Moving Beyond Marriage: Healthcare and the Social Safety Net for Families

Robin Fretwell Wilson

Introduction

At a time when families take many forms, married and unmarried, federal and state governments continue to preference married couples in many social supports. This occurs for everything from off-the-rack laws governing inheritance by spouses to filing joint taxes for married couples, but not unmarried ones.[1] Being married sometimes works to the advantage of a given family, other times to its disadvantage.[2] This uneven treatment of marital and nonmarital families extends to benefits that impact a person's — and family's — ability to access and afford healthcare services.

This article teases out the relationship between family form and the social safety nets around healthcare, showing the deep unfairness of defining the degree of social support by whether a couple marries. It argues that social policy should move beyond marriage with respect to healthcare. By continuing to tie healthcare benefits to specific family structures, we perpetuate the "galloping" inequality marking America today.[3]

I. America's Healthcare Social Safety Nets Encompass Some But Not All Families

The American family takes many different forms. In 2016, the United States was home to 60.25 million married couples.[4] Another 7.2 million families consisted of cohabitating partners,[5] who are often young, struggling financially, and less educated.[6]

Although married couples still outnumber nonmarital ones, the number of U.S. marriages performed annually has ebbed to a historic low.[7] In 2016, just over half of U.S. adults lived with a spouse, "the lowest share on record."[8] This morphing of family structure involves not just adults, but children as well. Today 40% of U.S. children are born outside of marriage.[9] Unmarried births as a fraction of all births have crested 70% in some communities.[10]

Although the move away from marriage occurs across society, it is most pronounced among the poor. Marriage has become the province of the wealthy. Among U.S. adults with a college degree or income in the top half, 56% have married, compared to 26% of persons with family income "below the 20th percentile or who are high school dropouts."[11] Poorer Americans are disproportionately cohabiting: 13% of adults living with low incomes compared to 5% of persons with middle and higher incomes.[12]

Marriage rates differ by educational attainment, too. In 2015, among 25-55 year-olds, 63% of college

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graduates are married, compared to 51% for those with some college and 48% for those who did not finish high school.[13] This has not always been so. In 1970, for example, no real differences existed between these groups.[14]

Clearly, Americans are conducting their domestic lives within and outside marriage. Despite this fact, three social safety nets affecting healthcare access and payment for services differ in scope and strength depending on whether an individual marries: tax-free employer-paid health insurance for spouses; government-subsidized health insurance that sometimes advantages unmarried individuals, thereby discouraging marriage; and the ability to declare bankruptcy after healthcare costs overrun an individual's ability to pay.

A. Tax-free Health Insurance for Spouses

Federal law has long advantaged marital couples. To grasp the scale of the marriage subsidy, one need look no further than the United States Supreme Court's landmark decision recognizing same-sex marriage, *Obergefell v. Hodges*.[15] The federal government's "comprehensive definition of marriage ... control[s] over 1,000 federal laws in which marital or spousal status is addressed ..."[16] Limiting marriage to heterosexual couples, *Obergefell* held, denied same-sex couples not only access to the most "profound" of unions, but also equal protection under the law.[17] Yet federal benefits are only one source of the largesse. States also give significant subsidies to marriage, compounding disadvantages to nonmarital families.[18]

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Not least among marital benefits is the fact that the federal government and all states do not tax employer-provided healthcare coverage for an employee's spouse, just as it is tax-free for the employee herself.[19]

Cohabitants largely miss out on this tax-free advantage, with one tightly circumscribed exception: cohabitants who make less than $4,050 annually — roughly $77 weekly or 11 hours per week at minimum wage — and who live in the covered employee's household for the entire year and receive more than half their support from the employee may receive healthcare coverage without the value being treated as income to the employed partner so long as their relationship does "not violate local law," which might occur if one cohabitant "was married to someone else."[20] Only a third of small employers and 40% of large ones extend the option for such coverage to opposite-sex domestic partners, with slightly more companies extending it to same-sex couples.[21]

To see the scale of the marital subsidy, assume a stereotypical family of three — father, mother and their biological or adoptive child [22] — with the father earning $50,000 annually from an employer that provides benefits and the mother making $15,000 annually without benefits. If the father takes employee-level coverage for himself only, the benefit to him will be $4,776 on average in untaxed healthcare coverage — or tax savings to him of $1342 if he falls in the 22% tax bracket and paid taxes on that income.[23] If the father receives coverage for the child, too, he receives on average an additional benefit, tax-free, of $5500, resulting in another $1210 of tax savings.[24] All large firms and 92% of small firms cover other dependents including children.[25]

If the couple is married, the father can also receive an additional average benefit of $6000 in the form of coverage for his spouse, or an additional tax savings of $1320 for her coverage.[26] If they cohabit, he cannot receive this tax-free coverage unless his partner works very little, has lived with him the entire year,

