

Ronald Reagan brought Wanniski’s and Kemp’s “safety net” imagery mainstream, making the protection of the “safety net” for the “truly needy” a cornerstone of his defense of cuts in domestic programs to begin his Administration. The new president explained in his much-anticipated February 18, 1981 Address on the Program for Economic Recovery that while he was proposing significant funding reductions:

We will continue to fulfill the obligations that spring from our national conscience. Those who, through no fault of their own, must depend on the rest of us—the poverty stricken, the disabled, the elderly, all those with true need—can rest assured that the social safety net of programs they depend on are exempt from any cuts.¹¹

He went on to identify social security, Medicare, veterans’ pensions, school breakfast and lunches, Project Head Start, summer youth jobs, and supplemental income for the blind as within the scope of this protected “safety net.”¹²

This usage by President Reagan in 1981, building on Jack Kemp’s use of the term in 1979, originated the “safety net” metaphor for understanding health and welfare programs in the United States.¹³ The Administration’s assertion that it would

LEARNED FROM IMPACT EVALUATIONS ON SOCIAL SAFETY NETS (2011) (World Bank, Washington D.C.),

https://ieg.worldbankgroup.org/sites/default/files/Data/reports/ssn_meta_review.pdf (defining “social safety nets” as “a particular set of noncontributory programs targeting the poor and vulnerable in order to reduce poverty and inequality, encourage more and better human capital investments, improve social risk management, and offer social protection”).

⁹ JACK KEMP, *AN AMERICAN RENAISSANCE: A STRATEGY FOR THE 1980’S* 78–83 (Harper 1979).

¹⁰ *Id.* at 78.

¹¹ Ronald Reagan, Address Before a Joint Session of the Congress on the Program for Economic Recovery, Pub. Papers 108 (Feb. 18, 1981), <https://www.reaganlibrary.gov/21881a>.

¹² *Id.*

¹³ William Safire, *On Language; Safety Nets*, N.Y. TIMES (Magazine Desk) at 9 (Mar. 29, 1981), <https://www.nytimes.com/1981/03/29/magazine/on-language-safety-nets.html>; David E. Rosenbaum, *Reagan’s ‘Safety Net’ Proposal: Who Will Land, Who Will Fall*, N.Y. TIMES A01 (Mar. 17, 1981), <https://www.nytimes.com/1981/03/17/us/reagan-s-safety-net-proposal-who-will-land-who-will-fall-news-analysis.html>; Krissy Clark, *How did the social safety net get its name?*, MARKETPLACE (April 2, 2013), online at <https://www.marketplace.org/2013/04/02/wealth-poverty/show-us-your-safety-net/how->

leave in place the “safety net” for “those with true need” or “the truly needy”¹⁴ became a cornerstone of its defense of proposed budget cuts,¹⁵ though the Administration’s definition of the safety net narrowed over time and its officials themselves disagreed with one another about which programs counted.¹⁶ As William Safire colorfully put it at the time, “administration spokesmen carry the safety net around as a kind of security blanket.”¹⁷

Academic observers saw the Reagan administration’s rhetorical move—conceptualizing domestic programs as a “safety net” for the “truly needy” as a means of obscuring the programs to be protected and the individuals entitled to that protection—as a great success at the time:

The twin phrases ‘truly needy’ and ‘safety net’ served admirably as a means of attaining political freedom of action while simultaneously diffusing, for the moment at least, a politically volatile confrontation. Through interpretive ambiguity, dissociation, and subtle shifts in definition, Reagan mitigated, and yet also capitalized on, political opposition. His behavior during 1981 bears out the more general aphorism that the person who can set the terms of the debate has the power to win it.¹⁸

The intervening decades have proven that Reagan’s success in setting the terms of the debate was far more than momentary. The “safety net” has become ubiquitous as an

did-social-safety-net-get-its-name (reporting that Ronald Reagan originated term). While Jack Kemp’s usage is occasionally cited as the earliest known invocation of the term in the United States, the ‘safety net’ metaphor saw earlier use in the New York gubernatorial race in 1966 when Franklin Delano Roosevelt, Jr., in explaining why he would invest significantly in jobs training programs, stated that “[p]ublic assistance will be envisaged as a ‘safety net’ on the one hand, and as a transmission belt to productive employment and participation in society on the other.” D.R., *Roosevelt Vows More Social Aid: Opponents Favor Limited Help, Candidate Says*, N.Y. TIMES (1966). Accordingly, this Essay uses the term “originated” to refer to Kemp’s and Reagan’s introduction of the metaphor into popular discourse but eschews the word “coined,” which would require either a permissive understanding of that word or a conclusive historical analysis that is beyond the scope of the Essay. Winston Churchill used the closely related metaphors of a “net” coupled with a “social ambulance” to describe his parties’ conception of certain British programs as early as 1951. Winston Churchill, Broadcast (Oct. 8, 1951) *reprinted in* WINSTON S. CHURCHILL, CHURCHILL BY HIMSELF: IN HIS OWN WORDS (RosettaBooks 2013).

¹⁴ Ronald Reagan, Address to the Nation Delivered from the White House on February 5, 1981 (Feb. 5, 1981), <https://www.reaganlibrary.gov/research/speeches/20581c>; *see also Transcript of Reagan Address Reporting on the State of the Nation’s Economy*, NY TIMES, Feb. 16 1981 (A 12) (“Our spending cuts will not be at the expense of the truly needy.”), *online at* <https://www.reaganlibrary.gov/research/speeches/20581c>.

¹⁵ David Zarefsky, Carol Miller-Tutzauer, and Frank E. Tutzauer, *Reagan’s Safety Net for the Truly Needy: The Rhetorical Uses of Definition*, 35 COMM. STUDIES 113, 114–118 (1984).

¹⁶ *Id.* at 118.

¹⁷ Safire, *supra* note 2, at 9.

¹⁸ Zarefsky *et al.*, *supra* note 15, at 119. *See also* Safire, *supra* note 2, at 9 (“Using the circus metaphor of a ‘safety net,’ the budget cutters seek to allay fears of many of the ‘truly needy’ (but not, one assumes, of the ‘falsely needy’) that society is not about to shove them off the high wire onto the sawdust below.”).

ill-defined catch-all for social programs in scholarship and discourse in the United States.¹⁹

II. THE 'SAFETY NET' TERM IS A RORSCHACH TEST IN CONTEMPORARY SCHOLARSHIP

What do you think of when you hear or read the term 'social safety net'? Which specific programs are included? Which are excluded? Are student loans part of the safety net? Life insurance? Is the U.S. Equal Employment Opportunity Commission part of the safety net? Mandatory vaccination? Are needle exchange programs?

Odds are, a writer's or reader's understanding of the term matches one of five very different senses in which the term is used in contemporary health and welfare law and policy scholarship. The 'safety net' is thus a Rorschach test for health and welfare law and policy; what it means shifts, narrows, or expands depending on the writer's or reader's underlying vision of the problems health and welfare policy seek to solve and the role of law in that effort.

