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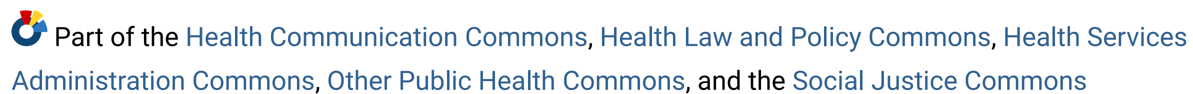
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AGAINST THE "SAFETY NET"

Matthew B. Lawrence[*]

Abstract

Then-Representative Jack Kemp and President Ronald Reagan originated the "safety net" conception of U.S. 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 Article 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 Representative Kemp and President 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 that the metaphor conjures of laws springing into 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 a 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, this Article 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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"Metaphors in law are to be narrowly watched,
for starting as devices to liberate thought,
they end often by enslaving it."[1]

INTRODUCTION

It is difficult to overstate the prevalence of the "safety net" metaphor for U.S. health and welfare laws. Since being originated by then-Representative Jack Kemp and President 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 over 4,500 law review articles, hundreds of reported cases, and numerous statutory provisions.[3] As the "balance of powers"

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1. Berkey v. Third Ave. Ry., 155 N.E. 58, 61 (N.Y. 1926).

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

3. *"Safety Net,"* WESTLAW, https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20%22safety%20net%22&jurisdiction=ALLFEDS&contentType=ANALYTICAL&querySubmissionGuid=i0ad62af00000016e656a5f1e3c162d2d&searchId=i0ad62af00000016e6569ea723f7712a4&transitionType=ListViewType&contextData=(sc.Search) (last visited Nov. 15, 2019) (type "safety net" into the search bar; narrow search to "All Federal Cases"; filter to "Statutes & Court Rules"; then filter to "Secondary Sources" and narrow by "Law Reviews & Journals"). *See generally, e.g.*, 22 U.S.C. § 262o-2(a)(2)(E) (2012) (promoting the establishment and strengthening of a social safety net for unemployment and worker dislocation); *id.* § 2212 note (Findings and Declarations of Policy of 2000 Amendment) (noting that the poor in the developing world, especially women, lack social safety nets); 42 U.S.C. § 2991a note (Section 1. Congressional Findings and Declaration of Policy) (noting that government programs for the poor have displaced traditional Alaska Native social safety nets); Marianne Bitler, *The EITC and the*

metaphor is to structural constitutional law and the "bundle of sticks" metaphor is to property law, the safety net metaphor has become to health and welfare law. Yet unlike the balance of powers or bundle of sticks metaphors, legal scholarship has not examined the usefulness of the safety net metaphor.[4] This Article 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 metaphor 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 subsistence programs, poverty-prevention programs, laws impacting the social determinants of health whether focused on health care or not, or health care providers willing to treat a person even if she lacks government-provided insurance coverage.[6]

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

Social Safety Net in the Great Recession, 70 TAX L. REV. 533, 533 (2017) (discussing the shift nationally from an out-of-work safety net to an in-work safety net); Brietta R. Clark, *A Journey Through the Health Care Safety Net*, 61 ST. LOUIS U. L.J. 437, 437 (2017) (discussing the health care safety net); Brian Galle & Jonathan Klick, *Recessions and the Social Safety Net: The Alternative Minimum Tax as a Countercyclical Fiscal Stabilizer*, 63 STAN. L. REV. 187, 187 (2010) (discussing the role of the social safety net in recessions); Robin Fretwell Wilson, *Moving Beyond Marriage: Healthcare and the Social Safety Net for Families*, 46 J.L. MED. & ETHICS 636, 636 (2018) (discussing the relationship between family form and health care social safety nets). For a differentiation of the five ways that contemporary legal scholarship uses the term "safety net," see *infra* Part II.

4. The balance of powers metaphor and bundle of sticks metaphor have been subject to extensive scholarly analysis and debate. *See, e.g.*, J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 713–15 (1996) (collecting sources discussing the usefulness of the bundle of sticks metaphor); Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution, and the Problem of Executive "Underenforcement,"* 164 U. PA. 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.").

