

MEDICAL SELF-DEFENSE, PROHIBITED EXPERIMENTAL THERAPIES, AND PAYMENT FOR ORGANS

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I. INTRODUCTION

Four women are in deadly peril.

Alice is seven months pregnant, and the pregnancy threatens her life; doctors estimate her chance of death at 20%. Her fetus has long been viable, so she no longer has the *Roe/Casey* right to abortion on demand. But because her life is in danger, she has a constitutional right to save her life by hiring a doctor to abort the viable fetus. She would even have such a right if the pregnancy were only posing a serious threat to her health, rather than threatening her life.¹

A person breaks into Katherine's home. She reasonably fears that he may kill her (or perhaps seriously injure, rape, or kidnap her). Just as Alice may protect her life by killing the fetus, Katherine may protect hers by killing the attacker, even if the attacker isn't morally culpable, for instance if he is insane or mistaken.² And Katherine has a right to self-defense even though recognizing the right may let some people use false claims of self-defense to get away with killing the innocent.³

Ellen is terminally ill. No proven therapies offer help. An experimental therapy seems safe, because it has passed Phase I FDA testing, yet federal law bars its use outside clinical trials because it hasn't been demonstrated to be effective (and further checked for safety) through Phase II testing. Nonetheless, the 2006 D.C. Circuit decision in *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*⁴ se-

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¹ *Roe v. Wade*, 410 U.S. 113, 163-64 (1973); *Casey v. Planned Parenthood*, 505 U.S. 833, 846 (1992).

² See *infra* notes 31-33 and accompanying text.

³ See *infra* text accompanying notes 34-30.

⁴ 445 F.3d 470 (D.C. Cir. 2006), *suggestion for rehearing en banc pending*.

cures Ellen the constitutional right to try to save her life by hiring a doctor to administer the therapy—at least so long as the decision isn't overturned by the en banc court or the Supreme Court.

Olivia is dying of kidney failure. A kidney transplant would likely save her life, just as an abortion would save Alice's, lethal self-defense may save Katherine's, and an experimental treatment may save Ellen's.

But the federal ban on payment for organs sharply limits the availability of kidneys, so Olivia must wait for years for a donated kidney; she faces a 20% chance of dying before she can get one.⁵ Barring compensation for goods or services makes them scarce. Alice and Ellen would be in extra danger if doctors were only allowed to perform abortions or experimental treatments for free. Katherine likely wouldn't be able to defend herself with a gun or knife if weapons could only be donated. If organ providers or their heirs could be compensated, many more organs would be available, and Olivia would be much likelier to get the life-saving kidney. But federal law bans organ sales, and thus frustrates Olivia's ability to protect her life.⁶

My claim is that all four cases involve the exercise of a person's presumptive right to self-defense—lethal self-defense in Katherine's case, and what I call *medical self-defense* in the others.⁷

This is a constitutional right: I argue in Part II that *Roe* and *Casey* secure not just a pre-viability right to abortion as reproductive choice, but also a separate post-viability right to abortion as medical self-defense when pregnancy threatens a woman's life. And given that Alice has such a right to defend herself by getting an abortion,⁸ Ellen and Olivia should have the same right to defend themselves through other medical procedures. Alice is free to have surgery in which a doctor in-

⁵ Even if kidney dialysis is keeping her alive, each year on dialysis she faces a 6% risk of death, and the mean waiting period for adult recipients is over four years. See sources cited *infra* notes 86 & 89.

⁶ See *infra* p. 21 (further discussing why restrictions on spending money to help exercise a right generally presumptively infringe the right).

⁷ Some might use the label "necessity" rather than "self-defense" when speaking of protection against a life-threatening pregnancy, an animal attack, or an attack by an insane person, rather than against morally culpable attackers. See, e.g., Boaz Sangero, *A New Defense for Self-Defense*, 9 BUFF. CRIM. L. REV. 475, 511-21 (2006). Not much logically turns on such a label, but I prefer "self-defense" because it's a common lay term for the conduct—people, for instance, would say "I had to kill that rattlesnake in self-defense" (see cases cited *infra* note 33 for examples) though they wouldn't see the rattlesnake as morally culpable. Moreover, the self-defense defense—including defense against animals and the insane—is recognized in all states, as is abortion-as-self-defense. The necessity defense, which isn't limited to protection against death or serious injury, is recognized only in about half the states, see 2 ROBINSON, *infra* note 32, §124(a), at 45.

⁸ Abortion-as-self-defense may involve very different emotions in the defender than lethal self-defense usually would—sorrow rather than rage and acute fear. See Nicholas Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 RUTGERS L. REV. 97, 111 (1997) (making this point). But the moral principle at the heart of both is similar: the right to defend one's life, whether the threat to life is culpable or innocent, and whether the right is exercised in anger or in anguish (as against an acquaintance who attacks you under an insane delusion, or a beloved pet that you suspect is rabid).

serts devices into her body to excise a fetus that, tragically, threatens her life. Ellen should likewise be free to have a procedure in which a doctor inserts chemicals into her body to destroy a tumor that threatens her life.⁹ And the government should not place substantial obstacles in the way of Olivia's having a procedure in which a doctor inserts an organ into her body to replace a failing organ that threatens her life. It can't be that a woman has a constitutional right to protect her life using medical procedures, but only when doing so kills a viable fetus.

I also argue, in Part III, that the right to medical self-defense is supported by the long-recognized right to lethal self-defense: the right to protect your life against attack even if it means killing the attacker. The right has constitutional foundations, in substantive due process, state constitutional rights to defend life and to bear arms, and maybe the Second Amendment. But even if it's treated as just a common-law and statutory right, our accepting it should lead us to accept a similar common-law or statutory right to defend one's life against medical threats as well as against human or animal threats. Even if the Court stops recognizing unenumerated constitutional rights, legislatures should presumptively protect people's medical self-defense rights just as they protect people's lethal self-defense rights, and as the public overwhelmingly supports women's abortion-as-self-defense rights. While a legislature need not fund people's self-defense, it generally ought not substantially burden people's right to defend themselves.

In Parts IV and V, I apply the abortion-as-self-defense and lethal self-defense analogies in more detail to experimental drugs and to compensation for organs. I argue that the right of medical self-defense offers extra support for the controversial and far from firmly entrenched *Abigail Alliance* decision. And I argue that the right makes the organ sales ban presumptively improper and unconstitutional when the organs are needed to protect people's lives; some concerns about organ markets may justify regulations of such markets, but not prohibition.

I also argue that, while this presumption is potentially rebuttable, it should take much to rebut it. Recognizing the right to medical self-defense as a constitutional right or a moral right means that the government should have a very good reason to substantially burden the right, and that the restriction should be as narrow as possible.

In particular, while the right may be regulated in some ways—for instance, to prevent the killing of people by organ robbers—such regulations can and should be far less burdensome than a total ban on organ sales would be. We respect and value self-defense rights enough that we allow lethal self-defense, even given the risk that false claims of self-defense can be used as a cloak for murder: Rather than prophylactically

⁹ That Ellen's surgery is riskier than Alice's might be relevant if Ellen had reliable alternatives. But if Ellen is terminally ill, the state's interest in protecting her short remaining lifespan against her own decision should be no weightier than the state's interest in protecting the fetus's long remaining lifespan against Alice's decision. See *infra* p. 15.

banning all use of lethal force, we make certain uses illegal and rely on case-by-case decisionmaking to discover these improper uses and to deter them. The same should apply to payments for organ transplants.

Finally, in Part VI, I argue that a right to medical self-defense is not only logically supportable, but also potentially viable both in political debate and in the judicial process. Both liberal and conservative judges and voters may be open to it; and I hope that the analogies in this Essay can be used to help persuade them.

II. THE RIGHT TO MEDICAL SELF-DEFENSE: *ROE* AND *CASEY*

Roe and *Casey* hold that the Constitution protects the right to an abortion. But this right actually consists of two different rights—different in scope, justification, and popular support. The first is the highly controversial right to abortion as reproductive choice, which generally allows pre-viability abortions on demand.¹⁰ The second is the right to abortion even after viability when necessary “to preserve the life or health of the mother.”¹¹

This second right is a right to medical self-defense—the right to protect your life using medical care, even when this requires destroying that which is threatening your life.¹² This medical self-defense right exists despite the interest in protecting the viable fetus’s life, an interest *Roe* and *Casey* held compelling enough to trump the abortion-as-choice right.¹³ Yet this right is largely uncontroversial, endorsed even by Chief Justice Rehnquist’s *Roe* dissent,¹⁴ by all the restrictive abortion laws in effect when *Roe* was decided,¹⁵ and by public opinion. Only 9% to 15% of Americans endorse the view that abortions should be banned even when the woman’s life is in danger.¹⁶ Compare this to the 42% to 58% of

¹⁰ *Casey v. Planned Parenthood*, 505 U.S. 833, 877 (1992) (securing the right subject only to regulations that don’t create a substantial obstacle to the right’s exercise).

¹¹ *Roe v. Wade*, 410 U.S. 113, 163-64 (1973); *Casey*, 505 U.S. at 846. See also *People v. Belous*, 71 Cal. 2d 954, 963, 969 (1969) (noting the existence of these two separate rights); Jack M. Balkin, *Abortion and Original Meaning*, at 60, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=925558 (likewise).

¹² See, e.g., Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 51-53 (1971); John T. Noonan, Jr., *An Almost Absolute Value in History*, in *THE MORALITY OF ABORTION: LEGAL AND HISTORICAL PERSPECTIVES* 1, 58 (John T. Noonan, Jr. ed., 1970). I say “self-defense” to note that the uncontroversial right to protect life against threat from a fetus is similar to the uncontroversial right to protect life against an attacker (even a morally innocent one, see *infra* text accompanying notes 31-33). I am not referring to the highly controversial argument that all abortions-on-demand are analogous to self-defense against serious bodily injury (on the theory that unwanted pregnancy is such an injury, and that the self-defense right applies even if the woman helped cause the pregnancy). See Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1611-18 (1979).

¹³ 410 U.S. at 163; 505 U.S. at 860 (holding that substantial burdens on the right are unconstitutional, though more modest ones are permitted).

¹⁴ *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting).

¹⁵ LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME* 5 (1997).

¹⁶ *E.g.*, Gallup Org., May 19-21, 2003, acc. no. 0431679 (15%); ABC News, Jan. 16-20,

Americans who endorse the view that abortion should be generally banned, and available at most to protect the woman's life or in cases of rape or incest,¹⁷ and the 33% to 46% who endorse a similar view but without even a rape or incest exception.¹⁸

The Court has so far recognized the medical self-defense right only in abortion cases. Yet the right can't be logically limited to situations where the defensive procedure is abortion, and rejected where the woman needs to defend herself using experimental drugs or an organ transplant.¹⁹ Nothing about therapeutic postviability abortion makes it deserve protection more than any other medical self-defense procedure.

One can't distinguish postviability abortions on the grounds that they involve the woman's reproductive choice. After viability the time for that choice has passed; the ability to get a therapeutic abortion is a side effect of the woman's medical self-defense right, not her abortion-as-choice right.²⁰ Nor can one distinguish therapeutic abortions on the grounds that they involve control over the woman's own body. A patient's adding substances (such as medications or an organ) to her body, as well as removing substances from her body (say, through medications that kill cancer cells), involves her control over her body as much as does a doctor's inserting a surgical instrument to remove a fetus.

The medical self-defense procedures may cause some harm. Ellen's experimental drug may shorten Ellen's already short expected lifespan.

2003, acc. no. 0419810 (10%); NBC News, Sept. 24-25, 1979, acc. no. 0084373 (9%). All surveys in these footnotes are on LEXIS, in the RPOLL file of the NEWS database.

¹⁷ *E.g.*, CBS News, Jan. 5-8, 2006, acc. no. 1639924 (55%); Princeton Survey Res. Ass. Int'l, Dec. 7-11, 2005, acc. no. 1638948 (42%); CBS News, Jan. 14-17, 1985, acc. no. 0014055 (58%).