Most narrowly, some see the 'safety net' the way President Reagan and his administration employed it, as programs providing cash or in-kind support directly to the "deserving poor," *i.e.*, those who, through no "fault" of their own, are young, sick, incapacitated, or otherwise dependent.²⁰ In short, they see the safety net as encompassing subsistence programs that are both means- and morality-tested. Second, but closely related, others envision all means-tested subsistence programs, not only those that are restricted to the subset of poor who are in some state-labeled sense "deserving."²¹

¹⁹ See *supra* note 3 (describing ubiquity of metaphor); *infra* Part II (differentiating various uses of metaphor).

²⁰ The Reagan Administration offered such a definition when it first invoked the term: "A social safety net encompasses the long-range programs of basic income security, most of which were established in the New Deal 50 years ago and are now widely accepted." Safire, *supra* note 2, at 9 (quoting David A. Stockman, Director, Office of Management and Budget). This included "Social Security and Medicare; unemployment compensation, the two components of what we call welfare (Aid for Families with Dependent Children, and Supplemental Security Income) and basic veterans' benefits." *Id.* See also Joshua Guetzkow, *Beyond Deservingness: Congressional Discourse on Poverty, 1964-1996*, 629 AM. ACADEMY OF POLITICAL & SOCIAL SCIENCE 173, 186 (2010) ("The 'social safety net' was intended for the 'truly needy.' Thus, the first thrust of welfare reform in the early 1980s began by discursively reinforcing the demarcation between the deserving (*i.e.*, 'truly needy') and the undeserving poor and blaming the latter for driving up government spending.").

²¹ Marianne Bitler, *The EITC and the Social Safety Net in the Great Recession*, 70 TAX L. REV. 533 (2016-2017) ("The U.S. safety net consists of a host of means-tested programs"); Robert J. Landry III & Amy K. Yarbrough, *Global Lessons from Consumer Bankruptcy and Healthcare Reforms in the United States: A Struggling Social Safety Net*, 16 MICH. ST. J. INT'L L. 343, 346 (2007) ("a panoply of programs and policies in the United States that provide mechanisms to catch individuals when they are financially unable to provide basic and vital living expenses for themselves."); see also Kara J. Bruce & Alexandra P.E. Sickler, *Private Remedies and Access to Justice in A Post-Midland World*, 34 EMORY BANKR. DEV. J. 365, 385 (2018) ("Examples of programs typically thought to comprise the social safety net include social security, Medicaid, the Family Medical Leave Act, welfare, SNAP, workers' compensation, unemployment insurance, and Temporary Assistance to Needy Families"); Karen Long Jusko, *Safety Net*, PATHWAYS: THE

The distinction between these two conceptions of the ‘safety net’ as comprising morality-tested or means-tested subsistence programs mirrors the legally controversial shift that the Affordable Care Act (ACA) sought to bring about in the Medicaid program, which provides health insurance to some low income individuals. Historically Medicaid, building on its roots in charity care, was available only to particular classes of “deserving poor.” The ACA attempted to expand Medicaid, however, to be more purely means-tested, dispatching with prior moral conditions on eligibility (with important exceptions).²² The Supreme Court’s decision in *NFIB v. Sebelius* made this aspect of the ACA optional for states, so that effort to expand Medicaid has only been partly successful and nationwide the applicability of moral conditions on Medicaid eligibility varies from state to state.²³

These first two conceptions of the ‘safety net’ also illustrate the rhetorical function of the metaphor employed by President Reagan, *i.e.*, obscuring the pivotal question of *who* is eligible for protection. Two people who hold these two underlying conceptions of the ‘safety net’ could have an entire conversation about the “safety net” without realizing, discussing, or engaging their underlying disagreement about the fundamental question whether or not state-sponsored subsistence programs should be restricted to those who are in some moral sense deserving.

Third, many conceive of the ‘safety net’ as comprising not just programs that support those in poverty but also programs that reduce the likelihood individuals who are not in poverty will become impoverished.²⁴ In short, they see the safety net as including poverty-prevention programs. This conception holds on to the goal of addressing poverty but recognizes that “as U.S. society has evolved, programs with benefits that flow substantially—even primarily—to those other than the poor and

POVERTY AND INEQUALITY REPORT, STANFORD CENTER ON POVERTY AND INEQUALITY (2015), https://inequality.stanford.edu/sites/default/files/SOTU_2015_safety-net.pdf (describing safety net programs as those providing financial support to low-income families, namely, the Supplemental Nutrition Assistance Program, the Temporary Assistance for Needy Families Program and tax credits such as the Earned Income Tax Credit and the Child Tax Credit). Daniel P. Gitterman, *Confronting Poverty: What Role for Public Programs: An Overview of Panel 1*, 10 EMPLOYEE RTS. & EMP. POL’Y J. 9, 9 (2006) (“Broadly understood, the public social safety net in the U.S. comprises a set of programs, benefits, and supports designed to maintain a minimum level of financial resources and to ensure that people do not lack the basic necessities of life.”).

²² See Brietta Clark, *A Journey Through the Health Care Safety Net*, 61 ST. L. L. J. 437, 443–45 (2017); see generally Merle Lenihan & Laura D. Hermer, *On the Uneasy Relationship between Medicaid and Charity Care*, 28 NOTRE DAME J. OF L., ETHICS & PUB. POL’Y 165 (2014). One exception to the ACA’s effort to make Medicaid more purely means tested is that the program continues to largely exclude undocumented immigrants. See Medha Makhoul, *Health Justice for Immigrants*, U. PA. J.L. & PUB. AFF. 235, 242 n.12 (2019) (describing Medicaid eligibility based on documentation and citizenship status).

²³ *NFIB v. Sebelius*, 567 U.S. 519 (2012).

²⁴ Julia D. Mahoney, *America’s Exceptional Safety Net*, 40 HARV. J. L. & PUB. POL’Y 33, 34 (2017) (“many policy experts and academics have had a way-too-cramped definition . . . in defining ‘safety net’ I take into account the full panoply of United States institutions”); *cf. id.* (including in definition “government-provided or government-subsidized health care and health insurance; Social Security, private pensions, tax-advantaged retirement accounts, and public expenditures on education”).

near-poor are essential for preventing or allaying poverty.”²⁵ So understood the ‘safety net’ includes tax incentives to purchase life insurance, buy health insurance, and save for retirement.²⁶ Indeed, so understood the ‘safety net’ can even include consumer bankruptcy in recognition of the fact that those facing crisis and lacking state help often turn to consumer credit to finance their own support, regardless whether they can afford it.²⁷