5. *See* David Zarefsky et al., *Reagan's Safety Net for the Truly Needy: The Rhetorical Uses of Definition*, 35 COMM. STUD. 113, 114–18 (1984) (identifying this function).

6. *See, e.g.*, *Social Safety Net*, FED. SAFETY NET, http://federalsafetynet.com/social-safety-net.html [https://perma.cc/G5MN-EZBM] (describing a general understanding of the term "safety net").

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)[7] and health justice (which emphasizes collective responsibility for and impacts of health outcomes).[8] And the conception of laws as lying dormant, ready to spring into action as a net for any person in need of rescue, obscures the important, ongoing role that 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 metaphor 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, this Article 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; "open-access providers" to describe health care providers willing to treat patients regardless of 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 this Article's contribution.

I. THE ORIGIN OF THE SAFETY NET

The safety net metaphor for certain social programs was popularized in international finance.[9] 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-

7. *See infra* note 46.

8. *See infra* note 47.

9. *See* Srawooth Paitoonpong et al., *The Meaning of "Social Safety Nets,"* 19 J. ASIAN ECON. 467, 468 (2008) (discussing the use of the term "social safety nets" in Southeast Asian development economics); *see also id.* ("[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. Developing countries introduced [social safety nets] to mitigate the social impact of structural adjustment measures on specific low-income groups.").

income groups from the impacts of these adjustments.[10] Such insulating mechanisms became known as social safety nets.[11]

Jude Wanniski, an editorial writer for the *Wall Street Journal*, learned the international-finance term before being tasked in 1979 with helping Congressman Kemp write *An American Renaissance: A Strategy for the 1980s*.[12] 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.[13] "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."[14]

President Reagan brought Wanniski 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.[15] 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.[16]

He went on to identify social security, Medicare, veterans' pensions, school breakfasts and lunches, Project Head Start, summer youth jobs,

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10. *Id.* at 468 n.1.

11. *See id.* at 468; INDEP. EVALUATION GRP., WORLD BANK GRP., EVIDENCE AND LESSONS LEARNED FROM IMPACT EVALUATIONS ON SOCIAL SAFETY NETS 5 (2011), https://ieg.worldbankgroup.org/sites/default/files/Data/reports/ssn_meta_review.pdf [https://perma.cc/URD5-PPEX] (defining "social safety nets" as "a particular set of noncontributory programs targeting the poor and vulnerable to reduce poverty and inequality, encourage more and better human capital investments, improve social risk management, and offer social protection"); WORLD BANK GRP., PROSPERITY FOR ALL: ENDING EXTREME POVERTY 12 (2014), http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1327948020811/8401693-1397074077765/Prosperity_for_All_Final_2014.pdf [https://perma.cc/7TFU-35XH] (referring to "[t]ransfers via social protection programs" designed to "lift people out of poverty" as "safety nets").

12. JACK KEMP, AN AMERICAN RENAISSANCE: A STRATEGY FOR THE 1980'S vii (1979).

13. *See id.* at 78–83.

14. *Id.* at 78.

15. Address to the Nation on the Economy, 1 PUB. PAPERS 79, 82 (Feb. 5, 1981) ("Our spending cuts will not be at the expense of the truly needy.").

16. Address Before a Joint Session of the Congress on the Program for Economic Recovery, 1 PUB. PAPERS 108, 110 (Feb. 18, 1981).

and supplemental income for the blind as within the scope of this protected safety net.[17]

This usage by President Reagan in 1981, building on Kemp's use of the term in 1979, originated the safety net metaphor for understanding health and welfare programs in the United States.[18] The Administration's assertion that it would leave in place the safety net for those with true need or "the truly needy"[19] became a cornerstone of its defense of proposed budget cuts,[20] though the Administration's definition of the safety net narrowed over time and its officials themselves disagreed with one another about which programs counted.[21] As William Safire colorfully put it at the time, "Administration spokesmen carry the safety net around as a kind of security blanket."[22]

