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ObamaCare's Day in Court: Reductio ad absurdum



Wednesday's universal lead: "If the government can force people to buy health insurance, justices wanted to know, can it require people to buy burial insurance? Cellphones? Broccoli?"

Illustration: ABCNews.com

One of the most useful and trenchant bits of commentary concerning the Supreme Court review of the Affordable Care Act—ObamaCare to you—was offered on Tuesday evening by Nina Totenberg, the National Public Radio legal affairs correspondent. She said what the conservative justices' questions revealed was just how much the *country* had changed. What she meant was how far the country had moved to a very particular kind of conservatism that allowed even the most basic philosophical principles of the proper role of government to be called into question.

At the most basic, *reductio* level, you have Justice Scalia asking if the government can force us to eat our broccoli. But beyond that lie murkier analogues for the compulsion arguments rooted in the commerce clause of the Constitution. "Why can't the government force people to buy burial insurance?" Justice Alito asked, In that case, too, a burden of cost falls upon the taxpayer and government when a person fails to act in advance on their own

behalf. It's a good enough question, if one that misses the issue of degree of burden that one must address in the provision of health care.

If a person falls dead on the street with no family to provide for burial the government steps in the basis of a time-tested precedent—public health and prevention of disease—to deal with the body. The cost of cremation, which runs in the range of several hundred dollars, is borne by the taxpayer for the good of all concerned. But here's the deal: it's only a few hundred dollars, the cost of perhaps 30 Advils as dispensed and accounted for under standard hospital accounting practices.

So-called "charity care" is a different story. Charity care arises from the fundamental ethics of the medical profession. That principle is codified in law in various ways. The Emergency Medical Treatment and Active Labor Act (EMTALA), passed in 1986, effectively requires all hospitals to provide emergency care regardless of ability to pay. No reimbursement is provided. Hospitals responded to the aggregate cost burden by pricing it into core costs at every level. That's one reason a hospital-dispensed Advil costs ten bucks.

These hospital expenses were passed on to insurers, who passed them on to the businesses who bought the insurance on behalf of employees. Most businesses passed on part of the cost to their employees, who have paid more for their health care insurance as unfunded hospital costs skyrocketed. Today, the meme goes, every insurance purchaser pays an extra thousand dollars a year for unfunded medical care to uninsured patients who lack the means to pay for their care. That cost is generally shared by employers and employees in varying proportions. The poor suckers who attempt to purchase medical insurance on the shark-infested private market bear that cost entirely upon their own. Sometimes it makes the difference between being able to afford comprehensive insurance as opposed to just getting a catastrophic care policy. All that to pay the bills of others!

In 1986, no one came forward to challenge the constitutionality of EMTALA as excessive—and unfunded—government compulsion. Why is that? First, hospitals themselves saw charity care (to a modest degree) as part of their mission. Physicians, to a point—as long as it was "affordable," tended to concur. Public health advocates saw systemic health benefits. And generally, the principle—I call it the principle of compassionate care—made life less nasty, brutish, and short.

But now, in short, perhaps the principle of compassionate care is passé. Maybe it's pay to play, or to heal, now...or else. Perhaps it comes down to that guy at the Rand Paul rally who shouted, to wit, "Let 'em die!" Is that where we are today? I think, in some strange measure, that's where the Court is heading.

It takes systemic thinking to assemble the component parts of a web of public health for 300+ million people. We lack that. When a Supreme Court justice is incapable of understanding the principle of insurance—"I can see why young people won't want to buy insurance, they'll get it when they're older."—we are headed for trouble. You almost have to think that nutcases like the Cato Institute's Roger Pilon, vice president for legal affairs, who believes that Social Security is unconstitutional, are behind the wheel, and behind five of the justices on the Supreme Court. After all, why should the government be able to compel young workers to pay into a Social Security fund to which they personally may not live long enough to receive any benefits? Why not just let them save for their own damn retirement?

When it comes to compassionate care, the paleoconservative position; the position which best characterizes mid- to late- 1930s reactionary thought about the Constitution and against the economic recovery plan of the Roosevelt administration, this kind of thinking holds sway in vast sectors of the public and maybe more than half the Court. I think that's partly what Nina Totenberg had in mind with her comment that the country had "changed." How did we come to a de facto "Let 'em die!" culture?

This recession, nasty, brutish and long, has made us mean. Even our Medicare recipients want government out of their health care. Really. Aren't we a little unhinged?

If you follow the Cato logic on compassionate care, if you unravel the imperative for compassionate care and the thousand bucks a piece it costs us, you realize that even if you denied what one might call heroic medical measures to end-stage patients who couldn't pay for it, you would still be left with an ocean of pain. Most of the kind of dying that end-stage emergency room patients experience involves the potential for incredible levels of pain. You can't relieve that kind of pain with Advil, but you can with narcotics.

Do our Cato friends of the Court wish us some kind of dystopia where black market solutions for end-stage narcotics are in order, or do we just allow them to writhe in pain somewhere, preferably out of sight?

The truth is, you can't deny compassionate care and maintain a civilized society. The only way to pay for it in proper, fair, measure is to enact universal health care and spread the costs to the widest possible risk pool, the entire taxpayer base. And yet 26 states howl that the federal government is engaging in *blackmail* by forcing them to widen the gates of Medicaid. Those potential Medicaid patients are the most vulnerable among us. And the states, it would seem, want them on the streets.

Well, here's my Swiftian bargain for the free marketers. I call it the Mother of All Incentives. Let the individual mandate go. Use, as the Court advises, incentives only. But repeal EMTALA so that any person who lacks insurance will no longer be treated. If they can't pay, they can go to a *medical bondsman* (free market solution alert). There, the patient's friends and/or family can put their house up as collateral to guarantee payment for the treatment to come. If the patient has no friends, then, well, that's what churches are for. I think Rand Paul (and Ayn Rand) would agree. It's a pay to play world we live in, and perhaps the vast majority of Americans would be just fine with having their health insurance costs cut by a thousand dollars a year once compassionate care no longer exists.

Would they? Or would they finally come to their senses and embrace a national health care solution? I just don't know.