ESSAY

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

Eugene Volokh

TABLE OF CONTENTS

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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 Alice 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 have a right to a therapeutic abortion even if the pregnancy were only posing a serious threat to her health, rather than threatening her life.[1]

A man 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.[2] And Katherine has a right to self-defense even though recognizing that right may let some people use false claims of self-defense to get away with murder.

Ellen is terminally ill. No proven therapies offer help. An experimental drug therapy seems safe because it has passed Phase I FDA testing, yet federal law bars the therapy outside of 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 panel decision in *Abigail Alliance for Better Access to Develop-*

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[1] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992); Roe v. Wade, 410 U.S. 113, 163–64 (1973).

[2] *See infra* p. 1817.

mental Drugs v. Von Eschenbach[3] — since vacated and now being reviewed en banc — would secure Ellen the constitutional right to try to save her life by hiring a doctor to administer the therapy.

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 might save Katherine's, and an experimental treatment might save Ellen's. But the federal ban on payment for organs sharply limits the availability of kidneys, so Olivia must wait years for a donated kidney; she faces a 20% chance of dying before she can get one.[4] 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. Likewise, Olivia's ability to protect her life is undermined by the organ payment ban.[5]

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.[6]

Part I argues 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 lethal self-defense right has constitutional foundations in substantive due process, in state constitutional rights to defend life and to bear arms, and perhaps in the Second Amendment. But even setting aside those constitutional roots, the right has long been recognized by statute and common law. Even if the Supreme Court stops recognizing unenumerated constitutional rights, legislatures should presumptively protect people's medical self-defense rights just as they protect people's lethal

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[3] 445 F.3d 470 (D.C. Cir.), *judgment vacated and reh'g en banc granted*, No. 04-5350, 2006 U.S. App. LEXIS 28974 (D.C. Cir. Nov. 21, 2006).

[4] Even if kidney dialysis is keeping her alive, each year on dialysis she faces a 6% risk of death, and the mean wait for adult recipients is over four years. *See* sources cited *infra* notes 87 & 90.

[5] *See infra* section IV.B (discussing why most restrictions on spending money to exercise a right presumptively infringe the right).

[6] 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, as opposed to protection against an attack by a morally culpable assailant. *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 is a common lay term for the conduct; for instance, people would say "I had to kill that rattlesnake in self-defense" (though they wouldn't see the rattlesnake as morally culpable), because the action involves defending oneself. *See, e.g.*, cases cited *infra* note 14. Moreover, the self-defense defense to criminal prosecution — 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 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 124(a), at 45 (1984 & Supp. 2006).

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.

Part II discusses one context in which medical self-defense has already been recognized: *Roe v. Wade*[7] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[8] secure not just a previability right to abortion as reproductive choice, but also a separate postviability right to abortion as medical self-defense when pregnancy threatens a woman's life. And it can't be that a woman has a constitutional right to protect her life using medical procedures, but only when those procedures kill a viable fetus; given that Alice has a right to defend herself even when doing so means aborting a viable fetus, 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 inserts 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.

Parts III and IV apply the abortion-as-self-defense and lethal self-defense analogies in more detail to experimental drugs and to compensation for organs. Part III argues that the right of medical self-defense offers extra support for the *Abigail Alliance* panel's controversial holding. Part IV contends that the right makes the organ sales ban presumptively improper and unconstitutional as applied to organs that are needed to protect people's lives; some concerns about organ transactions may justify regulation of organ markets, but not outright prohibition of such markets.

Part IV also argues that, while this presumption of impropriety and unconstitutionality is rebuttable, it should take much to rebut it. Recognizing medical self-defense as a constitutional or moral right means the government should need a very good reason to substantially burden that right, and any restrictions that do burden it should be as narrow as possible.

In particular, while the exercise of the right to medical self-defense may be regulated in some ways — for instance, to prevent organ rob-

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[7] 410 U.S. 113 (1973).

[8] 505 U.S. 833 (1992).

[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* pp. 1826–27.

bery — such regulations can and should be far less burdensome than the current total ban on organ sales is. We respect and value self-defense rights enough that we allow lethal self-defense, despite the risk that a false claim of self-defense will be used as a cloak for murder. Rather than prophylactically banning all use of lethal force, we outlaw certain uses and rely on case-by-case decisionmaking to discover and deter these improper uses. A similar approach should apply to payments for organ transplants.

Finally, the Conclusion argues that a right to medical self-defense is not only logically supportable, but also 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.

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

One form of self-defense — lethal self-defense, which means using deadly force to protect one's life against humans or animals (or to prevent serious injury, rape, or kidnapping) — has long been the basis for a general exception to nearly all criminal laws, including laws against murder, assault, weapon possession, and the like.[10] Lethal self-defense is allowed even against those who threaten your life with little or no moral fault.[11] You may kill those who are threatening your life negligently or through an unfortunate nonnegligent accident.[12] You may kill attackers who are insane and thus not morally culpable.[13] You may use self-defense against animals, which are inherently not morally culpable, even when such actions would otherwise violate endangered species law, gun law, animal cruelty law, or property law.[14] And you

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[10] *See, e.g.*, N.Y. PENAL LAW §§ 35.15(2)(a)–(b) (McKinney Supp. 2006); MODEL PENAL CODE § 3.04 cmt. 4(a), at 48 & n.35 (Official Draft and Revised Comments 1985) (as adopted in 1962).

[11] Even if you think 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 6, at 507–11 — even if they are insane or mistaken, and thus not culpable — the availability of lethal self-defense still potentially causes harm. That we recognize self-defense despite this potential harm suggests that we treat self-defense as a right that trumps some nontrivial government interests.

[12] *See, e.g.*, MODEL PENAL CODE §§ 3.04(1), (2)(b), 3.11(1) (stating that deadly force may be used against "unlawful force" that imperils one's life, and defining "unlawful force" to include 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)"); *id.* § 3.11 cmt. 1, at 159.

[13] *See* 2 ROBINSON, *supra* note 6, § 131(b), at 73–76 & n.13 (concluding that modern American law embodies this view); 1 *id.* § 36(a)(3) (same); sources cited *supra* note 12.

[14] *See, e.g.*, 16 U.S.C. § 1540(b)(3) (2000) (endangered species law); People v. Lee, 32 Cal. Rptr. 3d 745 (Ct. App. 2005) (illegal firearm discharge); Grizzle v. State, 707 P.2d 1210, 1212 (Okla. Crim. App. 1985) (cruelty to animals); Credit v. Brown, 10 Johns. 365 (N.Y. Sup. Ct. 1813) (tres-

may plead self-defense even though allowing such pleas endangers people who aren't attacking anyone, by giving cold-blooded killers a convenient cover story that might get them acquitted.

The relationship between lethal self-defense and medical self-defense is necessarily not as close as the relationship between one form of medical self-defense (abortion in cases where the mother's life is in danger, which I'll discuss in Part II) and other forms of medical self-defense. But it's close enough: if I may kill a human or an animal 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?[15] My hope is that people who feel strongly about the right to lethal self-defense (as I do) 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 encountered 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 a constitutional right to lethal self-defense stemming from substantive due process (though one could equally argue for it under the Ninth Amendment).[16] A four-Justice plurality opinion authored by Justice Scalia — usually no friend of unenumerated constitutional rights — suggested the same.[17]

The Court's holding that "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply

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pass tort). Note that the law treats self-defense not as an excuse like duress — a concession to human weakness — but as a full justification. *See* 2 ROBINSON, *supra* note 6, § 131(a), at 69. Moreover, the law lets people use lethal force to defend others, including strangers, though the defending party is unlikely to feel a duress-like compulsion to defend the person. *See* MODEL PENAL CODE § 3.05; 2 ROBINSON, *supra* note 6, § 133. Defending life is treated as a positive good, not just a concession to human frailty.

15 The right to lethal self-defense against humans protects not just life but also freedom from 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 a person who is in peril of dying, through disease or animal attack, and denies him the ability to fight back. Any distinction between such a situation and the law's barring people from lethally resisting criminal human attack is too gossamer to make a constitutional or moral difference.

16 *See* Eugene Volokh, *State Constitutional Rights of Self-Defense and Defense of Property*, 11 TEX. REV. L. & POL. (forthcoming 2007).