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

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17. *Id.*

18. *See* David E. Rosenbaum, *Reagan's "Safety Net" Proposal: Who Will Land, Who Will Fall*, N.Y. TIMES, Mar. 17, 1981, at A1; William Safire, *On Language; Safety Nets*, N.Y. TIMES, Mar. 29, 1981, § 6, at 9; *How Did the Social Safety Net Get Its Name?*, MARKETPLACE (Apr. 2, 2013), https://www.marketplace.org/2013/04/02/wealth-poverty/show-us-your-safety-net/how-did-social-safety-net-get-its-name [https://perma.cc/Y5YD-UEYG] (reporting that President Reagan originated the term). While 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, "Public 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." Douglas Robinson, *Roosevelt Vows More Social Aid: Opponents Favor Limited Help, Candidate Says*, N.Y. TIMES, Oct. 2, 1966, at 38. Accordingly, this Article 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 this Article. Winston Churchill used the closely related metaphors of a "net" coupled with a "social ambulance" to describe his party's conception of certain British programs as early as 1951. *See* Winston Churchill, Broadcast (Oct. 8, 1951), *reprinted in* CHURCHILL BY HIMSELF (Richard M. Langworth ed., 2008).

19. Address to the Nation on the Economy, *supra* note 15, at 82; *see also Transcript of Reagan Address Reporting on the State of the Nation's Economy*, N.Y. TIMES, Feb. 16 1981, at A12 ("Our spending cuts will not be at the expense of the truly needy.").

20. Zarefsky et al., *supra* note 5, at 114–18.

21. *Id.* at 118.

22. Safire, *supra* note 18.

> 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.[23]

The intervening decades have proven that President Reagan's success in setting the terms of the debate was far more than momentary. The safety net has become ubiquitous as an ill-defined catchall for social programs in scholarship and discourse in the United States.[24]

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 that health and welfare policy seek to solve and the role of law in that effort.

Most narrowly, some see the safety net the way that President Reagan and his Administration employed it, as programs providing cash or in-kind support directly to the "deserving poor"—that is, those who, through no "fault" of their own, are young, sick, incapacitated, or otherwise dependent.[25] In short, they see the safety net as encompassing subsistence

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23. Zarefsky, et al., *supra* note 5, at 119; *see also* Safire, *supra* note 18 ("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.").

24. *See supra* note 3 and accompanying text (describing the ubiquity of the metaphor); *infra* Part II (differentiating the various uses of the metaphor).

25. 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 18. 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 ANNALS AM. ACAD. POL. & SOC. SCI. 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

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 the poor who are in some state-labeled sense "deserving."[26]

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)[27] sought to bring about in the Medicaid program, which provides health insurance to some low-income individuals.[28] Historically Medicaid, building on its roots in charity care, was available only to particular classes of "'[d]eserving' poor."[29] The ACA attempted to expand Medicaid, however, to be more purely means tested, dispatching with prior moral conditions on eligibility (with important exceptions).[30] The United States Supreme Court's decision in *National Federation of*

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reinforcing the demarcation between the deserving (i.e., 'truly needy') and the undeserving poor and blaming the latter for driving up government spending." (footnote omitted)).

26. *See* Bitler, *supra* note 3, at 533 ("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) ("The social safety net has been used to refer to 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, 367 n.15 (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."); Daniel P. Gitterman, *Confronting Poverty: What Role for Public Programs: An Overview of Panel 1*, 10 EMP. 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."); Karen Long Jusko, *Safety Net*, PATHWAYS, Special Issue 2015, at 37, https://inequality.stanford.edu/sites/default/files/SOTU_2015_safety-net.pdf [https://perma.cc/9MUE-W2C8] (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).

27. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26, 29 and 42 U.S.C.).

28. Merle Lenihan & Laura D. Hermer, *On the Uneasy Relationship Between Medicaid and Charity Care*, 28 NOTRE DAME J.L., ETHICS & PUB. POL'Y 165, 168 (2014).

29. Clark, *supra* note 3, at 444.

30. *See id.* at 443–45. *See generally* Lenihan & Hermer, *supra* note 28 (exploring the historical relationship between Medicaid and charity care). 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 D. Makhlouf, *Health Justice for Immigrants*, 4 U. PA. J.L. & PUB. AFF. 235, 242 n.12 (2019) (describing Medicaid eligibility based on documentation and citizenship status).