¹⁸ *E.g.*, Opinion Dyn., Feb. 28-Mar. 1, 2006, acc. no. 1644506 (35%); Harris Interactive, Apr. 4-10, 2006, acc. no. 1651042 (44%); Roper Org., May 5-12, 1979, acc. no. 0118970 (46%); Roper Org., Aug. 20-27, 1977, acc. no. 115959 (33%). I have seen only one survey outside this range, which reports 23% support for this view, see Market Strategies, Feb. 19-25, 1998, acc. no. 0326766; but even it reports 54% support for the view that abortion-on-demand should generally be banned so long as there are exceptions in cases of rape, incest, and threat to the mother's life. Even when people are specifically asked about third-trimester abortions, only 22% endorse banning these abortions even when the mother's life is in danger, compared to 74% who endorse banning abortion on demand. See Gallup Org., May 19-21, 2003, acc. nos. 0431684, 0431688.

¹⁹ *Cf.* Yvonne Cripps, *The Art and Science of Genetic Modification: Re-Engineering Patent Law and Constitutional Orthodoxies*, 11 IND. J. GLOB. LEG. STUD. 1, 24 (2004) (suggesting that *Roe* may secure a right to be free from prohibitions that interfere with life-saving treatment, and that this may make bans on human cloning unconstitutional).

²⁰ One could distinguish abortion-as-self-defense from other procedures if the abortion right were justified on a sex equality theory, as a way of forbidding the imposition of legal burdens that women alone must bear. See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1983); Regan, *supra* note 12. But this is not the justification that the Court has generally given for the abortion right in *Roe*; *Roe* relied on precedents that didn't discuss sex equality, 410 U.S. 113, 177 (1973), and it has in turn been relied on in cases that don't involve sex equality, *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Lawrence v. Texas*, 539 U.S. 558, 565 (2003). *Cf.* *Casey v. Planned Parenthood*, 505 U.S. 833, 856 (1992) (noting *Roe*'s sex equality consequences, but reaffirming *Roe* based mostly on other grounds).

It may also cost her money for what the government thinks may well be a false hope (though note that the pharmaceuticals in the *Abigail Alliance* case were merely not proven effective, rather than proven ineffective). Likewise, as I discuss starting on p. 23, allowing compensation for organs has been said to potentially cause various other harms.

Yet *Roe* and *Casey* demand far more than a showing of some conceivable risk to some government interests before Alice's right to abortion-as-self-defense may be restricted. Even the compelling interest in protecting the life of a viable fetus—a fetus that is in many ways indistinguishable from a born baby—isn't enough to overcome Alice's rights.

The same should hold for other medical procedures used to protect one's life. Modest burdens on the right to medical self-defense, such as an informed consent requirement or a short waiting period,²¹ would be constitutional. But to impose a substantial burden on the patient's right to protect her life through medical procedures,²² the government should have to show an extremely powerful reason for burdening the right, and to show the burden is genuinely necessary because the government's goals can't be achieved in less burdensome ways.²³ And even when the interest is powerful in the abstract, it might still sometimes be rejected in favor of a right to protect one's life, as the interest in protecting viable fetuses is rejected under the abortion-as-self-defense right.

There is, of course, an important limit to the right to medical self-defense (or to lethal self-defense²⁴): The right is constrained by the rights of others who aren't threatening the woman's life. No woman has a constitutional right to force a doctor to perform an abortion, even to save her life. Likewise, Ellen's constitutional right to medical self-defense wouldn't entitle her to steal experimental drugs.

But this is no different from the way other indisputably recognized constitutional rights operate. My First Amendment rights don't let me steal a printing press, speak on your lawn, or trespass on private property to worship at the site of an alleged miraculous apparition (even if *Employment Division v. Smith* were overturned).²⁵

This is not because property rights are more important than free speech rights, free exercise rights, or self-defense rights; rather, it's because even important rights are bounded by the rights of others. Naturally the exact scope of those rights of others—for instance, whether they include the right to freedom from defamation, emotional distress,

²¹ See, e.g., *Casey v. Planned Parenthood*, 505 U.S. 833, 877 (1992).

²² See, e.g., *Abigail Alliance*, 445 F.3d at 486 (remanding for a decision “whether the FDA's policy barring access to . . . investigational new drugs by terminally ill patients is narrowly tailored to serve a compelling government interest”).

²³ For more on why I think the government can't make such a showing in Ellen's and Olivia's case, see *infra* Parts IV, V.C, and V.D.

²⁴ See also *infra* text accompanying notes 61-64 (discussing this).

²⁵ *Hudgens v. NLRB*, 424 U.S. 507 (1976); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1510-12 (1999). For a narrow exception that's not relevant here, see *Marsh v. Alabama*, 326 U.S. 501 (1946).

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offense, or interference with business relations—has long been the subject of debate.²⁶ But the existence of this debate, and the principle that constitutional rights are constrained by at least some rights of others, don't contradict the existence of the rights, or weaken the force of the rights when exercise of the rights doesn't conflict with others' rights.

III. LETHAL SELF-DEFENSE AND WHAT IT TELLS US ABOUT MEDICAL SELF-DEFENSE

The broad acceptance of the abortion-as-self-defense right should be no surprise, given the broad acceptance of self-defense more generally. As a pre-*Roe* case put it (even while rejecting a constitutional right to nontherapeutic abortions), abortion bans had exceptions to protect the life of the mother because “self-defense has always been recognized as a justification for homicide.”²⁷ Similarly, a 1939 English case held, in reading a “life of the mother” exception into an abortion ban that didn't include such an exception, “as in the case of homicide, so also in the case where an unborn child is killed, there may be justification [meaning a self-defense justification] for the act.”²⁸

Lethal self-defense—protecting one's life against humans or animals (or preventing serious injury, rape, or kidnapping)—has long been a general exception to nearly all criminal laws, including laws against murder, weapons possession, and the like.²⁹ And lethal self-defense has been allowed even against those who threaten your life with little or no moral fault.³⁰ You may kill those who are threatening your life negligently, or through an unfortunate nonnegligent accident.³¹ You may kill attackers who are insane and thus not morally culpable.³² You may use

²⁶ See, e.g., Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1286-1311 (2005) (concluding free speech mostly includes the right to harm others' interests through the communicative impact of speech—with some exceptions—but not through the noncommunicative impact of speech, such as noise or trespass).

²⁷ *Steinberg v. Brown*, 321 F. Supp. 741, 747 (D. Ohio 1970).

²⁸ *King v. Bourne*, 1 K.B. 687, 690 (C.C.C. 1939).

²⁹ See, e.g., 2 AM. LAW INST., MODEL PENAL CODE AND COMMENTARIES § 3.04, at 48 & n.35 (1985); N.Y. PENAL LAW (McKinney) § 35.15(2)(a)-(b) (2004).

³⁰ Thus, even if you think that the right to lethal self-defense is justified largely by the conclusion that attackers have forfeited some of their rights by their attack, see, e.g., Sangero, *supra* note 7, at 507-11 (describing this argument)—even if they aren't culpable, because they're insane or mistaken—the availability of lethal self-defense still potentially causes harm. That we recognize self-defense despite this potential harm suggests that we do treat self-defense as a right that trumps some nontrivial government interests.

³¹ See, e.g., MODEL PENAL CODE §§ 3.04, 3.11(1) (stating that deadly force may be used against “unlawful force” that imperils one's life, and defining “unlawful force” as nonconsensual force that “would constitute [an] offense or tort except for a defense (such as the absence of intent . . . or mental capacity [or such as] . . . youth)”); 2 AM. LAW INST., MODEL PENAL CODE AND COMMENTARIES § 3.11, at 159 (1985) (elaborating on this).

³² See *supra* note 31; 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 131(b), n.13 (1984 & Supp. 2005) (concluding that modern American law embodies this view); 1 *id.* § 36(a)(3) (likewise).

self-defense against animals, even when such actions would otherwise violate endangered species law, game laws, animal cruelty laws, or property law.³³ And you may plead self-defense even though allowing such pleas endangers even those who aren't attacking anyone, by giving even cold-blooded killers a convenient cover story ("I thought he was about to attack") that might get them acquitted.³⁴

The analogy between lethal self-defense and medical self-defense is necessarily not as close as the analogy between one form of medical self-defense (via abortion) and another. But it's close enough: If I may kill someone to protect my life, why shouldn't I be presumptively free to protect my life using medical procedures that don't involve killing, such as compensated organ transplants or the use of experimental drugs?³⁵ My hope is that people who feel strongly about the right to lethal self-defense (as do I), but who are skeptical of what they see as newly minted rights such as medical rights justified on pure autonomy grounds,³⁶ will agree that the moral case for medical self-defense is at least as strong as the case for lethal self-defense.

A. *The Constitutional Status of Lethal Self-Defense*

Lethal self-defense is so broadly accepted that courts have rarely faced grave restrictions on it, and thus haven't squarely decided whether the federal constitution protects it. Yet some lower court opinions have said that there is such a right (presumably stemming from

³³ See, e.g., 16 U.S.C.A. § 1540(b)(3) (endangered species law); *People v. Lee*, 131 Cal. App. 4th 1413 (2005) (illegal firearm discharge); *People v. Wicker*, 357 N.Y.S.2d 597 (1974) (cruelty to animals); *Credit v. Brown*, 10 Johns. 365 (N.Y. Sup. Ct. 1813) (trespass tort).

Note that the law treats self-defense not as an excuse such as duress—a concession to human weakness—but rather as a full justification. See, e.g., 2 ROBINSON, *supra* note 32, § 131, at 69. Moreover, the law lets people use lethal force to defend others, including strangers, though the third party is unlikely to feel a duress-like compulsion to defend the person. See, e.g., MODEL PENAL CODE § 3.05; 2 ROBINSON, *supra* note 32, § 133, at 101. Defending life is thus treated as a positive good, not just a concession to human frailty.

³⁴ Say I want to murder you. If the self-defense defense didn't exist, I would know that if I was found out as the killer, I would likely be convicted. But allowing self-defense may help me avoid conviction: "He threatened me, and I thought he was reaching for a gun," I would falsely say, and the only other witness—you—won't be there to contradict me. This might create a reasonable doubt for some jurors, especially if I'm a sympathetic character (say, a police officer) and my victim is not. See, e.g., Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 SO. CAL. L. REV. 777, 796 (1985).

³⁵ The right to lethal self-defense against humans protects not just our right to life but also our right to be free of domination by other people. There may be an extra indignity in dying by another human's will, as opposed to from disease or through animal attack. Yet a similar indignity exists when the law shackles you when you're in peril of dying, through disease or animal attack, and denies you the ability to fight back. If there is a distinction between such a situation and the law's barring people from lethally resisting criminal human attack, it's too gossamer to make a constitutional or moral difference.

³⁶ See Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Parts*, 55 OHIO ST. L.J. 1, 59-64 (1994) (discussing a possible constitutional privacy right to sell one's organs).

substantive due process or the Ninth Amendment).³⁷ A recent four-Justice plurality opinion—authored by Justice Scalia, usually no friend of unenumerated constitutional rights—suggested the same.³⁸

And the Court’s holding that “the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’”³⁹ supports recognizing such a right.⁴⁰ Framing-era sources call self-defense a natural right.⁴¹ Blackstone wrote of the right to prevent “any forcible and atrocious crime,” even with lethal force, as “justifiable by the law of nature.”⁴² St. George Tucker, a leading early American commentator,⁴³ described “[t]he right of self defence” as “the first law of nature”;⁴⁴ Thomas Cooley, the leading American constitutional law commentator of the late 1800s, wrote that “liberty” in the Due Process Clause protected “the right of self-defence against unlawful violence.”⁴⁵

The right is secured by forty-four state constitutions. Twenty-one of these, dating back to the 1776 Pennsylvania Bill of Rights, expressly secure the right to “defend[] life.”⁴⁶ Forty, dating from 1776 to 1998, se-

³⁷ See, e.g., *Taylor v. Withrow*, 288 F.3d 846, 851-52 (6th Cir. 2002); *Griffin v. Martin*, 785 F.2d 1172, 1186 n.37 (4th Cir. 1986) (Murnaghan, J.), *aff’d by equally divided court and opinions withdrawn*, 795 F.2d 22 (4th Cir. 1986); *Isaac v. Engle*, 646 F.2d 1129 (6th Cir. 1980) (Merritt, J., dissenting), *rev’d on other grounds*, 456 U.S. 107 (1982); *State v. Buckner*, 377 S.E.2d 139, 142-43 (W. Va. 1998) (adhering to *State v. Workman*, 14 S.E. 9, 10 (W. Va. 1891), and characterizing it as finding a federal constitutional right to self-defense); *State v. Hardy*, 397 N.E.2d 773, 776 (Ohio App. 1978) opinions cited *infra* note 51.

