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POLICY FORUM

An Argument Against the Feasibility of Taxing Cosmetic Surgery

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Introduction

As cosmetic procedures become more widely used, disagreement about their status as medical procedures intensifies. When Senator Harry Reid proposed a 5 percent tax on cosmetic procedures in a draft of the federal health care reform bill, there was an immediate outcry, largely from medical associations such as the American Medical Association and the American Academy of Cosmetic Surgery; opposition was based on arguments ranging from the possible discriminatory effect on women to the potential for taxes to be levied against other procedures not considered strictly “medically necessary” in the future [1]. The Senate tax was quickly pulled and replaced by a proposed 10 percent tax on tanning bed use.

Even though this particular proposal was withdrawn, a tax on cosmetic procedures remains a real issue to be considered. New Jersey successfully passed a tax, colloquially known as the “vanity tax” or “bo-tax,” in 2004, and nine other states have considered or are considering similar laws [2].

A tax on cosmetic surgery procedures is problematic for two reasons. The tax is commonly justified by framing it as a variant of a sin tax, but that comparison is not apt. The related problem is that, absent the sin tax classification, there is no other cogent justification for the tax. After explaining why the recent proposals for cosmetic surgery taxes are atypical and cannot accurately be grouped with sin taxes, we examine the ethical barriers to formation and execution of any tax on selected cosmetic procedures.

Justification

No explicit justifications have been advanced for either the federal or the New Jersey cosmetic surgery taxes aside from their fundraising purposes. The proposed federal tax was tacked on to the expensive health care reform bill to offset its costs. The New Jersey tax had no specified earmark, but was expected to raise \$26 million in annual revenue—though it has achieved only an estimated quarter of that [3, 4]. Essentially, taxing cosmetic procedures is a convenient way to offset budget shortfalls.

Given the lack of stated reasons for singling out cosmetic surgery for an added tax burden, it is best to examine the proposals in light of traditional tax justifications and practices. Two main underlying principles of taxation are horizontal and vertical equity. The imposition of a cosmetic procedure tax does not satisfy either principle

and, furthermore, has discriminatory potential. Horizontal equity demands that “people in similar circumstances should be taxed in similar ways” [5] and vertical equity holds that taxpayers ought to be burdened according to their ability to pay.

Horizontal equity. Proponents of the taxes on cosmetic surgery appear to believe that they will affect only entirely voluntary aesthetic procedures, and that affected patients should be compared to shoppers rather than viewed as consumers of ordinary health care (which is tax-deductible). This is, however, an incorrect assumption. The New Jersey statute’s description of a taxable procedure applies to a number of procedures that, while not medically necessary, are no less important than procedures that are not taxed. Compare, for example, a breast reduction—a cosmetic procedure, though one that can resolve a number of physical problems—with a rhinoplasty performed under the justification of repairing a deviated septum, a medical problem that would not be taxed under the statute. Both patients request the surgery to achieve more normal appearance and function more comfortably in society, but only one is taxed. These are similar circumstances, but one has a disproportionate burden.

Opponents of cosmetic surgery taxes have also argued that the tax is discriminatory due to its disproportionate impact on women, who are responsible for an estimated 86 percent of cosmetic procedures [6]. It is argued that, because women are under greater professional and social pressure to appear youthful and attractive, they effectively cannot avoid this expense.

Vertical equity. Many opponents of cosmetic procedure taxes have argued that the tax does not satisfy the principle of vertical equity because the majority of cosmetic surgery patients are socioeconomically disadvantaged. In a 2005 survey of people planning to have cosmetic surgery within the next 2 years conducted by the American Society of Plastic Surgeons, 40 percent of respondents reported an annual household income between \$30,000 and \$60,000, whereas only 10 percent reported an annual household income of greater than \$90,000 [6]. This argument, however, is insufficient to destroy the feasibility of a cosmetic procedure tax in and of itself because vertical equity is frequently set aside in favor of policy justifications for taxation. However, taken in combination with the apparently arbitrary nature of the tax and the lack of other support, it is one more persuasive argument.

As mentioned above, however, even taxes that seem to discriminate arbitrarily against a particular group can still be valid. A sin tax, for example, is a tax imposed on socially undesirable goods or activities, ostensibly to decrease their attraction and use and to offset their social costs. While obviously discriminating against a particular group—consumers of the taxed product—sin taxes have been popular in the United States for both their supposed (though generally unproven) deterrent effect and the valuable income they provide [7, 8].