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is claimed as his dependent, receives half her support from him, and is eligible under his company plan.[27] All large firms (200+ employees) and 94% of small firms (3-199 employees) offer spousal coverage.[28]

The tax savings as a result of marriage extend to stepchildren, as well. If the child were the mother's legal child only (i.e., the child did not have another legal parent, like a father), the husband could also receive a tax-free benefit for his stepchild's healthcare coverage, boosting the marriage benefit even further.[29]

So, the real marriage subsidy is the value to the employee of coverage for the spouse and the spouse's children — for the posited couple, the extra $1,320 in tax savings for her coverage plus tax savings for coverage for any of her children. Some employers are discontinuing spousal coverage when spouses can receive coverage from their own employers.[30] Nonetheless, when offered, the subsidy provided to married couples is considerable.

Without categorical entitlement to tax-free healthcare coverage for cohabitants like that for spouses, cohabiting couples shoulder a greater risk of healthcare-driven financial downturns. This deep unfairness affects millions of families.

B. Government-Subsidized Healthcare Coverage

Only 56% of working-age Americans receive employer-paid healthcare coverage.[31] For those who do not, Medicaid and subsidized insurance through the marketplace under the Patient Protection and Affordable Care Act (ACA) are important safety nets. The ability to access these social safety nets change with whether one has children, is married, and, crucially, lives in a Medicaid-expansion state. To illustrate, this Part contrasts Texas, a non-expansion state, with Illinois, an expansion state.[32]

Consider again our hypothetical woman who earns $15,000 annually. Assume first she lives by herself and has no children. In Texas, she does not qualify for Medicaid, no matter how poor — she is categorically ineligible unless pregnant, on Supplemental Security Income (disability benefits), and so forth.[33] If, however, she lives in Illinois, she would receive Medicaid since she earns less than 138% of the Federal Poverty Level ($12,140 in 2018 for a household of one), or $16,753.[34]

When a person makes too much for Medicaid, subsidized coverage under the ACA may be available.[35] In Texas, our hypothetical woman would qualify for ACA subsidies, which start at 100% of the Federal Poverty Level (again, $12,140)[36] Subsidies would be available in Illinois, too, beginning at 138% of poverty or $16,753 — but this is not as generous as Medicaid.[37]

Ironically, if the same woman now has a child, she fares worse in Texas. Her household size increases to two, eliminating her from eligibility for the ACA, which picks up at 100% of poverty in a non-expansion state, as Texas is — or at $16,460 for a household of two.[38] Earning $15,000 annually, she is "gapped" out.[39] She remains outside the Medicaid safety net (to qualify for this coverage as a parent of a dependent child her monthly income must be less than $196 a month) *and* outside the ACA subsidies.[40] Her child may independently qualify for Medicaid or the Children's Health Insurance Program.[41]

If our hypothetical woman now marries and seeks Medicaid, her spouse would count in the household size *and* the spouse's income would be considered for eligibility.[42] Couples who are common law married may file "a sworn statement declaring their informal marriage" and cohabitants who can be claimed as dependents count as household members.[43] Similarly, under the ACA, spouses count in household size but unmarried domestic partners do not, unless claimed as tax dependents.[44]

How a given couple fares in this circumstance depends on the parties' specific incomes.

If one party makes no income, the increase in household size as a result of marrying may place both inside the safety net.[45] If both parties are modest wage-earners, marrying combines their incomes and may cause them to fall out of Medicaid and onto the ACA, or outside both.[46] If the wage earners are very unequal in wages, marrying adds a high wage-earner into the mix and may drag the lower wage-earner off the safety net. In fact, this happens with the couple posited above.

If the woman and man married, together they would make $65,000; with child, as a family of three, they will not qualify for Medicaid in Texas or Illinois.[47] But they would qualify for ACA subsidies in both non-expansion and expansion states; the ACA provides subsidies to families between 100% and 400% of the federal poverty level — that is, between $20,780 and $83,120.[48] Thus, if the man's employer does not provide spousal or even employee coverage, the family will qualify for ACA subsidies.

Medicaid eligibility is one place where married couples often do worse. Indeed, one Texas couple is weighing whether to divorce in order to qualify for Medicaid for their child, who has a rare chromosomal condition that requires full-time care costing $15,000; they earn $40,000.[49] If they divorce, the mother would be a single, unemployed mother of two and would qualify for assistance.