These first three conceptions of the ‘safety net’ all focus on poverty but the former two are focused on those currently facing poverty and the third includes those who might come to face poverty. This distinction between the ‘deserving poor’ and ‘anyone in need’ conceptions of the ‘safety net,’ on the one hand, and the ‘poverty prevention’ conception, on the other, mirrors related distinctions that arise using differing terminology in various areas of health and welfare law. These include: the distinction between identified and statistical lives in medical ethics and health policy,²⁸ the distinction between harm reduction and prevention in public health,²⁹ the distinction between *ex ante* and *ex post* reforms in law and economics,³⁰ and the distinction between addressing resilience and addressing dependence in vulnerability theory.³¹

Fourth, the ‘safety net’ may be understood at maximum breadth as including all health and welfare programs, or all such programs relevant to a given topic or group (like “safety net for workers”).³² In particular, as scholars have recognized the

²⁵ *Id.*

²⁶ Robin Fretwell Wilson, *Moving Beyond Marriage: Healthcare and the Social Safety Net for Families*, 46 J. L., MED. & ETHICS 636, 638 (2018) (including tax subsidies for employer-sponsored insurance as safety net program); William P. Kratzke, *The Defense of Marriage Act (DOMA) Is Bad Income Tax Policy*, 35 U. MEM. L. REV. 399, 414 (2005) (including tax subsidies in definition of safety net); *see also id.* (“A social safety net, by definition, benefits everyone.”).

²⁷ *See* Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065 (2004) (“gaps in unemployed and health care insurance benefits in the United States, combined with ready availability of consumer credit, have led to use of credit as a self-financed safety net, contributing to dramatic increases in personal bankruptcy filings”).

²⁸ *See* I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANAL. 221, 251–54 (2013) (surveying debate about prioritizing identified versus statistical lives).

²⁹ *See generally* Richard L. Abel, *Pounds’s of Cure, Ounces of Prevention*, 73 CAL. L. REV. 1003 (1985) (comparing points along health axis at which legal intervention might seek to improve outcomes).

³⁰ *See generally* GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) (pioneering *ex ante* approach to evaluation of legal rules).

³¹ *See generally* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1 (2008) (Hereinafter “Vulnerable Subject”) (describing resilience).

³² *E.g.* Pamela J. Loprest & Demetra Smith Nightingale, *The Nature of Work and the Social Safety Net*, URBAN INSTITUTE (July 23, 2018), https://www.urban.org/sites/default/files/publication/98812/the_nature_of_work_adn_th_e_social_safety_net.pdf (“We define the US social safety net broadly, including structures and supports that have proven essential to the country’s diverse spectrum of workers. This framing of the social safety net includes government programs and policies related to work, legislation regulating work standards, and benefits provided by employers.”); *id.* at 2 (including in definition TANF, SNAP, Medicaid, Housing assistance, SSI, child care subsidies, the EITC,

importance of social determinants of health beyond health care on health outcomes—including education, transportation, and housing, among others—they have used the term “safety net” in ways that encompass all programs that influence such determinants.³³ Followed to its logical conclusion, the “safety net” so understood encompasses all state-based efforts to alter the laws, institutions, behaviors, and environmental factors that constitute the human ecosystem.

Fifth and finally, a very specific and limited definition of ‘safety net’ describes a discrete subset of health care providers. Here, ‘health care safety net’ refers to providers who accept patients regardless of their ability to pay, that is, open access providers.³⁴ This is inherently confusing, because so understood ‘safety net’ providers

and unemployment insurance); JAY M. SHAFRITZ, *THE DICTIONARY OF PUBLIC POLICY AND ADMINISTRATION* 261 (Westview 2004) (defining “safety net” as “[t]he totality of social welfare programs”).

³³ See Len M. Nichols and Lauren A. Taylor, *Social Determinants As Public Goods: A New Approach to Financing Key Investments in Healthy Communities*, 37 *HEALTH AFFAIRS* 1229 (2018) (“There is growing awareness that funding for interventions related to social determinants of health has long been inadequate, leaving health systems to treat the survivors of a frayed social safety net.”); Brietta Clark, *A Journey Through the Health Care Safety Net*, 61 *ST. L. L. J.* 437, 438, 447 (2017) (in “journey through the health care safety net” discussing social determinants of health); Julian J.Z. Polaris, *Personal Networks: Health Coverage Status and the Invisible Burden on Family and Friends*, 39 *HARV. J. L. & GENDER* 115, 186 (2016) (“More important than health coverage are broader elements like public health infrastructure, such as clean air and water; lifestyle factors, such as exercise and diet; and social determinants of health, such as socioeconomic status, education level, and adequate housing. America's safety net has gaping holes in many of these areas.”).

³⁴ See Institute of Medicine, *America's Health Care Safety Net: Intact but Endangered* (June 2000), online at <http://www.idph.state.il.us/tfjpr/materials/Carvalho%20bandout.pdf> (“Safety net providers are providers that deliver a significant level of health care to uninsured, Medicaid, and other vulnerable patients.”); Dave A. Chokshi & Ross M. Wilson, *Health Reform and the Changing Safety Net in the United States*, *NEW ENGLAND J. MED.* (Oct. 18, 2017), <https://catalyst.nejm.org/health-reform-changing-safety-net/> (“Safety-net health systems provide essential care to low-income people in the United States, including those who are uninsured.”); Mark A. Hall & Sara Rosenbaum, *The Health Care Safety Net in the Context of National Health Insurance Reform in THE HEALTH CARE SAFETY NET IN A POST REFORM WORLD AT 2* (HALL & ROSENBAUM, EDS.) (2014) (“The safety net consists primarily of publicly funded and community-supported clinics as well as public hospitals and mission-driven nonprofit hospitals that take all patients regardless of ability to pay”); Merle Lenihan & Laura D. Hermer, *On the Uneasy Relationship Between Medicaid and Charity Care*, 28 *NOTRE DAME J. L. ETHICS & PUB. POL'Y* 165, 195 (2014) (“By 1999, the ‘health care safety net’ was firmly entrenched in the health policy and medical literature”; it meant “hospitals . . . whose stated mission is to provide care to anyone in need regardless of their ability to pay”); Nathan Cortez, *Embracing the New Geography of Health Care: A Novel Way to Cover Those Left Out of Health Reform*, 84 *S. CAL. L. REV.* 859, 872 (2011) (“our health care safety net, loosely defined as ‘providers that organize and deliver a significant lever of health care . . . to uninsured, Medicaid, and other vulnerable patients.’”). This understanding has been codified in federal and law. *E.g.* S. 1533 (107th, Oct. 26, 2002), Pub. L. 107-251, Health Care Safety Net Amendments of 2002 (reauthorizing and strengthening health centers with a focus on mental health). The SMART Act in Illinois defines a “safety-net hospital” as one that provides a certain threshold of care to Medicaid and uninsured patients. 305 Ill. Comp. Stat. 5/5-5e.1 (State Bar Edition 2012) (“Broadly defined, the ‘safety net’ includes community health centers, public health

means those that treat people who do *not* have health care through the programs (like Medicare, the ACA, and Medicaid) that many others view as part of the 'safety net'.³⁵

III. THE 'SAFETY NET' METAPHOR TAKES SIDES ON DISPUTED NORMATIVE AND EMPIRICAL QUESTIONS

The 'safety net' metaphor is not just confusing, it is also problematic because it takes sides on disputed normative and empirical questions. As discussed in this Part, the visions of the subject of law as an autonomous high-flying agent (whether climbing a ladder, walking a tightrope, or swinging on a trapeze in one's go-to-vision³⁶) and the purpose of law as rescuing her should she fall are not value or fact neutral. Quite the contrary, they take sides on normative and empirical questions in ways that contradict leading feminist and communitarian conceptions of the nature and role of social programs, including vulnerability theory³⁷ and health justice.³⁸

department clinics, rural health clinics, free clinics, individual physician practices that provide health care services to indigent and uninsured patients, and any for-profit or non-profit hospital with an emergency department as defined by EMTALA.”).