Independent Business v. Sebelius[31] 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.[32]

These first two conceptions of the safety net also illustrate the rhetorical function of the metaphor employed by President Reagan—that is, 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 of whether 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 that individuals who are not in poverty will become impoverished.[33] 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 near-poor are essential for preventing or allaying poverty."[34] So understood, the safety net includes tax incentives to purchase life insurance, buy health insurance, and save for retirement.[35] 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 of whether they can afford it.[36]

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31. 567 U.S. 519 (2012).

32. *See id.* at 587 (plurality opinion).

33. Julia D. Mahoney, *America's Exceptional Safety Net*, 40 HARV. J.L. & PUB. POL'Y 33, 34 (2017) ("[M]any 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.* (listing safety net programs, including "government-provided or government-subsidized health care and health insurance; Social Security, private pensions, tax-advantaged retirement accounts, and public expenditures on education").

34. *Id.* at 35.

35. 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 the definition of safety net); Wilson, *supra* note 3, at 638 (including tax subsidies for employer-sponsored insurance as a safety net program); *see also* Kratzke, *supra* ("A social safety net, by definition, benefits everyone.").

36. *See* Jean Braucher, *Consumer Bankruptcy as Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1066 (2004) ("[G]aps in unemployment 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.").

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;[37] the distinction between harm reduction and prevention in public health;[38] the distinction between *ex ante* and *ex post* reforms in law and economics;[39] and the distinction between addressing resilience and addressing dependence in vulnerability theory.[40]

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 (such as a safety net for workers).[41] In particular, as scholars have recognized the importance of social determinants of health beyond health care or 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.[42] Followed to its logical conclusion, the safety net so

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

38. *Cf.* Richard L. Abel, *£'s of Cure, Ounces of Prevention*, 73 CALIF. L. REV. 1003, 1003 (1985) (book review) (comparing points along the health axis at which legal intervention might seek to improve outcomes).

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

40. *See* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 13 (2008) (describing resilience).

41. *See* JAY M. SHAFRITZ, THE DICTIONARY OF PUBLIC POLICY AND ADMINISTRATION 261 (2004) (defining "safety net" as "[t]he totality of social welfare programs"); *see also* PAMELA LOPREST & DEMETRA NIGHTINGALE, URBAN INST., THE NATURE OF WORK AND THE SOCIAL SAFETY NET 1 (2018), https://www.urban.org/sites/default/files/publication/98812/the_nature_of_work_adn_the_social_safety_net.pdf [https://perma.cc/PZ67-KP38] ("We define the US social safety net broadly, including structures and supports that have proven essential across the many types 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 the definition Temporary Assistance for Needy Families, Supplemental Nutrition Assistance Program, Medicaid, housing assistance, Supplemental Security Income, childcare subsidies, Earned Income Tax Credit, and unemployment insurance).

42. *See, e.g.*, Clark, *supra* note 3, at 438, 447 (discussing the social determinants of health that impact health access and outcomes); Len M. Nichols & Lauren A. Taylor, *Social Determinants As Public Goods: A New Approach to Financing Key Investments in Healthy Communities*, 37 HEALTH AFF. 1223, 1223 (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."); Julian J.Z. Polaris, *Personal*

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.[43] This is inherently confusing because so understood, safety net providers means those that treat people who do not have health care through the programs (such as Medicare, the ACA, and Medicaid) that many others view as part of the safety net.[44]

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." (footnote omitted)).