³⁸ *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (plurality) (dictum) (suggesting that “the right to have a jury consider self-defense evidence” may be “fundamental”).

³⁹ See *Washington v. Glucksberg*, 521 U.S. 702 (1997) (stressing that the Due Process Clause protects rights “deeply rooted in this Nation’s history and tradition”); see generally Nicholas H. Johnson, *Self-Defense?*, ___ J. L. ECON. & POL. ___ (2006) (arguing for recognizing a right to self-defense under the Second and Ninth Amendments); Nelson Lund, *A Constitutional Right to Self Defense?*, ___ J. L. ECON. & POL. ___ (forthcoming 2006) (likewise, under substantive due process); Victoria Dorfman & Michael Koltonyuk, *When the Ends Justify the Reasonable Means: Self-Defense and the Right to Counsel*, 3 TEX. REV. L. & POL. 381, 382-89 (1999) (likewise).

⁴⁰ For a brief discussion of the general objections to recognizing unenumerated rights, even traditionally recognized ones, see the text following note 83 *infra*.

⁴¹ See, e.g., PENN. CONST. art. 1, § 1 (1776); VT. CONST. ch. I, art. I (1777); MASS. CONST. pt. 1, art. 1 (1780); N.H. CONST. pt. 1, art. 2 (1784); DEL. CONST. pmbl. (1792); Samuel Adams, *The Rights of the Colonists: The Report of the Committee of Correspondence to the Boston Town Meeting*, Nov. 20, 1772 (“Among the natural rights of the Colonists are these: First, a right to life; Secondly, to liberty; Thirdly, to property; together with the right to support and defend them in the best manner they can. These are evident branches of . . . the duty of self-preservation, commonly called the first law of nature.”).

⁴² 4 BLACKSTONE’S COMMENTARIES *180.

⁴³ See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 296 n.2 (1964) (Black, J., concurring).

⁴⁴ 1 ST. GEORGE TUCKER, BLACKSTONE’S COMMENTARIES app. 300 (1803).

⁴⁵ 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1950, at 668 (Thomas Cooley ed., 4th ed. 1873).

⁴⁶ See Eugene Volokh, *State Constitutional Right To Defend Life Provisions*, ___ TEX. REV. L. & POL. ___ (forthcoming 2007) (quoting provisions and cases interpreting them).

cure a right to keep and bear arms in defense of self,⁴⁷ which presupposes at least the traditional core of lethal self-defense.⁴⁸

The right has thus been as broadly accepted as the rights to bear and raise children and to live with one's family members, and more broadly accepted than the right to an abortion or even the right to use contraceptives.⁴⁹ Even if due process or the Ninth Amendment is interpreted as protecting only those rights that were recognized as important common-law rights in 1791 or 1868, self-defense would qualify. The right has never been absolute, but in this respect it is like most constitutional rights, enumerated or unenumerated.

Two court of appeals decisions have rejected a constitutional right to lethal self-defense, but with little analysis, and in upholding rules that may be permissible even if the constitutional right is recognized. One decision upheld prison disciplinary rules that categorically rejected prisoner self-defense claims;⁵⁰ but even if prisoners ought to lack a constitutional right to self-defense,⁵¹ this says little about the right outside prison—prisoners are subject to far greater constraints on most of their constitutional rights than are nonprisoners.⁵² The other decision upheld the rare⁵³ state rules requiring defendants to prove self-defense by a preponderance of the evidence;⁵⁴ but one can have a constitutional right and yet bear the burden of proving that the conditions for its exercise are satisfied.⁵⁵ When the Supreme Court upheld laws placing the bur-

⁴⁷ See Eugene Volokh, *State Constitutional Right To Bear Arms Provisions*, __ TEX. REV. L. & POL. __ (forthcoming 2007) (quoting provisions and cases interpreting them).

⁴⁸ See, e.g., *McKellar v. Mason*, 159 So.2d 700, 702 (La. App. 1964); *State v. Hirsch*, 114 P.3d 1104, 1110 (Ore. 2005); *Webb v. State*, 439 S.W.2d 342, 343 (Ct. Crim. App. Tex. 1969); *State v. Buckner*, 377 S.E.2d 139, 142, 146 (W. Va. 1988).

⁴⁹ See, e.g., *Roe v. Wade*, 410 U.S. 113, 139-40 & n.37 (1973) (noting that most states outlawed many abortions by the late 1800s, that nearly all did by the late 1950s, and that by 1973, only a few states had generally legalized most early-term abortions); Comment, *The History and Future of the Legal Battles Over Birth Control*, 49 CORNELL L.Q. 275, 278-79 (1964) (noting that by 1964, only two states prohibited the sale of contraceptives).

⁵⁰ *Rowe v. DeBruyn*, 17 F.3d 1047, 1052-53 (7th Cir. 1993).

⁵¹ See *Rowe*, 17 F.3d at 1054-56 (Ripple, J., dissenting) (concluding that even prisoners have a constitutional right to self-defense); *DeCamp v. N.J. Dep't of Corrections*, 2006 WL 2068082, *5-*6 (N.J. Super. App. Div. 2006) (endorsing Judge Ripple's position).

⁵² See, e.g., *Thornburgh v. Abbott*, 490 U.S. 401 (1989); see also *MacMillan v. Pontesso*, 73 Fed. Appx. 213, 214 (9th Cir. 2003) (declining to decide whether there is a general "constitutional right to assert self-defense," and holding only that no such right can be asserted in prison disciplinary proceedings); *Sack v. Canino*, 1995 U.S. Dist. LEXIS 12093, at *3 (E.D. Pa. 1995) (citing *Rowe* only for the rule that a prisoner "had no constitutional right to assert a claim of self-defense within the context of a prison disciplinary hearing").

⁵³ This used to be the common-law rule, 4 BLACKSTONE'S COMMENTARIES *201, but it is now adhered to by only one state. See *Martin v. Ohio*, 480 U.S. 228, 236 (1987) (noting that in 1987, only Ohio and South Carolina had such a rule); *State v. Bellamy*, 359 S.E.2d 63, 64-64 (S.C. 1987) (retreating from this rule).

⁵⁴ *White v. Arn*, 788 F.2d 338, 347 (6th Cir. 1986).

⁵⁵ See, e.g., *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (stating that the defendant bears the burden of proving denial of the Sixth Amendment right to effective assistance of counsel); *Caston v. State*, 823 So. 2d 473, 504 (Miss. 2002) (stating that the defendant bears the burden of showing that his Due Process Clause rights were violated by

den of proving self-defense on the defendant,⁵⁶ it did so without opining on whether there's a constitutional right to self-defense.

Finally, if the Court concludes that the Second Amendment secures an individual right aimed partly at self-defense, a view expressed by Congress⁵⁷ and by the U.S. Department of Justice Office of Legal Counsel,⁵⁸ though only by a minority of federal circuit judges,⁵⁹ then some right to self-defense might be inherently protected through the Second Amendment. But, as I argue above, a right to self-defense (though potentially limitable by gun control laws) should be recognized even without reliance on the Second Amendment.

B. *Limits on Lethal Self-Defense*

The right to lethal self-defense is in some ways limited, as are other rights, and as the right to medical self-defense would be as well. First, the right is uniformly accepted only when self-defense is necessary to defend one's life, or at least prevent serious harm to oneself: You generally can't kill to prevent a bruise or a petty theft.⁶⁰ Similarly, I am arguing for medical self-defense against deadly or at least radically debilitating threats (such as paralysis or dementia), not the common cold.

Second, the right to lethal self-defense, like other rights, doesn't in my view include the right to injure the life, liberty, and property rights of people who aren't threatening you. If I'm starving to death on a life-

prejudicial pre-indictment delay); WAYNE R. LAFAYE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 11.10 & n.58, § 18.5 & n.47 (2006) (noting both these points).

⁵⁶ *Martin v. Ohio*, 480 U.S. 228 (1987).

⁵⁷ Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901(a)(2) (enacted 2005); Firearms Owners' Protection Act, Pub. L. 99-308, sec. 1(b) (enacted 1986), 18 U.S.C. § 921 Hist. & Stat. Notes; Freedmen's Bureau Act, 39th Cong. sess. I, ch. 200 (1866).

⁵⁸ *Whether the Second Amendment Secures an Individual Right*, 2004 WL 2930974 (O.L.C. Aug. 24, 2004).

⁵⁹ See *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (endorsing the individual rights view); *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir. 1982) (Coffey, J., dissenting) (same); *Silveira v. Lockyer*, 328 F.3d 567 (9th Cir. 2003) (noting that Judges Gould, Kleinfeld, Kozinski, T.G. Nelson, O'Scannlain, and Pregerson endorsed the individual rights view in dissenting from denial of rehearing en banc).

⁶⁰ See 2 ROBINSON, *supra* note 32, § 131(d), at 81-84. The necessity requirement explains the minority "retreat" rule, under which a person may not use lethal self-defense outside her home when she could safely avoid the threat by retreating. See *id.* § 131(c), at 79-81. Because lethal self-defense remains available when a safe retreat is impossible, the retreat rule (if applied properly) doesn't substantially burden the right to self-defense. Likewise, if the law bans a procedure that is not medically necessary to protect against death or serious injury, such a ban wouldn't violate the medical self-defense right.

As I note below, I don't think that all aspects of current self-defense law are mandated by the Constitution or by a moral right to self-defense. Most states, for instance, do not impose a duty to retreat, even when retreating is safe; that may be wise policy, but it's part of the optional component of self-defense, not of the mandatory component. In my view, the mandatory component of the right to self-defense is the right to do what is necessary to prevent death (or serious bodily injury, rape, or a few other serious harms) without infringing the rights of others who aren't attacking you.

boat, I have no right to kill and eat my fellow passengers.⁶¹ If a criminal forces me to kill someone, my actions won't be legally justified.⁶² Even taking another's property to save my life isn't, I think, part of my self-defense rights,⁶³ though the law may still decline to punish some of these actions due to sympathy towards my predicament.⁶⁴

This limitation should apply to medical self-defense: Ellen shouldn't be free to steal experimental drugs from the pharmaceutical company, Olivia shouldn't be free to kidnap someone to cut out his organs, and Alice shouldn't have a right to create a viable fetus just to harvest its organs to save her (or a friend's) life.⁶⁵ Yet none of this condemns medical self-defense using voluntarily provided experimental drugs, or organ transplants for which a willing provider is compensated.

Finally, some American jurisdictions burden people's ability to practice lethal self-defense by constraining their access to the tools that are often needed for effective self-defense: guns.⁶⁶ Generally speaking, private gun ownership and even carrying is allowed to most law-abiding adults in most American jurisdictions;⁶⁷ and this is even more true

⁶¹ See *Regina v. Dudley & Stephens*, 14 Q.B.D. 273, [1881-5] All E.R. Rep. 61, 1 T.L.R. 118 (1884), *aff'd* 1 T.L.R. 29 (1884), *amended* 14 Q.B.D. 560 (1885).