³⁵ See *infra* notes 57–59 and accompanying text (describing contradictory use).

³⁶ As first utilized by Jack Kemp in describing New Deal and Great Society programs the “net” was envisioned as intended to catch a person should she fall off the “ladder” of opportunity. *Supra* notes 9–13 and accompanying text. William Safire took Reagan to be referring to a tightrope walker at a circus in his contemporaneous description of the president’s use of the term. See *supra* note 18 (characterizing underlying vision).

³⁷ Vulnerability theory is a leading feminist approach to understanding equality, justice, and the role of the state originally developed by Martha Fineman but further developed and employed by many others. See Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J. L. & FEMINISM 1 (2014) (“Vulnerability theory is rapidly gaining acceptance within the legal academy as progressively-oriented scholars rush to apply the theory to a broad range of legal problems.”); *id.* (“The theory is attractive not only because it helps explain the basis for broad social welfare policies, but also because it suggests that vulnerability can replace group identity . . . as a basis for targeting social policy.”); see generally MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) (hereinafter ‘Autonomy Myth’); Fineman, *Vulnerable Subject*, *supra* note 31. The core conceptual move of vulnerability theory is to reject as unrealistic the idea of the independent, autonomous individual that is at the heart of much classical liberal theorizing as inconsistent with the human condition. *Id.* at 21. In its place vulnerability theory offers the vulnerable subject, in recognition of the inevitability of dependence (at birth, in old age, when sick, or when otherwise in particular need), *id.* at 25 (“Whereas both are universal, only vulnerability is constant, while inevitable dependency is episodic, sporadic, and largely developmental in nature.”), and accompanying universality of vulnerability. *Id.* at 9 (“Vulnerability initially should be understood as arising from our embodiment, which carries with it the ever-present possibility of harm, injury, and misfortune from mildly adverse to catastrophically devastating events, whether accidental, intentional, or otherwise. . . . There is the constant possibility that we can be injured and undone by errant weather systems, such as those that produce drought, famine, and fire.”). From the human condition of universal vulnerability and inevitable dependence, Fineman develops an obligation of the state to cultivate resilience and provide support to those who need it. *Id.* at 14–15.

³⁸ Health justice is a normative approach that builds on, incorporates, and broadens communitarian, social justice, reproductive justice, food justice, and related movements with a focus on health law and policy. Lindsay F. Wiley, *Applying the Health Justice Framework to*

The metaphor surely presents problems along the lines of those surveyed here from the standpoint of other normative theories as well. For example, the 'safety net' metaphor is in some tension even with libertarianism.³⁹ This Part is meant to highlight

Diabetes As A Community-Managed Social Phenomenon, 16 HOUS. J. HEALTH L. & POL'Y 191, 218 (2016) ("I have described health justice as an emerging framework for eliminating health disparities and for securing uniquely public interests in access to affordable, high-quality health care."); Lindsay F. Wiley, *From Patient Rights to Health Justice: Securing the Public's Interest in Affordable, High-Quality Health Care*, 37 CARDOZO L. REV. 833 (2016); Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J.L. & PUB. POL'Y 47 (2014); Emily Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. U. L. REV. 275 (2015). Health justice has emerged more recently than vulnerability theory but is increasingly used to analyze hard problems in health care. E.g. Medha D. Makhoul, *Health Justice for Immigrants*, 4 U. PA. J. L. & PUB. AFF. 235 (2019); Elizabeth Y. McCuskey, *The Body Politic: Federalism as Feminism in Health Reform*, 11 St. Louis U. J. Health L. & Pol'y 303, 311–13 (2018). It is also used by grassroots organizations leveraging environmental justice, reproductive justice, and other movements to advocate for health care access. LAWRENCE O. GOSTIN & LINDSAY F. WILEY, *PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT* at 536–39 (3d Ed. 2016). Health justice can be disaggregated into four concentric commitments. At its core, health justice is centered on the lived experiences of disenfranchised people. From that focus, health justice understands access to health care as one of several determinants of health; it may be much easier (for the community and the individual) to prevent someone from contracting a communicable disease through vaccination or sanitation than to treat them for the disease once they have it. In light of that broadening of the vision of the relationship between the individual, community, state, and health, health justice then sees law itself as a determinant of health because of the impact it can have on every aspect of lived experience. Finally, health justice probes interventions aimed at reducing health disparities—especially legal such interventions—for evidence of social bias. See generally Wiley, *From Patients Rights to Health Justice*, *supra* at 874. Thus, health justice sees public health not as a subfield of health law, but health care law as an important subfield of public health. Wiley, *Health Law as Social Justice*, *supra* at 91.

³⁹ A Hayekian understanding of libertarianism asserts the impossibility of regulating upstream behaviors effectively while preserving liberty, and so would counsel ignoring social and structural determinants of health and inequality at least in economic ordering. See F.A. HAYEK, *THE FATAL CONCEIT: THE ERRORS OF SOCIALISM* at 66 (W.W. Bartley III, ed.) (U. Chi. 1988) ("fatal conceit" that regulators can successfully alter complex behaviors); Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1326 (1986) (describing those who focus on formal equality of "opportunity" rather than outcomes as holding that "eliminating discrimination and providing a safety net for the truly needy constitute the limits of what the law in the American system can do, if that system is to remain free"). That said, on many libertarian theories only minimal social supports are warranted to correct particular risk and market failures. See Matthew B. Lawrence, *Health Insurance's Social Consequences Problem and How to Solve It*, 81 HARV. L. & POL'Y REV. ____ (forthcoming 2019) (summarizing welfare economic arguments about when and how government intervention is desirable); Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B.C. L. REV. 1345, 1380–81 (2015) (describing different sources and articulations of libertarian views). On this view a catch-all safety net would only encourage dependence and discourage responsibility by insulating people from the consequences of their choices. See generally David Super, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032 (2004) (explaining and problematizing modern opposition to entitlements). This concern about discouraging responsibility from the libertarian perspective is what led Republican presidential hopeful Newt Gingrich to object to his opponent Mitt Romney's reliance on the

the content of the metaphor on key questions in contemporary scholarship, not conclusively catalogue all of the ways the metaphor is problematic across all potential normative approaches.

