AMERICA'S EXCEPTIONAL SAFETY NET

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Two notions have achieved conventional wisdom status in many quarters. First, that the United States is a safety net laggard when compared with other highly developed nations;[1] and second, that the obvious thing to do to improve our safety net is to become more like those other nations.[2] In my judgment, both claims are wrong. Far from being a "welfare state laggard,"[3] the United States has a rich tradition of a strong, unique safety net,[4] one that has over the course of the nation's history reflected a distinct American identity. At its best, America's safety net is bouncy[5] and a key component of

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1. *See, e.g.*, Elise Gould & Hilary Wething, *U.S. Poverty Rates Higher, Safety Net Weaker Than in Peer Countries*, ECON. POL'Y INST. (July 24, 2012), http://www.epi.org/publication/ib339-us-poverty-higher-safety-net-weaker/ [https://perma.cc/9564-2NXD].

2. *See, e.g.*, Neil Irwin, *A Big Safety Net and Strong Job Market Can Coexist. Just Ask Scandinavia.*, N.Y. TIMES (Dec. 17, 2014), http://www.nytimes.com/2014/12/18/upshot/nordic-nations-show-that-big-safety-net-can-allow-for-leap-in-employment-rate-.html [https://perma.cc/QL5C-9KR6].

3. IRWIN GARFINKEL ET AL., WEALTH AND WELFARE STATES: IS AMERICA A LAGGARD OR LEADER? 5 (2010)

4. *Id.* at 5–9 (concluding that the United States is not a "welfare state laggard" when full account tis taken of employer-provided benefits, public expenditures on education, in-kind government benefits, and other factors); *see also* JACOB HACKER, THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES 7 (2002) ("What is most distinctive about American social welfare policies is not the level of spending but the source.").

5. *See* Ron Haskins, *Welfare Reform, Success or Failure? It Worked*, BROOKINGS INST. (Mar. 15, 2006), http://www.brookings.edu/research/articles/2006/03/15welfare-haskins [https://perma.cc/55GV-R7WE] ("[E]xperience with welfare reform since 1996 shows conclusively that most low-income families are capable of finding and holding jobs while, with government support, increasing the financial well-being of their children. Welfare reform has been a triumph for the federal government and the states . . . .").

what, at least until fairly recently, has been an extraordinarily entrepreneurial and dynamic society.[6]

That said, right now our safety net is not as bouncy as it once was, and not as bouncy as it has the potential to be.[7] In what follows, I detail some of the reasons why what should be a springy safety net—catching those in distress and then propelling them back up—is looking downright frayed these days. After describing the challenges we face, I offer some "outside the box" suggestions[8] that aim to draw on the United States' exceptional institutions to help reweave our social fabric.

So, first, why do I not see America as a safety net laggard? The answer is that unlike 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. When we carefully consider programs such as government-provided or government-subsidized health care and health insurance; Social Security, private pensions, tax-advantaged retirement accounts, and public expenditures on education,[9] the United States does not trail peer nations.[10]

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6. *See generally* ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR (2016).

7. *See, e.g.*, RICHARD V. BURKHAUSER & MARY C. DALY, THE DECLINING WORK AND WELFARE OF PEOPLE WITH DISABILITIES: WHAT WENT WRONG AND A STRATEGY FOR CHANGE 7 (2011) ("[E]ncouraging work rather than benefit receipt following the onset of a disability will slow the process that eventually leads to an inability to work and can solve a range of problems currently burdening the disability system.").

8. *Cf.* Julia D. Mahoney, *The Struggle for America's "Fiscal Soul"*, NEW RAMBLER (Jan. 4, 2016), http://www.newramblerreview.com/book-reviews/political-science/the-struggle-for-america-s-fiscal-soul [http://perma.cc/9DAR-AGUK] (reviewing EDWARD D. KLEINBARD, WE ARE BETTER THAN THIS: HOW GOVERNMENT SHOULD SPEND OUR MONEY (2015) and MICHAEL D. TANNER, GOING FOR BROKE: DEFICITS, DEBT, AND THE ENTITLEMENT CRISIS (2015)) (urging the consideration of "outside the box measures" to address the United States government's financial predicament).

9. *See* Julia Ryan, *American Schools vs. the World: Expensive, Unequal, Bad at Math*, ATLANTIC (Dec. 3, 2013), http://www.theatlantic.com/education/archive/2013/12/american-schools-vs-the-world-expensive-unequal-bad-at-math/281983/ [https://perma.cc/2PDZ-FRC6].