⁶² See 2 ROBINSON, *supra* note 32, § 177(g)(1), at 367-68.

⁶³ For a brief discussion of this, see *supra* text accompanying notes 24-26.

⁶⁴ See, e.g., A.W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW 247 (1984) (noting that Dudley's and Stephens' prison terms for killing and eating their fellow passenger were commuted to six months); 2 ROBINSON, *supra* note 32, § 177, at 347 (discussing duress, an excuse—though not a justification—available to those forced to commit a crime that doesn't involve killing another); *id.* § 124(a), at 45 (discussing the necessity justification allowed in about half the states); *id.* § 124(g), at 63 (noting that some states bar the necessity defense in cases of murder or other serious felonies).

⁶⁵ A parent's bearing a live child to use that child's bone marrow—or even kidney—to save the life of another of her children poses a harder question. I don't think this behavior should be banned, but I also don't think a ban would violate the older child's medical self-defense rights: The new child isn't responsible for the threat to the older child's life, the new child can't meaningfully give consent, and the parents' vicarious consent is made suspect by their conflict of interest.

⁶⁶ See GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 167-75 (1997). An analogy would be a law that allows abortion-as-self-defense, but bars women from using the safest late-term abortion procedures, and leaves them only with much less life-protective procedures. See *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000) (holding that “[w]here a significant body of medical opinion believes [an abortion] procedure may bring with it greater safety for some patients and explains the medical reasons supporting that view,” a woman may get such a procedure performed in order to protect her life or health, even if there is a “division of medical opinion” about the value of the procedure).

⁶⁷ Most high-profile firearms restrictions, such as bans on so-called “assault weapons,” don't substantially burden people's ability to have guns for self-defense, since they leave people free to use many other guns. The genuine gun bans are rare: All jurisdictions but D.C. let law-abiding adults possess loaded shotguns for home defense; the most restrictive jurisdictions other than D.C., such as Chicago, CHI. MUN. CODE § 8-20-040, -050, ban only handguns, leaving people free to possess shotguns, which are about as effective as handguns for home defense (and are even more lethal), GARY KLECK, POINT BLANK: GUNS AND VIOLENCE IN AMERICA 463 (1991); and even D.C. doesn't bar one from possessing an unloaded and locked shotgun, D.C. CODE § 7-2507.02, so that it's available (with some effort) when needed for self-defense, see *Horton v. United States*, 541 A.2d 604, 608

when the person can show some higher level of self-defense need than usual.⁶⁸ Yet there are exceptions: One jurisdiction (D.C.) generally bars people from possessing any loaded firearms.⁶⁹ A dozen states bar most people from carrying concealed loaded firearms in public places.⁷⁰ Felons, drug addicts, the insane, and children are generally barred from possessing guns altogether.⁷¹ And of course many people would restrict guns still further.

Yet even these laws do not cast doubt on the existence of lethal self-defense rights. Rather, they fit well with the lethal self-defense right I describe—a right that (a) is generally accepted, (b) presumptively may not be substantially burdened, but (c) may be substantially burdened when the danger to others' lives is seen as being so grave as to overcome the right's value in protecting lives. When gun laws do substantially burden people's ability to use lethal self-defense, the reason given is generally that guns harm innocents,⁷² only serious restriction on guns can prevent this harm, and gun bans are therefore necessary to protect innocent lives.⁷³

One can thus support gun bans and yet oppose restrictions on self-defense that is far less deadly to third parties, such as lifesaving medical procedures. It's much harder to justify the opposite position, at which our legal system has arrived: the position that people should be free to own a gun for lethal self-defense, but not free to engage in medical self-defense.

C. Lethal Self-Defense, Medical Self-Defense, and Imminence

Lethal self-defense is generally allowed only in response to imminent threats of harm, usually measured in minutes; medical self-defense

n.5 (D.C. 1988). Thirty-eight states let law-abiding adults carry guns for self-defense in most places outside the home either without a license or with a license that the police are generally required to issue. See Nicholas Johnson, *A Second Amendment Moment*, 71 BROOKLYN L. REV. 715, 753-54 & nn.217-252 (2005) (collecting statutes).

⁶⁸ Even when someone is generally barred from possessing or carrying firearms, self-defense against an imminent threat is usually a valid defense. See, e.g., 18 PA. CONS. STAT. ANN. § 6107(1); TENN. CODE ANN. § 39-17-1322; *United States v. Panter*, 688 F.2d 268 (5th Cir. 1982). In some states that don't automatically allow law-abiding adults firearms carry licenses, even nonimminent danger—when it's well above what the average person faces—is a factor in favor of granting the license, or of rendering the license requirement inapplicable. See, e.g., Orange County (Calif.) Sheriff's Department, Requirements [for Concealed Carry Permits], <http://www.ocsd.org/CCWPermit/Requirements.asp>. In other states, concealed weapons restrictions are waived for people who show sufficient threat from an identifiable potential attacker. See, e.g., CAL. PENAL CODE § 12025.5; OHIO REV. CODE § 2923.1213.

⁶⁹ See D.C. CODE § 7-2507.02.

⁷⁰ See *infra* note 68.

⁷¹ See, e.g., 18 U.S.C. §§ 922(g)(1), (3), (4), (9).

⁷² This harm is undeniable, though I generally think that most serious gun controls would on balance cause more harm than they avoid. See generally KLECK, *supra* note 66.

⁷³ See, e.g., JOSH SUGARMANN, EVERY HANDGUN IS AIMED AT YOU: THE CASE FOR BANNING HANDGUNS 55-70, 177-201 (2002).

would often be used to prevent a death that's likely in months. But for medical self-defense, it makes sense to treat imminence as simply requiring a present medical condition that seriously threatens life in the relatively near future—that is to say, as an application of a necessity requirement⁷⁴—not as requiring that death be likely within the hour.

The imminence requirement in lethal self-defense is aimed at serving several functions. First, imminence is a rough proxy for necessity of lethal response: Lack of imminence is correlated with the presence of alternatives (escape, calling the police, and the like) and the possibility that the threatener's anger will cool. Second, the imminence requirement diminishes erroneous claims of necessity, since judgments about long-term threats tend to be less accurate than judgments about short-term threats.⁷⁵ Third, the risk of false claims of self-defense would be especially high if "he had told me some time before that he wanted to kill me" were justification enough for killing. Fourth, insisting on tools that help show necessity and help weed out false claims is especially important because unnecessary self-defense causes unnecessary death.

For medical self-defense, all these functions would best be served by seeing imminence as simply requiring a present medical threat. The best proxies for necessity are the present medical threat (your kidneys are actually sick) and the lack of a satisfactory permitted therapy. You can't flee kidney disease that can be cured only through a transplant, or call the police to protect you. Present medical threats of future harm are generally more reliably diagnosable than human threats. There is little risk of insincere claims of danger, especially since the diagnosis is made by an objective medical expert. And even if an error happens, it will endanger others far less than erroneous lethal self-defense would.

These reasons help explain why the law doesn't distinguish a woman who gets a post-viability abortion to protect her life against immediate danger (her pregnancy was threatening likely immediate death) from a woman who gets a post-viability abortion to protect her life against real but not immediate danger (her pregnancy was threatening likely death in a month). So long as the dangerous medical condition currently exists, the woman may defend herself against the risk right away, especially since waiting may increase the danger. The same should apply to other forms of medical self-defense.

IV. MEDICAL SELF-DEFENSE AND A RIGHT OF THE TERMINALLY ILL TO USE EXPERIMENTAL MEDICAL TREATMENTS

Let us turn to Ellen, who is terminally ill. Existing therapies, doctors say, are useless. An experimental drug offers some hope, and FDA Phase I tests suggest that it's safe; but it is banned by federal drug law,

⁷⁴ *Cf.*, e.g., 2 ROBINSON, *supra* note 32, § 131(b)(3) (so describing the proper function of imminence); WAYNE R. LAFAVE, CRIMINAL LAW 495 (3d ed. 2000) (likewise).

⁷⁵ *See*, e.g., LAFAVE, *supra* note 74, at 495.

because it has not yet been shown effective.

As *Abigail Alliance* suggests, Ellen's right to medical self-defense should exempt her—and the doctors and pharmaceutical companies whose assistance she needs—from the ban. Alice may kill her viable fetus to protect her life, and may enlist her doctor's help to do so. Katherine may kill her attackers, whether guilty humans, morally innocent (for instance, insane or mistaken) humans, or morally innocent animals. Ellen should have at least an equal right to ingest potentially life-saving medicines, without threatening anyone else's life.

This is not a general autonomy argument, premised on the theory that all people should be free to ingest whatever they choose into their body.⁷⁶ Rather, it's an argument specifically focused on the right to self-defense, a right supported both by the Court's caselaw (*Roe* and *Casey*) and by the longstanding acceptance of the right to lethal self-defense.⁷⁷

What justification can the government have for limiting Ellen's rights? Ellen's use of experimental drugs might jeopardize what little time she has, and cost her money that may prove wasted.⁷⁸ Yet if people may protect their lives even by taking a viable fetus's life or an attacker's life, they should be as free to risk their own short remaining spans in trying to lengthen those spans.⁷⁹ Paternalistic government in-

⁷⁶ Cf. *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir. 1980) (rejecting a claimed right to use laetrile as a nutritional supplement to prevent cancer, a claim that focuses on medical autonomy rather than self-defense against a present deadly disease).

⁷⁷ This helps show, I think, why the *Abigail Alliance* dissent, 445 F.3d at 494-95 (Griffith, J., dissenting), erred in pointing to the longstanding regulation of pharmaceuticals as evidence that the right to medical self-defense can't be constitutionally recognized under the *Glucksberg* tradition test. See *supra* note 39 and accompanying text (briefly discussing *Glucksberg*). True, pharmaceuticals have long been subject to regulation. But so has abortion, and so has the use of lethal force. The right to self-defense has coexisted with such regulations, precisely because it has been a narrow exception from them. We can have a tradition of self-defense (medical or lethal) in cases where it's needed to protect the rightsholder's life, while still having a tradition of regulation in other cases.

⁷⁸ Government Brief in *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 445 F.3d 470, 2005 WL 1900323, *45 (D.C. Cir. 2006) (No. 04-5350).

⁷⁹ Compare cases such as *In re Guardianship of Browning*, 568 So.2d 4, 14 (Fla. 1990), which conclude that where a patient has an incurable disease, the state's interest in preserving his life isn't compelling enough to trump the patient's right to refuse treatment (a right protected by *Cruzan v. Director*, 497 U.S. 261, 278 (1990)). If the state may not use the interest in preserving life to trump the patient's right to end his life through refusing treatment, it should be even less able to use the interest in preserving life to trump the patient's right to try to prolong his life through experimental treatment.

The interest in protecting the patient's life may have more force if Ellen wanted to use experimental drugs to avoid (or cure) serious but nonfatal injury—blindness, paralysis, and the like. The abortion-as-self-defense right and the lethal self-defense right both apply even when the rightsholder is trying to protect herself from serious bodily injury, not just from death; the medical self-defense right may presumptively apply in such situations, too. But in such non-life-threatening situations, the government can credibly claim that its interest in saving the patient's life—notwithstanding her willingness to risk her life to prevent or cure something that's harming her quality of life—trumps the patient's medical self-defense rights. When Ellen is terminally ill, the government's interest in protecting her life against her attempts to lengthen the life is at its weakest.

terests suffice where no constitutional rights are involved, but they shouldn't justify blocking a person's right to protect her own life.⁸⁰

Terminally ill patients' right to use experimental drugs might also interfere with randomized clinical drug studies.⁸¹ It's possible that so many patients will insist on getting a not fully tested but promising drug that researchers will be unable to scientifically test the drug's effectiveness. If people can just buy the drug, they may not want to enroll in a study in which they might get a placebo instead of the drug.