A. The Height-Defying Premise Assumes an Independent Subject

The vision of the height-defying agent that is the potential subject of state support in the 'safety net' metaphor primes two problematic assumptions. First, that the subject of regulation is independent of state support unless and until she "falls." But that is a disputed conception of the subject of regulation. While classical liberalism is built around the assumption of such a subject, the starting point for vulnerability theory is the rejection of the independent subject conception on the ground that in the reality of the human condition dependence is inevitable and vulnerability universal.⁴⁰

The independent subject is also inconsistent with the nature of government assistance under many health and welfare laws. For example, Medicare—the health insurance program for the old aged—does not cover long term care. As a result Medicaid—coverage for the low income—is the primary source of long-term care coverage for Americans, paying for 60% of nursing home stays.⁴¹ Participation in the long-term care aspect of Medicaid is not temporary, it is an important if often-hidden component of our health care system. To return to the inherently problematic circus metaphor, Medicaid for long term care is more akin to the platform at the "other end" of the tightrope than the safety net hanging below.

A second problematic assumption primed by the vision of the high-flying subject is that the subject of regulation is autonomous, independent not only of state

'safety net' term during the 2012 election. Ashley Parker and Trip Gabriel, *Republicans in Nevada: Gingrich rides Romney, who ignores him*, SEATTLE TIMES (Feb. 3, 2012), https://www.seattletimes.com/nation-world/republicans-in-nevada-gingrich-rides-romney-who-ignores-him/?no_redirect=true ("It's not a safety net it's a spider web. It traps them in poverty, it keeps them at the bottom, it deprives them of independence. One of the reasons I am running is that I want to replace the spider web with a trampoline that launches them into the middle class and gives them a future.").

⁴⁰ FINEMAN, AUTONOMY MYTH at 32 ("Americans [] convince themselves that we are all capable of becoming economically 'self-sufficient' and 'independent.'"). See FINEMAN, AUTONOMY MYTH at 33 ("not only is dependency inevitable reliance on government largesse and subsidy is universal"); *id.* at 50 ("[I]t seems obvious that we must conclude that subsidy is universal. We all exist in contexts and relationships, in social and cultural institutions, such as families, which facilitate, support, and subsidize us and our endeavors."); *id.* at 273 ("We all experience dependency, and we are all subsidized during our lives (although unequally and inequitably so."); *id.* at 285 (calling for "both material and structural accommodation" for caretaking); *id.* ("In this regard, the state would provide some subsidies directly, such as child-care allowances, but also oversee and facilitate the restructuring of the workplace so that market institutions accommodate caretaking and, in this way assume some fair share of the burdens of dependency.").

⁴¹ Judy Feder, *Health Affairs Blog Post: Social Insurance Is Missing A Piece: Medicare, Medicaid, and Long-Term Care*, 15 YALE J. HEALTH POL'Y, L. & ETHICS 233 (2015) ("since 1965 Medicaid has become the nation's long-term care safety net").

support but of family and community supports.⁴² Perhaps there are those for whom the ‘safety net’ conjures an image of a family of trapeze artists, but the most natural assumption is that we risk heights—whether by walking tightropes, climbing ladders, or swinging through the air—alone.

Both vulnerability theory and health justice emphasize, however, the inter-relatedness of health and welfare within families and communities. They see families and communities as thriving or suffering together, not in isolation.⁴³ None of the usages discussed in Part II incorporate as part of the “safety net” the efforts of loved ones to care for their dependent, ailing, or vulnerable family members.

Moreover, there is empirical support for the necessity of grouping individuals in some contexts when fashioning regulation. The participation of a supportive friend or family member can be as influential on the outcome of a person’s battle with illness as significant health markers, like smoking.⁴⁴ And, of course, children do not raise themselves—parents and other caregivers devote innumerable hours to childcare, often unrecognized by the state, so state supports for the child must take into account the caregiver (and vice versa).⁴⁵

B. The ‘Safety Net’ Hides Social and Structural Determinants of Health and Inequality

The understanding of the role of law primed by the ‘safety net’ metaphor is just as problematic as its understanding of the subject of law. The ‘safety net’ metaphor reifies laws involved in the provision of state support to someone in desperate need as a “net” there to catch a person should she fall. As a way of understanding health and welfare laws this is problematic because it hides social and structural determinants of health and inequality.

By conceptualizing law as present only to help a person who falls, the ‘safety net’ ignores the law as a cause of a person’s fall in the first place. Yet the fundamental insight of both vulnerability theory and health justice is that the law does influence

⁴² This Essay uses the term “family” broadly to include all an “individual[’s] . . . closest emotional connections.” U.S. DEPT OF HEALTH AND HUMAN SERVICES, TREATMENT IMPROVEMENT PROTOCOL 39, SUBSTANCE ABUSE TREATMENT AND FAMILY THERAPY, at xvi, 2 (2015).

⁴³ See Wiley, *Health Law as Social Justice*, *supra* note 38 at 80 (describing emphasis on community-focused interventions); Wiley, *From Patient Rights to Health Justice*, *supra* note 38, at 882 (“Community prevention reduces exposure to health hazard by addressing environmental, economic, social, and cultural determinants of health at the community level.”); Benfer, *supra* note 38, at 347–48 (“Communities” experience “negative consequences of injustice and health inequity”); Martha A. Fineman, *Family Values: Between Neoliberalism and the New Social Conservatism (Book Review)* at 3 (2015) (“A healthy and functioning family is . . . deserving of collective support.”); Martha A. Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 273 (2010) (“societal institutions . . . should also be understood as vulnerable entities in and of themselves”).

⁴⁴ See Matthew B. Lawrence, *Deputizing Family: Loved Ones as a Regulatory Tool in the ‘Drug War’ and Beyond*, 11 NORTHEASTERN L. REV. 185, 213–14, 224–26 (2019) (collecting sources discussing role of family in health care).

⁴⁵ See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 386, 398–99.

whether a person “falls”; indeed, this is arguably the more important role of health and welfare law.