10. *See generally* JACOB FUNK KIRKEGAARD, PETERSON INST. FOR INT'L ECON., THE TRUE LEVELS OF GOVERNMENT AND SOCIAL EXPENDITURES IN ADVANCED ECONOMIES (March 2015), https://piie.com/publications/pb/pb15-4.pdf [https://perma.cc/E9JK-2E6S].

It is true that many of these institutions differ from the means-tested government programs for the poor and near-poor like the Supplemental Nutrition Assistance Program (SNAP)[11] that are often the first thing to leap to mind at the phrase "safety net."[12] But when we ponder what prevents and ameliorates poverty, we have to view matters with a far wider lens. The fact is 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.[13]

Perhaps most striking, when comparing the United States with other rich nations many neglect to account for the so-called "third sector" of nonprofit firms that undergirds civil society. One of the courses I teach at the University of Virginia School of Law is Nonprofit Organizations, and each time I teach it I am struck anew by the beneficence of individual and institutional donors in the United States. This tradition of benevolence, which predates U.S. independence,[14] remains strong today, as Americans of all political stripes give time, money, and expertise to a wide range of worthy causes in a way and to a degree that citizens of other highly prosperous nations simply do not.[15] These institutions of civil society often substitute for government, providing services similar to those provided by

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11. *See, e.g.*, Robert Rector, *Uncovering the Hidden Welfare State: 69 Means-tested Programs and $940 Billion in Annual Spending* (June 19, 2012), http://www.heritage.org/research/testimony/2012/06/welfare-state-69-means-tested-programs-and-940-billion-in-annual-spending [https://perma.cc/W4DM-83TY].

12. *See* KAREN LONG JUSKO, THE STAN. CTR. ON POVERTY AND INEQUALITY, SAFETY NET (2015), http://inequality.stanford.edu/sotu/SOTU_2015_safety-net.pdf [https://perma.cc/G8KB-8J2W].

13. *See* Binyamin Appelbaum & Robert Gebeloff, *Even Critics of Safety Net Increasingly Depend Upon It*, N.Y. TIMES (Feb. 11, 2012), http://www.nytimes.com/2012/02/12/us/even-critics-of-safety-net-increasingly-depend-on-it.html?pagewanted=all [https://perma.cc/MBY4-SVF3]

14. *See* KATHLEEN D. MCCARTHY, AMERICAN CREED: PHILANTHROPY AND THE RISE OF CIVIL SOCIETY 1700-1865 (2003); THOMAS G. WEST, POVERTY AND WELFARE IN THE AMERICAN FOUNDING (2015), http://www.heritage.org/research/reports/2015/05/poverty-and-welfare-in-the-american-founding [https://perma.cc/RD6C-38XW].

15. *See* Elisabeth Eaves, *Who Gives the Most?*, FORBES (Dec. 18, 2008), http://www.forbes.com/2008/12/24/america-philanthropy-income-oped-cx_ee_1226eaves.html [https://perma.cc/6BUG-PCMG].

governmental institutions, but a number do even more.[16] They provide important goods and services, including religious instruction and support, that the government cannot.[17]

Even in areas where the United States provides safety net services that have direct analogues in other developed nations, we are exceptional. Examining Medicare and Medicaid, we see that there is far more respect for individual needs and preferences than is the case in most other societies.[18] It is interesting to me that the Independent Payment Advisory Board (IPAB) contained in the Affordable Care Act has incited so much opposition,[19] because it was modeled on institutions in other nations that command acceptance.[20] But the sort of rationing the IPAB was charged with, where a panel of experts deliberately insulated from the political process makes life-and-death decisions,[21] does not map well on to American institutions and political commitments.

So what has gone wrong? Why do I and many others fear that America's safety net is less effective than it once was at providing a "hand up"? There are several reasons. The first is the omnipresence of "cliffs," whereby benefits plunge or even disappear altogether if beneficiaries earn more money. These "cliffs" include subsidies for health insurance premiums under the Affordable Care Act,[22] rights to live in public housing

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16. *See* RYAN MESSMORE, DOES ADVOCATING LIMITED GOVERNMENT MEAN ABANDONING THE POOR? (2011), http://www.heritage.org/research/reports/2011/05/does-advocating-limited-government-mean-abandoning-the-poor [https://perma.cc/6Y6D-NEC3].

17. *Id*.

18. *Compare* 42 Fed. Reg. § 483.15(a)–(b) (Feb. 2, 1989), *with* Lisa L. Dahm, *Healthcare Systems and Quality of Care: Do International Measurement Standards Exist?*, TEMP. INT'L & COMP. L.J. 395, 405 (2006).