Yet even if the need-to-test argument justifies some limits on the use of experimental drugs even by the terminally ill,⁸² it doesn't mean that people lack medical self-defense rights—it merely means that these rights may sometimes be trumped by a strong enough justification. Moreover, the argument justifies limiting medical self-defense only when such limits are really necessary for conducting clinical studies, and when no other alternatives will do. For instance, if the studies require 200 patients, and there are 10,000 who seek the experimental therapy, there's little reason to constrain the self-defense rights of all 10,000. Likewise, if the drug is being studied now only on people who suffer from a particular kind or stage of a disease, the drug shouldn't be legally barred to those who would fall outside those studies in any event. If we must strip people of self-defense rights to save many others' lives in the future, this tragic constraint should be imposed on as few people as possible and to as small an extent as possible.

There is one difference between Alice and Ellen: Ellen's experimental therapy is much less likely to be successful than Alice's therapeutic abortion would be. Yet there's no reason why self-defense rights should be limited to sure self-defense. Lethal self-defense is allowed even though it is often not completely reliable—even if Katherine tries to use lethal force, she may be overcome by the home invader. Similarly, imagine a woman who is sure to die without an abortion, but who may still die even with one. Her abortion-as-self-defense right should remain even if the therapeutic abortion will increase the chance of survival only

⁸⁰ This should be especially clear when the drugs have passed Phase I safety trials, as in *Abigail Alliance*, but I think this is so even if the drugs haven't been tested for safety. Surgeons, for instance, are rightly allowed to perform risky experimental surgeries when the alternative is likely death: The FDA doesn't purport to regulate medical procedures, and the main regulatory regimes that do apply to procedures—medical malpractice law and state regulatory systems—impose a reasonable care standard, under which even risky actions are quite legitimate when necessary to avoid nearly certain death. The same, I think, ought to apply to pharmaceuticals.

⁸¹ See, e.g., Government Brief, *supra* note 78 at 35; Ezekiel J. Emanuel, *Drug Addiction*, NEW REPUB., July 3, 2006, at 9.

⁸² See, e.g., Emanuel, *supra* note 81. I'm not sure that it does—we would balk at a law forcing people to go into clinical trials, and a law that forces people to go into clinical trials if they want access to the only possibly lifesaving drugs seems to me to be no different. But for purposes of this discussion, I'll assume that maintaining the efficacy of clinical trials is a strong enough interest to justify interfering with patients' rights.

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by a fairly small (or uncertain) amount.⁸³

The D.C. Circuit's decision in *Abigail Alliance* rested in part on the traditionally recognized right to defend one's own life; yet it didn't cite the close analogy to abortion-as-self-defense, or discuss the state constitutional protections for the right to self-defense. These analogies, I think, substantially add to the case the *Abigail Alliance* panel made.

Finally, some might respond that courts generally shouldn't recognize unenumerated constitutional rights. The right to abortion—even abortion-as-self-defense—ought not have been constitutionalized, they would argue, and ought not be broadened by analogy. Lethal self-defense should be seen as a legislatively trumpable common-law or statutory right, not a constitutional right. Let's be judicially minimalist on unenumerated rights, and leave matters to the democratic process.

This is a plausible argument, but not one the Supreme Court has adopted. The Court has continued to endorse abortion rights and family rights.⁸⁴ It has recognized rights to sexual autonomy and to refuse unwanted medical treatment.⁸⁵ There's little profit in reprising the whole unenumerated rights/Ninth Amendment/substantive due process debate here. My point is simply that the Court's process for recognizing unenumerated rights by analogy remains active, even for new rights that depart quite substantially from American legal tradition. There is therefore an especially strong case for using this process to recognize a right to medical self-defense, which I argue is closely analogous to the two traditionally well-entrenched rights of abortion-as-self-defense and lethal self-defense.

And regardless of whether medical self-defense should be recognized as a constitutional right, the arguments given above should offer a strong moral case for the legislature's respecting such a right. American legal traditions properly recognize people's rights to protect their lives, even when that requires killing. The law ought to do the same when a dying person simply seeks an opportunity to risk slightly shortening her life in order to have the chance of substantially lengthening it.

⁸³ At most, some people might reach a different result if the fetus is likely to survive the woman's death: As between a 100% chance of maternal survival and fetal death and a 100% chance of maternal death and fetal survival, they would choose allowing the woman to abort; but as between a 10% chance of maternal survival coupled with sure fetal death and a 100% chance of fetal survival coupled with sure maternal death, they would choose protecting the fetus. Yet even they would justify this conclusion by saying the woman's right to self-defense is trumped by the need to protect a viable fetus's life—not by claiming that the woman's right vanishes because her defensive tactics aren't certain to succeed.

⁸⁴ *Casey v. Planned Parenthood*, 505 U.S. 833, 877 (1992); *Troxel v. Granville*, 530 U.S. 57 (2000).

⁸⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003); *Cruzan v. Director*, 497 U.S. 261, 278 (1990) (describing the right to refuse unwanted treatment as a "liberty interest," which the Court noted may indeed constrain government action, and that was thus tantamount to a presumptive constitutional right); see also *Washington v. Glucksberg*, 521 U.S. 702 (1997) (treating *Cruzan* as "assum[ing], and strongly suggest[ing], that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment").

V. MEDICAL SELF-DEFENSE AND BANS ON PAYMENT FOR ORGANS

A. *The Problem*

To live, Olivia needs a kidney transplant. Though kidney dialysis is keeping her alive for now, each year on dialysis she faces a 6% risk of death:⁸⁶ If Olivia is in her twenties, her expected lifespan on dialysis is 30 years less than her expected lifespan with a transplant.⁸⁷

But Olivia is one of the 67,000 people on the American kidney transplant waiting lists. (Twenty five thousand more wait for other organs.⁸⁸) The median wait for adult recipients added to the list in 2001-02 was over four years.⁸⁹ Each year, only 6500 living Americans donate kidneys,⁹⁰ and only 45% of the 26,000 usable cadaveric kidneys—kidneys gathered from the bodies of people who die from accidents or other causes that leave their organs young and healthy—are donated.⁹¹

Nor should this shortage be surprising: Since 1984, “receiv[ing] or . . . transfer[ing] any human organ for valuable consideration for use in human transplantation” has been a federal felony.⁹² Price controls diminish supply. Setting the price at zero diminishes it dramatically.⁹³

⁸⁶ See Robert A. Wolfe et al., *Comparison of Mortality in All Patients on Dialysis, Patients on Dialysis Awaiting Transplantation, and Recipients of a First Cadaveric Transplant*, 341 NEW ENG. J. MED. 1725, 1725 (1999).

⁸⁷ E.g., Akinlolu O. Ojo, *Survival in Recipients of Marginal Cadaveric Donor Kidneys Compared with Other Recipients and Wait-Listed Transplant Candidates*, 12 J. AM. SOC. NEPHROL. 589, 589 (2001). Immediate transplantation, without long-term dialysis, also seems to lead to better transplant survival than does transplantation after dialysis. See Kevin C. Mange et al., *Effect of the Use or Nonuse of Long-Term Dialysis on the Subsequent Survival of Renal Transplants from Living Donors*, 344 N. ENG. J. MED. 726 (2001).

⁸⁸ Organ Procur. & Transp. Net., <http://www.optn.org/latestData/step2.asp> (category Waiting List, count Candidates, report Overall by Organ). The data does not include people waiting for bone marrow transplants or skin transplants.

⁸⁹ *Id.* (category Median Waiting Time, organ Kidney, report Waiting Time by Age).

⁹⁰ *Id.* (category Donor, organ Kidney, report Living Donors By Donor Age).

⁹¹ About 13,000 eligible sets of cadaveric organs become available in the U.S. each year, and only about 6000 are donated each year. See Ellen Sheehy et al., *Estimating the Number of Potential Organ Donors in the United States*, 349 NEW ENG. J. MED. 667, 669 (2003). Up to 7000 extra sets of organs, which would include up to 14,000 kidneys, might thus become available each year, depending on how many people will be motivated by the payment to provide their own organs (posthumously) or to provide their relatives' organs.

⁹² National Organ Transfer Act, 42 U.S.C. § 274e(a) (2006). The statute applies only “if the transfer affects interstate commerce,” but under modern law such provisions are interpreted very broadly, and would likely cover any sale of an organ. A minority of states have also adopted the Uniform Anatomical Gift Act of 1987, which bars sales of cadaveric organs for transplant. UNIFORM ANATOMICAL GIFT ACT § 10(a) (1987).

⁹³ Some have argued that allowing organ sales wouldn't substantially improve transplant patients' prospects, because it would decrease the quality of organs available for transplant by attracting providers—such as intravenous drug users—who are both especially in need of money and especially likely to have certain diseases. See, e.g., NUFFIELD COUNCIL ON BIOETHICS, HUMAN TISSUE: ETHICAL AND LEGAL ISSUES 51 (1995). Yet this concern can be easily dealt with without a sales ban. See Peters, *infra* note 103, at 1303. Diseases can generally be screened for, which wasn't true decades ago, when a similar concern drove blood banks to avoid paid providers. See Ronald E. Domen, *Paid-Versus-*

Lack of compensation naturally makes living donors less likely to incur the pain, modest risk, lost time, and lost wages that accompany organ extraction.⁹⁴ The relatives of the recently dead have less to lose tangibly from authorizing extraction of the decedent's organs; but even they may be put off by what strikes many as a macabre idea, may refuse consent if they're not positive what the decedent wanted,⁹⁵ or may not want to discuss the matter in their time of grief.⁹⁶ The prospect of (say) \$100,000⁹⁷ for their children's college education may lead them to overcome these barriers.⁹⁸

Some people do donate organs. Though living donations are almost always for relatives, friends, or other known recipients, a few living do-

Volunteer Blood Donation in the United States: A Historical Review, IX TRANSFUSION MED. REVS. no. 1, Jan. 1995, at 53. And they would in any case have to be screened for, since even charitable donors' organs may be diseased. Blood banks, including German blood banks that routinely buy blood, operate well with screening. See, e.g., *Paid Vs. Unpaid Donors*, 90 VOX SANGUINIS 63, 66 (2006). Sperm banks and fertility clinics buy and test sperm and ova; the same approach should work for organs, too. And if compensation generates more organs, doctors can *improve* average organ quality by being more selective about the organs they use, and by setting aside organs that are not diseased but also not optimal for transplanting. See Barnett et al., *infra* note 137, at 215.

⁹⁴ See LLOYD R. COHEN, INCREASING THE SUPPLY OF TRANSPLANT ORGANS: THE VIRTUES OF AN OPTIONS MARKET 25-29 (1995).

⁹⁵ See, e.g., Laura A. Siminoff et al., *Factors Influencing Families' Consent for Donation of Solid Organs for Transplantation*, 286 JAMA 71, 74 (2001) (noting that families were significantly more likely to approve a transplant if they "had enough information regarding [the decedent's] donation wishes").

⁹⁶ Similarly, people who don't sign a donor card may be turned off for emotional reasons, though far less intense ones. See, e.g., Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL'Y & L. 57, 67 (1989); COHEN, *supra* note 94, at 25-26. The prospect of essentially getting a free modest life insurance policy for one's relatives may be enough to help overcome such emotional objections. *Id.*

⁹⁷ I draw the \$100,000 from Crespi, *supra* note 36, at 44, which reasons that \$30,000 would be a plausible price for each major organ; I then assume that some but not all the potentially transplantable organs will indeed be used and paid for. Professor Crespi was calculating the price needed to sustain a futures market, in which people are paid a modest sum (\$200) during their lives for the right to extract their organs at death, and I speak instead mostly of payment at time of death; but my sense is that Professor Crespi's arguments make \$30,000 a plausible rough estimate for the price of an organ in either case.

Many people, of course, wouldn't sell a kidney during their lives, even if you offered them \$100,000. But that's not a problem for an organ market; even if only 0.01% of adult Americans are willing to sell an organ each year, that would still bring an extra 25,000 organs into the system every year—likely enough to clear out the waiting list, when added to the increased number of available cadaveric organs.