17 Montana v. Egelhoff, 518 U.S. 37, 56 (1996) (plurality opinion) (suggesting that "the right to have a jury consider self-defense evidence" may be "fundamental" and supported by the "historical record"). If a legislature could constitutionally outlaw self-defense, then a defendant wouldn't have a fundamental right to have a jury consider self-defense evidence, because such evidence would usually be irrelevant once the self-defense justification was abolished.

rooted in this Nation's history and tradition'"[18] supports such a right.[19] Founding-era sources call defending life a natural right.[20] Blackstone wrote that the right to prevent "any forcible and atrocious crime," even with lethal force, was "justifiable by the law of nature."[21] St. George Tucker, a leading early American commentator,[22] described "[t]he right of self defence" as "the first law of nature,"[23] and 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."[24]

The right to lethal self-defense is secured by forty-four state constitutions. Twenty-one, dating back to the 1776 Pennsylvania Bill of Rights, expressly secure the right to "defend[] life."[25] Forty, dating from 1776 to 1998, secure a right to keep and bear arms in defense of self,[26] which presupposes at least the traditional core of lethal self-defense.[27]

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 it is more broadly accepted than the right to an abortion and even the right to use contraceptives were at the time the Supreme Court found them to be constitutionally protected.[28] Even if due process or the Ninth

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[18] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

[19] *See generally* Nicholas H. Johnson, *Self-Defense?*, 2 J.L. ECON. & POL'Y. (forthcoming 2007) (arguing that courts should recognize a right to self-defense under the Second and Ninth Amendments); Nelson Lund, *A Constitutional Right to Self Defense?*, 2 J.L. ECON. & POL'Y. (forthcoming 2007) (likewise, under substantive due process); Victoria Dorfman & Michael Koltonyuk, Note, *When the Ends Justify the Reasonable Means: Self-Defense and the Right to Counsel*, 3 TEX. REV. L. & POL. 381, 382–89 (1999) (likewise, without expressing a view on precisely which clause secures the right). For a brief response to objections to recognizing unenumerated constitutional rights, see *infra* p. 1831.

[20] *See, e.g.*, DEL. CONST. pmbl. (1792); MASS. CONST. pt. 1, art. 1 (1780); N.H. CONST. pt. 1, art. 2 (1784); PA. CONST. art. 1, § 1 (1776); VT. CONST. ch. I, art. I (1777); Samuel Adams, The Rights of the Colonists, A List of Violations of Rights and a Letter of Correspondence (Nov. 20, 1772), *reprinted in* 2 THE WRITINGS OF SAMUEL ADAMS 350, 351 (Harry Alonzo Cushing ed., Octagon Books 1968) (1906).

[21] 4 WILLIAM BLACKSTONE, COMMENTARIES *180 (emphasis omitted).

[22] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 296 n.2 (1964) (Black, J., concurring).

[23] BLACKSTONE'S COMMENTARIES editor's app. 300 (St. George Tucker ed., Philadelphia, Birch & Small 1803).

[24] 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1950, at 668 (Thomas M. Cooley ed., Boston, Little, Brown & Co., 4th ed. 1873).

[25] *See* Volokh, *supra* note 16 (quoting provisions and cases interpreting them).

[26] *See* Eugene Volokh, *State Constitutional Rights To Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191 (2006) (quoting provisions and cases interpreting them).

[27] *See, e.g.*, McKellar v. Mason, 159 So. 2d 700, 702 (La. Ct. App. 1964); State *ex rel.* City of Princeton v. Buckner, 377 S.E.2d 139, 142–44 (W. Va. 1988).

[28] *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 and that by 1973, only a few states allowed most early abortions); Peter Smith, Comment, *The History and Future of the Legal Battle over Birth Control*, 49

Amendment is interpreted as protecting only those rights recognized as important common law rights in 1791 or 1868, self-defense qualifies. The right has never been absolute, but in this respect it is like most constitutional rights, both enumerated and unenumerated.

Though two courts of appeals have rejected claims asserting a constitutional right to lethal self-defense, each did so with little analysis and in the course of 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;[29] but whether prisoners lack a constitutional right to self-defense[30] says little about the right outside prison, because the constitutional rights of prisoners are far more limited than are those of nonprisoners.[31] The other decision upheld one of the rare[32] state rules requiring defendants to prove self-defense by a preponderance of the evidence;[33] but one can have a constitutional right and yet bear the burden of proving that the conditions for its exercise are satisfied.[34] When the Supreme Court upheld laws placing the burden of proving self-defense on the defendant,[35] it did so without opining on whether there is a constitutional right to self-defense.

Finally, if the Court concludes that the Second Amendment secures an individual right — a view explicitly adopted by Congress, by the

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CORNELL L.Q. 275, 278–79 (1964) (noting that in 1964, several states still prohibited the sale of contraceptives).

[29] Rowe v. DeBruyn, 17 F.3d 1047, 1052–53 (7th Cir. 1994).

[30] *See id.* at 1054–56 (Ripple, J., dissenting) (concluding that even prisoners have a constitutional right to self-defense); DeCamp v. N.J. Dep't of Corr., 902 A.2d 357, 361–62 (N.J. Super. Ct. App. Div. 2006) (endorsing Judge Ripple's position and concluding that prisoners have self-defense rights, though without explicitly deciding whether those are federal constitutional rights or only state law rights).

[31] *See, e.g.*, Thornburgh v. Abbott, 490 U.S. 401, 407 (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 the Constitution does not require that an inmate be able to assert such a right in prison disciplinary proceedings); Sack v. Canino, No. 95-1412, 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").

[32] This was the common law rule, *see* 4 WILLIAM BLACKSTONE, COMMENTARIES *201, but only one state still has it. *See* Martin v. Ohio, 480 U.S. 228, 236 (1987) (noting that only Ohio and South Carolina had such a rule); State v. Bellamy, 359 S.E.2d 63, 64–65 (S.C. 1987) (rejecting the rule).

[33] White v. Arn, 788 F.2d 338, 347 (6th Cir. 1986).

[34] *See, e.g.*, Strickland v. Washington, 466 U.S. 668, 689 (1984) (stating that the defendant bears the burden of proving denial of the 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 his due process rights were violated by prejudicial preindictment delay); WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE § 11.10 & n.58, § 18.5 & n.47 (2006) (noting both these points).

[35] *Martin*, 480 U.S. at 236.

Office of Legal Counsel, and by several state appellate courts, but by only two federal circuits[36] — 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

Like other rights, the right to lethal self-defense is in some ways limited, as would be the right of medical self-defense. First, the right to lethal self-defense is uniformly accepted only when deadly force is necessary to defend one's life, or at least to prevent serious harm (not just a bruise or a petty theft).[37] Similarly, the right to medical self-defense should exist only in the face of deadly or at least radically debilitating threats (such as paralysis or dementia), not against the common cold.

Second, the core right to lethal self-defense, like other rights, doesn't include the right to injure the life, liberty, or property of people who aren't the source of the threat. If I'm starving to death on a lifeboat, I have no right to kill and eat my fellow passengers.[38] If a criminal forces me to kill someone, my actions aren't legally justified.[39] Even taking another's property to save my life isn't part of my self-defense rights,[40] though the legal system may still decline to punish some of these actions out of sympathy for my predicament.[41]

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[36] *See* Protection of Lawful Commerce in Arms Act, 15 U.S.C.A. § 7901(a)(2) (West Supp. 2006); Firearms Owners' Protection Act, Pub. L. No. 99-308, sec. 1(b), 100 Stat. 449, 449 (1986), *reprinted in* 18 U.S.C. § 921 note (Congressional Findings and Declarations) (2000); Freedmen's Bureau Act, ch. 200, § 14, 14 Stat. 173, 176 (1866); Parker v. District of Columbia, No. 04-7041, 2007 WL 702084, at *7 (D.C. Cir. Mar. 9, 2007) (collecting court cases and citing Office of Legal Counsel opinion).

[37] *See* 2 ROBINSON, *supra* note 6, § 131(d), at 81–84. This 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. Likewise, if the law banned a procedure that was not medically necessary to protect against death or serious injury, such a ban wouldn't violate the medical self-defense right.

As noted below, not all aspects of current self-defense law are constitutionally mandated. Most states, for instance, impose no duty to retreat, even when retreating is safe; that may be wise policy, but it is an optional component of the right to self-defense, not a mandatory component. In my view, the mandatory component 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.

[38] *See* Regina v. Dudley & Stephens, (1884) 14 Q.B.D. 273.

[39] *See* 2 ROBINSON, *supra* note 6, § 177(g)(1), at 367–68.

[40] For a brief discussion of this point, see *infra* pp. 1827–28.

[41] *See, e.g.*, A.W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW 247 (1984) (noting that Dudley's and Stephens's prison terms for killing and eating their fellow passenger were commuted to six months); *see also* 2 ROBINSON, *supra* note 6, § 177, at 347–72 (discussing duress, an excuse — though not a justification — available to those forced to commit all but the

This limitation should apply to medical self-defense as well: Ellen shouldn't be free to steal experimental drugs from the pharmaceutical company, and Olivia shouldn't be free to kidnap someone and cut out his organs.[42] Yet this limitation does not constrain medical self-defense using voluntarily provided experimental drugs, or using organ transplants for which a willing provider is compensated.

Finally, some American jurisdictions burden lethal self-defense by constraining access to the tools often needed for effective self-defense: guns.[43] Nearly all law-abiding adults in most American jurisdictions are allowed to own and even carry guns,[44] particularly if they can show a heightened self-defense need.[45] Yet there are exceptions. One jurisdiction, the District of Columbia, generally bars people from possessing any loaded firearms.[46] A dozen states bar most people from carrying concealed loaded firearms in public places.[47] Felons, drug

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most serious crimes); *id.* § 124(a), at 45–47 (discussing the necessity justification allowed in about half the states); *id.* § 124(g), at 60–68 (noting that some states bar the necessity defense in cases of murder or other serious felonies).