Vulnerability theory emphasizes that state action influences the structures that develop individuals’ resilience against catastrophe—wealth, income, educational status, cultural competence, social networks, neighborhoods, and other tools people rely on to endure hardship—and that these structures are often more important than laws or institutions that provide after-the-fact support to those who have suffered harm.⁴⁶ A corollary is that existing institutions and structures do not distribute structural resilience uniformly; in light of this structural inequality efforts to prevent discrimination by focusing downstream at those suffering harm can be a Sisyphean task.⁴⁷

Relatedly, health justice emphasizes both that social, economic, cultural, educational, and other determinants of health are as influential for a person’s health outcomes as the health care they might come to receive should they get sick and that such determinants often cause inequities.⁴⁸ The ‘safety net’ metaphor contradicts both this emphasis of health justice and the fact established by social-epidemiological research underlying it, that social determinants profoundly health influence outcomes.⁴⁹

In the important task of educating the public and policymakers about the importance of social determinants of health, the ‘safety net’ metaphor is a counter-productive rhetorical tool because it primes the reader for the reactive, emergency-oriented vision of the role of social programs that social determinants research disputes. Indeed, the vision of the state as influencing a person’s wellbeing by catching her should she fall is the conceptual opposite of the vision espoused by those who emphasize that, whether the state wants to or not, it influences or constructs social,

⁴⁶ Fineman highlights that state institutions not only directly address discrimination (such as by penalizing those who engage in intentional discrimination) and vulnerability (such as by providing support to those in need), but also provide “advantages, coping mechanisms, or resources that cushion us when we are facing misfortunate, disaster, and violence.” Fineman, *Vulnerable Subject*, *supra* note 37, at 13. Collectively, these programs, institutions, and institutions provide “resilience in the face of vulnerability.” *Id.* Fineman includes among programs influencing vulnerability and resilience rules of inheritance and tax law; banking rules and regulations and credit policies; education; healthcare; employment systems; social assets like family and community groups; unions; political groups; and entitlement programs like Medicaid. *Id.* at 14–15.

⁴⁷ See Martha A. Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 253 (2010) (“the equal protection doctrine ignores existing inequalities of circumstances and presumes an equivalence of position, and possibilities . . . [s]uch a narrow approach to equality cannot be employed to combat the growing inequality in wealth, position, and power that we have experienced in the United States”); *id.* at 272 (“within these asset-conferring systems individuals are often positioned differently from one another”).

⁴⁸ Benfer, *supra* note 38, at 279 (“The social determinants of health often lead to inequities.”); see *id.* (collecting sources and surveying social determinants that can cause inequities).

⁴⁹ See generally Scott Burris, *From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective*, 159 U. PA. L. REV. 1649, 1652-55 (2011) (describing social determinants of health); LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT at 23-26 (3d Ed. 2016) (discussing social-epidemiological research).

transportation, education, financial, and other systems that largely determine whether, how, and when a person comes to “fall” (or need rescue if she does) in the first place.

As part of a panel discussion on employee rights, historian Alice O'Connor succinctly described this problem with the ‘safety net’ as a catchall for social programs in 2006:

We tend to think of ‘public provision,’ ‘public programs,’ and the safety net in terms of narrowly targeted, means-tested programs that are aimed principally at poor people. And these programs are juxtaposed against, or offered as alternatives to, private-sector benefits, or to the notion of self-help and ‘self-sufficiency.’

...

[W]hat we normally think of as the public safety net is in fact embedded in [a] larger system in which all of these forms of public social provision—including macro-economic policies, opportunity policies, labor protections, employer-provided benefits, as well as the more traditionally-defined social safety net policies—are meant to benefit us all, and are meant to provide protection for the broad citizenry, not just for those who fall below the poverty line, against the vicissitudes of the market economy.⁵⁰

Mixing metaphors helps demonstrate the point. A “safety net” is like the seat belt and air bags in a car. Yes, a seat belt will help you if you crash. But many other considerations influence the safety of driving. These include car safety features that influence whether a car has an accident in the first place such as traction control, the tires, the steering, and so on. And these also include considerations far beyond the driver and her car—other drivers, the safety of their cars, the design of the road, the width of the lanes, the weather, and on and on. Vulnerability theory and health justice emphasize how the law affects all these considerations, and how futile and incomplete it can be to focus only on the role of law if and when a person suffers harm. Yet the ‘safety net’ metaphor directly undermines that emphasis by inviting the reader to think first and foremost about rescue supports that are triggered only in the event of emergency.

Of course, if any writer or reader understands that the subset of programs they associate with a ‘safety net’ are in fact just an embedded component of a larger system then harm may not be done. But if on the other hand a writer or listener understands ‘safety net’ as a catch-all associated with the imagery it calls to mind—if the metaphor serves its purpose—then the term obfuscates in a way that contributes to the invisibility of social and structural determinants of health and inequality.

It is important to note two corollary problems associated with conceptualizing health and welfare laws as a “net.” First, recognition of social and structural determinants of health and inequality raises a difficult prioritization question about whether to favor upstream investments in preventing harm (or building resilience),

⁵⁰ Daniel P. Gitterman, *Confronting Poverty: What Role for Public Programs: An Overview of Panel 1*, 10 EMPLOYEE RTS. & EMP. POL’Y J. 9, 9, 13–15 (2006) (statement of Alice O’Connor).

downstream investments in rescuing those who come to harm, or neither⁵¹ Conceptualizing laws as a ‘net’ implicitly takes sides on this debate in favor of rescue supports. Second, while some conceive of the ‘net’ as being made up of programs, others describe the net as comprising health and welfare laws themselves.⁵² Reifying laws in this way ignores the importance of implementation and access in determining whether a person in need actually obtains the benefit of a protection described in law. Yet even traditional ‘entitlements’ are far from automatic, and much of the work of health and welfare policy—as well as much of the potential for unequal treatment and access—comes in the space between law and implementation.⁵³

IV. REPLACING THE ‘SAFETY NET’

“Words matter.”⁵⁴ The forty-year reign of the ‘safety net’ has seen persistent and perhaps growing frustration not only in the development of health and welfare law and policy but in the underlying scholarly and political discourse. It has also seen the development of deeper, richer understandings of the relationship between such policy and the people it impacts and, with these understandings, an ongoing expansion of the range of laws and programs understood to impact health and welfare. Yet as

⁵¹ See Wiley, *From Patient Rights to Health Justice*, *supra* note 38, at 885, 888 (describing challenge of resource allocation, calling for collective deliberation about allocation with health care as one of several determinants of health); Martha Albertson Fineman, George Shepherd, *Homeschooling: Choosing Parental Rights over Children's Interests*, 46 U. BALT. L. REV. 57, 61 (2016) (rejecting possibility of singling out particular groups for special or unique treatment to protect from harm).

⁵² Compare, e.g., Bitler, *supra* note 21 (describing safety net as comprising “programs”) with Michael R. Ulrich, *Health Affairs Blog Post: Challenges for People with Disabilities within the Health Care Safety Net*, 15 YALE J. HEALTH POL’Y, L., & ETHICS 247 (2015) (“Medicare and Medicaid were passed to serve as safety nets”).

⁵³ See Benfer, *supra* note 38, at 325 (“Many laws that are neutral on their face have a disastrous effect on low-income, marginalized communities.”); see generally TIMOTHY STOLFUS JOST, *DISSENT: THE THREATS FACING OUR PUBLIC HEALTH CARE PROGRAMS AND A RIGHTS-BASED RESPONSE* 23-46 (Oxford 2003) (describing efforts to limit entitlement programs by restrictive implementation).