While taxes on cosmetic procedures have not yet been specifically tied to social opprobrium of the consumers, it seems likely that governments have made cosmetic procedures a target because “vanity” is stigmatized as a negative value. Cosmetic procedures are often (albeit inaccurately) portrayed as a pursuit of the vain wealthy. Because they are stigmatized in this fashion, lawmakers doubtless see cosmetic procedures as an easy source of taxes that the population of consumers can afford and that the population of nonconsumers will sanction. This was especially evident when a Washington state senator proposed a similar vanity tax that was explicitly earmarked to fund children’s health care costs. The proposed tax failed, however, due to a lack of support [9].

To understand why, we should consider the common thread running through justifications of sin taxes: negative externalities. Smoking is a known cause of cancer and heart disease and produces secondhand smoke, which studies have shown to be harmful to bystanders who cannot avoid it. Liquor consumption is associated with expensive liver damage, motor vehicle accidents, drunken behavior, and crime. Fattening food, a target of proposed new taxes, contributes to obesity and associated diseases, which thereby significantly increase society’s health care costs. Cosmetic procedures have not been shown to have any overtly analogous effects on society. Some may think that cosmetic surgery has a detrimental impact on society, but until the proponents of these taxes are able to provide evidence to that effect, that argument cannot enter the discussion. Vanity may be one of the “seven deadly sins,” but it cannot be considered a taxable sin.

Enforcement

While a tax on cosmetic procedures is not reasonable under traditional tax models, that does not make it illegal, or necessarily an unethical way to raise money. But even if the government is within its constitutional right to implement such a tax, a vanity tax cannot be ethically or practicably enforced.

Both the New Jersey tax and the proposed federal tax provide an exemption for “reconstructive surgery or dentistry” used to “meaningfully promote the proper function of the body or prevent or treat illness or disease” [10]. Specifically, this includes procedures “performed on abnormal structures caused by or related to congenital defects, developmental abnormalities, trauma, infection, tumors, or disease, including procedures to improve function or give a more normal appearance” [10].

Despite this seemingly thorough definition of what is and what is not taxed under the act, it is still unclear whether many medical procedures would be classified as “meaningfully promoting the proper function of the body” and “reconstructive” or merely “directed at improving the [patient’s] appearance.” While it is clear, for instance, that breast reconstruction after a mastectomy for breast cancer would be tax-exempt, it is unclear whether reconstruction after a prophylactic mastectomy would be. Nor does the tax specify how severe a post-trauma or post-disease defect must be to trigger the exemption.

Most alarmingly, the statute makes no provisions for psychological conditions. Many scoff at the idea that rhinoplasty is “necessary” for an adolescent girl with low self-esteem, but it is difficult to argue that cosmetic procedures are not necessary to significantly improve the quality of life of an adult who suffers from gender identity disorder. This disorder causes “clinically significant distress or impairment in social, occupational, or other important areas of functioning” [11]. This condition would therefore seem to be firmly exempted from the vanity taxes, but some physicians or tax courts might see this differently

The confusing status of many procedures leaves the tax so vague as to be generally unenforceable. The difficulty of determining what is considered reconstructive leads to a second problem of enforcement: given that the act itself inadequately defines which medical procedures the tax covers, who should be designated to make this determination? Physicians are equipped to determine whether a procedure is medically necessary, but the vanity tax proposals do not merely cover procedures that respond to physical needs. Evaluating whether cosmetic surgery would enable a patient with a psychological condition to live a more functional life is the job of a psychiatrist or psychologist, not a plastic surgeon. The National Health System (NHS) of the United Kingdom has developed its protocol in light of that fact, requiring patients to get a referral from a psychologist before any aesthetic procedures are covered by national health insurance [12].

Furthermore, if individual physicians are given discretion to characterize a procedure as necessary, opinions may vary. This creates a risk that patients might “physician shop.” Patients who do not have the time or ability to go from one surgeon to the next comparing evaluations would be disadvantaged and forced to bear the greater burden of the tax. If a tax is to be imposed on cosmetic procedures, it should at a minimum be imposed equally on those who seek them.

Conclusion

Vanity taxes, as they have been conceived of to date, are impractical and undesirable. They do not fit within traditional justifications for taxation, and they cannot be practicably enforced. Unless strong public policy justifications are found, which seems unlikely, or a better system of administration is created to safeguard the interests of physicians and patients, the inherent discriminatory potential and administrative complications of these taxes should discourage lawmakers from considering them in the future.

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