⁹⁸ Compare, in a somewhat different though related context, the painful and potentially emotionally difficult process of egg donation. In England, where the compensation is capped at £250, there is a years-long waiting list; in Australia, where payment for eggs is banned, there is a five-year-long list; in America, where women routinely get \$5000 to \$15,000 for such eggs, the eggs are generally available. Human Fertilisation & Embryology Auth., *FAQs for Donors*, <http://www.hfea.gov.uk/cps/rde/xchg/SID-3F57D79B-696D45B3/hfea/hs.xsl/1205.html>; David Derbyshire, *I Went to a Spanish Clinic and Was Pregnant Within Months*, DAILY TELEGRAPH, July 3, 2004, at 9 (reporting two-year English waiting list); Nic Fleming, *Payment of Pounds 1,000 To Ease Egg Donor Shortage*, DAILY TELEGRAPH, Nov. 12, 2004, at 1 (reporting waiting lists of up to five years in England); Nick Papps, *Aussies Couples Buying Babies Made To Order*, Sept. 5, 2004, at 2.

nors (1.5% of the total⁹⁹) and many next-of-kin of the recently dead donate to anonymous strangers.

Yet kindness to strangers is generally not as strong a motivation as the desire for financial reward, or a combined desire to help strangers and at the same time put money aside for your children's education.¹⁰⁰ We pay hospitals and surgeons well for their parts in the transplant. If we didn't, there'd likely not be nearly enough transplant services provided, though many hospitals are charitable institutions and many doctors routinely donate their time to free medical care.¹⁰¹ Why should we expect organ suppliers to provide enough organs based solely on charity to strangers?¹⁰² We'd likely get far better results if we offered organ providers compensation—or, more precisely, offered them the choice of keeping the compensation, forgoing it, donating it to a familiar cause of their choice (for instance, their church) rather than to a total stranger, or spending it on their children.¹⁰³

⁹⁹ See Organ Procur. & Transp. Net., <http://www.optn.org/latestData/step2.asp> (category Transplant, organ All, report Living Donor Transplants by Donor Relation) (2005 data). The remaining 98.5% are donations to relatives, targeted donations (presumably mostly to acquaintances), or "paired exchange" donations, in which the recipient's relative or acquaintance provides an organ in exchange to the donor's relative or acquaintance.

¹⁰⁰ The concern about the children's education may be especially strong if the organ provision is made possible by the death of a parent who was the children's main source of support, and the spouse is now facing raising the children alone.

¹⁰¹ See Peter J. Cunningham & Jessica H. May, *A Growing Hole in the Safety Net: Physician Charity Care Declines Again*, Center for Studying Health System Change, Tracking Report No. 13, Mar. 2006, <http://www.hschange.org/CONTENT/826/> (estimating that American doctors in full-time nonfederal practice—excluding residents and fellows—spend over 6% of their practice time on charity care).

¹⁰² Even relatives of the recently dead often decline to donate their decedents' organs, see *supra* note 91, presumably because when one gets no benefit other than the satisfaction of charity towards strangers, even a small emotional cost (stemming from the perceived macabreness or insensitivity of the donation request) can lead people to say no. Cf. Thomas G. Peters, *Life or Death: The Issue of Payment in Cadaveric Organ Donation*, 265 JAMA 1302, 1303 (1991) (arguing against imposing the pro-altruism-to-strangers views of doctors who "are educated, well paid, and generally able to manage circumstances to the benefit of [them]selves and others"—and who are "mak[ing] money [them]selves" from the transplant operation—on next-of-kin who don't share such values).

¹⁰³ The availability of these options should satisfy the concern that offering money for organs might alienate donors who would have given the organs for free, and might therefore decrease (or not increase) the aggregate organ supply. See, e.g., Murray, *infra* note 144, at 118 (hypothesizing that some people will find an organ market immoral or disgusting, and thus refuse to provide organs even if offered the opportunity to decline the compensation that they find repugnant). Given that nearly all living donations are motivated largely by the desire to help a particular known person, it seems unlikely that many living donors will be turned off by the offer of payment; nor does it seem likely that a next-of-kin who would donate the decedent's organs under a pure donation system would instead refuse when offered money. But even if some people are upset by the shift from a purely altruistic system to one where compensation is possible, they should be considerably mollified by the charitable options that they're offered. Plus, of course, many organ providers—like transplant surgeons—might feel good about their actions even if they're compensated, just as even genuinely altruistic transplant surgeons can feel good about saving a patient's life even if they're paid for it. See COHEN, *supra* note 94, at 74-75,

Olivia is little different from Alice. To defend their lives, both need medical assistance. If the government may not substantially restrict Alice's getting this assistance, even in the service of protecting the life of a viable fetus, it shouldn't be allowed to substantially restrict Olivia's ability to get such assistance—at least absent evidence that Olivia's actions would cause grave harm that can't be averted any other way.

B. *Limits on Sales as Substantial Burdens*

So though the organ sales ban isn't a total transplant ban, it is a substantial obstacle¹⁰⁴ to people's medical self-defense. It substantially reduces the number of available organs, and substantially increases the chance that the recipient will die before she can get a transplant.

Where most other constitutional rights are concerned, bans on using money (either from your bank account or from an insurance policy that you've bought) to help exercise a right are obviously substantial burdens on the right. Say a legislature let people privately educate their children, engage lawyers in their criminal cases,¹⁰⁵ or get abortions—but only if these services were provided free.¹⁰⁶ Of course this payment ban would constitute a substantial burden on the underlying constitutional right: It would dramatically reduce the number of private schools, criminal defense lawyers, and abortion providers, and some people would thus be unable to exercise the right. Restrictions on paying money to speak have likewise been repeatedly struck down, because they burden speakers' ability to effectively convey their message.¹⁰⁷ And

¹⁰⁴ Cf. *Casey v. Planned Parenthood*, 505 U.S. 833, 877 (1992) (concluding that to be a presumptively unconstitutional undue burden on abortion rights, a law must set up a "substantial obstacle" to exercise those rights).

¹⁰⁵ See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-25 (1989) (noting that "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire," though upholding pretrial forfeiture of allegedly ill-gotten funds, including funds that the defendant wanted to use to pay his lawyer, because "A defendant has no Sixth Amendment right to spend another person's money" and the forfeited funds are treated as not being rightfully defendant's). *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985), upheld a \$10 limit on what a veteran may pay a lawyer who represents the veteran in Veterans Administration proceedings, but only because there's no constitutional right to counsel in such proceedings in the first place, *id.* at 323-24, 332, 334-35.

¹⁰⁶ Perhaps the rationale would be that paying money for education or lawyering fosters inequality, or that it is immoral or socially corrosive for people to earn money from the killing of fetuses, or for an industry to arise that is devoted to such killing. Cf. *Abortion Veto*, NEWSHOUR WITH JIM LEHRER, Apr. 11, 1996 (quoting Rep. Chris Smith condemning "the abortion industry, a multimillion dollar industry that is making its money by killing babies [through late-term abortions]").

¹⁰⁷ *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) (holding publishers may not be barred from paying money to authors); *Meyer v. Grant*, 486 U.S. 414 (1988) (holding ballot measure campaigns may not be barred from paying money to signature gatherers); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (holding speakers may not be barred from spending money for speech); *Buckley v. Valeo*, 424 U.S. 1 (1976) (same); *NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959) (holding people have right to contribute money to ideological causes).

if a ban on paying for one scarce input into the exercise of a constitutional right (teachers', lawyers', doctors', or authors' time, or space for a political ad in a newspaper) substantially burdens the right, then a ban on another scarce input (providers' organs) does as well.

A few such restrictions on paying money to exercise a right may be constitutional because there are very strong government interests justifying them. That was the Court's reason for upholding some modest restraints on spending money related to candidate elections.¹⁰⁸

A few other restrictions may be constitutional when the right is aimed at promoting goals that are served only by noncommercial exercise of the right: Consider the Compulsory Process Clause right to subpoena witnesses, the Due Process Clause right to call willing witnesses in criminal cases,¹⁰⁹ and the *Lawrence v. Texas* sexual autonomy right.¹¹⁰ I assume the law could ban paying witnesses or paying for sex on the grounds that such conduct tends not to advance the constitutional purpose of the rights—procuring accurate testimony and helping develop emotional relationships.¹¹¹ Paid-for testimony and paid-for sex aren't constitutionally valuable in the way that the unpaid conduct is.

But paid-for books, educations, legal counsel, abortions, and organs are constitutionally valuable, because they do serve the purposes of the underlying rights¹¹²—and more reliably than if these goods or services could only be provided for free. “It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.”¹¹³ Relying solely on the benevolence of lawyers, doctors, teachers, or organ providers likewise offers little protection for our rights. So long as a ban on compensating organ providers keeps many patients from getting the organs they need to live, it constitutes a substantial burden on the right to medical self-defense.¹¹⁴

¹⁰⁸ *Buckley*, 424 U.S. at 28-29; *Austin v. Mich. Chamber of Comm.*, 494 U.S. 652, 659-60 (1990).

¹⁰⁹ *Washington v. Texas*, 388 U.S. 14 (1967).

¹¹⁰ *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (suggesting that the sexual autonomy right wouldn't cover prostitution); *State v. Freitag*, 130 P.3d 544, 546 (Ariz. Ct. App. 2006) (so holding); *Lawrence*, 539 U.S. at 566 (suggesting that the justification for the sexual autonomy right is the link between sex and emotional relationships); Carolyn J. Frantz, *Should the Rules of Marital Property Be Normative?*, 2004 U. CHI. LEG. F. 265, 287 (so arguing). *Lawrence* does protect purely casual noncommercial sex, but I think it does so because the law can't distinguish such sex from emotionally significant sex.

¹¹¹ If I'm mistaken on this, then presumably the reason for upholding the bans on payment would be that there's a very strong government interest justifying the ban.

¹¹² While charitable donation of organs (or educational services or abortion services) may give donors and recipients extra gratification, this is peripheral to the constitutional value that the right to medical self-defense (or private education or abortion) protects.

¹¹³ ADAM SMITH, *THE WEALTH OF NATIONS* 18 (Edwin Cannan ed., 1976) (1776).

¹¹⁴ The right is thus not a “right to pay for organs” for its own sake, just as the right to get an abortion-as-self-defense is not a “right to a postviability abortion using dilation and extraction.” Rather, the right is a right to protect your own life; bans on organ sales are presumptively unconstitutional only because they substantially burden that right.

C. Pragmatic Reasons for Restricting the Right, and Less Restrictive Alternatives to a Total Ban on Compensation for Organs

The self-defense right, like other rights, isn't absolute. Modest regulations (informed consent requirements, waiting periods, and the like) that don't substantially interfere with the right should be permissible. The right may well be limited to situations where self-defense is necessary to avoid threat of death, or perhaps of very serious injury. The right is inherently limited to cases where it doesn't directly infringe the rights of others who are not threatening the person's life.¹¹⁵

Moreover, the self-defense right may be limitable in other ways, if the harm from allowing it is too great; in the lethal self-defense context, for instance, this is the foundation for many pro-gun-control arguments.¹¹⁶ Likewise, the D.C. Circuit in *Abigail Alliance* remanded the case for the district court to hear arguments about whether the FDA rules were narrowly tailored to some compelling government interest.¹¹⁷

Yet, as the abortion-as-self-defense and lethal self-defense examples show, self-defense ought only be limitable for the most pressing reasons. Protecting a viable fetus isn't enough. Protecting the life of an animal isn't enough. Protecting the life of an attacker, even one who's not morally culpable (for instance, because he's insane) isn't enough. These reasons can't justify denying people the right to protect their own lives. And even if there is a strong enough reason for restricting self-defense rights, the restriction ought to be narrowly limited so as to minimize the burden on the rights.¹¹⁸

1. *Preventing organ robbery.* — The risk of organ robbery, for instance, cannot justify the ban on compensation for organs. Consider by analogy the risk that some will mask murder by falsely pleading self-defense. That risk might justify rules requiring that defendants prove self-defense by a preponderance of the evidence, though such rules burden people's legitimate self-defense rights by raising the probability that legitimate defenders will be erroneously convicted.¹¹⁹ But the risk doesn't justify flatly rejecting self-defense, even though such a rejection may more efficiently deter and punish murders; courts must still resolve self-defense claims case by case. Some sacrifice of the interest in preventing murder of people who are falsely said to be attackers must yield

¹¹⁵ See *supra* text accompanying note 61.