⁵⁴ *Thomas More Law Ctr. v. Obama*, 651 F.3d 529, 551 (6th Cir. 2011) (opinion of Sutton, J.) (abrogated by *NFIB v. Sebelius*, 567 U.S. 519 (2012)). See Ruth Bader Ginsburg, *Ruth Bader Ginsburg's Advice for Living*, N.Y. Times, Oct. 1, 2016, https://www.nytimes.com/2016/10/02/opinion/sunday/ruth-bader-ginsburgs-advice-for-living.html?_r=0 (emphasis added) (“At Cornell University, my professor of European literature, Vladimir Nabokov, changed the way I read and the way I write. Words could paint pictures, I learned from him. Choosing the right word, and the right word order, he illustrated, could make an enormous difference in conveying an image or an idea.”); Joshua Guetzkow, *Beyond Deservingness: Congressional Discourse on Poverty, 1964-1996*, 629 AM. ACADEMY OF POLITICAL & SOCIAL SCIENCE 173, 175 (2010) (“The construction of a social problem is often a starting point for the formulation or selection of public policies.”); Donald M. McCloskey, Essay, *The Rhetoric of Law and Economics*, 86 MICH. L. REV. 752, 752 (1988) (“Economics and law have contrasting rhetorics, which is one reason perhaps why economics has become influential in law.”). See generally CLIFF GODDARD AND ANNE WIRZBICKA, *WORDS AND MEANINGS: LEXICAL SEMANTICS ACROSS DOMAINS, LANGUAGES, AND CULTURES* (2014).

just described the 'safety net' metaphor for such programs obscures and inhibits this development.

It is past time to move toward terminology that (1) promotes mutual understanding in discourse between those speaking from differing normative perspectives and (2) aligns with rather than contradicts those underlying perspectives. At the very least, adherents of vulnerability theory, health justice, or other normative theories that the 'safety net' metaphor directly contradicts should consider abandoning the metaphor.⁵⁵

Some scholars may agree with the assumptions of an autonomous, independent subject and of law's role as exclusively to rescue those who "fall."⁵⁶ Such scholars may nonetheless wish to avoid uncritical use of the 'safety net' metaphor insofar as employing value-laden terminology may confuse or discourage readers who favor alternative approaches. The risk of confusion is particularly great with regard to the 'safety net' metaphor because, as discussed in Part II, scholars use the term to mean several different things.

⁵⁵ Health justice scholarship often uses the 'safety net' metaphor. *E.g.* Wiley, *From Patient Rights to Health Justice*, *supra* note 38, at 882 (employing metaphor); Wiley, *Health Law as Social Justice*, *supra* note 38, at 68–69 (same); Benfer, *supra* note 38, at 334 n.327 (same). Vulnerability theorists do so as well. *E.g.* Julian J.Z. Polaris, *Personal Networks: Health Coverage Status and the Invisible Burden on Family and Friends*, 39 HARV. J. L. & GENDER 115, 186 (2014) (employing metaphor); Kohn, *supra* note 37, at 9 (same). Notably, however, although Fineman routinely employed the 'safety net' metaphor in her earlier writings, she has not used the term in her more recent published works, instead referring to the "web of economic, social, cultural and institutional relationships" when seeking a catch-all metaphor. *Compare* Fineman, *AUTONOMY MYTH*, *supra* note 37, at xvi (defending the "comparatively minimal guarantee of a social safety net for the poor and dependent in the United States"); *id.* at 32 ("a narrow conception of self-interest in which each person is permitted only to care about his or her own circumstances and those of his or her family ... has led to a rending of the social safety net in the United States"); Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 U. CHI. LEGAL F. 1, 21 (2004) ("We have also seen a withdrawal of the federal government's safety net, most notably in the elimination of entitlement to welfare benefits."); Martha Albertson Fineman, *The Family in Civil Society*, 75 CHI.-KENT L. REV. 531, 550 (2000) (unemployment insurance "as part of the governmental safety net for workers"); Martha Albertson Fineman, *The Nature of Dependencies and Welfare "Reform"*, 36 SANTA CLARA L. REV. 287 (1996) ("it is widely understood that the social safety net is being torn apart by the rhetoric of budget necessity and professed American moral values"), *with* Martha Albertson Fineman, George Shepherd, *Homeschooling: Choosing Parental Rights over Children's Interests*, 46 U. BALT. L. REV. 57, 61 (2016) ("Even before the moment of birth, human beings are embedded in webs of economic, cultural, political, and social relationships and institutions. We are dependent on those relationships and institutions because they support and sustain us."); Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & CIV. RTS. L. REV. 307, 318–19 (2014) (webs of economic, social, cultural, and institutional relationships that profoundly affect our individual destinies and fortunes); Martha Albertson Fineman, *Equality and Difference - the Restrained State*, 66 ALA. L. REV. 609, 622 (2015) (same); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 269 (2010) ("webs of economic and institutional relationships").

⁵⁶ *But cf.* *supra* note 39 (identifying source of tension between safety net metaphor and libertarianism).

In light of these arguments against the 'safety net' Part II employed extant descriptors for the various meanings of 'safety net' today that endeavored to be values pluralist. This Part explains this choice of descriptors with the goal of informing other scholars in considering their own choice of terminology or further examining the usefulness of ways to conceptualize health and welfare programs.

"*Subsistence programs*" and "*means tested*" or "*morality tested*": programs that provide health care or income support to those in poverty. The adjectives "means tested" and "morality tested" are applied to subsistence programs (or other programs) to distinguish whether they are accessible to all. It is particularly important that specific language be included to describe whether a program is morality-tested or not to avoid the situation created by the current use of the 'safety net', *i.e.*, that a key policy decision about program design (whether to limit eligibility to those deemed "deserving" or not) is left unspoken and therefore hidden.

"*Poverty prevention programs*": programs that seek to help people avoid becoming impoverished. While 'anti-poverty program' has seen some usage, it is unclear whether that term refers to subsistence programs, prevention programs, or both. Moreover, the term 'anti-poverty program' has the potential to stigmatize poverty and the impoverished.

"*Open access providers*": health care providers that treat all patients regardless of their ability to pay, and so are accessible to those who do not have insurance. The current usage of 'health care safety net' to describe such providers is highly problematic as a descriptive matter. Simultaneously in health law there are scholars writing of the 'health care safety net' as those providers who are willing to treat those who do not have health insurance from any source,⁵⁷ and other scholars describing programs that provide health insurance like Medicare and Medicaid as part of the 'safety net.'⁵⁸ This

⁵⁷ See Part II. See also Sara Rosenbaum, Bruce Siegel, & Marsha Regenstein, *EMTALA and Hospital 'Community Engagement': The Search for a Rational Policy*, 53 BUFF. L. REV. 499, 519–20 (2005) (focusing on provision of care to those lacking insurance as "health care safety net"); Mark A. Hall, *Approaching Universal Coverage with Better Safety-Net Programs for the Uninsured*, 11 YALE J. HEALTH POL'Y, L. & ETHICS 9, 9 (2011) ("Sources of care for the uninsured are referred to loosely as the health care 'safety net.'").