[42] Likewise, Alice should have no right to create a viable fetus just to harvest its organs to save her (or a friend's) life. A mother'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.

[43] *See* GARY KLECK, TARGETING GUNS: FIREARMS AND THEIR CONTROL 167–75 (1997).

[44] Most high-profile firearms restrictions, such as bans on "assault weapons," don't substantially burden people's ability to effectively defend themselves, since they leave people free to use many other guns. Genuine gun bans are rare: all jurisdictions but D.C. let law-abiding adults possess loaded shotguns for home defense, and all but a few let them possess handguns. 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 generally must issue. *See* Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 BROOK. L. REV. 715, 753–54 & nn.215–52 (2005).

[45] 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) (West 2000); United States v. Panter, 688 F.2d 268, 272 (5th Cir. 1982). In some states that don't generally grant licenses to carry firearms, even non-imminent substantial danger is a factor in favor of granting the license or of rendering the license requirement inapplicable. *See, e.g.*, Orange County (Cal.) Sheriff's Dep't, Requirements for Carry Concealed Weapon (CCW) Permits, http://www.ocsd.org/CCWPermit/Requirements.asp (last visited Apr. 6, 2007). Concealed weapons restrictions are also waived in some states for people who show a sufficient threat from an identifiable source. *See, e.g.*, CAL. PENAL CODE § 12025.5 (West 2000); OHIO REV. CODE ANN. § 2923.1213 (West Supp. 2006).

[46] *See* D.C. CODE ANN. § 7-2507.02 (LexisNexis 2004), *invalidated by* Parker v. District of Columbia, No. 04-7041, 2007 WL 702084 (D.C. Cir. Mar. 9, 2007). As of this writing, the mandate in *Parker* may not issue for many months, especially if the Supreme Court agrees to hear the case.

[47] *See* Johnson, *supra* note 44, at 753–54 & nn.215–52.

addicts, the insane, and children are generally barred from possessing guns.[48]

Still, even these laws, and most calls to broaden them, do not cast doubt on the existence of lethal self-defense rights. Rather, they fit the lethal self-defense right I describe — a right that (a) is generally accepted, and that (b) presumptively may not be substantially burdened, but that (c) may nonetheless be substantially burdened when the danger to others' lives is seen as grave enough 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[49] and that serious gun restrictions are necessary to prevent this harm.[50]

One can thus support gun bans and yet oppose restrictions on self-defense that is far less dangerous to third parties, such as the use of lifesaving medical procedures. It's harder to justify the opposite position, at which our legal system has arrived: that people should be free to own guns 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 would often be used to prevent deaths that are likely in months. But for medical self-defense, it makes sense to treat imminence as simply requiring a present life-threatening medical condition — that is to say, as a type of necessity requirement[51] — not as requiring that death be likely within the hour.

The imminence requirement in lethal self-defense serves 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 reduces erroneous claims of necessity, since the likelihood of harm from a long-term threat tends to be harder to predict accurately than the likelihood of harm from a short-term threat.[52] Third, the risk of false claims of self-defense would be especially high if "he told me once

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[48] *See, e.g.*, 18 U.S.C.A. §§ 922(g)(1), (3), (4), (9) (West 2000 & Supp. 2006).

[49] This harm is undeniable, though I generally think most serious gun controls would on balance cause more harm than they would avoid. *See generally* KLECK, *supra* note 43.

[50] *See, e.g.*, JOSH SUGARMANN, EVERY HANDGUN IS AIMED AT YOU: THE CASE FOR BANNING HANDGUNS 55–70, 177–201 (2001).

[51] *Cf.* WAYNE R. LAFAVE, CRIMINAL LAW 495 (3d ed. 2000) (describing the proper function of imminence); 2 ROBINSON, *supra* note 6, § 131(b)(3), at 76–77 (same).

[52] *See, e.g.*, LAFAVE, *supra* note 51, at 495.

that he wanted to kill me" were justification enough for killing. Insisting on tools that help show necessity and weed out false claims is especially important because unnecessary lethal defense of oneself causes unnecessary deaths of others.

With respect to medical self-defense, all these functions would best be served by construing imminence as simply requiring a present medical threat. The best proxies for necessity are the present medical threat (your kidneys are actually failing) and the lack of a satisfactory permitted therapy. You can't flee kidney disease that can be cured only through a transplant, nor can you call the police to protect you. Present medical threats of future harm are generally more reliably diagnosable than human threats are. There is little risk of insincere claims of danger, especially since the diagnosis is made by an objective medical expert. And even if a diagnostic error happens, it will endanger others far less than erroneous lethal self-defense does.[53]

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

The Supreme Court has already recognized medical self-defense in one context: abortion needed to protect the woman's life or health. *Roe* and *Casey* held that the Constitution protects two kinds of abortion rights, which are different in scope, justification, and popular support. The first is the highly controversial right to abortion as reproductive choice, which generally allows previability abortions for all women who choose them.[54] The second is the right to abortion even after viability but only when necessary "to preserve the life or health of the mother"[55] — a right to defend oneself using medical care, even when this requires destroying the source of the threat.[56]

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[53] These reasons help explain why the law doesn't distinguish a post-viability abortion when pregnancy threatens immediate death from a post-viability abortion when pregnancy threatens death in a month. *Cf.* MODEL PENAL CODE § 230.3(b) cmt. 2(b) at 431 (Official Draft and Revised Comments 1985) (as adopted in 1962) (taking this view even pre-*Roe*). 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 principle should apply to other forms of medical self-defense.

[54] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (securing the right subject only to regulations that don't create a "substantial obstacle" to the right's exercise).

[55] Roe v. Wade, 410 U.S. 113, 163–64 (1973); *see Casey*, 505 U.S. at 846 (majority opinion); *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* 60 (Yale Law Sch. Pub. Law & Legal Theory Working Paper No. 119, 2006), *available at* http://ssrn.com/abstract=925558 (same).

[56] *See, e.g.*, John T. Noonan, Jr., *An Almost Absolute Value in History*, *in* THE MORALITY OF ABORTION 1, 58 (John T. Noonan, Jr. ed., 1970); Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 50–53 (1971). I say "self-defense" to note that the uncontroversial right to protect life against a threat from a fetus is similar to the uncontroversial right to protect life against an attacker, even a morally innocent one, *see supra* p. 1817. I am not referring to the con-

This abortion-as-self-defense right exists despite the state's interest in protecting the viable fetus's life, an interest *Roe* and *Casey* held compelling enough to trump the abortion-as-choice right.[57] Yet the abortion-as-self-defense right is largely uncontroversial, at least when threats to the mother's life, and not just to her psychological health, are involved: it was accepted even in Chief Justice Rehnquist's *Roe* dissent,[58] it was recognized by all the restrictive abortion laws in effect when *Roe* was decided,[59] and it has since been endorsed by overwhelming public opinion. Only 10% to 15% of Americans believe that abortions should be banned even when the woman's life is in danger.[60] Compare this figure with the 42% to 55% of Americans, according to most surveys, who believe that abortion should be generally banned and available at most to protect the woman's life or in cases of rape or incest,[61] and the 35% to 44% who endorse a similar view but without even a rape or incest exception.[62]

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* opinion 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."[63] Similarly, a 1938 English case held — in reading a "life of the mother" exception into an abortion ban that didn't include such an exception — that, "as in the case of homicide, so also in the case where an unborn child is killed, there may be [a self-defense] justification for the act."[64] Lethal self-defense

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troversial argument that all abortions are analogous to self-defense against serious 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).

57 *See Casey*, 505 U.S. at 860; *Roe*, 410 U.S. at 163.

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

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

60 *See* Gallup Poll, May 19–21, 2003, Public Opinion Online, The Roper Center at the University of Connecticut [hereinafter Roper Center Database], accession no. 0431679, *available at* LEXIS, News Library, RPOLL file; ABC News, Washington Post Poll, Jan. 16–20, 2003, Roper Center Database, *supra*, accession no. 0419810.

61 *See* CBS News Poll, Jan. 5–8, 2006, Roper Center Database, *supra* note 60, accession no. 1639924; Princeton Survey Research Associates International Poll, Dec. 7–11, 2005, Roper Center Database, *supra* note 60, accession no. 1638948.

62 *See* Harris Interactive Poll, Apr. 4–10, 2006, Roper Center Database, *supra* note 60, accession no. 1651042; Opinion Dynamics Poll, Feb. 28–Mar. 1, 2006, Roper Center Database, *supra* note 60, accession no. 1644506. Even when people are specifically asked about third-trimester abortions, only 22% endorse banning these abortions when the mother's life is in danger, compared to 74% who endorse banning abortion on demand. *See* Gallup Org. Poll, May 19–21, 2003, Roper Center Database, *supra* note 60, accession nos. 0431684 & 0431688.

63 Steinberg v. Brown, 321 F. Supp. 741, 747 (N.D. Ohio 1970).

64 King v. Bourne, (1938) 1 K.B. 687, 690–91 (C.C.C.).

and abortion-as-self-defense share a moral core: the principle that people should generally be free to defend themselves against that which is threatening their lives.