¹¹⁶ I'm skeptical of these arguments on empirical grounds, and I think it should take a great deal of harm to justify interfering with people's right to defend themselves, but I agree that in principle the right to possess the tools for lethal self-defense may be limitable. To give an example, violent felons may need to defend themselves at least as much as nonfelons; yet restrictions on violent felons' gun ownership are constitutional and morally permissible. See, e.g., *People v. Blue*, 544 P.2d 385 (Colo. 1975).

¹¹⁷ *Abigail Alliance*, 445 F.3d at 486.

¹¹⁸ Cf., e.g., *Rutan v. Republican Party*, 497 U.S. 62, 74 (1990) (holding that where the constitutional right to free speech is involved, restrictions must be as narrow as possible).

¹¹⁹ The Court so held in *Martin v. Ohio*, 480 U.S. 228 (1987), though without considering whether there's a substantive constitutional right to self-defense.

to the constitutional and moral interest in preventing murder (or rape or serious injury) of people who are truly being attacked.

The same preference for case-by-case identification of abuse rather than blanket prohibition of a form of self-defense should apply to the similar argument that paying for organs will prompt murder of people for their organs.¹²⁰ There's no need to flatly ban compensation, when regulation of organ transfer could do a very good job, for instance if the law required that (1) all organs be extracted by a well-established hospital, (2) a living organ provider, or the relatives of a deceased provider, approve the provision by signing a document in front of some official, (3) the provider's blood sample be taken and securely stored so the organs' DNA can be matched against the provider's, and (4) all organ transfers be tracked, and done among well-established institutions.¹²¹ And if some rare transplant-related murders still happen despite this,¹²² that isn't reason enough to maintain a system under which 8000 people die each year waiting for organs.¹²³

2. *Preventing rich patients from buying up all available organs.* — Likewise, consider the concern that allowing payment for organs would let rich patients buy up all available organs, and leave poorer patients

¹²⁰ See Dougherty, *infra* note 143, at 53; NUFFIELD COUNCIL ON BIOETHICS, *supra* note 93, at 51; see also <http://www.snopes.com/horrors/robbery/kidney.asp> (discussing and debunking the urban myth about someone waking to find that his kidneys had been stolen, though noting that at least one nonforcible kidney theft scam had been identified, see *India Holds 10 in Plot to Steal Kidneys*, N.Y. TIMES, May 12, 1998, at A8).

¹²¹ See, e.g., Crespi, *supra* note 36, at 47 (describing a similar proposal). The law might also bar importation of organs from countries where these rules aren't followed. See, e.g., *id.* at 44. Allowing a regulated organ market may also dry up the international black market in organs, which exists largely because dying people can't buy organs legally. See, e.g., Brian Handwerk, *Organ Shortage Fuels Illicit Trade in Human Parts*, NAT'L GEOG. ULTIMATE EXPLORER, Jan. 16, 2004, http://news.nationalgeographic.com/news/2004/01/0116_040116_EXPLorgantraffic.html; Peters, *supra* note 103, at 1303.

¹²² Heirs, for instance, might still kill a spouse, parent, or child to sell off the organs. But this is just a rare cousin of the existing temptation to kill a relative to collect insurance or inherit property. See Kenneth Faig, *The Murder of the Insured by the Beneficiary: Attempting to Quantify One Moral Hazard Relating to Life Insurance Contracts*, 21 J. INS. REG. no. 3, at 3 (Spring 2003); AM. COUNCIL OF LIFE INSURERS, LIFE INSURERS FACT BOOK 2005, at 84 (noting that the average American life insurance policyholder has about \$150,000 in coverage); U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, at 476 (2001 data) (noting that the median net worth of American families in which the family head is 45 or older is over \$150,000). Yet we don't ban life insurance or inheritance, but rely instead on the criminal law to deter the murder (and expect the deterrence to work quite well, because the greedy relatives know they'll be among the first suspects). Even a risk of providing an incentive to murder isn't enough to justify interfering with families' economic well-being—and neither should it be enough to interfere with organ recipients' ability to protect their lives.

The risk that payment for organs will give some an incentive to commit suicide so as to leave money to their families, see Hansmann, *supra* note 96, at 65, is likewise just a rare analog of the incentive provided by life insurance. Many life insurance policies cover suicide, especially when the suicide is more than two years after the policy is bought. See ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW 482, 506 (1988).

¹²³ See *supra* note 86.

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without the chance of a transplant.¹²⁴ This result can similarly be avoided with regulation rather than prohibition.

Organ transplants are expensive. They are already available only to those who have health insurance, government-provided health care, or their own funds.¹²⁵ All people, rich or poor, who are up for transplants thus already have some health care funders paying for their care.

And long-term care used while transplants are unavailable is even more expensive than transplants; for kidneys, transplants cost on average about \$100,000 less than long-term dialysis.¹²⁶ Health care funders would save money by paying up to \$100,000 per kidney, again whether the patient is rich or poor. This means we can still maintain the current need-based system, but just have the health care funder for each person who's next in line pay for the person's new organ; the result will likely be savings for the funders, a greater pool of available organs, and no extra advantage for the rich.

Even if for some organ, transplants wouldn't save money, and the health care funder would have to pay \$30,000 per organ to compensate providers,¹²⁷ this would hardly be a huge burden to absorb. Each year, about 15,000 Americans are added to the nonkidney transplant waiting lists; even if that number doubles once organs becomes more available, that would still only constitute .012% of the 250 million Americans with health insurance.¹²⁸ If each organ cost \$30,000, and this price wasn't offset by any savings in alternative treatment costs, this would mean an increase in insurance costs of \$4 per year per insured.

The "rich outbidding others" concern only arises if (1) the rich or their insurers pay so much that other health care funders can't keep up, and (2) the other funders' payments don't suffice to make enough organs available for all patients. Even if we think this is likely—if we think the rich would pay \$200,000 per kidney, other health care funders wouldn't pay more than \$100,000, and this payment wouldn't yield enough organs for everyone—this only supports capping payments at the level that all funders would pay, likely the level at which they'll still be saving money by getting an organ instead of paying for long-term dialysis.

Of course, even the lesser burden created by a payment cap may still be substantial, if the capped payment yields fewer organs and thus leaves some extra people on the waiting list. And this burden may be

¹²⁴ See, e.g., Dougherty, *supra* note 143, at 53; Gorovitz, *infra* note 130, at 11; COHEN, *supra* note 94, at 56-64 (discussing and criticizing this argument).

¹²⁵ Hansmann, *supra* note 96, at 80.

¹²⁶ Arthur J. Matas & Mark Schnitzler, *Payment for Living Donor (Vendor) Kidneys: A Cost-Effectiveness Analysis*, 4 AM. J. TRANSPLANTATION 216, 218 (2003).

¹²⁷ See *supra* note 97 (explaining the source of the \$30,000 estimate).

¹²⁸ See Organ Procur. & Transp. Net., <http://www.optn.org/latestData/step2.asp> (category Waiting List Additions, organs All and Kidney, count Candidates, report Waiting List Additions by Age); U.S. Census Bureau, *Income Stable, Poverty Rate Increases, Percentage of Americans Without Health Insurance Unchanged*, Aug. 30, 2005, http://www.census.gov/Press-Release/www/releases/archives/income_wealth/005647.html.

improper if we conclude that preventing inequality isn't reason enough to interfere with medical self-defense. Where other matters—private schooling, hiring a criminal lawyer, most forms of free speech, hiring of guards, spending money on highest-quality medical care—are concerned, we generally don't have the government impose such payment caps, despite egalitarian concerns.¹²⁹

Part of the reason for this is a general respect for property rights, notwithstanding the inequality they necessarily cause, and the view that substantive rights (to educate one's children, speak, get an abortion, or hire a lawyer) include the right to spend money to exercise the right. And part is the fact that there'll be much less provision of valuable services, such as education, legal assistance, or medical care, if those services must be provided subject to a price cap.

Where organ transplants are concerned, this latter reason is especially strong: Equality achieved by leveling everyone down to the same low level of organ access often becomes the equality of the graveyard. Yet even if, despite this, the equality interest in keeping the rich from getting preferential access is strong enough to trump the medical self-defense right, this interest can justify only a cap on payments to organ providers, not the much more burdensome total ban on payments.

3. *Undue pressure to hurt one's health by selling organs.* — Some argue that allowing organ sales would unduly pressure poor providers to put their health and their lives at risk.¹³⁰ Yet the risk is modest. Giving a kidney carries a 0.03% risk of death or irreversible coma, a less than 2% risk of complications,¹³¹ and apparently no increase in susceptibility to kidney disease.¹³² Giving part of a liver (livers regenerate, so giving part is possible) has been associated with a 0.25% incidence of provider death, plus some risk of nonfatal complications.¹³³ Marrow do-

¹²⁹ See, e.g., Denise C. Morgan, *The Devil Is in the Details: Or, Why I Haven't Yet Learned To Stop Worrying and Love Vouchers*, 59 N.Y.U. ANN. SURV. AM. L. 477, 483 (2003) (noting that the constitutional right to send one's child to a private school helps "ensure that the children of relatively wealthy and powerful parents will have an educational leg up on everyone else"); 2 U.S.C. § 431(9)(B)(i) (exempting the institutional media from various campaign finance rules); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (rejecting equality arguments for limiting the ability of the rich to spend money on their speech); *Meyer v. Grant*, 486 U.S. 414, 426 n.7 (1988) (rejecting equality arguments for limiting the ability of a ballot measure campaign to pay money to signature gatherers).

¹³⁰ See, e.g., Samuel Gorovitz, *Against Selling Body Parts*, 4 REP. CENTER PHIL. & PUB. POL. 9, 10 (1984); COHEN, *supra* note 94, at 56-64 (criticizing this argument).

¹³¹ E.g., Arthur J. Matas et al., *Morbidity and Mortality After Living Kidney Donation, 1999-2001*, 3 AM. J. TRANSPLANTATION 830, 831 (2003).

¹³² See Mary D. Ellison et al., *Living Kidney Donors in Need of Kidney Transplants: A Report from Organ Procur. & Transp. Net.*, 74 TRANSPLANTATION 1349 (2002) (noting that the best current estimates of the risk of kidney donors' eventually developing end-stage renal disease "approximate[] the . . . adjusted incident rate for end-stage renal disease in the general U.S. population"); Margaret J. Bia et al., *Evaluation of Living Renal Donors*, 60 TRANSPLANTATION 322, 326 (1995) (same).

¹³³ See Charles Miller et al., *Fulminant and Fatal Gas Gangrene of the Stomach in a Healthy Live Liver Donor*, 10 LIVER TRANSPLANTATION 1315 (2004) (noting ten donor

nation is safe,¹³⁴ though temporarily painful. By way of comparison, working in fishing or logging for a year carries a 0.1% risk of death from occupational hazards; working as a truck driver or a delivery driver for a year carries a 0.03% risk of death.¹³⁵

Such risks may justify mandatory counseling, waiting periods, and requirements that part of the compensation include insurance against medical complications.¹³⁶ But they surely don't justify the current ban, which applies even to compensation for cadaveric organs.¹³⁷ And in my view they are too small to justify even a ban limited to organs provided by the living. If someone thinks the prospect of making tens of thousands of dollars is worth a small health risk, the government's interest in protecting him against being overtempted by the money shouldn't suffice to trump the medical self-defense right I've discussed.¹³⁸ If we don't ban fishing on the grounds that fishing work may tempt some poor people to risk their lives, it seems hard to see why protecting the poor from temptation should justify banning compensated organ provision.