43. *See* Dave A. Chokshi et al., *Health Reform and the Changing Safety Net in the United States*, 375 NEW ENG. J. MED. 1790, 1790 (2016) ("Safety-net health systems provide essential care to low-income people in the United States, including those who are uninsured."); 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) ("Those without adequate insurance generally rely on our health care safety net, loosely defined as 'providers that organize and deliver a significant level of health care . . . to uninsured, Medicaid, and other vulnerable patients.'" (alteration in original) (quoting INST. OF MED., AMERICA'S HEALTH CARE SAFETY NET: INTACT BUT ENDANGERED 3 (2000), http://www.idph.state.il.us/tfhpr/materials/Carvalho%20handout.pdf [https://perma.cc/83GD-MKLZ])); 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 1, 2 (Mark A. Hall & Sara Rosenbaum eds., 2012) ("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."); Lenihan & Hermer, *supra* note 28, at 194 ("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.'" (quoting LYNNE FAGNANI & JENNIFER TOLBERT, NAT'L ASS'N OF PUB. HOSPS. AND HEALTH SYS., THE DEPENDENCE OF SAFETY NET HOSPITALS AND HEALTH SYSTEMS ON THE MEDICARE AND MEDICAID DISPROPORTIONATE SHARE HOSPITAL PAYMENT PROGRAMS 1 (1999))); *see also* INST. OF MED., *supra*, at 1 ("Safety net providers are providers that deliver a significant level of health care to uninsured, Medicaid, and other vulnerable patients."). This understanding has been codified in federal and state law. *E.g.*, Health Care Safety Net Amendments of 2002, Pub. L. 107-251, 116 Stat. 1621 (codified as amended in scattered sections of 42 U.S.C.) (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 (2018).

44. *See infra* notes 71–73 and accompanying text (describing the contradictory use).

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 implicitly 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 vision)[45] 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 theory[46] and health justice.[47]

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45. As first utilized by 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. *See supra* notes 12–18 and accompanying text. Safire took President 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 23 (characterizing the underlying vision).

46. 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, 3–4 (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. 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." (footnotes omitted)). *See generally* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004) (analyzing theories on the relationship between individuals, families, and the state); Fineman, *supra* note 40 (developing the concept of vulnerability). 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. *See* Fineman, *supra* note 40, 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), *see id.* at 9 n.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 developed an obligation of the state to cultivate resilience and provide support to those who need it. *See id.* at 14–15.

47. 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. *See* Lindsay F. Wiley, *Applying the Health Justice Framework to 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

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.[48] This Part is meant to highlight the content of the

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care." (footnote omitted)). *See generally* Emily A. 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) (giving a comprehensive overview of the origins, aims, and focuses of health justice, and advocating for the creation of health justice jurisprudential and legislative framework); 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) [hereinafter Wiley, *From Patient Rights to Health Justice*] (articulating the health justice model as an alternative to existing health law models); Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J.L. & PUB. POL'Y 47, 84–85 (2014) [hereinafter Wiley, *Health Law as Social Justice*] (describing and examining the health justice movement). Health justice has emerged more recently than vulnerability theory but is increasingly used to analyze difficult problems in health care. *See, e.g.*, Makhlouf, *supra* note 30, at 283; Elizabeth Y. McCuskey, *The Body Politic: Federalism as Feminism in Health Reform*, 11 ST. LOUIS U. J. HEALTH L. & POL'Y 303, 311–12 (2018). It is also used by grassroots organizations leveraging environmental justice, reproductive justice, and other movements to advocate for health care access. *See* LAWRENCE O. GOSTIN & LINDSAY F. WILEY, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 536–39 (3d ed. 2016). Health justice can be disaggregated into four concentric commitments. Wiley, *From Patient Rights to Health Justice*, *supra*, at 874. At its core, health justice is centered on the lived experiences of disenfranchised people. *Id.* 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. *See id.* 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 the lived experience. *Id.* Finally, health justice probes interventions aimed at reducing health disparities—especially legal interventions—for evidence of social bias. *Id.* at 874 n.192. 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, 94–95.