The Supreme Court has so far recognized the medical self-defense right only in abortion cases. Yet the right can't logically be limited to situations in which the defensive procedure is abortion and rejected when a woman needs to defend herself using experimental drugs or an organ transplant.[65] Nothing about therapeutic postviability abortion makes it deserve protection more than any other medical self-defense procedure.

Postviability abortions cannot be distinguished on the ground that they involve the woman's reproductive choice. After viability, the time for that choice has passed, and the right to get a therapeutic abortion is a consequence of the woman's medical self-defense right, not her abortion-as-choice right.[66] 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 her 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.

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[65] *Cf.* Yvonne Cripps, *The Art and Science of Genetic Modification: Re-Engineering Patent Law and Constitutional Orthodoxies*, 11 IND. J. GLOBAL LEGAL STUD. 1, 24–25 (2004) (suggesting that *Roe* may secure a right to be free from laws that interfere with lifesaving treatment, and that this right may make bans on human cloning unconstitutional); John A. Robertson, *Embryo Culture and the "Culture of Life": Constitutional Issues in the Embryonic Stem Cell Debate*, 2006 U. CHI. LEGAL F. 1 (same).

Courts have also held that when someone is in deadly peril, government action that blocks others from rescuing the person may unconstitutionally deprive the person of his life without due process. *See, e.g.*, Ross v. United States, 910 F.2d 1422, 1433–34 (7th Cir. 1990) (so holding as to a police officer's blocking private rescuers from reaching a drowning victim). Several courts have taken the same view as *Ross*. *See, e.g.*, Beck v. Haik, No. 99-1050, 2000 WL 1597942, at *3–4 (6th Cir. Oct. 17, 2000); Thompson v. Rochester Cmty. Sch., No. 03-74605, 2006 WL 932301, at *5 (E.D. Mich. Apr. 11, 2006); Estate of Sinthasomphone v. City of Milwaukee, 785 F. Supp. 1343, 1349 (E.D. Wis. 1992); *see also* Frances-Colon v. Ramirez, 107 F.3d 62, 64 (1st Cir. 1997) (accepting *Ross* but finding it factually inapplicable); Andrews v. Wilkins, 934 F.2d 1267, 1270–71 (D.C. Cir. 1991) (same). The cases didn't draw the analogy to abortion-as-self-defense, but both situations involve an imperiled person's right to have others defend her life (should they choose to do so) free from government interference.

[66] 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 (1985); Regan, *supra* note 56. But this is not the justification that the Court has generally given for the abortion right in *Roe v. Wade*; *Roe* relied on precedents that didn't discuss sex equality, *see* 410 U.S. 113, 152–54 (1973), and later cases that did not involve sex equality in turn relied on *Roe*, *see* Lawrence v. Texas, 539 U.S. 558, 565 (2003); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977). *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992) (noting *Roe*'s sex equality consequences, but reaffirming *Roe* mostly on other grounds).

Medical self-defense procedures may cause some harm. Ellen's experimental drug may shorten her already short expected lifespan. It may also cost her money for what government officials believe is likely a false hope (though note that the pharmaceuticals in *Abigail Alliance* were merely not proven effective and had not been shown to be ineffective). Similarly, as section IV.C discusses, some argue that allowing compensation for organs would 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 state's 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, would be constitutional.[67] But to impose a substantial burden on the patient's right to protect her life through medical procedures,[68] the government should have to show that it has an extremely powerful reason for burdening the right and that the burden is genuinely necessary because the government's goals can't be achieved in less burdensome ways.[69] 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, just as the interest in protecting viable fetuses is rejected under the abortion-as-self-defense right.

There is, of course, an important limit on the right to medical self-defense, just as there is on the lethal self-defense right[70]: the right is constrained by the rights of others who are not 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 limit is no different from the recognized limits on other constitutional rights. My First Amendment rights don't let me steal a printing press, speak on your lawn, or trespass on private property to

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[67] *Cf. Casey*, 505 U.S. at 877, 881, 885–86 (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[68] *See* Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470, 486 (D.C. Cir.) (remanding for a decision on "whether the FDA's policy barring access to . . . investigational new drugs by terminally ill patients is narrowly tailored to serve a compelling governmental interest"), *judgment vacated and reh'g en banc granted*, No. 04-5350, 2006 U.S. App. LEXIS 28974 (D.C. Cir. Nov. 21, 2006).

[69] For the argument that the government cannot make such a showing in Ellen's and Olivia's cases, see *infra* Part III and section IV.C.

[70] *See supra* p. 1821.

worship at the site of an alleged miraculous apparition (and wouldn't even if *Employment Division v. Smith*[71] were overturned).[72]

This is not because property rights are more important than free speech rights, free exercise rights, and self-defense rights; rather, it is because even important rights do not include the right to violate the rights of others. Naturally, the exact scope of those rights of others — for instance, whether they include freedom from defamation, emotional distress, offense, or interference with business relations — has long been the subject of debate.[73] But the existence of this debate, and the principle that constitutional rights are constrained by at least some rights of others, doesn't contradict the existence of the constitutional rights or weaken the rights when their exercise doesn't conflict with others' rights.

III. 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 because it has not yet been shown to be effective.

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 abort 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 lifesaving medicines without threatening anyone else's life.

The analogy to Katherine is sharpest if Ellen is trying to use experimental drugs to kill otherwise unkillable cancer cells or parasites — why should a woman be free to use a gun to try killing an attacking grizzly bear (even when there's some chance of missing, angering the bear further, and causing her own death), but not a drug to try killing an attacking bacterium or cell? — but it should apply to other poten-

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[71] 494 U.S. 872 (1990).

[72] *See, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 512–21 (1976); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1510–12 (1999).

[73] *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 that free speech 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).

tially lifesaving techniques as well. The *Abigail Alliance* panel thus reached the right result.[74]

This is not a general autonomy argument, premised on the theory that all people should be free to put whatever they choose into their bodies.[75] Rather, the argument focuses specifically on the right to medical self-defense, a right supported both by the Supreme Court's case law (*Roe* and *Casey*) and by the longstanding acceptance of the right to lethal self-defense.[76]

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 it will cost her money that might prove wasted.[77] Yet if people may protect their lives even by taking a viable fetus's life or an attacker's life, they should be equally free to risk their own short remaining lives in trying to lengthen their lives.[78] Paternalistic gov-

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[74] The panel rested its decision in part on the traditionally recognized right to defend one's own life, *see* Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470, 480 (D.C. Cir.), *judgment vacated and reh'g en banc granted*, No. 04-5350, 2006 U.S. App. LEXIS 28974 (D.C. Cir. Nov. 21, 2006); yet it didn't cite the close analogy to abortion-as-self-defense or discuss state constitutional protections for the right to self-defense, analogies that add to the strength of the panel's argument.

[75] *Cf.* Carnohan v. United States, 616 F.2d 1120, 1122 (9th Cir. 1980) (rejecting a claimed right to obtain laetrile as a nutritional supplement to prevent cancer, a claim that focused on medical autonomy rather than self-defense against a present deadly disease); Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1, 59–64 (1994) (discussing a possible constitutional privacy right to *sell* one's organs).

[76] This focus on self-defense helps show why the *Abigail Alliance* panel dissent 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 Abigail Alliance*, 445 F.3d at 494–95 (Griffith, J., dissenting). 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. A tradition of self-defense (medical or lethal) in cases where it's needed to protect the rightholder's life can coexist with a tradition of regulation in other cases.

[77] Brief for Appellee at 35–36, *Abigail Alliance*, 445 F.3d 470 (No. 04-5350), 2005 WL 1900323.

[78] Compare Ellen's situation with cases such as *In re Guardianship of Browning*, 568 So. 2d 4, 14 (Fla. 1990), which concluded that when a patient is terminally ill, the state's interest in preserving his life is not compelling enough to trump his constitutional right to refuse medical treatment. If the state's interest in preserving life does not trump the patient's right to end his life by refusing treatment, it should not trump the patient's right to try to prolong his life through experimental treatment.

The interest in protecting the patient's life might have more force if Ellen wanted to use experimental drugs to avoid (or cure) a serious but nonfatal injury, such as blindness or paralysis. 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 rather than 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, however, the government's interest in protecting her short remaining life against her attempts to lengthen her life is at its weakest.

ernment interests suffice when no constitutional rights are involved, but they shouldn't justify blocking a person's right to protect her own life.[79]

Terminally ill patients' right to use experimental drugs might also interfere with randomized clinical drug studies.[80] It's possible that so many patients will insist on getting a not-fully-tested but promising drug that researchers will be unable to test the drug's effectiveness. If people can just buy the drug, they may do so rather than 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 by the terminally ill,[81] it does not mean that people lack medical self-defense rights — it merely means that a strong enough justification may trump these rights. Moreover, the argument justifies limiting medical self-defense only when such limits are necessary for conducting clinical studies and no other alternatives will do. For instance, if the studies require 200 patients, and there are 10,000 who seek the experimental therapy, there is little reason to constrain the self-defense rights of all 10,000. Likewise, if the drug is now being studied only on people who suffer from a particular kind or stage of a disease, the drug should not be legally barred to those who fall outside those studies. If we must strip people of self-defense rights to save many others' lives in the future, we should impose this tragic constraint on as few people as possible and to as small an extent as possible.[82]

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[79] The insufficiency of such government interests should be especially clear when the drugs have passed Phase I safety trials, as in *Abigail Alliance*, but it should be so even if the drugs have not been tested for safety. Surgeons are rightly allowed to perform risky experimental surgeries when the alternative is the patient's 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 medical professional licensing systems — impose a reasonable care standard, under which even risky actions are legitimate when necessary to avoid nearly certain death. The same rule ought to apply to pharmaceuticals.