Yet even if I'm wrong, recognizing that the organ sales ban limits patients' rights should invalidate such a serious burden on their rights if the law can prevent the harm through lighter burdens. For instance, the law might exclude living providers who we think are unduly tempted by a \$30,000 per-organ payment¹³⁹—say, the very poor (perhaps they're too desperate), young adults aged 18 to 24 (perhaps they're

deaths); Yasuhiko Sugawara & Masatoshi Makuuchi, *Safe Liver Harvesting from Living Donors*, 12 LIVER TRANSPLANTATION 902 (2005) (reporting that by 2005, 2734 live donor liver transplants had been performed in the U.S., and between 1990 and 2003, 1473 had been performed in Europe); Shin Hwang, *Lessons Learned from 1,000 Living Donor Liver Transplantations in a Single Center*, 12 LIVER TRANSPL. 920 (2006).

¹³⁴ M. M. Bortin & C. D. Buckner, *Major Complications of Marrow Harvesting for Transplantation*, 11 EXP. HEMATOL. 916 (1983).

¹³⁵ See U.S. Dept' of Labor, Bureau of Labor Statistics, *2005 Census of Fatal Occupational Injuries Charts, 1992-2005*, at 13, <http://www.bls.gov/iif/oshwc/foi/cfeh0004.pdf> (reporting that in 2005, this sector had a fatality rate of 0.03%). Note that while many of those jobs likely pay more than \$30,000 per year, the net profit from a dangerous year fishing is likely to be far less, since the fisherman would have to spend money on food, shelter, and other necessities. A \$30,000 payment for providing a kidney is likely to yield a far greater net profit, since the only associated costs are the housing and other expenses needed during the short convalescence.

¹³⁶ See *supra* note 96, at 74. These regulations may slightly increase the cost of organs, but likely not enough to substantially burden recipients' self-defense rights.

¹³⁷ Allowing compensation for cadaveric organs would actually help protect the health of living donors, because it would make living donations less necessary. See Andrew H. Barnett, Roger D. Blair & David L. Kaserman, *Improving Organ Donation: Compensation Versus Markets*, in THE ETHICS OF ORGAN TRANSPLANTS 208, 210 (Arthur L. Caplan & Daniel H. Coelho eds., 1999).

¹³⁸ See Russell Korobkin, *Buying and Selling Human Tissues for Stem Cell Research*, __ ARIZ. L. REV. __ (forthcoming 2007). This is especially so if the money will be spent by the recipient to treat his own unrelated health condition, or to treat his children's health problems. Here, the sale of the organ might on balance *improve* his family's expected health, rather than slightly jeopardizing it. See, e.g., RONALD MUNSON, RAISING THE DEAD: ORGAN TRANSPLANTS, ETHICS, AND SOCIETY 117-19 (2002).

¹³⁹ See *supra* note 97 (explaining the source of the \$30,000 estimate).

too present-centered), or poor parents of minor children (perhaps they may feel unduly pressured to risk their health for the sake of feeding their family).¹⁴⁰ Better a small decrease in potential organ providers than the large decrease caused by today's total compensation ban. And even these exclusions may leave enough providers to supply the medical self-defense needs of all Americans whose organs are failing.

True, some might balk at such limitations. Aren't 21-year-olds adult enough that we shouldn't treat them as second-class citizens who can't make intelligent choices? Why should very poor people, or people who are trying to improve their children's lives, be denied a money-making option that richer people have—and be denied it precisely because the money is especially valuable to the poor and to parents?¹⁴¹

But if such objections are right, they only show the problem with a paternalistic system that interferes with recipients' self-defense rights and providers' freedom of choice. The response to these objections should be to let all adult, competent would-be organ providers decide whether to sell their organs—as they now have the right to decide whether to give the organs away, or whether to become fishermen or loggers—not to bar everyone from doing so.

D. *Philosophical Reasons to Limit the Right*

What then about the argument that compensation is just inherently wrong? “The human body and its parts cannot be the subject of commercial transactions,”¹⁴² the argument goes. Like “a desired legal verdict, a Pulitzer Prize, or a child,” organs are goods that “have a meaning and value that places them outside the market.”¹⁴³ In the words of leading conservative bioethicist Leon Kass (for three years the chair of the President's Council on Bioethics), “the human body especially belongs in that category of things that defy or resist commensuration—like love or friendship or life itself.”¹⁴⁴

¹⁴⁰ Even under the current system, there's often strong family pressure on people to donate organs for relatives (even ones to whom the provider might not feel close). See Jeffrey P. Kahn, *Would You Give a Stranger Your Kidney?*, <http://www.cnn.com/HEALTH/bioethics/9807/stranger.kidney/> (noting this); Richard A. Epstein, *The Sale of Organs for Transplants Should Be Legalized*, in *BIOMEDICAL ETHICS: OPPOSING VIEWPOINTS* 62, 64 (2003) (likewise). This isn't identical to the pressure of an offered \$30,000, but in many ways it might be stronger. Allowing compensation for organs will diminish this pressure, as more non-relative organs become available.

¹⁴¹ See Radin, *supra* note 144, at 1910-11.

¹⁴² E.g., *Human Organ Transplantation: A Report on Developments Under the Auspices of WHO*, 42 INT'L DIG. OF HEALTH LEG. 389, 393 (1991) (so asserting, with no detailed justification).

¹⁴³ C.J. Dougherty, *Body Futures: The Case Against Marketing Human Organs*, 68 HEALTH PROG. 512-53 (1987).

¹⁴⁴ See, e.g., Leon R. Kass, *Organs for Sale? Propriety, Property, and the Price of Progress*, 107 PUB. INT. 65, 81 (1992). Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987), the classic legal work on anti-commodification arguments as justifications for rules barring sales of certain goods or services, doesn't take a stand on whether

[C]ommodification by conventional commensuration [through market exchange] always risks the homogenization of worth, and even the homogenization of things In many transactions, we do not mind or suffer or even notice. Yet the human soul finally rebels against the principle, whenever it strikes closest to home. . . .

. . . .
We surpass all defensible limits of such conventional commodification when we contemplate making the convention-maker—the human being—just another one of the commensurables. Selling our bodies, we come perilously close to selling out our souls. There is even a danger in contemplating such a prospect—for if we come to think about ourselves like pork bellies, pork bellies we will become.¹⁴⁵

Yet, once we look past the figures of speech to see what is really being asserted, this analysis is unpersuasive. Love, friendship, and prizes can't properly be gotten for money because paid-for love, friendship, and prizes aren't "love," "friendship," and "prizes" as we define the terms. A paid-for kidney is a kidney, just as a paid-for transplant operation is a transplant operation. It has the same meaning and human worth regardless of whether it's paid for—it can save a human life.

Nor is compensation for providing kidneys morally similar to selling "the human being." There's no despotic control over another human, as with slavery. There's no risk of a harm to a human who's too young to consent, as with sales of children. When an organ is taken from a cadaver, there's no soul to be sold out. And when an organ is provided by a living person, the organ is being provided, not the soul; there's no selling out of the soul in compensation for the organs, just as there's no giving away the soul in donating organs. We are no more pork bellies when organs are transplanted (whether for money or otherwise) than the paid transplant surgeon is a butcher.¹⁴⁶

Of course, such responses themselves have limited persuasiveness to those firmly on the other side. The anticommodification claim may be at bottom a philosophical and spiritual axiom—a premise for an argument rather than a conclusion. Leon Kass's soul rebels against payment for transplants.¹⁴⁷ My soul rebels against price controls that limit the supply of transplantable organs and thus lead people to die needlessly. When the test is soul rebellion, argument only goes so far.

Yet the presence of a constitutional and moral right ought to resolve this impasse. Something more demonstrably compelling than Professor Kass's conclusory assertions must be required to substantially burden such a right. Before limiting people's abortion-as-self-defense rights or lethal self-defense rights, we would demand more than just philosophical claims supporting a culture of life so unwavering that it never lets

the commodification objection should apply to organ sales, *id.* at 1855 n.23.

¹⁴⁵ Kass, *supra* note 144, at 82-83.

¹⁴⁶ See also, e.g., COHEN, *supra* note 94, at 68-76; Hansmann, *supra* note 96, at 74-78.

¹⁴⁷ Kass, *supra* note 24, at 82-83.

people use deadly force against viable fetuses or born humans.¹⁴⁸ Likewise, before limiting medical self-defense rights, we should need more than Professor Kass's view of the soul.

VI. CONCLUSION: POLITICAL FEASIBILITY

The debate over experimental drug therapies for the terminally ill, or market-based solutions to the organ shortage, isn't just a matter of public health or even saving lives. It's also a matter, I have argued, of a constitutional and moral right—the right to self-defense.

Abortion rights supporters have defended the abortion-as-self-defense aspect of that right. Gun rights supporters have relied on the lethal self-defense aspect of that right. And even those who aren't zealously in either camp have agreed that both aspects should be allowed.

I've argued that those who support self-defense in those contexts should equally support it when it comes to general medical self-defense. I hope this framing of the problem can help promote a broad left-right-center coalition in support of self-defense rights: a coalition that recognizes a basic human right, the right of those in peril of life to use their property and the help of others—security guards, doctors, pharmaceutical companies, willing organ providers—to defend their lives against threats posed by criminals, animals, fetuses, cancer, or organ failure.

And though I can't be sure that courts will accept the constitutional version of this right, I think they might. Notwithstanding some conservative Justices' rumblings of hostility to "activism" and unenumerated rights, abortion rights still stand.¹⁴⁹ So do unenumerated parental rights.¹⁵⁰ Rights to sexual autonomy and, apparently, unwanted medical treatment, have been recognized.¹⁵¹ One of the judges in the *Abigail Alliance* majority was Douglas Ginsburg, whom Ronald Reagan had nominated for the Supreme Court seat that ultimately went to Justice Kennedy. The *Abigail Alliance* legal effort was spearheaded by the conservative Washington Legal Foundation, whose Legal Policy Advisory Board members include Dick Thornburgh, Ted Olson, and Ken Starr.¹⁵²

Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, suggested that there might be an unenumerated right to lethal self-defense.¹⁵³ Reagan appointee Kenneth Ripple con-

¹⁴⁸ Cf. Aaron Fortune, *Violence as Self-Sacrifice: Creative Pacifism in a Violent World*, 18 J. SPECUL. PHIL. 184, 189 (2004) (endorsing violence in certain situations, but generally rejecting the principle that self-defense can itself justify violence).

¹⁴⁹ *Casey v. Planned Parenthood*, 505 U.S. 833 (1992).

¹⁵⁰ *Troxel v. Granville*, 530 U.S. 57 (2000).

¹⁵¹ *Lawrence v. Texas*, 539 U.S. 558 (2003); see *supra* note 85.

¹⁵² See <http://www.wlf.org/Resources/Partners/legalpolicy.asp>.

¹⁵³ *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996) (plurality) (dictum) (suggesting that "the historical record may support" the proposition that "the right to have a jury consider self-defense evidence . . . is fundamental").

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cluded there was such a right.¹⁵⁴ Republican-appointed judges Joel Flaum and Ilana Rovner joined Judge Ripple in voting to take the matter en banc.¹⁵⁵ The judiciary's continuing openness to unenumerated rights arguments, coupled with the analogy between lethal self-defense, abortion-as-self-defense, and a broader medical self-defense right, thus offers hope for a judicial coalition that will accept such a right.

¹⁵⁴ *Rowe v. DeBruyn*, 17 F.3d 1047, 1054-56 (7th Cir. 1993) (Ripple, J., dissenting) (concluding that even prisoners have a constitutional right to self-defense).

¹⁵⁵ *Id.* at 1047 n.**.