48. 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 66, 81–82 (W.W. Bartley III ed., 1988) (characterizing as "fatal conceit" that regulators can successfully alter complex behaviors); Morris B. Abram, Commentary, *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 generally* 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); Matthew B. Lawrence, *The Social Consequences Problem in Health Insurance and How to Solve It*, 13 HARV. L. & POL'Y REV. 593 (2019) (summarizing welfare economic arguments about when and how government intervention is desirable). On this view, a catchall safety net would only encourage dependence and discourage responsibility by insulating people from the consequences of their choices. *See*

metaphor on key questions in contemporary scholarship, not conclusively catalogue all of the ways that 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.[49]

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.[50] As a result, Medicaid—coverage for the low income—is the primary source of long-term care coverage for

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generally David A. 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 term "safety net" during the 2012 election. *See* Joy Lin, *Gingrich: "While I want your vote, I need your prayers"*, FOX NEWS (Feb. 4, 2012), https://www.foxnews.com/politics/gingrich-while-i-want-your-vote-i-need-your-prayers [https://perma.cc/SA8D-3EMC] ("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'm running is because I want to replace the spider web with a trampoline that launches them into the middle class and gives them a future.").

49. *See* FINEMAN, *supra* note 46, at 32 ("Americans . . . convince themselves that we are all capable of becoming economically 'self-sufficient' and 'independent' . . . ."); *id.* at 33 ("[N]ot 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 also 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.").

50. *See* 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, 233 (2015).

Americans,[51] paying for 60% of nursing home stays.[52] Participation in the long-term care aspect of Medicaid is not temporary, it is an important, 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 support but of family and community supports.[53] 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 interrelatedness of health and welfare within families and communities. They see families and communities as thriving or suffering together, not in isolation.[54] 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

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51. *See id.* at 233 ("[S]ince 1965 Medicaid has become the nation's long-term care safety net.").

52. Donald Redfoot & Wendy Fox-Grage, *Medicaid: A Program of Last Resort for People Who Need Long-Term Services and Supports*, INSIGHT ON ISSUES, May 2013, at 1, https://www.aarp.org/content/dam/aarp/research/public_policy_institute/health/2013/medicaid-last-resort-insight-AARP-ppi-health.pdf [https://perma.cc/RC4F-EPRA].

53. This Article uses the term "family" broadly to include all of an "individual's closest emotional connections." *See* SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., TREATMENT IMPROVEMENT PROTOCOL TIP SER. NO. 39, SUBSTANCE ABUSE TREATMENT AND FAMILY THERAPY 3 (2015), https://store.samhsa.gov/system/files/sma15-4219.pdf [https://perma.cc/3CSZ-FEVW].

54. *See* Benfer, *supra* note 47, at 346 ("Communities . . . experienc[e] the negative consequences of injustice and health inequity . . . ."); Martha Albertson Fineman, *Family Values: Between Neoliberalism and the New Social Conservatism*, 26 SOC. & LEGAL STUD. 781, 783 (2017) (book review) ("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) [hereinafter Fineman, *Vulnerable Subject*] ("[S]ocietal institutions . . . should also be understood as vulnerable entities in and of themselves."); Wiley, *From Patient Rights to Health Justice*, *supra* note 47, at 882 ("Community prevention reduces exposure to health hazards by addressing environmental, economic, social, and cultural determinants of health at the community level."); Wiley, *Health Law as Social Justice*, *supra* note 47, at 80 (describing the emphasis on community-focused interventions).

markers, such as smoking.[55] 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).[56]

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 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 that 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.[57] A corollary is that existing institutions and structures do not distribute structural resilience uniformly; in light of this structural inequality,

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55. *See* Matthew B. Lawrence, *Deputizing Family: Loved Ones as a Regulatory Tool in the 'Drug War' and Beyond*, 11 NE. U. L. REV. 195, 213–15, 224–26 (2019) (collecting sources discussing the role of family in health care).

56. *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 398−99 (2008).

57. *Cf.* Fineman, *supra* note 40, at 12–13. 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." *Id.* at 13. Collectively, these programs 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; health care; employment systems; social assets such as family and community groups; unions; political groups; and entitlement programs such as Medicaid. *Id.* at 13–15.

efforts to prevent discrimination by focusing downstream at those suffering harm can be a Sisyphean task.[58]

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 that they might come to receive should they get sick and that such determinants often cause inequities.[59] 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 influence health outcomes.[60]

In the significant task of educating the public and policymakers about the importance of social determinants of health, the safety net metaphor is a counterproductive 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 well-being 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, 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 often juxtaposed against, or offered as alternatives to, private-sector benefits, or to the notion of self-help and "self-sufficiency."