[80] *See, e.g.*, Brief for Appellee, *supra* note 77, at 35; Ezekiel J. Emanuel, *Drug Addiction*, NEW REPUBLIC, July 3, 2006, at 9, 10–12.

[81] Such an argument may be unconvincing — society would balk at a law that generally forced 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 be no less coercive. But for purposes of this discussion, let us assume that maintaining the efficacy of clinical trials is a strong enough interest to justify interfering with patients' rights.

[82] Likewise, if an experimental drug that might help the terminally ill doubles as an addictive recreational drug that can seriously harm the healthy, and allowing some medical use is likely to lead to leakage into the harmful recreational use, then banning the drug may be necessary to prevent such grave harm. Though the law has generally allowed medical uses of many highly addictive drugs (such as morphine), even though this does promote leakage into the recreational market, such a result might not be constitutionally compelled, especially when (unlike with morphine) the health benefits of the potentially harmful drug are quite speculative. Nonetheless, this justification would be limited to the drugs that healthy people are likely to abuse. The typical experi-

There is one potentially relevant difference between Alice and Ellen: Ellen's experimental therapy is much less likely to be successful than Alice's therapeutic abortion. Yet 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 die even with one. Her abortion-as-self-defense right remains even if the therapeutic abortion will increase the chance of survival only by a fairly small (or uncertain) amount.[83]

Finally, some might respond that courts generally shouldn't recognize unenumerated constitutional rights.[84] The right to abortion — even abortion-as-self-defense — ought not have been constitutionalized, they would argue, and a right to medical self-defense should not be created by analogy to that erroneous holding. Similarly, lethal self-defense should be seen as a common law or statutory right that is subject to legislative repeal, not a constitutional right.

This is a plausible argument, but not one the Supreme Court has accepted. The Court has continued to endorse abortion rights and family rights.[85] It has recognized rights to sexual autonomy and to refuse unwanted medical treatment.[86] Whatever the status of the theoretical unenumerated rights/Ninth Amendment/substantive due process debate may be (and there is little profit in reprising that debate here), the Court's process for recognizing unenumerated rights by analogy remains active, even for new rights that depart substantially from American legal tradition. There is, therefore, an especially strong case for recognizing a right to medical self-defense, which is closely analogous to the traditional and well-entrenched rights to abortion-as-self-defense and lethal self-defense.

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mental drug is of no interest to the healthy; only the terminally ill who have reason to think the drug may fight their disease want to run the risks involved in taking the drug.

[83] Some people might reach a different result if the fetus is likely to survive the woman's death, but the abortion is not guaranteed to save the woman's life: as between a 100% chance of maternal survival and fetal death if the woman aborts and a 100% chance of maternal death and fetal survival if she does not, they would choose allowing the woman to abort; but as between a 10% chance of maternal survival coupled with sure fetal death if the woman aborts and a 100% chance of fetal survival coupled with sure maternal death if she does not, they would choose protecting the fetus. Yet even they would justify this conclusion by saying the need to protect a viable fetus's life trumps the woman's right to self-defense — not by claiming that the woman's right vanishes because her defensive tactics are not certain to succeed.

[84] *See, e.g.*, Robert F. Nagel, *Conservative Judicial Activism?*, WEEKLY STANDARD, Feb. 5, 2007, at 25, *available at* http://www.theweeklystandard.com/Content/Public/Articles/000/000/013/224mekzh.asp (criticizing this Essay on such grounds and taking a narrow view of enumerated rights, such as free speech, as well as of unenumerated rights).

[85] *See* Troxel v. Granville, 530 U.S. 57, 66, 72 (2000) (plurality opinion); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.).

[86] *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003); Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (discussing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990)).

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

IV. 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.[87] If Olivia is in her twenties and not diabetic, her expected lifespan on dialysis is thirty years less than her expected lifespan with a transplant.[88]

But Olivia is one of the approximately 70,000 people on the American kidney transplant waiting list. (Roughly 25,000 more wait for other organs.[89]) The median wait for adult recipients added to the list in 2001–02 was over four years.[90] Each year, only about 6500 living Americans donate kidneys,[91] and only 45% of the 26,000 usable cadaveric kidneys — kidneys gathered from the bodies of people who die

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[87] *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, 1726 tbl.2 (1999).

[88] *See* Akinlolu O. Ojo et al., *Survival in Recipients of Marginal Cadaveric Donor Kidneys Compared with Other Recipients and Wait-Listed Transplant Candidates*, 12 J. AM. SOC'Y NEPHROLOGY 589, 589 (2001). Immediate transplantation, without long-term dialysis, also seems to lead to lower rates of rejection 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 NEW ENG. J. MED. 726, 726 (2001).

[89] *See* Organ Procurement and Transplantation Network, Current U.S. Waiting List Overall by Organ (Mar. 2, 2007), http://www.optn.org/latestData/step2.asp (select category "Waiting List" and count "Candidates"; then follow "Overall by Organ" hyperlink). The data does not include people waiting for bone marrow transplants or skin transplants.

[90] *See* Organ Procurement and Transplantation Network, Kidney Kaplan-Meier Median Waiting Times for Registrations Listed: 1999–2004 (Mar. 2, 2007), http://www.optn.org/latestData/step2.asp (select category "Median Waiting Time" and organ "Kidney"; then follow "Waiting Time by Age" hyperlink).

[91] *See* Organ Procurement and Transplantation Network, Living Donors Recovered in the U.S. by Donor Age (Mar. 2, 2007), http://www.optn.org/latestData/step2.asp (select category "Donor" and organ "Kidney"; then follow "Living Donors by Donor Age" hyperlink).

from accidents or other causes that leave their organs young and healthy — are donated.[92]

This shortage is not surprising: Since 1984, "receiv[ing] or . . . transfer[ring] any human organ for valuable consideration for use in human transplantation" has been a federal felony.[93] Price controls diminish supply. Setting the price at zero diminishes supply dramatically.[94]

Lack of compensation naturally makes living donors less likely to incur the pain, lost time, and (slight) risk that accompany organ extraction.[95] The relatives of the recently dead have less to lose (at least tangibly) from authorizing use 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 are not sure what the decedent wanted,[96] and may not want to discuss the matter in their time of grief.[97] The prospect of

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[92] About 13,000 eligible sets of cadaveric organs become available in the United States 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, including up to 14,000 kidneys, might thus become available each year, depending on how many people would be motivated by the payment to provide their own organs (posthumously) or to provide their relatives' organs.

[93] National Organ Transplant Act, 42 U.S.C. § 274e(a) (2000). The statute applies only "if the transfer affects interstate commerce," *id.*, but under modern law such provisions are interpreted very broadly and would likely cover any sale of an organ. *See also* UNIF. ANATOMICAL GIFT ACT § 10(a) (1987) (barring sale of cadaveric organs); MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 115 (2006) (noting that the Uniform Anatomical Gift Act of 1987 has been adopted by about half the states).

[94] Some argue 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 especially likely to do anything for money and are especially likely to have certain diseases. *See, e.g.*, NUFFIELD COUNCIL ON BIOETHICS, HUMAN TISSUE 51 (1995). Yet this concern can be easily addressed without a sales ban, simply through routine screening of the sort that would be wise even for donated organs and that is done by fertility clinics that pay for sperm and ova and by German blood banks that pay for blood. *See* Thomas G. Peters, *Life or Death: The Issue of Payment in Cadaveric Organ Donation*, 265 JAMA 1302, 1304 (1991); *Paid vs. Unpaid Donors*, 90 VOX SANGUINIS 63, 66 (2006). 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 transplantating. *See* Andrew H. Barnett et al., *Improving Organ Donation: Compensation Versus Markets, in* THE ETHICS OF ORGAN TRANSPLANTS 208, 215 (Arthur L. Caplan & Daniel H. Coelho eds., 1998).

[95] *See* LLOYD R. COHEN, INCREASING THE SUPPLY OF TRANSPLANT ORGANS: THE VIRTUES OF AN OPTIONS MARKET 25–29 (1995).

[96] *See* Laura A. Siminoff et al., *Factors Influencing Families' Consent for Donation of Solid Organs for Transplantation*, 286 JAMA 71, 74 tbl.1 (2001) (finding that families were significantly more likely to approve a transplant if they "had enough information regarding [the decedent's] donation wishes").