19. *See* Robert Pear, *Obama Panel to Curb Medicare Finds Foes in Both Parties*, N.Y. TIMES, (April 19, 2011), http://www.nytimes.com/2011/04/20/us/politics/20health.html?_r=0 [https://perma.cc/TK6F-4VY3].

20. Scott W. Atlas, *IPAB: President Obama's Nice Way to Ration Care to Seniors*, FORBES (Oct. 21, 2012, 10:53 A.M.), http://www.forbes.com/sites/scottatlas/2012/10/21/ipab-president-obamas-nice-way-to-ration-care-to-seniors/#1fecbed074f3 [https://perma.cc/C6RW-Y8LW].

21. George P. Smith & Richard P. Galena, *Re-Negotiating a Theory of Social Contract for Universal Health Care in America or, Securing the Regulatory State?*, CATH. U. L. REV. 423, 445 (2014).

22. *See* Manoj Viswanathan, *The Hidden Costs of Cliff Effects in the Internal Revenue Service Code*, U. PA. L. REV. 931, 961 (2016).

projects,[23] and student loan forgiveness programs.[24] It is a long, long list, and, disturbingly, it is growing.[25] Second is the rise of occupational licensing requirements. In the last generation or two, the percentage of jobs that require some form of occupational license has soared.[26] That makes it tougher for those in financial difficulty to redeploy their human capital to new jobs.[27] Third is tightened credit as the result of the Dodd-Frank Act and various other regulatory "reform" measures. Frequently justified as necessary to protect people from making bad choices,[28] these measures discourage the formation of new businesses and thus reduce the ability of those living on the edge to prosper.[29]

And that is not all. We have also made mistakes extremely costly for many citizens. Civil forfeiture is rampant.[30] If you

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23. *See id.* at 944–45.

24. *See* SANDY BAUM & MARTHA C. ROBINSON, URBAN INST., STRENGTHENING FEDERAL STUDENT AID: REFORMING THE STUDENT LOAN REPAYMENT SYSTEM, (2016), http://www.urban.org/research/publication/strengthening-federal-student-aid-reforming-student-loan-repayment-system [https://perma.cc/Q6L9-J2A3].

25. *See* CONG. BUDGET OFFICE, GROWTH IN MEANS-TESTED PROGRAMS AND TAX CREDITS FOR LOW-INCOME HOUSEHOLDS (2013), http://www.cbo.gov/sites/default/files/cbofiles/attachments/43934-Means-TestedPrograms.pdf [https://perma.cc/U3G6-P7S8].

26. *See* Michelle Minton, *Professional Licensing: A Risk to the Free Markets and Freedom of Speech*, COMPETITIVE ENTER. INST. (2014), https://cei.org/blog/professional-licensing-risk-free-markets-and-freedom-speech [https://perma.cc/NK7V-RMRY]; Austin Raynor, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1084-88 (2013).

27. *See* Steven Menashi & Douglas H. Ginsburg, *Rational Basis With Economic Bite*, N.Y.U.J.L. & LIBERTY 1055, 1088 (2014).

28. *See* Jason Scott Johnston, *Do Product Bans Help Consumers? Questioning the Economic Foundations of Dodd-Frank Mortgage Regulation*, 23 GEO. MASON L. REV. 617, 652 (2016) (noting that Dodd-Frank "aims at restricting consumer choice by ridding the market of certain types of loans").

29. *See* Karen Gordon Mills & Brayden McCathy, *The State of Small Business Lending: Credit Access during the Recovery and How Technology May Change the Game* 4–5 (Harv. Bus. Sch. Working Paper No. 15-004, 2014) (suggesting that "regulatory overhang" may be contributing to a "small business credit gap").

30. *See* Michael van den Berg, Comment, *Proposing A Transactional Approach to Civil Forfeiture Reform*, 163 U. PA. L. REV. 867, 875–76 (2015) (outlining the expansion of civil forfeiture since the 1980s); Rachel L. Stuteville, Comment, *Reverse Robin Hood: The Tale of How Texas Law Enforcement Has Used Civil Asset Forfeiture to Take from Property Owners and Pad the Pockets of Local Government-the Righteous Hunt for Reform Is On*, 46 TEX. TECH L. REV. 1169, 1187 (2014) ("While civil forfeiture's benefits can be great to society as a whole, they are currently overshadowed by rampant over-policing and law enforcement abuse."); *see also* Christopher Ingram, *Law Enforcement Took More Stuff From People Than Burglars*

have saved any money, it is possible to lose it if you get mixed up with the wrong people, even tangentially.[31] Excessive fines are imposed by many jurisdictions.[32] Over-criminalization saddles many with criminal records that make it hard to get hired.[33] Finally, perhaps the greatest strain on America's safety net is the precarious financial condition of the United States government. With total U.S. government debt projected to exceed $20 trillion in 2017,[34] America's capacity to fulfill all its obligations looks increasingly in doubt.[35]

