could conceivably draw the line somewhere else, such as loss of cognitive functioning, the reliability and social consensus that has emerged around brain death as death is reflected in the broad legal agreement under which brain death is recognized in every state.

Medical and legal acceptance that the irreversible loss of brain functioning is death enables families to grieve the loss of their loved ones knowing that they were absolutely beyond recovery, as distinct from patients in a coma or a vegetative state. It errs on the side of certainty when organ procurement is requested. The determination of death is a highly significant social boundary. It determines who is recognized as a person with constitutional rights, who deserves legal entitlements and benefits, and when last wills and testaments become effective. Sound public policy requires bright lines backed up by agreed-on criteria, protocols, and tests when the issue is the determination of death. The law and ethics have long recognized that deferring to medical expertise regarding the diagnosis of brain death is the most reasonable way to manage the process of dying. Nothing in these two cases ought to change that stance.

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Beyond Repeal — A Republican Proposal for Health Care Reform

Timothy Stoltzfus Jost, J.D.

By voting repeatedly to repeal the Affordable Care Act (ACA) over the past 4 years, Republicans have risked being identified as a party without a positive health policy agenda. On January 27, 2014, however, three Republican senators — Orrin Hatch (UT), Tom Coburn (OK), and Richard Burr (NC) — unveiled a proposal that would not only repeal the ACA, but also replace it with comprehensive legislation based on Republican health policy principles.[1] Although the proposal recycles long-standing Republican prescriptions, it also offers new ideas.

The proposal would not entirely repeal the ACA. Republicans seem to be coming to terms with the fact that the ACA has permanently changed the health policy landscape. The proposal would, for example, retain the ACA's Medicare provisions in recognition, no doubt, of the difficulty of rolling back all the ACA's provider-payment changes or reopening the doughnut hole in Part D coverage of prescription drugs but also apparently in order to use the ACA's $700 billion in Medicare payment cuts to finance Republican initiatives. The proposed legislation would retain popular ACA insurance reforms, including the ban on lifetime insurance limits, required coverage for children up to 26 years of age on their parents' policies, mandated disclosure of insurance benefits and limitations, and a ban on canceling an enrollee's insurance policy except in the case of fraud. It would retain limits on age rating of insurance premiums, but insurers could charge five times as much for an older as for a younger enrollee, as opposed to the three-to-one ratio limit in the ACA.

The proposal would, like the ACA, use premium tax credits to make health coverage affordable for lower-income Americans. Unlike the ACA's tax credits, which are available to families with incomes of up to 400% of the federal poverty level ($95,400 for a family of four) and are based on the actual cost of health insurance in particular markets, the Republican proposal would help families with incomes of up to only 300% of the poverty level

($71,550), with phasing out beginning at 200%. The proposal would go beyond the ACA, however, by allowing employees of small businesses to use tax credits to purchase insurance through their employer, which would make small-group coverage more affordable.

The tax credits would be for flat dollar amounts, adjusted for age but not for regional cost variations. The amounts proposed would be adequate to purchase high-deductible coverage in some parts of the country but would fall far short of the actual cost of coverage in others.[2] With the repeal of the ACA's cost-sharing reduction payments — which reduce deductibles and coinsurance — low-income families might find high-deductible insurance affordable but have trouble paying for actual health care services. Individuals would also still have to disclose personal information to the government to establish eligibility.

The proposal would reinstate premiums based on health status, with an important limit: such "medical underwriting" would not be permitted for any individual who maintained "continuous coverage" when moving from group to individual coverage or between individual or group plans. Americans who are currently uninsured would be given only a one-time opportunity to purchase coverage at a rate not based on their health status. The proposal would also provide federal support for state high-risk pools, although it would not ensure that premiums for those pools were affordable. Insurers could once again charge women more than men.

The proposal would repeal the unpopular individual mandate to obtain insurance coverage. The continuous-coverage requirement, however, would effectively impose another penalty for remaining uninsured: instead of paying a tax, individuals who failed to remain insured would risk facing increased — perhaps unaffordable — insurance premiums for the rest of their lives. There would be no exemption from this penalty for people who couldn't afford coverage, as there is from the ACA mandate.