[97] *See id.* Similarly, people who do not sign a donor card may be turned off for emotional reasons, though far less intense ones. *See, e.g.*, COHEN, *supra* note 95, at 25–26; Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL'Y & L. 57, 67 (1989). The prospect of essentially getting a free modest life insurance policy for one's relatives may be enough to help overcome such emotional objections. *See* Hansmann, *supra*, at 67.

(say) $100,000[98] for their children's education might lead them to overcome these barriers.

While living organ donations are almost always for the benefit of relatives, friends, or other known recipients, a few living donors (less than 1.5% of the total[99]) and many next-of-kin of the recently dead donate to strangers. Yet kindness to strangers is generally not as strong a motivation as the desire for financial reward, or as a combined desire to help strangers while putting money aside for the education of one's children.

We pay hospitals and surgeons well for their roles in transplants. If we didn't, there would likely not be nearly enough transplant services provided, though many hospitals are charitable institutions and many doctors routinely donate their time to provide free medical care.[100] Why should we expect organ suppliers to provide enough organs based solely on charity to strangers?[101] We would likely get far better results if we offered organ providers compensation — or, more precisely, offered them the choice of keeping the compensation, forgoing it, donat-

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[98] I draw the $100,000 figure from Crespi, *supra* note 75, at 44, which concludes 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 in case the organs are usable at death, and I speak instead mostly of lump-sum payment at time of death for only those organs that are indeed usable; 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. *See also* E.A. Friedman & A.L. Friedman, *Payment for Donor Kidneys: Pros and Cons*, 69 KIDNEY INT'L 960, 961 (2006) (estimating the price of a kidney at $20,000 and pointing out that an earlier $45,000 estimate stemmed from a vast exaggeration of the risk to the kidney provider's life).

Many people, of course, wouldn't sell a kidney during their lives, even if you offered them more than $30,000. But even if the prospect of payment motivates only 0.01% of adult Americans 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.

[99] *See* Organ Procurement and Transplantation Network, Living Donor Transplants by Donor Relation (Mar. 2, 2007), http://www.optn.org/latestData/step2.asp (select category "Transplant" and organ "All"; then follow "Living Donor Transplants by Donor Relation" hyperlink).

[100] *See* PETER J. CUNNINGHAM & JESSICA H. MAY, CTR. FOR STUDYING HEALTH SYS. CHANGE, A GROWING HOLE IN THE SAFETY NET: PHYSICIAN CHARITY CARE DECLINES AGAIN 2 & tbl.1 (2006), http://www.hschange.org/CONTENT/826/826.pdf (estimating that American doctors in full-time nonfederal practice — excluding residents and fellows — spend over 6% of their practice time on charity care).

[101] Even next-of-kin often decline to donate their decedents' organs, *see supra* note 92, presumably because when one gets no benefit other than the satisfaction of charity towards strangers, even a small emotional cost (stemming from the perceived macabre nature or insensitivity of the request) can lead people to say no. *Cf.* Peters, *supra* note 94, at 1303 (arguing against demanding that next-of-kin follow transplant surgeons' view that transplants should be motivated only by altruism toward strangers, especially when the surgeons "are educated, well paid," and "mak[ing] money [them]selves" from the transplant operation).

ing it to a familiar cause of their choice (for instance, their church) rather than to a stranger, or spending it on their children.[102]

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

B. Limits on Sales as Substantial Burdens

Though the organ sales ban isn't a total transplant ban, it is a substantial obstacle to medical self-defense. It substantially reduces the number of available organs and substantially increases the chance that the patient will die before she can get a transplant.[103]

Where most other constitutional rights are concerned, bans on using money (either from a bank account or an insurance policy) to help exercise a right are obviously substantial burdens on the right. Say a legislature let people privately educate their children, engage criminal lawyers, or get abortions — but only if these services were provided for free.[104] Of course this payment ban would constitute a substantial burden on the underlying constitutional right: it would dramatically reduce the number of private schools, defense lawyers, and abortion providers, and some people would thus be unable to exercise the right.

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[102] Some argue that offering money for organs might alienate donors who would have given the organs for free, and might therefore decrease (or at least not increase) the aggregate organ supply. *See, e.g.*, Thomas H. Murray, *Organ Vendors, Families, and the Gift of Life*, *in* ORGAN TRANSPLANTATION 101, 118 (Stuart J. Younger et al. eds., 1996). Given that nearly all living donations are motivated largely by the desire to help a particular person, it seems unlikely that the offer of payment would turn off many living donors; 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 prospective donors are upset by the shift from a purely altruistic system to one where compensation is possible, they should be satisfied by the charitable options that they are offered. Plus, of course, many organ providers might feel good about their actions even if they are compensated, just as genuinely altruistic transplant surgeons can feel good about saving a patient's life even if they are paid for it. *See* COHEN, *supra* note 95, at 74–75.

[103] *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.) (concluding that to be an unconstitutional undue burden on abortion rights, a law must set up a "substantial obstacle" to the exercise of those rights or at least be intended to set up such an obstacle).

[104] Perhaps the rationale would be that allowing payment 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. NewsHour with Jim Lehrer* (PBS television broadcast Apr. 11, 1996) (transcript available at http://www.pbs.org/newshour/bb/congress/abortion_4-11.html) (statement of Rep. Chris Smith, R-NJ) (condemning "the abortion industry, a multimillion dollar industry that is making its money by killing babies [through late-term abortions]").

Likewise, courts have repeatedly struck down restrictions on the spending of money to speak, because such restrictions burden speakers' ability to effectively convey their message.[105] And if a ban on paying for one scarce good needed to exercise a constitutional right (teachers', lawyers', doctors', or authors' time, or space for a political ad in a newspaper) substantially burdens that right, then a ban on paying for another scarce good (providers' organs) should generally do so as well.

A few restrictions on spending money to exercise a right may be constitutional because there are compelling government interests justifying them. That was the Court's reason for upholding some modest restraints on spending related to elections.[106]

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 Sixth Amendment right to subpoena witnesses, the Due Process Clause right to call willing witnesses in criminal cases,[107] and the right to sexual autonomy.[108] 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.[109] Paid-for testimony and paid-for sex aren't constitutionally valuable in the way that the unpaid conduct is.

But paid-for books, education, legal counsel, abortions, and organs are constitutionally valuable, because they do serve the purposes of the underlying rights — and they do so 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."[110] Relying solely on the benevolence of lawyers, doctors, teachers, or organ providers likewise offers little protection for our rights. So long as a

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105 *See, e.g.*, Meyer v. Grant, 486 U.S. 414, 416 (1988) (striking down a Colorado law against paying people to circulate an initiative petition).

106 *See* Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 659–60 (1990); Buckley v. Valeo, 424 U.S. 1, 28–29 (1976).

107 *See* Washington v. Texas, 388 U.S. 14, 19 (1967).

108 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (suggesting the sexual autonomy right wouldn't cover prostitution); State v. Freitag, 130 P.3d 544, 546 (Ariz. Ct. App. 2006) (so holding).

109 *See 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. LEGAL F. 265, 287 (so arguing). *Lawrence* does protect casual noncommercial sex, but probably because the law can't distinguish such sex from emotionally significant sex. If this is not the reason for protecting casual sex, then the only plausible reason for upholding bans on payment for sex would be that there is a strong government interest justifying such bans.

110 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 18 (Edwin Cannan ed., Univ. Chi. Press 1976) (1776).

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, and is therefore presumptively unconstitutional.[111]

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

The medical 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 a threat of death or perhaps of very serious injury. Further, the right is inherently limited to cases in which its exercise doesn't directly infringe the rights of others who are not threatening the rightholder's life.[112]

Moreover, the self-defense right may be limitable in other ways if the harm from protecting it is too great; in the lethal self-defense context, for instance, this is the foundation for many pro-gun-control arguments.[113] Likewise, the *Abigail Alliance* panel remanded the case for the district court to hear arguments about whether the FDA rules were narrowly tailored to some compelling government interest.[114]

Yet, as the abortion-as-self-defense and lethal self-defense examples show, self-defense ought to be limitable only for the most pressing reasons. Protecting the life of a viable fetus, an animal, or an attacker — even an attacker who is not morally culpable (for instance, because he's insane) — is not enough. These reasons can't justify denying people the right to protect their own lives. And even if there is some strong enough justification for restricting the self-defense right, in this instance by restricting the ability to get needed organs by paying for them, the restriction ought to be narrowly limited so as to minimize the burden on the right.[115] With this in mind, let us consider some of the possible justifications.

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[111] The right to medical self-defense is thus not a "right to pay for organs" for its own sake, just as the right to abortion-as-self-defense, even when exercised after viability, is not a "right to a postviability abortion using dilation and extraction." Rather, both rights are versions of the right to protect your own life; bans on organ sales are presumptively unconstitutional only because they substantially burden that right.

[112] *See supra* pp. 1821–22.

[113] *See supra* pp. 1822–23.

[114] Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach, 445 F.3d 470, 486 (D.C. Cir.), *judgment vacated and reh'g en banc granted*, No. 04-5350, 2006 U.S. App. LEXIS 28974 (D.C. Cir. Nov. 21, 2006).