So what should we do? In thinking about where to go next, we should start with what we have. That is, we should not aim to copy a fantasy paradise across the Atlantic, for those nations are for the most part under even greater financial pressure than we are.[36] The better course is to focus on what the United States does well and build on it. In the spirit of extending our panel discussion beyond the usual anti-poverty prescriptions,[37] I offer two suggestions. The first is think seriously about how better to

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Did Last Year, WASH. POST (Nov. 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/11/23/cops-took-more-stuff-from-people-than-burglars-did-last-year/ [https://perma.cc/Q3GZ-QL4E].

31. *See* John R. Emshwiller & Gary Fields, *Federal Asset Seizures Rise, Netting Innocent With Guilty*, WALL ST. J. (Aug. 22, 2011), http://www.wsj.com/news/articles/SB1000142405311190348090457651225326507387 0 [https://perma.cc/6F2H-Y5TT].

32. *See* Carey Gillam, *Lawsuits Claim Missouri Towns Jail Poor People For Profit*, REUTERS (Feb. 9, 2015), http://www.reuters.com/article/usa-missouri-lawsuits-idUSL1N0VJ1CW20150209 [https://perma.cc/6PPS-TM2V]; Terrence McCoy, *Ferguson Shows How a Police Force Can Turn Into a Plundering "Collection Agency"*, WASH. POST (Mar. 5, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/03/05/ferguson-shows-how-a-police-force-can-turn-into-a-plundering-collection-agency/ [https://perma.cc/W2BU-HCWQ].

33. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 712–15 (2005).

34. *See* CONG. BUDGET OFFICE, AN UPDATE TO THE BUDGET AND ECONOMIC OUTLOOK: 2016 TO 2026 (2016).

35. *See* Edmund W. Kitch & Julia D. Mahoney, Living with the Risk of United States Financial Failure (2016) (unpublished manuscript on file with the *Harvard Law & Policy Review*).

36. *See, e.g.*, Bill Gardener, *NHS may be forced to abandon free healthcare, Britain's top doctor says*, TELEGRAPH (Jan. 19, 2015), http://www.telegraph.co.uk/news/health/news/11356389/NHS-may-be-forced-to-abandon-free-healthcare-Britains-top-doctor-says.html [https://perma.cc/AB8P-ZGL2].

37. *See, e.g.*, AM. ENTER. INST./BROOKINGS INST. WORKING GRP. ON POVERTY AND OPPORTUNITY, OPPORTUNITY, RESPONSIBILITY, AND SECURITY: A CONSENSUS PLAN FOR REDUCING POVERTY AND RESTORING THE AMERICAN DREAM (2015).

harness the capabilities of our civil societal institutions, particularly in the area of healthcare. The Affordable Care Act focused on insuring people or enrolling them in Medicaid—in short, on "covering" them—but "coverage" is not access.[38] We blundered into a system whereby "nonprofit" hospitals only have to offer nebulous "community benefit," not demonstrable charitable payoffs, in order to enjoy valuable tax benefits.[39] We should reconsider that approach in order to boost access to needed health care. In addition, we should encourage the many "grass roots" health care innovations we are seeing, especially free clinics and low-cost clinics. My second suggestion is that we think very seriously about a major restructuring of the finances of the United States government. Such a restructuring could include selling off some of the nation's plentiful assets, including its carbon energy assets.

38. *See* Scott W. Atlas, *How Obamacare Fails the Poor and Middle Class*, CNN (Mar. 4, 2015), http://www.cnn.com/2015/03/04/opinion/atlas-obamacare-poor-middle-class/ [http://perma.cc/Z426-JXZ4].

39. *See* Jessica Berg, *Putting the Community Back into the "Community Benefit" Standard*, 44 GA. L. REV. 375, 384–86 (2010) (discussing the "community benefit" requirement for tax exempt status); *see generally* Zachary J. Buxton, Comment, *Community Benefit 501(R)edux: An Analysis of the Patient Protection and Affordable Care Act's Limitations Under Community Benefit Reform*, 7 ST. LOUIS U.J. HEALTH L. & POL'Y, 449 (2014) (discussing the impact of the Affordable Care Act on the tax exempt status of health care institutions).