C. Bankruptcy Protections Vary with Family Form

More than one in ten working age Americans (10.1%) are uninsured.[50] Half (49%) have incomes under 200% of the federal poverty level.[51] Households with annual

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incomes under $50,000 report having trouble paying medical bills (37%) — a significantly higher rate than moderate-income households, between $50,000 and $100,000 (26%), or the wealthiest households, with incomes over $100,000 (14%).[52]

Of course, even with Medicaid, Medicare, or employer-provided insurance, individuals bear the cost of copays, deductibles, and out-of-pocket expenses that can be difficult to repay.[53]

Sometimes medical bills drive a person into bankruptcy. The uninsured are over-represented among bankruptcy filers, making up nearly one third (30.8%) of all "medical" bankruptcies in the classic study by Elizabeth Warren and colleagues of all bankruptcies filed in America between January 25 and April 11, 2007.[54] In that study, participants identified a number of factors that contributed to their bankruptcy filing, including high medical bills, remortgaging their house to pay their medical bills, lost income due to illness, health problems, or medical and drug costs.[55] More than two-thirds (68.8%) involved the discharge of medical expenses in one way or another.[56] The authors characterized a bankruptcy as medical if any of the following were involved: the participant cited "illness or medical bills as a specific reason for bankruptcy; OR reporting uncovered medical bills >$1000 in the past 2 years; OR who lost at least 2 weeks of work-related income due to illness/injury; OR who mortgaged a home to pay medical bills."[57]

Of course, medical debt may be a small part of one's reason for seeking bankruptcy protection. If, for example, a person has $10,000 in medical bills but owes $1,000,000 on a house that is underwater,[58] medical costs may not be the impetus for bankruptcy. A 2006 *Health Affairs* study found that medical payments represented only 10-12% of all discharged debt.[59]

For many, though, medical debts dwarf their income and capacity to pay. A 2016 study of bankruptcy filings from 2003-2011 examined filings in five separate years in a single jurisdiction, the Eastern District of Washington, which has a mix of urban and rural areas.[60] It found that 23.1% of bankruptcy filers had "medical debts in excess of 10 percent of annual income."[61]

When medical payments outstrip resources, bankruptcy allows an individual to discharge debt or pay a portion of all that is owed, in order to get fresh footing financially. For individuals, the primary vehicles are filing under Chapter 7, which allows the debt to be wiped clean, or filing under Chapter 13, which allows one to keep property but requires repayment of some of the debt across a period that generally is 5 years.[62]

As one bankruptcy scholar explains the choice, the primary difference between Chapters 7 and 13 are between whether one wants most to preserve one's human capital or one's property. In Chapter 7, the debtor keeps her income after the bankruptcy but gives up all her property in exchange for discharging her debts, while in Chapter 13, the debtor keeps her property, but gives up control over her income for years following.[63] In these years, all "available" income goes toward paying down the debt. Thus, depending on a debtor's goals and whether her principal assets are her anticipated wages from labor or her property, she might prefer one form of bankruptcy over another. Debtors may be forced into or elect to be in Chapter 7 and will proceed there unless dismissed on grounds of "general abuse" or a means test.[64] Importantly, no one may force a debtor into a Chapter 13 bankruptcy.[65]

Here, as before, how one structures one's relationship as a couple, inside marriage or outside it, matters. Express provision is made for married couples to file jointly, allowing wealth-shielding, while no similar treatment is accorded to cohabitants.[66]

Differential treatment of families is also introduced by household size, which determines the amount of income one can make and not be vulnerable to a dismissal motion. Focusing only on debtors who do not file jointly, if one's income exceeds the state median for families of the same size as the debtor's household, then the debtor can be dismissed from Chapter 7 — forcing them to choose no bankruptcy or to voluntarily enter into Chapter 13.

The interplay between Chapter 7 and Chapter 13 is complicated. When the individual income of a sole-filing debtor exceeds the state median for families the same size as the debtor's household, anyone may bring a motion to dismiss under either test. When the combined income of debtor and spouse, whether the case is sole or joint, is equal to or less than the state median, no one can assert the means test. When the income of the actual filer(s) is equal to or less than the state median, only the court or United States Trustee may bring a motion to dismiss under either test. Also, for purposes of the "general abuse" test, the current monthly income of both spouses is included only if a joint case was filed; for purposes of the means test, a nonfiling spouse's income is included.[67]

Staying under these ceilings is crucial.

The key then becomes, who counts as the debtor's household? "Family," "household," "dependent" are all undefined in the Bankruptcy Code. The United States Trustee's Office (USTO) generally determines household size by IRS guidelines, which clearly counts both spouses as a part of the household.[68] Although USTO makes some provision for showing a couple has been a part of a longstanding economic unit, this is a very fact-specific inquiry where the onus would be on the debtor. Thus, married individuals have greater abil-

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ity to remain in Chapter 7 after cataclysmic medical events because both spouses clearly count in the household size for purposes of dismissal.