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

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 killer 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.[116] But the risk posed by false claims of self-defense doesn't justify flatly rejecting self-defense, even though such a rejection might more efficiently deter and punish murderers; 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 be accepted to protect the constitutional and moral interest in preventing murder (or rape or serious injury) of people who are truly being attacked.

Likewise, if we are worried that a legal organ market will prompt murder of people for their organs, we should respond by identifying and deterring abuse rather than by flatly prohibiting a form of self-defense.[117] There is no need to ban compensation outright when regulation of organ transfer could do a very good job of preventing organ robbery. For instance, the law could require that: (1) all organs be extracted by a well-established hospital; (2) a living organ provider, or a deceased provider's relatives, approve the organ transfer by signing a document in front of some official; (3) the provider's blood sample be taken and securely stored so the organ's DNA can be matched against the provider's; and (4) all organ transfers be tracked and performed by well-established institutions.[118] And if some rare transplant-related murders still happen despite these safeguards,[119] that isn't reason

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

[117] *See* NUFFIELD COUNCIL ON BIOETHICS, *supra* note 94, at 51; C.J. Dougherty, *Body Futures: The Case Against Marketing Human Organs*, 68 HEALTH PROGRESS 512, 553 (1987).

[118] *See, e.g.*, Crespi, *supra* note 75, at 47 (describing a similar proposal). The law could also bar importation of organs from countries where these rules aren't followed. Allowing a regulated organ market might have the additional benefit of drying 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 GEOGRAPHIC NEWS, Jan. 16, 2004, http://news.nationalgeographic.com/news/2004/01/0116_040116_EXPLorgantraffic.html.

[119] Heirs, for instance, might still kill a relative to sell off his organs; but this scenario is just a rare cousin of the existing temptation to kill a relative to collect insurance or inherit property. *See* 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 (2006) (noting that in 2001 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 murderous relatives, who are particularly deterrable because they know that they will be among the first suspects. Even a risk of providing an incentive to murder isn't enough to justify

enough to maintain a system under which over 6500 people die each year waiting for organs.[120]

2. Preventing the Rich 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 without the chance of a transplant.[121] This result can similarly be avoided through regulation rather than prohibition.

Organ transplants are expensive procedures, available only to those who have health insurance, government-provided health care, or their own funds.[122] All people, rich or poor, who are up for transplants thus already have some health care funders who are paying for the transplants. Those funders would, in the absence of a transplantable organ, have to pay for the care made necessary by the underlying sickness (for instance, kidney dialysis if the patient is waiting for a kidney transplant).

What's more, this long-term care needed while a transplant is unavailable is often more expensive than the transplant procedure itself; for instance, the net present value of the medical expenses stemming from a kidney transplant, including follow-up care, is on average about $100,000 less than the net present value of expenses associated with long-term dialysis.[123] If getting a transplantable kidney required compensating the provider, a health care funder that was already paying for long-term dialysis and was deciding whether to pay for a kidney and a transplant instead would thus find it efficient to spend up to $100,000 to get the kidney, no matter whether the patient was rich or poor.[124]

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interfering with families' economic well-being — and neither should it be enough to interfere with organ recipients' ability to protect their lives. And the same goes for the risk that payment for organs will give some people an incentive to commit suicide, *see* Hansmann, *supra* note 97, at 65; *cf.* ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW 482, 506 (student ed. 1988) (noting that many life insurance policies pay off in the event of suicide).

120 *See* Organ Procurement and Transplantation Network, Removal Reasons by Year (Mar. 2, 2007), http://www.optn.org/latestData/step2.asp (select category "Waiting List Removals," organ "All," and count "Candidates"; then follow "Removal Reasons by Year" hyperlink).

121 *See, e.g.*, Dougherty, *supra* note 117, at 553; Samuel Gorovitz, *Against Selling Bodily Parts*, 4 REP. INST. PHIL. & PUB. POL'Y 9, 11 (1984); *see also* COHEN, *supra* note 95, at 56–64 (discussing and criticizing this argument).

122 *See* Hansmann, *supra* note 97, at 80.

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

124 If the concern were not that insurers and government medical plans would refuse to pay for a transplant (and that therefore only the rich would get the organs), but rather that the overall cost of medical care would rise if kidney providers stopped subsidizing such care and were compensated instead, the precise numbers would change but the general picture would not. If paying for kidneys doubled the number of available kidneys, but all those kidneys had to be paid for, a payment of roughly $50,000 per kidney would cause the medical system to break even (since then the increased cost of transplantation would be offset by the decreased cost of long-term dialysis).

We can therefore maintain the current need-based system, but have the health care funder for each person who is 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. And even if transplants of organs other than kidneys wouldn't reduce any treatment costs, those organs could be paid for by increasing premiums a few dollars per year.[125]

Such a system would actually *decrease* the advantages rich patients have. The rich can already get paid-for organs by traveling to foreign countries where such transactions are tolerated in fact (even if they are nominally illegal).[126] The system I propose would, for the first time, make the pool of paid-for organs — a pool broadened by making such payments legitimate — available to poor and middle-class transplant patients as well.

The "rich outbidding others" concern arises only if the rich or their insurers pay so much that other health care funders can't keep up, and the other funders' payments don't suffice to make enough organs available for all patients. Even if we think this scenario 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 lower amount wouldn't yield enough organs for everyone — it only supports capping payments at the amount all funders would pay, which is likely the rather high amount at which the funders will still be saving money by paying for an organ to be transplanted rather than for long-term care in lieu of a transplant.

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 people on the waiting list. This burden may be improper if we conclude that preventing inequality isn't a compelling enough reason to interfere with medical self-defense — just as it isn't a com-

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And that only takes into account financial cost to the medical system; if one also took into account the reasonable value of the lives saved by the extra organs (or, to be precise, of the quality-adjusted life years saved), and assumes that payment will double the number of available kidneys, society would benefit so long as the compensation per kidney were under about $135,000. Matas & Schnitzler, *supra* note 123, at 218–19.

125 Assume that organs cost roughly $30,000 each, *see supra* note 98, and that the 15,000 Americans added to the non-kidney transplant waiting lists each year will double to 30,000 once organs become more available, *see* Organ Procurement and Transplantation Network, Waiting List Additions Age by Listing Year (Mar. 2, 2007), http://www.optn.org/latestData/step2.asp (select category "Waiting List Additions," organs "All" and "Kidney," and count "Candidates"; then follow "Waiting List Additions by Age" hyperlink). Given that 250 million Americans are insured, *see* Press Release, U.S. Census Bureau, Income Stable, Poverty Rate Increases, Percentage of Americans Without Health Insurance Unchanged (Aug. 30, 2005), *available at* http://www.census.gov/Press-Release/www/releases/archives/income_wealth/005647.html, the extra yearly cost per insured would be roughly $30,000 × 30,000 / 250,000,000 = about $4.

126 *See, e.g.*, Friedman & Friedman, *supra* note 98, at 961.

pelling enough reason to cap payments for obtaining private schooling, hiring a criminal lawyer, engaging in most forms of speech, hiring guards, or procuring top-quality medical care.[127]

This resistance to caps on spending money to exercise rights may flow partly from general respect for property rights, notwithstanding the inequality they necessarily cause, and partly from the view that a substantive right (to educate one's children, speak, get an abortion, or hire a lawyer) generally includes the right to spend money in exercising that right.[128] It may also flow partly from the fact that valuable services, such as education, legal assistance, and medical care, will be much less available if they are subjected to price caps. Where organ transplants are concerned, this latter reason is especially strong: leveling everyone down to the same low level of organ access creates for many the equality of the graveyard.

Yet even if, despite this hazard, the equality interest in keeping the rich from getting preferential access is compelling enough to trump the medical self-defense right, this interest can justify only a cap on payments to organ providers. The much more burdensome total ban on payments is not necessary to serve the interest, because the cap will serve the interest just as well.

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 lives at risk.[129] 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, and apparently no increase in susceptibility to kidney disease.[130] 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.[131]

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[127] *See, e.g.*, 2 U.S.C. § 431(9)(B)(i) (2000) (exempting the institutional media from various campaign finance rules); Meyer v. Grant, 486 U.S. 414, 426 n.7 (1988) (rejecting equality argument for limiting the ability of a ballot measure campaign to pay signature gatherers); Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (rejecting equality argument for limiting the ability of the rich to spend money on their speech); *cf.* 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").

[128] *See supra* section IV.B, pp. 1835–37.

[129] *See, e.g.*, Gorovitz, *supra* note 121, at 10–11. *But see* COHEN, *supra* note 95, at 56–64 (criticizing this argument).

[130] *See* Arthur J. Matas et al., *Morbidity and Mortality After Living Kidney Donation, 1999–2001: Survey of United States Transplant Centers*, 3 AM. J. TRANSPLANTATION 830, 831 (2003); Mary D. Ellison et al., *Living Kidney Donors in Need of Kidney Transplants: A Report from the Organ Procurement and Transplantation Network*, 74 TRANSPLANTATION 1349, 1351 (2002).