⁵⁸ Michael R. Ulrich, *Health Affairs Blog Post: Challenges for People with Disabilities within the Health Care Safety Net*, 15 YALE J. HEALTH POL'Y, L., & ETHICS 247 (2015) ("Medicare and Medicaid were passed to serve as safety nets for the country's most vulnerable populations") Eleanor D. Kinney, *Can the Medicare, Medicaid, and SCHIP Programs Meet the Challenges of Public Health Emergencies?*, 58 ADMIN. L. REV. 559, 570 (2006) (referring to Medicare, Medicaid, and SCHIP as "safety net institutions"); Christopher C. Jennings & Christopher J. Dawe, *Long-Term Care: The Forgotten Health Care Challenge*, 17 STAN. L. & POL'Y REV. 57, 61 (2006) ("Medicaid [was] originally designed as the health care safety net for low-income Americans"); John D. Rockefeller IV, *Health Care and the Underserved: Policy Decisions*, 3 STAN. L. & POL'Y REV. 27, 28 (1991) (describing Medicaid as "our health care safety net"); Susan E. Cancelosi, *Revisiting Employer Prescription Drug Plans for Medicare-Eligible Retirees in the Medicare Part D ERA*, 6 HOU. J. HEALTH L. & POL'Y 85, 103 (2005) (describing Medicare as "a significant health care safety net"); Catherine M. Reif, *A Penny Saved Can be a Penalty Earned: Nursing Homes, Medicaid Planning, the Deficit Reduction Act of 2005, and the Problem of Transferring Assets*, 34 N.Y.U. REV. L. & SOC. CHANGE 339, 371 (2010) ("The purpose of Medicaid is to provide a health care safety net for the nation's poorest and sickest citizens"). This broader use of the term "health care safety net" is not unique to scholarship. Sara Bernard, *For Consumers Some Clarity on Health Care Changes*, NY Times (March 21, 2010) available at

creates a significant risk of confusion and cross-talk. Moreover, as John Jacobi has pointed out, this usage creates the risk that policymakers might come to believe any obligation they feel to provide a 'safety net' is satisfied by open access providers alone (if they are themselves the "safety net"), thereby undermining support for Medicare, Medicaid, and other public health care coverage programs.⁵⁹ The term "last resort" may therefore be preferable in that it emphasizes that such providers are not necessarily a sufficient protection. This essay utilizes the term "open access" providers, however, because it is descriptively accurate but has minimal normative content.

"*Human ecosystem*": The laws, institutions, behaviors, and environmental factors that through their interaction affect human health, activity, and the propagation of society.⁶⁰ The ecological model pervades public health scholarship today and, from there, has been adopted into the health justice framework.⁶¹ It is descriptively apropos; because our growing appreciation of social determinants of health and other structural and environmental influences on human behavior and outcomes has broken down the distinction between sociocultural forces and biological ones, a phrase that does the same is now warranted.

Moreover, this metaphor calls to mind a concept—the ecosystem—that should already be familiar to most readers, making it accessible. The familiar idea of an ecosystem brings to mind the individual behavior of participants in the ecosystem, the interconnectedness of that behavior, and the degree to which their health and behavior depends as much or more on their environment as on their choices. It thereby erodes artificial boundaries between notions of the public and notions of the private inherent in a 'safety net.' And finally, this imagery allows for both a system and an individual perspective: Unlike a safety net an ecosystem can be healthy or sick, as can those within it.

<http://www.nytimes.com/2010/03/22/your-money/health-insurance/22consumer.html?src=me&ref=general> ("The uninsured are clearly the biggest beneficiaries of the legislation, which would extend the health care safety net for the lowest-income Americans. The legislation is meant to provide coverage for as many as 32 million people.").

⁵⁹ John Jacobi, *Government Reinsurance Programs and Consumer-Driven Care*, 53 BUFF. L. REV. 537, 543 (2005) ("[I]t can be argued powerfully that the health care safety net [so understood] has provided the opportunity for America to dither over reforming the health insurance system over the last several decades. But for the presence of the last-gasp, unheralded, and underfunded institutions, the pressure to respond to the crisis of uninsurance would certainly be more intense.").

⁶⁰ In addition to public health, this terminology has seen some use in environmental and resource-management literature. See Gary E. Machlis *et al.*, *The Human Ecosystem Part I: The Human Ecosystem as an Organizing Concept in Ecosystem Management*, 10 SOCIETY & NATURAL RESOURCES 347 (2008) ("Our hope is a fusion that transcends the arcane division or the biophysical and the sociocultural—one that is truly ecological.").

⁶¹ See LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT at 23-26 (3d Ed. 2016) ("[t]he social-ecological model places individual choices into their social context and emphasizes structural explanations for health behaviors and outcomes"). E.g. Wiley, *Health Law as Social Justice*, *supra* note 38 at 79–82 (describing "social-ecological model" of public health).

Finally, the 'human ecosystem' metaphor has benefits from a variety of normative perspectives. For vulnerability theory, the 'ecosystem' idea simultaneously emphasizes the interdependence and interconnectedness of players within the ecosystem,⁶² and the inclusion of "human" emphasizes the common humanity—and fragility—that is the basis for vulnerability. For health justice, the 'ecosystem' metaphor emphasizes the social determinants of health, the importance of upstream factors on health outcomes, and the fact that law is just one influence on ecosystem health insofar as it shapes structures and institutions, not the sole or a direct influence. And for libertarianism, the 'ecosystem' metaphor does not make any claims about the viability or desirability of intentional human alteration, leaving space for Hayek's claim that the operation of the social order broadly is beyond human comprehension or deliberate alteration.⁶³

CONCLUSION

Legal scholars should not employ the 'safety net' metaphor uncritically. The metaphor is descriptively confusing because it means different things to different audiences. Moreover, the metaphor takes a position on normative and empirical questions that contradicts the understanding of the nature and role of health and welfare laws espoused by leading feminist and communitarian theories. The vision of law springing to action to rescue an autonomous subject should she fall assumes an independent and autonomous subject and ignores social and structural determinants of health and inequality. Even scholars who share the perspective on disputed questions implicit in the 'safety net' should consider abandoning the term in the interest of constructive dialogue and mutual understanding. In light of these arguments against the 'safety net,' the Essay suggests replacing the metaphor with alternative terminology that captures the various senses in which 'safety net' is employed today and endeavors to be values-pluralist: subsistence programs (means- or morality-tested), poverty prevention programs, open-access providers, and the human ecosystem.

⁶² FINEMAN, *AUTONOMY MYTH* at 48 (describing social supports as "society preserving").

⁶³ See *supra* note 39 (describing this view).