But a third difference in treatment between families arises: for debtors who voluntarily elect to be in Chapter 13, their repayment obligations are measured by their disposable income, calculated as current monthly income less allowable expenses.[69] Obviously, "[h]ousehold expenses will vary according to the number of people in the household;" courts have concluded that household for this purpose is "defined by the number of dependents in the household, not the number of persons."[70] Expenses for boarders have been disallowed, as have expenses for a "fiancé and children, [and a] girlfriend and her dependents" in pre-2005 bankruptcy amendments cases.[71]

Continuing to preference marriage, though, seems increasingly callous because it allows families to fall through gaping holes in our social safety nets. Society's increasing legal and moral acceptance of letting couples and families form as they would like places additional pressure on a system that does not provide universal coverage — placing a premium on health insurance no matter who one is are or how one structures one's relationship to a romantic partner.

Courts have reasoned that if the debtor has no legal duty of support to a given person, then money they spend to support them should be "added back to a debtor's disposable income 'because the moral obligation to a family member who is not a dependent does not take priority over the legal obligation to repay a creditor.'"[72] Thus, courts have not allowed expenses related to a debtor's domestic partner or a live-in girlfriend and her children, or mortgage payments for the house in which a debtor's fiancé and her children lived.[73]

Payments for spouses would count as allowable expenses, however.[74] Whether a debtor can deduct expenses for a person's upkeep rests in part on whether there is a legal duty under state law (like a child support obligation) to support a domestic partner, as there is with a spouse.[75]

On the other side of the ledger, when calculating a debtor's disposable income for purposes of Chapter 13's repayment obligations, resources regularly contributed by *anyone*, including spouses who are not filing jointly and live-in partners, count as "current monthly income."[76]

For more moderate-income debtors, marrying and not marrying may mean the difference between a fresh start after cataclysmic expenses, not availing oneself of bankruptcy protections, and draconian repayment across years.

D. Summarizing the Connection Between Family Form and our Healthcare Safety Nets

Family form shapes whether one falls within or outside our social safety nets around healthcare. The principle effect of not getting married is that cohabitants must meet stringent tests to receive employer-paid insurance coverage tax-free; live-in partners generally do not count when qualifying for Medicaid or ACA subsidies unless tax dependents and even then are not categorically included. If medical expenses swamp a person's ability to pay, cohabitants are not automatically treated as household members, but partner's regular contributions do count as "current monthly income" for purposes of calculating repayment obligations under Chapter 13.

II. Moving Away from Marriage

Scholars have long explained the benefits attached to marriage as devices for the state to "channel" couples into marriage's protective benefits.[77] As families increasingly form outside of marriage, however, fairness issues — and sometimes in the case of Medicaid, perverse incentives not to marry — arise. How to stretch the social safety net for healthcare to encompass all families in need — whether formed inside or outside marriage — is a difficult question and care needs to be exercised not to disrupt the web of laws surrounding marriage.

One possibility would be to substitute any intimate relationship for marriage as the trigger for tax-free employer-provided coverage. That move carries risks, namely, moral hazard and adverse selection.

If benefits attach to less objectively verifiable statuses otherwise recognized in the law, employees may be incentivized to extend generous employer-provided, tax-free coverage to any sympathetic high-risk person, whether for their private monetary gain or just because they can accord benefits to someone in need.

Of course, the state and employers could police such moral hazard, to avoid escalating costs as a

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result of adverse selection, by examining whether the two people comprise a "family," however defined. But how should family, or more specifically, a couple, be defined? Do a couple have to be romantically or sexually involved? Currently or in the past? Do they have to live together? Do they have to have made a lifetime commitment to one another? Or any commitment? If so, what would that commitment have to include? Defining "couple" or "partnership" would then lead to a kind of review that invites intrusion into the couple's privacy and personal affairs that the simple indicia, marriage, does not. Requiring an affidavit designating another person as the employee's "plus one" is a possible solution but does not remove the moral hazard or fraud concerns.

Continuing to preference marriage, though, seems increasingly callous because it allows families to fall through gaping holes in our social safety nets. Society's increasing legal and moral acceptance of letting couples and families form as they would like places additional pressure on a system that does not provide universal coverage — placing a premium on health insurance no matter who one is are or how one structures one's relationship to a romantic partner.

III.Conclusion

The uneven treatment of marital and nonmarital families — sometimes preferencing married couples, sometimes penalizing them — matters greatly to the social safety nets society has created around healthcare.

Sometimes the safety net is thread-bare or non-existent for cohabitants but extends to spouses. At other times, the way we construct our social safety net, like Medicaid, encourages families to remain outside of marriage. In both cases, similarly situated families with identical healthcare needs are treated differently, all-too-predictably prefiguring poverty for many families.

Whatever happens with the thousands of benefits given to married families in other domains, delinking support for healthcare services from family form is just and would better assist struggling families.

Note

The author has no conflicts to disclose.

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