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58. *See* Fineman, *Vulnerable Subject*, *supra* note 54, at 253 ("[T]he equal protection doctrine ignores existing inequalities of circumstances and presumes an equivalence of position and possibilities. Such 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 ("[W]ithin these various asset-conferring systems individuals are often positioned differently from one another.").

59. Benfer, *supra* note 47, at 278–79 ("The social determinants of health often lead to inequities."); *see id.* at 279–306 (collecting sources and surveying social determinants that can cause inequities).

60. *See* GOSTIN & WILEY, *supra* note 47, at 23–26 (discussing social-epidemiological research); 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).

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> . . . [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.[61]

Mixing metaphors helps demonstrate the point. A safety net is like the seat belt and airbags 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 of 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 that 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 the safety net as a catchall 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), downstream investments in rescuing those who come to harm, or neither.[62]

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61. Gitterman, *supra* note 26, at 9, 13–14.

62. *See* Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights over Children's Interests*, 46 U. BALT. L. REV. 57, 61 (2016) (rejecting the possibility of singling out particular groups for special or unique treatment to protect them from harm); Wiley, *From Patient Rights to Health Justice*, *supra* note 47, at 885, 888 (describing the challenge of resource allocation, and calling for collective deliberation about allocation with health care as one of several determinants of health).

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.[63] 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.[64]

IV. REPLACING THE SAFETY NET

"Words matter . . . ."[65] 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 that it impacts and, with these understandings, an ongoing expansion of the range of laws and programs understood to impact health and welfare. Yet as 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

63. *Compare* Bitler, *supra* note 3, at 533 (describing the 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, 247 (2015) ("Medicare and Medicaid were passed to serve as safety nets . . . .").

64. *See* Benfer, *supra* note 47, at 325 ("Many laws that are neutral on their face have a disastrous effect on low-income, marginalized communities . . . ."). *See generally* TIMOTHY STOLTZFUS JOST, DISENTITLEMENT?: THE THREATS FACING OUR PUBLIC HEALTH CARE PROGRAMS AND A RIGHTS-BASED RESPONSE 23–46 (2003) (describing the efforts to limit entitlement programs by restrictive implementation).

65. Thomas More Law Ctr. v. Obama, 651 F.3d 529, 551 (6th Cir. 2011) (Sutton, J., concurring in part), *abrogated by* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); *see* Ruth Bader Ginsburg, Opinion, *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 [https://perma.cc/LG5E-G9PG] ("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."); *see also* Guetzkow, *supra* note 25, at 175 ("The construction of a social problem is often a starting point for the formulation or selection of public policies."); Donald N. McCloskey, *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.").

theory, health justice, or other normative theories that the safety net metaphor directly contradicts should consider abandoning the metaphor.[66]

Some scholars may agree with the assumptions of an autonomous, independent subject and of law's role as exclusively to rescue those who "fall."[67] 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.

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

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66. Health justice scholarship often uses the safety net metaphor. *See, e.g.*, Benfer, *supra* note 47, at 334 n.327 (employing the metaphor); Wiley, *From Patient Rights to Health Justice*, *supra* note 47, at 882 (employing the metaphor); Wiley, *Health Law as Social Justice*, *supra* note 47, at 68–69 (employing the metaphor). Vulnerability theorists do so as well. *See, e.g.*, Kohn, *supra* note 46, at 9 (employing the metaphor); Polaris, *supra* note 42, at 186 (employing the metaphor). 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 catchall metaphor. *Compare* FINEMAN, *supra* note 46, 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. . . . This 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 ("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, has become less effective in recent years."), *and* Martha Albertson Fineman, *The Nature of Dependencies and Welfare "Reform*,*"* 36 SANTA CLARA L. REV. 287, 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, *Equality and Difference — The Restrained State*, 66 ALA. L. REV. 609, 622 (2015) ("As individuals, we are differently situated within webs of economic, social, cultural, and institutional relationships that profoundly affect our individual destinies and fortunes."), Fineman & Shepherd, *supra* note 62, at 61 ("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. & C.R. L. REV. 307, 318–19 (2014) ("[W]e are differently situated within webs of economic, social, cultural, and institutional relationships that profoundly affect our individual destinies and fortunes."), *and* Fineman, *Vulnerable Subject*, *supra* note 54, at 269 ("We . . . are differently situated within webs of economic and institutional relationships.").