[131] *See* Shin Hwang et al., *Lessons Learned from 1,000 Living Donor Liver Transplantations in a Single Center: How To Make Living Donations Safe*, 12 LIVER TRANSPLANTATION 920, 925 (2006) (reporting that major complications occurred in about 3% of donors); Charles Miller

Marrow donation is safe, though temporarily painful.[132] 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.[133]

The risks associated with organ donation may justify mandatory counseling, waiting periods, and requirements that part of the compensation for organs include insurance against medical complications.[134] But the risks surely do not justify the current ban, which applies even to cadaveric organs.[135] And in my view they are too small to justify even a ban limited to organs provided by the living. If a would-be organ provider thinks the prospect of making tens of thousands of dollars is worth a small health risk, the government's interest in protecting him against temptation shouldn't suffice to trump the recipient's medical self-defense right.[136] If we don't ban fishing on the grounds that fishing salaries may tempt some poor people to risk their lives, it is hard to see why protecting the poor from temptation should justify banning compensated organ provision.

Yet even if these judgments are mistaken, the serious burden the ban places on patients' rights should invalidate the ban if the harm the ban seeks to avoid can be prevented through less burdensome means. For instance, the law might exclude living providers who we think would be unduly tempted by a $30,000-per-organ payment[137] — say, the very poor (perhaps they are too desperate), or young adults aged 18 to 24 (perhaps they are too present-centered).[138] Better a small de-

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et al., *Fulminant and Fatal Gas Gangrene of the Stomach in a Healthy Live Liver Donor*, 10 LIVER TRANSPLANTATION 1315, 1315 (2004) (noting ten donor deaths); Yasuhiko Sugawara & Masatoshi Makuuchi, *Safe Liver Harvesting from Living Donors*, 12 LIVER TRANSPLANTATION 902, 902 (2006) (reporting that by 2005, 2734 live donor liver transplants had been performed in the United States, and that between 1990 and 2003, 1473 had been performed in Europe).

132 *See* M.M. Bortin & C.D. Buckner, *Major Complications of Marrow Harvesting for Transplantation*, 11 EXPERIMENTAL HEMATOLOGY 916, 918–19 (1983).

133 *See* Bureau of Labor Statistics, U.S. Dep't of Labor, Census of Fatal Occupational Injuries Charts 13 (2005), http://www.bls.gov/iif/oshwc/cfoi/cfch0004.pdf. Though many of those jobs likely pay more than $30,000 per year, the net profit from a year of fishing is likely to be far less than the profit from providing a kidney. While the fisherman must spend money on food, shelter, and other necessities for a year, the kidney provider need do so only during his short convalescence. *See* T.G. Peters et al., *Living Kidney Donation: Recovery and Return to Activities of Daily Living*, 14 CLINICAL TRANSPLANTATION 433, 433 (2000) (reporting that donors in authors' study averaged one month away from work).

134 *See* Hansmann, *supra* note 97, at 74. These regulations may slightly increase the cost of organs, but likely not enough to substantially burden recipients' self-defense rights.

135 Allowing compensation for cadaveric organs would actually help protect living donors, because it would make living donations less necessary. *See* Barnett et al., *supra* note 94, at 210.

136 *See* Russell Korobkin, *Buying and Selling Human Tissues for Stem Cell Research*, 49 ARIZ. L. REV. (forthcoming 2007).

137 For an explanation of the $30,000 estimate, see *supra* note 98.

138 Even now, there is often strong family pressure on people to donate organs for relatives (even relatives to whom the provider might not feel close). *See* Richard A. Epstein, *The Sale of*

crease 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.

Some may ask why twenty-one-year-olds should be treated as second-class citizens or why poor people should be denied a money-making option that richer people have.[139] 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 objections should lead us to let all competent adults decide whether to sell their organs — as they are now free 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 about the argument that compensation for organs is just inherently wrong? "The human body and its parts cannot be the subject of commercial transactions,"[140] 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."[141] In the words of leading conservative bioethicist Leon Kass, three-year 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":[142]

> [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

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Organs for Transplants Should Be Legalized, *in* BIOMEDICAL ETHICS: OPPOSING VIEWPOINTS 62, 64 (2003); Jeffrey P. Kahn, *Would You Give a Stranger Your Kidney? The Ethics of "Unknown" Kidney Donors*, CNN INTERACTIVE, July 9, 1998, http://www.cnn.com/HEALTH/bioethics/9807/stranger.kidney. Allowing compensation for organs will diminish this pressure by making more non-relative organs available.

139 *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1910–11 (1987); *see also id.* at 1855 n.23 (not taking a stand on whether organs should be inalienable).

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

141 Dougherty, *supra* note 117, at 512–53.

142 Leon R. Kass, *Organs for Sale? Propriety, Property, and the Price of Progress*, 107 PUB. INT. 65, 81 (1992).

> contemplating such a prospect — for if we come to think about ourselves like pork bellies, pork bellies we will become.[143]

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 are not "love," "friendship," and "prizes" as we define the terms. But a paid-for kidney is a kidney, just as a paid-for transplant operation is a transplant operation. It has the same meaning and worth regardless of whether it is paid for: it can save a human life.

Nor is paying for kidneys morally similar to selling "the human being." There's no despotic control over another human, as with slavery. There's no risk of harm to a human who is 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, not the soul, is being provided; 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 for free) than the paid transplant surgeon is a butcher.[144]

Of course, such responses 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.[145] 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 recognizing a constitutional and moral right to self-defense ought to resolve this impasse. Something more demonstrably compelling than Professor Kass's conclusory assertions must be present to justify substantially burdening such a right. Before limiting people's abortion-as-self-defense rights or lethal self-defense rights, we demand more than just philosophical claims supporting a culture of life so unwavering that it never lets people use deadly force against viable fe-

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143 *Id.* at 82–83.

144 *See, e.g.*, COHEN, *supra* note 95, at 68–76; Hansmann, *supra* note 97, at 74–78. Some have pointed to the illegality of prostitution (often referred to as "selling one's body") as an analogy supposedly demonstrating the impropriety of selling body parts. *See, e.g.*, Margaret Engel, *Va. Doctor Plans Company To Arrange Sale of Human Kidneys*, WASH. POST, Sept. 19, 1983, at A9 (quoting Rep. Al Gore). But prostitution doesn't actually involve sale of the body as a good, and though it involves sale of services that use the body, sale of services that use the body is often quite proper — consider people who work as furniture movers, athletes, nonsexual masseurs, or nonsexual models. The illegality of prostitution stems from its commercialization of sex and says nothing about nonsexual commercial transactions involving the body (which is why being paid to use one's hands to massage backs is fine even though being paid to use the same hands to massage genitals is a crime).

145 *See* Kass, *supra* note 142, at 82.

tuses or born humans.[146] Likewise, before limiting medical self-defense rights, we should insist on more than Professor Kass's view of the soul.

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 is also a matter 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. I have argued that those who support abortion-as-self-defense and lethal self-defense should equally support 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 deadly peril to use their property and the help of others — guards, doctors, pharmaceutical companies, willing organ providers — to defend their lives against threats posed by criminals, animals, fetuses, disease, or organ failure.

This right ought to be recognized by legislatures; but courts may be persuaded to accept the constitutional version of this right as well. Notwithstanding some conservative Justices' rumblings of hostility to "activism" and unenumerated rights, abortion rights still stand. So do unenumerated parental rights. Rights to sexual autonomy and, apparently, freedom from unwanted medical treatment have been recognized.[147]

And some forms of a constitutional right to self-defense have won support from the right as well as the left. Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, has suggested that there might be an unenumerated right to lethal self-defense.[148] Reagan appointee Judge Kenneth Ripple concluded that there is such a right,[149] and Republican-appointed Judges Joel Flaum and Ilana Rovner joined Judge Ripple in voting to reconsider en banc the Seventh Circuit's refusal to recognize the right.[150] Likewise, one of the judges in the *Abigail Alliance* panel majority was Douglas Gins-

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146 *Cf.* Aaron Fortune, *Violence as Self-Sacrifice: Creative Pacifism in a Violent World*, 18 J. SPECULATIVE PHIL. 184, 189 (2004) (mostly rejecting the view that self-defense can itself justify violence).

147 *See* cases cited *supra* notes 85–86.

148 *See supra* note 17 and accompanying text.

149 Rowe v. DeBruyn, 17 F.3d 1047, 1054–56 (7th Cir. 1994) (Ripple, J., dissenting) (concluding that even prisoners have a constitutional right to self-defense).

150 *Id.* at 1047 n.**.

burg, whom Ronald Reagan 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 Richard Thornburgh, Theodore Olson, and Kenneth Starr.[151]

Federal judges, both liberal and conservative, continue to be open to unenumerated rights arguments. Convincing them to recognize an unenumerated right, such as a right to medical self-defense, is never easy. But the analogy between the medical self-defense right and the traditional and broadly accepted lethal self-defense and abortion-as-self-defense rights offers hope for such recognition.

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[151] *See* Washington Legal Found., Legal Policy Advisory Board, http://www.wlf.org/Resources/Partners/legalpolicy.asp (last visited Apr. 6, 2007).