The proposal would also allow states to "auto-enroll" individuals who were eligible for premium tax credits in health insurance plans, effectively signing them up for coverage without their consent, though allowing them subsequently to opt out. States would be responsible for working with insurers to create auto-enrollment plans that could be purchased for the value of the premium tax credit. The proposal also assumes that the states could auto-enroll people in Medicaid.

Auto-enrollment is an interesting idea. Although it would be technically challenging, it could result in significant coverage expansion. It is likely, however, that in many areas people would be auto-enrolled in very-high-deductible plans with limited benefits.

The proposal would eliminate the ACA's benefit mandates, including its limit on out-of-pocket costs. Eliminating mandates could make coverage more affordable but would also probably reduce the availability of some forms of coverage (e.g., coverage for maternity care, habilitation care, or mental health and substance-use-disorder care and, of course, for preventive services). Getting rid of out-of-pocket caps would increase Americans' financial insecurity and providers' uncompensated-care costs, although the ACA, with its high-cost-sharing plans, has not eliminated these problems.

The Republican proposal would repeal the unpopular individual mandate to obtain insurance coverage, but individuals who failed to remain insured would risk facing increased insurance premiums for the rest of their lives. There would be no exemption from this penalty for people who couldn't afford coverage, as there is from the ACA mandate.

The proposal would turn Medicaid into a block-grant program, refocusing it on "the low-income mother with children, or the elderly blind person — the kinds of individuals who Medicaid was originally designed to help."[1] States would continue to receive federal matching funds for acute care coverage for the aged, blind, and disabled, but funding for pregnant women, children in low-income families, and long-term care would

be capped, as would increases in future federal contributions. Medicaid for the working poor would be canceled. The proposal also calls for resurrecting Medicaid "health opportunity accounts" (which resemble health savings accounts), despite the fact that the 2005 demonstration project meant to test them was implemented only by South Carolina, which succeeded in signing up only two adults and three children.[3]

States would probably welcome greater flexibility for Medicaid programs but not decreased federal funding, which, unlike current funding, will not increase in economic downturns. Many current Medicaid recipients would be dropped from coverage (although they would most likely be eligible for premium tax credits), and those who remained would most likely face higher cost sharing.

The Republican proposal contains many long-standing Republican health care reform projects — more health savings accounts, association health plans for small businesses, interstate insurance sales, and malpractice reform. The proposal's estimate of the cost of "excessive tort litigation," at $589 billion, is more than 40 times the 0.5% of health care costs that the Congressional Budget Office (CBO) estimates could be saved by malpractice reform, but the proposal does focus on providing compensation to victims and not just liability protections for providers.[4]

The most controversial element of the proposal is its cap on the currently unlimited exclusion from an employee's taxes of the cost of employer-sponsored coverage. The proposal would cap the tax exclusion at 65% of the cost of an average health plan. The employer-sponsored coverage exclusion is currently the largest tax expenditure in the federal budget, and economists have long argued that it distorts the market for health insurance coverage and is more beneficial for higher-income than lower-income taxpayers.

Capping the exclusion would result in a reduction in employer coverage and a substantial tax increase for individuals who retained such coverage. The CBO estimates, for example, that capping the exclusion at 50% of average health plan cost would mean that 6 million Americans would no longer have job-related coverage (comparable to projected employer-coverage losses under the ACA) and an average annual tax increase of about $500 per person by 2019.[5]

Our health care system is unfathomably complex. Any reform will inevitably disrupt current arrangements and create winners and losers, as we are seeing with the ACA. The Republican proposal will give an advantage to some Americans and will put others at a disadvantage. In my opinion, Senators Hatch, Coburn, and Burr are to be commended, however, for moving beyond simply demanding repeal and putting out a proposal, the effects of which can now be debated.

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A Legal Victory for Insurance Exchanges

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Health care reform won a big victory in court on January 15, when a federal judge in Washington, D.C., rejected a challenge to the new health insurance marketplaces, or exchanges, created under the Affordable Care Act (ACA). Had this challenge succeeded, it could have crippled the ACA by denying its generous tax subsidies to the more than 12.5 million Americans expected to use this financial assistance to buy their health insurance through a federally run exchange. The ex-