67. *But cf. supra* note 48 (identifying the source of tension between the safety net metaphor and libertarianism).

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.[68] 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 to avoid the situation created by the current use of the safety net—that is, that a key policy decision about program design (whether to limit eligibility to those deemed "deserving") is left unspoken and therefore hidden.

"*Poverty-prevention programs*": programs that seek to help people avoid becoming impoverished.[69] 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.[70] 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,[71] and other scholars describing programs that provide health insurance such as Medicare and Medicaid as part of the safety net.[72] This creates a significant risk of confusion and

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68. *See supra* notes 25–26 and accompanying text.

69. *See supra* note 33 and accompanying text.

70. *See supra* note 43 and accompanying text.

71. *See supra* note 43 and accompanying text; *see also* 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.'"); Sara Rosenbaum et al., *EMTALA and Hospital "Community Engagement": The Search for a Rational Policy*, 53 BUFF. L. REV. 499, 519–20, 525 (2005) (focusing on the provision of care to those lacking insurance as a health care safety net).

72. *See, e.g.*, Susan E. Cancelosi, *Revisiting Employer Prescription Drug Plans for Medicare-Eligible Retirees in the Medicare Part D Era*, 6 HOUS. J. HEALTH L. & POL'Y 85, 103 (2005) (describing Medicare as "a significant health care safety net"); 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 . . . ."); 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 State Children's Health Insurance Program as "safety net institutions"); Catherine M. Reif, *A Penny Saved Can Be a Penalty Earned: Nursing*

cross talk. Moreover, as John Jacobi has pointed out, this usage creates the risk that policymakers might come to believe any obligation that 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.[73] The term "last resort" may therefore be preferable in that it emphasizes that such providers are not necessarily a sufficient protection. This Article 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.[74] The ecological model pervades public health scholarship today and, from there, has been adopted into the health justice framework.[75] 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.

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."); John D. Rockefeller IV, *Health and the Underserved: Policy Decisions*, 3 STAN. L. & POL'Y REV. 27, 28 (1991) (describing Medicaid as "our health care safety net"); Ulrich, *supra* note 63, at 247 ("Medicare and Medicaid were passed to serve as safety nets for the country's most vulnerable populations . . . ."). This broader use of the term "health care safety net" is not unique to scholarship. *See* Tara Siegel Bernard, *For Consumers, Clarity on Health Care Changes*, N.Y. TIMES (Mar. 21, 2010), http://www.nytimes.com/2010/03/22/your-money/health-insurance/22consumer.html?src=me&ref=general [https://perma.cc/P97Z-HGA5] ("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 . . . .").

73. John V. 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 these last-gasp, unheralded, and under-funded institutions, the pressure to respond to the crisis of un-insurance would certainly be more intense.").

74. In addition to public health, this terminology has seen some use in environmental and resource-management literature. *See, e.g.*, Gary E. Machlis et al., *The Human Ecosystem Part I: The Human Ecosystem as an Organizing Concept in Ecosystem Management*, 10 SOC'Y & NAT. RESOURCES 347, 348 (1997) ("Our hope is a fusion that transcends the arcane division of the biophysical and the sociocultural—one that is truly ecological.").

75. *See, e.g.*, GOSTIN & WILEY, *supra* note 47, at 23–26 ("The social-ecological model places individual choices into their social context and emphasizes structural explanations for health behaviors and outcomes."); Wiley, *Health Law as Social Justice*, *supra* note 47, at 79–83 (describing the "'social-ecological' model" of public health).

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.

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,[76] and the inclusion of the term "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.[77]

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 into 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 metaphor should be replaced 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.

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76. FINEMAN, *supra* note 46, at 48 (describing social supports as "society preserving").

77. *See supra* note 48 (describing this view).